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COMMONWEALTH OR STATE LAW

1. Is it a Commonwealth or State Law?

If it is a State law it does not need a head of power.

2. If it is a Commonwealth law, what is its head of power?

BEGIN: Unlike the States, the Commonwealth Parliament does not have a general power to make laws for peace, order and good government. Rather, it has enumerated powers under s 51 of the Constitution. This means, that in order for a Commonwealth law to be valid, it must have a head of power: **Royal Commissions case; Heiner v Scott**. A Commonwealth law will be valid if its legal effect relates to Commonwealth head of power, even if its practical effect or evident purpose relates to something outside the power: **Fairfax v Commissioner of Taxation**. In this case, prima facie, it appears that the law may fall into the

TRADE AND COMMERCE: s 51 (i)

The trade and commerce power is dealt with under s 51 (i) of the Constitution. It provides that the Commonwealth Parliament has the power to make laws with respect to trade and commerce, provided that the following three elements are satisfied.

1. “Trade and Commerce”

- Trade and commerce has been defined as “buying and selling are the very heart of trading”: **R v Trade Practices Tribunal**
- Trade includes:
 - The act of transporting or delivering for reward: **Australian National Airways Ltd**
 - Activities preliminary to trade: **W & A McArthur v Queensland**
- Covers the transfer of credit and traffic in intangibles as well as movement of goods and persons: **Bank Nationalisation**
- Profit motive no essential (indicative): **R v Trade Practices**
- Cth might be able to control production or manufacturing under Trade and Commerce even though those activities not themselves part of T/c: **Grannall**

2. “With other countries”

- The Commonwealth has the power to “prohibit, regulate and control the importation and exportation of goods” for any purpose: **Murphyores Inc.**
- Law regulating charges to be paid for air flights to and from Australia are permitted: **R v Halton**
- Regulations of extraterritorial trading activities connected to overseas trade including:
 - Condition of sale of goods arriving in foreign destination: **Crowe**
 - Regulation of investment in foreign countries: **R v Hughes**

3. “And among the states”

- If the law applies to transport, anything that crosses a border is interstate T/C
- Movement of intangibles is interstate T/C: **Bank Nationalisation**
- If the law applies to the making of a contract (rather than delivery), contract must (express or implied) contemplate delivery across a border, otherwise it will not fall in the scope: **W & A McArthur**
- Business in two states not necessarily interstate: **Hospital Provident Fund**

Scope of Trade/Commerce Power

Heart of Power: Prohibiting; Regulating; Protecting; Commonwealth Participating

CORPORATIONS: s 51 (xx)

The Corporations Power is dealt with under s 51 (xx) of the Constitution. It provides that the Parliament has the power to make laws with respect to foreign corporations and trading and financial corporations. These are referred to as “constitutional corporations”.

What Kind of Corporation is it ?

- **FOREIGN CORPORATION:** Corporations formed outside the limits of the commonwealth: **NSW V Commonwealth (Incorporation case)**
- **TRADING AND FINANCIAL CORPORATIONS:** Historically, the purpose test in R v Trade Practices Tribunal was used to determine whether a corporation was a trading or financial corporation. However, the preferred test that is presently used is that ACTIVITIES TEST as set out in **Adamson's case**. In this case there were conflicting views of the Justices. Barwick CJ held that a corporation is a trading corporation if its trading activities are substantial function of the corporation; Mason J held that it is a trading corporation if its trading activities are “not so slight as to be incidental to some other activity” and Murphy held that a corporation is a trading corporation if its trading activities are not insubstantial. ASK- WHAT ARE THE ACTIVITIES OF THE CORPORATION?

- **TRADING:** One which involves buying and selling: **Trade Practices Tribunal**. Trade refers to the same phenomena in s 51 (xx) as in ss 51 (i) and 92.

Scope of the Corporations Power:

The **Workchoices case** established that the corporations power is a very broad power.