

# CONSTITUTIONAL LAW NOTES

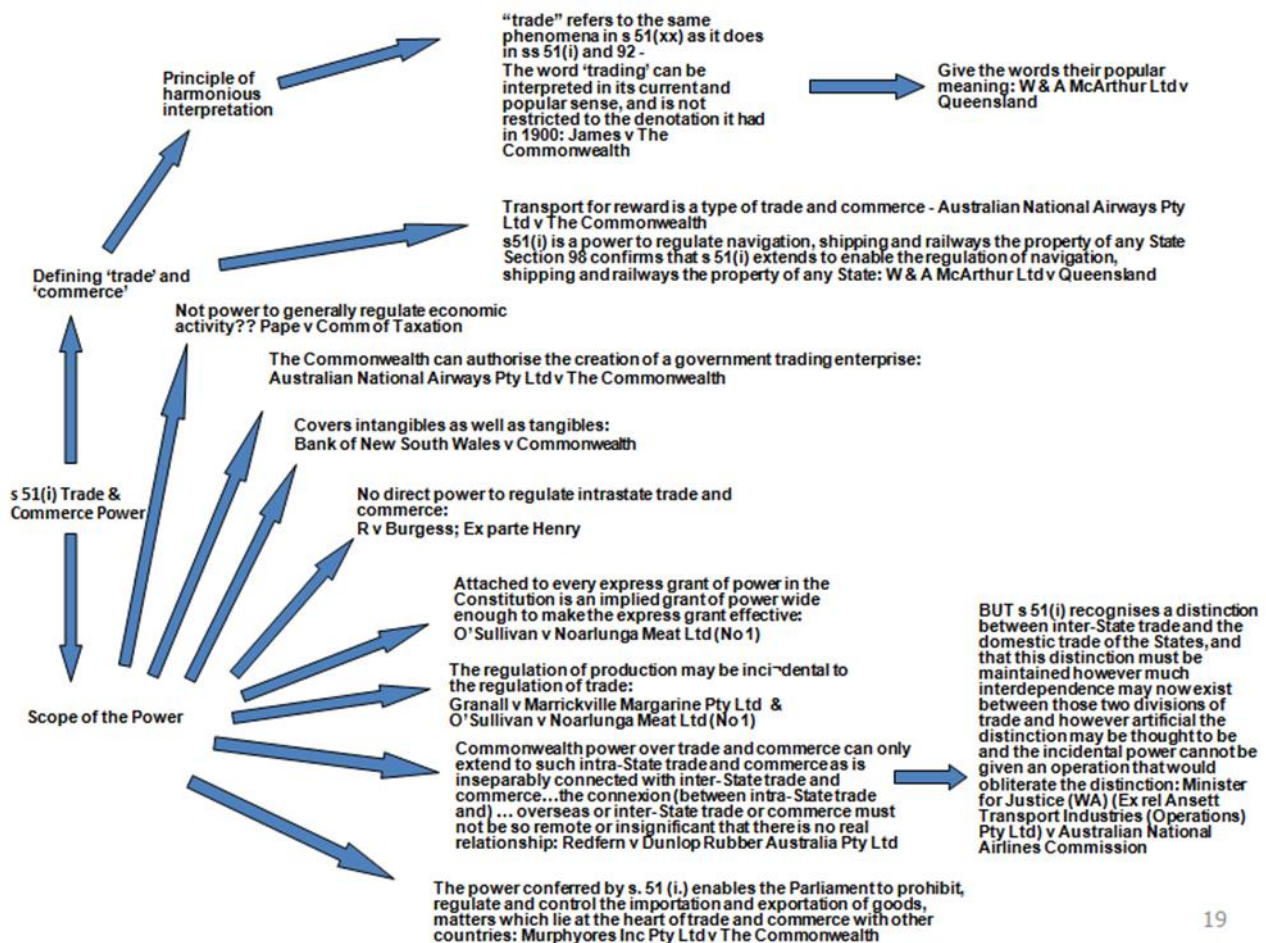
Nicholas Saady 2015

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# EXECUTIVE POWER

## SOURCES OF EXECUTIVE POWER

- Include (*Pape; Davis v Cth; Barton v Cth*):
  - Constitution (ss 61 and 51(xxxix))
  - Common law (prerogatives – authorised by/overlap with 61/51 (*VIC v Cth*))
  - Statutory Powers
  - CL capacity as an entity (eg. enter contracts and expend public money)
- PRIMARY POWER = s 61 = *Executive power of the Cth is vested in the Queen and is exercisable by the GG as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of Cth*
  - PURPOSE = enable executive to administer laws passed by Parliament
- INCIDENTAL/IMPLIED NATIONHOOD POWER = s 51(xxxix) = assist executive to fulfil its aims, where it may use this power to make laws with respect to:
  - *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 Cth, or in the Federal Judicature, or in any department or officer of the Cth*

## WHO IS THE EXECUTIVE

- Crown = executive arm of the government headed by the Queen through her representative (GG or one of State Governors)
- Governor General (s 2), Federal Executive Council/Cabinet [supreme policy making body] (s 62) and Ministers (s 64)
  - Responsible government = generally GG and Governors do not act except on FEC's advice (implied from s 63)
  - Cabinet confidentiality = all discussions within cabinet are confidential
- Executive power is formally vested in Queen, but exercisable by GG (s 61) appointed by Queen (s 2)
  - Federal departments are administered by Queen's Ministers (s 64)
  - GG/Ministers' salaries payable out of Revenue Fund to the Queen (s 3, 66)
  - GG is also Commander in Chief (s 68)

# **SCOPE OF EXECUTIVE POWER**

- Scope of executive power “often been discussed but never defined” (**Davis; Pape**)
  - Mason importantly notes in **AAP**, that “it is not unlimited [227]”
- Hybrid – “not a locked display cabinet” (**Pape; AAP Case**)
  - Has to be capable of serving the proper purposes of a national government
  - Adapting to society = enables Cth to deal with “new positions which the Nation in its progress from time to time assumes” (**Wooltops**)
- Applies to BOTH domestic and external affairs (**Davis; Burns v Ransley; AAP**)

## **COMMENTARY ON ITS SCOPE**

- Enterprises/activities peculiarly adapted to the government of a nation and “deduced from the nature of Cth as a polity” (**Davis**) or Cth’s status as national government (**AAP; Duncan; R v Hughes**)
- Carried on for the advancement and benefit of the nation (**Barton; Davis; Pape**)
  - Also necessary in circumstances (**Pape**)
- S 61 power must be sufficiently connected to protection or compliance with AC and Cth laws (**Brown; Wooltops; Comm Party**)
  - ‘Execute’ = authorise executive action to comply with obligations imposed by AC and Cth laws (**Brown v West; Wooltops**)
  - ‘Maintenance’ = executive action to “protect or safeguard” the nation (**Australian Communist Party Case; Pape**)

## **S 51(xxxix) – IMPLIED NATIONHOOD POWER – Extends s 61**

- Authorises Cth to legislate in aid of the executive power, but must be “peculiarly adapted to the government of a nation” (as per ‘scope’) (**R v Hughes; Pape**)
  - Enables Cth to legislate in aid of s 61 executive power (**Davis; Burns v Ransley**)
  - Often cited as the ‘nationhood’ power enabling Cth to make specific laws
    - Where there is no express statute/AC power to spend money

## **INTERNATIONAL EFFECT OF EXECUTIVE POWER**

- S 61 involves establishment of relations with other countries (**Barton; R v Burgess**)
  - Most obvious example is negotiation/making of treaties (**Barton v Cth**)
- Also enables request for detention of a fugitive offender before their extradition and their actual extradition to Australia (**Barton v Cth**)



# **STATE LEGISLATIVE POWER**

- **NOTE:** State Constitutions are STATUTES, having no special status and can be amended/repealed as any other legislation (***McCawley v R***)
  - **BUT** some sections have 'manner and form' requirements which must be met before amendment is permitted
    - EG: s 7A ensures NSW Legislative Council can only be abolished after a Bill is passed by both Houses then passes Referendum
- In NSW = Legislature may make any laws for *peace, welfare and good government* of NSW (**s 5 NSW Constitution Act 1902**)
  - Plenary power – Words (*p, w and gg*) do not limit what laws states may pass – still have universal law making power (***Union Steamship; Kable v DPP***)
- State laws may have extraterritorial reach (***Union Steamship; Pearce v Florenca***)
  - BUT must be a real connection between the subject matter debated (often being outside the State territory) and the State legislation (***Broken Hill South; Pearce v Florenca***)
    - Connection may be remote – mere presence, residence, carrying on business are sufficient (***Broken Hill South***)
  - Reinforced by **s 2(1) Australia Act 1986** (codifies above case law)
    - State may make laws having extra territorial reach
- Limits on unlimited State power to make laws:
  - Commonwealth Constitution
    - Powers expressly taken away from the States (eg. above from s 51)
    - Exclusive powers granted to Cth (s 52)
  - State Constitutions (manner and form)
  - Territorial Limits
  - Common Law

## **REFERRAL POWER (s 107)**

- State may refer subject matter to Commonwealth to govern it (by State Act)
  - Commonwealth then has power in this matter
    - Restricted to this subject matter alone/between Cth + referring State
  - EG: Marriage Power = NSW gave Cth power in marriage/child custody issues

# INTERGOVERNMENTAL IMMUNITIES

- “Neither the Cth or States can legislate so as to control the other”
  - Questionable if it still exists/applies – due to *Melb Corp* principles etc.
- RECIPROCITY RULE (**Engineers**) = Cth may make laws binding on all states/their citizens AND States may apply their legislation to Cth

## COMMONWEALTH LAW AND STATE GOVERNMENTS

- Cth may make laws binding on all states/their citizens (**Engineers** - Reciprocity)
  - EG: Taxation = no state immunity from Cth tax (**Pay Roll Tax Case**)
  - POSSIBLE EXCEPTIONS
    - State Prerogatives = cannot affect special powers of State executive governments (**Engineers; FCT v Official Liquidator for EO Farley**)
      - Questioned by *Dixon*’s dissent in *EO Farley* – held if Cth made grant of power which affects a State’s prerogative power then the Cth could regulate this prerogative
    - Discriminatory Laws = Cth cannot enact legislation discriminating against the States – SEE BELOW (**Melbourne Corp; QEC v Cth; ACTV**)

## **DISCRIMINATORY LAWS**

- Cth legislation relating to a state is invalid where it (2 limbs of **Melb Corp**; affirmed in **QEC** – the “standstill” presumption):
  - 1) Prevents State from performing the functions of State GOV
  - 2) Interferes in a substantial way with the exercise of the State’s Constitutional power
- EXCEPTIONS (**QEC v Cth**)
  - Where a discriminatory law places the States on equal footing (*Mason*)
  - Where it is authorised by Cth legislative power (IE. head of power) (*Deane*)
- **Austin** Test = was there a significantly sufficient impairment of the exercise by the State of its freedom to select the manner/method for discharge of its constitutional functions respecting the remuneration of the judges of the courts of the states? = Yes = CTH LAW INVALID (similar to ‘standstill’)