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2. Indirect Inconsistency

- **Indirect Inconsistency:** Where from its terms, nature or subject matter, a Commonwealth law is intended to 'cover the field' on a particular subject matter. Any other law which attempts to enter to any extent upon that same field is inconsistent → *Isaacs J in Clyde Engineering v Cowburn 1926*
- **About intent not effect**
 - It does not matter whether it is possible for the laws to work together. Even if the laws say the same thing and could both exist simultaneously, there will be inconsistency if the Cth law intends to be the only law over that subject (and the State law enters that field) → *Ex Parte McLean 1930*
 - Q: Did Commonwealth parliament intend for the legislation to be a complete statement of the law, or for it to work alongside State legislation?
- Note: this is made possible by the interpretation of the Constitution taken in by the Court in the *Engineers Case 1920* → Rejected the doctrine of 'reserve state powers' as limiting the power of the Commonwealth to legislate to limit State power.
- **3 step analysis:**
 1. Identify the 'field' that the Commonwealth law regulates
 2. Determine whether the State law 'enters' upon that same field
 3. Determine whether the Commonwealth law shows an intention to 'cover the field' exclusively

1. Determining the Field (subject matter) of both laws

- Determining what subject matter the Commonwealth law is regulating, and then whether the State law 'enters' this same subject. Involves characterisation of the legal and practical effects of both laws.
- Note: The fact that 2 laws can both be relevant to the same scenario does not mean that they both cover the same 'field'. Need to look at their general operation and purpose → *Ansett V Wardley 1980*
 - E.g. Industrial award concerned with a specific employment/employee relationship (but is silent on sex discrimination) covers a separate field to general discrimination laws which are concerned with equal opportunity etc. Thus, not necessarily inconsistent, though they may both apply in some instances. → *Ansett V Wardley 1980*
 - E.g. a Commonwealth law focusing on technical efficiency and quality of broadcasting through construction of towers was silent on issues of environmental effects etc. NSW Environmental protection legislation could apply at the same time, because it covered a different field → *Commercial Radio Coffs Harbour v Fuller 1986*

1. Trade & Commerce

s 51 Constitution

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

s 92 Constitution

Trade, commerce and intercourse among the States shall be absolutely free

- Three types of trade/commerce:
 1. Trade with other countries → Cth has express power under Constitution
 2. Trade between States → Cth has express power under Constitution
 3. Trade within a single state → not mentioned in Constitution.
 - Reflects the desire to preserve the power of States over their own affairs. National government only given those powers that they needed.
 - There are issues with this – intrastate trade and commerce is often very difficult to separate from inter-state trade.

1. Defining Trade and Commerce (Interpretation)

Interpreting the meaning of 'Trade and Commerce' under s 51(i)

- **'Trade and Commerce'**
 - Should be defined using ordinary meaning of the word as generally understood by those who engage in trade and commerce → *W&A McArthur v Queensland 1920*
 - 'Trade and Commerce' includes all arrangements and methods used to effectuate the trade or commerce (ie negotiations, correspondence, delivery and transport etc) → *W&A McArthur v Queensland 192*
- **Non-Purposive**
 - Commerce power is defined by subject rather than purpose. Means that the Commonwealth can exercise the power for whatever purpose they wish (even if non-commercial), so long as the subject matter falls within T&C → *Murphyores 1976*
- **Specific Examples:**
 - Transport Services: Transportation of persons or goods for a reward (payment) is itself trade/commerce, regardless of whether the purpose of this transportation was commercial or personal → *Airways Case 1945*
 - Production: Production *does not* fall within trade and commerce → *Grannall v Marrickville Margarine 1955*. However, regulation of production may be *incidental* to the regulation of trade and commerce (below)

2. Scope of Power (Characterisation)

- Assessing whether the law can be said to be ‘with respect to’ Trade and Commerce (whether there is sufficient connection)
- The fact that a regulation has effects on trade and commerce does not mean it is a law ‘with respect to’ trade and commerce → *Pape v FCT 2009*

a. Express Powers

- ‘Trade and Commerce’ power has been held to include a wide range of actions (ie these actions have been accepted as being *with respect to* trade and commerce:
 - Prohibitions: T&C power includes power to prohibit trade and commercial activities, so long as this does not violate s 92 (free trade) → *Airways Case 1945*
 - Licensing: T&C powers ‘necessarily comprehends’ powers to select who can engage in trade and commerce in different circumstances (ie to establish licensing regimes) → *Murphyores 1976*
 - Engaging in T&C: Power to make laws relating to T&C includes power to make laws authorising the Commonwealth itself to engage in such T&C (ie to make laws establishing Commonwealth businesses). No prohibition on Commonwealth engaging in something it regulates. → *Airways Case 1945*

b. Incidental Powers

- **General Common Law Principle**: Where the Constitution provides the Commonwealth with a power, this is implied to include any power which the denial of would render the initial power itself to be ineffective (ie powers needed to exercise the original power)
- This brings in a **purposive element**:
 - To fall within an implied incidental power, a power must be reasonably necessary/appropriate to effectuate the use of the express power → *Grannall v Marrickville Margarine Pty Ltd 1955*

i. Incidental Powers over Intra-state Trade and Commerce

- Trade and Commerce power expressly applies to inter-state and foreign trade. Question of when this gives the Commonwealth an *incidental* power to regulate inter-state trade
- **US Commingling Doctrine**
 - In the US – ‘commingling’ doctrine applied where interstate commerce has a substantial economic effect on interstate commerce. In these circumstances, Congress can regulate it
 - Australian High Court has regularly rejected this wide statement of incidental power in favour of a more narrow application
 - The fact that intra and inter-state/foreign trade are ‘commingled’/intermingled not enough → *R v Burgess ex parte Henry*

A. Is the law imposing a 'tax'?

- **Definition:** A compulsory exaction of money by a public authority for public purposes... and not a payment for services rendered → Latham CJ in *Matthews v Chicory Marketing Board 1938*

1. Does it meet the required elements?

A scheme will *prima facie* be a tax where it is: → *Air Caledonie 1988*

i. A compulsory exaction of money

- Not due to the person being charged consenting to be bound by the fee → *Air Caledonie 1988*

ii. By a Public Authority

- **Note:** Where a private body is authorised by statute to collect money for a public purpose, it can be characterised as a 'public authority' for the purpose of this element → *Aus Tape Manufacturers 1993*
- Note – above case is not authority for proposition that no public authority is required. It just means that a private body can act as a public authority → *Roy Morgan v FCT 2011*

iii. For Public Purposes

- **Public purpose** = A purpose related to providing benefits for a certain group in society or to overcoming a social problem of public importance. Does not need to be a *governmental* purpose → *Aus Tape Manufacturers 1993*
- However, is not broad enough to encompass anything which is has a *public interest* → *Roy Morgan v FCT 2011*

- **Factors to Consider:**

i. Payment into CRF

- If funds are paid into the CRF, this suggests that they are being collected for a public purpose → *R v Barger 1908*
- However, not determinative:
 - Funds can be collected for public purpose (and a tax) but not placed in CRF → *Aus Tape Manufacturers 1993*
 - Funds can be placed in CRF but not collected for a public purpose (and thus not a tax) → *Luton v Lessels 2002*

1. Is there a burden on the freedom?

A. Trade

- S 92 is not a protection from any burdens or limitations on inter-state trade. It only protects from burdens which are discriminatory and protectionist → *Cole v Whitfield 1988*
- **Test:** A law which limits trade will only be burden s 92 if it is: → *Cole v Whitfield 1988*

1. Discriminatory, and

- Discriminates against interstate trade through differential treatment (ie by applying differently to interstate versus intrastate trade)
- Can be either:
 - i. On its terms: The law expressly treats interstate and intrastate markets/goods differently.
 - E.g. *Bath v Aston Holdings 1888*: Act imposed 25% fee on tobacco purchased from wholesalers not in Vic
 - ii. In its effect: The law is neutral on its face, but in effect applies differently to intrastate markets
 - E.g. *Castlemaine Tooheys 1990*: Act imposing extra refund obligations on non-refillable bottles impacted intrastate producers who could not easily transport bottles to be re-filled
 - E.g. *Betfair 2008*: Law banning online bet exchanges impacted intrastate operators and preferenced local operators.

2. Protectionist:

- Can include either → *Bath v Alston Holdings 1988*
 - i. Conferring an advantage on an intrastate market (by providing it with a competitive advantage), or
 - ii. By conferring a disadvantage on an interstate market (by removing its competitive advantage)
- **Note:** This is in either purpose or effect – ie will still burden s 92 if the law is for a legitimate purpose but has effects of privileging the interstate market → *Bath v Alston Holdings 1988*
- **Note:** Where law burden's State's own export trade → *Barley Marketing Board 1990*
 - Will generally not be protectionist
 - However, if the resource is scarce and the State has a greater supply of it, this may be protectionist if the effect of burdening exports is to provide intrastate purchasers with greater access