

Ensure you do give concluding advice with respect to each question.

Never be absolute unless clearly warranted

Make a qualitative assessment of your advice, i.e. “probably valid”, “very likely valid”, “possibly valid”

## Topic 1 — Principles of Constitutional Interpretation: Powers/Prohibitions Characterisation - Reading Down / Severance / Purposive and Non-Purposive / Incidental Power; *Engineers Case* / Trade and Commerce (s 51(i))

### Introduction to Constitutional Interpretation

1. **Section 51 Constitution** vests legislative power in the Parliament with respect to a number of specific subjects. It is possible for government to enact legislation with respect to these **heads of power** (and only these had of powers) that are **concurrent** powers with the **states**, as state parliament have **plenary** legislation meaning they can make laws on anything to the **extent of inconsistency** (s 109 Constitution)
2. *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129 was important as it recognised **textualism** as a form of **constitutional interpretation** method. The Court **rejected** two doctrines of previous constitutional interpretations: (1) implied immunity of governmental instrumentalities (e.g. Cth laws could not affect state government agencies and employees) and (2) doctrine of reserved state powers (Court limited Cth heads of power in order to reserve state legislative powers that were traditionally state powers).
  - a. **Knox CJ, Isaacs, Rich and Starke JJ, delivered by Isaacs J** adopted a literal interpretation of the Constitution known as **textualism** or **legalism** (at [151]) which is the **dominant approach to interpretation**, where the court said “no Court has any right to narrow those limits by reason of any fear that the powers... maybe be abused” and “the meaning of the Constitution must be read it naturally in the light of the circumstances in which it was made.”
  - b. Therefore policy and philosophical ideas were not used to influence the interpretation of the Constitution, though **sometimes** these considerations do come into influence
3. Other methods of interpretation include:
  - a. **Originalism** (not adopted in Australia except in a very limited way) — interpreting the Constitution by reference to the intentions of the original framers of the Constitution, which may result in a conservative or narrow interpretation.
    - i. **Exception** that this method was used was s 92 Constitution, where trade and commerce must be “absolutely free”. HCA permitted itself to examine the convention debates to clarify the definition to help it interpret it in the contemporary meaning, since “absolutely free” could mean either no trade barriers and customs, **OR**, laissez faire economics where everything is free
  - b. **Living tree method** — interpreting the Constitution with reference to contemporary standards (however, this could result in judges using their own philosophical and political influences) to interpret the Constitution which should not be allowed since judges are not elected by the people.
4. Interpretation and Characterisation
  - a. **Note:** Interpretation refers to the interpretation of the Constitution itself whereas, characterisation refers to the interpretation of the Statute that has been challenged for its constitutional validity
5. Purposive/Non-Purposive
  - a. Most of the heads of power in **section 51 Constitution** are non-purposive, meaning that all the courts are simply concerned about is whether the law comes within the subject matter that is permitted
  - b. **Exception** to this is the defence power, in that legislation must be exercised for the purposes of executing and maintaining the laws of the Commonwealth, not to punish political opponents, etc.
6. Reading Down and Severance
  - a. Principle of **reading down** is to ensure that that the legislation can be read in such a way that might be within constitutional power
  - b. The Courts prefer not to render an act invalid given that it emanates from Parliament which represents the will of the Australian people
  - c. **Severance** refers to the idea that you cannot read it down so that it falls within the heads of power
    - i. You can sever in whole, a word or part of a provision **BUT** there are **LIMITS**:
      - 1) When reading down a statute and severing it, what is left must still make sense and be consistent with the will of the parliament

## 1. Interpretation and Characterisation

1. Determine whether the relevant legislation is Commonwealth legislation, or it is NSW legislation
  - a. If NSW legislation, then can it be invalidated through constitutional inconsistency (s 109)?
  - b. If Cth legislation, then is it **within** the heads of power **OR incidental** to the heads of power?
2. Section **X of X legislation** purports to regulate **X (contracts for for the purchase or sale of / production of... etc.)**, applying characterisation methods as per **Kitto J** in *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at para [6], by determining the **rights, duties, powers and privileges** which it changes, regulates or abolishes, whilst taking into account both the practical and legal applications of the law (*The Grain Pool of WA v The Commonwealth* [2000] HCA 14 at para 16 per **Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ**).

## 2A. Trade and Commerce (Intrastate) — Implied Incidental Power to Validate Legislation (Scenario A)

3. The subject matter here, **X Apply** which is relating to trade and commerce, comes within the terms of “**trade and commerce**” in s 51(i) **Constitution** which has been interpreted to include, but not limited to the “mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and... delivery.” (per **Knox CJ, Isaacs and Stake JJ** at 547 in *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530) **X Facts, argue how it is trade and commerce**
  - a. **Dixon J** in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 381-382 defined trade and commerce as, “it covers intangibles as well as the movement of goods and persons. The supply of gas... covers communication... broadcasting... transportation, traffic, movement, transfer, interchange.”
4. As s 51(i) is a non-purposive power, the validity of the legislation, **X section of X legislation** does not depend on characterising its purposes in order to conform to any constitutional purpose (per **Dixon J** in *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 at 515-516; **Mason J** in *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 19-20). In this case, **X law** is seeking to **prohibit/regulate Apply facts** which falls within the power of the Commonwealth to prohibit and regulate **the subject of trade and commerce** and hence is within power (per **Mason J** in *Murphyores* at [19]).
  - a. The court adopted a **dual characterisation** approach that as long as one of the characterisations of the statute comes within power, **even if it has little or no apparent relevant to trade and commerce**.
    - i. **Facts**: In *Murphyores*, it was irrelevant that the Cth was concerned with mainly environmental factors when regulating the export of mining on Fraser Island, given that the trade and commerce head of power is non-purposive. *Murphyores* held mining leases granted by the state of Queensland. They sought permissions from the Cth minister for minerals to export minerals extracted from the sand that was mined off Fraser Island which was off the coast of Qld. Because written approval was required, the minister examined the case and informed the plaintiff that it would not make a decision on whether they could export decisions, until the minister had considered the outcome of an environmental enquiry.
5. The difficulty however here is that **X section** applies to **X facts** relating to **intrastate** trade. Intrastate trade does not directly fall within the Commonwealth legislative powers under section 51(i) of the Constitution.
6. However, the High Court has permitted the **implied incidental power** to section 51(i) to apply to intrastate aspects in very limited circumstances where it is necessary or appropriate in order to protect the interstates or export trade from **physical interference** (**Kitto J** at 117 in *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54; see **Mason J** in *Nationwide News* regarding appropriateness), but **not** where it may improve the **economic efficiency, competitiveness and profitability** of the interstate or export trade (**Barwick CJ** at 499 in *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492).
  - a. “Although foreign and inter-State trade and commerce may be closely associated with intra-State trade and commerce, the court has uniformly held that the **distinction drawn by the Constitution must be fully recognized**, and that the power to deal with the former subject does not involve an incidental power to deal with the latter subject.” (**Latham CJ** in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 628-629)

- b. “The express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction however artificial it may appear and whatever interdependence may be discord.” (Dixon J in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 672)
  - i. Facts *Burgess*: s 4 of the Air Navigation Act authorised the making of regulations for the control of air navigation in the Commonwealth and the territories. The Commonwealth argued that in order to have effective regulation of inter-state and overseas air travel, it also had to control intra-State air travel

## 2A(1) If Physical Interference

### 7. CASE: *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54:

- a. Facts: Regulation 6(1)(f), enacted in 1964, made the *Air Navigation Regulations* (Cth) applicable to *intrastate* air navigation. Regulation 198 prohibited the use of an aircraft in regular public transport operations except pursuant to a licence issued by the Director-General of Civil Aviation. Regulation 199 in granting a licence, the DG was required to have regard to: “safety, regularity and efficiency of air navigation and to no other matters.”
- b. Held:
  - i. Court permitted the regulation of intrastate air navigation through this licensing mechanism **ONLY** because the licensing was limited to the **safety, efficiency and regularity** of the interstate and overseas air navigation, but no other matters were permitted to extend the direct head of power by the implied incidental power, “as a means of protecting and fostering inter-State and foreign trade and commerce. Because of the intrinsic factors connected with flight and of the factual situation in which air navigation takes place in Australia, such laws may validly in my opinion include within their operation intra-State air navigation.” (**Barwick CJ at 93**)
  - ii. This was reiterated by **Kitto J at 116-117**, “it follows from these considerations, in my opinion, that a federal law which provides a method of controlling regular public transport services by air with regard only to the **safety, regularity and efficiency of air navigation is a law which operates to protect against real possibilities of physical interference** the actual carrying on of air navigation, and therefore is, in every application that it has, a law “with respect to” such air navigation as is within federal power, and none the less so because it is also legislation with respect to that intra-State air navigation which is not within the power.”

- 8. Example of Further Support using Physical Interference argument: The **provision/s** regulating both interstate/overseas and intrastate trade may be held valid on the basis that they are necessary to protect the interstate and export trade from physical interference to the extent that they are preventing **X facts (i.e. stockpiling prescribed drugs for palliative care)**. The evidence shows that **X is causing physical problems**.