

## Corporations Power: Section 51(xx) – Subject Matters Power

### Section 51(xx)

- 1) The Parliament shall, subject to this Constitution, have the power to make laws for the peace, order and good government of the Cth with respect to: foreign corporations, and trading or financial corporations formed within the limits of the Cth.

### Summary

- 1) Subject matters power, therefore, must establish sufficient connection to be valid.
- 2) Is the law supported by s 51(xx)?
  - a) A question of whether the law is valid
  - b) Starting point: WorkChoices
- 3) Assuming the law is valid, does the law apply to a particular corporation?
  - a) Foreign
    - i) Formed outside of the Commonwealth (*Incorporations Case*).
  - b) Trading
    - i) Does it engage in substantial trading activities or have a trading purpose? (*Adamson's Case*)
    - ii) No need to profit - making revenue is enough (*Adamson's Case*).
    - iii) Trading activities must not be insubstantial (*Adamson's Case*).
  - c) Financial
    - i) Does it engage in substantial financial activities or have a financial purpose?
    - ii) Financial activities need not be the company's predominant activity, but merely form a substantial portion of its total activities (*State Superannuation Board*).
    - iii) Purpose test may be useful when corporation has not begun (*State Superannuation Board*)

### What is a corporation

- A distinct legal person, separate from its shareholders, directors and employees (separate legal personality)
- Capable of having legal rights and obligations.
- Usually created by a process called 'incorporation' or by statute.
- Corporation must already have been formed. The Cth cannot make legislation to form a corporation: *Incorporation Case*.

### What aspects of corporations can be regulated? (reach of power)

#### Concrete Pipes

- Narrow view
  - Aspects/activities must be linked to corporations, such as trading activities of trading corporations.
- Broad view (current position)
  - No limit.
  - Provided the corporation has the characteristics that bring it within s 51(xx), any aspect or activity can be regulated.

## CP and Third Parties

### *Actors and Announcers Equity Association v Fontana Films Pty Ltd*

- Facts
  - A law prohibiting conduct which would cause damage to the business of a corporation was held to be supported by the CP, because it protected corporations from the conduct of outsiders.
  - Section 45D of the TPA protected a corporation from a secondary boycott.
  - Union was preventing the supply of actors to the company.
  - The law regulated unions, not corporations.
- Held
  - Even though it regulates others, the conduct regulated may cause substantial loss/damage to the business of a trading corporation.
  - Therefore, it was within the scope of s 51(xx).
  - Majority held that no nexus was required.

### *Re Dingjan*

- Facts
  - IRA gave IRC the power to examine unfair contracts imposed on independent contractors; they could be set aside wholly/in part/varied (s 127).
- Held
  - A law relating to business of a constitutional corporation was held to be outside the scope of the corporation's power.
  - A law operating on the conduct of outsiders will not be within the power conferred by s51(xx) unless that conduct has significance for trading, financial or foreign corporations. Thus, in this case, the terms of a contract between a contractor and a sub contractor had no significance for the corporation. Thus, the law was outside the scope of the corporation's power.

## Important Case: WorkChoices Case

- This case accepted the broad view.
- Legislation regulated all aspects of relationship between corporations and their employees.
- Majority held that the laws were valid
- Workplace Relations Amendment (Work Choices) Act 2005 (Cth) made extensive amendments to the Workplace Relations Act. The new legislation regulated every aspect of the relationship between corporations and their employees (pay rates, breaks, leave entitlement, role of unions and industrial action etc.)
- Too much power in the hands of employers - legislation was controversial.
- A number of unions challenged the legislation in the high court.
- The heads of power in s51 are to be interpreted by reading the terms in context.
- They could find no basis in the text of the constitution for limiting s51(xx).
- Thus, rejected the plaintiff's argument that the corporations power should be interpreted narrowly.

- Judges referred to Gaudron J's judgment in Re Dingjan. Gaudron J said that the Corporations power could be used to regulate employees AND subcontractors of corporations.
- Gaudron's statement from Re Pacific Coal was adopted:
  - 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 sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters [i.e. activities, functions, relationships and the business of a corporation], to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those [people] whose conduct is or is capable of affecting its activities, functions, relationships or business [i.e. laws regulating the way that third parties interact with corporations].
  - Note: cite this quote as: WorkChoices, quoting Gaudron J in Re Pacific Coal.
- Breaking the statement into steps
  - (1) First, activities of corporations formed in Australia signify whether they are trading/financial corporations (foreign corporations must do business within Australia but have been formed outside of Australia).
  - (2) Second, corporations power extends at the very least to the business functions of corporations and their business relationships.
  - (3) Once the previous step is accepted, follows that power also extends to persons by and through whom they carry out those functions and activities (including people working)

### Breaking down Gaudron's Statement

- Gaudron is saying that the corporations power extends to, or allows Cth to make laws about certain things.
- Laws regulating the activities, functions, relationships and business of a corporation; creating rights and privileges belonging to such corporations; imposing obligations on corporations. All these laws would operate directly on corporations. That is, a corporation may, must, may not, must not do something = laws operating on corporations directly.
- Corporations power extends to those through whom the corporation acts (including directors), its employees and shareholders. Thus, a law could not directly apply to corporations and still fall within the scope of the CP.
  - So, if a law is applying to the employees of a corporation, then this is the section of Gaudron's quote that needs to be referred to.
  - BUT, be careful, the quote does not explicitly say any law regulating those through whom the corporation acts are within the scope of the power. It says, such a law will be within the scope of power if it's in respect of those matters (i.e. in respect of the activities, functions, relationships, business, rights and privileges of corporations).
- Power can be used to make laws that do things to corporations or for corporations, and also can be used to regulate people who are part of the corporation.

- Corporations power can be used to regulate the activities, functions, relationships and the business of a corporation (that is, almost everything a corporation does). The power also extends to laws conferring rights and privileges on corporations and imposing obligations on corporations.
- Thus, a law requiring corporations to do, or refrain from doing something, is likely to fall within the corporation's power.
- The Cth has wide powers to regulate what corporations do.
- The corporations power can also be used to regulate 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 (this is referring to third parties who might affect these things). HOWEVER, can only be used to regulate aspects of their conduct that are in relation to matters such as the activities and functions of corporations.
- This case confirms that the CP has extensive reach.

### Key Findings

- Majority rejected that we need to narrow the scope of the CP by reference to the idea of federal balance.
- HC rejected the argument that the legislation could be used to regulate the external but not the internal conduct of corporations.

### Examples of laws 'with respect to' constitutional corporations

- A law regulating restrictive trade practices between corporations: Strickland v Rocla Concrete Pipes Ltd (Concrete Pipes Case)
  - That is, regulating corporations trading activities.
- A law prohibiting a secondary boycott (conduct hindering or preventing the supply of goods or services to a corporation or the acquisition of goods or services by a third person from a corporation, where the conduct would cause damage to the business of the corporation: Actors and Announcers Equity Association v Fontana Films Pty Ltd
- A law prohibiting corporations for the purposes of their trading activities, from carrying out excavation works, building, damaging buildings, damaging trees, making roads or using explosives on certain land: Tasmanian Dams
- Comprehensive regulation of corporations' workplace regulations: WorkChoices

### Application of s51(xx) in Workchoices

#### Sections 365 & 366 Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

- Section 365: offence to include prohibited content in a workplace agreement.
- Section 366: offence to make a misrepresentation, in relation to a workplace agreement, that a particular term does not contain prohibited content.
- The agreements referred to in these sections were defined as agreements between an employee and a corporation.
- A person committing an offence under this section need not be a corporation or in any way connected to a corporation.
- Majority held that these sections were supported by the Corporations power because they formed an integral part of a wider set of provisions which forbid employers and

employees from making or seeking to make workplace agreements with prohibited content.

#### Sections 755(1)(a) WPA Act

- Restricted union official right to enter workplaces occupied or otherwise controlled by a constitutional corporation.
- Majority held that the connection lies in the controlling of entry to a constitutional corporation's premises and was therefore a sufficient connection to the corporation power.

#### Schedule One WPA Act

- Required unions and employers' associations to meet certain standards, such as to register under the act and become incorporated under the act.
- Held to be valid.

### Examples of laws outside the scope of the CP

- Re Dingjan
  - A law giving the industrial relations commission power to vary or set aside unfair contracts 'relating to the business of a constitutional corporation'
    - Note: the CP is not a power to vary contracts between a corporation and a person, it's a power to vary contracts relating to the business of a corporation.
    - The law in question here was regulating to conduct the relationship between two individual persons (i.e. contractor and sub-contractor) not an individual person and the corporation.
    - Law held to be beyond the scope of the CP
    - Law did not actually do anything that was relevant to the corporation.
- Williams v Cth
  - A law authorising the Cth to give money to corporations.
  - Held that this law was invalid because a law that does no more than authorise the Cth to give money to corporations, does not effect the legal rights of corporations. It has no effect on the legal status or operations of the corporations.
- NSW v Cth (Incorporations Case)
  - A law providing the incorporation of trading and financial corporations. That is, a law that allowed the Cth to incorporate corporations.
    - Section 51(xx) 'foreign corporations, and trading or financial corporations formed within the limits of the Cth'. That is, the Cth can only make laws with respect to corporations that have already been formed. Thus, the Cth could not form corporations.

### Are these laws 'with respect to corporations'?

- No corporation shall sell cigarettes
  - Yes, relates to trading corporation.
- No person shall buy cigarettes from a corporation

- Yes, law is with regards to a person in respect of the activities, functions, relationships, business, rights and privileges of corporations.
- No employee of a corporation shall smoke a cigarette at any time or place (i.e. cannot smoke ever, even at home).
  - No, this law does not appear to be regulating the activities of employees in respect of corporations, it is simply regulating them in general.

## Foreign Corporation

- Corporation that has been incorporated outside of Australia: Incorporation Case

## Trading Corporations: Activities Test

- R v Federal Court of Australia; Ex parte WA National Football League (Adamson's Case)
  - Depends on the trading activities in which the corporation engages.
  - This case did not define the extent of the trading activities. This is a question of fact and degree, which was discussed in State Superannuation Board of Victoria v Trade Practices Commission; Tasmanian Dams
- State Superannuation Board of Victoria v Trade Practices Commission; Tasmanian Dams
  - Trading activities need not be the primary or dominant activities of the corporation, but they must be substantial or significant.

## Financial Corporation

- State Superannuation Case
  - A financial corporation is one which engages in substantial financial activities
- Spending money is not a financial activity for this test.
- Financial activities include:
  - Making loans, providing credit, banking, providing financial advice, dealing in money etc.
- A question of fact and degree.

## Tasmanian Dams: The Activities Test

- This case involved a question of whether the Tasmanian Hydro-Electric Commission was a trading corporation
- Trading activities included:
  - Selling electricity, both in bulk and by retail, on a very large scale.
    - Selling services in exchange for money.
- Non-trading activities
  - Generating electricity for distribution to the public.
  - Constructing dams and plans.
  - Policy making
- Held that this was a trading corporation because while it has substantial non-trading activities, it also had substantial trading activities. This was enough to make it a trading corporation.

## Trading and financial corporation: the purpose test

- If the corporation has no activities, it will be a trading or financial corporation if it has a trading or financial purpose: *Fencott v Muller*
- Company was a shelf corporation, which meant that it had not yet conducted any activities.
- Court looked at the company's constitution to determine its purpose.
- Found that the purpose of the company included conducting financial activities such as making loans and trading activities.
- Thus, the court found that the company's purpose was for trading or financial purposes.
- Purpose test may be relevant as a supplement to the activities test: *St George County Council; Adamson's Case*

### *Queensland Rail*

- QR's purposes included 'managing railways, providing rail transport services etc.'
- QR was to 'carry out its functions as a commercial enterprise'
  - Clearly, looking at its constitution, QR had the purpose of a trading corporation.
- Activities: labour hire only.
- High court looked at both purposes and activities
  - In combination, these considerations require to the conclusion that the authority is a trading corporation. It is not necessary to consider which of them (i.e. activities or purposes) is or are necessary or sufficient to support the conclusion.

## Important Case: Adamson's Case

### Facts

- Determining whether a corporation is foreign, trading or financial corporation for the purposes of s 51(xx).
- Brian Adamson (A) played for the West Perth Football Club in the 1970s.
- A wanted to transfer from West Perth to the Norwood Football Club. To do this, he needed clearance from the State football league, which was the WANFL in this case.
- A's request was denied, so he brought an action under the Trade Practices Act (Cth), claiming that this was an unlawful restraint of trade.
- However, the TPA (Cth) would only apply if the WANFL, SANFL and West Perth FC were trading corporations.
- Thus, the question for the HC was whether these corporations could be classified as trading corporations.

### Decision

- Mason J
  - A corporation is a trading corporation if its trading activities form a sufficiently significant proportion of the overall activities as to merit its description as a trading corporation.
  - Mason J relied on the activities test.
  - Not every corporation which is engaged in trading activities is a trading corporation. The trading activity of a corporation may be so slight and so

incidental to some other principle activity that it could not be described as a trading corporation.

- It is not simply a question of whether a corporation engages in trading activities. You must look at the amount of trading activities and consider whether they are sufficiently significant.
- Question of fact and degree.
- Purpose of WANFL
  - The promotion, control, management and encouragement of Australian Rules Football matches and competitions.
  - Selling tickets, membership, renting out premises, selling broadcasting rights, catering, raising money through advertising and sponsorship, selling a weekly program and parking fees.
  - These trading activities were considered so substantial that they were in fact the principle activities of the football league.
  - Under WANFL's constitution, income was to be applied solely to fostering Australian rules football and no part of the profits were to be passed on to members.
  - The club did engage in significant trading activities. Its main source of income was payment from the football league for the club's participation.
  - Mason J concluded that the club carried on the game of football as a trade.
  - He characterised WANFL as a trading corporation.
- Key finding
  - This case establishes that we tell whether something is a trading corporation by looking at its activities.

## Important Case: State Superannuation Board of Victoria v Trade Practices Commission

- Held that the test for whether something qualified as a financial corporation for the purposes of s 51(xx) was the same as the test for trading corporations.
- The test is based on the financial activities in which the corporation engages but these activities need not be the primary or dominant undertaking of the corporation.
- In this case, SSBV had the purpose of providing super benefits to state employees. In the course of its investment of money into superfunds, it granted large mortgages. This granting of mortgages was significant enough to characterise the SSBV as a financial corporation.

## Important Case: Cth v Tasmanian Dams Case

- Test for whether something is a trading corporation is the substantial activities test.
- Tasmanian hydro-electric Commission (THC) was a government controlled statutory corporation that generated and sold electricity on a large scale.
- THC did have significant non-trading activities but it also had substantial trading activities such as selling electricity on a large scale. Therefore, THC was held to be a trading corporation.

## Important Case: Fencott v Muller



- Oakland Nominees Pty Ltd was a corporation without any activities.
- ON had not yet engaged in financial or trading activities.
- In the absence of any activities, one must look to the purpose for which the corporation has been formed. Thus, we are looking again at the purpose test.
- The purpose of the company can be found in the company constitution.
- Found in the constitution that the company's purpose included trading and financial interactions. Thus, despite its lack of activities, the company was found to be a trading or financial company.

## Summary

### Trading corporation

- Activities test: does the company engage in substantial trading activities?

### Financial corporation

- Activities test: does the company engage in substantial financial activities?

### No activities

- Purpose test
- Look at the purpose of the corporation as set out in the constitution

## Cases

### Huddart Parker v Moorehead

- Note: this case has since been overruled (it is not good law).
- Facts
  - HP was charged with offences under the Australian Industries Preservation Act 1906 (Cth)
- Issue
  - Were these provisions within the Cth's power under s 51(xx)?
- Decision
  - Section 51(xx) does not give the Cth power to regulate all activities of corporations.
- Discussion
  - This case suggested limits on the Cth power, especially to regulate the interstate activities of corporations.
  - It must be noted that this case was decided in the era of reserved powers and the case has since been overruled by the Concrete Pipes Case.

### Strickland v Rocla Concrete Pipes Ltd

- Facts
  - RCP was charged with not reporting an examinable agreement under the Trade Practices Act 1965 (Cth)
- Issue
  - Was this provision within the Cth's power?
- Decision
  - Huddart Parker was overruled and a wider scope given to the corporations' power though some provisions of the Act still exceeded Cth power. The

power should extend at least to the trading activities of trading corporations and the financial activities of financial corporations.

### Actors and Announcers' Equity Assoc v Fontana Films Pty Ltd

- Facts
  - The AAEA had imposed a 'secondary boycott' on Fontana contrary to s45D of the Trade Practices Act 1974 (Cth). That is, it had threatened to boycott other providers unless they boycotted Fontana.
- Issue
  - Is a secondary boycott of a corporation by a non-corporation able to be prohibited by the corporations' power?
- Decision
  - The corporations power extends far enough to protect corporations from secondary boycotts as these affect their trading.

### New South Wales v Commonwealth (Incorporation Case)

- Facts
  - The Cth enacted the Corporations Act 1989 (Cth), a comprehensive scheme to regulate corporations in Australia. NSW and some other States challenged its constitutionality, in particular, as to whether the corporations power included the power of incorporation.
- Issue
  - Does s51(xx) include the power of incorporation?
- Decision
  - The HC held by 6:1 that the corporations power did not include the power to incorporate. It held that 'formed' meant that the corporation had to have been incorporated under State law before it could be regulated by the Cth. This drove the Cth back to the negotiating table and the States eventually referred their corporations power to the Cth.

### Re Dingjan; Ex Parte Wagner

- Facts
  - Sections 127A and 127B of the Industrial Relations Act 1988 (Cth) allowed the IRC to set aside contracts involving constitutional corporations that were deemed unfair.
- Issue
  - Were ss127A and 127B of the 1988 Act within the corporations power?
- Decision

Held, the sections were invalid. It is a power with respect to (corporate) persons and must operate differently on them from other persons: per Brennan J. It is a mixed test depending on both personality and activities and is not met here