1. Characterisation

2. Identify the head/s of power that could reasonably be invoked to support a Commonwealth law

3. How has the power/s been interpreted by the High Court?

4. What is the scope of the grant of power?
   - What limits have been applied by the High Court in its interpretation?

5. Is the power non-purposive or purposive, or is it a power incidental to the execution of the grant of power (i.e. the implied incidental power)
   - i.e. External Affairs (implementation of a treaty) and Nationhood are purposive

6. Characterising the law
   1. Non-purposive Powers (subject matter)
      - Is it a law ‘with respect’ to a head of power, look to the rights duties, obligations and privileges which it changes, regulates or abolishes (i.e. its substantive legal operation) (Fairfax)
      - A substantial connection
         - The Commonwealth law must possess a substantial connection with relevant head of Commonwealth power (Tasmanian Dam Case)
         - The connection need not be close, rather it means that the connection must not be so insubstantial, tenuous or distant that it cannot be regarded as a law with respect to the relevant head of power (Tasmanian Dam Case)
      - Irrelevant considerations
         - The ulterior motive of the legislative, or the purpose or the indirect consequences which it seeks to achieve, either economic or social, are irrelevant (First Uniform Tax Case)
         - Prima facie, if the law is one with respect to a Commonwealth head of Power, it does not cease to have that character because the Commonwealth seeks to achieve by its enacted a purpose which is not within the Commonwealth’s legislative power (Northern Suburbs Cemetery Reserve Trust v Commonwealth)
      - Other considerations
         - Practical effect
            - The High Court may consider the practical effect or operation of the law (Tasmanian Dam case)
            - The High Court has been more willing to consider the practical operation of a law where it imposes some form of prohibition (Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board)

2. Purposive Powers
   - The Court will look not only to its direct legal operation (as with non-purpose head of power), but also its purposes or object (Richardson v Forestry Commission)
   - Test
      - A law made in exercise of a purposive constitutional power will be valid if it is reasonably capable of being regarded as appropriate and adapted to the object which gives the law its character as a law with respect to the relevant head of power
      - It is a question of proportionality

3. Incidental Powers
   - Existence
Every grant of power conferred by the Constitution, s 51 extends to the making of laws in relation to matters necessary to achieve the main purposes of that power (Nationwide News)

Whatever is incidental or ancillary to the subject matter of a power conferred by s 51 is a law with respect to that grant of power if it is necessary for the reasonable fulfilment of that legislative power (Grannall v Marrickville Margarine)

Proportionality Test
- It must be reasonably proportionate to some object or purpose within that power
- That is, it must be reasonably proportionate or reasonably appropriate and adapted to the pursuit of the purpose of a law (Nationwide News Pty Ltd v Wills)
  → Reasonable proportionality
    → The court will ascertain whether, and to what extent, the law goes beyond what is ‘reasonably necessary’ or ‘conceivably desirable’ for the achievement of a legislative object sought to be maintained
    → The court will ascertain whether the law causes adverse consequences unrelated to the achievement of the object and, in particular, whether those adverse consequences result in the infringement of fundamental values traditionally protected by the law, such as freedom of expression

Sufficient connexion
- There must be a relevant and sufficient connection with the subject matter of that power (i.e. to be within the scope of the incidental power)
- In determining whether it exists (i.e. the connexion) the courts will have regard to the purpose of the legislative provision and the reasonableness of the connection between the law and the subject matter of the power (Nationwide News)

4. Scope

Activities
- Where the Commonwealth Parliament possesses power to make a law in relation to an activity, it may prohibit that activity or permit it conditionally (Murphyores Inc Pty Ltd v Commonwealth)
- Conditions or criteria laid down by the Parliament which authorise an otherwise prohibited activity need have no relevance to the subject matter of the Commonwealth’s legislative power pursuant to which the prohibition was imposed (Herald & Weekly Times Ltd v Commonwealth)

Touch or affect
- A law upon a subject matter within a Commonwealth legislative power does not cease to be valid because it either
  → touches or affects subject outside a Commonwealth legislative power; or
  → because it can also be characterised as a law upon a subject outside Commonwealth legislative power

Exclusivity
- A Commonwealth law need not relate exclusively to an enumerated grant of legislative power (Actors Equity)

Several characters
3. Trade and Commerce Power (s 51(i))

S 51(i)
- The Parliament shall, subject to the Constitution, have the power to make laws for the peace, order and good government of the Commonwealth with respect to;
- Trade and Commerce with other countries, and among the States

Meaning of ‘Trade and Commerce’ (W & A McArthur Ltd v Queensland)
- Principle of harmonious interpretation
  1. Trade (James v The Commonwealth)
     - Refers to the same phenomena in s 51(xx) as it does in ss 51(i) and 92
     - The word ‘trading’ can be interpreted in its current and popular sense, and not restricted to the denotation it had in 1900
  2. Trade and Commerce
     - Give the words their popular meaning (W & A McArutherford Ltd v Queensland)
     - Includes transport for reward (Australian National Airways Pty Ltd v Commonwealth)

Scope
- Is a power to regulate navigation, shipping and railways the property of any State (W & A McArthur Ltd v Queensland)
- Not a power generally regulate economic activity (Pape v Commissioner of Taxation)
- Covers intangibles as well as tangibles (Bank of New South Wales v Commonwealth)

Intrastate trade and commerce
- No direct power to regulate intrastate trade and commerce (R v burgess; Ex Parte Henry)
  - Incidental power
    - Attached to every express grant of power is an implied grant of power widen enough to make the express grant effective (O’Sullivan v Noarlunga Meat Ltd (No 1))
    - Production
      - The regulation of production may be incidental to the regulation of trade (Granall v Marrickville Margarine Pty Ltd)
  - Inseparable connection exception
    - Commonwealth power can only extend to such intrastate trade and commerce as is inseparably connected with interstate trade and Commerce (Redfern v Dunlop Rubber Australia Pty Ltd)
    - Connexion
      - The connexion (between intra/interstate trade) must not be so remote or insignificant that there is no real relationship (Redfern v Dunlop Rubber Australia Pty Ltd)
      - However, s 51(i) recognises a distinction between inter/intrastate trade, and that distinction must be maintained however much interdependence may now exist and however artificial the distinction, the incidental power cannot be given operation that would obliterate the distinction (Minister for Justice (WA), Ex rel Ansett Transport Industries Pty Ltd v Australian National Airlines Commission)

Exports
- The Commonwealth Power extends to the supervision and control of all acts or processes done or carried out for export (O’Sullivan v Noarlunga Meat Ltd (No 1))
- The Parliament may prohibit, regulate and control the importation and exportation of goods, matters which lie at the heart of Trade and Commerce with other countries (Murphyores Inc Pty Ltd v The Commonwealth)