

- If it is to be severed: Under s 15A of the *Acts Interpretation Act*, Parliament's intention is to have as much of an Act to be operating, even if some parts of it may fail.

# Heads of power

## s 51(i): Trade and Commerce Power

### *Step 1 Is this a trade and commerce power*

- Mutual communing, bargain, negotiations, agreements, transport and delivery (*W&A McArthur Ltd v Queensland (1920)*)
- Selling tickets to provide services, transporting people, 'all carriage for reward of goods or persons between States is within the legislative power' (**Dixon J, The ANA case (1945)**)
- Incidental power: Activities preliminary to the trade and commerce and in the earlier steps such as production and manufacture, packaging and employee relations. (*O'Sullivan v Noarlunga Meat (1954)*)

### *Step 2 Scope of trade and commerce power*

#### **Limitation**

- s 51(i) implies a **clear distinction** between interstate and intrastate trade and commerce. (*R v Burgess(1936)*)
- Constitutional distinction must apply, both in relation to the main power and the incidental power. (*R v Burgess(1936)*; *Wragg v NSW (1953)*)
  - the incidental power cannot be used to let the Cth legislation encroaching the State power (**Wragg v NSW (1953)**)

#### **How to deal with the limitation**

- Implied limitation, **can get around from other head of power** to consequently regulate the intrastate trade and commerce activities
- The incidental power cannot be used to let the Cth legislation encroaching the State power (**Wragg v NSW (1953)**)
- Is there a **real necessity** to apply the power in intrastate area?
  - Real necessity: **impossible to regulate** foreign and interstate trade and commerce unless it also regulate intrastate trade (*R v Burgess(1936)*); **direct and proximate** relationship between interstate and intrastate trade (*R v Burgess(1936)*); **safety** issues (*The Second Airline case (1965)*); legislation written in a more **precise** manner (*The Second Airline case (1965)*)
  - Insufficient reasons: merely for **wise and expediency** (*R v Burgess(1936)*); **vague and general wording** like 'in the Commonwealth and the territories' (*R v Burgess(1936)*); increasing the **efficiency, competitiveness and profitability** of interstate activity (*A-G(WA) v ANA Commission (1976)*)

## s 51(vi): Defence Power

## *Step 1 Peace time or war time?*

The scope of defence power waxes and wanes depending on the ever-changing facts. (*Andrews v Howell (1941)*). It has different scope of application on peace time and on war time.

The Commonwealth legislation cannot decide the scope of its own power. It cannot recite itself into power. It is for the court to decide the constitutional facts of whether the Australia is at war time or in a national emergency and what is the scope of the defence power. (*the Communist Party case (1951)*)

Is it a war time? E.g.: Covid 19 / bush fire is an urgent social problem to deal with, but there is no real hostility against Australia. There is no external threats or internal terrorism. Australia is in a peace time.

## *Step 2 Two aspects of defence power*

Fullagar J held in *the Communist Party case (1951)* that s 51(vi) has two aspects.

- First aspect: apply to both peace time and war time - matters that have '**direct and immediate purpose of defence**': Defence preparedness through maintaining armed forces (e.g. preventing the undermining of the armed force), enlistment, munitions, fortifications; preventing obstruction to defence preparation.
  - **Identify the defence preparedness purpose.** (What is the purpose of the act in question)
  - **Attacking terrorism** falls within the first aspect because protecting individuals from threat of terrorist activities is at the central conception of the defence power, regardless of the time. (*Thomas v Mowbray (2007)*)
  - Preventing cyber-attack might be of such a purpose (similar to the terrorism)
- Is the law **a reasonably appropriate and adapted means** of achieving this defence purpose?
  - e.g. Is the law targeting properly? E.g. Prohibiting the drone for commercial use is not targeting at terrorism
    - e.g. Is it a threat to Australian people's lives or is it merely a threat to property? Is it a complete prohibition/ban? (Draw similarity/distinction with *Thomas v Mowbray*, where the law targeting at preventing the loss of life by providing a control order)
    - Is it **targeting at** the cyber-attack **or** is it just **ancillary** that the law can prevent cyber-attack?
    - Conclusion: is it a tenuous purpose in the time of peace?
- Second aspect: only apply to a war time or national emergency - activities other than defence preparedness.
  - Is the law a reasonably appropriate and adapted means?

## s 51(xxxix) Nationhood Power

Nationhood power is supported by s 51(xxxix) and s 61. It provides the Cth with the capacity to exercise the executive power conferred by s 61 of the Constitution

## *Step 1 Scope of Nationhood Power*

The Nationhood power supports the law that engage in enterprises and activities that are peculiarly adapted to the government of the nation and cannot be otherwise carried out for the benefit of the nation (*the AAP case(1975)*), those could be

- National problem. Particularly within the capacity and resources of the Commonwealth government to step in. Things that the States doesn't have the power to effectively engage in (*Pape v Commissioner of Taxation (2009)*)

- Cth cannot recite itself into the power. It is for the court to decide whether the national emergency demands for the nationhood power (*the Communist Party case (1951)*)
- No real competition with the State executive or legislative competence (*Davis v Commonwealth (1988)*)
  - States imposing own regulation, could be an indication of competition of competence (*Williams No. 1*)
- Symbolic aspects of nationhood, flags, emblems, celebration of a national festival (*Davis v Commonwealth (1988)*)
- Laws regarding **treason and sedition** (*the Communist Party case (1951)*)

## *Step 2 (If a coercive law) Reasonably appropriate and adapted*

Prohibition, acquisition, demandings that affects people's right and property → coercive law

The coercive law must be 'reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power' (*Davis v Commonwealth (1988)*)

- What is the national purpose accepted in step 1?
- Is it appropriate and adapted? Do you need to ban all? Significant impact? Alternatives?

## s 51(xxvi) Race Power

### *Step 1 Is it a Race*

Multiple factors to consider (*the Tasmania Dam case (1983)*)

- **Biological relation:** a person of aboriginal descent
- Physical similarities: common **history**, common **religion and culture**
- **Recognition:** those similarities lead others identify people as members of a race. People identify themselves as such and who is recognized by the aboriginal community as an aboriginal.
- Sub-group: 'race' includes a racial **sub-groups** among all aboriginal people.

### *Step 2 Is it 'special' law deemed necessary to make*

#### **Special law**

- **Discriminatory** in nature: Not a special law if it is non-discrimination on the ground of race. *Racial Discrimination Act* was not a special law because it directed to eliminate the discrimination (*Kowarta v Bjelke-Petersen (1982)*)
- Differential operation (both on the terms and in practice): 'Special law' is to be ascertained **by reference to its differential operation upon the people of a particular race** (*WA v Commonwealth (1995)*), e.g.: conferring a right or benefit; imposing an obligation or disadvantage
- General operation: Even though the law **applied in general**, it can be a special law if it has **particular importance** to a race or a racial sub-group of people. (*the Tasmansi Dam case (1983)*) It is enough that the site has a **special significance** to the sub-group of people of the aboriginal race.

## Necessary

- It is a matter for Parliament to deem a law to be necessary, but the Court has an ultimate supervisory jurisdiction to protect against 'manifest abuse'. (*WA v Commonwealth (1995)*). Gaudron J concluded that
  1. Parliament must have **identified some difference** pertaining to the people of the race involved or some material upon which the Parliament might reasonably for a political judgment that there is a difference.
  2. The law must be reasonably capable of being viewed as **appropriate and adapted** to the difference stated, otherwise, it would be a manifest abuse and the court should step in.

### *Step 3 It can be both for the benefit and for the detriment*

- It hasn't yet decided whether the race power only support the laws benefit the special race of people. So far in *the Hindmarsh Island Bridge case (1998)*, **Gummow and Hayne JJ** held that s 51(xxvi) allows both beneficial and detrimental legislations. Brennan CJ and McHugh J confirmed that s 51(xxvi) allows an repeal to the provision which removes the benefit to a special race. **Gaudron J** argued that the referendum expands the power to legislate and the 'for' in the Consitution should be interpreted as 'with respect to' rather than 'for the benefit of'.
- To the very least, a law supported by the race power and operates for the benefit of the race can still be repealed by the Parliament under the race power, because Brennan CJ and McHugh J has held in *the Hindmarsh Island Bridge case (1998)* that so long as there is a head of power to enact a law, that head of power also permits its repeal. Otherwise, the law would become entrenched.

## s 51(xxix) External Affairs

- Under s 51(xxix), the Commonwealth Parliament has power to make laws with respect to 'external affairs'

### *Matters outside Australia: Geographical externality*

Geographical externality: Cth can make laws with respect to **relations with foreign countries** or **actions that occur outside Australia** or things that are **physically outside Australia**

- **The relations** of the Cth with all countries outside Australia are matters which **fall directly within the subject of external affairs.** (*R v Sharkey (1949)*)
  - Majority in *Thomas v Mowbray (2007)* held that matters affecting Australia's relation with other countries, like **terrorism**, falls within the extent of external affairs power
- The external affairs power extends to **matters geographically external** to Australia (*Hortav Commonwealth*)
- **Mere externality (matters geographically external** to Australia) was sufficient for the law to be supported by the external affairs power. (*the Industrial Relations Act case (1996)*)
  - There is no need to have a connection with Australia
  - It applies to **matters happen within Australia**, but have a **sufficient connection** with conduct geographically external to Australia. It applies to the people who are in the process of engaging in external affairs. (*Alqudsi v Commonwealth (2015)*)
  - Applied not only to tangible things, but also to **intangible things (e.g. funding** a travel agency which support people with hostility to enter into a foreign State) (*Alqudsi v Commonwealth (2015)*)
  - A law regulating **matters within Australia doesn't fall within the external affairs** power simply because **the cause/need** of regulating the Australian matters **arose outside Australia.** (*Pape v Commissioner of Taxation (2009)*)

## *Matters inside Australia: Implementation of treaties*

A treaty which has not been incorporated into municipal law cannot operate as a direct source of individual rights and obligations under the municipal law (*Minister of State for Immigration and Ethnic Affairs v Teoh*)

**Entering into a treaty was enough** for a legislation to implement **any treaty, regardless of the subject matter**, and such a legislation is supported by the external affairs power as long as the treaty was made **bona fide**. (*the Tasmania Dam case (1983)*)

1. Bona fide: The treaty must be made bona fide. The party countries must genuinely want to enter into the treaty. Cth cannot just buy them into a treaty for the purpose of legislation (*the Tasmania Dam case (1983)*)
  2. **What kind of treaty** can be implemented: The treaty should have **sufficient specificity** and **specify a course to be taken**. Some treaties do not enliven the legislative power because they are too vague and aspirational (e.g. to promote full employment). (*the Industrial Relations Act case*)
  3. The law, either in whole or in part, must reflect a **'faithful pursuit' of the treaty's purpose** (Dixon J. in *R v Burgess*). **The purpose of the law is to implement the treaty** (*It cannot merely include several provisions implementing the treaty while having the rest on other subject matters*) (*the Tasmania Dam case (1983)*)
    - **Partial implementation is permissible and there is no need to comply with all obligations under the treaty**, but not if it is so selective as to deny the law of the character of implementing the treaty or become inconsistent with the treaty as a whole (*the Industrial Relations Act case*)
  4. Proportionality: the law must be reasonably adapted and appropriate to fulfill an international obligation or secure the benefit of the treaty/convention. (*the Tasmania Dam case (1983)*; *the Industrial Relations Act case*) not structural proportionality here.
    - pursuing an 'extreme course' might be relevant, but **a wide departure from the purpose of the treaty is not permissible** (*R v Burgess*; *the Tasmania Dam case*)
    - the legislation **went further** than the convention required (e.g. shifting the onus of prove, including additional considerations and requirements): **permissible**, because (1) the validity of the law depends on whether its **purpose or object** is to implement the treaty and (2) it is **for the Parliament to decide the means** of implementing a treaty so long as the means is appropriate and adapted to the end (*the Industrial Relations Act case*)
- Implementing other international law or agreements:
    - Mere recommendations and declarations doesn't create international obligations (*Pape v Commissionaer of Taxation*)
    - Recommendations (maybe): the Recommendations can be relied upon if it is (1) the Recommendations can be regarded as appropriate and adapted to giving effect to the terms of **the Conventions** to which they relate and (2) The provisions in question **'implement the terms** of the Recommendations' (*the Industrial Relations Act Case*)

## s 51(xx) Corporation Power

S 51(xx) power allows the Commonwealth government to make laws with respect to **foreign corporations and trading or financial corporations** formed within the limits of the Commonwealth.

### *Step 1 Is the body a corporation?*

- The Commonwealth cannot define itself into power (*Communist Party case*). It cannot declare every body is a trading corporation for the purpose of regulating it. Whether a body is a trading corporation is a question for the court.
- Incorporation occurs upon registration under the Corporations Act, or
- The body is incorporated under other statutes, or