s 51(xx): Corporations Power

Determine if focus of Q is:

- (1) Identifying if the entity purporting to be regulated is a constitutional corporation (see 2025 Q1A); or
  - Deal with II. first, then spend more time on I.
- (2) Law imposing obligations on a party that is not a trading corporation – consider *Work Choice*; whether the law concerns an entity/person whose conduct 'is or is capable of affecting the business of a trading corporation'.

I. Is the entity being regulated a constitutional corporation?

1. Formed 'within the limits of the Cth'

*s 51(xx) only deals with **already incorporated corporations** – Cth cannot legislate on the process of incorporation itself (NSW v Cth (Incorporation Case) 1990).*

2. Is the entity a corporation?

A corporation under s 51(xx) is an organisation recognised by law as having legal personality or personhood, which is separate from its members.

a. **[Often assumed e.g. 'Ltd']** *Per Queensland Rail, determinative consideration is the authority's independent exercise as a legal person (recognition as a right and duty bearing entity with perpetual succession) (at [36]).*
   i. **Facts:** QRA's primary activity was providing labour hire to a related government entity, for which it charged prices that produced **no profit**.
      1. Even if it did no more than provide labour to QR at non-profitable price, its structure, purposes and activities are sufficient to render it a 'trading corporation'.
      2. Still selling service of labour → trading activity.
   ii. **Held:** not enough for Parliament to say QRA was 'not a body corporate' → Parliament cannot determine limits of federal power (at 185) → **constitutional fact**.

b. **[If not an incorporated body with limited liability] Does it have its own assets rather than the owners'?**
   i. If yes → it has a distinct personality and is thus a corporation.

3. [Step 1] **Is it a constitutional corporation?

s 51(xx) refers to trading, financial and foreign corporations. Prima facie, the [entity] appears to be a [trading] corporation because it engages in [...].

- NB: classes are ***not mutually exclusive*** – corporation can be both trading and financial (*State Superannuation Board*).

a. **A ***trading corporation*** is 'formed for the purposes of trading' (*R v Trade Practices Tribunal*).
   i. *The [entity] is engaged in buying or selling goods/services for profit or business activities carried on with a view to earning revenue (Adamson's case).*
   ii. Profit not required (*State Superannuation*).
      1. Could be a 'bad' trading corporation e.g. making a loss.

b. A ***financial corporation*** 'borrows and lends or otherwise deals in finance' (*Re Ku-ring gai Co-operative Building Society*).

c. A ***foreign corporation*** must be formed outside the limits of the Cth (*NSW v Cth*, 497-8).

4. [Step 2] Whether the trading or financial corporation is resolved by the 'current activities test'?

*We apply the current activities test, which Mason J provides is whether the corporation's 'trading activities form a **sufficiently significant proportion of its overall activities**' (Adamson, 233) The test is applied liberally,'with little apparent weight being given to the element of overall proportionality of trading activities' (Quickenden v O'Connor).*

a. **(1)** *The threshold for satisfying this test is very **low**; it merely requires that the trading activities be 'not an insubstantial part' of the activities as a whole (State Superannuation).*
   i. *Here, as [...] are very much **at the core of what [corporation] does,** they cannot be said to be 'so slight and so incidental' to its principal activity (Adamson per Mason J).*

b. **(2)** *Lower court decisions have interpreted this standard expansively. These facts can be analogised to [...].*
   i. See cases below.

c. **(3) [Counter]** ***In the alternative****, the High Court has raised the possibility of a '**hybrid**' approach being adopted, appealing also to purpose, or what the body is constituted to do (Queensland Rail). Gageler J adopts a more expansive approach, finding that whether an entity is a trading corporation can be identified through **activities or purpose**. As such, the 'trading activities' of the corporation is not the only relevant factor.*
   i. *Isaacs J in Work Choices **excludes** certain corporations from being trading corporations e.g. scholastic and religious corporations. Further, in AWU v Etheridge Shire Council, activities were*

held to be <u>dwarfed by its political and civic purposes</u>, which were valid reasons for them <u>not</u> to be trading activities.

ii. ***Applying this to the facts**, the [entity] purports to [...]. Trading activities may be construed as 'incidental' to this broader purpose.*

d. **(4) *Overall***, *per the decision in Queensland Rail, the court concludes that the **<u>activity</u>** is still the basis for identifying a trading corporation, with Gagelor J indicating that either trading activities independent of their purpose or purpose itself, could be applied. Therefore, the [corporation] is a trading corporation.*

5. **[Step 3] Other entities?**

   a. Shelf companies

   i. If a corporation has <u>not yet engaged in activities</u>, you can look at its **purpose** (*Fencott v Muller*).

   ii. Must look to **indicia** in the Constitution, memorandum and articles of association (*Fencott v Muller*).

      1. *Shelf co Oakland's* – arts of association included stuff re trading, so was trading even though had done none and had no intention of doing any.

   b. Holding or subsidiary companies

   i. The HCA has never determined whether the mere character of being a holding company or subsidiary of a s 51(xx) corporation brings that body within power.

   ii. Arguable that power to legislate a holding company is ***<u>incidental</u>*** to regulating its subsidiary (*Fencott v Muller; Actors Equity* per Murphy J) i.e. not a trading corporation.

Examples of *trading* corporations

1. <u>Selling tickets</u>
   a. The WA Football League in *Adamsons case* (1979) **sold tickets**, which constituted engaging in trade.
   b. In *Quickenden v O'Connor* (2001), University of WA was a trading corporation engaging in 'substantial amounts' of trade, where revenue from tickets, parking fees, sale of publications and services etc. was around **18% of total revenue** (substantial).
      i. Even if it's of no charge i.e. free, still considered a trading activity.
2. <u>Business activities generating revenue e.g. stalls, shops, receiving fees.</u>
   a. In *E v Australian Red Cross* (1991), RC was a trading corporation due to **stalls and shops with $2 million revenue** (a small proportion of its revenue from them). The Royal Prince Alfred Hospital was also a trading corporation because it received some patient fees and did some business activity.
   b. In *United Firefighters' Union v Metropolitan Fire & Emergency Services Board* (1988), the fire brigade was a trading corporation because it **serviced fire equipment for fees (5% of revenue).**
   c. **[Use if trading activity <u>not the most prominent</u> purpose]** *Tasmanian Dam Case* (1983) – activities included purchasing energy, locating energy resources, advising the minister, controlling hydro-electric works etc.. Hydro-electric Commission held to be a trading corporation.
      i. Although **trading activities of HEC were less prominent** than its policymaking role and generation of power in public interest, <u>trading of power was still a significant portion of its business</u>.
3. <u>Managing funds e.g. Superannuation.</u>
   a. In *State Superannuation Board* (1982), the SSB managed superannuation funds, pensions for public servants.
4. <u>Schools/hospitals</u>
   *a. Following Work Choices' expansion of other aspects of s 51(xx), any school/hospital etc. can now be seen as trading corporations. Courts may need to focus on a body's **predominant purpose** to avoid this.*
   b. Suggested that corporations in education, research, public health or government activity should **not** be considered a trading corporation (*Zines*).

Examples of *financial* corporations

1. In *State Superannuation Board* (1982), financial activities included investment, commercial and housing loans (to generate further funds); found to be a trading corporation.

Examples of *non-trading* corporations

1. When an entity's primary activity is ***<u>religion or education</u>*** in the case of a church or school (*Adamson* at [234]).
2. The purpose of the council was not to trade, but to ***<u>govern</u>*** – even though its only function was supplying electricity (*R v Trade Practice; Ex Parte St George County Council*).
3. All ***<u>domestic corporations</u>*** which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific and literary purposes (no longer contemporary purpose) (Isaac J in *Huddart Parker*).