

Federal Constitutional Law

2016, Semester 1

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Corporations

Constitution s 51(xx)

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:

...
(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth

Introduction

- This power is about “constitutional corporations”
- Contrast with the trade and commerce power
 - The corporations power does not distinguish between interstate and intrastate corporations, but the power can only regulate corporations
 - Trade and commerce is limited to intrastate transactions, however applies to non-corporate entities
- The main question is what is limit to this power and how far it extends
- Historically, in *Huddart, Parker v Moorehad (1909)*, this power was interpreted very narrowly to mean the Commonwealth could only regulate corporations as an entity (e.g. the number of directors they may have) but not the activities of the corporations itself
- Thus, this power remained dormant for over 60 years
- This decision was overturned in *Strickland v Rocla Concrete Pipes (1971)*

<i>Strickland v Rocla Concrete Pipes (1971)</i>	
Facts	<ul style="list-style-type: none"> • This case concerned the validity of the <i>Trade Practices Act 1965</i> (Cth) and its application to constitutional corporations • Section 35 made certain anti-competitive activities listed in s 36 “examinable” • Section 41 and 43 provided that details of examinable agreements were to be provided to the Trade Practices Commission • There was an agreement between pipe manufacturers so the parties could reduce competition and ensure market share • This became an examinable agreement, and R was charged for not providing the particulars to the Commission • The validity of the Act was challenged
Result	<ul style="list-style-type: none"> • The Court overruled <i>Huddart Parker</i> • <i>The Commonwealth can regulate the trading activities of trading corporations under the Corporations power</i> • However, the legislation was still invalid
Discussion	<p>Barwick CJ</p> <ul style="list-style-type: none"> • Dominant theory in 1909 was reserve state power - corporations were traditionally within the State’s legislative competency

- Following *Engineers*, this was no longer the case and therefore, because the decision in *Huddart Parker* was founded so strongly on the reserve state power doctrine, it should be over-ruled
- There is no requirement that the activities being regulated be limited to foreign and interstate trade if the act falls within the Corporations power

The question of law is

- Whether a law is one which regulates or controls the trading activities of constitutional corporations and formed within the limits of the Commonwealth and has *operations on persons within the Parliament's constitutional competence*?
- The current act was held invalid because there was no requirement that the Act only applied to constitutional corporations, and thus could not be construed as an act that was made with respect to s 51(xx)

What is the ambit of the power?

- Following *Strickland*, the Commonwealth is now competent to regulate the trading activities of trading corporations, however did not set the limits to this power
- The power extended to
 - activities not carried out by constitutional corporations but may affect constitutional corporations: *Actors and Announcers Equity Association v Fontana Films (1982)*
 - activities done in preparation of trading activities: *Tasmanian Dam (1983)*
 - but activities of third parties that merely *relate to* trading corporations was beyond the power: *Re Dingjan (1995)*

<i>Actors and Announcers Equity Association v Fontana Films (1982)</i>	
Facts	<ul style="list-style-type: none"> • Section 45D(1)(b)(i) of <i>Trade Practices Act</i> (new one that fixed the issue in <i>Strickland</i>) prohibited secondary boycotts <ul style="list-style-type: none"> • A secondary boycott is when a person acting in concert with another person engages in conduct that hinders or prevents the supply the goods or services of a corporation where that conduct is for the purpose is/likely to cause substantial losses to that corporation • Dispute between AE (an actors' union/employee organisation, <u>a non-corporate</u>) and F (a constitutional corporation), that F should agree only to employ union members • AE persuaded a theatrical agency to refuse to supply F with agents and as a result of this, F had to cease production of its films • F sued AE on the basis it was engaged in a secondary boycott • AE appealed on the basis this provision was invalid
Result	<ul style="list-style-type: none"> • Unanimously held that the provision did have sufficient connection to the trading activities of trading constitutional corporations • The Corporations power extends to regulate the activities of a non-constitutional corporation (natural persons, associations), if the activities is aimed at protecting the activities of a trading corporations
Discussion	<ul style="list-style-type: none"> • The activities that can be regulated under the corporations power do not need to be engaged by a constitutional corporation • So long as it affects the constitutional corporations, legislation may protect trading corporations and their trading activities

- Mason, Aickin, Murphey JJ: adopted a broad view and held all activities of a trading corporation can be protected, not just trading activities
- Gibbs CJ, Wilson J: adopted a narrow view - only trading activities of trading corporations could be protected
- Stephen, Brennan JJ: decided the case on the narrow view, but did not decide whether the narrow or broad view applies generally – that is, the narrow view is enough for this case, and there is no reason to discuss the broader view
- In this case, the ratio is that the narrow view prevails

Tasmanian Dam Case (1983)

Facts

- The Commonwealth also tried to enact the *World Heritage Properties Conservation Act* using the corporations power
- Section 9 prohibited a range of activities such as mining and drilling, on property that was declared protected under the Act, but s 9 was not limited to constitutional corporations
- Section 10(2) prohibited the same things as s 9, but only applied to constitutional corporations
- Section 10(4) prohibited the same things again, but only when they are done for the trading purposes of a constitutional corporation
- The question was whether activities done in preparation to trading activities of trading corporations would be within the power

Result

- Section 10(4) was held valid by the majority (Gibbs CJ, Mason, Murphy, Deane and Brennan JJ, Wilson and Dawson JJ dissenting)
- The position of s 10(2) is uncertain (the Court was divided 3:3 as Brennan J did not decide on this issue)

Discussion

- Mason, Murphy and Deane JJ took the broad view of the power and held that both s 10(2) and (4) were valid under the corporations power
- Taking the narrow view, Gibbs CJ and Brennan J held that that s 10(4) was within the scope trading activities was within the corporations power
- Wilson and Dawson JJ took a stricter view and held that activities in both ss 10(2) and 10(4) were not trading activities for the purposes of the corporation power
- Gibbs CJ, Wilson and Dawson JJ would have held s 10(2) as invalid under the corporations power, Brennan J did not decide on s 10(2) and thus the broad view is still open to argument

Ratio

- This case decided the corporations power extends to activities that were preparatory to trading activities, even if you took the narrow view (per Gibbs CJ and Brennan J)

Re Dingjan; Ex parte Wagner (1995)

Facts

- The impugned provision purported to regulate the activities of *third parties who were not necessarily constitutional corporations which related to the business of constitutional corporations*

Result

- The majority held that the provision was invalid (not relevant to the point of law)
- All judges, except Dawson J, adopted the broad view of the power, that you can regulate the activities that affect the business of the corporation

- Held that merely regulating activities *relating to*, but not affecting, the activities of constitutional corporations was not enough to bring legislation within the corporations power
- The minority dissented on the outcome, but not the law, and were willing to allow the words “relating to” to be read down to mean “affect”

Discussion

McHugh J

- The corporations power is a persons power, not a subject matter power so a law within this power must be “with respect to” (not just “relating to”) a corporation of a kind described by s 51(xx)
- The character of the law must be determined by reference to the rights, powers, liabilities and privileges which it creates
- A judgment must be made as to whether the law can be said to be connected to the corporations head of power
- If a law regulates the *activities, functions or relationships or business of a constitutional corporation*, or regulates the conduct of those who control, work for, or hold shares or office in those corporations, then it is likely to be within the reach of s 51(xx)
- However, if it regulates of persons other than s 51(xx) corporations, then the law will generally not be authorised by s 51(xx) unless it does *more than operate by reference* to the activities, functions, relationships or business of such corporations

Current authority

- The current authority adopts the widest possible view of the corporations power

Work Choices Case (2006) *New South Wales v Commonwealth*

Facts

- The Commonwealth was trying to enact a complete industrial relations package under the corporations power in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)

Result

- It was held 5:2 that this was a valid exercise of the corporations power
- The Court adopted Gaudron J’s position in *Re Pacific Coal (2000)*

Discussion

Gaudron J in *Re Pacific Coal (2000)*

- “I have no doubt that the power conferred by s 51(xx) extends to the regulations of the activities, functions and relationships and business of a constitutional corporation [note: not just trading activities], the creation of rights relating to such a corporation, the imposition of obligations on it, and to the regulation of the conduct of whom it acts, and also the regulation of those [not necessarily corporates] whose conduct is capable of affecting the conduct of the business... no doubt that it extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations”

Kirby J (dissenting)

- First argument: up until WorkChoices, it was thought that industrial relations was covered by the industrial relations power

- If there are more than one power that suits the legislation, the more relevant power should be used - but this is rejected (following *Engineers*) and has not been revisited

What is a “constitutional corporation”?

- Whether a corporation is a trading or financial corporation is determined by reference to its activities it carries out
 - Trading means buying and selling anything that can be bought or sold, including services
 - Financial corporations deal with banking
- The issue is when a corporation engaged in multiple activities
- Initially, the test was its “actual or intended activities” in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974)
- However, this has been overruled and the current test is the “current substantial activities” test in *Adamson’s Case* (1979) which was reinforced in *State Superannuation Fund v Trade Practices Commission* (1982)

<i>Adamson’s Case (1979)</i> <i>R v Adamson, ex parte WA Football Club</i>	
Facts	<ul style="list-style-type: none"> • The issue for the Court was whether the WA Football Club was a constitutional corporation
Result	<ul style="list-style-type: none"> • The court held 4:3 that they were, applying the “current activities test”
Discussion	<ul style="list-style-type: none"> • The Court noted that the trading activities in these football clubs were a significant part of their activities, even though their purpose was to be a football club • Trading activities included selling club merchandise and extensive promotion • A company will be a constitutional corporation if a substantial portion of their activities is trading • The “substantial” threshold is very low – “not insubstantial” is enough (per Murphy J at 239)

<i>Superannuation Fund v Trade Practices Commission (1982)</i>	
Facts	<ul style="list-style-type: none"> • The State Superannuation Board was a state body that was set up to invest people’s money so that pension payments could be made to retirees • The Board engaged in extensive investments and employed about 100 staff • The TPC alleged that it may have engaged in practices contrary to the <i>Trade Practices Act (1974)</i> but the Board sought a declaration that it was not a constitutional corporation and was not caught by the act
Result	<ul style="list-style-type: none"> • The Board, even though it was a state body, was held to be a constitutional corporation
Discussion	<ul style="list-style-type: none"> • Adopted the <i>Adamson</i> test for a trading corporation to financial corporations • The threshold is identical for both types of constitutional corporation • The categories are not mutually exclusive

- It is sufficient that “trading [or financial activity] is a substantial and not merely a peripheral activity” to classify a corporation as a trading corporation
- Whether the trading activity is substantial is a *question of fact and degree*
- The fact there is a more extensive non-trading activity carried out by the corporation does not mean that it is not a trading corporation

Incidental power

- The incidental power in relation to s 51(xx) has arisen in two contexts
- First is to regulate individuals or entities that are not s 51(xx) corporations who are implicated in the activities of a s 51(xx) corporation
- The second is the power to regulate the holding company of a s 51(xx) corporation

<i>Fencott v Muller (1983)</i>	
Facts	<ul style="list-style-type: none"> • The validity legislation which imposed civil penalties to persons aiding, abetting, counselling or procuring contravention of legislation by a s 51(xx) head of power
Result	<ul style="list-style-type: none"> • Unanimously held the legislation was valid
Discussion	<ul style="list-style-type: none"> • Because corporations are ultimately controlled by people, the power extends to regulating the conduct of those who control the activities of corporates

Exam template

Introduction

The _____ Act is purported to be supported by the corporations power under s 51(xx). It is a non-purposive, 'persons' power and it is interpreted to give the Commonwealth power to regulate, inter alia, *the activities, functions and relationships and business of a constitutional corporation, and... those whose conduct is capable of affecting the conduct of the business of a constitutional corporation*: per Gaudron J in *Re Pacific Coal* as adopted in the *WorkChoices Case*

As the _____ Act regulates _____, it is regulating the _____ activities of a trading corporation, it is likely to be within this construction of the Act and thus the Act is prima facie a valid exercise of Commonwealth legislative power.

Who is a constitutional corporation?

The question of whether or not _____ is a constitutional corporation must be answered by reference to the "current activities" of the corporation: *Adamson's Case*, affirmed in *State Superannuation Board v TPC*.

So long as a *non-insubstantial* (per Murphey J in *Adamson* at 239) amount of its activities can be regarded as trading/financial activities, it will be classified as a constitutional corporation. This is a question of fact and degree: *State Superannuation Board v TPC*

It is clear that a substantial portion of _____'s activities is _____, which is clearly within the definition of "trading/financial" activity. The fact that (it is primarily engaged in / it also engages in / its corporate constitution defines its purpose as) _____ is not relevant in rebutting this classification: *State Superannuation Board*. Therefore _____ will be within the reach of the _____ Act.

What activities can be regulated?

[almost all activities of constitutional corporations]

The Act is likely to be valid as (section / regulation / rule) _____ which is clearly (a / an) (activity / business / right / obligation / conduct) of the corporation that is within the wide formulation in *WorkChoices*.

Third parties

The impugned section purports to regulate _____, and operates by _____.

The debate of what activities of non-corporates can be regulated was largely settled in *WorkChoices*. The High Court adopted Gaudron J's broad view in *Re Pacific Coal*, and the activities of non-corporates can be regulated if their conduct is *capable of affecting* [and not merely relating to] *the conduct of the constitutional corporation*.

If the activity is merely 'relating' to corporations

However, even with the broad construction in *WorkChoices*, to the extent that it regulates persons other than s 51(xx) corporations, the law must do *more than operate by reference to the activities and functions of such corporations*: *Re Dingjan*.