

The second test is the distinctive character test which was adopted by Gibbs CJ in *Actors* and the *Tasmanian Dam case*. It holds that s51(xx) authorises only laws that regulate a corporation in its trading or financial capacity, as opposed to its corporate status alone. It reflects the reserved powers logic underpinning *Huddart Parker*, preserving a substantive federal balance by restricting Commonwealth reach into areas traditionally managed by the States. However, the *WorkChoices* decisively rejected this view, describing it as producing “awkward results”. Accordingly, the distinctive character test endures as a dissenting approach to determining the scope of the corporations power.

Step 3: Determine whether there is a sufficient connection between the law and the HOP:

- Is there an analogous case?
- Is the law valid under the distinctive character test – even though it is a dissenting and narrow view, if it passes this test, then it will also pass the broad object of command test
- Based on how you have characterised the law in step 1, does it fall within the scope of the corporations power as described in step 2 and is it therefore sufficiently connected to power?
- OR is connection between law and corporations power “so insubstantial, tenuous or distant” that it cannot sensibly be described as a law with respect to the head of power?

Case examples to look out for:

**Classification of corporations:**

- **Adamson’s case:** established current activities test: a corporation is a “trading corporation” if trading forms a substantial or significant part of its actual operations, even if not its dominant purpose. [Includes sport and recreation organisations if they engage in monetised activities like player contracts or ticket sales.]
- **State Superannuation Board:** Applied the current activities test to financial corporations. A body engaged in substantial financial activities, such as borrowing and investing, could be regulated under s 51(xx). [What matters is the factual significance of the financial activity to the entity’s operations.]
- **Fencott:** Affirmed the constitutive purposes test as a secondary tool when current activities are unclear. Courts may examine the founding documents or constitution of a corporation to determine if it was formed for trading or financial purposes.
- **St George County Council:** A municipal corporation was not a trading corporation, despite engaging in some trading. The purpose of incorporation as a local government body was decisive.
- **Queensland Rail** - Affirms the dual applicability of the current activities and constitutive purposes tests. A body can be a trading corporation even if primarily statutory or governmental in origin, so long as its activities are significantly commercial.

**Third parties:**

- **Actors & Announcers:** Upheld a law prohibiting third parties (e.g. unions) from engaging in secondary boycotts against trading corporations. [object of command test: if a constitutional corporation is the legal target or object of protection, the law is valid.] Stephen J – multiple character doctrine: a law may have several aspects and will remain valid so long as the part within power is dominant and the rest incidental.
- **Re Dingjian:** Struck down a provision allowing review of contracts between non-corporate parties that merely related to a corporation’s business.
  - Majority held that a sufficient legal connection could not be established simply referring to the business of a corporation, without any legal rights, duties, or obligations attaching to the corporation itself, is insufficient. It was a private contractual relationship and the law must directly engage with the rights, liabilities, or conduct of the corporation, not merely its business in a general sense.

- Dissenting held that the law was valid as it regulated relationships that materially affected the conduct of the corporation's business – broader view

#### Regulation of corporate activity

- **Tasmanian Dams case:** Upheld a law prohibiting corporations from damaging a heritage site. [the Commonwealth can regulate any activity of a constitutional corporation. The test is whether the corporation is the object of statutory command – Mason, Murphy, Deane JJ]- Gibbs JJ dissented applying the distinctive character test

#### Functional regulation

- **Strickland:** trading activity by a corporation falls squarely within s 51(xx), even if wholly intrastate. Overruled Huddart Parker
- **WorkChoices:** Landmark expansion of the corporations power. Upheld a national workplace relations law applying to constitutional corporations. [Adopted Gaudron J's test from *Pacific Coal* and firmly rejected the distinctive character test and federal balance reasoning.] The law need not regulate trading activities per se — it suffices that the corporation is the legal object of regulation.
- **Re Pacific Coal** - Corporations power extends to regulating “activities, functions, relationships, business, and employment practices” of corporations (*Gaudron J dicta*). Provides the broadest formulation of the corporations power before *WorkChoices* adopted it wholesale.