

The Corporations Power

(a) S.51 (i) 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.

Initially narrow interpretation – **Huddart Parker (1909)** (HIGGINS LIST OF HORRIBLES)
NOW = applied more liberally – **Strickland (1971) BW 818**

It is a **NON PURPOSIVE** – concerned with legal persons, legal entities or corporations

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

- (a) What is the definition of trading, financial or foreign?
 - (i) 'FOREIGN'
 - created overseas, given legal recognition overseas or under Australian law and carries on business in Australia
 - formed outside of the limits of the Cth **New South Wales v Commonwealth (Incorporation case) (1990) BW 826**
 - constituted and organised according to the law of another jurisdiction - **Queensland Rail case (2015)**
 - (ii) 'TRADING' – SUFFICIENTLY SIGNIFICANT or SUBSTANTIAL
 - to be interpreted in its current and popular sense – **ACTIVITIES TEST**
 - whether those trading activities form a '**significant proportion**' of its overall activities which is a question of fact and degree (do not have to be predominant) - **R v Federal Court of Australia and Adamson; ex parte Australian National Football League (1979) BW 819**
 - This involves questions of fact and degree
 - '**business activities carried on with a view to earning revenue**'
 - did not settle the point as to whether they need to be **PREDOMINANT** or a **SUBSTANTIAL** part of the activities – BW 821
 - trading not limited to those activities to merely produce revenue, would also extend to activities carried on with a view to earning revenue - **State Superannuation Board Victoria v Trade Practices Commission (1982) BW 821**
 - **confirmed SUBSTANTIAL TEST** - need not form a predominant part of the corporation's activities
 - BUT NOT CLEAR ON %
 - nature of the corporation to which the laws must be **significant as an element in the nature or character of the laws if they are to be valid** - **Actors and Announcers Equity Association v Fontana Films (1982) BW 828**

- its main activity (building) was **intrinsically linked** to the production of electricity - **Commonwealth v Tasmania (Tasmanian Dams Case) (1983)**
 - **BW 825** – its operations are largely conducted for the public benefit/interest
- **UNLESS** – its an **INACTIVE CORPORATION**
 - Then apply the **PURPOSES TEST** - **Fencott v Muller (1983) BW 823**
 - SLIM MAJORITY - look to the purposes for which it was created (articles of association, memorandum etc.)
 - Minority
 - possibility of a COMBINATION of both constitution, activities and purposes which led the court to a conclusion it is a trading corporation – **need to move with the times** - **Queensland Rail case (2015)**
- (iii) 'FINANCIAL'
 - the words financial corporation are not a term of art nor do they have a settled legal meaning, they merely describe a corporation that deals with finance for commercial purposes - **State Superannuation Board Victoria v Trade Practices Commission (1982) BW 821**
 - here they were undertaking financial activities on a large scale (they invested in considerable funds as well as the super fund)
 - NEED NOT BE PREDOMINANT IN SO LONG AS THEY ARE SUBSTANTIAL
 - money dealings – **Re Ku-Ring-Gai Co-Operative Building Society (No.2)**

2) Is the Legislation within the scope of s51 (xx)? BW 828

- Which activities can be regulated?
- **Concrete Pipes Strickland (1971) BW 818**
 - **NARROW VIEW** – the aspect that can be regulated must have something to do with the characteristic that brings corporations within the Cth power (e.g. only trading activities can be regulated)
 - **BROAD** – NO LIMITS (**HIGGINS LIST OF HORRIBLES**)
 - *If the argument for the Crown is right, the results are certainly extraordinary, big with confusion. If it is right, the Federal Parliament is in a position to frame a new system of libel laws applicable to newspapers owned by corporations, while the State law of libel would have to remain applicable to newspapers owned by individuals. If it is right, the Federal Parliament is competent to enact licensing Acts, creating a new scheme of administration and of offences applicable only to hotels belonging to corporations. If it is right, the Federal Parliament may enact that no foreign or trading or financial corporation shall pay its employes less than 10s per day, or charge more than 6 per cent interest ... If it is right, the Federal Parliament can enact that no officer of a corporation shall be an Atheist or a Baptist, or that all must be teetotallers.*³

- (a) What does the power extend to?

- CONDUCT OF OTHERS

- the regulation of those whose conduct is or is capable of affecting the interest of s51(xx) corporations (**protecting constitutional corporations**) - *Actors and Announcers Equity Association v Fontana Films* (1982) BW 828
 - **NARROW** - GIBBS & WILSON – narrow (contained a nexus)
 - **BROAD** - MASON MURPHY AICKEN – broad, not confined by any nexus – should construe the constitution with all the generality which the words admit (*Jumbunna*) – Nothing in the provision to suggest it should be read down
 - **PLENARY POWER**
 - **THEREFORE accepted** that they could regulate the trading activities of a trading corporation

- Moving to purposes...

- **REGULATION AND PROTECTION** - *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983)
 - Cth able to regulate activities undertaken for the **PURPOSE** for trade, for trading corporations or financial activities of a corporation - *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983)
 - the activity the Cth was prohibiting was not a trading activity but it was an activity of the corporation which would allow them to undertake trading activities
 - 3 supported broad
 - MASON 3 ARGUMENTS – BW 831 – *Koowarta* – may be directed to any aspect of human activity
 - 3 supported narrow
 - **NOW** = extends to activities undertaken for the **PURPOSES** of trade

- Laws which penalise individuals for involvement in prohibited activities of corporations are valid – *Fencott v Miller* (1983) BW 823

- **OBJECT OF COMMAND TEST** - *NSW V Cth (Work choices Case)* (2006) BW 836

- took **GAUDRON's reasoning** in *Re Dingjan* provided the law can be seen as a command in that it modifies rights, duties, powers, privileges, obligations of a corporation it will be within the limits of the power (both internal and external)
 - PLENARY POWER
 - REJECTED SIGNIFICANCE TEST
 - instead of focusing on what aspects or activities, they focuses on whether there was the **sufficient connection** with trading or financial corporations – BW 833 (MCHUGH) – **SIGNIFICANCE**
 - **WHAT DEGREE OF RELEVANCE OR CONNECTION TO CONSTITUTIONAL CORPORATIONS** is necessary for characterisation as a law with respect to those corporations - *Re Dingjan* (1995) BW 836

- (b) Identify if there is an incidental aspect?

- **IMPLIED INCIDENTAL ASPECT therefore PURPOSIVE TEST** (establishing a reasonable connection between the law and the way the law operates and the head of power)
 - need a reasonable connection between a law's direct legal operation and some matter directly within s51(xx) of the Const- **Fencott v Miller (1983) BW 823**
 - not enough to be a point of reference, the **law actually needs to be about corporations, either for it to come within the direct head of power, it had to affect the rights duties and obligations** of a corporation or with the implied incidental it had to be a LAW TO ACHIEVE A PURPOSE UNDER THE CORPORATIONS POWER - **Actors and Announcers Equity Association v Fontana Films (1982) BW 828**
- **(c) What does the power NOT extend to?**
 - **incorporate or control incorporations**
 - 'FORMED WITHIN' –
 - **NSW v Commonwealth (Incorporation Case) (1990) BW 826 –**
 - The words 'formed within the Cth' exclude the process of incorporation
 - the generality of words 'with respect o' cannot expand a power over existing formed corporations into a power to form corporations
 - **Huddart Parker to NSW V Cth (Work choices Case) (2006) BW 836**
 - does not extend to the creation of companies – past tense meaning of the word formed
 - not a general power to regulate the formation of companies
 - unable to create a government corporation
 - HOWEVER they are able to create provided the Cth can find another head of power and the corporation created is for those purposes - **Strickland (1971) & Australian National Airways v The Cth**
 - does not encompass the subject matter of incorporations of corporations – therefore dependent on **STATE CO-OPERATION**
 - HOWEVER
 - they do have a power to **require incorporation** as a pre-requisite/condition in order to engage in some activity within Cth power - **NSW V Cth (Work choices Case) (2006) BW 842**
 - registration giving right to appear before IRC – **Jumbunna**
 - registration giving right to practice as a migration agent – **Cunliffe**

