s 51(xx): The Corporations Power

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: *foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth*

The court has played particular attention to the word "foreign" "trading" "financial" and "formed". The HC's approach to the trade and commerce power had meant that although it was the primary power that the Commonwealth could rely on to regulate the economic activities, it meant that there were many aspects of Australian economic life that could not be regulated by the Commonwealth, it was not until the HC adopted a more extensive approach to the corporations power that the cth in fact could see and did see the opportunities to expand its economic control.

The significance of the Corporations power in Australia

- NOTE: Corporations coming within the scope of s51(i) are often referred in cases or texts as *Constitutional Corporations.*
- History
  - ★ The Original Narrow View
    - ➢ *Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330.*
  - ★ The New Approach
    - ➢ *Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468*

S51 (xx) was unused for 60 years because of the narrow interpretation given to that section in *Huddart, Parker & Co Pty Ltd v Moorehead.* There it is important to keep in mind that the early HC was dominated by justices who really were determined to prevent the Cth gaining the dominant position within the federation. But in 1971, when the court heard the case of *Strickland v Rocla Concrete Pipes Ltd* , that a slightly more (not much more) expansive reading was given to s51(xx), since then the Cth has come to rely more and more on the corporations power to regulate economic activities through the regulation of the activities, functions and relationships of corporations. When looking at this power, it is important to keep in mind that the corporations power is a non-purposive power, it is concerned with the type of legal person, a legal entity, a corporation. The original narrow view of the court in Huddart, Parker which is a case concerning the Australian Industries Preservation Act which was a predecessor to the trade practices act, under that legislation the controller general customs could demand that corporations and their offices answer certain questions in writing. Certain questions were put to Huddart, Parker and its managing director. They refused to answer the questions and they were prosecuted under the legislation for that refusal. Huddart, Parker and its managing director were fined 5 pounds each. They appealed their conviction, the court in this case consisted of Griffith CJ and Baton, O'Connor, Higgins and Isaacs JJ. The majority (the first 4 judges) all found the relevant provisions of the legislation were invalid. Griffith relied on the doctrine of reserved state powers, this is one of the 2 doctrines that the court were ultimately rejected in the Engineers case. Griffith said that when 51(xx) was read in the context of that doctrine and the context of the powers that were to be seen to be reserved to the states, 51(xx) had to be read narrowly. He

was of the view that 51(xx) only permitted the CTH to control the capacity of a constitutional corporation to enter into a field of activities but once a corporation has entered into that field of activity, the CTH no longer was able to legislate, to regulate, was then put beyond the legislative capacity of the Cth governance. Higgins in addition to generally agreeing with Griffith also gave a slightly broader interpretation, he took the view that in addition to regulating the entry into a particular field by a corporation that the power also enabled the CTH to regulate the conditions under which a corporation could carry on business. Higgins and Griffith both warned of the danger that they saw in giving 51(xx) too expansive an interpretative reading. It was only Isaacs who dissented in this case, he said that 51(xx) permitted the CTH to regulate the conduct of corporations in their external relationships with the public. So 51(xx) allowed the Commonwealth to make laws regulating the relationships and transactions between a corporation and the public. He acknowledged that that would mean that some internal activities of the corporation would be permitted but he also said that ultimately there had to be a limit on the scope of the CTH power in this area. Ultimately the case left the CTH with very little power over the regulation of corporations. Another issue that all judges agreed on, and it is a principle that a court still abides by, is that the wording of the section limits CTH legislative activity in this area to corporations that once they had been formed so they referred back to the wording of the section where it says "CTH makes laws in respect to foreign corporations and trading or financial corporations formed within the limits of the CTH", so to them the fact that the drafters used the word "formed" indicated that the CTH could not have anything to do with corporations either to regulate for the incorporation or to use the power to incorporate a government corporation. This is a principle that the court still upholds, that 51(xx) does not permit the CTH to regulate the incorporation process or allow CTH to rely on 51(xx) to create a government corporation. Because of this extremely narrow scope given to the power, the CTH basically did not use the corporations power for over 60 years. It was not until 1971 when the court heard the case of *Strickland v Rocla Concrete Pipes Ltd* when this changed. The case concerned part 5 of the trade practices act, provisions of the act dealing with restrictive trade practices. The question for the court was whether Rocla Concreate Pipes were in fact subject to the terms of the trade practices act whether or not the CTH could actually regulate anti-competitive activities of corporations. Court said the CTH could regulate the anti-competitive activities of a corporation because they were clearly laws with respect to the topic of 51(xx), although again in this case, the court was not prepared to set the limit of the scope of the power. Again, there were warnings from members of the court about too broad an approach being taken to the scope of 51(xx), so from a very narrow approach taken in Huddart Parker, you have a slight growth in the approach adopted in Strickland. Barwick CJ was of the view that the power was such that for example would allow the CTH to regulate the trading activities of corporations, but that view of itself is problematic because if we say the power was limited to the regulation of the characteristic that brings a particular corporation within the scope of 51(xx), it becomes problematic when you begin to look at firstly financial corporations but particular foreign corporations, it has been consistently rejected that the power is to be limited to the regulation of foreign activities of a foreign corporation. We need to understand what a corporation is within the meaning of 51(xx) is and to look at the reach of the corporations power. 51(xx) refers to 3 types of corporations: foreign, trading and financial. Trading and financial corporations must also be corporations that are formed within the limits of the CTH. Since the scope of the power is restricted by that limitation, it means that any corporation not falling within one of those descriptions will not come within the limits of 51(xx). It is important that we are able to identify, the types of corporations that are subject to 51(xx). One thing you will often see within the texts and cases references being made to constitutional corporations which is just a corporation that

comes within the scope of 51(xx) so either a foreign corporation, a trading corporation, or a financial corporation.

What is a corporation – The reach of the Corporations Power

- '*Foreign* corporations'
  - *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* (*Adamson's* case) (1979) 143 CLR 190
  - *New South Wales v The Commonwealth* (the Incorporation Case) (1990) 169 CLR 482

Very little difficulty in determining this type of corporation, any entity formed under the law of a foreign country and accorded legal personality, either by that foreign country or by Australia and who carries on business in Australia is a foreign corporation. That view was discussed by members of the court in Adamson's case and also the Incorporation case. The cases held in 1979, Australian corporations law still was very narrow in its view in what constituted a corporation, it did not generally recognise a number of commercial entities that were recognised in other jurisdictions. Murphy J said that foreign corporations may include syndicates or joint ventures, things that are common in Europe and other legal systems whose laws of incorporation are based on principles entirely different from those of the Australian states and the United Kingdom. Murphy was prepared to take a broader view of what constituted a corporation, there is not much doubt now that provided a joint venture or a syndicate is incorporated, it would be considered a corporation now for the purposes of 51(xx). In the incorporation case, Mason, Brennan, Dawson, Toothey, Gaudron and McKew all were of the view that to fall within the power of 51(xx) a foreign corporation must be a corporation that is formed outside the limits of the Cth, Deane J said in the context of 51(xx), the word "foreign" and the phrase "formed within the limits of the CTH" should be construed as comprehensive alternatives and that a foreign corporation was for the purposes of the paragraph, one that was formed outside the limits of the CTH. So a foreign corporation is a corporation that is created overseas, given legal recognition overseas or under Australian law and carries on business in Australia.

'Trading'

- The word 'trading' can be interpreted in its current and popular sense, and is not restricted to the denotation it had in 1900
  - *Actors and Announcers Equity Association v Fontana Films Pty Ltd (1982) 150 CLR 169*

The court has consistently taken the view that the word "trading" is to be interpreted in its current and popular sense and should not be restricted to its denotation in 1900. Is there any significance to the fact that the reference in 51(xx) is to trading corporations rather than corporations that trade? Would a difference in wording impact on the types of corporations that could come within the scope of the power? The court has consistently held that the term "trading corporations" covers a substantial range of corporations. The issue was considered in Actors Equity v Fontana Films, in that case the Frazer government had in the late 70s introduced amendments to the trade practices act, s45(D) was primarily aimed at preventing secondary boycotts (where you have a business having an industrial dispute with a union, other unions go out on strike or they impose bans or boycotts in support of the union that is in direct dispute with the corporation) being imposed on businesses. Under s45(D) secondary boycotts were prohibited. s45D(5) imposed vicarious

liability on trade unions for the actions of their members. With respect to the meaning of "trading", Gibbs CJ said the words of s51(xx) suggested that the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws if they are to be valid. In other words, in the case of trading and financial corporations, laws which relate to their trading or financial activities will be within the power, the reasoning of the majority of the court in cases since then has supported this view that the references made to trading are references to the corporations' activities.

'Financial'

- *Re Ku-Ring-Gai Co-Operative Building Society (No 2)* (1978) 22 ALR 621
- *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282

S51(xx) distinguishes financial corporations from trading corporations, what constitutes financial corporations? If a trading corporation is one that trades or is involved in trade, what criteria will be used to determine what constitutes a financial corporation? This issue was considered in *Re Ku-Ring-Gai Co-Operative Building Society*, another trade practices case. Ku-ring-gai co-operative building society had been formed to provide cheap loans to its members (not for profit organisation so all the money that went into the building society went out in the form of loans to its members. Ku-ring-gai argued that they were not subject to the provisions of the trade practices act because they were not a constitutional corporation, they said we are not-for-profit organisation, we do not make a profit from what we do, we do lend money, we do take in savings, but we are not a financial corporation within the scope of 51(xx) and the court disagreed with them. The members of the court particularly Deane J looked at the altruistic qualities behind the building society and also it looked at the other features that distinguished it from other types of corporations such as the fact that they were not for profit. But ultimately, and the other members of the court agreed with him, said that the phrase "financial corporations" is a composite one and obvious reference point is the activity of commercial dealing in finance, namely transactions in which the subject of the transaction is financed, the fact that the applicant's objectives are to provide benefits to its members rather than the carry on commercial activities as for profit, and that the applicant's perform an important social function traced to government funds, is relevant to the characterisation of the applicants but it is not to be seen as conclusive of it. In all of the circumstances, he said each applicant being found carry on a business in dealing in finance and in fact carry on such a business is to be properly characterised as a financial corporation. The issue arose again in *State Superannuation Board v Trade Practices Commission*, State Superannuation Board was the government agency of the Victorian government that looked after the Superannuation of pension schemes of Victorian government employees. Again, the question for the courts was whether they were a corporation for the purposes of s51(xx) and therefore subject to the terms of the trade practices act. The state superannuation board argued that we are not a financial corporation. We are merely the trustees of and we administer the state public servants superannuation funds, they did not make a profit out of it, again they were involved in receiving money, they lent money out, they invested money but they said that they should be seen as being something other than a financial corporation. An unanimous court rejected that argument, and affirmed the view of the court in *Re Ku-Ring-Gai*. The court at page 305 said like that expression "Trading corporation" the words financial corporation are not a term of art, none do they have a special or settled legal meaning, they do no more than describe a corporation which engages in financial activities or perhaps as intended to do so. A corporation that deals with finance for commercial purposes, whether by way of making loans, entering into higher purchase agreements or providing credit in other forms are

involved in an activity of financial dealing even if it is not undertaken for the purpose of carrying on some other business or for profit. Ultimately, the court said that the board was a corporation which was formed by an employer providing superannuation benefits to its employees and those of associated employees but it may nevertheless be a financial corporation if it engages in any financial activities in order to provide or augment the superannuation benefits. So trading corporation is a corporation that is involved in trade, in trading activities. A financial corporation is a corporation that is involved in the provision of finance and other financial activities irrespective of whether they are not for profit or are a for profit corporation.

Intended activities or 'purposes'?

- The 'Distinctive Character tests'
  - ★ The character of a corporation may be determined by reference to its actual or intended activities
    - ➢ *R v Trade Practices Tribunal; Ex parte St George County Council* (the *St George County Council* case) (1974) 130 CLR 533

Since we now have considered what constitutes a trading corporation and a financial corporation, it is now time to consider how we characterise an individual corporation; whether or not it falls into one of those categories. This is where the court has developed some discrete tests that needs to be applied. There are 2 tests that have been applied:

- Purpose test
- Activities test

The issue was considered in *R v Trade Practices Tribunal; Ex parte St George County Council.* In that case, the court said that the character of a corporation was to be determined by reference to its actual or intended activity. They applied intended activities test or a distinctive character test. Why was a corporation formed? What was the purpose for which the corporation was formed? St George County Council was a number of county councils (which were bodies that were constituted and were made up of members of the local government areas that they operated in e.g. St George was constituted by Rockdale, Hurstville, Sutherland councils). The county councils were formed to provide electricity to residents and commercial operations, whereas now we buy electricity from AGL, up until the 1980s, the supplies were at the various county councils. They also engaged in a limited other activities, one of those was that they provided electrical appliances to local residents at a discounted rate. An issue arose under the trade practices act; whether the county councils were engaging monopolisation that was an exemptible trade practice under the trade practices act. St George county council said we are not subject to it, we are not a constitutional corporation therefore we are not subject to any law that relies on s51(xx). Their argument was accepted by the HC. The majority found that the county council was not a trading corporation for the purposes of the trade practices act or s51(xx). The majority here with only Barwick dissenting was of the view that a constitutional corporation was to be defined by reference to the purpose(s) for which it is being formed rather than the activities that it undertook. In the case, the purpose test was adopted, you look to why the corporation had been formed. But this view was challenged years later in the Adamson case where Adamson who played for a team which was part of the West Australian football league, he wanted to transfer to a SA team but under the rules of the West Australian football league, permission of both the team that he was leaving and also the league itself was required before the transfer could go ahead and in fact permission was

refused. He challenged the validity of the leagues' ability to refuse on the ground that it was a form of restrictive trade practice. West Australian football league said we are not subject to the trade practices act because we are not a corporation within the limits of 51(xx) therefore we are not subject to any cth law on corporations. The court in rejecting their argument also rejected the purpose test that had been adopted in St George County Council and instead adopted an activities test. So in Adamson's case, the court said you do not look to the purpose for which a corporation was formed to determine whether or not it is a trading or financial corporation, you look to the activities that it undertakes. The WA football league said we are not a trading corporation, we are a sporting organisation, we might have some trading activities but we are ultimately a sporting organisation and therefore not a trading corporation. The court rejected that argument, it said that although the league had been formed for the purpose of sporting activities and certainly a majority of what they did was undertaking sporting activities that in fact they were involved in the sale of tickets to matches, in the sale of merchandise, in the sale of food and drinks at the venues, all of which were trading activities, and in applying the activities test, the court found that the league was in fact a trading corporation. Mason J said a trading corporation is to be seen as one whose trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation. Murphy expanded a bit on that and said the description trading corporation does not mean a corporation which trades and does nothing else, or in which trading is the dominant activity. A trading corporation may also be a sporting, religious or governmental body as long as the trading is not insubstantial the fact that trading is incidental to or even supports other activities does not prevent it from being a trading corporation. In State Superannuation Board, that view was affirmed that provided the trading or financial activities of a corporation formed a significant part of the activities undertaken by the corporation, it does not mean predominant, all it is required is that it not be insubstantial that they will be seen as being a trading or financial corporation.

- Substantial or significant activities
  R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Adamson's case) (1979) 143 CLR 190
    - ★ These substantial or significant activities need not form a predominant part of the corporation's activities
      State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282
- A test of intended activities applies to 'shelf' companies
  Fencott v Muller (1983) 152 CLR 570

•Between St George County Council and Adamson case, we have a shift in the view of the court as to how you characterise a corporation as being trading or financial. We move from looking at the purpose from which the corporation was formed to the activities that they undertake. The purpose test however does still have a role to play. The purpose test is applied where you have a corporation such as a shelf company that has not yet undertaken any activities. In Fencott v Muller, the Fencotts brought O pty ltd which was a shelf company, it had been created and the stated purpose in the corporate constitution was that it was to undertake trading activities. But the Fencott was only going to use it as a mere trustee of a unit trust and for it to wind up the activities and affairs of the trust. But an issue arose concerning alleged misleading and deceptive conduct by the Fencotts, and the question for the court was whether the Fencotts and O pty ltd was subject to the misleading and deceptive conduct provisions of the trade practices act. They said we have not carried on any activities, we are not a trading corporation because we have not undertaken any trading activities and the court rejected that argument. They said in circumstances where

you have a trading or financial corporation, or where you have a corporation that has been formed and not yet undertaken any activities rather than applying the activities test, you apply the purpose test. In other words, you look to the stated purpose for which the corporation had been formed, you look to the corporation constitution for the stated purpose, the stated purpose of the shelf company was to trade, therefore according to the court O pty ltd was in fact a trading corporation. So here you've got the activities test being applied where a corporation has in fact been involved or has undertaken activities whether it be trading or financial, but where a corporation has not undertaken any activities, you use the purpose test, what was the purpose for which the corporation was formed? The minority in this case argued a slight modification, but the majority did not accept that view. The minority argued for a subjective intention test that rather than looking to the stated purpose for which the corporation was formed, the minority argued that you should look to the intention of the directors in forming the corporation. But the majority were not prepared to accept that, they said we look to the stated purpose, the stated purpose here was trading therefore it was a trading corporation. No matter what test you apply, so whether you place the emphasis on the purpose for which the corporation was formed or the activities that it undertakes, it is the characteristic of either trading or being involved in financial activities that will bring a particular corporation within the scope of 51(xx).

Trading and financial corporations 'formed within the limits of the Commonwealth'

- No general power to incorporate trading or financial corporations
  - *Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330*
  - *New South Wales v The Commonwealth (the Incorporation Case) (1990) 169 CLR 482*
- The Commonwealth may incorporate companies as a matter incidental to other heads of power
  - *Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468*
  - *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29

•Foreign corporations are those corporations formed outside the limits of the cth, the HC has been quite strict with its reading, and its been consistently adopted from 1909 in Huddart, Parker through to the incorporation case, through to work choices in 2006 that a trading or financial corporation that come within the scope of 51(xx) must have been formed within the limits of the cth and the courts said that the use of the word formed means that the cth's power, therefore 51(xx) does not become effective until the corporation has in fact been formed. 2 implications arise from this; 1) 51(xx) is not a general power to regulate the formation of corporations, that has been a problem in corporations law for decades until a dozen years ago because it meant that it was almost impossible to achieve a uniform national corporations scheme because states held the power to regulate the formulation of corporations, the cth's power no matter how limited or how wide it might be, did not come into play until after the formation . Numerous attempts to put together a uniform national corporation law failed, each of them for different reasons, the closest we ever got to a successful scheme was in the late 1990s when there were uniform laws introduced throughout Australia by its states and by the cth, but it fell to pieces when the HC found one aspect of it was invalid. One of the problems when you have a distribution of powers between the cth and the states and where you attempt to have a uniform scheme is whose courts hear the matter? If some of the powers belong to the state and some of the powers belong to the cth, does that mean that people if they have various issues concerning corporations may be required to go to different courts to have a determination of those matters? Under a scheme that was introduced in the mid1990s there was cross vesting of

jurisdiction so state courts were vested with jurisdiction to hear the cth law on these matters, and federal courts were vested with the jurisdiction to hear state legal matters on those issues. Chapter 3 allows for state courts to be vested with the judicial power of the cth but there is no mention of federal courts being able to exercise the judicial power of the states, as a result of the decision in the boilermakers case where the court clearly said that federal courts created under chapter 3 of the constitution could only exercise the judicial power of the cth, it meant that the vesting of state jurisdiction in the federal courts was doomed to failure. We do finally have a fairly uniform corporations scheme throughout Australia but that has come about as a result of the referral of state powers to the commonwealth. So the end result is that you no longer have the problem that you have had with the 1990s scheme where there is a problem of having to go for one court for one issue and then going to another court for another issue.

Another issue that came about from Huddart Parker was not only that the cth did not have the power to regulate the incorporation of a corporation, the cth could not rely on 51(xx) to create a government corporation. That view was expressed in Huddart, because the word formed meant that the cth could not enter the field until after the corporation had in fact been formed, again in the incorporation case, the view was upheld but the court has not accepted the view that narrow reading of 51(xx) limits other powers, so the court in Strickland confirmed that the position adopted in Australian National Airways v The Commonwealth that the cth could create a government enterprise/corporation in reliance on other powers. In that case, Australian National Airways had argued that the cth could not create a government airline or a government corporation to run an airline because according to their argument because 51(i) should be read narrowly, should be seen as limited by 51(xx) but the court rejected that argument. Provided that the cth can find another head of power and that the corporation it creates is for the purpose of that power, it can create a corporation, it just cannot rely on 51(xx) to create a government corporation.

The scope of the corporations power

- The early view
  - *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330
- A wider view: a power to regulate the trading or financial activities of trading or financial corporations
  - *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468
  - *R v The Judges of the Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235

What can the cth regulate in reliance on the corporations power? The initial very narrow view was adopted in Huddart v Moorehead, according to the majority in that case, the cth could only regulate the entry of a corporation into a particular field of activity. A wider view was adopted in Strickland case and also in R v The Judges of the Australian Industrial Court, in those cases the court was of the view that the power was broad enough to enable the cth to regulate the trading activities of trading corporations or the financial activities of a financial corporation. But it is still not a very broad view, the cth's power was still severely limited. After Huddart, the cth attempted to amend the constitution, there were 3 referendums that were held to broaden the scope of 51(xx) but each of those referendum were rejected by the people. That formed part of the dissent by Kirby J in the workchoices case, in workchoices, Kirby said we cannot expand the scope of a power the way it has been argued by the cth because the expansion has been rejected by the people. His argument was that the court should be guided in its constitutional interpretation by the outcome of referendums where referendums had in fact been held but that view was not accepted by the

majority in Workchoices. So we have moved from 1909 where the cth can only regulate corporations in a particular field, by the 1970s, the cth can now regulate trading activities of trading corporations and financial activities of financial corporations. Problem with this is what about foreign corporations? The cth cannot really regulate the foreign activities of foreign corporations.

- Wider still: a power to regulate the activities of persons who harm the interests of s 51(xx) corporations
  - *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169
- A power to regulate *any* activities of a s 51(xx) corporation?
  - *Strickland v Rocla Concrete Pipes*
  - *Commonwealth v Tasmania* (the *Tasmanian Dam* case) (1983) 158 CLR 1
- *BUT NOW*
  - *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1

In the 1970s, you have this slightly wider view of this power, in the 1980s, a more expansive view of the power adopted. Actors Equity v Fontana Films, s45D of the trade practices act, the secondary boycott provisions. In that case, in discussion of the scope of the corporations power, the court said that in addition to enabling the cth to regulate the trading activities of trading corporations and the financial activities of financial corporations, there was a power that extended to allow the cth to regulate the activities of persons who might harm the interest of 51(xx) corporations. So the secondary boycott provisions of 45D were a valid exercise of the power because the purpose of them was to protect constitutional corporations from harm that might arise from the imposition of secondary boycotts. But it was argued in the case that 51(xx) should be seen as a power to regulate any activities of a 51(xx) corporation. That was a view that had been given some consideration in Strickland but had generally been rejected. It was also considered in the Tasmanian Dam case where there was a slight expansion of the power, the majority of the court here were of the view that 51(xx) extended to enable the cth to regulate the activities of a trading or financial corporation where those activities were undertaken for the purpose for which the corporation existed, so in other words, cth could regulate activities that were ultimately for the purpose of trade, for trading corporations or financial activities of a financial corporation. In Tasmanian Dam, the cth had introduced legislation to prevent Tasmania building the Dams on the Franklin and Gordon rivers, cth relied on a number of powers, they relied on the external affairs power, it is a registered world heritage site, we are under international obligation to protect it, they argued trade and commerce power, they argued that there were aspects of the race power but they also argued corporations power. On the issue of corporations power, Tasmania argued that Tasmania Hydro was not a trading corporation and even if it was the building of a dam was not a trading activity and therefore was not subject to cth control. The majority rejected that argument, they said that the activity which was prohibited by the cth, the purpose of the building of the dam was to generate electricity which would be sold by Tasmanian Hydro so the activity that the cth was regulating may not have been a trading activity but it was an activity of the corporation that would allow them to undertake trading activities, so it was a slight broadening of the view that the cth could regulate the trading activities of a trading corporation.

New South Wales v Commonwealth (WorkChoices Case) (2006) 231 ALR 1

- The main challenge concerned the use of the Corporations Power to regulate industrial relations.

- Amongst other things, the challengers argued:
  - ★ The Corporations Power only permitted the regulation of *'external'* relationships, not *'internal'* relationships and the relationship between a constitutional corporation and its employees was *'internal'*.
  - ★ A law was not within the Corporations Power merely because it confers rights and imposes obligations on constitutional corporations.

Workchoices was a challenge to the Howard's government of the introduction of the Workchoices legislation which was reliant on s51(xx) for its validity. Now the challenge to the legislation primarily concerned the use of the corporations power to regulate the industrial relations of corporations. There were a few arguments put forward by the applicants here. Among them, they argued that the corporations power did not extend to permit the cth to regulate the internal relationships of a corporation. They accepted in their submission that in Strickland the court has accepted the view that and even as far back as Huddart, the court then had been prepared to accept the view that there were aspects of the relationships between a corporation and the public that may come under the scope of the corporations power. But NSW and the other applicants here said industrial relations were an internal relationship, the relationship between the employer and the employee and therefore it does not come within the scope of 51(xx). It was also argued by the applicants that the mere reference to a corporation was not sufficient to bring within 51(xx) and that is quite correct. A law to be able to properly characterised with respect to constitutional corporations must refer to the rights, duties, obligations of a corporation, a corporation must be something more than just a mere point of reference in a legislation.

The majority decision: Gleeson CJ and Gummow, Hayne, Heydon and Crennan JJ.

- A law regulating the '*activities, functions, relationships and business*' of a constitutional corporation or creating/modifying the rights, privileges or obligations of a constitutional corporation was within the Corporations Power.
- In effect the Court adopted an 'Object of Command test'

The majority rejected the argument of the applicants. They were of the view that the law which regulated the activities, the functions, the relationships and business of a constitutional corporation or a law that created or modified the rights, privileges, obligations of a constitutional corporation would be within the scope of the corporation power. What the court did here was adopt an object of command test, 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.

The majority decision

- Accepted reasoning of Gaudron J (dissent) in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375:
- "I have no doubt that the power conferred by s 51(xx) of the Constitution extends to 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 those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business."

The majority to a large degree relied on the reasoning of Gaudron J in an earlier case, *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union.* Gaudron had

been in dissent in that case. Ultimately, the court was of the view that 51(xx) extended the cth's constitutional power over corporations to the regulation of the activities, functions, relationships and businesses of a constitutional corporation, both internal relationships and external relationships. On the issue that had been argued by the applicants that industrial relations is an internal activity, not an external activity, the majority said they did not have to decide whether industrial relations was an external or internal relationship because according to their view now, the power extended to the regulation of both.

The minority-Kirby and Callinan JJ.

- The federal balance had to be maintained. Consequently, the Corporations Power was subject to the Industrial Disputes Power.
- Either the Corporations Power could not be used to regulate industrial relations or was subject to the same limitations as the Industrial Disputes Power (ie. being limited to making laws about conciliation and arbitration of interstate industrial disputes).
- This meant the entire WorkChoices Act was invalid – although only part relied on the Corporations Power.

But probably the most interesting aspect of workchoices are the dissenting judgement of Kirby and Callinan JJ. One of the arguments that has been advanced by the applicants in this case was that 51(xx) should be read in light of 51(36)- the conciliation and arbitration power, so the cth under 51(36) has the power to make laws with respect to interstate industrial disputes, disputes across the state borders, the applicants had said as a result of this provision states were responsible for the industrial relations law of purely intrastate industrial relations, they argued that to take a view that 51(20) was not limited, or was not to be read as to be limited by 51(36) would in fact disrupt the federal balance in the distribution of powers. This federal balance issue was quite important to the applicant's argument and was seen to be important to Kirby and Callinan. On that issue, the majority said, 1) doctrine of state powers was done away a long time ago 2) there is no constitutional requirement that there be some balance in the distribution of powers between the cth and the states that must be maintained. Both Kirby and Callinan saw the federal balance had to be maintained, therefore 51(xx) should be subject to the industrial dispute power, the conciliation and arbitration power. They saw that any power given to the cth under 51(xx) to regulate the industrial regulations of a corporation should be limited to those circumstances where it involves cross border disputes but that was rejected by the HC, what is interesting though is the fact that the majority played down the importance of this notion of a federal balance. Jump forward 3 years in the Pape case in 2009, you have the HC in Workchoices under Gleeson taking a particularly broad view of the corporations power and rejecting the notion that some federal balance had to be maintained. In Pape's case, the court under French CJ took quite a few steps backward on the issue of the federal balance. According to the court in Pape, the federal balance is important, they certainly discussed the concept of federal balance but they were not prepared to take a view that the federal balance, as argued by the majority in Workchoices, was not a constitutional requirement. Although the majority in Workchoices really played down the importance of a federal balance, that is certainly not the view of the current HC under French CJ. Where are we now as far as the scope of the power? 51(xx) is a power to regulate the activities, functions and relationships of a corporation. All that is necessary to bring the corporation within commonwealth regulation is that it could either be a foreign, a trading or a financial corporation.

- **Implied Incidental Power**
  - *Fencott v Muller (1983) 152 CLR 570*

- ★ *So long as there is a reasonable connection between a law's direct legal operation and some matter directly within section 51(xx) of the Constitution, the law will be one with respect to the subject matter of section 51(xx) of the Constitution*
  at 598-9 per Mason, Murphy, Brennan and Deane JJ, at 583-4 per Gibbs CJ
- ➢ *Actors and Announcers Equity Association v Fontana Films Pty Ltd (1982) 150 CLR 169*

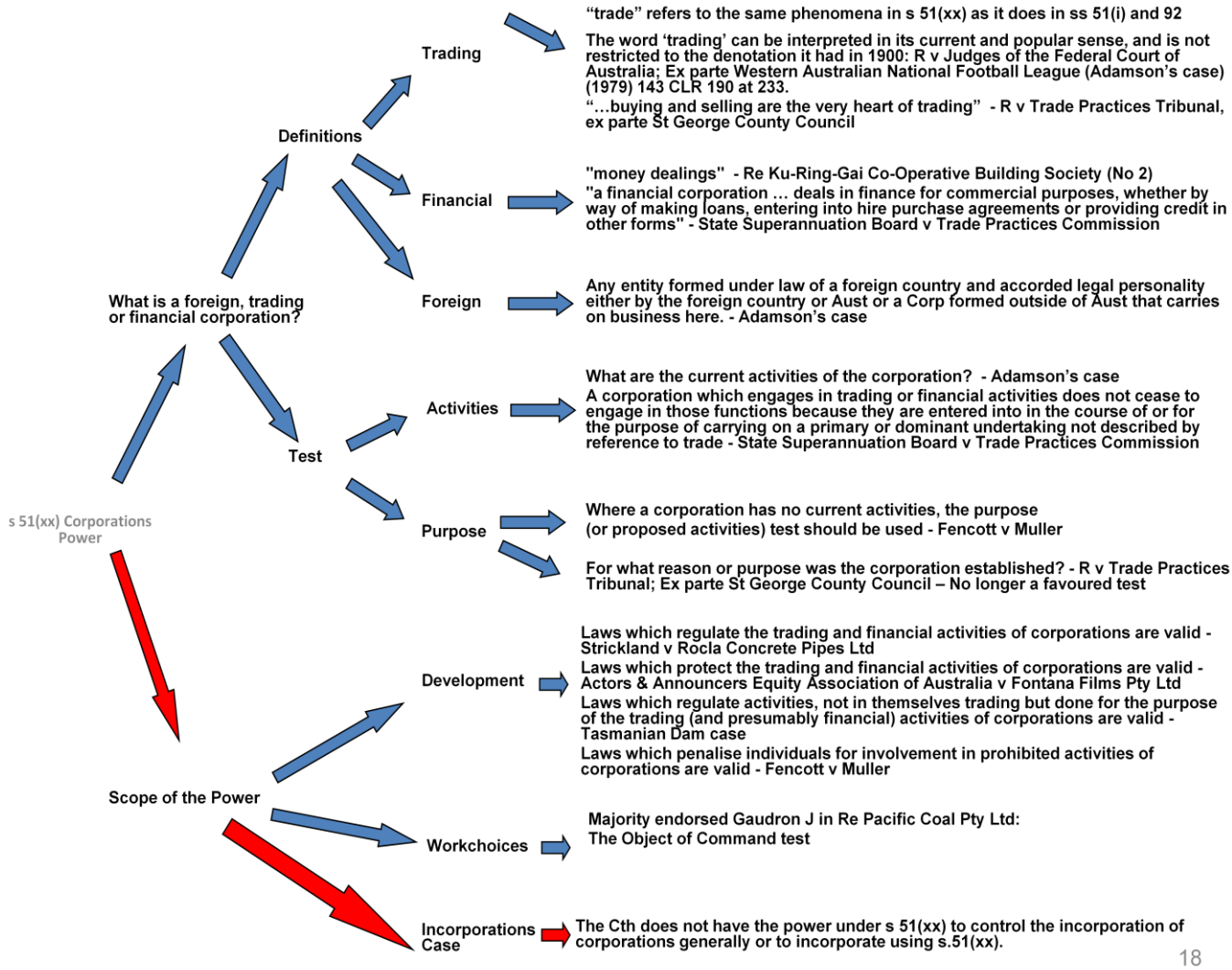
In every power, there is an incidental power wide enough to enable the main head of power to be effectively exercised. When we are characterising powers, we have different tests depending on which type of power it is. With each of these test, what you are attempting to determine is if there is a sufficient connection between the law and the subject matter of the power. With an implied incidental power, you apply the purposive test to establish that there is a reasonable connection between the law and the way the law operates and the head of power. So the question you need to ask with implied incidental power is does the law achieve a purpose within the scope of the direct grant of power itself? But attached to the corporations power, there is the implied incidental power. One thing that the court has cautioned on is whether it be an exercise of an implied incidental power or whether it be an exercise of the direct head of power itself, there must be this connection between the law and the power. It is not good enough, as raised in Actors, that corporations merely be used as a point of reference. In Actors, the court said that with s45D(5) the vicarious liability provisions, it was not sufficient that corporations were used as a point of reference. The law actually had to be about corporations, either for it to come within the direct head of power, it had to affect the rights, duties, obligations, powers and privileges of a corporation or with the implied incidental power, it had to be a law to achieve a purpose under the corporations power. With respect to s45D(5), the court said this is not a law about the corporation, it is a law regulating trade unions and therefore it cannot be characterised either directly and incidentally as being a law about corporations, therefore that provision was invalid because it did not come within the scope of either 51(xx) or the implied incidental power attached to 51(xx).

Characterisation

- What tests of characterisation apply?
  - ★ *Re Dingjan; Ex parte Wagner (1995) 183 CLR 323*
  - ★ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309*
  - ★ *Tasmanian Dam Case (1983) 158 CLR 1*

What test of characterisation when it comes to the corporations power? It is a non-purposive power, so the test to be applied is; does the law address the rights, duties, powers, privileges or obligations in that it either creates, regulates, modifies or abolishes those of a corporation. An example of the way in which the court has approached this is to be found in the Dingjan case. Mr and Mrs Wagner had a contract with Tasmanian P Forest holdings to transport timber to timber mills. The Wagners then subcontracted the Dingjans and the Ryans to transport the timber. Tasmanian forest holdings altered the terms of its contract with the Wagners, the Wagners then altered the terms of their contract with the Dingjans and the Ryans, under the cth Industrial relations act, the industrial relationships commission had the power to vary unreasonable or unfair contracts between corporations and others. The Dingjans sought a review of the contract as modified by the Wagners, so the question for the court here was; were the powers given to the industrial relations commission exercisable over a contract it entered into between the Wagners, the Dingjans and the Ryans? The court said no, they said there had to be in the law for it to be applicable

to a particular contract, a relationship between that law and a constitutional corporation, certainly the provisions of the act would have applied to modify contracts between Tasmanian P and the Wagners, because Tasmanian P was a constitutional corporation but the Dingjans and the Ryans and the Wagners were not corporations, they were sole traders and partnerships and therefore were not subject to 51(xx), commonwealth regulation. In applying the test of characterisation, the court affirmed that you look to whether rights, duties, powers, privileges, obligations of a corporation have been created, modified or abolished to determine whether there is a sufficient connection between the law and the head of power itself. In Dingjan, they were merely picking up on a view previously expressed in *Jumbunna Coal Mine* and Tasmaniam Dam case. To see if it is a direct exercise of the head of power, courts use the rights, privileges, powers test or use the purposive test when it comes to the exercise of the implied incidental power.



The accepted test is now the activities test. You only use the purposive test if the corporation has not yet undertaken any activities. Provided the law can be seen as making a corporation as the object of command, that it will be a valid exercise of the corporations power. The only consistency that we really have with respect to 51(xx) is that the view from Huddart that 51(xx) only comes into play after a corporation has been formed is still accepted by the court. The use of the word formed in 51(xx) has consistently been important to the court in determining that the cth cannot regulate the incorporation of corporations or it used 51(xx) to actually create government corporations.