

s 51 (vi) Defence Power

S 51(vi)

The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

Sentence starter: The issue is whether ____ [the law] falls within the defence power (s 51(vi)). The defence power is purposive (*Stenhouse v Coleman*), and elastic, one that waxes and wanes.

Two overarching steps:

1. **What is the current ambit of the defence power?** (scope)
 - a. ie, What is the nature and extent of the relevant external/internal threat(s) faced by Australia? Is it a time of peace, war/emergency, or something in between?
 - b. This is a question of fact => can take judicial notice of notorious facts

2. **Is the law 'reasonably appropriate and adapted' to achieving the defence purpose in s 51(vi)?**
 - a. What is regarded as proportionate in peace time will differ to what is proportionate in war time.

Features of the defence power:

- **Elasticity** - The defence power is not a power that is static. It both expands and contracts as a result of whether we are in a war or not.
 - Elastic: Is not a pendulum, one or the other (ie elastic and inelastic). It is a scale and Parliament's powers will be drawn so as to match the level of threat.
 - During war times there is a rapid expansion even to the point where people's human rights can be compromised in order to assure national security.
- **Purposive** power;
 - This has the practical consequence that the Commonwealth must show with particularity how given measures relate to a defence purpose, or furthers the defence effort;
 - If it cannot demonstrate this, the law will not be supported by [section 51\(vi\)](#)
- **Elusiveness of other facts and the court's role:** the executive and legislative may have confidential facts that cannot be disclosed to courts but will be essential in determining proportionality of legislation;
- **Judicial notice of facts:** a lot of facts will be just common knowledge (eg. fact that a nation is at war)

**Step 1. What is the current context (war, post-war, peace-time, threat)
(Question of fact - judicial notice)**

This will determine the scope of the defence power

Overview:

- The scope of the power depends on Australia's defence needs at any given time and, as these needs fluctuate, so does the scope of the power.
- The conditions that determine the scope of the power as it 'waxes and wanes' are factual conditions of common knowledge (political, international, economic and social):
 - Is Australia at war or facing threat of invasion?
 - What are the military and economic needs of Australia at such time?

Title: Scope of the power

Sentence starter 1: The scope of s 51(vi) turns on judicially noticeable facts about the existence and character of hostilities or threats (external/internal) faced by Australia; *Stenhouse*. In turn, this determines whether the law falls within the primary or secondary aspect of the defence power (Fullagar J, CPC).

- **NOTE:** When ascertaining the extent of the threat, the Court is limited to 'matters of general public knowledge' of which it can take judicial notice (*Stenhouse*).
- **Relevant to the assessment is what Dixon J said in *Andrews v Howell*:**
 - a. The nature and dimension of the conflict;
 - b. Actual and apprehended danger;
 - c. Exigencies and course of the war;
 - d. Matter incidental thereto.

Sentence starter 2: Here, the Cth appears to be in a time of ____ (war / post-war / peace / threat), as evidenced by the facts that ____ (apply the facts):

- [facts of common knowledge suggest it is peacetime]: e.g., Australia is not presently engaged in armed hostilities, nor is invasion reasonably apprehended.
- [facts of common knowledge suggesting we are in imminent threat]: A state of war has been declared / invasion is imminently apprehended.

- [facts of common knowledge suggesting we are in active wartime]: Australia is presently engaged in armed conflict.
- [facts of common knowledge suggesting we are in post-war transition]: Active hostilities have ceased but transitional dislocation persists.

Sentence starter: The power therefore operates in its [primary only / primary and secondary] aspect, and its scope is [narrow / narrowing / broad / extremely broad].

Quick Summary

Phase	Scope	Key Authority
Active wartime [primary and secondary]	Extremely broad - near unlimited	Fary v Burvett (Isaacs J)
Post-war transition [primary and secondary]	Narrowing - only incidental/transitional measures	R v Foster (1949)
Peacetime (stable) [primary]	Narrow - defence preparedness only	<i>Communist Party Case</i> (1951)
Peacetime (threatened) [primary and secondary]	Expanded - terrorism, geopolitical tension	Thomas v Mowbray (2007)

<p>Primary aspect of the defence power</p>	<p>The “primary” aspect, which always applies, authorises legislation which has defence as its “direct and immediate object” or their “only possible purpose”.</p>	<p>This is a narrower power.</p> <p>Example:</p> <ol style="list-style-type: none"> 1. Military enlistment; 2. Training; 3. Provision of ship and munitions; 4. Manufacture of weapons; and 5. Erection of fortifications. 6. This includes laws authorising acts incidental to maintenance of essential defence purposes (<i>Clothing Factory Case</i>), and anti-terrorism legislation (<i>Thomas v Mowbray</i>).
<p>Secondary aspect of the defence power</p>	<p>Comes into existence ‘upon the commencement or immediate apprehension of war and [continues]</p>	<p>This is a broader power.</p> <ul style="list-style-type: none"> • Temporal nature of the power

	<p>during war and the period necessary for post-war readjustment’</p> <p>The “secondary” aspect, which waxes and wanes depending on factual circumstances, authorises legislation which is passed for the purpose of defence on matters that would not always be related to defence.</p>	<ul style="list-style-type: none"> ● Primary operates at all times; ● However, when secondary arises during pre and post war, reasonable minds might disagree when an awareness is immediately apprehensible. ● Scope for some dispute. <p>Example:</p> <ul style="list-style-type: none"> ● Extends to economic/social regulation
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Primary Aspect of the Defence Power

- **Primary purpose:** the defence power directly authorises laws with the immediate object of defence. Here the connection is direct and proportionality is less scrutinised.

Secondary Aspect of the Defence Power

- **Secondary purpose:** the broader scope that historically arose upon the commencement or apprehension of war. *Thomas v Mowbray* shows this has now been extended to **anti-terrorism** even outside formal war — which represents a significant expansion of the doctrine.

Step 2. Is the law reasonably appropriate and adapted to achieving the defence purpose in s 51(vi)

In this next stage, you need to construe the law, consider how it operates, and then compare it to analogous or distinguishable cases falling within the same scope identified at Step 1.

The factual scenario will confine the scope that something can be considered ‘reasonably appropriate and adapted’ to the defence power.

- Proportionality - asking a value judgement: *is the law reasonably appropriate and adapted to achieve the stated purpose in light of the gravity of the threat?*

Step 2A. Active Wartime [Primary and Secondary power] & Extremely Broad Power

Overview:

- Isaacs J described the defence power during total war as a ‘**paramount**’ constitutional power.

- During genuine wartime (***Farey v Burvett***)
 - The power may **override normal constitutional restraints**
 - It may **displace the usual division of power** between the Commonwealth and the States, effectively centralising authority in the Commonwealth
 - Courts must extend **extreme judicial defence** to Parliament and the Executive
 - The limits of the power are **'bounded only by the requirements of self preservation'**
 - If a measure could even **incidentally** assist defence, the Court should leave the matter entirely to government judgment

Sentence starter [**Addressing the scope of the power**]: During wartimes, the secondary aspect of the power is invoked alongside the primary aspect (***Communist Party Case***). The scope of the power is extremely wide during this time (albeit not as unlimited as envisaged by Isaacs J in ***Farey v Burvett***) and deference is given to legislative judgement. The classic and popular view is that the defence power confers a near unlimited power on the Commonwealth during wartime to protect the nation from internal or external threats or other national emergencies.

Sentence starter 2 [**Construe the law first - see what it does in one sentence**]: Here, the sub-s ____

- ie. regulates women's employment and forces them to join with the words 'must' (ie looking at what the effects are) and inserts a penalty in sub-s __ for failing to comply.

Sentence 3: [**is the law reasonably appropriate and adapted?**] It must be determined whether the Act is reasonably appropriate and adapted to the defence power (***Stenhouse v Coleman***). Here, ____

- Draw analogies/distinguish with the cases below;
- <ie. think of any alternatives which would achieve the same purpose but be less intrusive OR target or more defined class of people>

[**If the law arose from a problem arisen from the war itself → If not, or the law is more incidental like economic or social regulations, consider the other examples below**]

Sentence starter: ...Like the wartime regulation of women's employment in the ***Women's Employment Case***, which addressed labour shortages caused by enlistment, the present law addresses ____ [shortage of fuel / disrupted shipping / scarcity of materials] caused directly by the war. Latham CJ's reasoning applies: such measures are reasonably necessary to maintain the civilian economy that supports the war effort.

- ... The present case is distinguished from the ***Women's Employment Case***. Whilst in that case determining the wages and conditions for women was regarded as necessary to promote the successful prosecuting of the war, the present case attempts to give the Cth the power to _____ (ie. something not connected to the war effort). It is unlikely _____ (the law) fits within the scope of s 51(vi).

[If the law arose and it is indirect and does not directly address an issue]

Sentence starter: The connection between the present law and the war effort, while indirect, is no more remote than that accepted in *Farey v Burvett* (bread price-fixing) or *Andrews v Howell* (apple and pear marketing). During active wartime, the Court has consistently held that even economic measures with only an indirect link to military operations fall within s 51(vi), provided they support the broader war effort. Here, [apply facts].

Case	Measure	Outcome	Reasoning
<u>Farey v Burvett</u>	Fixing the price of bread under the War Precautions Act 1914	Valid	Economic measure with only an indirect connection to military operations was sufficient during wartime
<u>Ferguson v Commonwealth</u>	Restrictions on Christmas advertising	Valid	Conserving resources during wartime
<u>Andrews v Howell</u>	National marketing scheme for apples and pears	Valid	Prevented market disruption caused by wartime shipping shortages — only an indirect link to military operations
<u>Women's Employment Case</u>	Regulating women's wages and conditions across all industries	Valid	Maintaining the civilian economy as a whole supported the war effort; Parliament's choice of method not to be second-guessed

[Where the law lacks a genuine defence purpose (invalid)]

[Federal government's attempt to regulate the working conditions of state public servants engaged in routine administrative work that had nothing to do with the war effort] - This was **INVALIDATED** [*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488].

Sentence starter: The Commonwealth argues the law supports defence by [stated purpose], but as in *Ex parte Victoria*, the asserted connection is too remote. The actual operation of the law — [apply facts] — regulates conduct that is, in substance, ordinary [commercial / administrative / industrial] activity unrelated to the war effort. A defence label cannot supply a defence purpose where none genuinely exists. The law is not reasonably appropriate and adapted to defence under s 51(vi).

Women's Employment Case (1943)

Facts:

- *Women's Employment Act 1942* purpose to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war.
- Point of contention was that Act did not just cover women working in war-related jobs (category 1), or women working in jobs vacated by men going to war (category 2), but all jobs for which women had previously not been employed (overarching category 3)

Argument: It was argued that even if there was authority under the defence power to deal with the employment of women, there was no authority to deal with such employment in the manner in which the legislation dealt with it because that **legislation was not limited by any reference to women engaged in work which is directly associated with the war, but extends to all kinds of work which may be done by women.**

Held:

- The majority held that the legislation was valid.
- Latham CJ and McTiernan and Rich JJ upheld the Act on the **broad basis that it regulated new economic conditions prevailing as a consequence of war, and therefore 'reasonably ... necessary'** (at 357 per Latham CJ):
 - Wartime manpower shortage made it necessary to draw women into the workforce.
 - The **Act and Regulations were designed to address these new wartime circumstances.**
 - **Purpose:** ensuring the "*efficient supply of goods and services, both for the army and for the civil community, by organizing the labour power of the community*".
 - The Act did not compel women to work — it set wages and conditions to incentivise their participation.
- Legislation to deal with war-created problems (whether considered in relation to the general community or to the fighting services) is within the power to legislate with respect to defence.

Step 3B. Post wartime [Primary and Secondary power] & Narrowing Power

Post-War Transition - Narrowing Scope

Overview:

- As with use of power during time of war, scope of defence power after cessation of hostilities depends on factual assessment;
- **ASK:** is this law genuinely *winding up* wartime arrangements, or is it simply extending Commonwealth power into peacetime under the guise of post-war adjustment?
- **The defence power does not instantly collapse the moment hostilities cease.**
- Courts must **scrutinise** post-war laws more carefully than wartime laws — the deference extended during wartime contracts along with the power itself.

Sentence starter: Since hostilities have ceased, the scope of the defence power significantly diminishes in comparison to wartimes (*R v Foster*). The primary and secondary aspect of the power is invoked, albeit the latter only continues for the period necessary for post-war readjustment. The basic test is whether laws **can reasonably be seen as necessary for regulating some consequence of war** (*R v Foster*). In this sense, *R v Foster* describes these controls as being incidental to the defence power. Where ___ (apply the facts).... Thus, it is

Sentence starter 2 [Construe the law first - see what it does in one sentence]: Here, sub-s ___ [construe what the law actually does — e.g. continues wage-fixing for women workers / continues petrol rationing / provides preferential housing for ex-service personnel], and sub-s ___ imposes [penalty / regulatory consequence] for non-compliance.

Sentence starter 3: [Is the law reasonably appropriate and adapted?] It must be determined whether the Act is reasonably appropriate and adapted to the defence purpose in s 51(vi) (*Stenhouse v Coleman*). In the post-war context, this is assessed through the *R v Foster* framework.

- Draw analogies/distinguish with the cases below;
- <ie. think of any alternatives which would achieve the same purpose but be less intrusive OR target or more defined class of people>

[If the law is only regulating matters within the state only]

Sentence starter: As ___ [the Act provision] regulates only ___ [apply facts] within [the state], the Court must see "with reasonable clearness" how continuing this wartime measure is incidental to the defence power (*R v Foster*). Many wartime controls regulated matters normally within State legislative competence, and continued Commonwealth

regulation requires clear constitutional justification. Here, it is likely / unlikely that this can be justified because ___ [apply facts].

[If the law is genuinely transitional — analogising to uphold]

Sentence starter: Analogous with the categories recognised in *R v Foster*, the present law is directed to ___ [repatriating soldiers / rebuilding war-damaged infrastructure / winding up wartime arrangements]. This is genuinely incidental to the execution of the defence power during wartime, or necessary for a reasonable transition from war to peace. As in *Dawson v Commonwealth* and *Miller v Commonwealth*, the law addresses a condition brought about by the exercise of the defence power itself, and is therefore reasonably appropriate and adapted to defence under s 51(vi).

- **The phrase "a condition which has been brought about by the exercise of the defence power itself":** refers to a specific, narrower category of post-war problems: situations where the Commonwealth can legislate post-war **because the wartime exercise of the defence power itself created the condition** that now needs to be addressed:
 - 1 - During the war, the Commonwealth controlled prices or rationed goods → it can legislate to wind those schemes down in an orderly way, because the condition (an artificial wartime market structure) was created by the defence power.
 - 2 - During the war, the Commonwealth conscripted soldiers and stationed them overseas → after the war, it can legislate for their repatriation, because the condition (servicemen needing to be returned home) was created by the defence power.

[If the law is merely a consequence of war — distinguishing to invalidate]

Sentence starter: The present case is distinguishable from the genuinely transitional measures upheld in *R v Foster*. While the law addresses a social condition that resulted from the war — namely [labour shortages / housing demand / industrial dislocation] — *R v Foster* makes clear that mere consequences of war do not automatically grant the Commonwealth legislative power. The Court is unlikely to see "with reasonable clearness" how the measure is incidental to the defence power. As with the wage-fixing, petrol rationing, and preferential housing schemes invalidated in *R v Foster* itself, the present law is not reasonably appropriate and adapted to defence and falls outside s 51(vi).

Case	Measure	Outcome	Reasoning
<i>R v Foster</i>	Wage-fixing under the Women's Employment Regulations	INVALID	Continuation of wartime labour controls into peacetime not incidental to defence; mere consequence of war insufficient
<i>R v Foster</i>	Petrol rationing under the National Security (Liquid Fuel) Regulations	INVALID	Could not be justified as transitional once hostilities ceased
<i>R v Foster</i>	Preferential housing for ex-service personnel	INVALID	Social welfare measure rather than genuine transitional defence measure
<i>R v Foster (framework)</i>	Repatriation of soldiers; rebuilding war-damaged cities; winding up wartime arrangements	VALID	Genuine ongoing connection to the war effort; addressing conditions brought about by exercise of the defence power itself
<i>Dawson v Commonwealth; Miller v Commonwealth</i>	Measures addressing conditions brought about by the exercise of the defence power	VALID	Direct transitional connection — these conditions exist because of the war
<i>Illawarra District Council v Wickham (1959)</i>	Attempted extension of preferential hiring schemes for ex-service personnel	INVALID	Could not be sustained as incidental to defence so long after hostilities ended

<u><i>R v Foster</i></u>	<p>VALID</p> <p>The Cth can validity legislate with respect to:</p> <ul style="list-style-type: none"> • ... a matter that is incidental to the execution of the defence in the past • ... directed to the transition period between war and peace
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