

Constitutional Law Exam Notes - UTS

1.0 Characterisation, Incidental Powers and Scope	4
1.1 Subject Matter Powers (Non-purposive).....	4
1.2 Purposive Powers.....	4
1.2.1 Proportionality Test.....	4
1.3 Incidental Powers.....	4
1.3.1 Implied Incidental Power.....	5
1.3.2 Express Incidental Power.....	5
1.4 Scope of Power.....	5
2.0 Trade and Commerce Power	6
2.1 Meaning of Trade and Commerce.....	6
2.2 Scope of Trade and Commerce.....	7
2.2.1 Incidental power:.....	7
2.2.2 Participation in trade:.....	7
2.2.3 Production:.....	7
2.2.4 Economy regulation:.....	7
2.3 Interstate v Intrastate Trade.....	7
2.4 Trade and Commerce Incidental Power.....	8
3.0 External Affairs Power	9
3.1 Matter external to Australia.....	9
3.2 Implementation of International Obligations.....	10
3.2.1 Absence of a treaty:.....	11
3.3 Matters of International Concern.....	11
3.4 Relations with other countries.....	11
4.0 Defence Power	12
4.1 External/Internal Threats.....	12
5.0 Acquisition on Just Terms	13
5.1 Defining property:.....	13
5.2 Defining Acquisition:.....	13
5.2.1 Acquisition v Regulation of Property.....	13
5.3 Just Terms.....	14
5.3.1 Fairness.....	14

6.0 The Nationhood Power	15
6.1 Benefit of the nation	15
6.1.1 Coerciveness.....	16
6.2 National matter.....	16
7.2.1 Interaction with States	16
6.3 Characterisation.....	16
7.0 Judicial Power	17
7.1 Judicial Power of the Commonwealth.....	17
7.1.1 Judicial power is limited to Chapter 3 courts.	17
7.1.2 Chapter 3 courts can only exercise judicial power and incidental non-judicial power.....	18
7.2 Judicial v Non-Judicial Power	18
7.2.1 Defining Judicial Power:	18
7.2.2 Defining Arbitral Power.....	18
7.2.3 Overlap between the Arbitral and Judicial power	19
7.2.4 Exception: Delegation of Judicial Power	19
7.2.5 Exception: Binding Arbitral Decisions:.....	19
7.3 Persona Designata	19
7.3.1 The Incompatibility doctrine.....	20
8.0 Melbourne Corporations Doctrine (Federalism)	21
8.1 History of the Doctrine – The Engineers Case	21
8.2 The Melbourne Corporation Case	21
8.3 Reconceptualisation under <i>Austin v Cth</i>	22
8.4 Defining Discrimination	22
8.4.1 Examples of Discrimination	22
8.4.2 Examples of non-discrimination	22
8.5 Preventing State Law from functioning	23
8.5.1 The Test	23
8.5.2 Examples of impediment:	23
8.5.3 Examples of non-impediment:.....	23
9.0 Section 80 – Trial by Jury	25
9.0.1 The Jury	25
9.1 Application of section 80.	25
9.1.1 Defining ‘indictable’ offences.....	25
9.1.2 State Offences.....	25
9.2 Unanimous Verdict.....	25

9.3 Waiver of the right to jury	25
10.0 Section 109 – State/Commonwealth Conflict	26
10.1 Is it a law for the purposes of section 109?	26
10.1.1 Covered by section 109.....	26
10.1.2 NOT covered by section 109.....	26
10.2 Are the laws valid and operative?	27
10.2.1 Grounds for invalidity.....	27
10.3 Determining inconsistency	27
10.3.1 Simultaneous Obedience Test	27
10.3.2 Conferral of rights test.....	27
10.3.3 Covering the field	28
10.4 Implications of Inconsistency	28

Problem Solving Q Layout:

1. What have we got
2. Head/s of power
3. Characterisation
4. Limitations (Implied Freedom, Melbourne Corp, s.116, s.80)
5. S 109

1.0 Characterisation, Incidental Powers and Scope

1.1 Subject Matter Powers (Non-purposive)

1. Is this a law 'with respect to' a head of power.

Grain Pool of Western Australia v Commonwealth (2000): Look to the rights, duties, obligations and privileges which it changes, regulates or abolishes.

Murphyores Inc Pty Ltd v The Commonwealth (1976): Policy of law is irrelevant.

2. Is there a sufficient connection?

Re Dingjan; Ex parte Wagner (1995): Connection must be **substantial**, not merely tenuous:

3. Dual characterisation?

Fairfax v Federal Commissioner of Taxation (1965): It only needs to fall under one head of power, but may fall under multiple.

4. Ulterior Purpose?

South Australia v Commonwealth (1942): Not relevant

5. Practical effect of operation

Tasmanian Dam Case: This may be considered by the court

1.2 Purposive Powers

Richardson v Forestry Commission (Lemonthyme and Southern Forests Case) (1988): The court looks not only to its direct legal operation but also to its purposes or object.

1.2.1 Proportionality Test

Looks to whether the act is **reasonably capable of being regarded as reasonably appropriate and adapted to the object which gives the law its character as a law with respect to the relevant head of power.**

Examine:

1. Object of the power
2. Object of the legislation
3. Determine whether appropriate and adapted

This test applies to the following heads of power:

1. External Affairs - s51(xxix)
2. Defence s51(vi)
3. Nationhood

1.3 Incidental Powers

The implied and express incidental powers implied through case law and found in s51(xxxix) respectively grant Parliament the right to make laws with respect to matters incidental to a constitutional head of power. This has given Parliament greater flexibility in making laws, and allows their legislative capacity to adapt to changing environments.

1.3.1 Implied Incidental Power

Grannall v Marrickville Margarine Pty Ltd (1955): Whatever is incidental or ancillary to the subject matter of a power conferred by s 51 is a law with respect to that power if it is necessary for the reasonable fulfilment of that legislative power:

Nationwide News Pty Ltd v Wills (1992) (McHugh J): For every grant of power conferred by the Constitution, s 51 extends to the making of laws in relation to matters necessary to achieve the main purpose or purposes of that power:

Proportionality Test:

Nationwide News Pty Ltd v Wills (1992); Davis v Commonwealth (1988): Where a law is incidental to the subject matter of a Commonwealth legislative power, **it must be reasonably appropriate and adapted (Proportionate) to some object or purpose within that power.**

The court will ascertain whether, and to what extent, the law goes beyond what is 'reasonably necessary' or 'conceivably desirable' for the achievement of the legislative object sought to be obtained.

1.3.2 Express Incidental Power

Section 51(xxxix): *'Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.'*

Also applies a **purposive** approach to characterisation.

In reference to Trade and Commerce:

Attorney- General (WA) (Ex rel Ansett Transport Industries (Operations) Pty Ltd) v Australian National Airlines Commission (1976): The implied incidental power cannot 'obliterate the distinction' between interstate and intrastate trade and commerce

1.4 Scope of Power

Where the Commonwealth Parliament possesses power to make a law in relation to an activity, it may prohibit that activity absolutely or permit it conditionally.

Murphyores Inc Pty Ltd v Commonwealth (1976):

Facts: Related to regulations prohibiting export of minerals with ministerial approval. The minister wished to consider an environmental report to determine whether to allow such export. It was held that the minister could consider material outside of the scope of the head of power for the purpose of export regulation.