

Q1: Problem Question: Directory

<u>CHARACTERISATION</u>	4
<u>ENUMERATED HEADS OF POWER</u>	
TRADE AND COMMERCE POWER (s51(i)).....	5
CORPORATIONS POWER (s51(xx)).....	9
TAXATION POWER (s51(ii)).....	14
GRANTS POWER (s96).....	18
RACES POWER (s51(xxvi)).....	
DEFENCE POWER (s51(vi)).....	20
<u>LIMITATIONS</u>	
FREEDOM OF INTERSTATE TRADE AND COMMERCE (s92)	28
<i>Will likely arise if T&C is one of the heads of power. Watch out for references to STATE laws, as this limitation will likely become relevant.</i>	
FREEDOM OF INTERSTATE TRADE AND COMMERCE STRUCTURED PROPORTIONALITY	32
IMPLIED IMMUNITIES—COMMONWEALTH’S ABILITY TO BIND THE STATES (Melbourne Corporation)	34
<i>If the Commonwealth is doing something that compromises the fundamental functioning of the States (or their Laws).</i>	
INCONSISTENCY	38
<i>Watch out for references to STATE laws, as this limitation will likely become relevant.</i>	
STRUCTURED PORTIONALITY	41

Q2: Essay: Directory

<u>INCONSISTENCY</u>	
SIMULTANEOUS OBEDIENCE TEST (DIRECT).....	43
CONFERRAL OF RIGHTS TEST (DIRECT).....	43
COVERING THE FIELD TEST (INDIRECT).....	44
RELATIONSHIPS WITH THE TESTS.....	45
OPERATIONAL INCONSISTENCY.....	45
<u>MELBOURNE CORPORATION</u>	
EARLIEST ITERATION.....	46
CLARIFICATION.....	46
AUSTIN (NOTE OCCURRED AFTER INDUSTRIAL RELATIONS).....	46
FRENCH CJ’S FACTORS IN CLARKE.....	47
REGULATING EMPLOYMENT RELATIONSHIPS.....	47

Move to a specific section = **move**

Make a decision between several sections = **PICK/ IF**

Pure script to just type out = **Lorem ipsum**

Insert facts = **[INSERT]**

Directions to navigate through = Plain text

Headers to include in answer = **HEADER**

Hybrid between PICK and Pure script (You write out the pure script only for the PICK segments relevant = **Lorem ipsum**)

Enumerated heads of power:

Trade and commerce power, s51(i):

1. The issue is whether the Act falls within the trade and commerce (T&C) head of power (s51(i)).

Scope:

2. The scope of the T&C power is very wide. The words are terms of 'common knowledge' that are 'better understood in detail by traders and commercial men than by judges' (*W&A McArthur*).

3. **DISAGGREGATE THE ACT INTO INDIVIDUAL SECTIONS, AND DISCUSS EACH SECTION SEPARATELY IN THE RELEVANT CATEGORY IT FITS INTO:**

3.A. Transportation of merchandise

S___ of the Act directly deals with the transportation of [DESCRIBE PRODUCT, 'merchandise']. This expressly fits within the definitional aspect of the T&C power (*W&A McArthur*).

IF TRADING IS OF INTANGIBLES: Furthermore, the trading of intangibles, such as [INTANGIBLES, i.e., electricity] is within the syncope of the power (*Bank of NSW case*).

3.B. Negotiations/ OR Bargaining/ OR Transport/ OR Delivery

S___ of the Act directly deals with the commercial arrangement of [DESCRIBE PRODUCT, 'merchandise']. This directly relates to the [NEGOTIATIONS/OR BARGAINING/OR TRANSPORT/OR DELIVERY] of the merchandise. The T&C power extends to these business arrangements (*W&A McArthur*).

3.C. Regulating conduct of persons involved in T&C activities

S___ of the Act regulates the conduct of persons involved in T&C activities, being the [TRANSPORTATION/OR NEGOTIATIONS/OR BARGAINING/OR TRANSPORT/OR DELIVERY] of 'merchandise'. This is because it [DESCRIBE HOW THE ACT REGULATES CONDUCT]. The T&C power extends to regulating this conduct (*Re Maritime Union; CSL Pacific*).

3.D. Regulating preliminary/ OR preparatory activities

S___ of the Act regulates preparatory activities that are preliminary to the actual trading of the merchandise. Prima facie, these activities cannot fit within the core power. The issue is whether these activities fall within the incidental power, whether the T&C power can support legislation reaching back from the actual trade and commerce.

Reasonably necessary:

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Corporations power (s51(xx)):

1. The issue is whether the Act falls within the corporations head of power (s51(xx)).

Scope:

2. Power:

PICK WHICH IS THE ONE RELEVANT TO THE QUESTION, IT WON'T BE BOTH:

- A. ESTABLISHING A FRAMEWORK TO INCORPORATE COMPANIES:** The facts are analogous to the *Incorporation Case*, as here, the Commonwealth is attempting to establish a legislative framework to regulate the incorporation of companies in Australia. Hence, the issue is whether the corporations power can be used to create and incorporate corporations. 'Formed' in s51(xx) indicates, as seen through the way in which it has been deployed as 'a past participle used adjectively', that the use of the corporations power to legislate will, prima facie, not be supported.

3. Incidental power:

If it is argued that the corporations power is not able to support the establishment of [ENTITY], this does not preclude the Commonwealth from relying on other heads of power to establish the corporation. Analogous to *ANA Case*, the Court may consider the establishment of [ENTITY] to be valid under the **[ANOTHER HEAD OF POWER, i.e., the trade and commerce power; defence power; etc]**. This is because the limitation of the scope of power is not a carve out or restriction that applies to other heads of power (*Work Choices*).

- B. ATTEMPTING TO INCORPORATE A SINGLE COMPANY:** From the facts, here the Commonwealth is attempting to incorporate [ENTITY], a company, and confer it with functions. Hence, the issue is whether the corporations power can be used to create and incorporate corporations. While the facts of the *Incorporations Case* are somewhat different, the reasoning employed by the court can be applied to the present circumstances 'Formed' in s51(xx) indicates, as seen through the way in which it has been deployed as 'a past participle used adjectively', that the use of the corporations power to legislate will, prima facie, not be supported.

3. Incidental power:

Nonetheless, despite the corporations power not being able to support the establishment of [ENTITY], this does not preclude the Commonwealth from relying on other heads of power to establish the corporation. Analogous to *ANA Case*, the Court may consider the establishment of [ENTITY] to be valid under the **[ANOTHER HEAD OF POWER, i.e., the trade and commerce power; defence power; etc]**. This is because the limitation of the scope of power is not a carve out or restriction that applies to other heads of power (*Work Choices*).

4. Corporation:

The issue is whether [ENTITY] can be considered a corporation.

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Taxation power, s51(ii):

1. The issue is whether the Act falls within the taxation head of power (s51(ii)).

Scope:

2. The starting point in determining whether the Act imposes a tax is the positive attributes set out in *Matthews*, although it must be noted that this criterion is not determinate (*Air Caledonia*).

A tax is defined as (1) a compulsory extraction; (2) by a public authority; (3) for a public purpose, and (4) enforceable by law (*Matthews*).

Applying this definition to the facts, first the Act is a compulsory extraction as **[FACTS, i.e., it orders the payment of \$1000]**.

Second,

PICK:

- A. A PUBLIC AUTHORITY: [ENTITY]**, which is collecting the tax, is a public authority set up by the government.
- B. NOT A PUBLIC AUTHORITY, BUT HAS POTENTIAL TO BE DEEMED ONE:** even though **[ENTITY]**, which is collecting the tax, is not a public authority, it has the potential to be deemed a public authority. This is because the purpose of **[ENTITY]** is **[SPECIFIC ACTIVITY, i.e., prompting fairness between copyright holders and sellers of blank tapes, etc.]**. This purpose can adequately be characterised as a public interest (*Australian Tape Manufacturers*).

Third,

PICK:

- A. EXTRACTION FOR GOVERNMENT ISSUE:** the extraction is for the government issue of **[APPLY FACTS]**, thereby fulfilling a public purpose.
- B. EXTRACTION NOT FOR GOVERNMENT ISSUE, BUT FOR ENFORCING PRIVATE OBLIGATION:** the extraction is not for government issue, but rather, provides a mechanism for enforcing a private obligation (*Luton v Lessels*) **[I.E., scheme when parents break up → payment goes to CRF → Commonwealth pays child support]**.
- C. WHILE NOT FOR A GOVERNMENT PURPOSE, STILL HELPS RESOLVE A COMPLEX ISSUE:** even though the extraction is not for a governmental purpose, it arguably helps resolve the complex issue of **[DESCRIBE issue, i.e., a tax levy not going to a government body but instead private hands, but it just so happened that this private body was dealing with a problem affecting the public at large (*Australian Tape Manufacturers*)]**, which may be characterised as an issue of public importance. This suggests that the issue may be deemed for a 'public purpose' (*Australian tape manufacturers*).

Fourth, the extraction **[is/OR is not]** enforceable by law, as evidenced by **[FACTS, i.e., the legislation itself?]**.

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Grants power (s 96):

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Defence power (s51(vi)):

1. The issue is whether the Act falls within the defence head of power (s51(vi)).

Characterisation:

2. **Characterise threat level in the Commonwealth:** The defence power is an elastic power that waves and wanes. Hence, the preliminary question is a factual assessment of the threat to the Commonwealth.

3. **What time:**

PICK:

- A. IF Australia is in an all-out-war:** In the present circumstances, the Commonwealth appears to be in a time of war, as evidenced by the fact that **[APPLY FACTS]**. When ascertaining the extent of the threat, the Court is limited to 'matters of general public knowledge' of which it can take judicial notice (*Coleman*).
- B. IF Australia is not in all-out-war, but is just involved in hostilities:** In the present circumstances Australia is involved in hostilities, as evidenced by the fact that **[APPLY FACTS]**. This does not automatically mean Australia is 'at war'; analogous to the *Communist Party Case*, the threat level in the Commonwealth may be treated as if 'a state of peace ostensibly existed.' Despite the hostilities, the Commonwealth appears to ostensibly be in a time of **[PICK: 1. post-war; 2. peace; 3. communism; 4. Terrorism]**. When ascertaining the extent of the threat, the Court is limited to 'matters of general public knowledge' of which it can take judicial notice (*Coleman*).
- C. IF Australia isn't involved in hostilities:** In the present circumstances, the Commonwealth appears to be in a time of **[PICK: 1. post-war; 2. peace; 3. communism; 4. terrorism]**, as evidenced by the fact that **[APPLY FACTS]**. When ascertaining the extent of the threat, the Court is limited to 'matters of general public knowledge' of which it can take judicial notice (*Coleman*).

4. **Internal/external threat:** The threat is **[EXTERNAL/OR INTERNAL]** since it is **[FACTS; i.e. internal since it is directed against home-grown terrorism]**.

- IF EXTERNAL:** s51(vi) applies to external threats to security.
- IF INTERNAL:** Whilst the defence power has historically been confined to external enemies, *Thomas v Mowbray* suggests that s51(vi) is expansive and applies to internal threats to security.

5. **Victim/Perpetrator:** The victim of the threat is **[APPLY FACTS; i.e. the Australian government; Individuals; Property]**. The perpetrator of the threat is **[APPLY FACTS; i.e., foreign governments; individuals; non-government organisations]**.

6. **Move to: 7.A. WAR; 7.B. POST-WAR; 7.C. PEACE; 7.D. COMMUNISM; 7.E. TERRORISM**

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Limitations:

Freedom of interstate trade and commerce (s92)

1. The issue is whether the Act breaches the interstate trade limitation in s92 that T&C shall be absolutely free. The test contains a number of steps (*Cole*; *Bath*; *Castelmaine*; *Betfair*).

Imposes a burden:

2. The first question is whether the law imposes a discriminatory burden on interstate T&C. The burden is not limited to border custom duties, but includes fiscal and non-fiscal burdens which discriminate against interstate trade (*Cole*).

Here, the relevant burden is **[APPLY FACTS, i.e., a greater tax is imposed on interstate products; a greater fee is imposed; that specific regulations are imposed, etc]** (*Bath*; *Cole*). This burden is imposed on **[Describe who, i.e., the interstate company]**.

Protectionist on its face:

2. The second question is whether the law, on its face, discriminates in a protectionist sense. The law must treat intrastate and interstate trade so differently as to help protect the industry within one jurisdiction from out-of-jurisdiction competition (*Cole*). The law must preference or discriminate against a market in one state as against others.

PICK:

A. There is discrimination in the actual legislation:

[Party being discriminated against] will likely argue that the law, prima facie, is discriminating against them. This is because the Act expressly distinguishes between **[What specifically, i.e., apples sold in Victoria and apples sold in NSW]** by imposing a commercial 'disability or disadvantage' on **[PARTY]** by **[i.e., imposing greater taxes on NSW apples in comparison to Victorian apples]**.

Distinguishing *Cole v Whitfield*, the legislation itself distinguishes between **[What specifically, i.e., Victorian and NSW apples]** by making it commercially disadvantageous to **[What, i.e., sell apples in NSW]**.

In this sense, the case is analogous to *Bath*, as prima facie, there is an element of discrimination, which **[is/OR is not]** protectionist in form and substance as

PICK:

- I. IS protectionist:** the provisions protect local wholesalers from the competition of out-of-state wholesaler products, since it means that the out-of-State wholesaler **[Limitation, i.e. pays less more/less and other**

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Implied immunities—Commonwealth’s ability to bind the States (*Melbourne Corporation*):

1. The issue is whether the Commonwealth Act breaches the *Melbourne Corporation* limitation (MCL). This is because the Act may be compromising the fundamental functioning of the States. While the test for MCL has undergone many different formulations, the current one-principle test is whether the Commonwealth law restricts or burdens one or more of the States in the exercise of their constitutional powers (*Melbourne Corporation*; *Austin*).

Multifactorial approach

2. First, it may be useful to adopt the multifactorial approach of French CJ in *Clarke* to determine whether the MCL has been breached.

3. 1. The Act

PICK:

- A. DOES SIGNAL OUT ONE OR MORE OF THE STATES:** The Act signals out one or more of the States because it references the **[MUST be a reference to States → make sure to draw distinction between a specific state or states more generally]**.

USE ANY OF THESE IF RELEVANT TO REFERENCE TO STATES ANALYSIS:

- benefits and funds established by state laws which are specifically designed by the Commonwealth laws (*Austin*; *Clarke*),
 - use of Tasmanian Crown land (*Tasmanian Dam* case)
 - agencies of the State of Queensland (*Queensland Electricity Commission*)
- B. THE ACT DOES NOT SIGNAL OUT ONE OR MORE OF THE STATES:** The Act does not signal out one or more of the States as it is not aimed at the State or their entities but rather **[XYZ]** (*Fortescue Metals Group v Commonwealth*).

4. 2. The law

PICK:

- A. DOES IMPOSE A BURDEN:** imposes **[DESCRIBE how the law works → the burden/ disability generally]**.

USE ANY OF THESE IF RELEVANT TO REFERENCE TO BURDEN ANALYSIS:

- a tax specifically upon persons holding office as members of Parliament of the State (*Clarke*)
- a tax specifically upon persons holding office as members of the State Judiciary (*Austin*).
- a prohibition against using the Tasmanian Crown land to build a dam.

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Inconsistency:

1. The issue is whether there is an inconsistency between **[Commonwealth law]** which **[Describe law]**, and **[State law]** which **[Describe law]**.

For s109 to apply, for the Commonwealth law to prevail over the State law, the following tests must be satisfied.

Laws:

2. The first question is whether both are laws for purposes of s109. Here **[Apply facts, i.e., both are pieces of [legislation/OR delegated/OR secondary legislations/OR regulations] which have been passed by an Act of Parliament]**.

Valid laws:

3. The second question is whether these laws are, on their own, constitutionally valid.

The Commonwealth law, **[NAME of the Act]**, **[is/OR is not]** valid. As established above, it fits under a head of power and does not breach any limitations.

The State law, **[NAME of the Act]**, **[is/OR is not]** valid. There is no issue with heads of power since States have plenary power (*Union Steamship v King*). Furthermore, the State law **[does/OR does not]** breach any limitations.

Test for inconsistency:

4. The third question requires characterising the type of inconsistency on the facts. Here, **PICK:**

- A. Direct inconsistency as it is impossible to obey both:**
direct inconsistency arises because it is impossible to obey both laws. This is because the Commonwealth law imposes a **[duty/OR prohibition]** to **[Describe law]**. Similarly, the State law imposes a **[duty/OR prohibition]** to **[Describe law]**.

Consequently s109 will apply, rendering the State law invalid.

Alternatively, it may be possible to advance an argument using the authority of *Fuller*, wherein the Court held that there was no inconsistency because the Commonwealth law imposed a conditional duty, such that Parliament intended for the duty to build towers to be qualified upon compliance with State laws. Applying the same logic here, **[APPLY, i.e., you can follow the Commonwealth law which is qualified upon compliance with State law also (you have to do what you are told to do by the Commonwealth law with respect to State prohibitions also)]**. Analogous to *Fuller*, even though this qualification isn't written, this is not detrimental, as the qualification may be implied based on logic and interpretation of the text.

- B. Direct inconsistency rights and duties:**
direct inconsistency arises because the two laws create inconsistent rights and duties. Whilst it is possible to obey both laws, in the same that **[i.e., an employer**

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

Q2: Essay:

1. Inconsistency

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

2. Melbourne Corporation

**CONTINUED IN COMPLETE
PAID-FOR NOTES**

3. Reading Down and Severance

**CONTINUED IN COMPLETE
PAID-FOR NOTES**