

- **Implied freedom of political communication** --- Australian Capital Television Pty Ltd v the Commonwealth (1992)
 - The majority of the High Court **held** that an **implied** freedom of political communication exists as an incident of the system of representative government established by the Constitution.
- **Multiple characterization is ok:** A law can be characterized as a law with respect to more than one subject-matter.
- A law with respect to a matter not within commonwealth power is irrelevant. --- Murphyores Inc Pty Ltd v Commonwealth (1976)
 - **Fact:** The Customs (Prohibited Exports) Regulations 1926 (Cth) enacted under Customs Act 1901(Cth) prohibited the export of the mineral zircon without ministerial approval. M sought the approval of the relevant Minister, and Minister advised that no approval would be given until an environmental impact study was completed. **Controversy:** Minister was not permitted to take environmental matters into account when making export decision.
 - **Held:** law is valid, M's submission is rejected
 - **Reasoning:** The power to legislate with respect to trade and commerce with other countries, including power to prohibit and regulate exportation of goods from Australia. Thus, it is enough that the law operates on the topic of trade and commerce with other countries. **A law which absolutely or conditionally prohibits exportation of goods is a law that operates on that topic.** It is not a law which ceases to deal with that topic because it confers a discretion, unlimited in scope, to permit exportation of particular goods. (Mason J)
 - If the law is deal with the permitted topic, it is irrelevant that the conditions are made by

reference to criteria (*environmental protection*) has no apparent relevance to trade and commerce.

- **Severance in --- 2 Forms**
 - 1) **Divisible:** cut out invalid part
 - 2) **Distributive:** read-down the general provision so as to fall within power
 - Read-down meaning: Where a court gives an over-inclusive statute a sufficiently narrow interpretation to bring it into line with the demands of the constitution.
- **S15A-Acts Interpretation Act 1901** (Cth)
- "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."
- 3. Check whether any **restrictions** on that power is infringed
 - **Express Limitations:**
 - S92 – freedom of interstate trade
 - S99 – no preference
 - **Implied Limitations:**
 - Cth immunity from State Law
 - Implied freedom of political discussion
- Determining the validity of State Legislation (**2 steps test**)
 1. What is the **direct legal effect** of the law? (**NB:** States have a plenary legislative power)
 - Referring to the source of legislative power (e.g. *Qld s2&8 Cs – p,w,GG* = Peace, Love and Good government). These are not words of limitation + Steamship Case
 2. Does it breach any constitutional restrictions?

S51 (i) – Trade and commerce with other countries, and among the States

- Important role in government administration of the national economy: Trade and commerce power, along with taxation power, the corporations power, grants power
- **Section 51(i):** 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: (i) trade and commerce with other countries, and among the States
 - Only in very specific situations can the Commonwealth use this power (s51(i)) to regulate 'local' or 'intrastate' trade and commerce.
- Using s51(i), the commonwealth:
 - Can regulate others engaged in trade and commerce; *and*
 - Can engage in trade and commerce
 - *Australian National Airways Ltd v Commonwealth* (1945)
- **3 issues need to consider**
 1. How to characterize a law as being with respect to 'trade and commerce with other countries and among the states'
 - Meaning of 'trade and commerce' – *not include manufacture*
 - Which activities of trade and commerce are interstate and overseas? --- *not intrastate*
 2. Circumstances where it may be permissible for the Cth to regulate intrastate trade and commerce or intrastate activities connected thereto
 3. The relationship with **s92, s98, s99 & s100**
 - **S92:** Trade within the Commonwealth to be free
 - **S98:** Trade and commerce include navigation and State railways
 - **S99:** Commerce not to give preference
 - **S100:** Nor abridge right to use water
- 1. **Meaning of 'trade and commerce'**
 - *W A McArthur Ltd v Queensland* (1920)
 - The movement of: **goods, people** (*ANA Case*), **intangibles** (*Bank Nationalisation Case* (1948))

- **Trade and commerce not 'terms of art':** *'Trade and commerce ... has never been confined the mere act of transportation of merchandise over the frontier ... All the commercial arrangements of which transport is the direct and necessary result form part of 'trade and commerce'. The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls 'trade and commerce'.* (at 546-7)
- Huddart Parker Ltd v Commonwealth (1931)
 - **As with other heads of power, the Cth can regulate matters ancillary or incidental to trade or commerce.**
 - **Facts:** The Transport Worker Act 1928(Cth) authorized the Governor-General to make regulations regarding employment of transport workers. The regulations limited hiring of waterside workers to those who were member of the trade union. **Issue:** the main job for waterside workers is to load and unload materials on the docks, legislations re that were invalid, for being beyond the s51(i) head of power.
 - **Held:** Legislation is valid. Commonwealth could legislate to give priority in employment to waterside workers who were employed to work on ships involved in interstate and overseas trade.
 - **Reasoning:**
 - *'it directly regulates the choice of persons to perform the work which forms part of or is an incident in interstate and external commerce. It does so in spite of the fact that it affects employers in the selection of their servants and in spite of the industrial aspect which the provision undeniably presents...'* (Per Dixon J at 515-16)
 - The work with which the law in question deals is 1). Putting goods on ship **which is carry them to another country or another state**, and or 2). Fueling a ship for voyage **to another country or another state**, 3). Taking goods from a ship which has carried them **from another state or from another country**.
- Grannall v Marrickville Margarine Pty Ltd (1955) --- Not for merely manufacture
 - **But trade and commerce do not include mere production or manufacture**
 - Commonwealth carried with the power to make laws governing or affecting may matters that are incidental or ancillary to the subject matter.
- O'Sullivan v Noarlunga Meat Ltd (1954) --- Manufacture has sufficient connection with incidental scope of power
 - **But if the manufacture or production is sufficiently connected to the incidental scope of power.** Commonwealth can regulate trade and commerce where **'vertically integrated'**.
 - **'Vertical' Integration:** *The chain between the export activity and the preceding production or manufacturing activities.*
 - Thus, in this case, **vertical integration** of the activities from pasture, abattoir, packaging plant and distribution, the Commonwealth can regulate back to the field, if the cattle can be identified as being for export.
 - **Facts:** Commerce (Meat Export) Regulations made under Customs Act 1901 (Cth). Imposed certain conditions on the slaughter of animals for export. State legislation required license. Noarlunga did not hold license. It killed and froze 152 lambs for export. Company charged under state legislation. It argued that state leg inconsistent with Cth, and therefore invalid. Before question of inconsistency could be decided, first had to be shown that the Cth was valid.
- 2. **Which activities of trade and commerce are 'interstate and overseas'**
 - Murphyores Inc Pty Ltd v Cth (1976)
 - **Held:** Valid legislation in Commonwealth.
 - **Reasoning:**
 - As Fullagar J said, *'the question which emerges is whether the Commonwealth power with respect to trade and commerce with other countries extends to authorizing legislation regulating and controlling the slaughter of meat for export.'* (at 596)
 - *It is true that the Commonwealth possesses no specific power with respect to slaughterhouses. But it is undeniable that the power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of meat or of any other commodity to be exported.'* (at 596)
 - Nor can the power, in my opinion, be held to stop there. By virtue of that power, all matters which may affect beneficially or adversely the export trade of Australia in any commodity **produced or manufactured** in Australia must be the legitimate concern of the Commonwealth.
 - *****That case involved necessity, without the procedure of slaughter/process animal, the goods cannot be trade, thus, even the process touched the definition of manufacture, it is not really a manufacture, it's just a trace with incidental process of 'trade and commerce'.**
 - Such matters include not only grade and quality of goods but packing, getup, description, labelling, handling, and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it.
 - *'It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine. How far back the Commonwealth may constitutionally go is a question which need not now be considered, and which must in any case depend on the particular circumstances attending the production or manufacture of particular commodities.'*

- **Facts:** *Murphyores* sought a declaration that the Minister could not take into account the environmental impact of *Murphyores*' mining in deciding whether to grant export permit
 - **Held:** Valid law. S51(i) empowers the Cth to regulate the export and import of goods into Australia [=overseas trade and commerce]. Cth Parliament can impose any conditions it thinks fit on export or import.
 - **Reasoning:** The point here is that by imposing a conditional prohibition on exportation, a prohibition which may be relaxed according to the exercise of a discretion, the law is dealing with the exportation of goods, a matter at the heart of trade and commerce with other countries [Mason JJ]
3. To what extent does the power enable the Cth to regulate 'intrastate trade' and commerce or intrastate activities connected thereto: incidental power
- Test = a 'sufficient connection' between: the law and the subject matter of the head of power
 - **A sufficient connection** --- established in at least 2 ways
 - 1) A direct, proximate, substantive connection
 - Redfern v Dunlop Rubber Australia Ltd (1964)
 - **Intrastate can also be regulated because of the proximity.** Sometimes the Commonwealth's power over trade and commerce must *extend to regulating the intrastate aspect* if **inseparable connection** with other states existed. [**Necessity**]
 - **Facts:** Retailers of tyres sued manufacturers of tyres for damages under the Australian Industries Preservation Act 1906 which prohibited 'restraint of trade' practices in relation to 'trade and commerce with other countries or among the states'. Some manufacturers had factories in more than one state, but one had its only factory in Victoria. So, the manufacturers argued that the act was invalid since they regulated both intrastate and interstate trade arrangements, and in this case, some of the sale K

were between manufacturers and retailers wholly within Victoria.

- **Held:** The manufacture's arguments were rejected. Valid Law. S51(i) could regulate intrastate trade arrangements where they were '**inseparably connected**' with interstate trade arrangements. Legislation would not be found **ultra vires** just because it dealt with activities that combined intrastate and interstate trade.
- 2) A causative connection
- Airlines of NSW v NSW (No 2) (1965)
 - **Protective measures:** *Intrastate activities encroach on the physical safety of the interstate and international trade is a sufficient connection.*
 - **Fact:** Both NSW & Cth had licensing regimes. Argued 109. In order to decide whether any inconsistency, first had to decide whether the Cth law was valid (i.e. was it supported by a head of power, in this case, s51(i).)
 - **Held:** Valid. *The safety regulations were valid exercise of s51(i)*
 - **Reasoning:**
 - Air navigation operations, whether intra-state, inter-state, international or to and from the Territories, have become inseparably connected as a result of the development of transport by air in Australia and its Territories.
 - For Commonwealth to maintain the safety, regularity and efficiency of inter-state and international air operations without exercising a very considerable degree of regulation and control over the conduct of intra-state air navigation.
 - The physical integration of the intrastate and interstate aspects of safety of air navigation meant that the entire transport activity had to be regulated by the Commonwealth.
 - O'Sullivan v Noarlunga Meat Ltd (1954)
 - Minister for Justice (WA) v Australian National Airlines Commission (1976) [**No Necessity**]

- **Economically integrated activities will not suffice as a 'sufficient connection'**
 - **Fact:** Australian National Airlines Commission (federal body) made regulations enabling the commencement of a service between Perth and Darwin, with a stopover in Port Hedland, to pick up passengers and freight in order to make the transport business more profitable.
 - **Held:** Invalid law of s51(i). Maj held that proposed scheme insofar as it operated between the NT and parts of WA was a valid exercise of the territories power (s122). However, inasmuch as the scheme contemplated an intrastate journey between Perth and Port Hedland, it was invalid exercise of s51(i).
 - **Reasoning:** Economic interdependence between intra and interstate trade is not sufficiently connected to s51(i).
 - Economic profitability is not a relevant consideration for characterisation of a law under the incidental scope of the trade and commerce power.
 - Commonwealth is not permitted to regulate intrastate commercial transport where the regulation is merely to **promote economic profitability** for the interstate business activity.
 - Pape v Commissioner of Taxation (2009)
 - **The trade and commerce power is not a general power to regulate the economy**
4. The relationship with **s92 (restrictions)**
- S92:** Trade, commerce and intercourse amongst the States shall be absolutely free.
- It only prohibits discriminatory, protectionist burdens on trade and commerce (Coles v Whitfield (1988)), instead of prohibits the Commonwealth from regulating interstate trade.
- Cole v Whitfield (1988) 165 CLR 360
 - **Rule:** The concept of discrimination in its application to interstate trade and commerce necessarily embraces **factual discrimination** as well as **legal**