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(1) Powers

TRADE AND COMMERCE POWER S 51(I)

• **Meaning/Scope of ‘Trade and Commerce’**
  o Includes all commercial dealings of which the “direct and necessary result” is to “initiate, continue and effectuate the movement of persons and things” interstate or overseas (McArthur (1920); Bank Nationalisation Case (1950) per Dixon J).
  o Includes the power to prohibit certain acts (Murphyores (1976); Huddart Parker).
  o Not clear whether profit is necessary
    ▪ Dixon J in the Airlines Case (1945) leaves open the question as to whether profit is a necessary result or whether purely non-profit, non-commercial transport across a border will constitute ‘trade and commerce’ within s.51(i).
    ▪ Trade and commerce can include non-commercial relationships e.g. the exchange of a letter or gift.
  o Don’t need actual physical transportation
    ▪ Although it has been suggested in Sleigh Ltd v SA (1977) that there need be actual physical transportation of goods interstate or overseas, today actual physical movement is not required as long as there is trade between the states e.g. sale of goods over the internet.

• **Examples:**
  o Promote certain types of trade and prohibit others (subject to s 92)
    ▪ Sale of ordinary goods and services
    ▪ Sale of **intangibles** e.g. banking services (Bank of NSW v Cth 1958), ideas, resources e.g. gas and electricity, broadcasting, television, transmission of intelligence (Bank Nationalisation Case) this is taken to include dealings over the internet
  o Regulate the fairness of trade (e.g. under the Trade Practises Act)
  o Regulate transportation of goods or people for **profit**
  o Regulate importation/exportation of goods (e.g. drugs, pornography, weapons)
    ▪ Prohibit export of meat (O’Sullivan v Noarlunga Meat)
  o Regulate conduct (set safety standards/determine conditions of employment) of people employed in overseas or interstate trade and commerce activities (Maritime Union of Australia 2003)
    ▪ E.g. stevedores (people who load ships)
    ▪ **Maritime Union of Australia 2003:** A ship journeying for reward is in commerce; those who co-operate in the journeying of the ship are in commerce and the wages of those persons and the conditions of their employment relate to that commerce
  o Cth may themselves **participate** in interstate and overseas trade and commerce
    ▪ the Cth can run its own airline (ANA case) or shipping line (Australian Coastal Shipping Commission v O’Reilly) or set up co-operative State and Commonwealth bodies such as the Australian Wheat Board.

• **Inter-state and Intra-state trade**
  o NB: s 51(i) **does not allow the Commonwealth to regulate ‘intra-state trade’** (i.e. **trade within a State**) (R v Burgess; Ex parte Henry (1936))
  o **UNLESS** it could be shown that intra-state regulations are absolutely essential for safety purposes; this may make them permissible (Second Airlines case)
    ▪ **Relevant Case:** R v Burgess; Ex parte Henry (1936)
      ▪ One legged pilot (pirate) flew plane under harbour bridge in breach of the Air Navigation Regulations 1921 Cth. Ct held regulations fell **beyond** s 51(i)
      ▪ Distinction between inter-state and intra-state trade cannot be obliterated by the incidental power.
Even though there is possible “commingling” in air routes and airports this is not a valid enough theory to say that the Cth has power to legislate intra-state as well as inter-state aviation

Concession: aspects of intrastate trade might have ‘a sufficiently proximate relationship’ with interstate trade e.g. issues of safety. I.e. IF it could be shown that the regulations were absolutely essential for safety purposes and such commingling between flights – then it would be permitted under s 51(i)

**Effect of s 51(i) on other heads of power: constitutional prohibitions**

- Since there is no express exclusion to intra-state trade, this means that laws made with respect to another head of power under s 51 (e.g. defence power) can effect intra-state trade and commerce because there is no express limitation in s51(i).

**Powers incidental to Trade and Commerce**

- Narrowly confined ambit being given to the incidental power in the case of s 51(i) *(AG v ANA Commission)*
- When incidental powers are permissible:
  
  - (1) Powers regulating intra-state trade and commerce is permissible in some circumstances
    
    - Profit, efficiency and competitiveness is not a reason to make intra-state trade permissible
      
      - *(A-G (WA) v ANA (1976))* intra state flight THEN an interstate flight, profitability did not provide a sufficient connection, invalid use of power
    
    - Safety is a legitimate reason, as long as provisions are specific not general
      
      - *(Second Airlines Case (1965))* specific safety measures concerning intra-state trade were deemed necessary and *valid cf. Burgess; Ex parte Henry* where measures were more general and deemed *invalid.*
  
  - (2) Powers to make provisions for the condition and quality of a commodity to be exported
    
    - Cth may regulate production where:
      
      - (1) The regulated activity is objectively ascertainable as ‘for export’
      - (2) If it is reasonably necessary for the Cth to reach back to the production process to give effect to s 51(i)
    
    - Cth can regulate production: *(O’Sullivan (1954))*
      
      - (i) Supervision and control of all acts or processes which can be identified as being done or carried out for export. e.g. packing, get-up, description, labeling, handling
    
    - Cth can regulate to ensure quality control
      
      - (ii) 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
    
    - The regulated activity is objectively ascertainable as ‘for export’ *(tricky point)*
      
      - Need to consider whether product has discrete export requirements for export (as opposed to domestic use) → this may effect scope of incidental powers
        
        - Slaughter of meat for export has distinct production requirements to slaughter of meat for home consumption. Thus, conditions for export can be regulated under s 51(i).
        
        - Mining minerals or sowing wheat for export has same production process for home use or for export so the above may not apply
• CASES
  1. ANA case (1945)
     • Cth was able to establish a government-owned interstate airline because to do so was to make a law with respect to interstate trade and commerce.
     • Trade and commerce power allowed Cth to regulate and participate in overseas and interstate trade
     • However, Cth was unable to give the airline a monopoly because that would infringe s 92 (so part 4 of the Act was severed to save the rest of the Act)
       o Trade and commerce power is ‘subject to this constitution’ so subject to s 92 which provides that:
         o ‘Trade, commerce and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.’
       o S 92 prohibits discriminatory burdens of a protectionist kind (Cole v Whitfield)
  2. R v Burgess; Ex parte Henry (1936)
     • One legged pilot (pirate) flew plane under harbour bridge in breach of the Air Navigation Regulations 1921 Cth
     • Ct held regulations fell beyond s 51(i)
     • Distinction between inter-state and intra-state trade and has held that it cannot be obliterated by the incidental power.
       • Even though there is possible “commingling” in air routes and airports this is not a valid enough theory to say that the Cth has power to legislate intra-state as well as inter-state aviation
       • Concession: aspects of intrastate trade might have ‘a sufficiently proximate relationship” with interstate trade e.g. issues of safety.
       • IF it could be shown that the regulations were absolutely essential for safety purposes and such commingling between flights – then it would be permitted under s 51(i)
  3. Second Airlines Case (1965)
     • S 51(i) must remain a power to make laws ONLY with respect to inter-state and foreign trade and commerce
     • Profit is not a reason to make intra-state trade permissible but safety is a legitimate reason. (Here specific safety measures concerning intra-state trade were deemed valid)
     • C.F. Burgess; Ex parte Henry in that case there was a more general power, here there precisely drafted set of regulations which were necessary
  4. O’Sullivan (1954)
     • The power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of a commodity to be exported.
     • The power extends to:
       • Supervision and control of all acts or processes which can be identified as being done or carried out for export
       • 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
         • E.g. packing, get-up, description, labeling, handling
         • Noted that slaughter of meat for export was different to slaughter of meat for home consumption.
           o Contrasted this with mining minerals or sowing wheat for export and which have the same process for home use or for export so the above may not apply
       • So Cth may regulate production where
CORPORATIONS POWER S 51(XX)

PART A: WHAT IS A CONSITUTIONAL CORPORATION?

• S 51(xx) power to make laws with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”
  o (1) A foreign corporation is one formed outside the limits of the Cth (i.e. established outside of Australia – don’t worry about this no cases about this).
  o (2) A trading corporation is one that engages in trade i.e. buying and selling goods and services, for profit or otherwise
  o (3) A financial corporation is one that engages in financial activities, such as borrowing or lending money
  o Meaning of (2) and (3) are contentious

• Power extends only to corporations that are actually incorporated!
  o Need to ask: Is X actually incorporated?
  o Cth does not have the power to legislate for the incorporation of companies because s 51(xx) refers to corporations ‘formed’ within the limits of the Cth (i.e. they had already been formed under foreign law or under State Law) Incorporations Case (1990)

• HC classification of Trading Corporation and Financial Corporation
  o What constitutes trading Corporation? (Current activities test)
    ▪ Trading must be a ‘substantial’ and not merely peripheral activity of the corporation (Adamson’s case 1979- incorporated football club which was financial corp)
      • What meets this test is very much a question of fact and degree (Mason J)
      • However, trading so slight and incidental to the activities of the corp would NOT be enough (per Mason J Adamson’s case - e.g. if football club had small raffle each season to raise funds this would be inadequate)
  o What constitutes Financial Corporation? (Current activities test)
    ▪ Financial activities must be a ‘substantial' and not merely peripheral activity of the corporation (State Superannuation Board following Adamson’s case)
      • Financial activities should form a significant portion of the overall activities

• But Lower Courts have been more liberal in classification:
  o As long as the amount of money generated in trading is substantial (i.e. in the millions) this is enough to qualify a corporation as a trading or financial corporation
    ▪ This applies even though the corporation might be a non-profit body with trade only a small part of revenue and trade only a small proportion of the activities of the corporation
  o (These Lower Courts cases are more recent, HC hasn’t had a chance to address since 1980s)
  o Examples of what Lower Court classified as trading/financial corp:
    ▪ Red Cross was a trading corporation because it runs op-shops (getting a small proportion of its revenue from them) E v Australian Red Cross Society (1991)
    ▪ RPA was a trading corporation because it received some patient fees and did some business activity (despite this being dwarfed by grants from the State) E v Australian Red Cross Society (1991)
    ▪ University of WA was a trading corporation. Investing, buying, renting and selling properties, selling publications and providing student accommodation
and information technology services were trading activities (no its educational services) *Quickenden v O’Connor (2001)*

- **Fire brigade is a trading corporation** because it services fire equipment for fees which amounted to 5% of revenue. *United Firefighters' Union v Metropolitan Fire & Emergency Services Board (1988)*

- **HC confirmation of stricter test in 2008:** *AWU v Etheridge Shire Council (2008)*
  - Spender J held that the proportion that trading activities takes up compared to other activities is important. He went back to:
    - **Barwick CJ’s dissenting judgment in St George County Council** where he said that ‘a corporation whose predominant and characteristic activity is trading whether in goods or services’ was a trading corporation.
    - **Mason J in Adamson’s case** that a trading corporation is one whose ‘trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation’.
  - Effect: not clear if the trading activities need to be a certain proportion of the corporations overall activity.

- **Other types of corporations:**
  - **Shelf companies:** (i.e. company that has had no activity) one must also look to shelf company’s constitution, including its objects and powers and its memorandum of association, to determine whether or not it is a trading or financial corporation (*Fencott v Muller*).
  - **Government body:** govt body (e.g. local council) can be trading corporation if they satisfy current activities test, even where trading is for public interest
    - *Tasmanian Dams-* Tasmanian hydro commission was considered to be a trading corp because it sold electricity, operated power stations, derived substantial profits while fulfilling a govt regulatory role
  - **Non-profit bodies** e.g. church owned corporations, RSPCA, indigenous welfare charities can be classified as trading corporations

**PART B: WHAT SORT OF LAWS CAN BE MADE UNDER S 51(XX)?**

- **Scope of power**
  - *Work Choices Case (2006)* held that corporations power extend broadly to:
    - (1) The regulation of the activities, functions, relationships and the business of a constitutional corporation
      - Laws with respect to the trading activities of trading corporations (*Concrete Pipes*)
      - Laws with respect to acts undertaken by trading corporations engaged in for the purpose their trading activities (*Tasmania Dams*)
    - (2) The creation of rights and privileges belonging to it
      - *(seems to have disappeared from later cases e.g. doesn’t feature in Williams)*
    - (3) The imposition of obligations on it, and with respect to those matters
    - (4) In respect of (1), (2) and (3), the regulation of the conduct of those through whom it acts (e.g. employees and shareholders) and those whose conduct is capable of affecting its activities, functions, relationships or business (e.g. non corporations).
      - Laws that protect trading activities of trading corporations (*Fontana films*)
      - Laws limiting what non-corporations can do to constitutional corporations (*Fontana films*)
      - Laws concerning people who affect or interact with trading corporations (*Fontana films*)