

GENERAL PRINCIPLES / APPROACH

Determine if the law is valid

Look to the relevant Head of Power:

- CORPORATIONS s 51(xx)
- RACE s 51(xxvi)
- TAXATION s 51(ii)
- GRANTS s 96
- DEFENCE s 51(vi)

Limitations which also invalidate it

Even if authorised by HoP, does the law breach Constitution in some other way?

s 51: every law is 'subject to this Constitution'.

As *'the stream cannot rise above its source'* (Fullagar J in **Communist Party**), no law can be passed that contravenes the prohibitions:

- **s 92:** freedom of interstate trade and commerce
- Implied freedom of political communication (from representative democracy)
- Implied intergovernmental immunity (from federalism)

If the law is invalid

The statute can be enforced to the extent to which it does not exceed power: **s 15A Acts Interpretation Act**

1. Invalid section may be **read down** where ambiguous, so as to fit within power.

Cannot be done where the provision is an **'undistributed expression'** (i.e., where the one term contains both constitutional and unconstitutional subject matter): **Burgess** ['within the limits of the Cth' invalid in applying to intrastate T&C and could not be read down as undistributed'].

2. If the invalid provision cannot be read down, it may be **severed** to save the remainder of Act. Doing so must be:

- (a) Consistent with intention of Parliament (as expressed by statute – e.g. cannot sever if intention of Parliament was for Act to operate as a whole or not at all): **Work Choices Case**
- (b) Appropriately few and specific **Industrial Relations Act Case**, leaving a logical statute which is internally consistent.
- (c) In this process: court's function cannot be *'in essence legislative not judicial'* – thus cannot insert new words, only remove them: **Burgess**

If dealing with a State Act, prima facie valid as States' have plenary legislative power

- Therefore, no head of power issue
- **HOWEVER**, limitations still apply to invalidate it

CORPORATIONS POWER s51(xx)

s 51: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to... (xx) **foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.**

Is the entity being regulated a constitutional corporation?

s 51(xx) power is with respect to persons rather than a subject matter (e.g. trade & commerce, external affairs). First issue is thus what persons it applies to:

***intention is irrelevant** **Queensland Rail** → Qld state Act said Queensland Land Authority was 'not a body corporate' → Court said existence is determinative [36], AND that state parliament cannot limit federal power (186).

1. Foreign corporation

- 'To fall within the [foreign corporations] limb, a corporation must be ... formed outside the limits of the Commonwealth.' **New South Wales v Commonwealth (Incorporation Case) (1990), 497-8.**

2. Trading or financial corporation

- **Current activities test:** **Are a significant portion of the present activities of the corporation trading / financial activities?**
 - Applies to trading corporations per **Adamson**, and financial per **State Superannuation Board**.

See last pg. of Corps Notes for line about purpose WorkChoices

Trading (buying/selling goods and services)

- **Adamson** → Trade Practices Act limited restraint of trade for corporations, WAFL wanted to prohibit Adamsons switching clubs, was the league a corporation? **YES**
Court 4:3 rejecting the argument that the purpose for which a corporation is formed is the sole or principal criterion of its character as a trading corporation, concluded that the relevant character of the football leagues and the football club was to be ascertained by reference to their established activities.
"Its activities rather than purpose of its incorporation will designate its relevant character"
Mason J - Benevolent activities does not change character if upon examination overall it is a trading corporation.
At 234: *'The trading activity of a corporation may be so slight and so incidental to some other principal activity viz religion or education in the case of a church or a school, that it could not be described as a trading corporation'*
- Profit is not necessary (**Queensland Rail**)

Financial (lending/borrowing money)

- **State Super** → Court majority said **sufficient that the activity is substantial and forms a significant part of its overall activities**. The Board engaged in financial activities such as investing in housing and granting commercial loans, which were substantial and not insignificant parts of its operations. Although it served a public purpose, the Board operated in a manner similar to private financial institutions, handling significant amounts of money and engaging in financial transactions.

Low threshold – significant activities mean not insignificant:

- **E v Australian Red Cross**: Red Cross a trading corporation due to stalls and shops with \$2 million revenue. Royal Prince Alfred hospital also a trading corporation due to patient fees (even though dwarfed by State grants)
- **Quickendon v O'Connor**: University of WA a trading corporation – even though trading revenues amounted to 18% of revenue.
- **Tas Dams**: While trading activities of Tas Hydro Commission less prominent than policy-making role and generation of power in public interest, trading of power was still significant portion of its business. Irrelevant that owned by state.
- **Firefighters' Union**: Federal Court held that fire brigade was a trading corporation because it serviced fire equipment for fees (5% of revenue).

NEW CORPORATION → then can have consideration of purpose

- When a corporation *'has not begun, or has barely begun, to carry on business ... its constitution, including its objects, assumes particular significance as a guide'* **Fencott v Muller** (602)
 - In Fencott a shelf company with articles of association including matters regarding trading, so was trading even though had done none and had no intention of doing any. Had the legal capacity.
- In **Queensland Rail**, court identified *'the conclusions that the Authority was constituted with a view to engaging in trading and doing so with a view to profit are irresistible'* (189)
- Gageler J: a trading corporation *'either by reference to its substantial trading purpose (irrespective of activity) or by reference to its substantial trading activity (irrespective of purpose)'* (200)

Ambit of the Express Power

To answer, state present Work-choices position and apply, but then note whether the law would have been within power under more limited Strickland era view (obviously would not be within power under Huddart Parker era view).

1. Development

a. **Huddart Parker** (1909)

- Corporations power is limited to the corporation as an entity, not its activities (e.g. legal status and capacity). Judgement based on reserved state powers doctrine, later rejected in **Engineers** (1920).

b. **Strickland** (1971) expanded the power: reserved state powers abandoned, thus reviving s 51(xx):

- The Cth can regulate **trading** activities of trading corporations/financial activities of finance corporations per Barwick CJ.
- This is still a comparatively **narrow view**.

c. Narrow view subsequently extended to permit Cth regulation of:

- Activities of a natural person that is not a constitutional corporation, if by regulating those activities it protects the trading/financial activities of a trading/financial corporation: **Fontana Films**
- Activities preparatory to trading activities of trading corporations, or activities engaged in for the purposes of the trading activities: **Tasmanian Dams** (1983)

Re Dingjan (1995) broadened (i) further:

- While every direction to a third party is a law with respect to a corporation, regulation of activities which have a substantial effect ('benefit or detriment') on the business of the constitutional corporation are within power – i.e. broadens **Fontana Films** (which required the effect be on the trading/financial activities).
 - Not enough that the activities may affect the business. **Must in fact do so** (if not, not 'in respect of' the Constitutional Corp: McHugh J).
 - The majority held that the legislation was invalid because it purported to apply to contracts which merely related to the business of the corporation, (and which might therefore not affect the business of the corporation) whereas, to be within s51(xx) the legislation could only apply to contracts, or indeed other subject matter, which definitely affected the business of the corporation

2. Current (broad, plenary) position

Work Choices Case (2006) rejects the narrower view in Strickland – **no need for legislation to be regarding the trading/financial activities of the corporation**. Also rejects (other than Kirby J in dissent) the argument that s 51(xx) should be read as subject to s 51(xxxv) the industrial relations power.

Rather, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ adopt the ratio of Justice Gaudron at 375 in **Re Pacific Coal**. The power conferred by s 51(xx) extends to:

- "*at the very least*" to the regulation of activities, functions, relationships and business of a corporation (incl internal relations, industrial relations, dealings with shareholders etc).
- The creation of rights, and privileges belonging to such a corporation
- The imposition of obligations on it
- The regulation of the conduct of those through whom it acts – employees, shareholders
- The regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

The court rejected 'list of horrors' concern (Higgins J in **Huddart**) – Must not interpret a power based on suspicion over power's future and potential misuse [118]. This was a crossing of a "*constitutional Rubicon*" in Kirby J's words, Cth gaining essentially unlimited power over Constitutional Corporations. Thus a major shift in the federal balance, especially given the broad interpretation of what a trading / financial corporation is – can regulate education and health etc.

Does not apply to mere grants of money

- Williams v Commonwealth (No. 2)** → school chaplaincy funding not authorised by corporations power even where recipient is a corporation, law merely grants money, must instead entail a form of regulation, of conduct, activities, relationship or businesses.

Remaining areas of uncertainty / lack of power:

Consideration of purpose in what is a constitutional corporation (WorkChoices)

- At [86], court cited Isaacs J's view in **Huddart Parker** that certain domestic corporations fell outside the class of trading or financial corporations – municipal, mining, manufacturing, religious, scholastic, charitable, scientific, literary.
- Especially now that the Court appears to accept that the purposes of the corporation may be relevant to identifying a constitutional corporation (**Fencott v Muller/Queensland Rail**), does this further support applying Isaacs J's qualification?
- At [86]: *"Although, as explained earlier, it is not necessary to consider what are "trading or financial corporations formed within the limits of the Commonwealth", it is interesting to observe that Isaacs J regarded "a purely manufacturing company" and "those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading" as falling outside the class of trading or financial corporations. The basis for excluding mining and manufacturing corporations from the class of trading or financial corporations was not explained."*
- In **AWU v Etheridge Shire Council** (2008) FCA Spender J determined that the Council was not a trading or financial corporation for the purposes of s 51(xx). Spender referred to Work Choices, and its consideration of two cases:
 - Majority in **St George County Council** HCA said *'trading of a council is subordinate to its governmental purposes'* (Menzies J at 551). In this case Barwick CJ's dissenting judgment was that *'a corporation whose predominant and characteristic activity is trading, whether in goods or services'* was a trading corporation.
 - Mason J in **Adamson's** case: a trading corporation is one whose *'trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation'*.
- **Given that Work Choices referred to both, it leads Spender J to conclude that the Council here was not a trading or financial corporation.**

NO power of incorporation

- **Incorporation Case** confirms 6:1 that the Cth does not have power to legislate about the incorporation of financial and trading corporations ('formed within the Cth' is a *'past participle used adjectivally'*).
- N.B. States then referred power to the Cth under s51(xxxvii) and the Commonwealth enacted the Corporations Act 2001.

Dissolution?

- HCA as a whole has not addressed issue.
- **Incorporation Case** Deane J (in obiter): s 51(xx) authorised the liquidation of local trading or financial corporations.
- Zines: would be "startling" if state had power to create, but Cth had power to destroy.

The Incidental Power

'Where any power or control is expressly granted, there is included in the grant...every power and control the denial of which would render the grant itself ineffective': **D'Emden v Peddler**

This test liberalised in **Nationwide News v Willis**, such that specific grant of power extends to permit Cth control of all matters incidental to the subject matter which are necessary OR appropriate and adapted for the reasonable fulfilment of the power.

For the Corporations power:

Fencott v Muller: As corporations act through persons, in order to be effective a regulation of activities of corporations calls for the **imposition of duties on those natural persons who would or might ordinarily participate in the corporate activities**. Thus, penalties for natural persons valid under incidental power.

RACE s51(xxvi)

s 51: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxvi) the people of any race, for whom it is deemed necessary to make special laws.

Is there an identified race?

Race 'is not a precise concept': **Tasmanian Dam**, Brennan J at 243

- **Multiple factors determinative of a race:**

- Biological – proof of ancestry, “an essential element of membership of a race” **Dam**, Brennan J 244
- ‘Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race’ Ibid.
- These also tend to lead others to identify ‘people as members of a race’ Ibid.

- The law does not have to relate to all people of that race, it may relate to a sub-group of people within that race **Dam**

Groupings such as Sikhs/Jews can constitute racial groups:

- **Mandla v Dowell Lee** 1983 → House of Lords, Lord Fraser of Tullybelton “... a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, **even if not drawn from what in biological terms is a common racial stock**. It is that combination which gives them an historically determined social identity in their own eyes and **in the eyes of those outside the group**. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.”
- **R(E) v JFS Governing Body** [2010] → The UKSC highlighted that the legal classification of race does not solely rest on the discriminator's stated motive but on the characteristics that underlie the discriminatory criterion. In this case, the ethnic aspect of being recognized as Jewish by Office of the Chief Rabbi made the policy based upon race.

Is there a special law which is deemed necessary?

1. Special law

The power is not a power to make laws generally about race, the laws must be specific to a certain race in **terms or operation**

- **Koowarta** → Racial Discrimination Act made unlawful acts based on race that nullified human rights → Gibbs CJ at 186-7 the law was “directed to people of all races” and hence “a law which applies equally to the people of all races is not a special law for the people of any one race.” To be a ‘special law’, the law must be ‘for the people of a particular race, no matter what the race’
 - **BECAUSE** Wilson J: ‘The power contained in s 51(xxvi) is activated when the Parliament discerns circumstances which in its view give rise to a necessity to make a special law. That necessity can arise only from the circumstances considered to be compelling in relation to a section of the community.’ (244)
- **Tasmanian Dam** → Conservation Act protected archaeological sites which were also of particular significance to the Aboriginal race, can the law be ‘special’ when its terms confer a benefit to all peoples, but its operation holds special significance to some? **YES**
 - Brennan J at 245: the law is “**special in its operation**”
 - **TYPES OF LAWS THIS COULD EXTEND TO:** ‘The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity’ ... ‘The advancement of the people of any race in any of these aspects [historic, religious, spiritual, cultural heritage] of their group life falls within the power’ at 244
 - Gibbs CJ (DISSENT) at 110: “Artefacts and relics of such antiquity are of significance to all mankind; a law for their protection is not a special law for the people of any one race.”
- **Special laws can be ‘ascertained** by reference to its differential operation upon the people of a particular race’ “the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race” **Native Title Act Case**