**Week 3 - Corporations Power ("Head of Power")**

Relevant Provision:

<table>
<thead>
<tr>
<th>Section 51(xx)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Parliament shall, subject to this Constitution, have the power to make laws ... with respect to ... foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth.</td>
</tr>
</tbody>
</table>

**Introduction**

- Cth relies on the corp power to regulate the activities, functions, relationships and the business of corporations.
- Through this head of power it has been able to control a variety of economic activities as so much commercial activity is carried out by corporate entities.

**What is a corporation?**

**CORPORATIONS ACT 2001 (Cth) - SECT 57A**

**Meaning of corporation**

(1) Subject to this section, in this Act, corporation includes:

(a) a company; and

(b) any body corporate (whether incorporated in this jurisdiction or elsewhere); and

(c) an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose.

**Natural meaning of a corporation?** (*doesn’t mean entirely what is meant by a corp under the constitution*)

- An association of individuals who join for certain purposes;
- Separate legal identity; (*fundamental principle of corporations*)
- Can sue, be sued, enter contracts, own property and commit offences.

Constitution recognises 3 **types of corps:**

- **Foreign Corps** *easiest to define*
  - Any entity formed under the law of a foreign country and accorded a corporate legal personality either by the foreign law, or by Aus law, will be a foreign corp. Thus if a corp is incorporate in a foreign country then it can be regulated under the corp power, even if the corp is not a trading or financial corp.
  - Extent of the regulation on what a foreign corp is remains uncertain based on a lack of case law in relation to- Haven’t really looked at what a foreign corp is in common law.

- **Trading Corps** (*development line (through cases) as to how we establish what is a trading corp)*

**R v The Trade Practice Tribunal; Ex Parte St George County Council (1974) (*OVERRULED- Majority of four judges found that this case was wrongly decided in Adamson)**
The Corporations Power

- A local government entity, which sold electricity and appliances, was found not to be a trading corporation; rather they treated the incorporated association as a public authority, supplying goods and services to the public.

- **Test Used: Purpose Test** - What were the purposes for which the council was established?
  - A trading corp is identifiable by the purpose for which it was established or formed.
  - ‘[i]t is necessary to determine the true character of the corp upon a consideration of all the circumstances that throw light on the purpose for which it was formed.’ Gibbs J
  - Court concluded that whilst it did have some trading activities in regard to electricity and appliances, its purpose was as a local gov entity and for providing local gov services, so therefore court found it was not a trading corp.

R v Judges of the Federal Court; Ex parte WA National Football League(1979) (Adamson’s case)

- Issue is whether SA and WA football leagues and West Perth football clubs were trading corps for the purposes of the Trade Practices Act 1974 (Cth).
- Three incorporated corporations were established to promote football matches for profits. Found to be trading corporations.
- **Test: Current Activities Test** - The activities or functions of the corporation were the main consideration, not the purpose for which it was established. (Looking at what the corps did not what they were formed for.)
- Scope:
  - Are there ‘substantial’ trading activities? Barwick CJ
  - Do they form a ‘significantly sufficient proportion’ of the company’s overall activities, trading activities? Mason J
  - Could be identified as a trading corp ‘so long as trading is not insubstantial’. Murphy J
- Mason J stated that ‘whether the trading activities of a particular corp are sufficient to warrant it being characterised as a trading corp is very much a question of fact and degree.’
- Minority - Purpose test - Corps established for the purpose of ‘fostering of football’. Trading was merely ancillary or incidental to the dominant purpose.

Tasmanian Dam Case (1983) (* Confirmed that Adamson and current activities test was to be followed.)

- Majority held that the Hydro Electricity Commission (HEC), a body established by statute, was a trading corporation because its trade in electricity made a significant proportion, or ‘sufficiently significant proportion’ of its overall (current) activities.
- Mason J made it very clear that St George was no longer correct and Adamson was to be followed.

Financial Corp

- Financial activities described as transactions where the subject of the transaction is finance.
- **Test: Current Activities test** also applies to financial corporations (*State Superannuation Board v Trade Practices Commission (1982))*
- Most financial corporations are also trading corporations - Lots of crossover.
- Financial activities consist of a significant or sufficient proportion of overall activities.

Inactive Corps (*What about corporations without activities?*)

- A ‘shelf company’ is an inactive corporation.

Fencott v Muller (1983)

- Is a ‘shelf-company’ a trading or financial corporation? Yes!
- Test: The purpose test
- Why? The current activities test was inappropriate as there is no engagement in activity.
- Used constitution/memorandum & articles of association (corp) to determine purpose.
There is no better guide to its character than its constitution and its constitution establishes its character as a trading and financial corp. *Majority*

- **Minority** looked at ‘subjective intention’ of directors

### Scope of the corporation’s power

*what exactly is it that the Cth can legislate for in regard to corps?*

#### Historical Development

**Huddart Parker & Co v Moorehead (1909)** (*Narrow view, Applied reserved state powers doctrine*)

- HP was a company formed under Vic law.
- Company and its manager were fined 5 pounds for refusing to answer certain questions in relation to certain offences under the Act.
- The Act regulated trade monopolies & restraints of trade
- Challenged the validity of Act as they said it was beyond the power of s 51(xx).
- **Majority** held the provisions were invalid as it was outside Cth power and was reserved to the State (reserved powers strong at this point, however ‘exploded’ in Engineers case)
- **Test:** The Commonwealth could only legislate to control the legal capacity of corporations to legitimately enter a field of area or operation (had no power to do anything once it was in that field).
- **Issac’s J dissent;** Regulation of a corporation’s conduct regarding transactions with the public (with the public and effect the public)

**Strickland v Rocla Concrete Pipes (1971)** (*New, broader view however court expressly declined to define the scope or the limits of the Corp power saying that the ‘law develops case by case’*)

- Involved a challenge to certain provisions in the *Trade Practices Act 1965 (Cth)*. Act regulated agreements that sought to reduce competition.
- Rocla was a party to an agreement which sought to reduce competition between concrete pipe manufacturers.
- Trade carried out in QLD so concerned intrastate trading activities.
- Rocla was charged under the Act.
- Lower court upheld Huddart. → Overturned on appeal
- High Court found that Huddart was wrongly decided
- Cth can regulate trading activities of trading corporations
- In Barwick CJ’s view, a law controlling a corporation’s trading activities was clearly a law with respect to s 51(xx).

#### Development of scope

*The development of the broad and narrow views*

**Actors & Announcers Equity Association v Fontana Films (1982)**

- In regards to Act that prohibited secondary boycotts (where one parties coerces another party not to provide goods or services).
- In this case the trade union was preventing members (actors) from being employed by Fontana, a film company
- The High Court unanimously found that the section was supported by corps law.
- Found that power can regulate activities of natural persons insofar as that law is protecting a trading corporation.
- **Narrow View (Gibbs, Wilson JJ);** Limited to trading activities of trading corporations.
- **Broad View (Mason, Aickin and Murphy JJ);** The corps powers will support laws which directly regulate any of a constitutional corps activities (Cth should be legislate for any activity of a trading
corporations as long as it’s a constitutional corp) There is no implication that the power should be read down so that it only relates to trading activities.

Commonwealth v Tasmania (1983) (Tasmanian Dams Case) (*development of broad and narrow view)

- Cth enacted legislation to enact World Heritage Properties Conservation Act 1983
- Two provisions were challenged
  - S10(2) prohibited a trading corporation from carrying out certain activities on an ‘identified property’
  - S10(4) prohibited a trading corporation from carrying out those prohibited activities if they were done for the purposes of trade
- Mason, Murphy, Deane JJ found all of section 10 valid.
  - This is the Broad View. Corporation’s power supported laws which regulated any activities of trading corporations, including, for example tree lopping or logging. Plenary power.
  - ‘In my view, the legislative power conferred by s 51(xx) is not restricted to laws with respect to trading corps in relation to their trading activities. It is a general power to make laws with respect to trading corps.’ Deane J
- Wilson, Dawson and Gibbs JJ found S10(2) invalid. (Note: Brennan J did not decide on this section)
  - → Narrow View There must be sufficient connection or nexus between activity & power.
- Brennan & Gibbs JJ found S 10(4) valid, incidental to corp power.
- Majority found S10(4) valid.
- Minority found S10(4) invalid.- simply wasn’t a reasonable connection between 10(4) and s 51(xx)
- Middle View The Commonwealth can regulate a corporation’s trading activities as well as activities for conducted for the purpose of trade

New South Wales v Commonwealth 2006 (Work Choices) (* really challenged scope of corps power, whole new raft of laws were valid after this case, before this case no Act regulated the internal relationships of corps was valid- was new ground)

- Introduction of audacious industrial relations law (under Howard gov, since law has been shelved) that applied to regulate relations between corporations and their employees
- The Act relied on corps power instead of s 51(xxxv), the head of power expressly concerned with industrial relations, as it imposed quite restrictive and specific limits on the Cth power in this area (it is limited to interstate industrial disputes and prescribes conciliation and arbitration as the manner of resolving disputes).
- Used s 51 (xx) as it was unsettled and open to broader interpretation.
- Challenged whether it came under corps power.
- Distinctive Character v Object of Command tests
- Broad view The Court rejected an argument that s51(xx) was limited to regulating external relationships of a corporation
- → Identified competing narrow and broad views:
  - Narrow- ‘Distinctive character test’ was said to be: ‘The fact that the corp is a foreign, trading or financial corp should be significant in the way in which the laws relates to it’ if the law is to be valid. (The type of corp will affect what activities the Cth has power over as there would have to be a nexus or connection—for example if it was a trading corp Cth could legislate over trading activities etc.)
  - Broad- The ‘object of command test’ was said to be: that a constitutional corp is an ‘object of command [of a law], permitting or prohibiting a trading or financial corp from engaging in conduct or forming relationships.’ (*as long as it’s a constitutional corp and it’s the object of the law (or command) then Cth has ability to legislate over it.)
- Note Kirby’s dissent re State laws & Callinan’s historical argument
Kirby J talks about effect it has on State power - opening power up like this has the power to
effect lots of areas that are traditionally powers of the state e.g. Education, healthcare etc.
(Question: Isn’t this reopening reserve power doctrine??)

He focuses on maintaining federal structure of Constitution

Also said that if Industrial Relations power had not been in Constitution then it would have
been fine to apply s 51(xx) widely but Industrial Relations is in the Constitution- text and
context approach- If a law falls under another head of power, which clearly puts restrictions
on it, this needs to be taken into account- Can’t just ignore the fact that there are strong
restrictions on one head of power just because it can fit under another head of power- They
are there for a reason.

Callinan J- Historical argument in policy here- what is the point of having a number of
referendums (four in total, after Huddart) that denied the expansion of Constitutional power
in regards to corps if you can just turn around and do what the gov did with the WC Act--
what was point of refs and their outcomes if you can just turn around and ignore them.

New Scope of s 51(xx)

New scope of 51 (xx) best expressed by words from **Gaudron J in Re Pacific Coal Pty Ltd (2000)**- affirmed in
WC case- Kirby says these were taken out of context- really wide- almost everything would fall under that-
appears now to be the scope.

‘... 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.’

The incidental scope of s 51(xx) (**NEEDS TO BE LOOKED OVER- COULD BE BETTER**)

**Actors Equity 1982**

- Law which made trade unions liable for the actions of their members found by majority not to be
incidental to the corporations power
- Law was about trade unions and not corps.

**Fencott v Muller 1983**

- Law which made it possible to claim against a person for a loss suffered due to deception was found
  to be incidental
- Law was about a natural person → Cth could make a law against natural person cause it was
  incidental as it affected the corp-
- *Idea is evolving here

**Re Dingjan; Ex Parte Wagner (1995) (**Clearer test emerged**)

- Case involved two Tas couples that owned properties.
- W contracted with Tasmanian Pulp and Forest Holdings which was a trading corp- subcontracted to D-
  contract between two natural persons- dispute between W and D- D altered contract, W cancelled it,
  D had it reinstalled by Industrial Relations Commission- W challenged as said IRC had no power to
  make such a ruling as it was a contract that related to the business of a Constitutional Corp.
- s127(1)(b) attempted to regulate - ‘a contract relating to the business of a constitutional corporation’
- Not incidental, too far removed.
- Test of Invalidity Contract must at least operate to have some effect on a constitutional corporation

**Work Choices (2006)**

- Related to the entry of officers (3rd parties) on premise of corps for OHS regulation purposes.
- Widened the Dingjan test. ‘Capable of affecting’ v ‘actually affecting’ incorporation → As long as it is capable of affecting a corp it can be found to be incidental too s 51(xx).

**Incorporation ("Cth power in regards to incorporation") ("NEEDS TO BE LOOKED OVER- COULD BE BETTER")**

- Incorporation is the forming of a corporation.
- With broadening of the corp power Cth assumed that it would have power to incorporate corps but this was challenged in Incorporation case:

**NSW v Commonwealth (1990) (Incorporation Case)**

- Cth could not incorporate corporations.
- Court looked at the wording of s 51 (xx). The term ‘formed’ (within the limits of the Cth) refers to corporations already formed (past participle. Cth does not have the right to form.
- Cth enacted uniform provisions as States unanimously agreed to refer their powers in the area to the Cth.
- Lead to very messy situation in regards to regulation.
- As a result were able to establish ("these powers do not come from s 51(xx) but referred State power):
  - Uniform companies law
  - ASIC
  - Corporation Act 2001, using State referred power in s51(xxxvii)