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EXAM: S 51(xx): gives the Commonwealth Parliament the power to legislate with respect to certain kinds of corporations: foreign corporations and ‘trading and financial corporations formed within the limits of the Cth’.

Note: keep and eye out for Pty Ltd & potential involvement of persons who are not constitutional corporations e.g. natural persons

(1) Summarise the impugned legislation:

- a. Think about what the legislation does, and the fact set.
- b. *EG. The Act creates a right and an obligation on employers to pay parental leave.*
- c. *EG. It binds both constitutional corporations per s 3(1)(a), and contractors providing services to constitutional corporations per s 3(1)(b)*

(2) State s 51(xx)

- a. S 51(xx) of the *Constitution* provides that the ‘parliament shall, subject to this constitution, have power to make laws for the peace order and good government of the Cth with respect to foreign corporations, and trading and financial corporations formed within the limit of the Cth.

(3) Does the law apply to X? Is X a ‘constitutional corporation formed within the limits of the Cth’?

- a. **EG.** Per s 3(2), a constitutional corporation specified in s 51(xx): foreign corporation, trading and financial corporations formed within the limits of the Cth.

b. Is X a foreign corporation?

- i. Easily identifiable (is the company incorporated in another country?)
- ii. Is this a key issue? See ‘foreign corporations’ notes (Page 9)

c. Is X a trading corporation?

- i. Trading is defined as ‘activities carried on with a view to earn revenue’ but not necessarily for profit (*Adamson*)
 - 1. Note: Activities conducted in the public interest can still be considered trading activities (*UFU v CFA*)
- ii. To be a trading corporation for the purposes of s 51(xx), the test is whether a ‘**substantial**’ (Barwick CJ), **not insignificant** (Murphy J) or ‘**sufficiently significant proportion**’ (Mason J) of the overall **activities** of the business are trading in nature (*Adamson*, confirmed in *Tasmanian Dams*). This question is a matter of ‘fact and degree’ (Mason J in *Adamson*).
 - 1. (Put in brackets that we no longer use the purpose test from *St George CC*).
 - 2. The trading activities, however, do not need to be the predominant activity (Mason J in *Adamson*, contra Stevens J in dissent)
 - 3. **Qualification:** i
- iii. Is this a key issue? See ‘trading corporations’ notes

d. Is X a financial corporation?

- i. Majority in *State Superannuation Board* take same approach as ‘trading corporations’ – apply the same principles as ‘trading corporations’
- ii. ‘Transactions’ where the subject of the transaction is finance such as borrowing or lending money’ (*Deane J Ku-Ring-Gai*, endorsed in *Superannuation Board*)
- iii. Does the corporation engage in financial activities which form a sufficiently significant or substantial amount or proportion of its overall activities (*Ku-Ring-Gai*)

iv. Is this a key issue? See 'financial corporations' notes (Page 9)

e. Is the corporation inactive?

- i. **Purpose test:** Inactive corporations can be constitutional corporations if the trading and financial activities were specified as objects within the corporation's capacity (Fencott v Muller)¹

(4) Is X a law with respect to s 51(xx)?

- a. *The question is whether there is a 'sufficient connection' between the law in question and the s 51(xx) corporations power.*
- b. **Gaudron J test in *Pacific Coal*: the Cth's power under s 51(xx) 'extends to regulation of activities, functions, relationships, and business of a corporation described in that subsection, the creation of rights and privileges belong to such a corporation, the imposition of obligations upon it, and in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders, also regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business' (Gaudron J in *Dingjan* as repeated in obiter in *Pacific Coal*, but resoundingly endorsed by the majority in *Work Choices*).²**
- c. **Is a law which does _____ (to a CC) a law with respect to s 51(xx)?**
- i. **Apply Gaudron J statement**
- d. **Is a law which does _____ (to entities through whom a CC acts) a law with respect to s 51(xx)?**
- i. **Apply Gaudron J statement**
- e. **Is a law which does _____ (regulates non-CC's) a law with respect to s 51(xx)?**
- i. **Apply Gaudron J statement.**
- ii. **EG.** *Is a contractor who provides services to a CC 'capable of affecting the activities, business, relationships or functions of a CC'?*
- iii. ***Qualified:** *But only in respect of their conduct affecting* CC's activities, functions, relationships or business (*Work Choices*); for instance, for the OHS persons, only in the course of providing services to constitutional corporation
- iv. ***Qualified:** *However, courts may require that the connection between the CC and the non-CC be 'not insubstantial, tenuous or distant'* (Majority in *Work Choices*, citing Dixon CJ in *Melbourne Corporation*)
- v. **Fontana-type laws no problem:** *the power extends to laws that prevent significant harm to a Constitutional corporation (ie by regulating conduct that adversely affects a constitutional corporation) (Fontana, which appears to be good law after Work Choices).*
- vi. *May read down the provision in order to save its validity; but consider the pragmatic ramifications, and whether the other party would concede to it being read down as the Cth did in WorkChoices.*

¹ Fencott v Muller (1983) 152 CLR 570

² Held in dissent by Gaudron J in RE Dingjan; Ex Parte Wagner 183 CLR at 365. Restated by her Honour in dicta in RE Pacific Coal v Ex Parte: Construction, Forestry, Mining and Energy Union 203 CLR at 24. Endorsed by a resounding majority in WorkChoices Case (2006) 229 CLR at 74-5