

# CORPORATIONS POWER

## Section 51 (xx):

The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government with respect to:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

## 1. Preliminary questions:

### **Is it a corporation? (check also if a foreign corporation)**

- Label does not determine if it is a corporation or not. Cannot determine whether a body is a corporation solely by reference to the intention of the parliament that creates it because it focuses on the wrong issue, the label, rather than the content of the term corporations, the substance of the enquiry. (*Queensland Rail, 2015 as per French CJ, Bell, Kiefel, Keane, Nettle*)
- Cannot take state parliament intention to determine the limits of federal legislative power. (*Queensland Rail, 2015 as per French CJ, Bell, Kiefel, Keane, Nettle*)
- Non-exhaustive list of characteristics of a corporation: *Queensland Rail, 2015 as per*
  - ➔ French CJ, Bell, Kiefel, Keane, Nettle (missing one)
    - It was created as a separate entity that has rights and duties
    - Can own, possess and deal with property
    - Perpetual succession (corporation does not die)
  - ➔ Gaegler:
    - The term corporation is readily capable of encompassing all artificial legal persons (as long as have these then a corporation)
    - Qld Rail has a legal personality
    - Owns property, can contract and sue
      - ➔ Not necessary to decide whether a lesser subset of these would suffice (leaving the door open that maybe if can own property and sue but does not own property – then maybe still could be a corporation)

### **Is it a constitutional corporation?**

**Which tests to use:** Activities test as per Adamson Case 1979, unless it has not begun or barely begun its business then look to the purpose test (State Superannuation Board, 1982). (\*Note if the corp has only existed for small amount of time probably discuss both, also always only look at activities post incorporation)

**i) Activities test:** When determining whether a corporation is a trading corporation the prime consideration are the activities of the corporation rather than the purposes of incorporation. (Barwick CJ, Murphy, Jacobs JJ in *Adamson's Case*, 1979)

- **Why use activities test?**

- Barwick CJ (*Adamson's Case*, 1979): The term trading corporation is not confined to those that were formed as trading corporations nor for those that were formed for the purpose of trading.
- Barwick CJ (*Adamson's Case*, 1979): (why to prefer activities test) May be difficult to work out a corporation's purpose from its memorandum, those documents do not need to include a purpose. Instead the only sure guide to the nature of the company is the purview of its current activities.

**Is it a trading corporation?**

- **What is trade: (ask is the corp trading?)**

- Barwick CJ (*Adamson's Case*, 1979): Trade is not confined to dealing in goods or commodities. You should look to if the activities are of a commercial nature.
- Mason J (*Adamson's Case*, 1979): The concept of trading extends to business activities carried on with the view of earning revenue (this is suggestive of trade).
- French CJ, Bell, Kiefel, Keane, Nettle (missing one) (*Queensland Rail*, 2015): You do not have to operate as a profit-making enterprise to be a trading corporation.
  - *Adamson's Case*: for profit, trading in souvenirs,

- **How much trade to be a trading corporation? (ask how much trading is the corp doing)**

- Mason J (Jacobs agrees) (*Adamson's Case*, 1979): If a significant proportion of its overall activities are trading activities then it is a trading corporation. It will not be a trading corporation if the trading activity is so slight and so incidental to some other principal activity.
  - Mason: Not every corporation engaged in a trading activity is a trading corporation. The trading activity may be so slight and incidental to some other principal activity viz religion, education in the case of a church or a school that it could not be described as a trading corporation. Whether the trading activities of a particular corporation are sufficient to warrant its being characterised as a trading corporation are a matter of fact and degree.
- Murphy (*Adamson's Case*, 1979): It is a trading corporation as long as trading is not insubstantial.
- Barwick CJ (*Adamson's Case*, 1979): Trading corporation was one which engaged in 'substantial' trading activity.

- Factual analysis: This aspect is dependent on the facts:

**Is it a financial corporation?**

- Mason, Murphy, Deane (*State Superannuation Board, 1982*) To work out what a financial corporation is use the same test as for trading corporations, i.e. activities test.
- Activities test: Look at the financial corporations in accordance with its established activities.
- Look beyond its predominant and characteristic activity, it can be a trading corporation if trading is a substantial and not merely peripheral activity.
- Question of fact and degree.
- Even if a corporation engages in extensive non-trading activities it could well be a trading corporation, if it also engages in trading activities on a substantial scale. (Mason, Murphy, Deane in *State Superannuation Board, 1982*)
- Factual analysis: large sum (\$millions) and trading in financial markets.

## ii) Purpose test:

- May be relevant when no activities: Could apply when a corporation that has not begun or has barely begun to carry on a business you might have to look to the purpose for which the corporation has been formed (if no activities then look to purpose). (Mason, Murphy, Deane in *State Superannuation Board, 1982*)

Which test to use:

- French CJ, Bell, Kiefel, Keane, Nettle (missing one) (*Queensland Rail, 2015*): Do not endorse any tests but say whichever test is adopted it will be a trading corporation as it has a range of activities that are for a commercial enterprise.
  - Gaegler (*Queensland Rail, 2015*): Either the purpose or activities test will suffice: A corporation is capable of being a trading corporation if it has substantial trading purpose or a substantial trading activity.
- If in a hypo the activities test is not satisfied mention this open possibility by Gaegler.

## 2. What does the head of power cover or mean?

- **Scope of power:** Corporations power conferred by s 51(xx) extends to: (Quote Gaudron J in *Re Pacific Coal; Ex parte Construction, Mining and Energy Union (2000)* - in *WorkChoices* Case by the majority)
  - i) The regulation of the activities, functions, relationships and the business of a corporation described in that subsection.
  - ii) Creation of rights and privileges and obligations of constitutional corporation
  - iii) The regulation of the conduct of those through whom it acts i.e. managers and directors as well as employees and shareholders.
  - iv) The regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

## 3. What does the law do?

- Go through provision by provision – like in *WorkChoices*.
- Identify what the law is doing
- Practical as well as the legal operation of the law must be examined. Examine the law in practice not just how it looks. (McHugh, *Re Dingjan; Ex parte Wagner (1995)*)

#### 4. Is there a sufficient connection between the head of power and the law?

- Have easy and hard cases:
  - ➔ Easy: Where the law makes the corporation the object of statutory command. (discriminatory operation) Telling the corporation exactly what to do or not to do. Provisions that single out cc corps, and make them the object of command – connection present.
  - ➔ Hard: Looking for a connection that is not insubstantial, tenuous or distant (WorkChoices, 2006 per majority)
- Dinjan case provides some guidance but uncertainty as to some statements: But it is not sufficient for a provision to regulate conduct that is related to a cc corp
  - Beneficial, prejudicial: Instead the conduct must be beneficial or prejudicial to a constitutional corporation (Brennan J in Dingjan, 388, 536).
  - Significance: Or as McHugh says conduct must have significance for the corporation (369, 538).
- The connection cannot be so insubstantial, tenuous or distant that it could not sensibly be described as a law with respect to corporation. (McHugh, Re Dingjan; Ex parte Wagner (1995) → this wording adopted in WorkChoices by the majority.
- The law must discriminate between a constitutional corporation or natural person (Brennan J in Re Dingjan; Ex parte Wagner (1995)
- The law must be beneficial or prejudicial (Brennan J in Re Dingjan; Ex parte Wagner (1995) but McHugh emphasises the significance of the law to the corporation and this is adopted in WorkChoices.

#### Examples from WorkChoices:

- When a law singles out a constitutional corporation it is likely a law with respect to s51(xx). It has a discriminatory operation (Part 7 in WorkChoices Case, 2006 per majority)
- When a law has substantially adverse effects on a constitutional corporation it is a law with respect to constitutional corporation. (Held in Fontana Films, quoted in Workchoices as applying to s496(2) as per majority)
- Section 365 and 366 in WorkChoices legislation prohibited content that could not be in an employment agreement. It also prohibits misrepresentations about the agreements even by third parties such as union officials. → These provisions relate to existing or proposed workplace agreements. By definition a workplace agreement is an agreement an employer is a party to – so regulating a third party conduct but in respect of something that the employer is a part of → The connection is not insubstantial, tenuous or distant (quote McHugh from Dingjan)
- Regulating a third party as to the entry of a corporations' premises (Part 15). This is sufficient connection because it is the CC corp premises (WorkChoices, 2006 per majority)
- Part 16 regulates certain types of conduct, cannot coerce etc; s785 makes part 16 relate to conduct that directly relates to person in the capacity of an employee or a contractor. It does not regulate them in a private capacity
- S309: About employees and employers forming associations and organisations, if registered then certain rights and privileges. → If you can regulate employee-employers

that it is also within power to authorise registered bodies to perform certain functions within that scheme of regulations. (as conducting that relationship between the employer and employee)

- Section 27 of Schedule 1 allows you to incorporate organisations registered under that Schedule: It has been established that corp power does not extend to the creation of corp as the wording of s51(xx).

Court: If you have the power in relation to banking you have power to create a corporation to affect that head of power. Though cth does not have general power to create corp, it can establish those that are under other heads of power. SO here to determine the means of securing an object it is legitimate under the power of the Parliament to pursue- so power over the associations and corporations that regulate the relationship of employer-employee.