

Defence Power

Rule: the law must reasonably appropriate and adapted to the defence purpose (i.e. conducive to the defence purpose): *Farey* at 440

Question 1A - Is the Primary Aspect of the Power Available?

1. **Rule:** laws which have as their direct and immediate object, the naval and military defence of the Cth → **within power:** *Communist Party Case* at 253 (Fullagar J)
 - a. **Test:** matters where the only possible object is naval and military defence: *CPC* at 254
 - b. **When:** the power is not confined to time of war, but extends to matters that may be undertaken in peace: *CPC* at 254
2. **Scope of Matters:** *CPC* at 254
 - a. Enlistment of personnel in the navy, army and air force
 - b. Training and provision of equipment
 - c. Provision of ships, aircrafts, munition
 - d. Manufacture of weapons and erection of fortification
 - e. Prevention and punishment of activities obstructive to defence operations

Question 1B - Is the Secondary Aspect of the Power Available?

1. Element 1 - Existence of War or National Emergency:

- a. **Rule:** the secondary aspect comes into existence where there is the existence of a war or national emergency, that is recognised through judicial notice (i.e. matters of public general knowledge): *Communist Party Case* at 254
 - i. **Communist Party Doctrine:**
 1. **Rule:** Parliament cannot deem a constitutional fact because the stream would rise higher than its source: *Communist Party Case* at 258
 - a. i.e. if a law must be within constitutional power to be valid, the validity of the law cannot depend on the opinion of the law-maker
 - b. *Communist Party Case:* Parliament's recitals in the preamble asserted that the Communist Party were engaged in activities that posed national security risks → recitals were given **no probative weight**: 263
 - ii. **Judicial Notice:**
 1. **Step 1 - Collection:** the existence of a war is to be collected from: *Stenhouse* at 471
 - a. the instrument in question;
 - b. the facts to which it applies;
 - c. the circumstances which called it forth;
 - d. the character of the war;
 - e. its consequences
 2. **Step 2 - Judicial Notice:** ordinarily, the Court depends upon matters of general public knowledge: *Stenhouse* at 469
 - a. **Note:** information guiding Parliament may be of such a nature that they cannot be publicly canvassed without imperilling the national interest: *Stenhouse* at 469
- b. *Communist Party Case:*
 - i. **Facts:** during the Korean War, a law empowered the GG to declare persons unlawful where satisfied they were prejudicial to security and defence disqualified such persons from holding positions vital to national security
 - ii. **Ruling:** although Aus forces were involved in the Korean War, Australian forces were part of the US command and part of a US coalition in a peacekeeping endeavour → Australia itself was **not** upon a war footing, so the matter had to be considered substantially upon the same basis as if a **state of peace** ostensibly existed: 196

2. Element 2 - Reasonable Proportionality with the Level of Threat:

- a. **Rule:** where the secondary aspect is enlivened, the law must be examined as a reasonably appropriate and adapted step to assist with dealing with the emergency: *Communist Party Case* at 255