

CONSTITUTIONAL LAW 70616

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SOLVING A PROBLEM QUESTION

1. IDENTITY HEAD OF POWER
2. DESCRIBE HOW THE POWER HAS BEEN **INTERPRETED** BY THE HIGH COURT? E.G. SCOPE AND LIMITATIONS.
3. DETERMINE WHETHER IT IS A **SUBJECT MATTER OR PURPOSIVE POWER**.
 - CHARACTERISE THE LAW:
 - SUBJECT MATTER POWER TEST OR
 - PURPOSIVE POWER TEST
4. IF IT CANNOT BE CHARACTERISED AS EITHER, TRY **IMPLIED INCIDENTAL TEST**.
5. ONCE CHARACTERISED AS BEING WITHIN A CONSTITUTIONAL POWER, LOOK AT **EXPRESSED OR IMPLIED LIMITATIONS**.

1: FUNDAMENTALS OF CONSTITUTIONAL LAW

REMEDIES

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| <ul style="list-style-type: none"> • When a law is unconstitutional, P will seek either: <ul style="list-style-type: none"> ○ A declaration of invalidity ○ Reading down and severance <ul style="list-style-type: none"> ▪ Only remove the invalid clause to the extent of the inconsistency ▪ Strict limits to the effectiveness of severability e.g. the complexity of legislation ▪ If Act is mostly bad, the entire act will be declared invalid. | <p>James v Cth</p> <p>Victoria v Cth (Industrial Relations Case) 1996</p> <p>NSW & Ors v Cth (Workchoices 2016).</p> |
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2. TRADE AND COMMERCE POWER (S. 51(I)) AND THE IMPLIED INCIDENTAL POWER

How has the power been interpreted by the HC? What is the scope of the grant of power? What limits have been applied by the HC in its interpretation?	
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Definition of 'trade and commerce'.	
<ul style="list-style-type: none"> • S 51 (i) empowers the commonwealth to make laws with respect to 'trade and commerce with other countries and among the States'. 	Constitution 1900
<ul style="list-style-type: none"> • Words are not 'terms of art' but 'terms of common knowledge'. 	McArthur Ltd v Queensland 1920
<ul style="list-style-type: none"> • 'trade and commerce' encompass transportation of merchandise across borders as well as all the commercial arrangements involved. 	McArthur; Bank of NSW
<ul style="list-style-type: none"> • 'with other countries and among states' limits the Commonwealth to make laws with respect to interstate or foreign trade and commerce, not intrastate. 	Strickland v Rocla 1971
Scope	
<ul style="list-style-type: none"> • Intangibles e.g. broadcasting, telecom, tech, as well as movement of goods or person are covered. 	Bank of NSW
<ul style="list-style-type: none"> • External exports or imports. 	Murphyores
<ul style="list-style-type: none"> • Navigation, shipping and railways across states. 	W&A McArthur
<ul style="list-style-type: none"> • Power of the com extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export. 	O'Sullivan v Noarlunga Meats 1954
Limitations	
<ul style="list-style-type: none"> • Do not encompass the manufacture or production of goods. <ul style="list-style-type: none"> ○ T&C commences when the production ends, the first shipment of goods. 	Beal v Marrickville Margarine 1966
<ul style="list-style-type: none"> • Production may be incidental to the regulation of trade. <ul style="list-style-type: none"> ○ 'reasonably appropriated or adapted' test below. 	Grannall v Marrickville Margarine 1954
<ul style="list-style-type: none"> • Cannot regulate intrastate trade. <ul style="list-style-type: none"> ○ However, if there is an inseparable connection between inter and intrastate trade, Com may regulate intrastate trade. ○ Test: An inseparable connection must not be so remote or insignificant that there is no real relationship. <ul style="list-style-type: none"> ▪ <i>If it is impossible to prevent physical interference with, or ensure the safety, regularity or efficiency of interstate or foreign trade and commerce.</i> ▪ Mere efficiency, competitiveness and profitability were not sufficient for connection. <ul style="list-style-type: none"> • Burden on industry and need for regularity and efficiency is ok. ▪ Economic convenience is not a sufficient connection between intra/interstate trade. ▪ Inseparable if one cannot exist without the other 	Ex Parte Henry Redfern v Dunlop Rubber Australia 1964 Ex Parte Henry, Swift, Redfern, Airlines of NSW Ex Rel Ansett Transport Swift 1962 Airlines of NSW Redfern v Dunlop Rubber
<ul style="list-style-type: none"> ○ Example of success in intrastate trade: <ul style="list-style-type: none"> ▪ Slaughtering is production and production but was FOR the purpose of exportation. ▪ Commonwealth power extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export. 	Noarlunga Meats 1954
Is it a subject matter or purposive power?	
Subject matter power test	
1. Laws enacted pursuant to it must change, regulate or abolish the rights, duties, obligations and privileges relevant to trade and commerce with other countries and among states.	Fairfax v FCT 1965
2. The connection between the law and the power must be substantial, not insubstantial, tenuous or distant.	Herald & Weekly Times 1966; Melbourne Corporation 1947; Tasmanian Dam Case 1983.
Implied Incidental Power	Grannall v Marrickville Margarine 1955
<ul style="list-style-type: none"> • If the law does not have sufficient connection, may be invoked under implied incidental power. 	
Test	

<ul style="list-style-type: none"> Regulation of production would have to be reasonably appropriated or adapted, or proportionate, to a purpose relevant to trade and commerce. <ul style="list-style-type: none"> Suitable, necessary and adequate in its balance with respect to its purpose test. 	Davis 1988; Nationwide News McCloy
<ul style="list-style-type: none"> The authority to make laws with respect to 'trade and commerce with other countries, and among the States' extends back to the 'supervision and control of all acts or processes which can be identified as being done or carried out for export'. 	O'Sullivan v Noarlunga Meat Ltd (1954) 92 CLR 565
3. RACE POWER (S 51 (XXVI)	
How has the power been interpreted by the HC? What is the scope of the grant of power? What limits have been applied by the HC in its interpretation?	
Definition	
<ul style="list-style-type: none"> S 51 (xxvi): Parliament can make laws for the peace, order and good government of the Commonwealth with respect to: the people of any race for whom it is deemed necessary to make special laws. 	
<i>Special Law</i>	
<ul style="list-style-type: none"> For a law to be 'special' it must be specific to a particular race. <ul style="list-style-type: none"> Protection of cultural and spiritual relics of ATSI was held specific. Minority: this protection of relics is significant to all mankind therefore not special. 	Koowarta v Bjerknes-Pietersen 1982 Tasmanian Dams Case
<ul style="list-style-type: none"> Special quality is ascertained by its differential operation upon the people of a particular race. <ul style="list-style-type: none"> NTA was 'special' because it confers a unique protection on ATSI people. 	Native Title Act Case 1995 Native Title Act Case 1995
<i>Necessary</i>	
<ul style="list-style-type: none"> It is for the parliament to determine whether a special law is 'necessary, not courts. 	Native Title Act Case 1995
<i>People of Any Race</i>	
<ul style="list-style-type: none"> Parliament can pass laws with respect to ATSI. 	Kartneyri v Commonwealth 1998
<ul style="list-style-type: none"> Minority with Kirby: alteration of Race power now forces parliament to only pass laws for the benefit of ATSI people. 	Kartneyri
<ul style="list-style-type: none"> Gaudron: parliament cannot make discriminatory laws over ATSI in present. <ul style="list-style-type: none"> 'for whom it is deemed necessary to make special laws' must weigh in to impose some limit. Two limbs: <ol style="list-style-type: none"> Must be a relevant difference between the people of the race to whom the law is directed and the people of other races. Law must be reasonably capable of being viewed as appropriate and adapted to that difference. <ol style="list-style-type: none"> Suitable, Necessary, Adequate in balance with its purpose. 	Kartneyri McCloy
Is it a subject matter or purposive power?	
1. Is the law 'with respect to' to head of power- does it change the rights, duties, obligations and privileges or regulates or abolishes them in regard to race?	Fairfax
2. Does the Com Act have sufficient connection to the subject matter?	Tasmanian Dam Case 1983.
<ul style="list-style-type: none"> must be substantial, not insubstantial, tenuous or distant. 	
3.1. ALIENS POWER (XIX)	
How has the power been interpreted by the HC? What is the scope of the grant of power? What limits have been applied by the HC in its interpretation?	
Definition	
<ul style="list-style-type: none"> Parliament can make laws for the peace, order and good government of the Commonwealth with respect to: naturalisation and aliens. 	
<ul style="list-style-type: none"> '<i>aliens, not being members of the community that constitute the body politic of Australia, have no right to enter or remain in Australia, unless such right is expressly</i> 	Chu Keng Lim v Minister for Immigration 1992

<p><i>granted. Laws regulating their entry to and providing for their departure from Australia (including deportation, if necessary) are directly connected with their alien status'</i></p> <ul style="list-style-type: none"> ○ Doesn't apply to non-immigrants or people coming home. ○ Does apply to people who have immigrated and have made Australia their permanent homes and become members of the Australian community. 	
<ul style="list-style-type: none"> • People born overseas who have migrated to Australia and have not taken up citizenship are aliens. <ul style="list-style-type: none"> ○ This isn't the case for the people born in the UK and who migrated before 1948 when the citizenship act came into force. 	<p>Nolan v Minister for Immigration and Ethnic Affairs 1988</p> <p>Shaw Singh</p>
<ul style="list-style-type: none"> • People born in Australia to non-citizen parents and are not themselves citizens are also aliens. • Aboriginal people born outside Australia are non-aliens even if they are not citizens. 	<p>Love, Thoms</p>
Aliens or Citizens (Persons born in Britain)	
<ul style="list-style-type: none"> • 'Meaning of the word 'aliens' in s 51 xix cannot depend on the law of England (but) on the law of Australia'. • Alien is synonymous with 'non-citizen'. • Subject of a foreign state • Includes person who has ceased to be a citizen by acts/ process of denaturalisation. <ul style="list-style-type: none"> ○ Dissent by Gaudron: <ul style="list-style-type: none"> • An alien is a 'person who is not a member of the community which constitutes the body politic of the nation state'. • Nolan came in as a British subject during when that was enough. • Although the law may have changed during his stay, parliament's power cannot be at 'large' to automatically change him into an alien. 	<p>Pochi v Macphee 1982</p> <p>Nolan v Minister for immigration and ethnic affairs 1988</p>
<ul style="list-style-type: none"> • British citizens arriving before the legislative change in 1984 are exempt from the change. Agreed in dissenting judgement before. 	<p>Re Patterson; Ex Parte Taylor 2001</p>
Unlawful Non-Citizens	
<ul style="list-style-type: none"> • If came before 1949 and isn't a British subject: serious criminal activity is incompatible with absorption within the community. • It is for the court to define Alien, not parliament although it could make laws prescribing who could come within the terms. 	<p>Re Minister for Immigration and Multicultural affairs; Ex Parte Men Kok Te</p>
<ul style="list-style-type: none"> • British Citizens are now aliens as UK is now regarded as a foreign power. • If they came before 1949, they are not aliens. 	<p>Shaw v Minister for Immigration and multicultural affairs.</p>
Persons Born in Australia	
<ul style="list-style-type: none"> • Birth place is not a decisive criterion. • The central characteristic of that alienage status is and always been owing obligations to a sovereign power other than the sovereign power in question here (Australia). • When someone who has neither automatic right to a foreign citizenship, nor the right to acquire such citizenship here- Stateless <ul style="list-style-type: none"> ○ Granted citizenship in Australia if they were born here 	<p>Singh v Commonwealth</p> <p>Australian Citizenship Act 2007 s 21 (8)</p>
Indigenous Alienage	
<ul style="list-style-type: none"> • Aboriginal people are born outside Australia are non-aliens even if they are not citizens <ul style="list-style-type: none"> ○ Recognition by the common law of the unique spiritual connection between aboriginal Australians and their traditional lands is incongruous with the finding that an aboriginal Australian can be described as an alien to that land. • Test for aboriginality <ol style="list-style-type: none"> 1. Self-identify 2. Be recognised in the community 3. And have genealogical decent 	<p>Love; Thoms</p>
Is it a subject matter or purposive power?	
Subject matter power test	