

LAWS2150 FINAL NOTES

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NOTES ON CHARACTERISATION

WHETHER THE LAW IS OF SUCH A CHARACTER AS TO RELATE TO THE SUBJECT MATTER OR PURPOSE OF THE CONSTITUTIONAL HoP, SUCH THAT IT MAY BE DESCRIBED AS A LAW WRT THAT HoP	
GENERAL	<ul style="list-style-type: none"> • Test per Mason J in Tas Dams: <ul style="list-style-type: none"> ◦ (1) what is the scope of the power (question of constitutional interpretation) ◦ (2) is the law in truth a law with respect to the subject-matter of the power, once its scope has been ascertained (also has interpretive dimension, focused upon the statute itself.) • General approach to interpreting HoP is to give each head a broad meaning compatible with notion that Constitution is meant to endure over time (Engineers; Jumbunna) <p>Latham CJ in the Bank Nationalisation Case</p> <ul style="list-style-type: none"> • "When a question arises as to the validity of legislation it is the duty of the Court to determine what is the actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges, and then to consider whether that which the enactment does fall in substance within the relevant authorised subject matter, or whether it touches it only incidentally, or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power."
DUAL	<ul style="list-style-type: none"> • In Fairfax, it was affirmed that: <ol style="list-style-type: none"> 1. So long as a law can fairly be characterised as being a law 'with respect to' a subject matter than is within Commonwealth power, it does not matter that it might also be characterised as bearing upon some other subject matter that is not within power. Only the first characterisation is relevant. 2. In characterising a law the focus should be on its direct legal operation, as ascertained from its text and from the legal rights and liabilities affected thereby • In Herald, Kitto J: <ul style="list-style-type: none"> ◦ So long as the end or purpose of a law is within power, the choice of means to that end is entirely a matter for Parliament. • In Murphyores, Mason J: <ul style="list-style-type: none"> ◦ "It is no objection to the validity of a law otherwise within power that it touches or affects a topic on which the Cth has no power to legislate." • In Fontana Films, Stephen J: <ul style="list-style-type: none"> ◦ "Once it is recognised that a law may possess several distinct characters, it follows that the fact that only some elements in the description fall within one or more of the grants of power in s 51 or elsewhere in the Constitution will be in no way fatal to its validity
OVERLAP:	<ul style="list-style-type: none"> • Primary rule: One power may not fetter the scope of another. Each head of power must be construed

	<p>independently, so that one grant of power cannot be used to 'read down' another (Engineers).</p> <ul style="list-style-type: none"> ○ Pidoto: was held that the conciliation and arbitration power (s 51(xxxv)) could not be used to inhibit attempts to regulate industrial relations on the basis of some other power (defence power, s 51(vi)). ● Secondary rule: However, the above is subject to exception where the wording of a particular power expressly extracts from or restricts what otherwise might be included within it (for eg, s 51(xiii) - banking power, contains the words 'other than State banking', is a limit not only on s 51(xiii) but all other heads of power. <ul style="list-style-type: none"> ○ Practical effect: a law enacted under another head of power can apply to State banking so long as it cannot be characterised as 'a law wrt banking'; but once it can be characterised as a law wrt banking, it must not 'touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking.' (See Bourke). 	
TYPE	<p>SUBJECT MATTER</p> <p>Apply sufficient connection test</p> <ol style="list-style-type: none"> 1. Define subject matter of law by reference to the 'rights, powers, liabilities, duties and privileges which it creates' (Re Dingjan) 2. Decide whether law so characterised is 'sufficiently connected' to HoP (Re Dingjan) 	<p>PURPOSIVE</p> <p>Apply proportionality test</p> <ul style="list-style-type: none"> - what the CTH is authorised to do is to pursue the specified purpose, and its legislation will be valid if it can reasonably be considered conducive to that purpose. <p>'reasonably appropriate and adapted'</p>
	<p>Almost all heads of power are considered subject matter except a few purposive ones.</p>	<p>Defence — s 51(vi) External affairs — s51(xxix)</p>
ALWAYS APPLY:	<p>Law on characterisation summarised in the form of 5 principle: Grain Pool</p> <ol style="list-style-type: none"> 1. Construe constitutional text 'with all the generality which the words used admit' 2. Determine character of law by ref to rights, powers, liabilities, duties & privileges which it creates: Re Dingjan 3. Examine practical and legal operation of law to determine if there is sufficient connection between law and head of power: Re Dingjan 4. Disregard fact that law may be characterised in another way that can't be brought under head of power, even if no 'independent connection' b/w the two subject matters: Re F; Ex parte F 5. If a sufficient connection with head of power exists, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice (Leask at 602) 	

HEAD OF POWER: TRADE AND COMMERCE

<p>s51: ... power to make laws for the peace, order, and good government of the Cth with respect to:</p> <p>(i) trade and commerce with other countries, and among the States ... [T&C]</p>	
<p>[X] may [challenge/support] the [Act/provision] on the basis that it is with respect to the trade and commerce with either other countries or among the States (s51(i)).</p>	
<p>STEP 1: DOES THE REGULATED ACTIVITY FALL WITHIN THE DEFINITION OF T&C?</p>	
<p>W & A McArthur Ltd v Queensland</p>	<ul style="list-style-type: none"> ● Assumes ordinary, commercial meaning ● Principle of harmonious interpretation – as held re s 92 in this case, s51(i) includes: <ul style="list-style-type: none"> ○ transportation of merchandise over state/international borders ++ ○ Commercial arrangements directly leading up to transportation (contracts, negotiations, transport, deliveries, etc) ○ T&C partially defined in s 98 → phrase 'extends to navigation and shipping, and to railways the property of any State' ● Query whether online transactions (spotify, netflix etc) captured - extremely likely to constitute T&C
<p>STEP 2: DOES THE LEGISLATION FALL WITHIN THE SCOPE OF T&C POWER? – sufficient connection</p>	
<p>Direct Scope:</p>	<p>Regulation:</p> <ul style="list-style-type: none"> ● No smoking on international flights ● Of employment: Re Maritime → interstate ship journeys staffed by union labours <p>Participation:</p> <ul style="list-style-type: none"> ● Creation and operation of an airline service: ANA Case <p>Overseas and interstate trade and commerce.</p>

<p>Incidental Scope:</p>	<p>Authority to refer to incidental power:</p> <ul style="list-style-type: none"> • If a legislative provision is found to be within the incidental power, it is just as valid as if it were directly within HoP: D'Emden v Pedder • All legislative powers carry authority to legislate in relation to acts, matters or things the control of which is found to be <i>sufficiently connected</i>: Bank Nationalisation <p>Powers incidental to s 51(i) will only be enlivened where:</p> <ol style="list-style-type: none"> 1. The regulation of T&C intra-State is necessary to protect international or interstate T&C from physical interference: Second Airlines Case 2. The law regulates manufacturing or production processes objectively geared to export: O'Sullivan
<p>CASES</p>	<p>INTRASTATE → Prima facie, this power does not expressly allow the Cth to regulate intrastate T&C. However, intrastate T&C may be regulated where [1. above].</p> <ul style="list-style-type: none"> • Distinction between inter and intra must still be maintained: Re Burgess; ANA Case • A purely economic connection will not suffice: Pape, Heydon J <ul style="list-style-type: none"> ◦ it has not been demonstrated that the connection is more than insubstantial, tenuous or distant: Pape • Government cannot use power to create a monopoly (breach s 92): ANA Case <p>Airlines Case No 1: HC held NSW licensing system for aircraft operating solely within the State was not inconsistent (per s109) with Cth regulations made under Cth Act.</p> <p>Second Airlines Case: Cth extended aviation regulations by reg 6(1) to 'all air navigation within Australian territory of a kind not specified', i.e., to purely intrastate aviation.</p> <ul style="list-style-type: none"> • + intro of reg 198 meant all aircraft must be licensed by Cth, incling intrastate aviation (reg 199(3)-(4)) • HELD (Kitto J): law under s 51(i) may support Cth law regulating intrastate T&C, where to do so is necessary to protect the subject matter of the legisl pwr from physical interference <p>O'Sullivan: Cth legisl required licencing of meat exports - need to meet certain health requirements. SA state legislation also required registration (note, it was 3:3 w/ CJ being casting vote → the 2 laws were inconsistent)</p> <ul style="list-style-type: none"> • HELD: T&C could support laws regulating production/manufacture of commodities for overseas export • Fullagar J (Dixon CJ and Kitto J agreeing): ...includes a power to make provision for the condition and quality of.. any other commodity to be exported... By virtue of that power all matters which may affect beneficially or adversely the export trade of Aus in any commodity produced or manufactured in Aus must be the legitimate concern of the Cth." <ul style="list-style-type: none"> ◦ Effect of ^ is that pwr may extend back before the commencement of the transactions constituting trade w/ other countries to 'the factory or the field or the mine'. ◦ Shows preparatory activities may be protected where they are an integral part of the export process • HCA set high threshold for incidental pwr to directly regulate production → required it to be objectively ascertainable that production was specifically “conditioned” by export destination - often hard to satisfy <p>Swift: Court considered whether slaughtering was genuinely “for export”. Mere assertion by company is insufficient; Court looked for an “established pattern of trade” to determine whether goods were truly part of export commerce.</p> <ul style="list-style-type: none"> • In absence of objective evidence linking production to export, the activity was not protected as export trade. <p>Beal: Rejected argument that goods intended for interstate sale were protected during manufacture. Labelling, storage, or earmarking goods for interstate trade did not convert manufacture into interstate commerce.</p> <ul style="list-style-type: none"> • Constitutional protection applies to trade itself, not to antecedent manufacturing processes. <p>ANA Case: established ANAC (state-owned airline) - S 19B was inserted authorising intrastate transport for purposes of ‘efficient, competitive or profitable’ conduct i.e. economic integration – rational: to allow a flight from Perth to Darwin stopping in Port Headland (WA). Port Headland flight needed to make flight viable → Ansett, a competitor on this route, challenged the validity of s 19B.</p> <ul style="list-style-type: none"> • HELD: Only Murphy J held valid under s 51(i), however, section was valid under s 122 by 3:2 majority. • Stephen J: could not support a law regulating intrastate T&C where the only connection to the power was ‘efficient, competitive or profitable’. But ‘reading down’ preserved law to extent supported by s122.
<p>IF YES → STEP 3: NOTE LAW IS VALIDLY CHARACTERISED AS A LAW WRT T&C</p>	

HEAD OF POWER: RACES POWER

s51: ... power to make laws for the peace, order, and good government of the Cth with respect to:
(xxvi) the people of any race for whom it is deemed necessary to make special laws **[RACE]**

[X] may **[challenge/support]** the **[Act/provision]** on the basis that it **[is/not]** a law with respect to the people of any race for whom it is deemed necessary to make special laws (**s51(xxvi)**).

<p>RACES PWR FROM FEDERATION TO 1967</p> <p>[essay]</p>	<ul style="list-style-type: none"> • Intended purpose – enable Cth to regulate affairs of the coloured or ‘inferior’ races that are in the Cth. Not intended to be a protection. • Convention debates reveal the intention behind the clause was to give Cth power to pass special legislation for non-European races, both beneficial and detrimental. • In its original formulation, races power was thus undeniably racist – potentially still racist as not clear whether only for benefit of a race or benefit & detriment. • Exclusion of aboriginals was, according to Kirby J in Kartinyeri mainly aimed at leaving regulation of ‘aboriginal affairs’ to the States. • Post-1967, post-referendum meaning of s51(xxvi) unclear: <ul style="list-style-type: none"> ○ did deletion of “other than the aboriginal race in any State” simply re-instate Cth’s power to legislate on Aboriginal affairs, or ○ did it also remove the discriminatory intention behind the clause? • This issue has NOT been satisfactorily resolved.
<p>STEP 1: IS THE LAW IN QUESTION A SPECIAL LAW?</p>	
<p>LIMB 1: DOES IT RELATE TO A SPECIFIC RACE?</p> <p>[NB: likely not contentious – just need a line of acknowledgement]</p>	<p>TEST: whether the individs or the group regards themselves, and are regarded by others in the community, as having a particular historical identity in terms of their colour or racial, national, or ethnic origins (Brennan J, Tas Dams)</p> <ul style="list-style-type: none"> • Brennan J emphasises → Common [history / religion or spiritual beliefs / culture / knowledge] <ul style="list-style-type: none"> ○ ‘it is not a precise concept’ but ‘there is, of course, a biological element’ (essential) • Must look to OPERATION not INTENTION: Native Title Act Case • May relate to a subset or whole of the ppl of particular ‘race’ – cannot be a law for all races: Koowarta • Wide and non technical meaning: Deane J, Tasmanian Dams • Person of ATSI descent whose self-identification as ATSI person is recognised by the relevant community • Another way is ‘tripartite test’ (Brennan in Mabo (No 2)), as affirmed in Love) – descent / self-identification / recognition by a senior member of the relevant Aboriginal community.
<p>LIMB 2: DOES IT OPERATE DIFFERENTLY TO SAID RACE?</p>	<p>TEST: Laws special quality must be ascertained by reference to its differential operation upon ppl of a particular race, not by reference to circumstances which led Parlia to deem it necessary to enact the law: Tasmanian Dams</p> <ul style="list-style-type: none"> • Special quality appears when law confers a right or benefit or imposes an obligation or disadvantage, especially on people of a particular race. • Example: law protecting any aspect of personality / identity of ppl of race – i.e. protecting cultural & spiritual heritage by protecting property w/ significance to that cultural or spiritual heritage: Tas Dams <p>FACTORS FOR DIFFERENTIAL OPERATION</p> <ul style="list-style-type: none"> • Practical operation: where the law <u>discriminates in favour</u> of a particular race <u>by its operation upon the subject-matter</u> to which it relates: Tas Dams <ul style="list-style-type: none"> ○ A law may be special even when it confers a benefit generally to all races or does not target a particular race/is seemingly neutral to race on its face, provided in operation the law is of special significance or importance to the people of a particular race: Tas Dams <ul style="list-style-type: none"> ■ e.g. the preservation of a site which has special significance for ATSI even though it is in all Australians’ interest to have the site protected/is of significance to ‘all mankind’ (Deane and Brennan JJ in Tas Dams) • Confers rights and obligations: the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race: Native Title Act Case <p>Koowarta v Bjelke-Petersen: Cth agency purchased pastoral property w/ intent of transferring it to ATSI from Far North Qld → Koowarta, was a member. Transfer blocked by Qld govt via Cabinet resolution which stated it did not ‘view favourably proposals to acquire large areas of ...freehold or leasehold land for development by’ ATSI.</p> <ul style="list-style-type: none"> • Koowarta sued bc basis for refusal of consent breached <i>Racial Discrimination Act 1975</i> (Cth) — Qld govt responded by challenging the constitutional validity of that Act. • HELD: invalid – Act protected all races & not a particular one, thus was not a ‘special law’ for ‘the people of any race’ → cannot confer a benefit (such as protection from racial discrimination) on Aus ppl generally • Gibbs CJ (maj): the act prohibited discrimination GENERALLY on ground of race - self-contradictory to say that a law which applies to the people of all races is a special law. Argument that if legislation enacted individually for each race then it would be OK is irrelevant, based on textual considerations. • Wilson J (maj): If Act can apply WRT to ppl of ANY race at all who may be victims of discrimination bc of their race, then it is NOT a special law – its a general law directed to elimination of all racial discrimination • Murphy J (dis): Act is supported by races power and the race power may only be used for the benefit of a particular race i.e. beneficial laws. BC the word ‘FOR’ <ul style="list-style-type: none"> ■ FOR = FOR THE BENEFIT OF ■ FOR ≠ WRT, so as to enable laws intended to affect adversely the ppl of any race. If WRT or other similar expression was intended, it would’ve been used as in other <p>Tasmanian Dams: Challenge to ss 8 and 11 of the Act. s 8 expressly declared that ss 8, 11, 13(7) & 14(5), were</p>

LAWS2150 FINAL ESSAY NOTES

**refer to PQ notes for large case summaries

**A political value judgment is an assessment of public policy, actions, or leaders based on subjective moral criteria (what is "good," "bad," "right," or "wrong") rather than purely on objective facts.

IFPC	
	<ul style="list-style-type: none"> • Does it actually exist? (see Steward J dissent in LibertyWorks and Babet). <ul style="list-style-type: none"> ◦ Rooted in the text of const (s7, s24) ◦ Consistent recognition across the court, despite differences in proportionality assessment, is accepted • Should we use structured proportionality? Is it a foreign import? [<i>does divergence go against role of the court re precedent</i>] <ul style="list-style-type: none"> ◦ We disagree on the doctrinal nature of structured proportionality; however, not very clear whether it actually makes a difference on outcome ◦ Adopted from systems w/ Bills of rights which we don't have → alien (eg Germany, Canada) ◦ Gordon J in Brown – SP is alien doctrine unsuited to AU → the Constitution + traditions <ul style="list-style-type: none"> ■ NB argument BUT still only a freedom – sufficient to preserve distinctly AU approach • How consistent is the Court's recognition of an implied freedom of political communication with the Engineers principle? How much does this matter when considering the legitimacy of the Court's decision to recognise the implied freedom? <ul style="list-style-type: none"> ◦ Engineers: If no express limitations, the idea is that there are no limits at all, then <ul style="list-style-type: none"> ■ See Barwick (1981) in Engineers section****: 'triumph of the Engineers' Case is never tarnished' ◦ Re legitimacy: Judges are not elected, and not directly accountable to the ppl unlike parliament. Constitutional law overrides so courts can override what the parliament has done (even as democratically elected), the court needs to be mindful of its role that it is managing the accountability of parliament which the ppl has elected <ul style="list-style-type: none"> ■ In cases where it may be controversial, the courts must be hyper-conscious of doing its constitutional role, given it is not a democratically elected body ■ Thus we see judicial activism — you cannot just apply the law, you must deal with the fork ◦ ** categories in inconsistency are entirely judicial constructs
SUMMARY OF DEVELOPMENT	<ul style="list-style-type: none"> • Launched in Nationwide News (1992), affirmed in ACTV (1992) • Lange (1997) helps formulation <ul style="list-style-type: none"> ◦ Freedom of communication on matters of government and politics is an indispensable incident of that system of rep govt which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' ◦ Neither the Cth Parliament or State Parliaments can make laws that infringe the IFPC • Monis (2013) showed that unity within the Court after Lange as to the applicable legal test cannot mask what are sometimes deep disagreements over the underlying values at stake in freedom of political communication cases. • McCloy (2015): Modify the test to incorporate structured proportionality • Brown (2017): Modify the test to incorporate structured proportionality • Babet (2025); Ravbar (2025): Majority says structured proportionality is a tool that can be used when needed, not a test for all cases
WHAT IS IT?	<ol style="list-style-type: none"> 1. IFPC is necessary in order to give effect to the constitutional requirement of repr & resp govt. <ol style="list-style-type: none"> a. People need to be able to make a free & fair choice in elections b. S 7: The Senate shall be composed of senators for each State, directly chosen by the ppl of the State c. S 24: House of Reps shall be composed of members directly chosen by the people of the Cth... 2. Political communication is protected, but this is quite broad <ol style="list-style-type: none"> a. Not limited to Commonwealth matters b. Not limited to the election period c. Not limited to those eligible to vote 3. IFPC is not absolute. <ol style="list-style-type: none"> a. Is the law proportionate? reasonably necessary? not disproportionate? 4. It is NOT a personal right. <ol style="list-style-type: none"> a. Just precludes curtailment of protected freedom (Lange, Monis, McCloy) b. negative in nature: invalidates laws + creates an area of immunity from legal control, particularly from legisl control Lange – prevents system from operating as it should <p>Nationwide News: [article published in <i>The Australian</i>] Deane & Toohey JJ</p> <ul style="list-style-type: none"> • Inferred existence of this freedom from doctrine of rep govt underlying Constitution – 3 doctrines: <ul style="list-style-type: none"> ◦ 1) federalism (at least give rise to Melb Corp principle – implied limit on Cth legislative power) ◦ 2) separation of judicial power (Boilermakers' principle) and ◦ 3) doctrine of representative govt (fundamental to structure of the Consti)

TEST	CASES
<p style="text-align: center;">HEAD OF POWER: TRADE AND COMMERCE</p> <ol style="list-style-type: none"> Does the regulated activity fall within the definition of trade and commerce? Is the legislation sufficiently connected to the scope of the trade and commerce power? <ol style="list-style-type: none"> Direct <ol style="list-style-type: none"> Regulation Participation Overseas & interstate T&C Incidental <ol style="list-style-type: none"> Reg of T&C intra-State are necessary to protect international or interstate T&C from physical interference Law regulates manufacturing or production processes, objectively geared to export Can provisions be read down or severed to bring Act into power? 	<ul style="list-style-type: none"> Re Burgess: Distinction between inter and intra must still be maintained Pape: A purely economic connection will not suffice Second Airlines Case: [aviation reg to intrastate] yes for intrastate where necessary to protect the subject matter of the legisl pwr from physical interference O'Sullivan: [meat exports] preparatory activity may be protected if integral to export. Swift: [slaughtering] there must be objective evidence goods are actually in export stream Beal: mere intention or preparation for interstate trade is not enough. ANA Case: [established ANAC (state-owned airline)] ≠ support a law regulating interstate T&C where the only connection to the power was 'efficient, competitive or profitable'
<p style="text-align: center;">HEAD OF POWER: RACES POWER</p> <ol style="list-style-type: none"> Is the law in question a 'special' law? <ol style="list-style-type: none"> Does it relate to a specific race? Does it operate differently to that race? Does it confer a benefit or disadvantage? (aisi specific) <ol style="list-style-type: none"> Various for and against, see notes Is this law deemed necessary? <ol style="list-style-type: none"> Exception: manifest abuse Can provisions be read down or severed to bring Act into power? 	<ul style="list-style-type: none"> Tas Dams: [restricting development on an Aboriginal site] it can be for the benefit of everyone, but has a special significance for a particular race (Aboriginal ppl) Koowarta: [state refused consent to acquire property w/ intent of transferring it to ATSIL] cannot confer a benefit (such as protection from racial discrimination) on Aus ppl generally – must be specific Native Title Act Case: [regulations for native title] special quality of law must be ascertained by ref to its differential operation upon the people of a particular race (confers a right/benefit or imposes an obligation/disadvantage) Kartinyeri: [Hindmarsh Island Bridge saga] races pwr could support a law WRT a sub-group of a particular race (4 judges) + undecided whether power is confined to laws for the BENEFIT of the people of the relevant race (or alternatively that this will apply to Aboriginals only) <p>** NB Test proposed by Gaudron's persuasive J in Kartinyeri</p> <ol style="list-style-type: none"> Is there a different treatment Is leg R A+A to address that D treatment
HEAD OF POWER: DEFENCE POWER	
<ol style="list-style-type: none"> Is the legislation WRT to the primary or secondary aspect? What is the period: war post-war peace terrorism? <ol style="list-style-type: none"> War Time – Both primary and secondary/ incidental Post War – Slow narrowing back (how far + how long = Foster) 	<p style="text-align: center;">War</p> <ul style="list-style-type: none"> Ferguson: approved reg that prohibited any ref to Christmas in ads relating to the sale of goods, since such ads might encourage "expenditure on non-essential goods".