Australian Constitutional Law (LPAB 06)

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Steps to answering a Constitutional law problem question:

1. Is there a Commonwealth law?
2. What is the source of authority for that law?
3. Characterise the Law (the process used by the courts to determine whether a law falls within the legislative power of the Commonwealth)
    a. What are the tests and what are the cases for the power under which the law is characterised? Does the Cth law satisfy those tests?
    b. Are there any Constitutional limits on the exercise of that power by the Commonwealth?
    c. Is there a State Law?
    d. What is the source of authority for that State law?
    e. Are there any Constitutional limits on the exercise of that power?
    f. Is the State law inconsistent with the Cth law?

Steps to characterising a Cth Act

1. Ask what does the Cth Act in question actually do?
2. Is the subject matter covered by a Commonwealth head of power? Here the issue of how the Court has interpreted the power will be relevant.
3. Is it subject matter power or a purpose power?
4. If it's a subject matter power does the Cth Act have a sufficient connection to the subject matter? (Kitto J in Fairfax "Is it in real substance a law upon, "with respect to", one or more of the enumerated subjects")
5. If no sufficient connection but by invoking the implied incidental power it can be brought into the subject matter then is it "appropriate and adapted" to the purpose
6. If it's a purpose power use the proportionality test (ie is it appropriate and adapted)

CONSTITUTIONAL VALIDITY OF A COMMONWEALTH LAW

Characterise the Commonwealth law

- The subject matter of the provision, determined solely by the operation which the enactment has if it be valid (i.e. the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes: Tasmanian Dams); its true nature and character: Fairfax v Federal Commissioner of Taxation per Kitto J.

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- The law thus characterised must fall within a valid head of Cth power, (given a broad construction: Australian National Airways Case per Dixon J); and
- Must be sufficiently connected to that head of power that it is not an "insubstantial, tenuous or distant" connection: Melbourne Corporation.

Head of power?

- Trade and Commerce Power: s 51(i)
    - Cth may: engage in international or interstate trade or commerce itself; create or authorise other entities to engage in international or interstate trade or commerce; authorise or prohibit international or interstate trade or commerce, either absolutely or on condition; regulate activities sufficiently connected to interstate or international trade or commerce.
- Taxation Power: s 51(ii)
    - Cth may: make laws with respect to taxation provided they do not discriminate between States; use the taxation power to achieve nontaxation purposes.
- (iv) borrowing money
- (v) postal, telegraphic, telephonic and like services
- (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;
- (ix) quarantine
- (xi) Census and Statistics
- (xii) Currency
- (xv) Weights and Measures
- (xvi) bills of exchange and promissory notes
- (xvii) bankruptcy and insolvency
- (xvii) copyrights, patents of inventions and designs, and trade marks;
- (xix) naturalization and aliens;
- Corporations Power: s 51(xx)
    - Cth may: regulate foreign corporations; regulate the trading activities of trading corporations and the financial activities of financial corporations; (arguably) regulate the non-trading activities of trading corporations.
    - Is the entity subject to the power?
    - foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxi) marriage;
- (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
- (xxiii) invalid and old-age pensions;
- (xxvii) immigration and emigration;

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Week 2: Trade and Commerce s 51(i)

THE TRADE AND COMMERCE POWER: S 51(I)

51 Legislative Powers of the Parliament

The Parliament shall subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) trade and commerce with other countries, and among the states.

92 Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

98 Trade and commerce includes navigation and State railways

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

122 Territories Power

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

1. LAWS DEALING DIRECTLY WITH INTERNATIONAL/INTERSTATE TRADE AND

- Trade and Commerce has ordinary meaning: *W & A McArthur Ltd v Queensland.*
    - Commonwealth has power (*inter alia*) to regulate transportation of merchandise, negotiations (verbal and by correspondence), sale of goods and delivery: *W & A McArthur Ltd v Queensland.*
    - This includes the first sale from inter-state: *Permewan Wright*.
    - Includes transport of people for reward: *ANA v Commonwealth*;
    - Includes intangibles (banking, electricity, gas etc): *Bank Nationalisation*;
    - May not extend to the 'noble professions': *Street v Queensland Bar Association* per Dawson J.
    - Does not extend to manufacture: *Beal v Marrickville Margarine* [but s 92 case and it is open to question];
- It is sufficient that one characterisation of the law falls within a head of power: *Murphyores v Commonwealth*.
- s 51(i) authorises the Commonwealth to:
    - Engage in international or interstate trade or commerce itself: *ANA v Commonwealth*.
    - Create or authorise other entities to engage in international or interstate trade or commerce: *ANA v Commonwealth*.
        - But it cannot grant such entities monopoly powers: *ANA v Commonwealth*.

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