Corporations

Section 51(xx) – ‘Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.’

Work Choices Case – NSW v Cth – Gaudron J’s statement from Re Pacific Coal adopted by the majority:
‘the power conferred by s 51(xx) of the Constitution extends to the regulations 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.’

Laws with respect to corporations:
- law regulating restrictive trade practices between corporations – Concrete Pipes Case
- law prohibiting a secondary boycott because conduct would hinder the supply of goods/services to a corporation, so can protect corporations from 3rd parties – Actors Equity Case
- law prohibiting corporations for the purpose of their trading activities from carrying out excavation works etc – Tasmanian Dam Case
- comprehensive regulation of corporations’ workplace regulations (e.g. even things like when a toilet break is allowed) – Work Choices Case
- laws regulating the trading activities of trading corporations (Concrete Pipes Case) or regulating activities such as building, demolition etc for the PURPOSE of their trading activities (Tas Dam) are supported by the corporations power.

Laws outside the scope:
- law merely referring to corporations, but regulating relations between natural persons, so can regulate corporation-contractor but not contractor-subcontractor – Re Dingjan
- law providing for the incorporation of trading/financial corporations – Incorporation Case – so the power is only about corporations that have already been formed.
- can’t regulate things around the corporation rather than the corporation itself – Re Dingjan

The test is sufficient connection. McHugh J in Re Dingjan quoted Dixon J in Melbourne Corporation saying the connection cannot be ‘insubstantial, tenuous or distant.’ - p782

Constitutional Corporation

Foreign Corporations – a corporation formed outside the limits of the Commonwealth – Incorporation Case

Trading Corporations – trading forms a substantial part of the corporation’s activities – Adamson’s Case. Trading activities do not need to be the primary or dominant activities, rather substantial/significant – Tasmanian Dam Case, State Super, Adamson’s Case.

Trading activities are a question of fact and degree and include buying/selling goods/services with an aim to profit – Adamson’s Case. Look at what the corporation actually does rather than what they say they do – Adamson’s Case.
Financial Corporations – a corporation which engages in substantial financial activities – State Superannuation Board of Victoria v Trade Practices Commission (here granted mortgages on a substantial scale so they were found to be a financial corporation).

Financial activities are a question of fact and degree and include dealing in finance (e.g. making loans), or providing financial advice or management.

If a corporation has little or no activities, you look to the purpose it was created for – Fencott v Muller.

Checklist

1. Can the law be characterised under s 51(xx) of the Constitution: look to Work Choices.
2. Pick the relevant parts of Gaudron J’s statement, list them.
3. What is the character of the law?
5. If invalid, can the law be read down or severed?
6. Is the client a corporation (Pty Ltd)?
7. If valid, does the law apply to the given corporation?
8. Is it a constitutional corporation (trading, financial or foreign)? Go through activities test.
9. What are the corporation’s activities? Are they substantial? Are they just incidental to the main activity?
10. If they are a constitutional corporation, then the law applies to them.

Defence

Section 51 (vi) – ‘the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.’

Section 114 – ‘A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force…’

Peace:
- Shipping Board and Clothing Factory Case are difficult to reconcile, have to argue both, the Commonwealth may or may not be able to enter into commercial agreements under the defence power to keep the production lines running. However, smaller % for the military in the Shipping Case than in the other one. The use was still for government organisations in the Clothing Factory Case so that may be why.
- Maintaining defence preparedness is within the primary aspect, so things like conscription etc – Communist Party Case.

Primary Aspect:
- Fullager J – Communist Party Case:
  - Laws aimed at naval and military defence as their primary object
Enlistment and training of armed forces
Provision of ships and manufacture of weapons
Erection of fortifications
Maintaining defence preparedness, e.g. conscription etc.

**Secondary Aspect:**
-Fullager J – *Communist Party Case*:
  - ‘Extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection to defence.’
  - As the world is changing, it can arise in some circumstances which ‘fall short of immediate apprehension of war.’
  - Prices, rationing of goods etc.

**Constitutional Facts:**
- Do the facts give rise to an ‘enhanced threat’ – Fullager J – *Communist Party Case*.
- Dixon J – *Stenhouse v Coleman* – Court usually should only depend on ‘matters of general public knowledge.’ In grave emergencies etc, the defence power may permit greater control of human resources etc. So consider such things as whether there is war, imminent invasion, immediate military needs etc.
  - Court can rely on judicial notice – *Thomas v Mowbray*.
  - Can look at news broadcasts, public discussion etc. – *Thomas*.
  - So basically consider the defence need and how great it is at the given time, because the defence power ‘waxes and wanes.’
  - Judiciary decides whether there is a defence need, the parliament cannot ‘recite itself into power’ McTiernan J – *Communist Party Case*.
  - Retrospective criminal laws with ‘deterrence’ as the defence purpose are invalid during times of peace – *Polyukhovich*, found not appropriate and adapted.

**Thomas v Mowbray (no strong majority):**
- Gleeson CJ, Gummow & Crennan JJ:
  - Reject a narrow interpretation of s 51(vi).
  - Protection against terrorism is within the primary aspect of defence, it is at the heart of the power.
  - No need to establish constitutional facts.
  - Categorising times of war and peace are less applicable now in the time of terrorism.
  - However they didn’t expressly say that you don’t need to do the appropriate and adapted test, so prudent to still go through it.

- Callinan & Heydon JJ:
  - Terrorism falls within the secondary aspect.
  - Established a defence need by looking at the constitutional facts.
  - Callinan J BUT NOT Heydon J, applied test of proportionality – is the law proportionate to the defence need.

- Kirby J (in dissent):
  - Looked to constitutional facts.
  - Said there is a defence need but on a much lower scale than the other justices – i.e. terrorism has
always been around etc.
-The law was not appropriate and adapted, not proportionate to the threat. The given law ‘travels far beyond responding to such a threat.’
-The drafting of the law as ‘with respect to political, religious or ideological violence of whatever kind’ is very extensive in its application. Could arguably operate to allow control orders to prevent attacks against abortion clinics, controversial building developments, ethnic groups etc. These things are matters for criminal law.

Checklist:

1. Can the law be characterised with respect to s 51(vi) – defence?
2. What is the purpose of the regulation? Is it a defence purpose?
3. Does this fall within the primary or secondary aspect?
4. If primary, then can be characterised as a law with respect to defence. However, still good to go through appropriate and adapted test.
5. If secondary, do the constitutional facts enliven the defence power with a defence need?
6. Then Callinan and Kirby JJ look to proportionality and whether the law is appropriate and adapted to the defence need.

External Affairs

Section 51(xxix) – ‘external affairs’

Laws Dealing With Relations With Other Countries
- ‘preservation of friendly relations’ , relations with ‘all countries outside Australia’ – R v Sharkey.
-Relations with other ‘international persons’ – Koowarta.
-Matters affecting Australia’s relations with other countries – Thomas v Mowbray.
-Subject-matter power so the test is that of sufficient connection.

Matters Geographically External to Australia
-‘anything which in its nature is external to Australia’ – Seas and Submerged Lands Case – Barwick CJ
-Regulating matters, persons or things outside of Australia, even things that happened externally – Polyukhovich – Deane J
-Can regulate citizens while they are not in Australia – XYZ v Commonwealth – Child sex tourism
-However NOT laws regulating matters in Australia simply because they are somehow related to matters outside of Australia, e.g. fiscal stimulus package during the GFC – Pape v Commissioner of Taxation
-Subject-matter power so the test is that of sufficient connection.

Treaty Implementation
- The treaty need not be of international concern, can be regarding anything – Tas Dam Case
- The treaty must have been entered into bona fide – this is a frail shield, hard to prove – Gibbs CJ – Koowarta. If a treaty is multilateral, it can indicate that it was entered into bona fide.
- The treaty must have ‘precise obligations rather than mere vague aspirations’ so not too vague or aspirational – Industrial Relations Act Case.
However, Deane J says in this case that you cannot be too vague because treaties are vague in
nature. A good way to look at it is whether there are specific ways to achieve the treaty?
- The test for vagueness is whether it can be implemented in profoundly contradictory ways – 
  Industrial Relations Act Case.
- The Commonwealth law must be appropriate and adapted to implementing the treaty – Tas Dam

Appropriate and adapted:
- Must be reasonable proportionality between the designated purpose/object and the means the law 
  embodies to achieve it – Tas Dam
- Penalty can also be a part of this test.
- Or does the law go beyond the obligation of the treaty?

Checklist

1. Can the law be characterised with respect to s 51(xxix) – external affairs?
2. Which aspect of external affairs will be used?
3. If treaty interpretation, then;
4. Does the treaty (NAME THE TREATY) enliven the external affairs power→?
5. Treaty need not be of international concern, but was it entered into bona fide?
6. Is the treaty too vague or aspirational? Article by article.
7. Commonwealth has the power to implement treaties affirmed by Tas Dams so long as:
8. Is the Commonwealth law appropriate and adapted to implementing the treaty (each 
   section)?
9. I.E. is there reasonable proportionality? Are there other ways of achieving the same thing?
10. If it is appropriate and adapted then the law can be characterised with respect to external 
    affairs.
11. Can partially implement a treaty if it doesn’t distort the treaty – Industrial Relations Act 
    Case, Tas Dams – Deane J.

Implied Freedom of Political Communication

The Constitution includes the underlying doctrine of representative government (ss 1, 7, 24, 61, 64). 
Freedom of communication about politics and public affairs is indispensable to representative 
government – Nationwide News, ACTV, Lange.
However representative is expressly in the Constitution, so the freedom is implied off of something 
that is already implied… McHugh J?????

The Constitution also provides for responsible government (ss 6, 49, 61, 62, 64, 83) – Lange. We are 
electing people to make laws, be the executive, supervise executive finances, allow referendums etc.

Dawson J said that ‘The Constitution provides for a choice and that must mean a true choice… a 
choice is not a true choice when it is made without an appreciation of the available alternatives or…
without an opportunity to gain an appreciation [of them].’

The Court in Lange tie it back to the text of the Constitution, saying the sections protect the freedom 
of communication between people about such matters so that they can exercise a free and informed 
choice.