

# LAWS2202 (Commonwealth Constitutional Law) Exam Guide

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## Corporations

**S51: 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:**

**(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth**

A. Does the Corporations Power in section 51(xx) of the Constitution give the Commonwealth the authority to [perform act in fact scenario]?

1. Is [section] valid under section 51(xx) of the Constitution?

a) Is [section] a law with respect to (a) constitutional corporation(s)?

For a law to be one with respect to constitutional corporations, the connection must be more than incidental, tenuous or distant (*Work Choices*). Moreover, the law does not need to be one with respect to the trading elements of the corporation (*Work Choices*).

If the provision singles out the corporation as its object of statutory command, or regulates its ‘activities, functions, relationships... the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it..., 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’ then it will be considered a law with respect to constitutional corporations (Gaudron J, *Re Pacific Coal*, endorsed in *Work Choices*).

*Examples:*

- *Fontana Films*: Regulating unions in industry sufficiently connected to trading corporations of that industry ‘A law will fall within the power if the conduct to which it is directed is so relevant to the subject of the power that a law rendering such conduct unlawful can be described as a law with respect to that subject’ – Gibbs CJ
- *Work Choices*: Prohibition on the content of workplace agreements is ‘with respect to’ constitutional corporations
- *Williams [No 2]*: A law that merely can but does not necessarily regulate constitutional corporations in particular is not sufficient to be a law ‘with respect to’

b) Is [party in question] a constitutional corporation?

The majority in *Adamson’s Case* adopted the characterisation test of a trading corporation as being determined ‘by reference to their established activities’. ‘Trading activities’ are those ‘business activities carried on with a view of earning revenue’ (Mason J, *Adamson’s Case*)

and will indicate a corporation is a trading corporation when they form a sufficiently significant proportion of its overall activities (Mason J, *Adamson's*).

The fact that the trading activities are only undertaken for the purpose of carrying out some primary activity does not preclude the corporation from being a trading corporation (*Superannuation Board*).

*Examples:*

- *Adamson's Case*: Football league is a corporation
- *Tasmanian Dams; E v Australian Red Cross*: Doesn't matter if publicly owned or a non-profit, can still be a trading corporation (eg HEC)
- *Educang Ltd; Aboriginal Legal Services Serves of WA Inc v Lawrence*: Government grants are not a trading activity
- *Quickenden v O'Connor*: UWA is a trading corporation
- *Orion Pet Products*: RSPCA is a corporation
- *Educang*: Church-owned corporation operating private schools is a trading corporation
- *Aboriginal Legal Services Serves of WA Inc v Lawrence*: Aboriginal legal service NOT a trading corporation, services provided mostly for free and funded by government grants
- *Bankstown Handicapped Children's Centre Association Inc v Hillman*: Government money provided to a commercial enterprise on the basis of being engaged to provide government services is NOT the same as a grant for a charity and can be considered a trading corporation
- *Fencott v Muller*: If inactive shelf company can't use activities test → can look at purpose
- *Qld Rail*: all indicia of a constitutional corporation will be taken into account to see whether a body is a corporation, regardless of what the legislation says (can't legislate out of being a corporation)

c) Can the Commonwealth incorporate [corporation in fact scenario] as a trading corporation under s51(xx)?

As a general rule, the Commonwealth cannot incorporate bodies as the power in s51(xx) is limited to corporations already in existence (*Incorporations Case*).

However, the Commonwealth can incorporate if there is a sufficient connection to another head of power (*National Airways; Work Choices*).

*Examples*

*National Airways*: Commonwealth could create a corporation to engage in interstate trade and commerce under s51(i)