

**Heads of Commonwealth Power** → does the Commonwealth have power to make this law or is it invalid?

**Constitutional Limitations** → even if the law is within power, is it still invalid?

**Inconsistency** → Commonwealth law prevails (with exceptions)

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## Section 51(i): Commonwealth may make laws with respect to trade & commerce with other countries or among states

WHETHER THE ACT FALLS WITHIN THE TRADE & COMMERCE POWER UNDER S 51(I)	
STEP 1: DOES THE ACT FALL WITHIN MEANING OF "TRADE & COMMERCE"?	
<b>Definition</b>	Commercial arrangements connected with <b>buying + selling of goods or services</b> , incl. negotiations, contracts, communications, transport, delivery: <b>W &amp; A McArthur</b>
<b>Constitutional Definitions</b>	Navigation, shipping, state-owned railways: <b>Section 98</b> Internal carriage or ocean navigation: <b>Section 92</b>
<b>Examples</b>	Commonwealth can regulate conduct of people EMPLOYED in international or interstate trade & commerce, such as regulation of crew wages or conditions: <b>Re Maritime Union</b> Any interstate transportation is generally FOR PROFIT so it = trade & commerce: <b>ANA No 1</b> Trading of intangible property such as electricity is trade & commerce: <b>Bank of NSW</b>
<b>Preparatory</b>	Production / manufacture are PRELIMINARY to trade, → trade begins when goods are moved across state lines AFTER production / manufacture: <b>Beal v Marrickville Margarine**</b>
<b>Assessment</b>	Common knowledge assessment better understood by traders and commercial men than by judges; evolves with commercial practice : <b>W &amp; A McArthur</b>
STEP 2: IS THE TRADE INTERSTATE, INTRASTATE OR BOTH?	
<b>Purely Interstate</b>	Section 51(i) expressly empowers regulation of interstate regulation in the words "among the states": <b>AG v ANA</b>
<b>Purely Intrastate</b>	Incidental power cannot obliterate the constitutional distinction between intra and inter; it must be maintained: <b>Wragg</b>
<b>Unknown</b>	Clear constitutional distinction between intrastate vs interstate must be maintained, as there is no power granted over intrastate trade: <b>R v Burgess</b> <b>Invalid.</b> Cth air navigation regulation purported to regulate air navigation "in the Commonwealth (AU)" broadly without distinguishing between intra v inter: <b>R v Burgess</b> If there was evidence that it is IMPOSSIBLE for the Cth to regulate interstate trade & commerce without regulating intrastate trade & commerce, then the outcome may be different: <b>R v Burgess</b>
STEP 3: IS THE INTRASTATE REGULATION SAVED BY INCIDENTAL POWER? → SUFFICIENT CONNECTION TEST	
<b>Test</b>	Laws regulating intrastate trade may incidentally affect intrastate trade if it satisfies the sufficient connection test; not insubstantial, tenuous or distant: <b>Melbourne Corp</b> Examine the law's rights, powers, operation → is it sufficiently connected to interstate or overseas trade?; THIS POWER IS BROAD due to wide meaning of trade & commerce: <b>Re Maritime Union</b>
<b>Operational Necessity + Connection</b>	Incidental regulation for physical safety of interstate trade & commerce when there is a real threat to interstate trade & commerce is within power: <b>ANA Case No 2</b> NOT within power when the interference is purely for economic profitability → cannot regulate intrastate trade & commerce to increase profits: <b>ANA Case No 2</b> Broad regulation CANNOT just be for convenience + efficiency: <b>R v Burgess</b> Incidental power <b>DOES NOT extend to laws based solely on general economic benefit</b> → there must be a definable + sufficient connection between law to interstate /overseas trade: <b>Pape</b> Constitutional division of interstate vs intrastate means that incidental power is narrowly constructed when there is intrusion: <b>AG v ANA</b>
<b>Analogy</b>	<b>Invalid.</b> Proposal to make an intrastate stop within an interstate route so the flight can be more commercially viable is NOT within power: <b>AG v ANA</b> <b>Valid.</b> Safety regulation required all airlines (incl. intrastate) to hold federal licences; intra x inter routes share same airspace + affect each other; danger to interstate air navigation: <b>ANA Case No 2</b> <b>Invalid.</b> Cth Tax Bonus Act provided one-off payments to taxpayers earning <\$100k to encourage spending for more economic activity in trade but did not refer to INTERSTATE trade: <b>Pape</b>
<b>Production for Export</b>	Incidental power supports conditions on export → incl. all matters that may affect export trade + regulation of processes identified as processes FOR EXPORT: <b>O'Sullivan v Noarlunga Meat</b> <b>Valid.</b> Cth regulated health standards + registration for premises used for the slaughter + storage of meat FOR EXPORT: <b>O'Sullivan v Noarlunga Meat</b>

Exemption from betting prohibition for INTRASTATE operators so they could continue to operate while INTERSTATE operators were prohibited: <b>Betfair No 1</b>	
<b>STEP 4: IS THE ACT PROPORTIONATE TO THE NON-PROTECTIONIST PURPOSE? → "SAVING"</b>	
<b>Rule</b>	The discriminatory burden must be reasonably necessary (appropriate + adapted) for the protection of the asserted non-protectionist purpose: <b>Betfair No 1</b>
<b>Structured Proportionality Test</b>	<b>(1) Suitability:</b> Is there a rational connection to a legitimate non-discriminatory purpose?
	<b>(2) Necessity:</b> Are there no obvious + compelling LESS restrictive ALTERNATIVES to achieving the same purpose?
	<b>(3) Adequacy:</b> Does the importance of the purpose outweigh the burden on the freedom
<b>Suitability Legitimate Purpose</b>	Legislature has the power to enact legislation for the wellbeing of the people of the State (such as imposing higher fees on non-refillable bottles → environmental purpose): <b>Castlemaine v Toohey</b>
	To protect "the integrity of racing" where it was easier to fix losses than wins was a legitimate purpose and concern: <b>Betfair No 1</b>
	Purpose was genuine non-protectionist CONSERVATION of Tasmanian crayfish stock which DID NOT give TAS producers a competitive market advantage: <b>Cole v Whitfield</b>
<b>Necessity</b>	Not every law that incidentally burdens interstate trade breaches s 92: <b>Cole v Whitfield</b>
	TAS licensing scheme (Betfair's license) showed there is an <b>effective non-discriminatory regulatory alternative</b> that exists, so the discriminatory burden was not reasonably necessary: <b>Betfair No 1</b>
<b>Adequacy</b>	Fee <b>disproportionate to environmental purpose</b> that could be achieved by 6 cents; true purpose to disadvantage interstate; burden NOT incidental but the purpose of the scheme: <b>Castlemaine</b>
	<b>Evidence of Harm.</b> WA could not show that there were actual risks of dishonesty to integrity → justification / assertions of harm invalid when not supported by evidence: <b>Betfair No 1</b>
	Not every law that incidentally burdens interstate trade breaches s 92: <b>Cole v Whitfield</b>

COMPARISON TABLE				
Case	Burden?	Discriminatory Against Interstate Trade?	Protectionist?	Cf
<b>Cole v Whitfield</b>	Imposed lower minimum for WA fish	NO, applied equally to all fish in Tasmania	NO, it was for genuine non-protectionist purpose of CONSERVATION	INCIDENTAL burden <b>Proportionate to genuine conservation purpose</b>
<b>Bath v Alston</b>	Additional fee for retailers purchasing from interstate wholesalers	Retailers buying from interstate had an additional fee	Scheme protected intrastate wholesalers from interstate competition	Goods must be taxed equally once it enters a state
<b>Castlemaine</b>	Higher fee for interstate breweries	Practical burden fell entirely on interstate trade	True purpose was to disadvantage interstate brewers	COVERT burden <b>Disproportionate to environmental purpose</b>
<b>Betfair No 1</b>	Regulation prohibited interstate exchanges	Equal application, but practically protected intrastate operators	Yes, there are other effective alternatives	Discrimination must be REASONABLY NECESSARY Non-discriminatory alternatives defeat it
<b>Betfair No 1</b>	NO, applied equally to ALL operators			