**Interpreting Heads of Power and Characterising Laws Answer Structure**

Focus is on Trade & Commerce Power, and Corporations Power

1. **STARTING POINT:** A commonwealth law must be supported by a head of power in s51: *Heiner v Scott* or another constitutionally afforded legislative power, including:
   - Seat of the government of the Cth, and all places acquired by the Commonwealth for public purposes: *s52(i).*
   - Power to appropriate money: *s81-83.*
     - Appropriations and taxation “shall not” originate in the Senate: *s53.*
   - Exclusive power to impose duties of customs and of excise & to grant bounties: *s90*
   - Territories: *s122*
   - Nationhood power: *Thomas v Mowbray; Pape*

2. Heads of Power relevant for LWB242 Constitutional Law:
   - Trade and commerce: *s51(ii)*
   - Corporations: *s51(xx)*
   - External affairs: *s51(xxxix)*
   - Immigration and emigration: *s51(xxvii)*
   - Naturalisation and aliens: *s51(xix)*
   - Defence: *s51(vi)*
   - Race: *s51(xxxvi)*
   - Taxation: *s51(ii)*
   - Just terms: *s51(xxxi)*

3. The Cth law cannot infringe *express* prohibitions in the Constitution:
   - Geographic discrimination in taxation laws: *s51(ii)*
   - Acquisition on just terms: *s51(xxxi)*
   - Right to trial by jury: *s80*
   - Revenue must be paid to CRF: *s81*
   - Freedom of interstate trade and commerce: *s92*
   - Geographic preferences in trade, commerce and revenue laws: *s99*
   - Freedom of religion: *s116*
   - Discrimination on grounds of state residence: *s117*

4. The Cth law cannot infringe *implied* prohibitions in the Constitution:
   - Implied rights – political communication, voting, arbitrary detention (maybe not)
   - Separation of judicial power and limited regulation of Courts: *Ch III*

5. The Cth law must follow certain *procedural requirements:*
   - Appropriations cannot originate in senate: *s53.*
   - No tacking of taxation: *s55.*
**Remember and state first principles of interpretation of constitution**

- Words of constitution are to be given their ordinary and natural meaning; and
- Generally no implications limiting the scope of one head of power should be drawn from the presence of another: *Engineers’ Case*
- Courts lean towards broader interpretation of words in Const unless there is something in the context or rest of Const indicating a narrow interpretation will best carry out its objects or purpose: *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association*.
- High court not bound by previous constitutional law decisions: *Aus Agricultural Company*

Normal principles of interpretation apply – clear meaning must be given effect even if impolitic or problematic.

**Question will usually be:**

Is the _____ Act, Section __(x)____ a valid law with respect to ____ head of power?

This process is known as characterisation. The courts have adopted a two-step approach in ruling whether a Commonwealth Act is within a head of power:

1. The court interprets the meaning of the provision claiming to give the power, i.e. what is the scope of the power?
2. The court decides whether the act is actually a law with respect to that head of power, as correctly interpreted, i.e. is the law with respect to that head?

**Note:**

If a law can be regarded as a law with respect to a head, or heads, of commonwealth power, it is valid whether or not it could also be regarded as a law with respect to matters outside commonwealth power, this is known as **multiple subject matter characterisation**.

Tax exemptions for superannuation funds removed unless investments were made in public stocks and bonds – motive may have been to encourage investment in government bonds, still a law with respect to taxation: *Fairfax v Commissioner of Taxation*

- Kitto: Under s51, the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes”

Regulations prohibiting export of mineral sands except with approval of Cth minister, having to show that the mining would not damage environment – still a T&C law despite alternate motive of protecting the environment: *Murphyores Incorporated v Commonwealth*.

- Mason: it is enough that the law deals with the permitted topic and it does not cease to deal with that topic because factors extraneous to the topic may be taken into account in the relaxation of the prohibition imposed by the law.

Essentially if a law is with respect to one or more topics, as long as one topic comes within a head of power, the law is valid. We look at the legal operation and substance of the act, not its effect or purpose.
4.9.3 Can the meanings of words change?

Drafters made it clear they were aware HCA would have final say on meaning of the words and leading members seemed not to expect interpretation to be too narrow or literal.

HCA has indeed favoured ‘broad’ or ‘flexible’ approach, but there has nevertheless been tension between judges

1. favouring an ‘originalist’ approach – in which original intent of the drafters, or perhaps the electors who approved the Constitution should prevail, and those
2. favouring a ‘proggessivist’ approach – naturally to the contrary

Question is what does the language mean? And then, should it be what the language meant then, or what it means now?

Few extreme proponents of originals apart from Callinan J, see dissent in Workchoices.

Some judges recently advocated a ‘living force’ approach.

• As in all debate about theory in law, one side or the other can be expressed quite heatedly in individual judgments, but majorities tend to steed a rather pragmatic course between the two extremes, sometimes favouring one approach and sometimes the other.

Cases of technology generally take the proggessivist approach, e.g. extension of telecommunications power to radio and television are considered examples of liberal interpretation, but are not, because the power in para 51(v) was expressed to include “telephonic, telegraphic, and other like services” precisely because the drafters knew radio was on the way.

• An expansion of Cth power to include new forms of technology was clearly intended.

One clear triumph of progressive approach is the accommodation of para 51(xviii) – copyrights, patents of invention and designs, and trademarks... to include laws for the protection of circuit layouts (*Nintendo Co v Centronics Systems*) and plant variety rights (*Grain Pool of WA v Cth [2000]*)

Alien used to mean all not subjects of the Queen, and the liberal approach now taken means that even British Citizens are aliens
**First element: What is the scope of the relevant head of power?**
First determine the head of power. The below principles are used to interpret certain heads of power. They are applied to the examinable heads below. Focus on the scope of the relevant head in relation to the facts – e.g. in trade or commerce, scope for aviation, or scope for manufacture.

Heads of power are said to be made up first of the heart of power, and second of incidental, or periphery matters.

A law is within the heart of the power if it is a law directly “with respect to” the power – i.e. the rights, duties, powers or privileges that the law changes, regulates or abolished relate to the power, then the law is one with respect to that power: *Fairfax v Commissioner of Taxation*.

In order for a law that is not within the heart of a head of power to fall within the scope of that head of power, the Commonwealth must show that it is a law with respect to that power in any of the following ways:

- the law is incidental to that power; or
- the law is substantially connected with that power; or
- the law has a causal or direct effect on that power.

General principles to be applied to determine whether a law is with respect to a head of legislative power are well settled: *Grain Pool of WA v Cth*:

1. The constitutional text is to be construed ‘with all generality which the words used admit’:
2. The character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates (Kitto in *Fairfax*)
3. The practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law, and the head of power
4. In a case where a law fairly answers the description of being a law with respect to two subject-matters, one of which is, and the other of which is not, a subject-matter within s51, it will be valid notwithstanding that there is no independent connection between the two subject matters: *Re f; Ex Parte F* at 388.
5. Finally, if a sufficient connection is found between the law and the head of power, it is valid, no analysis of quality of law.

The above elements are used to interpret the Heads of Power, relevant ones done below. The question should say what had of power the piece of legislation is to come under, but if not, it should be reasonably obvious.
Constitution s51(i) – Trade and Commerce Power

51. The Parliament [has] power, subject to this Constitution, 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;

There are 3 elements to examine, they are:

1. What trade and commerce means, and thus whether the act comes under that meaning
2. What with other countries means; and
3. What ‘among the states’ (interstate) means

Work through 3 elements – T&C? Yes/no. Then - Overseas? Yes/no OR Interstate? Yes/no

Then, see if regulation relying on s51(i) falls within heart or periphery of power – consider how far back (Fullagar in O’Sullivan v Noarlunga) – as well as to what degree the commonwealth can regulate intrastate activity under s51(i)

T&C Power – Element 1: Does the ____ act cover ‘trade or commerce’?

- Buying and selling are at the heart of trading: R v Trade Practices Tribunal; ex parte St George County
- A profit motive is not essential, though indicative: R v Trade Practices Tribunal
- Trade includes transporting or delivering for reward (carriage of passengers or delivery of goods): Australian National Airways and,
- In some cases, activities preliminary to trade – mutual communings, negotiations, verbal and by correspondence, the bargain, the transport and the delivery all, but not exclusively, trade or commerce: W & A McArthur v Queensland
- Trade & Commerce covers intangibles: Bank of NSW v The Cth
  - Includes movements of goods and persons, supply of gas, transmission of electric current, visual signals... transportation, traffic, movement... communication
- Can control the production/manufacture of goods even though those activities are not themselves part of trade or commerce: Grannall v Marrickville Margarine,
  - Company manufactured margarine without license – tried to argue manufacturing is not trading – law validated because without goods there is no trade, and manufacturing is so closely connected with trading.
- S98 extends the definition of T&C to include “navigation, shipping and railways the property of any state” but it must still be oversea or interstate: SS Kalibia v Wilson

More information on each case is in Week 4 Lecture material. Answer the question.

It appears that ____Act (or section) will/will not fit within the ‘trade or commerce’ element of the s51(i) power to legislate on trade or commerce matters, the next elements is whether the law matches either the 2nd or 3rd element, with other countries or interstate respectively.
If the answer appears no, still go on and analyse the next elements saying “if a court finds otherwise”

T&C Power – Element 2: Does the ____ act cover trade and commerce with other countries?

This power has been held to authorise the commonwealth to:

• “prohibit, regulate and control the importation and exportation of goods” for any purpose: *Murphyores v Cth*
• Regulate charges to be paid for air flights in respect of travel to or from Australia, on all sectors of flights to overseas destinations: *R v Halton; Ex Parte AUS Student Travel*
• Compel persons engage in trading and commercial transaction within Aus involving prohibited imported narcotics to pay pecuniary penalties in respect of particular dealings, even transactions taking place after importation has ended: *R v Smithers; Ex Parte McMillan*
• Regulate extraterritorial trading activities connected to overseas trade,
  o including the condition of sale of goods arriving in a foreign destination: *Crowe v Cth*
  o and the regulation of investments in foreign countries: *R v Hughes*

Apply to facts – e.g. Here, the facts are that ____ act had the effect of ______, and this has/has not been authorised by existing case law by the s51(i) power and would thus be valid/invalid.

T&C Power Element 3 – Does ____ Act cover trade or commerce ‘among the states’?

• For transport, anything crossing a border is interstate trade and commerce: *Commonwealth v Australian Shipping Board*
• movements of intangibles across borders is also interstate trade and commerce: *Bank of NSW v The Cth*
• If the law applies to the making of a contract (rather than the delivery) the contract must, expressly or by necessary implication, contemplate delivery across a border: *W & A McArthur v Queensland*
• Business in two states not necessarily doing T&C interstate: *Hospital Provident Fund v Victoria.*
  o Also business where employees move across borders: *Hospital Provident*
• Professional carrying on discrete business in different states is not interstate T&C: *Street v QLD Bar Association*

Just because there is a company engaged in business in more one states does not necessarily mean that it is therefore engaged in interstate trade and commerce – must look at the nature of the commercial agreements and contracts entered into – only if those contracts expressly/by necessary implication contemplate payment or transfer across state borders will it be considered interstate trade and commerce.
What is the scope of the power – i.e. is the law made with respect to that head, as correctly interpreted?

If the rights, duties, powers or privileges that the law changes, regulates, or abolishes relate to the power, then the law is one with respect to that power: *Fairfax v Commissioner of Taxation*

- Prohibiting a part of trade and commerce, or only allowing on certain conditions: *Murpores v Commonwealth*
- Regulating trade and commerce, including who can be employed: *Huddart v Cth* – Commonwealth gave preference to union members for stevedoring operations for interstate and international state
  - and conditions of work: *R v Wright; R v Foster*
- Where regulation is with respect to imports/exports (or interstate trade)
  - Protecting interstate or overseas trade or commerce from strike or boycott action: *Seamen’s Union of Aus v Utah Development*
  - *Cth participating* in interstate or overseas T&C: *Aus Coastal Shipping Commission v O’Reilly* (this case held s51(i) This allowed the setup of a nationalised airline company

Incidental Power:

Often issue is the regulation of activities prior to trade, occurring wholly in a state.

- This power does extend to regulation of activities preparatory to trade occurring wholly within a state: *O’Sullivan v Noarlunga Meat*:
  - Act stating that “all premises used for preparing meat for export should meet the Cth standards” Fullagar J:
  - “all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth”
  - These matters include not only grade and quality of goods but packing, get-up, description, labelling, handling and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it.
  - Power of Cth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export.
- Thus it is established that the Cth parliament can use scope of T&C power to regulate a heap of activities leading up to trade, include things in the list above.
- Establish law prohibiting Cth owned body from paying taxes: *Coastal Shipping v O’Reilly*

Power extends to enable regulation that might affect both interstate and intrastate trading activity.
Different from US model which extends the similar power of the congress to the regulation of activities wholly within a state on the basis that all commerce is necessarily intermingled.

With exception of Murphy J, no HCA Justice has ever adopted this view. Gibbs J in A-G (WA) v Australian National Airlines Commission said that s51(i) recognises a distinction between interstate trade on the one hand, and domestic trade of the states on the other – and that this must be maintained despite interdependence or artificiality of the distinction in modern Australia.

No direct power to regulate intrastate trade and commerce: Airlines of NSW v NSW – not enough that interstate and intrastate trade and commerce intermingle: R v Burgess

EXCEPTIONS:

- **Cth may regulate intrastate activities when it cannot be avoided to regulate interstate operations**: Swift v Boyd Parkinson – 5% of meat processor’s meat was exported, remainder sold interstate or in QLD. Cth law provided detailed standards for meat processing for export, while QLD law prohibited processing on premises not licensed under QLD acts (defendant was licensed under Cth). Swift argued in its defence that the QLD legislation was invalid for inconsistency with the Cth meat export regulation.
  - Held – regulations only intended to regulate the processing of that poultry that was intended for export.
  - Two dissenting members asserted Cth could regulate whole of commercial activity so organised by the trader that the international or interstate aspects could not be separated from the intrastate aspects.

- **Where a regulation of interstate activity consequentially effects intrastate activity**: Redfern v Dunlop Rubber – Cth act made persons liable in respect of conduct engaged in with the intention or result of restraining interstate or overseas trade or commerce. P alleged due to restrictive trade agreement between D they were unable to buy tyres and other rubber materials at the wholesale prices at which they would otherwise have been available or at prices other than current trade list prices. Tyre companies pleaded act unconstitutional on basis it could apply to agreements which involved both intrastate trade and s51(i) trade
  - Held – Cth could, under s51(i) regulate an activity combining interstate and intrastate trade.
  - Menzies J – Clear that cth power over trade and commerce can only extend to such intra-state T&C as is inseparably connected with inter-state T&C
  - Full acceptance of this limitation is quite consistent wit according to Cth power to prohibit or regulate acts which relate to intra-stat trade and commerce if they relate to inter-state or overseas trade and commerce as well.
  - Where impossible to separate what is going to be for interstate or overseas T&C, and what will be for intrastate T&C, Cth is under s51(i) able to regulate.
• *Airlines of NSW v NSW (No 2)*

- Held that Cth could regulate significant aspects of commercial transport operations in Aus, without regard to distinction between international, interstate and intrastate air services. Cth could regulate those aspects which affect the safety, regularity and efficiency of air services.
  - A regulation that goes beyond safety/regularity/efficiency is invalid, as was regulation 200B in this case which controlled access to certain flight paths.
  - It would be too artificial in this case to maintain a distinction – to have one set of rules for interstate/international flights and another for intrastate flights would threaten the safety of both.

On the facts, ____ Act (or section) would come under the T&C Power (other countries or interstate), and the scope of the law does/does not fit with the heart/periphery of that power as established by caselaw.
Constitution s51(xx) – Corporations Power

51. The Parliament [has] power, subject to this Constitution, to make laws for the peace, order and good government of the Commonwealth with respect to: - ...

(xx) Foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth;

As to ‘in the heart of’ or ‘incidental’ WorkChoices has all but confirmed this power plenary.

Two questions again under this power:

1) Is the relevant organisation a foreign, trading, or financial corporation?
2) What is the scope of the power – what activities can be regulated under s51(xx)?

1) Is ____ a foreign, trading or financial corporation?

Foreign corporations:

• Those formed outside the limits of the commonwealth: NSW v Cth

Trading Corporations:

• Trade has same meaning as in s51(i) and s 92 and includes buying and selling, negotiating and bargaining, transport for reward, and the purchase or sale of money, credit, news information, tangibles and intangibles: R v Trade Practices Tribunal
• Buying and selling is the very heart of trading: R v Trade Practices Tribunal
• Trading can be interpreted in its current sense: Adamson’s case

Examples of Trading Corporations:

• Western Aus Cricket Association: Hughes v Waca but not Subiaco cricket club – bar trade quite insubstantial in context of its overall activities
• University of WA: Quickenden – 28% of revenue from trading activities
• Australian Red Cross and Society of the Prince Alfred Hospital: E v Aus Red Cross – Red Cross earned $2m/year from SoG, Hospital received $14m/year patient fees and $3.7/year from business activities.
• Etheridge Shire Council: Australian Workers Union v Etheridge Shire Council – Council – not trading corporation as most trading activities were unprofitable
• Hydro-electric commission: Commonwealth v Tasmania (Tasmanian Dams Case) – the commission was owned by Tas Gov and sold electrical power in bulk

Financial corporations

The predominant activity of a financial corporation is the borrowing of moneys to lend to its members, the lending of those moneys, the receipt of repayments and the ultimate repayment of moneys to the source from which they came. The activities of borrowing in order to lend and lending at interest are financial activities placing the corporation in the category of financial corporation: Re Ku Ring Gai Co-operative Building Society