Topic D: Corporations Power (s 51(xx))

PHASE 1: THE ENTITY TEST (Is it a “Corporation”?)

1. Search for the "LTD" Label

- **Factual Indicator:** Look for the words **“LTD”** or **“Limited”** in the facts. This indicates limited liability and formal incorporation, satisfying the threshold of being a corporation.

2. Substance over Form (e.g. If State labels deny corporate status)

- **Legal Principle:** A State cannot define a body out of federal power by its own **“ipse dixit”** (mere declaration) [***Queensland Rail (2015)*** at 185]. Whether it is a corporation is defined **objectively** by its traits.
- **Traits to Look For:**
  - Separate legal personality?
  - Does it have **“perpetual succession”**? [***Queensland Rail (2015)*** at 172].
  - Is it a **“right and duty bearing entity”**? [***Queensland Rail (2015)*** at 173].
  - Can it **“hold property, to contract and to sue”**? [***Queensland Rail (2015)*** at 193].
- **Judicial Statement:** Recognition as an **“independent existence as a legal person”** is the **“determinative consideration”** [French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ in ***Queensland Rail (2015)*** at 187].

PHASE 2: STATUS TEST (Consider if the following arise on the facts)

*If a problem question involves a Commonwealth law that purports to **create, register, or incorporate** a company, the **Incorporation Case** is your authority to argue that such a law is **invalid** under **s 51(xx)**.*

Step 1: Foreign Corporations

- **Rule:** To fall within this limb, a corporation must be **“formed outside the limits of the Commonwealth”** [***Incorporation Case (1990)*** at 498].
  - Just as the Commonwealth cannot "form" (create) a foreign corporation, this limb confirms the **s 51(xx)** power only attaches to entities that have already undergone the process of formation elsewhere.
  - ***Note**:* You do **not** need to apply the ***Adamson*** "significant proportion of activities" test here

Step 2: Corporations Formed within the Commonwealth

- **Legal Principle:** **Section 51(xx)** applies only to corporations **already in existence**; it does not give the Cth power to legislate for the *process* of incorporation itself (***NSW v Commonwealth (Incorporation Case)*** **(1990)**).

- **Judicial Phrase:** The word **"formed"** is a **"past participle used adjectivally,"** meaning the power is restricted to **"formed corporations"** and **"exclude[s] the process of incorporation itself" (**Majority in the ***Incorporation Case***).

PHASE 3: THE CHARACTER TEST (Is it a "Trading/Financial Corporation?")

1. Apply the Activities Test (The Primary Test)

- **Rule:** A corporation is a trading/financial corporation if such activities form a ***"sufficiently significant proportion of its overall activities as to merit its description"*** [**Mason J** in ***Adamson (1979)*** at 233; ***Work Choices (2006)*** at 108].
- **Key Idea:** It need **not** be the **"predominant and characteristic"** activity [Majority in ***State Superannuation Board (1982)*** at 303-304].
- **Factual Indicators of "Trading":**
    - **"Trading"** involves the buying and selling of goods or services for reward, but **need not be for profit** (***State Superannuation Board 1982***)
    - **Profit is not required:** Selling tickets for events to social club members is trading even if no profit is kept [***State Superannuation Board (1982)*** at 305-306].
- **Threshold:** It need **not** be the **"predominant and characteristic"** activity (***State Superannuation Board 1982***)
    - **Benchmarking "Significance" (Use these for analogies):**
        - **18% revenue** is enough (University) [***Quickenden (2001)***].
        - **5% revenue** is enough (Fire Brigade) [***United Firefighters' Union (1988)***].
        - **Small proportion via op-shops** is enough (Red Cross) [***Red Cross (1991)***].
- **Judicial Phrases**
    - **To distinguish marginal activity:** Trading must not be **"so slight and so incidental to some other principal activity"** (e.g., religion) that it fails the description [**Mason J** in ***Adamson (1979)*** at 234].
    - **Majority in *State Superannuation board*:** It is sufficient if the activity is **"substantial and forms a significant part of its overall activities"**; it need **not** be the **"predominant and characteristic"** activity.

2. The Purposes/Objects Test (For new or inactive corporations)

- **Rule:** If a body has **"barely begun to carry on business,"** the court looks to its **"constitution, including its objects"** as a guide [Mason, Murphy, Brennan and Deane JJ in ***Fencott (1983)*** at 602].
- **The "Hybrid" Argument (For Distinguishing Marginal Facts):** A corporation might be identified by either its **"substantial trading purpose (irrespective of activity) or by reference to its substantial trading activity (irrespective of purpose)"** [Gageler J in ***Queensland Rail (2015)*** at 200].

Exam Tip: The "Do Both" Strategy

Since the High Court is currently in an "interregnum" period, your scaffold should explicitly acknowledge the split:

1. **Start with the Palmer Majority (SP):** Go through suitability, necessity, and balance.
2. **Pivot to the Likely Future Law (EJ):** Quote Gageler J: *"Reasonable necessity ... expresses a standard that **guides the making of an evaluative judgment** as distinct from a test that **substitutes for [it]**"*.
3. **Evaluate the Statute:** Conclude that the law is/is not reasonably necessary because it is (or isn't) **sufficiently constrained by specific statutory features** (like temporal limits or expert triggers).

s 92 – Overview

1. Nature of the Provision

- **Limit on Legislative Power:** Section 92 acts as a **limitation upon the legislative power** of both the **Commonwealth and the States**.
  - **NOTE:** While it applies to the Commonwealth also, most cases involve State laws because s 92 is primarily concerned with preventing States from protecting their own **intrastate (domestic) players** from interstate competition.
- **Constitutional Purpose:** Its goal is to create a national "free trade area" and prevent States from using borders as barriers to keep "outsiders out" or "insiders in".

2. Historical Origin: Duties and Customs

- **Prerequisite for Federation:** The inclusion of s 92 was an essential condition for the colonies to agree to federate.
- **Elimination of Barriers:** It mandated that upon the imposition of uniform duties, trade and intercourse among the States must be **absolutely free** from border customs, taxes, and other protectionist barriers.

3. The Two Limbs of Section 92

The provision is a **composite expression** containing two distinct but overlapping limbs:

- **Trade and Commerce**: Relates to commercial dealings, negotiations, and the transport/delivery of goods and services.
- **Intercourse**: Relates to the movement of people, the transport of goods, and the transmission of communications across State boundaries.

4. Critical Difficulty: "Absolutely Free" from what?

- **Not Anarchy:** The High Court has long rejected a literal reading; "absolutely free" does **not** mean freedom from all regulation, which would result in "anarchy" (***Cole v Whitfield***; ***APLA Ltd v Legal Services Commissioner (NSW)***).
- **Free from Discrimination:**
  - **Trade and Commerce limb:** Must be free from **discriminatory burdens of a protectionist kind** (***Cole v Whitfield***; ***Barley Marketing Board (NSW) v Norman***).
  - **Intercourse limb:** Must be free from any **unjustified differential (discriminatory) burden** (***Palmer v Western Australia***; ***Nationwide News Pty Ltd v Wills***).
- **The Modern Test:** A law infringes s 92 if it imposes a burden that is **discriminatory** (treating interstate movement/trade less favourably than intrastate) and that burden cannot be **justified as reasonably necessary** to achieve a legitimate, non-protectionist goal.

Summary – post *Palmer*

- ***Cole* for interstate trade**: the law is discriminatory in a protectionist sense. Sets up two steps: discrimination analysis and justification analysis.
- **(1) Is there differential treatment (discrimination) between interstate trade/intercourse and intrastate trade/intercourse**
  - Consider – is the purpose of the law to differentiate, or does it have that effect (it impacts differentially on interstate trade/intercourse)?
  - **For trade** – that the law protects/advantages intrastate trade (discriminates against interstate trade); for intercourse – that the law differentially burdens interstate trade in any way
    - **Note for trade**: may need to consider a national market, cross-substitutability, and elasticity of demand
    - **Note**: trade and intercourse form a 'composite expression' (with the trade inquiry uniquely framed as a discussion of protectionism) (***Palmer***)
- **(2) Justification:** are the means adopted by the law 'reasonably necessary' to achieve a legitimate non-discriminatory purpose? (***Palmer***)
  - **(a) Legitimate non-discriminatory purpose / legitimate non-protectionist purpose (for trade):** what is the purpose of the law? What mischief is it directed at?
    - **Note**: State's capacity to address real danger to the welfare of its people (***Castlemaine***)
  - **(b) What means has the law adopted to achieve that purpose?**
    - **Structured proportionality**: suitability; necessity (compelling alternatives); adequate in its balance (***Palmer*** majority)
      - However – need to be attentive to the fact that this is not likely to remain the law
    - **'reasonably necessary'** – evaluative judgment focused on facts (***Palmer*** minority – but likely position?)
    - ***In an exam***: Need to conduct BOTH analysis' → "If the dominant approach were to be the 'reasonably necessary' approach in the future, the conclusion would be …"

Summary of Palmer's Effect on Section 92's Application:
To answer an exam problem, the analysis is affected because:
1. You must first determine if there is **differential treatment** (Step 1).
2. If it is a trade issue, look for **protectionism**; if it is intercourse, look for any **differential burden**.
3. For **Justification** (Step 2), you must identify a **legitimate non-protectionist/non-discriminatory purpose**.
4. You then must decide **how** to assess "reasonable necessity"—noting that while ***Palmer*** currently mandates **structured proportionality**, a current High Court majority prefers an **evaluative judgment**.

TOPIC D – Corporations Power (s 51(xx))

Phase 1: The Entity Test (Is it a "corporation"?)

Case Name	Facts	Principle	Reasoning	Application
***Communications Union v Queensland Rail* (2015)**	Queensland established a Rail Authority to hire out labour and declared via statute that it "is not a body corporate" to avoid federal industrial laws.	**Substance over form.** A state cannot use its own "ipse dixit" (mere declaration) to define an entity out of federal power if it objectively possesses corporate traits.	The Authority's **"independent existence as a legal person... recognition as a right and duty bearing entity"** was the determinative factor. Gageler J noted it answered the constitutional description because it had the capacity to **own property, contract, and sue**.	Ignore State labels like "this is not a body corporate"; look for objective traits of a legal person (suing/being sued, owning property, perpetual succession).

Phase 2: The Status Test (Is it a "constitutional corporation"?)

Case Name	Facts	Principle	Reasoning	Application
***Adamson's Case* (1979)**	Professional football leagues and clubs argued they weren't "trading corporations" because their primary purpose was the promotion of sport, not profit.	**The Activities Test.** A body is a trading corporation if its trading activities form a **"sufficiently significant proportion of its overall activities"**.	Mason J held that "trading corporation" is a label for when trade is a significant part of overall activity; **profit is not required**. Trade includes selling services like gate receipts and broadcasting rights.	Look for revenue-generating activities. Even if a body has "loftier" purposes (religion, sport), it is a trading corporation if those activities are substantial.
***State Superannuation Board v TPC* (1982)**	A State Board managed a super fund for public servants and engaged in large-scale investment and commercial/housing loans.	**Financial limb.** A financial corporation is identified by its substantial financial activities.	The Majority rejected the "predominant activity" test; it is sufficient if the financial activity is **"substantial and forms a significant part of its overall activities"**.	Use for bodies that manage money, invest, or lend for interest. Use this "substantial" threshold (analogous to ***Adamson***) for

				financial entities.
***Fencott v Muller* (1983)**	A "shelf company" had been incorporated but had not yet begun any actual business activities.	**The Purposes Test.** For new or inactive corporations, look to the objects and purposes in the founding documents.	When a corporation has not begun business, its **"constitution, including its objects, assumes particular significance as a guide"**.	Use only if the body is **new or inactive**. Check the "Memorandum of Association" or "Objects" clause in the facts.
***Incorporation Case* (1990) (Foreign Limb)**	A challenge to the Commonwealth's power to legislate for the *process* of incorporating companies.	**Status by origin.** Foreign corporations are defined by where they were formed, not what they do.	To fall within this limb, a corporation must simply be **"formed outside the limits of the Commonwealth"**.	Use for foreign companies (e.g., Apple Inc.). **No Activities Test required**; place of formation satisfies the Status Test immediately.
Lower Court Examples	***Quickenden***: Uni of WA (18% revenue). ***Red Cross***: Red Cross (op-shops). ***Metropolitan Fire Board***: Fire Brigade (5% revenue).	**Liberal Threshold.** Lower courts apply the Activities Test broadly; even small percentages of revenue can suffice.	Uni of WA is a trading corporation even if education itself isn't "trade".	If facts show revenue from trade is "dwarfed" by grants (like a hospital or Uni), it is likely still a constitutional corp.

Phase 3: Characterisation (Reach of the Power)

Case Name	Facts	Principle	Reasoning	Application
***Strickland v Rocla Concrete Pipes* (1971)**	Three companies made an agreement to restrict competition regarding concrete pipe sales (intra-State trade).	**The Narrow View.** The power at least extends to regulating the **trading activities** of a trading corporation.	Barwick CJ held that restrictive trade agreements are at the **"very heart of the purpose for which the corporation was formed"**.	Confirms that laws regulating the **actual trade** of a constitutional corporation (e.g., price-fixing) are valid.

***Actors and Announcers Equity v Fontana Films* (1982)**	A union imposed a "black ban" on a theatre agent (third party) to stop them from supplying services to Fontana (a trading corp).	**Protection of Trade.** The power extends to regulating **third parties** if the purpose is to **protect the trading activities** of a constitutional corporation.	Mason J: A law prohibiting secondary boycotts that **"adversely affect the trading activities of corporations"** is within power.	Use if the facts involve regulating a **non-corporation** (like a union or person) to protect a corporation's trade/business.
***Tasmanian Dam Case* (1983)**	Federal law prohibited a trading corp (the HEC) from excavating or building a dam to generate electricity for future sale.	**Intermediary View.** The power extends to non-trading activities if they are done **for the purpose** of the corporation's trading activities.	Building a dam is "preliminary to trade" but within power because it is a necessary **"prelude"** to future trade.	Use if a corporation is doing something (building, excavating) that isn't trade yet, but is a **necessary preparatory step**.
***Work Choices Case* (2006)**	The Cth shifted the basis of federal industrial relations to s 51(xx), regulating terms for almost all employees of "constitutional corporations".	**The Broad View.** Section 51(xx) is a **"persons power."** The Cth can regulate any matter so long as the corporation is the **"object of command"**.	The Majority adopted Gaudron J's view: the power extends to the **"activities, functions, relationships and the business"** and to the **"conduct of those through whom it acts"** (employees/shareholders).	**Current Law.** Validates regulation of internal personnel, industrial relations, and third parties whose conduct affects the business.

Phase 4: Constitutional Limits

Case Name	Facts	Principle	Reasoning	Application
***Incorporation Case* (1990)** **(The Limit)**	A challenge to the Commonwealth's power to legislate for the *process* of incorporating companies.	**No power to create.** The Commonwealth cannot use s 51(xx) to *incorporate* companies.	The word "formed" is a **"past participle used adjectivally,"** describing	Strike down laws that purport to **register, create, or bring a company into**