

Format: 3 Problem Questions, each with multiple sub-questions (40 marks total)

1 Question 'builds' on the scenario → some issues covered in the scenario are included in the exam

1. Defence power (Purposive)
2. Trade and Commerce power (Non-purposive)
3. Race power (Non-purposive)
4. External Affairs power (Both purposive and non-purposive)
5. Nationhood power (+ executive power to the extent necessary for exercise of nationhood power, s 81 of Constitution) (Purposive Power)
6. Judicial power
7. s.80 Trial by Jury
8. Inconsistency of Laws (s.109)
9. Implied freedoms, including the implied freedom of political communication (+ implied freedoms in relation to separation of power and exclusive power of courts to determine criminal guilt)

Defence Power (s 51(vi))

Definition & Characterisation

The Defence Power – s51(vi) - even in times of peace, enables the Commonwealth to

- Maintain Defence preparedness; and
- Deal with matters such as (*Australian Communist Party v Cth* (1951)83CLR1)
 - enlistment (compulsory or voluntary)
 - training and equipment of men/women in navy, army and air force
 - the provision of ships and munitions
 - manufacture of weapons
 - erection of fortifications

→ The Defence Power is a prerogative power; a traditional power/immunity enjoyed by the imperial crown at common law at Federation

→ Purposive power: test – consider the purpose of the power, the purpose of the law and whether the law can be seen as ‘reasonably appropriate and adapted for that purpose’ (*Leask v Cth*) – a safeguard against the abuse of legislative power

Scope of the Power

- a. **Original Scope - Communist Party Case** - The HCA adopted a narrow view as the national defence against **external aggression** from other nations.
- b. **Extended Scope - Thomas v Mowbray** [2007] HCA 33 - Extended the scope of the defence power to not only include **external** threats but also against internal threats such as **terrorism**.
 - > HC noted that a terrorist organisation is capable of causing serious destruction on a level similar to that of military action

An elastic power – the power ‘waxes and wanes’

The defence power is an ‘*elastic power which waxes and wanes*’ according to the circumstances (*Stenhouse v Coleman* (1944)) – **since its application is highly dependent on the perceived necessity for its enforcement and defence of the Commonwealth.**

The range of matters that can be regulated expands and contracts according to the apprehension of danger – time of war = more scope, time of peace = less scope

Varied between peacetime and wartime

1. The **primary limb** is exercisable by Parliament in peacetime and ‘cannot exist in the same form [as the secondary limb].’
 - allows the establishment and enforcement of a code of military law including:
 - a. **A statutory compulsion to render military service** – *Krygger v Williams* (1912) 15 CLR 366
 - b. **Legislative Control of Commodities in order to facilitate Australian Military needs** – *Logan Downs Pty Ltd v Cmr of Taxation* (1965) 112 CLR 177
 - c. **Maintenance of discipline in armed forces** – *Re Tyler; Ex parte Foley* (1994) 181 CLR 18

2. **Secondary limb** can only be exercised when Australia is involved in war or the risk or probability of ‘immediate **apprehension of war**’ becomes evident.
- Allows Parliament to have unprecedented control of matters, + extreme power and ‘authority over an immense field’
 - The court is more prepared to find a ‘sufficient connection’ in wartime (*Adelaide Company of Jehovah’s Witness Incorporated v Cth* (1943))
- The Defence Power becomes a ‘general legislative power’ and enables Parliament to control:
- a) **Price control of all goods and services sold in Australia** (*Victorian Chamber Manufactures v Commonwealth* (1943) 67 CLR 335)
 - b) **Manpower controls:** the ability to control employment of labour in Australia generally (*Reid v*
 - c) **Housing of return service people**
 - d) **Rent Legislation**
 - e) **State Taxation:** control of staff, facilities and records of the States for collection of income Tax (*South Australia v Cth (Uniform Tax Case 1)*(1942) 65CLR373)
 - f) **Expropriate property:** for the purposes of defence exempt from any requirement under ‘just terms’ s 51(xxxi) (*Johnston Fear and Kingham v Cth* (1943))

Defence force discipline

- Court martial are not Chapter III courts even though they are required to act judicially (*Re Tracev; Ex parte Ryan* (1989))
- Purpose of defence force regulation is the maintenance and in enabling disciplinary regulation to punish for an offence is not outside the scope of the power (Double Jeopardy still applies) (*Re Colonel Aird* [2004] HCA 44)

Is there a conflict with State Immunity?

- Refer *State Immunities* section – it interferes with an essential function of the State/serious capacity to stop provision of State services - Is this valid? *Melbourne Corporation Doctrine*
- s 114 of the Constitution provides that ‘a state shall not, without the consent of the Cth, raise or maintain any naval or military force’ – Defence power is exclusive to the Cth.

Power is not ‘unlimited’

- > *Thomas v Mowbray*: S119, read with s51(vi) provides that the Cth can protect a State against domestic violence and invasion on the ‘application of the State’.
- > Therefore, the power is not unlimited – to permit s51(vi) to extend to the protection of all persons and all property would sit uncomfortably with s119.
- > **Regulation of women’s employment, rationing of petrol and control of residential accommodation** is not longer exercisable under the defence power (Per *R v Foster; Ex parte Rural Bank of NSW* (1949) 79 CLR 43)

Trade & Commerce Power (s 51(i))

Characterisation

- Non purposive power, a subject matter power
- Test: Whether there is **sufficient connection** between law and s 51(i)
- Policy of law is irrelevant & HC will look at rights, powers, liabilities, duties and privileges it creates and if it is 'with respect to' (*Murphyores v The Cth (1976)*)
- Economic relationship between intrastate and interstate is insufficient (*Minister for Justice (WA) (Ex rel Ansett Transport Industries (Operations) Pty Ltd v ANA Commission (1976)*)
- Law may have dual characters – where the implied incidental power is involved, purpose becomes relevant & you ask if the law is appropriate and adapted to achieving the end within power.

Board Approach & Direct Scope of Power

S51(i) allows trade and commerce with other countries and among the States. It prohibits, regulates and controls the importation and exportation of goods i.e. The power relates **exclusively** to trade and commerce international and interstate (*Huddart Parker Ltd v Cth (1930)*)

→ Limited by the words of the provision ('other countries and among the states'); revealing the intention of the enacting Parliament (*Engineers Case*). However, it is construed broadly.

Definition:

The words 'trade and commerce' are given their popular meaning (*W&A McArthur Ltd v QLD (1920)*): "all the commercial arrangements of which transport is the direct and necessary result form part of trade and commerce. The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and deliver."

→ same meaning as 'trade and commerce' in s 92 (*James v The Cth (1936)*)

Scope of 'trade and commerce'

This is defined broadly, including:

- Navigation, shipping and rail assets of the States (s 98)
- Intangibles (e.g. communication, transportation, movement, transfer, interchange, traffic) (*Bank of NSW v Cth (1948)*)
- Allows Cth to create government owned trading enterprises (not limited by s 51(xx), Corporations Power) for interstate/international trade and commerce, but does not confer monopoly powers to prevent private sector competition (*Australian National Airways Pty Ltd v Cth (1945)*)
- **Not production, manufacturing, mining etc.** (*Granall v Marrickville Margarine (1955)*) but *Beal v Marrickville Margarine (1966)* said that regulation of production may be incidental to regulation if trade – 'nothing has been said implies that under s 51(i) the Cth can never reach or touch production
- **Not a power to regulate the economy** (*Pape v Commissioner of Taxation (2009)*)
- Extends to matters preparatory to trade - to make provision for condition and quality of meat or any other commodity being imported even if Cth has no direct power in respect to an industry (*O'Sullivan v Noarlunga Meat (1954)*)
- However, does not extend to imposition of condition which has no apparent relevance to trade and commerce on exportation (thus outside the scope of power if no relevance) (*Murphyores v Cth (1976)*)