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1. BASICS: Characterisation of Commonwealth Laws

<p>Commonwealth Laws Characterisation Steps</p>	<p><u>Steps to Characterising a Commonwealth Law:</u></p> <ol style="list-style-type: none"> 1. Identify head(s) of power that could be reasonably invoked to support a Cth law. 2. How has the power(s) been interpreted, what is its scope? 3. Characterisation: three distinct types of Cth legislative power: <ol style="list-style-type: none"> i. <u>Subject Matter (Non-purposive powers).</u> <ul style="list-style-type: none"> ▪ Most powers fall within this category, power is concerned with a subject matter (or thing) eg. Race, Trade & Commerce, Corporations. ii. <u>Purposive powers</u> <ul style="list-style-type: none"> ▪ Eg. Defence, external affairs (treaty). iii. <u>Implied incidental power</u> 4. Once law can be characterised as being within power, consider constitutional limitations on Cth's exercise of the power. <ul style="list-style-type: none"> ▪ Express limitations – eg. s 51(xxi), s 92. ▪ Implied limitations – eg. Implied freedom of communication, <i>Melbourne Corporation doctrine</i>.
<p>Cth's legislative Powers</p>	<ul style="list-style-type: none"> • Commonwealth doesn't have a general legislative power → This is unlike the states • Cth can only make laws where there is a grant of power to it in the Constitution, either s.51 or s.52.
<p>Tests: Subject matter or non-purposive.</p>	<p>Subject matter (Non purposive powers)</p> <ol style="list-style-type: none"> 1. Sufficient connection test: is the law in question sufficiently connected to the subject matter than falls within the head of power under s51? Does not matter that it might also be characterised as bearing upon some other subject matter not within.– <i>Fairfax v Commissioner of Taxation (1965)</i>. 2. Focus is on direct operation of the law: not concerned with policy or if good/bad, just constitutional - <i>Murphyores</i>. 3. Question of degree: – <i>Re Dingjan; Ex parte Wagner 1995</i> <ul style="list-style-type: none"> ▪ For a law to be within s 51(xx) it must operate on the rights, duties, powers or privileges of corporations in such a way as to evidence a sufficient connection between the law and the corporations. It is not enough to identify corporations as a reference point so as to affect the activities of others. ▪ The connection must be substantial and not merely tenuous. <ul style="list-style-type: none"> • Sufficient connection test cases - <i>Fairfax; Herald & Weekly Times; Murphyores; Re Dingjan</i>. • Primary qn is whether a law is one with respect to a legislative power granted to the Cth by the Constitution is answered by ascertaining its substantive or <u>direct legal operation, by determining that duties, obligations and privileges which it creates</u> – <i>Fairfax v Commissioner of Taxation (Cth) (1965) (Kitto at 7); Tasmania Dam Case 1983 (Mason J at 152); First Uniform Tax Case (Mason J at 150)</i>. • The Cth law must possess a <u>substantial connection</u> with the relevant head of Cth power - <i>Herald & Weekly Times Ltd v Cth (1966) (Kitto J at 436); Tasmania Dam Case (Mason J at 152)</i>. • HOWEVER this does NOT mean the connection must be close. Rather it means only the connection must not be so insubstantial, tenuous or distant that it cannot be regarded as a law with respect to the relevant head of power - <i>State Banking Case 1947 (Dixon J at 79); Tasmania Dam Case (Mason J at 152)</i>. • If the subject matter of the law is sufficiently connected to the subject matter of the power, court will NOT be concerned with the policy of the law: ulterior motive of the legislature, or the purpose or the indirect consequences which it seeks to achieve, either economic or social are irrelevant. - <i>First Uniform Tax Case 1942 (Latham CJ); Cth v Bank of NSW 1949; Fairfax v Commissioner of Taxation (Cth) 1965; Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) (Mason J at 202-3)</i>. • If a law on its face is one with respect to a Cth legislative power, it does not cease to have that character because the Cth Parliament seeks to achieve by its enactment a purpose which is not within the Cth's legislative power - <i>Northern Suburbs General Cemetery Reserve Trust v Cth (1993), Mason CJ, Deane, Toohey, Gaudron, Dawson and McHugh</i>. <p>Fairfax v Commissioner of Taxation 1965</p> <ul style="list-style-type: none"> • Held: that provisions of the <i>Income Tax and Social Services Contribution Assessment Act 1936 (Cth)</i>, which denied exemption from income tax liability to the income of a superannuation fund which did not invest in certain public securities, could properly be characterised as a law with respect to taxation. As the law imposed a liability to pay taxation, it was irrelevant that the acknowledged policy of Parliament in enacting the law was to increase investment in public securities by superannuation funds: Taylor J at 16, Windeyer J at 18. • Per Kitto: "Under that section (s51) the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes..." <p>First Uniform Tax Case 1942</p> <ul style="list-style-type: none"> • <i>The question [of characterisation] may be put in these terms: "what does the law do in way of changing or creating or destroying duties or rights or powers?" The consequential effects are irrelevant for this purpose."</i> • HC may also consider the practical effect or operation of a law – <i>Tasmanian Dam Case 1983 (Mason J at 152)</i>. <p>Herald & Weekly Times Ltd v Cth 1966</p> <ul style="list-style-type: none"> • Court held that the <i>Broadcasting Act 1942 (Cth)</i>, which prohibited persons from holding shares in and lending money to companies holding television licences and companies holding shares in those companies, was a law with respect to the provision of television services, and thereby authorised by the Constitution, s 51(v). Menzies J considered the practical operation of the law: • <i>'The laws are concerned with matters of business influence rather than of legal power. A law governing a particular relationship may, however, be supported by a legislative power with respect to a subject matter notwithstanding that the connexion between the legal relationship and the subject matter of legislative power is of practical rather than of legal significance.'</i> (Menzies J at 440, and see Kitto J at 436).' • HC has been more prepared to consider the practical operation of a law in deciding whether it is a law with respect to a grant

7. HEADS OF POWER: Trade & Commerce s51(i) + Implied Incidental Power Application

The Trade & Commerce Power:

S51: The Parliament shall subject to this Constitution, have power to make laws for the peace, order and good government of the Cth with respect to...**(i) Trade and commerce with other countries, and among the states.**

<p>Quick Characterisation Guide</p>	<ol style="list-style-type: none"> 1. Characterise: Sufficiently Connected Test – Subject Matter Power. <ul style="list-style-type: none"> • There must be a sufficient connection between the matter, thing or activity to be regulated (including intrastate matters) or overseas trade before s 51(i) can support a federal law – O’Sullivan v Noarlunga Meat Ltd 1954. • The Cth act must have a sufficient connection to the subject matter – Fairfax v Federal Commissioner of Taxation 1965. • Look to ‘rights, duties, privileges and obligations’ that are given, removed or altered by the law. Not concerned with consequential impact on another area, only direct effect. – Fairfax v Federal Commissioner of Taxation; Bank of NSW v Cth 1948; Cunliffe v Cth 1994. <ul style="list-style-type: none"> ○ Connection must be substantial not merely tenuous – Re Dingjan; Ex parte Wagner 1995 per Toohey J. • Cth heads of power should be construed in broad and general terms – Bank Nationalisation Case. • The sufficiency of connection depends on the context: <ul style="list-style-type: none"> ○ In O’Sullivan a sufficient connection was supplied by the fact that the production processes were objectively geared for export trade. ○ While it is clear that this method of characterisation can significantly enhance the scope of the trade and commerce power, a sufficient connection is not supplied by a mere economic relationship between the intrastate matter and <u>interstate or overseas trade</u> (needs to be a physical relationship also). • If does not have a sufficient connection may be by invoking implied incidental power the power implicit in every head of power without which the grant of power would be ineffective (Grannall v Marrickville Marg) it can be brought into the subject matter then as is it <u>appropriate and adapted</u> to the purpose. <ul style="list-style-type: none"> ○ Definition: Everything which is incidental to a main purpose of power is contained within the power – Burton v Honan 1952 per Dixon J. ○ Characterisation: There must be a relevant and sufficient connection with the subject matter of the power and in determining such a connection; the court regards the purpose of the legislative provision and the reasonableness of the connection between the law and the subject matter. Must be considered ‘reasonably appropriate and adapted to the pursuit of an end within a substantive power’ – Nationwide News v Wills; Davies v Cth. 2. Definition of ‘trade and commerce.’ <ol style="list-style-type: none"> a. Harmonious interpretation – s51(i) the same as s92 – James v The Cth 1936 b. Give words their current and popular meaning – W&A McArthur v QLD – <ul style="list-style-type: none"> ○ Encompasses much more than the act of trade itself: <p><i>“The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of the class of relations between mankind which the world calls ‘trade and commerce’.</i></p> ○ All the commercial arrangements of which transport is the direct and necessary result form part of trade and commerce – Bank of NSW v Cth 1948. 3. Scope of power <ol style="list-style-type: none"> a. Intangibles as well as movement of goods or persons are covered – Bank of NSW v Cth <ol style="list-style-type: none"> i. Intangibles = broadcasting, telecommunications, technology. b. Movement of people is part of the power, as is ability to create a government trading enterprise but not through s 51(xx) – Australian National Airways v The Cth. <ol style="list-style-type: none"> i. le. Transport for reward. c. Can be external exports or imports – Murphyores. d. Includes regulating navigation, shipping and railways of the property of any state– W&A McArthur; confirmed s 98. e. Ultimately is construed broadly – Noarlunga Meats Case <ol style="list-style-type: none"> i. This power allows the Cth to both regulate and participate in trade and commerce with other countries and with the States – Australian National Airways v Cth 1945. ii. Matters falling within the <u>core</u> of trade and commerce power in the Constitution, s 51(i) may be regulated by Parliament for any person. 4. Implied incidental power <ol style="list-style-type: none"> a. For effective regulation of trade and commerce the Cth may legislate where their power normally will not hold, incidentally – O’Sullivan v Noarlunga Meat 1954 5. Limitations <ol style="list-style-type: none"> a. Production process does not fall within power but may be regulated if incidental – Granall v Marrickville Margarine Pty Ltd b. Generally NOT a power to regulate national economy as there is a need to show definable relationship – Pape v Commissioner of Taxation. c. Cannot directly regulate intrastate – R v Burgess <ol style="list-style-type: none"> 1. BUT can be used incidentally should intrastate be tied to interstate – Redfern v Dunlop Rubber Australia; requires an <u>inseparable connection</u>. d. S 92 prohibits restrictions of interstate trade where the purpose or effect is to discriminate against interstate traders.
<p>Elements & Limitations</p>	<p>Elements</p> <ol style="list-style-type: none"> 1. Trade and commerce; 2. Interstate; or 3. Overseas <p>Limitations</p> <ol style="list-style-type: none"> 1. No power to regulate the economy generally. 2. No direct power to regulate intrastate trade and commerce. 3. No power to regulate production.

	<ul style="list-style-type: none"> Objectively look at if the production is geared towards export and if this is a separately identifiable process from the other production – O’Sullivan v Noarlunga Meat 1954. Only a subjective intent for export or inter-state trade is not sufficient since there are no objectively distinguishing facts – Beal v Marrickville Margarine. Unless there is no opportunity for an ordinary person to distinguish between the types of trade then (probably) Cth can regulate – Swift Australian v Boyd-Parkinson. Look at any contracts. <p>Granall v Marrickville Margarine (1955) Concerned laws that imposed limits through a licensing system which regulated how much margarine could be produced. The Court held that trade and commerce does not start until the production process is finished, but also made the point that the Commonwealth was not excluded from ever touching the production process, as ‘there will be circumstances in which the Commonwealth can reach back to the factory or the field or the mine and regulate things as a matter incidental to the regulation or trade and commerce.’</p> <p>Beal v Marrickville Margarine Pty (1966) 114 CLR 283</p> <ul style="list-style-type: none"> The mere fact that goods happen to be intended for out of state or overseas markets will not suffice to make their production part of interstate trade. A margarine producer unsuccessfully argued that produce destined for other states was kept wholly separate from its other production lines, was subject to Cth and not state laws. Subject intent as to the destination of the margarine did not, in itself make its production subject to s 51(i) and since there were no objectively different facts relating to its method of production to distinguish it from margarine destined for intrastate markets its production could not be government by s 51(i) legislation. If the production process was objectively geared towards export market the Cth could regulate. <p>3. Cannot regulate intrastate trade</p> <ul style="list-style-type: none"> Trade and commerce power <u>does not allow the government to regulate purely intrastate trade and commerce – R v Burgess; Ex Parte Henry.</u> HOWEVER if there is an <u>inseparable connection</u> between inter and intrastate trade, then Cth may regulate intrastate trade. An <u>inseparable connection</u> must not be so remote or insignificant that there is no real relationship – Redfern v Dunlop Rubber Australia 1964. When the court with an ambiguity within the legislation to whether the legislation had extended into intrastate matters, Latham CJ in R v Burgess; <i>Ex parte Henry</i>, which supported by Dixon J was in the view that the <u>Cth could not expand its legislative grip merely on the grounds of intermingling.</u> Gibbs J in Ex Rel Ansett Transport further clarified that <u>mere efficiency, competitiveness and profitability were not sufficient grounds for a connection</u> and that the distinction must be maintained no matter how much interdependence may have existed between them two. <p>R v Burgess; Ex parte Henry (1936) Henry operated joy flights out of Sydney airport. The Commonwealth introduced navigation regulations, relying on the trade and commerce power, which regulated the height at which planes could fly in the area. Henry challenged the validity of the law, and the High Court found in favour as a <u>clear distinction must be maintained between interstate and overseas trade and commerce, with intrastate.</u> Particularly important approach as there was not a lot of air traffic at the time of this case, so the Commonwealth could not argue that they had to regulate all airplanes more generally.</p>
<p>Implied Incidental Power: Exceptions (Purpose test)</p>	<p>1. Reasonable connection between production and trade and commerce</p> <ul style="list-style-type: none"> Attached to every express grant of power in the Constitution is an implied grant of power wide enough to make the express grant effective – O’Sullivan v Noarlunga Meats; McCulloch v Maryland 1819. There must be a sufficient connection between the way the production process is being regulated, and the relevant aspect of trade and commerce. The process for production has to be distinguished from the process that would be used if it was going to be sold usually/locally. Still has limitations where the Cth is explicit – eg. Can’t be used to ‘obliterate’ the distinction between interstate and intrastate trade – Wragg v NSW 1953. Incidental aspect to a power extends to anything ‘reasonably incidental to the fulfillment of the core of the power.’ – Burton v Honan 1952. Expanded in Nationwide news v Wills which held that a matter will fall with the incidental aspect of power if it is reasonably appropriate and adapted to the fulfillment of the power; reasonably proportionate to the exercise of the power or reasonably necessary or conceivably desired for the fulfillment of the power. Implied incidental power has enabled the Federal Parliament to regulate: <ul style="list-style-type: none"> Activities preparatory to trade – O’Sullivan v Noarlunga Meat Ltd (No 1) 1954 Activities occurring wholly within a State – Minister for Justice (WA) (Ex rel Ansett Transport Industries (operations Pty Ltd) v Australian National Airlines Commission 1976. <p>O’Sullivan v Noarlunga Meat Ltd (No 1) (1954) <u>Facts:</u> Concerned the validity of Commonwealth laws that regulated the production of meat for export. O’Sullivan argued that the Commonwealth could not make laws with respect to the production process, as this is outside the scope of section 51(i). Noarlunga argued that the Commonwealth had a right to regulate the production process as a matter incidental to the regulation of the export of the meat itself. The Commonwealth regulation set things such as how the meat was to be handled, packaged and labelled, with the</p>

8. HEADS OF POWER: The Executive Power s61

The Executive Power:

S61: The Executive Power of the Cth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and the laws of the Cth.

Introduction	<p>S 61 is limited to the execution and maintenance of this constitution and can’t act outside of the Constitution. It also can’t act outside all other laws of the Cth. It also can’t act outside other laws of the Cth. S61 is not exhaustive – Tampa Case – French J.</p> <p><u>Four sources of executive power – Pape v Federal Commissioner of Taxation (2009)</u></p> <ol style="list-style-type: none"> Express constitutional provisions/power conferred by statutes of the Parliament. Prerogative power of the Crown. Commonwealth Capacities. Nationhood power
Constitution Provisions	<p><u>1. Constitutional provisions</u></p> <ol style="list-style-type: none"> S 52: The Cth has exclusive power to regulate its public service, the seat of government, the Cth public places. S 90: The Cth has exclusive power to levy customs duties and excise duties. S 114: The Cth can enjoy exclusive power to regulate defence. S 115: The States shall not coin money, making the currency power (s51(xii)) is an exclusive power. S51(xxxvii): Cth can make powers with respect to matters referred to the Parliament of the Cth by the Parliament or Parliament of any State or States, but only so that the aw shall extend only to States by whose Parliaments the matter is referred, or which adopt the law.
Prerogative Powers	<p><u>2. Prerogative powers</u></p> <ol style="list-style-type: none"> The executive has inherent power that may be exercise without parliamentary authority. These powers are the residual powers that remain with the Crown – Barton v The Cth 1974. Common law executive powers may be removed constitutionally by valid legislation – Cth v Cigamatic Pty Ltd. <ol style="list-style-type: none"> Except those that are necessarily exercisable by States under the allocation of responsibilities made by the Constitution itself – Davis v Cth, Mason CJ, Deane and Gaudron JJ citing Wooltops case. No judicial review of executive power <ol style="list-style-type: none"> The court have shown deference to the executive, and the exercise of prerogative powers was generally not susceptible to judicial review – R v Toohey; Ex parte Northern Land Council. However judicial assessment of the limits of executive power are part of the courts’ exclusive power of judicial review – North Australian Aboriginal Legal Aid Service v Bradley. <p><u>Examples of Preogative Powers:</u></p> <ol style="list-style-type: none"> International affairs <ol style="list-style-type: none"> Most significant executive power of Cth is power to engage in international affairs – R v Burgess; Ex parte Henry 1936 per Latham CJ. <ol style="list-style-type: none"> Power to engage in treaties. Conduct of diplomatic matters. Extradition. <p>Koowarta v Bjelke-Petersen 1982: the conduct of foreign affairs generally, including entry into and execution of treaty obligations, and diplomatic matters, is part of the prerogative power of the Crown.</p> <p>Barton v Cth 1974: Also extends to enable the executive to request the extradition of fugitives where there is no extradition treaty in place with the relevant country.</p> <ol style="list-style-type: none"> Defence <ol style="list-style-type: none"> Declaration of war/peace is within the power of the executive as it expresses the prerogative power of the Crown. S61. <ul style="list-style-type: none"> ▪ Farey v Burvett 1916: Cth enjoys a number of prerogative powers in relation to defence, including the power to declare war or peace. Defence of the nation – Essenden 1947, land used by the Cth is immune from State tax because of prerogative power to defence. <ul style="list-style-type: none"> ▪ The executive power may be used to authorise legislation imposing criminal sanctions for seditious or subversive conduct. ▪ R v Sharkey 1949: The prevention of attempts to excite hostility where obedience is necessary for the effective working of government appears to be recognised a proper purpose of the Government concerned. Armed forces. Fiscal and Legal Matters <ol style="list-style-type: none"> Cth priority over the States in the payment of taxation debts in a bankruptcy – Cigamatic. The executive may conduct inquiries. Crown Immunity in tort – now reversed by s 64 Judiciary Act. Executive Immunity <ol style="list-style-type: none"> At common law, the Executive, its servants and agents were presumed to be ommune in relation to their activities in the course of their functions or duties – Bropho v Western Australia. There are 2 questions or tests to ask to determine whether there is Crown Immunity – Grain Elevators Board (Vic) v Dunmunkle Corporation. <ol style="list-style-type: none"> <u>Control test</u> – a threshold question to consider was whether a person or corporation could be regarded as a servant or agent of the Executive. The answer to this question depends on the extent to which or servant or agent was subject to direct ministerial control, or was independent of the Government and enjoyed discretionary powers of its own (the ‘control test.’). <u>Functions and duties test</u> – a second test involved a consideration of the overall nature of the functions and duties of the purported servant or agent – Registrar Accident Compensation Tribunal v Commissioner of