

Step 1: Characterisation

MAKE SURE TO GIVE A BRIEF INTRO SENTENCE FIRST E.G.

[Insert Law] may be captured within the ambit of s 51 [insert section] ('[insert power]'). It could come within the scope of the [...] part of this Power.

- governmental action, legislation or decision deemed to be invalid, the act or decision is generally treated as **void ab initio (of no legal effect)**
- if certain provisions of law or application of these provisions are found to be unconstitutional, remaining provisions can continue to operate if unconstitutional is severed

Subject matter powers (determining substantive activities)

- Subject matter powers are given a broad interpretation (*Bank Nationalisation Case and Murphyores (1976)*), applying the **'sufficient connection' test**
 - All heads of power are subject matter powers except for three: *defence power, external affairs(both) and nationhood power* → all others are assumed as subject matters
- **TEST** - If it's a subject matter power, does the Cth Act have a sufficient connection to the subject matter? (Kitto J in **Fairfax** "Is it in real substance a law upon, "with respect to", one or more of the enumerated subjects") –
 - Only way to answer this question is to know the history of the case law of characterising laws under the head of power
- **Dual characterisation** - a law may have multiple subjects and be attached to multiple heads of power. This is basically the gist of Kitto J's findings in **Fairfax v Cmr of Tax (1965)**.
- Kitto J found that it is a question of the *'true nature and character of the legislation; is it in its real substance a law with respect to, one or more enumerated subjects, or is there no more in it in relation to any of those subjects than an inference so incidental as not in truth to affect its character?'*

Step 1a: Specific Heads of Power

Corporations power s51(xx) - subject matter – sufficient connection

Subject matter power → Apply **sufficient connection** test; *Bank Nationalisation Case and Murphyores (1976)*

BACKGROUND

- **Corporations:**
 - A. corporation is a **legal entity** that can operate as an individual
 - B. separate **legal personality** of a company is designed to permit company directors and shareholders to evade personal legal liability: *Salomon v Salomon [1897]*; *Corporations Act 2001 s 124*
 - C. Companies and their directors have a legal duty to act in the **best interests of shareholders/the company**: *Corporations Act (Cth), s181(a)*;

Two requirements:

1. First Requirement: That the **law deals with constitutional corporations**: foreign, trading or financial corporations (the latter two formed within the Commonwealth)

A. DEFINING TYPE OF CORPORATION

- **Foreign Corporations** → defined as any entity formed under the law of a foreign country and accorded a corporate legal personality either by foreign or Australian law
- **Trading Corporations** → identifiable by the activities test for its establishment
- **Financial Corporations** → identifiable by the activities test for its establishment
CAN BE BOTH TRADING & FINANCIAL – doesn't impact, just specify
 - a) Must look at **actual activities** *Adamson's Case (1979)*; **[DOMINANT TEST AFFIRMED IN WORK CHOICES (2006)]**
 - b) Must be engaged in 'not insubstantial trading or financial activities' *Adamson's Case (1979)*; 'sufficiently significant' or 'substantial' **THOUGH** no necessarily 'predominant' part of the entity's overall activities [no numerical value of this]; *Tas Dam (1983)*;
 - c) Corporation holds 'legal personality' (e.g legislative 'capacity to own property, to contract and to sue'); *CEPU v Queensland Rail (2015)*
 - **Financial Activities**; transactions in finance (such as borrowing or lending money) as distinct from transactions (such as purchase or sale of goods for monetary consideration) in which finance cannot properly be seen as

Summary

- 1) Is law demonstrating mere fact of externality *Horta v Cth* (1994)
 - a. Includes persons, places, matters or things; *Seas and Submerged Land* (1975)
 - 2) Adopt broad view – provides plenary power; *Polyukovich* (1991) (Mason CJ, Deane, Dawson and McHugh JJ); *XYZ v Cth* (2006) (Majority); *Horta* (1994)(Majority);
 - 3) Sufficient connection test; *Polyukovich* (minority); *XYZ v Cth* (2006) (minority)
| THIS WILL PROBABLY REQUIRE POINTING TO A CASE EXAMPLE
- **International relations** are a **purposive** power – proportionality test: must be ‘appropriate and adapted’
 - Australia’s relations with other countries (*Sharkey* (1949)) and relations with international persons or organisations (*Koowarta v Bjelke-Peterson* (1982))
 - **Implementing international instruments** (I.E all obligations/ agreements/ treaties to which Australia is subject or a party) may be enacted into domestic law: *Tasmanian Dams* (1983) per Mason CJ, Murphy, Deane and Brennan JJ
 - “*more than just treaties or agreements or relations between countries, also covers affairs not consensual in nature*”; *Seas and Submerged Land* (1975) ~ can also include terrorism events
 - Proportionality test (for matters of **‘international externality’** - relationships, treaties, international concerns; *R v Burgess* (1936); *Ex parte Henry* (1939); *Tasmanian Dams* (1983) (Deane J))
 - **Treaty implementation** is a **purposive** power – proportionality test
 - Proportionality test (for matters of **‘international externality’** - relationships, treaties, international concerns; *R v Burgess* (1936); *Ex parte Henry* (1939); *Tasmanian Dams* (Deane J))
 - Under s 51(xxix) the Commonwealth may make laws to incorporate its treaty obligations into domestic law; *R v Burgess* (1936); *Ex parte Henry* (1939);
 - Ratification may render administrative decision makers like to consider treaty provisions; *Minister for Immigration & Ethnic Affairs v Teoh* (1995)
 - **Proportionality Test: TO DETERMINE IF ‘APPROPRIATE & ADAPTED’** ; two key views

Executive Power - Nationhood ss 61 and s 51(xxxix) – Purposive Power – Proportionality Test

CHAPTER II = ALL EXECUTIVE POWER

- S 61 executive power > cabinet + ministers
- S 62 federal executive council > constitutional monarchy ~ governs only democratically leading executive
- S 63 provisions referring to Governor-General >
- S 68 Command of Naval and Military Forces

‘physical property or artistic, intellectual, scientific or sporting achievement or endeavour’, things that are ‘part of the heritage distinctive of the Australian nation’, worthy of *‘protection, preservation or promotion’*

Proportionality test

- The High Court holds that the nationhood power is implied under s 61 of the Constitution. (Implied under s 51(xxxix) **express incidental power**; s 61; **Davis (1988)**)
- A purposive power, so the test is whether the law is appropriate and adapted to a purpose which is of benefit to the people or nation (**Davis v Cth**) → **proportionality**
 - The High Court has held that a **narrow approach to the test of proportionality for the nationhood power is to be adopted** (**First Pharmaceutical Benefits Case**; **Davis v Cth (1988)**; **Pape v Cth (2009)**)
- Power may only be **exercised for the benefit of the people or nation**; **Davis (1988)**; **Dixon J in First Pharmaceutical Benefits Case (1945)**; **Mason J’s argument in VIC v CTH (AAP Case) (1975)**; **Tas Dams (1983)**, **Deane J**; **Pape (2009)**; **Davis (1988)**
- Laws potentially constituting a ‘benefit to the nation’ may include:
 - **National scheme for free medicine**; **First Pharmaceutical Benefits (1945)**
 - Establishing regional social development councils to support **social welfare activities** through an **Australian Assistance Plan**; **AAP case (1975)**
 - **Preserving the environment** through World Heritage listing; **Tas Dam (1983)**
 - Commemoration of **Australia’s Bicentenary**; **Davis v Commonwealth (1988)**

ADVISED STRUCTURE

Structure

1. Write a **separate response** for each Part (corresponding to a specific client/plaintiff - e.g. Part 1 Advise 'X' (often Minister or client))
2. **Divide up the issues** in a logical order & use subheadings for elements- e.g.
 - I. Characterisation of Cth law - Corporations power
 - II. Limitation - Freedom of political communication
 - III. Inconsistency of laws - s109
 - a. Field Test
 - b. ETC
3. **Cover fundamental elements common to all legal problem solving**
 - (i) **Issue** - Use each issue as a Subheading

> characterisation | constitutional limitations | issues involving inconsistency (need two valid laws to get to inconsistency)

Specific wording

- If you find one of the laws invalid at the limitation point of dividing the issues, & see no logical way to proceed to the next step inconsistency of laws use phrase “*IN the alternative...*” to get to that next step
- Conclude limitation issue by saying “I would suggest that the [implied freedom of political communication - **INSERT**] would render this law invalid.”
- However, in the alternative, if the court does not agree, then the law would proceed to a section 109 dispute involving an inconsistency of laws.

> Citing the relevant issue, using the issue as a subheading

> Next step involves a brief statement of the facts in no more than one or two sentences, the **relevant facts from the problem question here**

(ii) **Facts** - in Constitutional Law these can include clauses within legislation as well as material facts

(iii) **Rules** - cite the relevant section of the constitution, and the case law interpreting the Constitution

(iv) **Application** (of rule(s) to facts) - apply the legal principles to the relevant facts for each issue

- **MOST IMPORTANT PART / WHILE MAINTAINING RELEVANCE, TELL YOUR EXAMINER ALL YOU KNOW ABOUT HOW THE RULE HAS APPLIED IN VARIOUS CASES WE HAVE STUDIED | AS MANY RELEVANT CITATIONS OF CASES WE HAVE STUDIED AS POSSIBLE. MARKS ARE AWARDED FOR EACH RELEVANT CASE AND CONSTITUTIONAL PROVISION CITED**

(v) **Conclusion** - explain the most ‘probable’ or ‘likely’ outcome

Recommended that you underline or use **bold font** for *subheadings, case names and sections of the Constitution*

Constitutional Paragraph Scaffolds

5 MINUTES READING + SCAFFOLD FOR EACH QUESTION [10 MINUTES]

5 MARKER: 10 MINUTES

10 MARKER: 20 MINUTES

15 MARKER: 30 MINUTES

STEP 1: CHARACTERISATION

Implied incidental power (s 51(xxxix))

RELEVANT:

- a. Corporations power
 - a. With respect to the **corporations power**, the implied incidental power was found to authorise a law which permitted a person who had suffered a loss because of a corporation's misleading or deceptive conduct to recover that loss from any natural person involved in that deception: *Fencott v Miller* (1983).
- b. Nationhood power
- c. External Affairs: Geographic Externality (subject)
- d. External Affairs: matters of international concern (purposive)

Corporations power (s 51(xx))

[LAW] may be captured within the ambit of s 51(xx) ('power name'). It could come within the scope the ... part of this Power.

To determine if [X] can challenge the constitutional validity of the [ACT/LEGISLATION], it must first be characterised under the legislative corporations s 51(xx) [and other if relevant] head of power.

If the challenge provides the act is invalid under the corporations power, these provisions may be considered void ab initio and cannot confer any legal rights or impose obligations.

1) Characterisation

a. Corporations Power (s 51(xx))

The corporations power is a subject matter power that enables the Cth to legislate on foreign, trading and financial corporations within its scope (s 51(xx)). To determine the validity of the [LEGISLATION/PROVISIONS], we must employ the sufficient connection test to consider if there is sufficient connection to the HOP (*Bank Nationalisation Case (1984); Murphys (1976)*) on whether the law regulates a constitutional corporation.

FIRST REQUIREMENT: CONSTITUTIONAL CORPORATION

ISSUE/RULE/APPLICATION:

On the facts, the entity holds legal personality (*CEPU v QLD Rail (2015)*) and can be considered a [FOREIGN/TRADING/FINANCIAL] AS [APPLY FACTS].

- IF FOREIGN; defined as any entity formed under the law of a foreign country
- IF TRADING; APPLY Q = transactions in manufactures, purchase & sale of goods (*Kui Ring ai Cooperative Building Society (1978)*)
- IF FINANCIAL; APPLY Q = transactions in borrowing & lending money

The dominant 'actual activities test' (*Adamson's Case (1979); Work Choices Case (2006)*) must be applied to consider that the corporations is engaged in 'not insubstantial' (*Adamson's Case (1979)*) 'sufficiently significant' though not necessarily predominant trading/financial activities (*Tas Dams (1983)*). [APPLY FACTS & CONSIDER SIMILAR CASES]

- IF INACTIVE/SHELF COMPANY: if does not undertake any 'activities', character must be found in other indicia (*Fencott v Mueller (1983)*) and the purpose test applies (*adopts minority position of Adamson's Case (1979)* +

Tas Dam (1983) [APPLY FACTS – WHAT IS PURPOSE/WRITTEN IN COMPANY CONSTITUTION]

CONSTITUTIONAL CORPORATION CAN:

- include **sporting clubs, charities** (Red Cross Case (1991)), **universities** (Quickenden v O'Connor (2001)), mention of a **board** [subject to activities test] (State Superannuation (1982))

BUT DOES NOT

- include **public entities** that run at a loss; AWU v Etheridge Shire Council (2008) or **funded wholly by the state**; ALSWA v Lawrence (2008)
- The cth can create a corporation (*Malone v Metropolitan v Police Commissioner* (1979))

*In the law fails the test (ie natural persons) may nevertheless be **impliedly incidental** through s 51(xxix) to s51(xx) if:*

3. Its purpose affects or impacts upon trading activities or corporations in some way (apply the proportionality test: *Tas Dams* (1983) (per Brennan); *Re Dingjan* (1995))
 1. Is it a law which will assist in giving effect to the purpose of the corporations power, and if so, is it **appropriate and adapted** to that purpose
4. **Subject to two exceptions**: incorporation (*Incorporation Case*); and entry into contracts and expenditure (*Williams* (No. 2))

SECOND REQUIREMENT: SCOPE OF S 51(XX) POWER

ISSUE/RULE/:

The dominant broad view (*Work Choice* (2006)) provides plenary power to the cth to create valid laws that govern the activities, functions, relationships, business, rights and privileges, or impose obligations, or regulate the conduct of those through whom it acts of constitutional corporations. [CHOOSE THESE AS APPLY].

Conversely, the narrow view requires a regulated activity to have a sufficient connection to trading or financial activities (*Actors v Fontana* (1982)).

NOTE WHICH VIEW ADOPTING

EXCEPTIONS:

- **Tasmanian Dam (1983) majority** found that a law prohibiting a trading corporation from undertaking certain activities, at least when done for the purposes of trade, came within the scope of the power

APPLICATION:

[APPLY FACTS TO DETERMINE WHETHER COMES UNDER SCOPE – LOOK AT SPECIFIC PROVISIONS & WHETHER IT CAN GOVERN]

2. the activities, functions, relationships and the business of constitutional corporations;
 - In **Tas Dams**, a majority found that **a law prohibiting a trading corporation from undertaking certain activities**, at least when done for the purposes of trade, came within the scope of the power
5. the creation of rights, and privileges belonging to such a corporation;
6. the imposition of obligations on it;
7. 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; *[note this latter point may more accurately be construed as part of the implied incidental power].*

INCIDENTAL POWER:

INCIDENTAL SCOPE OF CORPORATIONS

In the law fails the test (ie natural persons) may nevertheless be **impliedly incidental** through s 51(xxix) to s51(xx) if:

- Its purpose affects or impacts upon trading activities or corporations in some way (apply the proportionality test: **Tas Dams (per Brennan); Re Dingjan**).
- Subject to two exceptions: incorporation (**Incorporation Case**); and entry into contracts and expenditure (**Williams (No. 2)**)
- With respect to the **corporations power**, the implied incidental power was found to authorise a law which permitted a person who had suffered a loss because of a corporation's misleading or deceptive conduct to recover that loss from any natural person involved in that deception: *Fencott v Miller (1983)*.

CONCLUSION:

IF VALID:

As the law does govern a constitutional corporation and is within the scope of the corporations power (s 51(xx)), the sufficient connection test is satisfied and thus the [LAW/PROVISION] is likely valid.

IF INVALID

As the law does/does not govern a constitutional corporation and is/isnot within the scope of the corporations power (s 51(xx)), it is likely invalid, failing to satisfy the sufficient connection test.