

CONSTITUTIONAL STRUCTURE

TOPICS IN EXAM

- Characterisation
- Trade and Commerce Power
- External Affairs Power
- Judicial Power
- Defence Power (and incidental power)
- Acquisition on Just Terms
- Federalism
- S. 80 and Trial by Jury
- S. 109 Inconsistency of Laws

ANSWER FORMAT

IFRAC

- Issue (use as a subheading)
- Facts (in Con law these can include clauses within legislation as well as material facts)
- Rule(s) (cite the relevant section of the constitution, caselaw (might be conflicting judicial opinion) and legal doctrine)
- Application (of rule(s) to facts) → Discuss both sides, dissenting judgments etc.
- Conclusion (explain the most 'probable' or 'likely' outcome)

CHARACTERISATION

1. HEAD OF POWER

1. Fits within head of power?

- IDENTIFY any heads of power. MULTIPLE.
- SCOPE → how broad or narrow is HOP.
- CHARACTERISATION → each HOP has a test based on whether they are a subject matter (nouns) or purposive power (refer to a particular purpose – verbs).
- Subject Matter – Sufficient Connection test (law with respect to)
- Purposive – Reasonably appropriate and adapted test.
- Implied Incidental Power – reasonably necessary test. Eg. If it is incidental to trade, then it falls under Cth HOP → reasonably necessary?

CHARACTERISATION STEPS

1. Ask what does the Commonwealth Act in question actually do?
2. **Identify HOP + Scope** - Is the legislative activity covered by a Commonwealth **head of power**? Here the issue of how the Court has previously interpreted the power will be relevant (REQUIRES PRIOR KNOWLEDGE OF THE LAW RELATING TO THE POWER)
3. Is it a **subject matter** power or a **purpose power** (SIMPLE MATTER OF LEARNING THREE PURPOSE POWERS, or incidental power)?
4. Subject matter powers: broad interpretation *Nationalisation of the Banks Case* and *Murphyores* (1976)

TEST - If it's a subject matter power, does the Cth Act have a **sufficient connection** to the subject matter? (Kitto J in *Fairfax* "Is it in real substance a law upon, "with respect to", one or more of the enumerated subjects") –

Dual characterisation - a law may have multiple subjects and be attached to multiple heads of power. Kitto J in *Fairfax v Cmr of Tax* (1965).

Kitto J found that it is a question of the 'true nature and character of the legislation; is it in its real substance a law with respect to, one or more enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?'

5. If no suff connection but by invoking the **implied incidental power** it can be brought into the subject matter, we must ask whether the law is "**appropriate and adapted**" to its purpose (FAIRLY DISCRETIONARY) (*D'Emden v Pedder* (1904)); *R v Burgess* (1936). reasonably necessary/conceivably desirable.

In respect to **trade and commerce**, for instance, the implied incidental power can be invoked to regulate steps **preparatory** or ancillary to trade and commerce like **manufacturing**: *Grannall v Marrickville Margarine* (1955) (including penalties (*Burton v Honan* (1952)), or **international trade and commerce** or export: *O'Sullivan v Noarlunga Meat* (1954). MUST BE REASONABLY NECESSARY.

The difference between the express and implied incidental power is that the implied incidental power from *D'Emden v Pedder* (1904) is used to interpret the head of power and the express incidental power (s. 51 (xxxix) is used to interpret an executive exercise of power under the head of power.

6. If its a **purpose power** use the **proportionality** test (ie is it appropriate and adapted) (AGAIN, DISCRETIONARY)

This is a test of proportionality between the legislation and the PURPOSE of defence or external affairs or the nationhood power– not necessarily the head of power. Different in each case:

External affairs, there is a very broad approach – mere fact of externality: *Horta v Cth* (1994); *Seas and Submerged Lands Case* (1975).

Defence power, a very narrow approach: threat to the Cth? Where there was no war involving a threat to Australia, the court said, no way.: *Communist Party Case*. However, in the case of terrorism, there was a sufficient connection between the purpose of defence in Australia and the law: *Thomas v Mowbray*.

QUICK SUMMARIES OF S51 HEADS OF POWER

Trade and Commerce Power (s51(i))

- Applies to international and interstate trade only.
- Does not apply to intrastate trade.
- Does not apply to the production process – only applies to everything after production stage (may use implied incidental power to get around this)
- Sufficient connection test;
- Unless, there are steps preparatory or ancillary to trade and commerce like manufacturing, production or export, international trade and commerce are involved
- Use implied incidental power and purposive test.

Defence Power (s51(vi))

- The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: *(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;*
- Purposive power – RAA test.
- Waxes and wanes depending on if in war time or peace time (broad during war, narrow during peace).
- Will fit under HOP where “defence or war is the purpose to which the legislation is addressed” (see, for example, *Stenhouse v Coleman*)
- Courts will show significant deference to the Parliament’s judgment, at least where the issue is raised in the context of active hostilities.
- Law must be proportionate to the purpose of defence.

Defence – Incidental Power – R v Foster (1949) (s 51(xxxix))

- POST WAR – Often, matters will remain within the scope of the defence power since they are incidental to achieving the purpose of the power in the past. This rule has been set in *R v Foster*.
- R V FOSTER RULE → The rule is that the defence power does not authorise post-war laws but it does incidentally authorise those laws which are directed at dealing with the consequences of war. Eg, reparation, economic recovery, strengthening of the post war economy, rehabilitation of soldiers, rebuilding city.
- Furthermore, matters which were approved under the defence power need not cease with the actual fighting as the laws may be required to deal with life after the war.
- LIMITS → However, there are limits - the government can no longer legislate to all areas of life under the defence pretense; what is authorised is a matter of factual judgement. (judicial notice).
- USE REASONABLY APPROPRIATE AND ADAPTED TEST. Reasonably necessary.

Acquisition of Property on Just Terms Power (s51(xxxi))

1. Is there property?
2. Has it been acquired by the Commonwealth?
3. Have 'just terms' been provided?
4. Is the particular law outside s 51(xxxi) because the notion of fair compensation is 'irrelevant or incongruous' and incompatible with the very nature of the exaction? (eg. Taxation power in *Attorney-General (Cth) v Schmidt* (1961); or the fisheries power s51(x), as in *Re Director Public Prosecutions; Ex parte Lawler* (1994))

Sufficient connection test of characterisation under s. 51(xxxi) will be satisfied after the following are resolved:

1. Is there Property? – a lease?

- *Dalziel* (1944) – lease of a car parking lot extinguished by Cth acquisition for military use – vacant land (*Dalziel*) + by legislation (*Newcrest*) (invalid acquisition cases) (wide definition of property: *Bank Nationalisation Case*);
- *Georgiadis*: any tangible or intangible thing which the law protects under the name of property. Eg. Common law cause of action in tort
- *Dalziel*: real and personal property, rents, services, rights of way, rights of profit, choses in action.
- *Dalziel*: extends to innominate and anomalous interests and includes assumption of continuance of exclusive possession and control.
- Right to extract minerals from leased land; *Newcrest Mining*
- Common law native title rights; *Mabo*.

2. Is there an acquisition?

- Partial acquisition is sufficient & Cth need not acquire an interest: *PJ Magennis v Cth* (1949)