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TRADE AND COMMERCE POWER

s 51(i): Cth has the power to make laws with respect to 'trade and commerce with other countries, and among the States'.

1. Within the Meaning of 'Trade and Commerce'?

Wide reach

Scope

- The term 'extends to navigation and shipping, and to railways the property of any State': s 98 Constitution.
- Encompasses all commercial arrangements associated with the buying and selling of goods, including negotiations, transport and delivery: *W & A MacArthur Ltd v Queensland*.
  - Matters within scope 'depend upon the varying phases and development of trade, commerce and intercourse'.

Relationship Between Subdimensions

- Provision must have 'some definable relationship' with the 2 subdimensions of the power (T&C; with other countries or between States): Heydon J's dictum in *Pape*.
  - Insufficient to show Act is for maintenance of vigorous national economy as this does not inevitably bring legal or practical effects wrt T&C with other countries and among the States.

Cth Regulation & Participation Included

- Includes Parliament's regulation of 'the conduct of persons employed in those activities which form part of T&C with other countries and among the States': *Re Maritime Union; Ex parte CSL Pacific (2003)*.
- Includes the Cth Gov's participation in the field: *Australian National Airways Pty Ltd v Commonwealth (1945) (ANA Case)*.
  - Cth established the Australian National Airlines Commission.

2. Does it Seek to Regulate Intrastate Trade & Commerce?

Principle: Does not extend to 'intrastate' T&C and this dichotomy 'must be maintained': *Attorney-General (WA) v Australian National Airlines Commission (1976)*.

➔ Cth power is narrowly construed to ensure it does not encroach on intrastate matters.

R v BURGESS; EX PARTE HENRY (1936)	
FACTS	Cth made regulations 'for the control of air navigation in the Cth and the territories'. Argued that in order to have control over interstate traffic, the Gov should have control over intrastate traffic.
HELD	Invalid. Makes no distinction between interstate and intrastate, must maintain the strict distinction.

3. If So, Does it Fall Under an Exception in the Incidental Aspect of the Power?

s 51(xxxix): Cth can legislate on matters incidental to the execution of any of their powers under the Constitution.

➔ Cannot be used to 'obliterate the distinction' though: Dixon CJ in *Wragg v New South Wales (1953)*.

1. 'Physical Interference' Exception: Airlines of NSW Pty Ltd v NSW (No 2) (Second Airlines Case)

Q: Does the law in question that seeks to regulate intrastate activities actually protect interstate T&C against the danger of physical interference? If yes, then law is allowed: Kitto J in *Second Airlines Case*.

TAXATION POWER

s 51(ii): Cth has the power to make laws with respect to 'taxation; but so as not to discriminate between States or parts of States'.

*Noting here that **even if** the statute is not regarding tax, it may nevertheless be characterised as 'with respect to' taxation bc it falls within the **implied incidental aspect** of the power per s 51(xxxix).*

Express Limitations

Customs and excise: s 90

- Parliament has exclusive power over customs and excise.

Laws imposing taxation 'shall not originate in the Senate': s 53

- Restricts Senate's power to amend such laws (though not its power to reject them).

Tax laws shall only deal with the matter of taxation: s 55

- Laws must not deal with any other matter, and each law should deal with 'one subject of taxation only'.
- Practice of splitting tax legislation into 2 enactments, but some leeway.
  - Terms are broad enough 'to allow the insertion of any provision which is fairly relevant or incidental to the imposition of a tax on one subject of taxation': *Osborne*.
  - Would not be 'unlawful to include in a taxing Act provisions incidental and auxiliary to the assessment and collection of the tax': *Munro*.

What is a Tax?

State the features of a tax (per *Matthews v Chicory*):

- Compulsory exaction of money
- By a public authority for public purposes
- Enforceable by law
- Not a payment for services rendered

1. Compulsory exaction of money: Is payment mandatory? *Air Caledonie*

- Includes compulsory exaction of money by private companies on behalf of the Gov – not essential that it be by a public authority: *Air Caledonie*, confirmed in *Tape Manufacturers*.

AIR CALEDONIE	
FACTS	Cth imposed a $5 fee on intn. passengers entering Aus; collected by airlines but passed on to Gov.
HELD	Tax.

2. For public purposes: Is purpose broadly governmental? *Tape Manufacturers*

- Not necessary that the money passes through the CRF: *Tape Manufacturers*.

TAPE MANUFACTURERS	
FACTS	Vendors of blank tapes required to pay a % of the sales price to a collecting society on behalf of copyright owners.
HELD	Tax. Public purpose = pursuit of fairness between copyright holders and sellers of blank tapes.

DEFENCE POWER

s 51(vi): Cth has the power to make laws with respect to 'the naval and military defence of the Cth and of the several States, and the control of the forces to execute and maintain the laws of the Cth'.

General Features

1. The power waxes and wanes

- Its application depends upon facts and as these facts change, so may its operation: *Andrews v Howell*.
- Political, international, economic and social facts; likely to be notorious as matters of common knowledge.
  - Courts take these facts on 'judicial notice' – using only the facts that judges can draw from their personal knowledge without requiring evidentiary proof: *Stenhouse v Coleman*.

a) Determine the Threat

- **Q:** As a question of fact, do circumstances exist that enlarge or restrain the operation of the power?
- Assess through Dixon J's structure in *Andrews v Howell*:
  - Nature and dimensions of the conflict
  - Actual and apprehended dangers
  - Exigencies and course of the war (aka emergency)
  - Matters incidental thereto
- Parliament and Exec institutionally better placed to evaluate sec threats ('substantial deference').
  - Thus Court is likely to give a very wide latitude to the sorts of laws that, at least during wartime, can reasonably be regarded as achieving a defence objective: *Stenhouse*.

2. It is a Purpose Power: Requires Proportionality Test

- Does not relate to a specified subject matter, but is rather for a specified purpose.

b) Determine Purpose: *Stenhouse v Coleman*

- **Q:** What is the purpose of the provisions?
- Ascertained by reference to (per Dixon J):
  - The text of the statute;
  - The facts to which it applies; and
  - The circumstances which called it forth (as determined in 1).
- Sufficient to make quick assessment from circumstances to conclude purpose is national defence.

c) Apply Proportionality

- **Q:** Is the law reasonably appropriate and adapted to achieving the stated defensive purpose in light of the gravity of the threat (considering judicial notice and substantial deference)? *Stenhouse*.
- This can be speculative/inferential due to lack of knowledge: Dixon J in *Stenhouse*.
  - Presumption in favour of validity of statutes.
  - Standard of review is differential as Exec best placed to judge the nature of the threat.

3. Two Aspects of the Defence Power (per Fullagar J in *Communist Party Case*)

1. Primary Aspect

- Applies in both peace and war.
- Ie the 'core' of the power – does not change, secondary changes depending on facts.
- Covers laws directly related to defence.
  - Eg: enlistment, training, equipment.
- Such laws are necessarily valid, as their only possible purpose is defence.
- If law within core, NO NEED to consider constitutional facts or proportionality: *Thomas v Mowbray*.

MELBOURNE CORPORATION PRINCIPLE

Application

Principle: State immunity from Cth interference to preserve the continued existence of States and their separately organised governments.

- ➔ The 'federal balance' requires that the Cth not be given too much power at the expense of the States.
- ➔ Seen as a revival of the earlier doctrine of implied immunities that had been rejected in *Engineers*.
- ➔ Sets limits only on what the Cth can do to the States.

Case	**Use it for…**	**One-Liner**
Engineers (1920)	Historical backdrop	Swept away earlier State immunities.
Melb. Corporation (1947)	Birth of principle	Cth can't single out or cripple States' banking.
Payroll Tax (1971)	Valid general tax	Shows ordinary burden OK if truly general.
AEU (1995)	Staff-management split	Cth can set minimum wages but States control numbers/identity.
Austin v Cth (2003)	Modern restatement	New test; no more discrimination; only one limb.
Clarke (2010)	Parliamentary pensions	Same outcome for MPs; French CJ's factors.
Fortescue Metals (2013)	Mining tax upheld	No special burden; States free to tax minerals.

Test

Noting: *Austin* overturned Mason J's 2 limb test in *Tasmanian Dams*, turning away from the importance that had been previously attributed to 'discrimination' as a separate element.

Test (per *Austin*): Does the law impose a special burden or disability on one or more of the States in a way that impairs their capacity to function as governments?

- Includes an 'assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments"': Gaudron, Gummow and Hayne JJ.
- Can use **French CJ's multifactorial guide in *Clarke* – factors relevant in the assessment (not rigid):**
  - **Whether the law in question singles out one or more of the States and imposes a special burden on them that is not imposed on people generally.**
    - **Q:** Does the law discriminate against a State such that it is aimed at their restriction or control? Gibbs J in *Payroll Tax Case*.
      - If yes (ie the law is not one of general application), will breach the principle.

MELBOURNE CORPORATION (1957)	
FACTS	During WWII, CBA was given power to oversee the private banks and control the supply of money and credit. Cth sought to make these arrangements permanent by enacting a law that a bank shall not conduct any banking business for a State unless consent given by treasurer.
HELD	Invalid.