

Constitutional law exam notes:

Commonwealth process- Corporations Power:

Question: Advise X whether they can continue to do X.

Section XXX of the XX Act 2019 (Cth) may prevent X from serving drinks. Therefore, we must consider whether s X is valid. As this is a Commonwealth law, this requires a head of power

sX may be supported by the s51(xx) corporations power. This is a subject matter power so we must establish sufficient connection.

Interpretation:

Step 1: Interpret head of power via *Work Choices*. To be within the scope of the corporations power, we must consider what part of quote by Gaudron J does it fit?

The s51(xx) head of power per *Work Choices* with reference to the decision of Gaudron J in *Pacific Coal* "extends to the..."

e.g. ... "extends to... the imposition of obligations on [constitutional corporations] and... its employees". (Just end it here and go to step 2 if that's all you need, or can use examples below if they are relevant)

or can paraphrase like: Extends to laws regulating the employees of constitutional corporations, with respect to the activities, functions, relationships and business of corporations.

*"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**, 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."*

This has 3 categories: Pick relevant one, and grab that portion from the quote above:

1. Laws directly operating on to corporations
Regulating activities, functions, relationships, and business of a corporation.
Imposing obligations on corporations
Giving corporations rights and privileges.
2. Laws operating on those through whom corporations act
Regulating employees, shareholders, directors.

Pretty much just natural persons who operate in corporations. But only 'in respect to those matters' involved in the corporation (so to employees but only with respect to activities etc. of corporations).

3. Laws operating on those whose conduct is capable of affecting corporations

e.g. no person shall damage property owned by corporations. Applies to everyone, doesn't matter if they work for corporation, as their conduct is able to affect the corporation.

Examples below:

Examples within this definition (within the scope of corporations power):

1st category: *Strickland* had law regulating restrictive trade practices between corporations.

1st category: *Tasmanian Dams* had law prohibiting corporations from carrying out excavation works, damaging land, building, etc.

1st category: *Work Choices* had regulation of corporations workplace regulations.

3rd category: *Fontana Films* had law prohibiting a 'secondary boycott' (contract prohibiting supply of goods and services to a corporation, which causes damages to that corporation).

Examples that are not within this definition:

Re Dingian had company contracting to someone, who subcontracting to someone else. So Commission could look at contract between contractor and subcontractor, which is between 2 natural persons but relating to the business of a corporation. Close majority said this was beyond scope of the corporations power, therefore invalid law. "the mere fact that a corporation is somehow related to the activities that are happening does not of itself mean that there is a sufficient connection to the corporations power."

Williams had a law giving money to corporations (churches are corporations here, with the money given to contract chaplains for schools). High court decided that a law giving money to corporations does not alter any legal rights or obligations of corporations. It only alters the rights of the Commonwealth, as it authorises spending that would otherwise be unlawful. Thereby outside scope of corporations power.

Incorporation Case had Cth passed a law allowing ASIC to incorporate businesses. Took a textual approach interpreting s51, where they noted it was a power with respect to corporations already formed, not to form corporations. (power was eventually referred to cth, but didn't pass here).

Characterisation:

Step 2: Characterise legislation: Does sX of the Act apply to constitutional corporations?

s51(xx) applies to constitutional corporations that do X, requiring XXX.

EXAMPLE: The *DFHA s72(2)* applies to constitutional corporations that provide dental services, requiring they grant free treatment to requesting ADF former and current members within 7 days.

Sufficient connection:

Step 3: Is there sufficient connection between sX and head of power?

A sufficient connection thereby exists between sX and this head of power, as sX does (*whatever you had in quote used above*).

EXAMPLE: A sufficient connection thereby exists between s72(2) and this head of power, as s72(2) clearly imposes obligations on constitutional corporations to provide treatment.

Therefore, sX is supported by the corporations power.

OR: There is a strong argument sX is not supported by the corporations power, and the law is therefore invalid. (Should still consider some limitations or just mention the limitations as done below).

Limitations:

e.g. With no apparent relevant limitations, sX is valid.

e.g. An apparent limitation that may apply here is... (**go through Cth limitations section**)

e.g. No apparent limitations may apply here, however the law seems invalid as it is not supported by a head of power.

Application: (does sX apply to our client?)

This law applies to QUOTE LEGISLATION “*constitutional corporations that engage in...*”

Is our client a constitutional corporation such that the law would apply? (Foreign, trading, or financial).

1. Foreign corporation:

- A corporation formed outside the limits of the Commonwealth (*Incorporation Case*).

2. Trading Corporation:

- **Activities Test**: To determine whether it's a trading corporation, depends on the trading activities in which the corporation engages: (*Adamson's Case* said trading activity is some sort of activity to generate revenue, regardless of whether it's a profit).
 - **PARTIALLY TRADING** (*Tas Dams*): Trading activities need not be the primary or dominant activities of the corporation, but they must be substantial or significant: *State Super v Trade Practices*; *Tasmanian Dam Case*; Mason J in *Adamson's Case*.
 - This is a question of fact and degree. Analyse facts of the case.
 - E.g. *Tasmanian Dam Case* had trading activities (selling electricity in bulk at large scale) and non trading activities (generating electricity, constructing dams and plants, policy making). Found a trading corporation. Court said trading doesn't have to be dominant activity, but a substantial or significant activity. Question of fact and degree.
 - *Adamsons* case had football league that sold stuff on the side and donated all profits, so no trading purpose but still found a trading corporation as it had those activities.
 - *Red Cross* and *RSPCA* had charities that also did trading activities to raise revenue to donate. Still found to be a trading corporations. Donating doesn't matter (*Adamsons*)
- **IF NO ACTIVITIES, PURPOSE TEST**: (e.g. corporations is new/shell) ○ If a corporation has no activities, then can look to the purpose of the corporation (*Fencott*).
 - Purpose test may be relevant as a supplement to the activities test if its unclear (*St George, Adamsons*), however use as supplement is unclear (*Work Choices, Queensland Rail*).
 -

3. Financial Corporation:

- **Activities Test**: A financial corporation is one which engages in substantial financial activities: *State Super v Trade Practices*.
 - A question of fact and degree.

- Note: Merely spending or receiving money are not financial activities. Things like giving loans, financial advice, banking, activities where money is the subject of the transaction are. Can also have financial purpose making it a financial corporation.

EXAMPLE: The law applies to “constitutional corporations that serve alcohol”. Is our client a trading corporation? Activities test per *Tas Dams* where we look at the fact and degree. Like in *Tas Dams*, our client does both trading and non-trading activities. GO INTO ACTIVITIES. The trading activities are a “substantial or significant” activity, therefore will likely be found to be a trading corporation.

Conclusion:

Therefore, our client is a constitutional corporation and sX will apply to them requiring they do XXX.