

# ComCon Exam Notes

## Is the Commonwealth law constitutionally valid?

1. **Is there a head of power in the Constitution to support the law? (Midsem)**
2. **Does the law infringe an express/implied limitation on Cth legislative power? (Final)**
  - Implied: Freedom of Political Communication
  - Express rights: Jury (s80), Religion (s116), Freedom of interstate trade (s92)
  - Limits within grants e.g. Property (s51xxxi), Defence (s51vi) [proportionality as a limit]

Does the law have a sufficient connection with a Commonwealth legislative head of power?

### Possible heads of power:

- Corporations power (s51xx)
- External affairs power (s51xxix)
- Races power (s51xxvi)
- Taxation power (s51ii)
- Appropriations and spending power
- Nationhood power
- **Defence power: s 51(vi) (Final)**
- Note: Property [s51(xxix)] is treated as a limit on power in this course (Final)

Dual characterisation – if a law can be characterised with respect to a subject matter within power, it does not matter that it can also be characterised as a law with respect to a subject matter outside of power.

Incidental area of power – The core of head of power carries an incidental area necessary to effectuate the core e.g. penalty provision (fine for the breach of the core provision)

### Other principles:

- The Constitutional text is to be construed with all the generality that the words used admit, unless there is something in the context or in the rest of the Constitution that indicates otherwise – Jumbana
  - Note: Engineers has limited this qualification
- Note: Grainpool principles might be helpful

## Is a State Law Constitutionally valid?

1. Do the States have a head of power to enact this law?
  - Generally, States have plenary legislative power.
2. **Does the law infringe an express/implied limitation on State legislative power?**
  - IFPC
  - S92 Freedom of Interstate Trade

## Corporations Power s51 (xx)

### What laws can be enacted under s51 (xx)?

#### Example of laws that CAN be enacted under s51 (xx)

<u>Case</u>	<u>Facts</u>	<u>Judgement</u>
Work Choices	‘No employer shall’ Work Choices Act S6(1) – Definitions Section ‘employer means (a) a constitutional corporation, so far as it employs, or usually employs, an individual.  Other possible examples:	<b>OBJECT OF COMMAND</b> <ul style="list-style-type: none"> <li>• Does the section direct its commands specifically and exclusively to corporations?</li> <li>• A law that imposes a duty or liability, or confers a right or privilege, only on a constitutional corporation will be valid</li> <li>• Doesn’t matter if trading activity or not!</li> </ul>

	<p>‘A constitutional corporation cannot do X’  ‘No trading corporation shall...’  ‘All trading corporations shall...’</p>	<ul style="list-style-type: none"> <li>• Or if the provisions have purposes that would otherwise be outside of power e.g. no constitutional corporation shall litter</li> </ul> <p>Acceptable if the law has a differential application, not just a law of general application - Strickland</p> <ul style="list-style-type: none"> <li>• In Work Choices, ‘employer’ was defined in layers.</li> <li>• The law can have various layers of operation, one of which is with respect to constitutional corporations and each layer seeks to draw from a separate constitutional source of authority.</li> </ul> <p>Note: possible qualification in Williams No 2</p>
R v Australian Industrial Court Ex Parte CLM Holdings	<p>‘A person employed by a constitutional corporation can or cannot do X’</p> <ul style="list-style-type: none"> <li>• Includes the regulation of conduct of: employees, company directors, officers, shareholders</li> </ul>	<p>The employee of the constitutional corporation is the object of command – VALID.</p> <ul style="list-style-type: none"> <li>• If the activities of constitutional corporations can be validly regulated, the conduct of individual persons taking part in those activities can be regulated as well.</li> <li>• Note: Not ANY activity – this was limited to only trading activities (Strickland), because that was all Cth could regulate of constitutional corporations at the time.</li> <li>• But note that Work Choices may have extended this scope.</li> </ul>
Work Choices	The contractor engaged by a constitutional corporation is the object of command	<p>To be a sufficient connection, the law must regulate the contractor in a relevant way to its engagement by the constitutional corporation</p> <ul style="list-style-type: none"> <li>• ‘Regulating of those whose conduct is or is capable of affecting its activities, functions, relationships or businesses’ – Gaudron J, Re Pacific Cole</li> <li>• If it affects the relationship of the constitutional corporation, it will likely be valid.</li> </ul>
Work Choices	A building operating next door to a constitutional corporation can or cannot do X	<p>Depends on what aspects of the business next door are being regulated, and if they are being regulated because of physical proximity of threat presented to the constitutional corporation</p> <ul style="list-style-type: none"> <li>• ‘Regulating of those whose conduct is or is capable of affecting its activities, functions, relationships or businesses’- Gaudron J, Re Pacific Cole</li> </ul>
Work Choices	<p>Laws that regulate the mechanisms for industrial relations as they pertain to constitutional corporations</p> <ul style="list-style-type: none"> <li>• Regulation of the employment relationship between constitutional corporations as ‘employer’ and their employees’</li> </ul> <p>Laws that regulated the terms and conditions of employment that the constitutional corporation could offer to its employees</p> <ul style="list-style-type: none"> <li>• Provided that a constitutional corporation must pay employees a minimum wage, provide them with certain leave entitlements, require them to work more than certain hours</li> </ul>	<p>The legislative power in s51(xx) extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations.</p> <p>VALID - Provisions regulating the activities, functions, relationships and the business of a corporation</p> <ul style="list-style-type: none"> <li>• Rejected the external/internal distinction</li> <li>• Rejected the distinctive character test.</li> <li>• Rejected the fact that the conciliation and arbitration power (s51xxxv) would restrict its validity.</li> </ul>
Work Choices	Laws that prohibited constitutional corporation employees from making certain agreements	VALID - Provisions regulating the relationship of constitutional corporations with others

	<ul style="list-style-type: none"> <li>Regulating the type of agreement that can be created between employers as constitutional corporations and employees</li> <li>Provisions preventing constitutional corporations from making misrepresentations about the content and nature of industrial and employment agreements between employers (constitutional corporations) and employees</li> </ul>	
Work Choices	<p>Provisions that regulated what <b>industrial action</b> constitutional corporations can take against their employees</p> <p>Provisions that regulated advising, encouraging or inciting a corporation to do certain things that regulated the rights and immunities of the corporation</p>	<p>VALID</p> <ul style="list-style-type: none"> <li>Provisions imposing duties on others whose actions is sufficiently connected to constitutional corporations or agreements between constitutional corporations and their employees</li> <li>These were provisions conferring rights or immunities on constitutional corporations, like Fontana Films</li> </ul>
Work Choices	<p>Provisions <b>controlling entry to premises occupied by constitutional corporations OR occupied by contractors providing services</b> to the constitutional corporation</p>	<p><b>Valid where the right of entry related to activities undertaken by contractors</b></p> <ul style="list-style-type: none"> <li>Provisions conferring rights and immunities on constitutional corporations, or others because of their connection to the activities of constitutional corporation</li> <li>Regulation of those whose conduct is or is capable of affecting it activities, functions, relationship or business</li> </ul>
Tasmanian Dam	<ul style="list-style-type: none"> <li>S10(2) Except with ministerial consent, trading corporations <b>cannot carry out certain acts (that were not necessarily trading activities)</b></li> <li>S10(4) Except with ministerial consent, corporations <b>cannot carry out certain acts, for the purposes of its trading activities</b></li> </ul>	<p><b>VALID – REGULATING NON-TRADING ACTIVITIES DONE FOR THE PURPOSES OF TRADE</b></p> <ul style="list-style-type: none"> <li>e.g. cutting down trees in anticipation of building a dam which would induce electricity</li> <li>S10(4) was upheld to be valid because it specifically dealt with the purposes of trade, whilst S10(2) was just a blanket prohibition. <ul style="list-style-type: none"> <li>Note that S10(2) would be valid now, under Work Choices.</li> </ul> </li> </ul>
Fontana Films	<p>S45D(1)(b)(i) TPA: <b>regulated the conduct of people that was intended and likely to cause substantial loss or damage to the trading activities of trading corporations</b></p> <ul style="list-style-type: none"> <li>Prohibited secondary boycotts against constitutional corporations: a person could not conspire with another to prevent the supply of goods to a constitutional corporation where the conduct was intended to cause harm to the trading activities of a constitutional corporation</li> </ul>	<p><b>VALID – REGULATING THIRD PARTIES WHERE THEIR ACTIONS CAN CAUSE HARM TO THE TRADING ACTIVITIES OF TRADING CORPORATIONS</b></p> <ul style="list-style-type: none"> <li>Still in the realm of trading activities, from Strickland.</li> <li>But note that Work Choices – a law that does not have the constitutional corporation as the object of command can still be valid IF the duty or liability provides some other form of sufficient connection to a constitutional corporation <ul style="list-style-type: none"> <li><b>It might extend from just protecting trading activities of trading corporations from harm</b></li> </ul> </li> </ul>

Strickland	The law regulated the intra-state trading activities of trading corporations, because it <b>related to their ability to enter into certain anti-competitive agreements with others.</b>	<p><b>VALID – CAN REGULATE BOTH INTER-STATE AND INTRA-STATE TRADING ACTIVITIES</b></p> <ul style="list-style-type: none"> <li>• Rejected Huddart Parker following Engineers</li> <li>• Thus, the distinction in s51(i) does not apply to s51(xx)</li> </ul> <p>The regulation, control or prohibition of trading activities was within the scope of s51(xx)</p> <ul style="list-style-type: none"> <li>• It is said this power might be wider in relation to foreign corporations</li> </ul>
Work Choices	<p>Work Choice regime set up registrations for employer and employee associations</p> <ul style="list-style-type: none"> <li>• Provisions about who can be registered under the new scheme to control union movement in Australia – the associations required to meet certain conditions and efficiency standards and democratic conduct style requirements</li> <li>• Provisions for the incorporation of these associations – companies were created if they were registered employer associations</li> <li>• Provisions conferring benefits on the registered associations</li> </ul>	<p><b>VALID – REGULATING THE EMPLOYMENT RELATIONSHIP BETWEEN CONSTITUTIONAL CORPORATIONS AND EMPLOYEES AND THE TERMS AND CONDITIONS OF EMPLOYMENT OFFERED BY TRADING CORPORATIONS</b></p> <ul style="list-style-type: none"> <li>• The law was just setting up a framework for that to be effective.</li> <li>• Incorporating a registered employer associations allows for there to be a body to represent constitutional corporations who were employers.</li> <li>• Note: Refer to Incorporation Notes</li> </ul>

**Examples of laws that DO NOT have a sufficient connection to s51(xx)**

<b>Case</b>	<b>Facts</b>	<b>Judgement</b>
Strickland	<p>It regulated any anti-competitive agreement entered by any person</p> <ul style="list-style-type: none"> <li>• Object of command was a person</li> <li>• Even though ‘person’ included a trading corporation, it also included natural people.</li> <li>• <b>The legislation applied not only to constitutional corporations, but others as well</b></li> </ul>	<p>A law of general application, where the command is not specific to a trading corporation and just happens to apply to a corporation, will not be a sufficient connection.</p> <p><b>The law has to discriminate between in its application to constitutional corporations and the public at large (Discriminatory Operation Test – Brennan J)</b></p>
Strickland	<p>A prohibition on the levying of taxes and duties on trading activities generally</p> <ul style="list-style-type: none"> <li>• Mason J – obiter example</li> </ul>	<p><b>A law cannot apply to benefit a constitutional corporation along with others.</b></p> <ul style="list-style-type: none"> <li>• This would protect the trading activities of corporations, but also other traders, so it would be a law of general applicability.</li> </ul>
Re Dignan	<p><b>The law regulated contracts ‘relating to the business of a constitutional corporation’</b></p> <ul style="list-style-type: none"> <li>• It did not regulate the activities of trading corporation, but the</li> </ul>	<p><b>The degree of connection to the constitutional corporation has to be ‘more than insubstantial, tenuous or distant’ – it has to be ‘more than a mere peg’</b></p> <ul style="list-style-type: none"> <li>• A law relating to the business (not relating to the trading activities or potentially harming the</li> </ul>

	<p>conducts of persons outside the corporation.</p> <ul style="list-style-type: none"> <li>The contract did not necessarily have to be entered into by a constitutional corporation, it just had to be relating to the business of a constitutional corporation</li> </ul>	<p>corporation) of a constitutional corporation will not have a sufficient connection as it is too distant.</p>
Williams No 2	<p>The Commonwealth provided funding of organisations who provided chaplaincy services</p> <ul style="list-style-type: none"> <li>Scripture Union of Queensland was an incorporated entity who was funded</li> <li>Commonwealth argued that it was supported by s51(xx) because the organisation was a constitutional corporation</li> </ul>	<p>INVALID – Not discriminating against constitutional corporations</p> <ul style="list-style-type: none"> <li>The law was applying to everyone who provided chaplaincy services, not limited to whether or not they were constitutional corporations</li> </ul>
Williams No 2	<p>Hypothetical situation: <b>What IF the funding regime did only apply to trading corporations?</b></p> <ul style="list-style-type: none"> <li>A law that authorises the payment of money by the Commonwealth to a constitutional corporation engaged in the provision of religious services – <b>providing money would be affecting its rights and privileges</b></li> </ul>	<p><b>GIVING MONEY TO A CONSTITUTIONAL CORPORATION WAS NOT A SUFFICIENT CONNECTION</b></p> <p>It did not regulate corporations – it was just a provision of funding.</p> <ul style="list-style-type: none"> <li>It did not provide the corporation with the capacity to enter into agreements or change their capacity to do so, alter the corporation’s rights and capacities to do things, it didn’t regulate relationships or conduct of people acting on behalf of the constitutional corporation)</li> <li>It did not provide the corporation’s capacity to make the agreement and receive and apply the payments.</li> </ul> <p>Therefore, <b>Gaudron J’s statement endorsed in Work Choices seems to be narrowed slightly</b> – she said that if the character of the law was such that it confers a right or privilege on the corporation, it was sufficient.</p> <ul style="list-style-type: none"> <li>But it seems now we have to <b>have some regulation of the rights and capacities of constitutional corporations.</b></li> </ul>
Williams No 2	<p>By giving money to the entity, the Commonwealth was transforming its character into a constitutional corporation.</p> <ul style="list-style-type: none"> <li>Without the grant, the corporation would not be a trading corporation.</li> <li>Funding the trading activities gave it its constitutional character (i.e. it helped establish a trading corporation)</li> <li>i.e. offering entities that may not be trading corporations yet money to engage in a trading activity</li> </ul>	<p>Commonwealth cannot form constitutional corporations itself</p> <ul style="list-style-type: none"> <li>If <b>the grant of the money was the only thing that transforms the body into a constitutional corporation</b>, they will not be allowed to do so.</li> </ul>

### Is the entity a constitutional corporation?

Even if the law is valid with a sufficient connection, it may not apply to the present corporation if it does not fit within the definition.

- Statutory interpretation - The corporation in the statute is usually defined to mean a s51 (xx) corporation.

When is an entity a constitutional corporation under s 51(xx)?