

PART D: Trade and Commerce - s 51(i)

STEP 1: What is “trade and commerce” and how far back into production does it extend?

1. **W & A McArthur:** Includes all commercial arrangements of which transportation is the direct and necessary result – including negotiations, bargaining, transport
2. **Re Maritime Union; Ex parte CSL Pacific:** can regulate conduct of those employed in trade and commerce
3. **ANA Case:** Extends to participation in trade and commerce by the Commonwealth
4. **O’Sullivan v Noarlunga:** Extends to all matters that might affect beneficially or adversely the export trade of Australia (Fullagar J)

Glosses

- **O’Sullivan:** Licence prohibited the export of meat unless the premises used for slaughter, treatment and storage met certain health requirements → fell under trade and commerce

STEP 2: To what extent can the power extend to intra-state trade and commerce?

1. **Test:** The Commonwealth can regulate intra-State activity, where there would be physical interference with the safety of the inter-state activity: **Second Airlines Case** (Kitto J)
2. Mere profit/loss not sufficient – must physically interfere with safety: **Australian National Airlines Commission** (Stephen)
3. Focus on trade and commerce generally, not interstate/international trade and commerce, will make it invalid: **Heydon J in Pape**

Glosses

- **R v Burgess; Ex parte Henry** – s 4 of the *Air Navigation Act* authorised the making of regulations for the control of air navigation → all judges made it invalid insofar as it interfered with intra-state
 - There may be occasions where parts of intra-state aviation occupy such a direct and proximate relationship to inter-State that it will be brought within the ambit of Federal power – not the case now
- **Second Airlines Case:** regulation required licence for local flights → within federal power because air navigations complex, regulations substantially impact each other, protects against real possibility of physical interference
- **ANAC:** flight from Perth to Darwin, but to make it profitable had to stop in Port Hedland → profit/loss not sufficient – must physically interfere
- **Pape:** connection with trade and commerce was not more than insubstantial/tenuous

PART E: Corporations Power – s 51(xx)

STEP 1: What corporations fall within s 51(xx)? – foreign, trading or financial

1. **Must be a corporation:** Must be a corporation under the *Corporations Act 2001* or other legislation
2. **Foreign corporation:** Incorporated overseas: *NSW v Commonwealth*
3. **Trading Corporations:**
 - (i) **TEST:** substantial/not insignificant trading activities: *Adamson's Case*, adopted by a majority in *State Super Board of Victoria; Tas Dams*
 - (ii) **Trading Activities:** includes buying and selling goods, services – profit is not an essential element of trade: **Mason J, Adamson's Case**
 - (iii) **Shelf Companies** – purposes of the company are relevant if not yet commenced activities: *Fencott v Muller*
 - (iv) **Gov Companies** – can be a government owned corp: *Tas Dams*
 - (v) Does not extend to the process of incorporation: *Incorporations Case*
4. **Financial Corporations:** The subject matter of the transaction must be finance (*Re Ku-ring-gai*), otherwise the same test as trading corporations – substantial/not insignificant activities: *State Super Board of Vic*

Cases

- **Adamson's Case:** The football clubs and leagues were 'trading corporation' → because their trading activities were so extensive, revenue was so great and the commercial means so varied (mostly food and beverage sales) that trading constituted principal activity. Did not matter that none of the clubs' money is distributed to members (although is a relevant factor)
- **State Superannuation Board of Vic:** Administered a superannuation fund providing pensions for public servants → engaged in financial activities on a very substantial scale in order to provide superannuation benefits
- **Fencott v Muller:** shelf company – used purposes test
- **Tas Dams:** the Hydro-Electric Commission was a trading corporation, sells electrical power in bulk on a very large scale

STEP 2: What aspects or activities of a constitutional corporation may be regulated by the Commonwealth Parliament?

1. **Test – given by Work Choices.** 3 different areas:
 - (i) Business, functions, activities and business relationships of the corporations
 - (ii) Persons by and through whom they carry out those relationships and activities
 - (iii) And with whom they enter into those relationships – regulating those whose conduct is or is capable of affecting a corporation's business activities, functions, relationships

Cases

1. Work Choices Case (2006)

- 2 provisions to focus on: ss 365 and 366 – prohibited ‘prohibited content’ from being in contracts → content of a contract has a not insubstantial connection with constitutional corporations
- s 755(1)(a) – prohibited trade unions officials from coming onto the premises of corporations to conduct workplace health and safety checks → argued that it does not more than make the activity of a corporation the condition for regulating the conduct of an outsider → rejected this, there was a connection, regarded the premises occupied by a constitutional corporation
- Registration of trade unions → within the corporations power for the Parliament to regulate employer-employee relations, and therefore also within power to authorise registered bodies

2. Actors & Announcers Equity

- S45D of the *Trade Practices Act* – protected a corporation against a ‘secondary boycott’ – which prevented the supplier of a corporation from maintaining supplies to it
- Whole court said this was valid – **Gibbs**: the conduct to which the law is directed is conduct designed to cause substantial loss or damage to a trading corporation: this is sufficient
- An example of group 3 from work choices

3. Tasmanian Dam Case

- s 10(4) of *World Heritage Properties Conservation Act 1983* related to a body corporate doing prohibited activity *for the purposes of its trading activity*
- Gibbs: The facts that s10(4) applied to the business of trading activity was sufficient

4. Re Dingjan; ex parte Wagner (1995)

- A 1992 Amendment to the *Industrial Relations Act 1988* (cth) gave the Industrial Relations Commission the power to examine unfair contracts imposed on independent contractors
 - S127C(1)(b) meant that the power extended to cases in relation to a contract relating to the business of a constitutional corporation
- Brennan, Dawson, Toohey and McHugh – s127(1)(b) could not be supported under s 51(xx)
- For a s 51(xx) corporation – it is difficult to see how it can have any connection with such a corporation unless, in its legal or practical operation, it has significance for the corporation – merely referring to the corporation will not be enough