

Corporations Power s51(xx)

Step 1: Introduction

For Cth parliament to legislate, it must have a head of power (HoP). The Cth Act may come under the corporations power (CP) (s51(xx)). X may argue the law is invalid for it exceeds the scope of this HoP.

Step 2: Does the law regulate a Constitution Corporation (CC)?

The Cth will need to establish that the laws enacted are with respect to CC only, that is foreign, trading or financial corporation. The law will be prima facie invalid if it purports to regulate “all corporations” (*Concrete*).

Foreign – A foreign corporation is defined as any entity formed under the law of a foreign country. If it is a foreign corporation, it need not be a financial or trading corporation (*Incorporation case*)

Trading – Cth may apply the current activity test version from *Adamson*, which looks at if a substantial or sufficiently significant proportion of its activities are trading activities.

- Won't be a trading corporation if the trading is so slight and trivial (*Adamson* per Mason J)
- Even if the primary purpose is to achieve something else if the corporation engages in trade sufficiently, it will be deemed a trading corporation (*Adamson; Dams*)

Financial – Cth may apply current activity test version from *Superannuation Board*, looking if a substantial or sufficiently significant proportion of its activities are financial activities.

- Financial exchange (lending, borrowing, investing funds)
- Obligation upon each side to pay money at some stage (Deane J in *Ku-ring-gain Building*)
- A corporation may be a financial corporation notwithstanding its financial activities are entered into, carrying on some other predominant or primary business (*Superannuation*)

Inactive/Shelf Corporations – Pursuant to *Fencott* a shelf company may be a trading or financial corporation, absent any current activities, on the basis that it was made for the purpose of trading/financial activities.

Conclude: Therefore, on the facts the [LAW] is/is not regulating a CC.

Step 3: Scope of the CP

Given the law is regulating a CC, [X] may argue that the manner of regulation exceeds the scope conferred on the CP. Cth will apply the modern **characterisation** test (*Kitto J, Fairfax*), which focuses on the direct effect of the law wrt CP, not the consequential effect. On the facts...

Core Scope:

[X] will have to apply the *object of command test* set out in **Gaudron J's dissent** in *Re Pacific Coal*, endorsed by **Majority** in the leading case, *Workchoices*:

- Broad view = the Cth can control **all** activities of a corporation, once it has been determined to be a 'foreign, trading or financial corporation'
 - **NB:** minority view = the '*distinctive character*' narrow test where the Cth only controls aspects or activities of a corporation which bring corporation within the reach of a HOP
- The regulation of the activities, functions, relationships and the business of a corporation described in that subsection,
- The creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of the matters; and
- To the regulation of the conduct of those through whom it acts, its employees and shareholders

- CP may extend protection of a CC from other non-CC, instead of just regulating them (*Fontana*)

On the facts...

Incidental Scope:

Cth may enliven s 51(xxxix) to extend to the incidental scope of the CP if the CP has ‘some effect on a CC’ (*Re Dingjan*) and there is a sufficient or reasonable connection between the law’s direct operation and the CC’s. Thus the CP may also extend:

- To the regulation of those whose conduct is affecting its activities, functions, relationships or business
- To the regulation of those whose conduct is capable of affecting its activities, functions, relationships or business as establish by **Gaudron J** in *Re Pacific Coal*, endorsed in *Workchoices*
- McHugh J in *Re Dingjan*: CP law must have some “definite significance” for CC cause benefit or detriment to it.
- **NB:** s 51(xx) CANNOT be used to regulate the formation, incorporation or dissolution of a constitutional corporation, it is limited to corporations already formed (*Incorporation Case*)

On the facts...

Natural persons

[X] may point to the fact that he/she is a contractor, however as in *Workchoices*, a contractor providing services for a CC, that is *engaged in the course of* providing services to a CC is valid within the incidental scope (*Workchoices*, the Cth conceded this point). This is because for regulation of CC to be effective we need to impose duties on natural persons who participate in corporate activities, which are the subject of regulation (*Fencott*). On the facts...

Incorporation of Companies:

[X] may argue that the [LAW] is purporting to regulate incorporation of companies, and the that the Cth has no power to do so, because s51(xx) does not apply to the incorporation or creation of the company, only corporations once it has been **formed**. This is the effect of a literal interpretation as opposed to the purposive approach (*Incorporation case*) On the facts...

Step 4: Conclusion

On the facts [X] is likely to succeed/fail in arguing that the law has be enacted correctly/incorrectly because the law is/is not enacted under a validly under the s 51(xx).

Case	Details
<i>Fencott</i>	Deciding whether shelf co. could be regulated as a CC – a trading and financial corp
<i>Workchoices</i>	CP extends past external relationships, includes internal relationships
<i>Fontana</i>	Upheld a law that protected a corporation against a secondary boycott. The legislative purpose thus upheld was protection of corporations rather than regulation of them.
<i>Re Dingjan</i>	Woodchip corporation business entered into a subcontract b/w two natural persons. Law must have some effect on constitutional corporation to be within incidental scope
<i>Incorporation Case</i>	Cth purported to enact a law that would control the formation of corporations, internal affairs and the winding up of corporations, literal interpretation of the constitution take. Deane J dissent on grounds of interpretation
<i>Adamson</i>	Football leagues and clubs established to promote football matches for profit – engaged in activities such as selling souvenirs, advertising, selling TV and catering rights, renting premises – HC held trading corporation – trading was substantial portion of its activities

Grants Power s96

During a Period of ten years after the establishment of the Cth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks fit.

Step 1: Introduction

For Cth parliament to legislate, it must have a head of power (HoP). The Cth Act may come under the grants power (GP) (s96). [X] may argue the law is invalid for it exceeds the scope of this HoP. The GP allows the Cth to grant financial assistance to the states on such terms and conditions it sees fit.

Step 2: Scope

Cth will apply the modern **characterisation** test (**Kitto J, Fairfax**), which focuses on the direct effect of the law with respect to GP, not the consequential effect. On the facts...

Prima facie, the Cth can give states grants based on any conditions it wants (**Fed Roads**), so long as it does not legally compel them to accept (**Latham CJ, UTC 2**).

- (i) Cth has very broad power under s 96 (**Moran; UTC 1; UTC 2**)
- (ii) [State] may argue the grant compels it to pass on the funding to an entity. However, the Cth can make grants even if the State is simply a conduit to allow giving of money to a particular organisation/class of persons (**Moran; DOGS**).
- (iii) [State] may argue the grants are discriminatory between states. However, the Cth can distinguish between states to 'even the inequalities in accordance with the judgement of parliament' (**Moran per Latham CJ**).
- (iv) Cth can politically induce a state to use/abstain from using its plenary power and can also weaken or destroy state activity in some areas (**Latham CJ, UTC 1**)
- (v) The court will only look at the legal operation of an Act rather than its effect and apparent intended outcome (**UTC 1**).
- (vi) Cth can make grants even if State is bound to apply the money specifically to an object (**UTC2**)
- (vii) Cth can make grants even if the object is outside Cth powers (**UTC 2**)
- (viii) Cth can make grants even if the payments are left to the discretion of the Cth Minister (**UTC 2**)
- (ix) Cth can make grants even if the money is provided as the Cth's contribution to an object for which the State is also to contribute funds (**UTC 2**)
- (x) HC reads each Act in a Cth legislative scheme separately (**UTC Cases**)

On the facts...

Limitations

There are very weak/few limitations that [STATE] may be able to rely on, as **s96** is susceptible to very wide construction (**UTC #2**). Therefore State must be constitutionally capable of carrying out conditions in **s96** grant (**UTC #2**)

- The Cth cannot rely on **s96** to achieve a purpose with complete disregard the concept of enumerated powers from **s51**. This would amount to using **s96** as a 'colourable device' and may render the law ultra vires (**Moran**).
- State must be constitutionally capable of fulfilling the conditions imposed under **s96** (**UTC 2**).
- Cth cannot enact laws, which amount to an abdication of state power (**UTC 2**)
- Cth cannot legally compel the State to accept the grant (**UTC 1**).
- Policy = suggests the result may be different if HC rules in future (obiter of **DOGS** and **ICM**)
 - **s96** is subject to **s116** (**DOGS**)
 - **s96** 'does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms' (**ICM**)