

# FEDERAL CONSTITUTIONAL LAW

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## EXTERNAL AFFAIRS

The issue is whether \_\_\_\_\_ (the law) falls within the **external affairs** head of power (**s 51(xxix)**). The relevant aspect(s) of the external affairs power that \_\_\_\_\_ (the law) enlivens is \_\_\_\_\_ (apply below).

- ... international relations
- ... matters external to Australia
- ... **treaty implementation**
- ... [miscellaneous]
  - ... international law other than treaties;
  - ... internal concern;
  - ... international organisation recommendations;
  - ... universal jurisdictions;
  - ... customary law

## INTERNATIONAL RELATIONS

**\*\* Cth law must have a direct and explicit r/s with other country**

### Scope

The international relations aspect of the external affairs power is relevant because \_\_\_\_\_ (the law) relates to the **preservation of relations with countries outside Australia** (**R v Sharkey**). \_\_\_\_\_ (the law) directly concerns \_\_\_\_\_ (describe the relevant part of the law related to international relations). This is an issue which \_\_\_\_\_ (**has / does not**) a 'direct and explicit capacity' to affect Australia's relationships with other countries (**R v Sharkey**), since \_\_\_\_\_ (apply facts – ie. global warming is a global issue, and therefore connected to Australia's relations with other countries).

- ... Analogous to **Thomas v Mowbray**, the control orders are a valid exercise of the external affairs powers. **Efforts to combat terrorism are connected** with Australia's relations with other countries.
- ... Analogous to **Koowarta**, the international relations aspect of the power extends to relations with:
  - ... other international persons (**Koowarta**)
  - ... international organisations (**Koowarta**)
- ... Analogous to **Plaintiff M68**, a law which authorises executive action outside of Australia (ie. in Nauru), **in response to an agreement**, is a valid exercise of the external affairs power. This is because Australia has specifically entered into agreement, which mean that there will be **consequences in terms of Australia's relationship** with Nauru if this agreement is not adhered to.

### Test

Since the international relations aspect of the external affairs power is being used, the test is one of **sufficient connection** between the law and the head of power (**Re Dingjan; Ex parte Wagner**). This is ascertained by reference to the steps in **Grainpool**, that is, the character of the section is determined by reference to the rights, powers, liabilities, duties and privileges that it creates.

- Here, since \_\_\_\_\_ (ie. the law creates a power to fight a global issue), there is a sufficient connection between \_\_\_\_\_ (the law) and **s 51(i)**.
  - ... It must also be noted that since \_\_\_\_\_ (the law) fits within the scope of the international relations aspect of the defence power, it will therefore likely satisfy the test.
- Here, the connection is 'so insubstantial tenuous or distant' that it cannot sensibly be described as a law 'with respect to' external affairs (Dixon J in **Melbourne Corporation**) because \_\_\_\_\_ (apply facts).

## MATTERS EXTERNAL TO AUSTRALIA

## Scope

The matters external to Australia aspect of the external affairs power is relevant because \_\_\_\_ (the law) concerns a matter 'which in its nature is external to Australia' (**Seas and Submerged Lands Case; Polyukhovich v Commonwealth**). The test is 'mere geographical externality', which is sufficient to invoke the external affairs power (**Horta; Industrial Relations Act Case**). Here, \_\_\_\_ (the law) concerns \_\_\_\_ (apply facts).

### Polyukhovich

- a law which provides for a present day trial in Australia for war crimes committed in Europe during WW2.
- Since the law criminalises a **wrongful act (war crimes) which occurred geographically outside of Australia**, it is a law with respect to external affairs.

## Test

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- Here, since \_\_\_\_ (ie. the law creates a power to fight a global issue), there is a sufficient connection between \_\_\_\_ (the law) and **s 51(xxix)**.
  - ... It must also be noted that since \_\_\_\_ (the law) fits within the scope of the international relations aspect of the defence power, it will therefore likely satisfy the test.

## TREATY IMPLEMENTATION

### Scope

The treaty implementation aspect of the external affairs power is relevant because \_\_\_\_ (the law) is implementing \_\_\_\_ (describe the treaty/convention). There are a number of elements that must be satisfied:

- (1) First, the treaty must be **bona fide**, that is, it must be entered in good faith between nations (**Tasmanian Dams**). This will likely be satisfied because \_\_\_\_ (ie. the treaty was signed at an international conference; the treaty was signed by other nations)
- (2) Second, there must be a **real and identifiable obligation** (**Tasmanian Dams**). An obligation \_\_\_\_ (arises / does not) arise in the present case because:
  - ... the treaty was signed and ratified, which gives rise to obligations under international law (cf. guidelines or mere recommendations).
  - **<does not arise because of a qualification / discretion>** ... the article contains a **qualification**: "...in light of different...circumstances"..
- (3) Third, the obligations \_\_\_\_ (**are / are not**) precise enough in the sense that it contains sufficiently specific details of how the obligation can be achieved (**IR Act Case**). This is evidenced by the wording of \_\_\_\_ (break down examples of specific / non-specific words).

SPECIFIC	NOT-SPECIFIC
<ul style="list-style-type: none"><li>• Even though ____ (the law) fails to specify the exact course of action to be taken, analogous to the <b>IR Act Case</b>, it is sufficient that the <b>courses of action suggested</b> are connected to a binding obligation. This may be enough to enliven the power.</li></ul>	<p><b>"Undertake and communicate ambitious efforts"</b></p> <ul style="list-style-type: none"><li>• No <b>real specificity</b> as to what these efforts will look like</li></ul> <p><b>"Pursue domestic mitigation measures with the aim of achieving the objectives of such contributions"</b></p>

- **Lack of specificity**
- Real concern that there might be a **wide variety of possible contradictory policies** that the government could undertake to achieve these

### Test

Treaty implementation is a purposive power and as such, the relevant test of characterisation is one of proportionality. The issue is whether \_\_\_\_ (the law) is capable of being reasonably considered to be appropriate and adapted to implementing the \_\_\_\_\_ (treaty) (Deane J in [Tasmanian Dams](#)).

\*\*\* must engage specifically with the treaty and legislation

### <establishment of a body>

- ... The case is analogous to [Richardson](#) and [Tasmanian Dams](#) because the Cth is establishing a body (in this case, the \_\_\_\_\_ (ie. [World Heritage Commission, Renewable Energy corporation](#))). Arguably, this body \_\_\_\_\_ (is / is not) appropriate and adapted to implementing the treaty because it \_\_\_\_\_ (ie. complies with the obligations under the treaty and provides Parliament with a valid means of implementing it).

### <federal govt. itself>

It may be argued that it is not reasonably appropriate and adapted for the Federal Govt. to be itself engaging in the establishment of \_\_\_\_\_ (ie. solar/wind/hydro electricity projects). This is because \_\_\_\_\_ (apply facts).

### <discretion>

The ultimate power in \_\_\_\_ (the law) is vested in the Governor-General, who must give "approval".

- ... Analogous to [Tasmanian Dams](#), \_\_\_\_ (the law) does not confer an arbitrary power, since the Governor General can only give approval upon his being satisfied that the property will likely be destroyed or damaged. The GG's powers are 'limited by the purpose for which it exists', namely the purpose of preventing or avoiding damage to the property.

### <peculiar / drastic measures>

Example	<ul style="list-style-type: none"> <li>• <a href="#">International convention</a>: states that countries must take steps to safeguard the spread of sheep disease</li> <li>• <a href="#">In response, law is passed</a>: requires all sheep to be slaughtered</li> </ul> <p>The law requiring all sheep to be slaughtered is a peculiar or drastic measure. This points to the fact that the law is <b>not proportionate</b> to implementing the treaty obligation and will not satisfy the test.</p>
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### (4) Conclusion

Tentatively, Cth \_\_\_\_ (is / is not) able to validly pass the law under the external affairs head of power.

## DEFENCE POWER

The issue is whether \_\_\_\_\_ (the law) falls within the **defence** head of power (**s 51 (vi)**).

### (1) Characterising threat level in the Commonwealth

The defence power is an **elastic power** that waxes and wanes. Hence, the preliminary question is a factual assessment of the threat to the Cth.

#### (A) WHAT TIME

\*\*\* **NOTING: terrorism from an overseas threat (ie. Syrian war) → likely to also be a middle ground**

In the present circumstances, the Cth appears to be in a time of \_\_\_\_\_ (war / post-war / peace / communism / terrorism / middle ground), as evidenced by the fact that \_\_\_\_\_ (apply facts).

**[SEE FULL ANALYSIS IN NOTES]**

## PEACE

During peacetimes, the primary aspect of the defence power is invoked (**Communist Party Case**: Fullagher J). The scope of the power is generally limited to **maintaining defence preparedness** as well as matters which could **reasonably be considered to be a threat to the safety of Australia** (**Communist Party Case**). In this sense, peacetime extends to direct navy/military defence activities.

In this case, the Cth is attempting to legislate to \_\_\_\_\_ (describe law – **ie. protect Australian citizens from foreign interference**). Arguably, the legislation \_\_\_\_\_ (is / is not) therefore connected to making sure that the Cth will be able to fight a future war that may arise.

#### VALID

<b>Communist party case</b>	VALID <b>[SEE FULL ANALYSIS IN NOTES]</b> •
<b>Clothing factory case</b>	VALID <b>[SEE FULL ANALYSIS IN NOTES]</b>

#### INVALID

<b>Cth v Shipping Board</b>	INVALID • NOT able to set up a manufacturing ring or engineering business for <b>general commercial purposes</b>
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## WAR

During wartimes, the secondary aspect of the defence power is invoked along with the primary aspect (**Communist Party Case**). The scope of the power is extremely wide during this time (but not as unlimited as envisaged by Isaacs J in **Farey v Burvett**). The classic and popular view is that the defence power confers a **near unlimited power** on the Commonwealth during wartime to protect the nation from internal or external threats or other national emergencies.

**[SEE MORE IN FULL NOTES]**

## POST-WAR (transition period)

\*\*\* May have to discuss how the **transition** to post-war may impact upon the validity of the law

Since hostilities have ceased, the scope of the defence power significantly diminishes in comparison to wartimes (**R v Foster**).

The basic test is **whether the law can reasonably be said to be necessary for regulating some consequence of war** (**R v Foster**). In this sense, **R v Foster** describes these controls as being incidental to the defence power.

Here, the Cth is attempting to legislate to \_\_\_\_\_ (describe law). This is \_\_\_\_\_ (likely / unlikely) a valid exercise of power because it is \_\_\_\_\_ (apply below).

### VALID

<b>R v Foster</b>	<b>VALID</b> The Commonwealth can validly legislate with respect to: <ul style="list-style-type: none"><li>• ... a matter that is <b>incidental</b> to the execution of the defence in the past</li><li>• ... directed to the <b>transition period between war and peace</b></li><li>• ... a condition which have been brought about by the exercise of the defence power itself (<b>Dawson v Cth; Miller v Cth</b>).</li><li>• ... concerns the <b>repatriation</b> and <b>rehabilitation</b> of soldiers</li><li>• ... concerns <b>rebuilding</b> of a city destroyed or damaged by the war</li></ul>
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**COMMUNISM** (*middle ground → ie. Cth unsure if it will be going back to war*)

[SEE COMMUNISM ANALYSIS IN FULL NOTES]

### **TERRORISM**

[SEE TERRORISM ANALYSIS IN FULL NOTES]

## TRADE AND COMMERCE

The issue is whether \_\_\_\_\_ (the law) falls within the **trade and commerce (T&C)** head of power (**s 51(i)**).

### Scope

#### (1) Fit within the words

The scope of the T&C power is very wide. The words are terms of 'common knowledge' which are 'better understood in detail by traders and commercial men than by Judges' (**W&A McArthur**).

Here, \_\_\_\_\_ (**apply the definition to EACH section of the Act**).

#### <transportation of merchandise>

- s\_\_\_ of \_\_\_\_\_ (the law) directly deals with the **transportation** of \_\_\_\_\_ (describe product) ("**merchandise**"). This expressly fits within the definitional aspect of the T&C power (**W&A McArthur**).
  - ... Furthermore the **trading of intangibles**, such as \_\_\_\_\_ (ie. electricity) is within the scope of the power (**Bank of NSW Case**: Dixon J).

#### <negotiations, bargaining, transport, delivery>

- s\_\_\_ of \_\_\_\_\_ (the law) directly deals with the **commercial arrangements** of \_\_\_\_\_ (product) ("**merchandise**"). The law directly relates to the \_\_\_\_\_ (negotiations / bargaining / transport / delivery) of the merchandise. The T&C power extends to these business arrangements (**W&A McArthur**).

**[SEE ALL CATEGORIES IN FULL NOTES]**

#### (2) Preparatory activities (only supported incidentally) **(\*\*\*only apply if relevant on the facts)**

**[SEE FULL ANALYSIS IN NOTES]**

#### (3) Inter-State vs Intra-State **(\*\*\*may need to break the analysis down by discussing each section separately and the relevant category it fits into)**

The third issue is whether there are any issues with maintaining the strict dichotomy between inter-State and intra-State trade laws, which is required by the Constitution (**Attorney General (WA) v ANA**).

##### There are a number of ways to argue:

1. The section deals with inter-State trade laws → fine
2. The section deals with intra-State trade laws → not fine  
→ UNLESS **incidentally** on physical safety (**Second Airlines Case; confirmed in Third Airlines Case**).
3. The section **intermingles** both laws together (impossible to distinguish) → not fine (**R v Burgess; Ex parte Henry**)
4. The section appears to be about trade BUT makes no reference to trade → not fine??? (**Pape**)

#### <provisions dealing with inter-State trade laws>

With respect to s\_\_\_ of \_\_\_\_\_ (the law), \_\_\_\_\_ (**merchandise** – ie. energy / tax bonus) is being sold into an inter-State market, as evidenced by the fact that \_\_\_\_\_ (apply facts). These sections will likely fit within the scope of the T&C power, since the constitution imposes no limitation on Cth regulation of inter-State trade laws (**Attorney General v ANA**).

- ... it is **'reasonably necessary'** (**high bar test**) for \_\_\_\_\_ (entity / Cth) to be engaging in the whole market without drawing a distinction b/t inter-State and intra-State trade since it will protect against **danger of physical interference** of \_\_\_\_\_.
- ... it is **'reasonably necessary'** (**high bar test**) for \_\_\_\_\_ (entity / Cth) to be engaging in the whole market without drawing a distinction b/t inter-State and intra-State trade since it will have a prejudicial effect on matters merely consequential to the conduct of federal activities, that being **loss of profit** (**cost effectiveness**) in the present case.

**[SEE FULL ANALYSIS IN NOTES]**



## CORPORATIONS POWER

The issue is whether \_\_\_\_\_ (the law) falls within the **corporations** head of power (**s 51(xx)**).

### Scope

**[SEE FULL SCOPE ANALYSIS IN NOTES]**

### **(4) Type of corporation – “foreign”, “trading” or “financial”**

The next question is whether \_\_\_\_\_ [entity] fits into one of the three categories defined in **s 51(xx)** – foreign, trading or financial. <apply the relevant category>

Situation	TEST
If the company is <b>already doing stuff</b>	Adopting the activities test from Adamson’s case, _____ (apply)

\*\*\* **note:** apply EITHER activities or purposes test, depending on the above

#### <foreign>

\_\_\_\_\_ [entity] is a foreign corporation since it was formed outside of the Cth.

#### <trading>

Adopting the activities test from **Adamson’s Case**, \_\_\_\_\_ [entity] may be characterised as a **trading corporation** because it buys and sells goods or services, that being \_\_\_\_\_ (describe **merchandise** – ie. energy). The buying/selling of these goods \_\_\_\_\_ (**represents** / does not represent) a substantial proportion / not insignificant part of the corporation’s total activities (**Adamson’s Case**) since \_\_\_\_\_ (apply any relevant facts).

#### <conduct of others affecting CC>

The third limb covers laws concerning the conduct of **others who may impact the activities, functions** of a CC. The law fits into this category because \_\_\_\_\_ (apply facts – ie. it attempts to regulate the conduct of protestors, a relevant class of people who may impact the activities of \_\_\_\_\_ [entity]).

### **Does NOT fit into the category → authorising an agreement / payment**

Arguably, the case is analogous to **Williams**. \_\_\_\_\_ (the law) is simply authorising the Cth to \_\_\_\_\_ (make an agreement / pay) a trading/financial corporation. According to **Williams**, this is **not** a law with respect to trading/financial corporations.

<b>Williams</b>	<b>INVALID</b> <ul style="list-style-type: none"><li>• The impugned law authorises funding of a national school welfare problem</li><li>• <b>ISSUE:</b> whether funding is authorised by the corporations power where the <b>recipient</b> is a trading / financial corporation → <b>NO</b></li></ul>
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### **Conclusion**

Tentatively, this suggests that \_\_\_\_\_ (the law) \_\_\_\_\_ (fits / does not fit) within the scope of the corporations power.

## TAXATION AND GRANTS POWER

The issue is whether \_\_\_\_\_ (the law) falls within the **taxation** head of power (**s 51(ii)**).

### Scope

#### **(1) Positive attributes**

The starting point in determining whether \_\_\_\_ (the law) imposes a tax is the positive attributes set out in **Matthews**, although it must be noted that this criterion is not determinate (**Air Caledonia**).

#### **[SEE FULL TAX ANALYSIS IN NOTES]**

<b>Northern Suburbs Cemetery</b>	<b>YES = TAX</b> <ul style="list-style-type: none"><li>• Employer had to pay training guarantee shortfall to the Cth (ie. the money that an employer spent on training, less the actual amount spent)</li><li>• This was characterised as a tax, rather than a penalty → even though revenue raising was secondary to the object of the Act.</li></ul>
<b>Osborne v Cth</b>	<b>YES = TAX</b> <ul style="list-style-type: none"><li>• The object of the Act here was to <b>prevent residents owning large areas of land / prevent landholders from residing out of Australia</b></li><li>• This did not mean that the law ceased to have the character of a tax</li></ul>

### **Conclusion**

Tentatively, since the law cannot be characterised as a fee for service, penalty or arbitrary extraction, \_\_\_\_ (the law) fits within the scope of the taxation power.

#### **NOW MOVE ONTO TEST (if it is clearly NOT a fee for service, penalty, extraction)**

- (1) Third, the **person who pays must get the service**.

#### **<YES>**

- Here, \_\_\_\_ [**PERSON**] paid \_\_\_\_ [**COST**] and received the specific service of \_\_\_\_ [**SERVICE**] him/herself. This is sufficient to satisfy this element.

#### **<NO>**

- ... Analogous to **Parton v Milk Board**, the fee goes towards funding the **general activities** of \_\_\_\_\_ (ie. the milk board).

#### **[SEE FULL NOTES]**

- (2) Fourth, the **fee must be proportionate** to the cost of the service. Here, \_\_\_\_\_

## OVERVIEW OF LIMITATIONS

Once the law fits within a head of power, must discuss whether there is a limitation:

- Melbourne Corporation Limitation (**implied by constitution**)
- Freedom of trade and commerce (**s 92**)
- Freedom of political communication (**implied by constitution**)

### LIMITATION 1: MELBOURNE CORPORATION LIMITATION (implied)

\*\*\* apply this if the Cth is doing something that this screwing the states (or their laws)

\*\*\* **Commonwealth doing something that comprises the fundamental functioning of the States**

The issue is whether \_\_\_\_\_ (the law), a **COMMONWEALTH** law, breaches the **Melbourne Corporation** limitation (MCL). This is because \_\_\_\_\_ (the law) may be compromising the fundamental functioning of the States. Whilst the test for MCL has undergone many different formulations, the current one-principle test is whether the Cth law, in this case \_\_\_\_\_ (**Cth law**), restricts or burdens one or more of the States in the exercise of their constitutional powers (**Melbourne Corporation; Austin**).

#### <apply multifactorial approach>

First, it may be useful to adopt the multifactorial approach of French CJ in **Clarke** to determine whether the MCL has been breached.

- (1) First, \_\_\_\_\_ (the law) singles out one or more of the States because it references the \_\_\_\_\_ (**must be a reference to States → make sure to draw distinction between a specific state or states more generally**).

<b>Austin; Clarke</b>	<i>... benefits and funds established by State laws which are specifically designated by the Cth laws</i>
<b>Tasmanian Dam Case</b>	... use of Tasmanian Crown land
<b>Queensland Electricity Commission</b>	... agencies of the State of Queensland
<b>Education Union Case</b>	... redundancy packages of Victoria
<b>Fortescue Metals Group v Cth</b>	<NO> ... it is not aimed at the States or their entities but rather private mining companies

- (2) Second, the laws impose \_\_\_\_\_ (**describe how the law works – the burden / disability generally**).

#### [SEE FULL NOTES FOR UNHIGHLIGHTED]

<b>Austin; Clarke</b>	
<b>Tasmanian Dam Case</b>	
<b>Queensland Electricity Commission</b>	
<b>Education Union Case</b>	

Fortescue  
Metals  
Group v Cth

- (3) Third, \_\_\_\_\_ (**this** / this does not) effectively and specifically **burdens and restricts** the state in the exercise of their constitutional functioning (ie. by imposing a disability) because \_\_\_\_\_ (**describe the effect of the burden**).

Austin

- **Cth law** – federal law adversely impacting the **financial security of state judges** → **NOT ALLOWED**

<note higher level of govt – apply **RE Australian Education Union**>

Clarke

- **Cth law** - federal law adversely impacting the **financial security of state parliamentarians (or "higher levels of govt")** → **NOT ALLOWED**

<note higher level of govt – apply **RE Australian Education Union**>

Queensland  
Electricity  
Commission

Industrial  
Relations  
Case

Re  
Australian  
Education  
Union

- **Cth law** – federal law regulating employment r/s between State and employee (and in particular, the **redundancy packages** offered to Victorian public school teachers)
- **NOT ALLOWED** for higher level employees

<higher level govt>

The case is analogous to the **Education Union Case**, since the Cth law affects \_\_\_\_\_ (ie. **minister, ministerial assistant and advisor, head of department, high level statutory office holder, parliamentary offices, judges**), who is a 'higher level' member of government is being targeted by the law. Since it is **critical to a State's capacity to function as a government** to \_\_\_\_\_ (ie. **determine the number and identity / terms and conditions of employment**) of these higher levels of govt., the Cth law imposes a special burden on States to exercise their constitutional powers. In this sense, the MCL applies.

<lower level govt>

The case can be distinguished from the **Education Union Case**, since the Cth law in the present case affects \_\_\_\_\_ (secretary / office assistant / normal employee), a lower member of government. According to the **Education Union Case**, \_\_\_\_\_ (the law) will not infringe the implied MCL, since there is no special burden or disability imposed on the states by \_\_\_\_\_ (describe what the law does).

		Nonetheless, it must be noted that Dawson J’s dissenting argument in the <u>Education Union Case</u> – that there should be no discernible line between higher and lower level government – is compelling. This is because a law affecting _____ ( <i>ie. the number and identity of lower level govt. officials / terms and conditions of employment of lower level govt. officials</i> ) will ultimately affect the State’s budget and therefore, the implementation of its policies and redundancy packages. It is therefore artificial to draw a line because _____ (the law) will affect a State’s function, whatever the level of employment ( <u>Education Union Case</u> ).
	<u>Re Lee; ex parte Harper</u>	
	<u>Melbourne Corporation</u>	
	<u>Fortescue Metals Group v Cth</u>	
	<u>Native Title Case</u>	

## LIMITATION 2: FREEDOM OF TRADE AND COMMERCE (s 92)

**“trade and commerce among States should be absolutely free”**

\*\*\* careful → this limitation will likely arise if T&C is one of the heads of power

\*\*\* also watch for reference to STATE law as this limitation will likely become relevant

The issue is whether \_\_\_\_\_ (STATE or COMMONWEALTH law) breaches the inter-State trade limitation in s 92 that T&C shall be absolutely free. The test contains a number of steps (Cole, modified by Bath; Castlemaine and Betfair):

Cole v  
Whitfield

- TAS legislation **prohibited** the taking, buying, selling, offering or exposing of crayfish under a minimum size
- SA legislation prohibited buying and selling fish but the minimum size was smaller [**this means you could import/export SMALLER fish**]
- Whitfield imported small SA crayfish into TAS (*would have legal in SA but not in TAS because there were requirements for a larger minimum size*)
- The crayfish were below the minimum size of Tasmania so he was prosecuted.

HELD: no infringement of s 92

**[SEE FULL NOTES FOR ANALYSIS OF ALL STEPS IN THE PROCESS]**