

SCAFFOLD

- 1) CTH OR STATE LAW?

o CTH

- 1) what does the law do?
 - i.e. what are the rights/powers/privileges/duties/immunities/interests the law grants/removes/limits
- 2) is there a relevant HOP?
 - A) TRADE & COMMERCE – S51(1)
 - o Subject-matter power → sufficient connection test
 - B) EXTERNAL AFFAIRS – S51(29)
 - o 1) GEOGRAPHICAL EXTERNALITY → subject-matter power → sufficient connection test: **Alqudsi**
 - o 2) TREATY → purposive power → proportionality test = to implement the treaty: **Tas dam case**, **Industrial relations act case**
 - C) DEFENCE – S51(6)
 - o Purposive power → proportionality test = defence of Aus: **Thomas v Mowbray**, **Stenhouse v Coleman**
 - D) NATIONHOOD POWER – s61 & 51(29)
 - o Purposive power → proportionality test = relevant purpose
 - e.g. holding bicentenary celebrations: **Davis**
 - o Although HCA did not employ the proportionality test when applying nationhood power in Pape, we assume nationhood power is purposive
 - E) CORPORATIONS – S51(20)
 - o Subject-matter power → sufficient connection test: **Re Dingjan**
 - F) RACE – S51(26)
 - o Subject-matter power → sufficient connection test
 - G) TAXATION – S51(2)
 - o Subject-matter power → sufficient connection test: **Northern Suburbs**
 - Law may be one w respect to s51(2) even if it seeks to achieve another purpose (e.g. training guarantee: **Northern Suburbs**)
 - H) COMPULSORY ACQUISITION OF PROPERTY – S51(31)
 - I) GRANTS POWER – S96
 - J) APPROPRIATIONS POWER – S81
- 3) is the constitutional HOP a purposive OR subject-matter power?
 - A) Subject-matter → sufficient connection test
 - o TEST = is there a sufficient connection between law & HOP?: **Re F**, **Re Dingjan**, **Grainpool**
 - Yes → law is w respect to that HOP
 - No – connection is 'so insubstantial, tenuous or distant' → NOT a law w respect to that HOP: **Re Dingjan**
 - B) Purposive → proportionality test
 - o TEST = is the law capable of being seen as reasonably appropriate & adapted to achieve that purpose?
- 4) does incidental power apply?
 - Express or implied?
 - o A) EXPRESS incidental power – s51(39)
 - Law is valid if:
 - 1) incidental to grant of powers to judiciary, exec & parliament
 - o E.g. laws re: procedure & operation of HCA, parliamentary privilege
 - 2) incidental to subjects covered by its existing HOPs
 - o B) IMPLIED incidental power
 - 'where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective': **D'Emden v Pedder**
 - TEST = is there a sufficient connection between the incidental aspect & the main grant of power?: **Leask**

- NOTE – although the current test is the sufficient connection test, in the future there may be a switch to the proportionality test as per dicta in several cases (McCloy, Murphy, CVCF)

- STATE

- States have plenary legislative power so don't need HOP
 - NOTE power can be removed by CC ss 90, 92, 114, 115
- TEST = Is the law w respect to the peace, welfare & good govt of the state OR is there a Cigamatic issue?
 - Peace/welfare/gg → law valid
 - Cigamatic issue → law invalid

- 2) DOES THE LAW BREACH AN EXPRESS CONSTITUTIONAL PROHIBITION?

- A) CTH

- 1) s51(31) – acquisition of property on just terms
- 2) s116 – freedom of religion
- 3) s92 – freedom of interstate trade
- 4) s99 – Cth can NOT give preference to 1 state

- B) STATE

- 1) s90 – excise power exclusive to Cth
- 2) s92 – freedom of interstate trade

- 3) DOES LAW BREACH AN IMPLIED CONSTITUTIONAL PROHIBITION?

- 1) Federalism
- 2) Representative govt
- 3) Intergovernmental immunities
 - Cth – *Melb corp*
 - State – *cigamatic*
- 4) IFOPC

- 4) ANY ISSUES RE: FORMALITIES OF ENACTING LAW?

- Re: money bills
 - s55 tacking issue

- 5) IF PART OF ACT/PROVISION IS INVALID:

- A) CAN ACT/PROVISION BE READ DOWN?

- Rules:
 - Yes
 - If law is phrased in general languages so it could operate validly BUT some applications of it would be invalid if interpreted more broadly → court will read down meaning of general words to limit them to their valid application
 - No
 - If there is a contrary express legislative intention against reading down: *Railway servants case*
 - *Railway servants case* – HCA could not read down provision re: industrial disputes cus definition section expressly defined dispute as including it
 - If reading down involves having to change its text
 - If reading down renders Act w an operation that parliament never intended: *Bell Group v WA*
- Outcome:
 - Yes → provision read down
 - No → B)
- Case:
 - *Monis* – provision (re: offence of making “offensive” communications by post) was read down so it went no further than necessary to achieve its protective purpose consistent w its terms without unduly burdening IFOPC

- B) CAN ACT/PROVISION BE SEVERED?

- PROCESS:
 - 1) is severance as a matter of language possible?
 - Rule:

- If courts would have to substitute words rather than merely sever them to make sense of provision → severance not possible → no
 - Outcome:
 - Yes → 2)
 - No → whole Act/provision invalid
- 2) is severance “legally” possible?
 - Rule:
 - If remainder of Act is interdependent on clause/words proposed to be severed (e.g. “not”) so severance will give a diff effect to the rest of the Act → severance not possible → no
 - Outcome:
 - Yes → 3)
 - No → whole Act/provision invalid
- 3) look at intention of Act derived from structure & language of Act → would the legislature have enacted provision/act without the severed bit?
 - Yes → invalid part can be severed
 - No → severance NOT possible → whole Act/provision invalid
- Outcome:
 - Yes → invalid provision severed & rest of law is valid
 - No → whole Act/provision invalid
- Case:
 - **Bell Group v WA**
 - Invalid provisions could not be read down as it would leave the Act with an operation that the state parliament never intended
 - Although only part of the Bell Act was invalidated, it could not be severed cus:
 - 1) Act was a package of interrelated provisions intended to operate fully & completely according to its terms
 - 2) state parliament never intended to enact Act without the invalidated provisions

- 6) IS THE LAW INEFFECTIVE OR INOPERATIVE FOR ANY OTHER REASON?

- A) Is the state law inconsistent w a valid Cth law?
 - PROCESS
 - 1) is there a direct inconsistency?
 - TEST:
 - 1) impossible to obey both laws: **Ex parte Daniel**
 - 2) 1 law permits, other prohibits → denial of rights: **Colvin**
 - Outcome:
 - YES → s109 renders state law invalid to the extent of the inconsistency: **The Kakariki** → no need to consider whether field has been covered: **Telstra v Worthing** → BUT FOR EXAM TALK ABOUT INDIRECT
 - NO → 2)
 - 2) is there an indirect inconsistency?
 - TEST = Does the Cth law show an INTENTION (express or implied) to cover the whole field, completely, exhaustively, or exclusively, so there is no room for a state to legislate on the subject?: **Cowburn**, **Ex parte McLean**
 - Consider:
 - Is the Cth law so detailed that it clearly intended to cover the entire subject to the exclusion of state laws?: **Noarlunga Meat**
 - Would the purpose of Cth law be undermined by the application of state law?: **Goulden**
 - Yes → indicates intention to cover field
 - State law must have a significant impact of precluding/overriding/rendering ineffective Cth law: **APLA**
 - Outcome:
 - YES → s109 renders state law invalid to the extent of the inconsistency: **The Kakariki**
 - NO → state law valid
- Cases:
 - Yes inconsistency
 - **Cth v ACT** – ACT law was inconsistent cus ALL marriage was covered by Cth law and hence could not operate in parallel

- No inconsistency
 - **CRCH v Fuller**
 - No indirect inconsistency cus:
 - 1) it was intended that in building antennas, broadcasters were to comply w other laws including state environmental laws, and
 - 2) court could not discern an intention to exclude operation of state laws,
 - No direct inconsistency cus although broadcasters were required to build towers, Cth law did not purport to authorise building antennas in particular places or try to override environment state laws
 - **Ansett v Wardley** – no inconsistency cus Cth & state laws operated in diff fields of subject matters – Cth in industrial matters re: pilots & state in anti-discrimination

▪ NOTE

- **Operational inconsistency**
 - 2 laws are able to operate effectively in parallel UNTIL a decision is made under Cth law, hence s109 renders state law inoperative to the extent of the inconsistency created by that decision: **Cth v WA**
- **Criminal law**
 - Rules:
 - Cth & state crim laws may conflict
 - If Cth law excludes from criminality, actions that state law renders criminal → state law invalid under s109: **Dickson**
 - If Cth law evinces an intention NOT to cover field AND Cth law is less strict than state law in imposing crim liability (i.e. easier to be convicted under Cth law) → no inconsistency → 2 laws can operate concurrently: **Momcilovic**
 - Cases:
 - **Dickson** – state law was invalid due to s109 inconsistency cus it ‘altered, impaired or detracted’ from the operation of Cth law by closing up “areas of liberty” (of having an extra defence & requiring additional proof) Cth had deliberately left open
 - **Momcilovic** – no s109 inconsistency cus:
 - 1) federal law expressly stated that it was not intended to cover the field, and
 - 2) Momcilovic had not been prosecuted under Cth law so there was no operational inconsistency
- **Manufacturing inconsistency**
 - Rules:
 - Cth can legislate to create an inconsistency w state law → s109 renders state law inoperative to the extent of the inconsistency
 - BUT NOTE – Cth can NOT legislate to prohibit a state from enacting a law or to say state has no power to enact law: **uniform tax cases**
 - As long as Cth has done SOME regulation within the field they have shown an intention to cover to the exclusion of states, Cth need not make detailed provisions about every matter within that field → state law that comes within that field is inconsistent: **Wenn**, **Work choices**
 - Cases:
 - **Wenn** – Cth had substantially legislated within the field, hence the express statement of their intention to cover field to the exclusion of state law was effective
- **Clearing the field**
 - NOTE – ONLY APPLIES TO INDIRECT INCONSISTENCY
 - i.e. can NOT avoid/eliminate direct inconsistency
 - Rules:
 - Cth can expressly declare that it doesn’t intend to cover the field, allowing concurrent state laws (not inconsistent w Cth law) to continue to operate: **Credit Tribunal**
 - BUT can NOT avoid/eliminate direct inconsistency
 - Clearing the field works prospectively (i.e. reviving state law for the future) – SO can NOT retrospectively clear the field: **Metwally**

- B) Does a subject of the queen have an immunity from the law under s117
- C) Is it a scheme to avoid s51(31)?

- 7) TO WHOM DOES THE LAW APPLY?

- Is it intended to bind the Crown? Can it do so? → Melb corp/Cigamatic issue
- If law only applies to trading corps → is the body in question a trading corp?

- NOTE

- Establishing bodies
 - [section] establishes [body] which [purpose/role/ what it does] → hence [section] is incidental to [HOP] to the extent that [purpose/rol/what it does]
 - Also [body] may just be part of the Cth public service, in which case s64 CC allows Cth to establish bodies: *French CJ in Pape*
 - Hence [section] is supported by s51(39) as being incidental to [HOP]
- Cth can NOT recite itself into power: *Communist party case*
 - See under defence power

Lecture outline:

- HOP
 - o Trade & commerce: s51(1)
 - o External affairs: s51(29)
 - o Defence: s51(6)
 - o Nationhood
 - o Corporations power: s51(20)
 - o Race power: s51(26)
 - o Taxation power: s51(2)
 - o Compulsory acquisition of property: s51(31)

 - o Grants power: s96
 - o Appropriations power: s81, s83
- Prohibitions
 - o Express
 - Compulsory acquisition of property: s51(31)
 - Excise duties: s90
 - Freedom of interstate trade: s92
 - Freedom of religion: s116
 - o Implied
 - Inter-governmental immunities: s117
 - IFOPC

Lecture 2.2 – trade & commerce

- Provisions
 - o s51(1) – TC w other countries & among states
- Sufficient connection test
- Rules:
 - o Must cross borders – international or interstate
 - NOTE for intra-state TC → another HOP can be used (e.g. corp power)
 - o S51(1) applies to:
 - Sale of g/s
 - Transportation of goods or people (ANA) for profit (as part of a commercial transaction)
 - Re: transportation of goods, even if not selling those goods, the transport itself likely involves payments (e.g. freight, plane tickets) so is likely TC supported by s51(1)
 - Intangibles
 - Banking services: Bank of NSW v Cth
 - Supply of gas & electricity
 - Broadcasting & sale of ideas
 - Ordinary goods
 - 'all the commercial arrangements (i.e. negotiations, transport, delivery) of which transportation is the direct & necessary result': W&A McArthur
 - Cth regulating TC – e.g.:
 - setting safety standards
 - dealing w conditions of employment of those involved in overseas or interstate TC: maritime union case
 - Cth regulating fairness of trade (e.g. under CCA)
 - Cth banning importation or exportation (Murphy sands case) of goods for sale in Aus
 - Murphy sands case – Cth banned export of mineral sand
 - Cth promoting or prohibiting certain types of trade
 - Cth participating in TC – e.g.:
 - running its own airline or shipping line: O'Reilly
 - setting up co-operative state & Cth bodies (e.g. Aus Wheat Board)
 - o s51(1) is subject to s92 (freedom of interstate trade) → SO s51(1) permits regulation of TC if it does NOT amount to protectionist discrimination: Cole v Whitfield
 - o Re: incidental power
 - Law is valid as being incidental to interstate TC if:
 - Law is necessary for safety of interstate TC UNLESS its sole justification is profitability: AG WA v ANA
 - Law protects against danger of physical interference w activity within federal power: Second airline case
 - Cth has power to ban resultant trading activity completely (e.g. export ban on meats not prepared safely: Noarlunga meat) AND law regulates earlier steps of trading activities (e.g. production, manufacture)
 - Incidental power maintains distinction between inter & intrastate TC: Wragg
- Cases:
 - o ANA – airline was engaged in TC when transporting people cus the service of transportation was provided by selling tickets (i.e. for profit)
 - o Burgess –
 - o Second Airline case –
 - o AG WA v ANA – flight would have been supported by s51(1) if it had been necessary for safety reasons to land in Port Headland (e.g. to refuel as it was a long flight) BUT the fact it was done to support profitability of route did NOT activate incidental power
 - o Noarlunga meat – earlier steps of trading activities (e.g. production, manufacture) solely for purposes of export was incidental to interstate TC

Lecture 3.2 – external affairs

- Provisions
 - o **s51(29)** – external affairs
- 1) GEOGRAPHICAL EXTERNALITY
 - o Sufficient connection test
 - o Rules:
 - If Act relates to matters geographically external to Aus → Act is supported by s51(29): **Polyukhovich, Horta**
 - Any law w respect to a matter, thing or person occurring or situated outside Aus is a law w respect to “external affairs” for purposes of s51(29): **Deane J, Polyukhovich**
 - Unclear whether a nexus/connection between Aus & external matter is required for a law to be supported by geographical externality principle BUT CURRENTLY mere geographical externality is sufficient to validate exercise of s51(29)
 - Cth has power under s51(29) to make laws w respect to:
 - relations w foreign countries: **Seas & submerged lands case, Thomas v Mowbray**
 - o may include terrorism affecting other countries: **Thomas v Mowbray**
 - conduct by a nation or its nationals which affects other nations & conduct in violation of international comity: **Seas & submerged lands case**
 - actions that occur outside Aus: **XYZ, Polyukhovich**
 - things physically outside Aus
 - Law regulating matters/things within Aus is NOT supported by s51(29) simply cus a cause of the perceived need to regulate those Aus matters/things arose outside Aus: **Pape**
 - Geographic externality principle applies to intangible things
 - e.g. intangible intent to support crimes overseas: **Alqudsi**
 - If law has a sufficient connection w conduct geographically external to Aus → law supported by s51(29): **Alqudsi**
 - o Cases:
 - **Sharkey**
 - **Seas & submerged lands case** – laws re: territorial sea & continental shelf was valid cus they related to things physically external to the territory of Aus
 - **Polyukhovich** – law for crimes committed by non-Australians for crimes that occurred outside Aus (only connection being person having come to Aus to live later on) was a valid exercise of s51(29) cus it related to matters geographically external to Aus
 - **Horta** – Act implementing Timor Gap treaty w Indonesia was supported by s51(29) cus it related to matters geographically external to Aus
 - **Re Patterson** – split
 - **XYZ** – Cth child sex tourism legislation that made it an offence for Australians to have sex w people <16 in foreign countries was valid under external affairs power cus it concerned acts that took place outside Aus
 - **Pape** – Act was NOT supported by s51(29) cus although GFC had arisen from events occurring outside Aus, Act was directed only to providing a fiscal stimulus of the Aus economy → hence was NOT a law w respect to any matter or thing external to Aus
 - **Thomas v Mowbray** – Cth anti-terrorism legislation was supported by s51(29) (and also defence power) cus s51(29) extends to matters affecting Aus relations w other countries including terrorism affecting other countries
 - **Alqudsi** – although A’s alleged conduct (organising & supporting foreign terrorism) occurred solely within Aus, there was sufficient connection w conduct geographically external to Aus cus provision made it an offence to engage in conduct intended to support or promote entry of a militant into a foreign country

- 2) TREATY

- Proportionality test
- Rules:
 - Treaty must be bona fide/genuine: **Tas dam case**
 - C.f. mere excuse to engage the power
 - Fair to assume these are bona fide cus they concern peace-keeping
 - Specificity principle: **Industrial relations act case**
 - Law must prescribe a regime that treaty has defined w sufficient specificity to direct the general course to be taken by the signatory states
 - C.f. treaties that express mere aspirations (rather than binding obligations) giving no directions as to how they are to be fulfilled can NOT support a law under s51(29)
 - Implementation of treaty
 - Law must implement treaty (in whole or in part): **Tas dam case**
 - Partial implementation of treaty sufficient UNLESS: **Industrial relations act case**
 - it is so selective as to deny the law the character of the law of implementing treaty OR
 - it is substantially inconsistent w treaty as a whole
- Cases:
 - **Tas dam case** – World Heritage Act was supported by s51(29) cus legislation implementing ANY treaty was supported by EA power as long as treaty was made bona fide, which it was

- 3) INTERNATIONAL RECOMMENDATIONS

- Currently, there is no clear majority on whether laws enacted in accordance w an international recommendation is supported under s51(29)
 - **Industrial relations act case** suggested that a mere recommendation will NOT be sufficient to support legislation under s51(29)
 - **Pape** (3 judges) affirmed & added to this by suggesting recommendations will ONLY be sufficient if it effectively gave rise to an obligation (e.g. one of an international body giving effect to or interpreting a treaty obligation)
- PROCESS:
 - 1) does the recommendation give rise to an obligation?
 - Yes → 2)
 - No → s51(29) unlikely applies
 - 2) treaty rules
 - 3) proportionality test

Lecture 4.1 – defence power

- Provisions
 - o s51(6) – naval & military defence of Cth & states & control of forces to execute & maintain Cth laws
 - o s119 – if state asks, Cth must protect them against invasion against domestic (internal) violence
 - o s68 – GG acts on advice of ministers in exercising defence power
- Proportionality test
- Rules:
 - o S51(6) covers BOTH external AND internal violence: *Thomas v Mowbray*
 - o Waxes (expands) & wanes (shrinks) depending on circs: *Andrews v Howell*
 - 2 aspects: *Fullagar J in communist party case*
 - 1) primary aspect = peace time
 - o S51(6) supports laws w direct & immediate objects as the naval & military defence of Cth & states
 - o E.g.
 - recruitment, enlistment & training of armed forces, equipment, weapons & munitions, erection of fortification
 - NOTE training of those OUTSIDE armed forces (e.g. children) unlikely to be covered
 - terrorism (*Thomas v Mowbray*)
 - *Thomas v Mowbray* – HCA accepted that protection from terrorist acts necessarily engages s51(6) BUT court must be satisfied that law is reasonably capable of being regarded as for the purposes of defence of Aus regardless of what's in the recitals
 - Peace-keeping falls within primary aspect of defence power: *Kirby J in Thomas v Mowbray*
 - 2) secondary aspect = war time
 - o Periods:
 - A) Immediate apprehension of war
 - B) During war → defence power expands
 - C) Post-war readjustment → defence power does NOT immediately cease when war ends – period for post-war reconstruction is permitted to wind-down laws (e.g. petrol rationing)
 - BUT if it goes on for too long, court will strike down law
 - o *Foster* – extending wartime measures for 4yrs post-war was too long
 - o S51(6) extends to:
 - matters not regarded in normal conditions of national life as having any connection w defence
 - matters incidental to execution of power of the exec to deal w an emergency
 - o E.g. prices & rationing of goods, rents, transfer of interests in land, industrial employment
 - o Cth can NOT recite itself into power: *Communist party case*
 - So preamble statements [re:...] is not sufficient in themselves to connect Act to s51(6)
 - o 'Stream cannot rise higher than its source': *Communist party case*
 - i.e. parliament can't enact a law using HOP that allows them to do things that go beyond what HOP allows them to do
 - o Validity of law does NOT depend on decision-maker's opinion
 - *Communist party case* – was left to GG to decide whether person was a communist & a threat to the nation → law not supported by defence power
 - o More likely defence power supports law if: *Capital Issues case*
 - Review mechanisms available
 - c.f. GG's decisions were not subject to judicial review in *communist party case*
 - Restrictions on economic rights
 - c.f. civil liberties or political rights: *communist party case*

- Cases:

- **Communist party case** – law was NOT supported by a HOP cus:
 - 1) merely sending troops overseas to Korean war did not mean Aus was on a war footing → hence not supported by defence power
 - 2) GG's opinion was the only link between act of declaring person to be a communist & defence power, and GG's decisions are not subject to judicial review
 - 3) re: nationhood power –
- **Capital Issues case** – regulations were valid cus:
 - 1) there were objective tests by which connection w defence power could be ascertained
 - 2) there were provisions that allowed a full review of treasurer's decisions if he went beyond his powers
 - 3) concerned economic rights

Lecture 4.1 – nationhood power

- Provisions
 - o **s51(39)** – incidental power
 - o **s61** – exec power
- Proportionality test
- Rules:
 - o Nationhood power allows exec (and by virtue of s51(39) incidental power also Cth Parliament) to “engage in enterprises & activities peculiarly adapted to the government of a nation & which cannot otherwise be carried on for the benefit of the nation”: **Mason J in AAR**, **Pape**
 - o SO for nationhood to be validly exercised, activity: **AAR**
 - 1) must be a national endeavour
 - As the legislation is only something the Cth govt could achieve as it is peculiarly within the capacity & resources of Cth govt (French CJ in **Pape**, also in **AAR**), it is “truly national”
 - 2) cannot otherwise be carried on by the states
 - Activity cannot otherwise be carried on by the states → valid
 - Activity can otherwise be carried on by the states → invalid
 - Cases:
 - o **Davis**
 - Commemoration of bicentenary was pre-eminently the biz & concern of Cth as the national govt (even though it is not exactly clear why the bicentenary could not be celebrated by NSW when it was regarding the settlement of NSW as a colony not the Cth of Aus)
 - BUT NOTE in the end provisions were invalid cus:
 - 1) law went too far by being grossly disproportionate to the need to protect the commemoration
 - 2) law was not reasonably & appropriately adapted to achieve ends within constitutional power
 - 3) limited freedom of speech
 - o **Williams No 1** – states had the legal & practical capacity to provide a scheme such as the national school chaplaincy program
- Limitations:
 - o Convenience is not enough to bring an activity within a nationhood power: **AAR**
 - o There must be no competition w the states: **Williams No 1**
 - **Williams No 1** – the fact that the chaplaincy program involved direct competition w state exec & legislative action was reinforced by the already existing QLD govt’s chaplaincy program
 - o Exec powers cannot be grossly disproportionate to the national need they are addressing
 - The impingement on autonomy/general detriment (...) is grossly disproportionate to the legitimate objects of the provision (the national need it is addressing is...) hence not a valid exercise of nationhood power
 - **Davis** – preventing sale of “200yrs of oppression” shirts were grossly disproportionate to the purpose of commemorating the bicentenary, and hence was beyond the scope of nationhood power
 - o Nationhood can NOT be used to justify coercive action or legislation that creates penalties: **Tas Dam**
 - EXCEPTION for self-preservation (preserving your existence or your ability to do something)
 - Cases:
 - **Davis** – law went beyond what was necessary to fill the intended legislative purpose (i.e. celebrating the bicentennial) as there was “extraordinary intrusion” into Davis’ freedom of speech/expression
 - **Tas Dam** – regulations associated w s62(e) was coercive cus they prohibited performance of certain acts on property which could be identified as having distinctive heritage value
 - o Nationhood power cannot be used to allow the Cth to ‘aggregate to itself control of such property, achievement or endeavour’: **Pharmaceutical benefits case**
- Examples:
 - o Nationhood power can be validly exercised:
 - 1) for national emergencies (e.g. war, national disaster): **Pape obiter**
 - 2) to protect & control the marginal seas, seabed, airspace, continental shelf & incline: **Seas & Submerged Lands case**
 - 3) to commemorate bicentenary: **Davis**

Lecture 4.2 – corporations power

- Provisions
 - o s51(20) – foreign corps & trading or financial corps formed within limits of Cth
- Sufficient connection test

PROCESS

- 1) IS IT A CORPORATION?
 - o Rules:
 - Merely stating a body is NOT a corp in legislation does NOT avoid application of s51(20): **QLD rail**
 - Yes corp
 - If incorporated under:
 - o Corp Act
 - o state law (e.g. local gvmt bodies, state-owned corps, hospital, unis)
 - o Cth law relying on another HOP (e.g. bicentenary corp: **Davis**)
 - Deemed to be a corp under s51(20) if NOT formally incorporated BUT body holds all attributes & powers of a corp: **QLD rail**
 - Not corp
 - State may turn a body corporate back into part of the body politic → avoids application of Cth laws made under s51(20)
 - o Outcome:
 - Yes → corporation → 2)
 - No → NOT corporation → s51(20) does not apply
 - o Case:
 - **QLD rail** – although not incorporated under Corp Law, QLD rail authority was deemed to be a corp under s51(20) cus:
 - 1) it had all the attributes of a corp – i.e. perpetual succession, power to own property, contract, sue, be sued etc
 - 2) merely declaring that they were not a body corporate did not avoid application of s51(20)

- 2) IS IT A CONSTITUTIONAL CORPORATION?

o A) foreign corporation

- Formed outside Aus

o B) trading corporation

▪ TEST – PROCESS:

- 1) look at current activities of corp → do their trading activities (e.g. buying/selling g/s whether or not for profit) form a sufficiently significant proportion of its overall activities to merit it being a “trading corp”? **Adamson's case**
- 2) look at purpose for which corp was established (including powers granted) → is their trading purpose substantial as to merit it being a “trading corp”? **Gageler J in QLD rail**
- 3) if yes in either → yes trading corp
- 4) if conflicting → make best judgment

▪ Rules:

- NOT a trading corp if trading activity is so slight/incidental to some other principal activity (e.g. religion for church, education for school)
- “sufficiently significant proportion”
 - o HCA has not provided guidance on what % amounts to “sufficiently significant”
 - o BUT lower courts (although not authoritative) have held that:
 - 1) it is enough that the AMOUNT of money generated by trading is substantial (i.e. millions)
 - 2) 18% (**Quickenden**) & 5% (**United firefighters**) of total revenue for trading was “substantial” to conclude the bodies (UWA, fire brigade) were trading corps

▪ Cases:

- **Adamson's case** – WA National Football League was a trading corp as trading was its principal activity cus:
 - o 1) their trading activities was extensive & of a “very substantial scale”
 - o 2) its financial revenue was so great & the commercial means by which it was achieved varied hugely
 - o 3) although a “football” league, football was merely incidental to its trading activities
 - o 4) “trading” was interpreted widely to extend to any biz activities carried on w a view to earn revenue
- **QLD rail** – QLD rail authority was a trading corp cus:
 - o 1) it was constituted w a view to engage in trading & doing so for profit
 - o 2) they have a substantial trading purpose – “rail transport services” & “services relating to rail transport services”
 - o 3) it paid dividends & the equivalent of corporate tax to the state
 - o 4) it was granted powers such as property rights, contractual rights, right to sue & be sued, succession
- Lower court decisions held to be trading corps:
 - o **Red cross** – RC & RPA hospital were both trading corps cus:
 - 1) RC runs op-shops (although only a small proportion of its revenue was from them)
 - 2) RPAH received patient fees & did some biz activity (despite this being dwarfed by state grants)
 - o **Quickenden** – UWA was a trading corp cus although its trading revenues amounted to only 18% of its total operating revenues, its trading activities included investing, buying, renting/selling properties, selling publications, providing student accomm & info tech services
 - NOTE educational services were NOT regarded as trading
 - o **United firefighters' union** – fire brigade was a trading corp cus it serviced fire equipment for fees – did not matter that it only counted for 5% of revenue
 - o Church owned corps that run schools
 - Revenue from tuition fees were regarded as trading
 - Revenue from gvmt grants were NOT regarded as trading
 - o RSPCA – pounds & sells dogs, fundraises, runs dog-training clinics
 - o Indigenous welfare charities

○ C) financial corporation

- TEST = does the corp engage in financial activities (e.g. borrowing/lending \$\$, dealing in finance, providing credit, entering into hire purchase agreements) of such a nature, extent or volume as to justify it being a "financial corp"?: State superannuation board
 - Yes → financial corp
 - No → not financial corp

○ NOTE

- Corp w no activities (e.g. shelf company)
 - If a corp has undertaken no activities → look to its constitution, including objects & powers: Fencott v Muller → is it a trading/financial corp?
- Gvmt bodies → same test
 - May be trading corps if they undertake substantial trading activities: Tas dam case
 - Tas dam case – Tas hydro-electric commission was a trading corp cus although it fulfilled a gvmnt regulatory role (e.g. licensing electricians, regulating electrical appliances):
 - 1) it also undertook substantial trading activities (e.g. generated & sold electricity, constructed & maintained work for its generation, operated power station)
 - 2) it derived substantial profits (\$103mil)

- 3) SCOPE OF S51(20)

○ Rules:

- S51(20) extends to:
 - Work choices case
 - Regulation of activities, functions, relationships & biz of a constitutional corp
 - Creation of rights & privileges belonging to it
 - Imposition of obligations on it & w respect to those matters
 - Regulation of conduct of those through whom it acts (e.g. employees, shareholders)
 - Regulation of conduct of those whose conduct is capable of affecting its activities, functions, relationships or biz
 - Law w respect to non-corps that deals w protecting trading biz of a trading corp: Fontana films
 - Tas dam case
 - Laws w respect to trading activities of trading corps
 - Laws that protected those trading activities
 - Laws w respect to acts by trading corps engaged in for the purpose of their trading activities
- S51(20) does NOT extend to:
 - Legislating about corporations or trading generally: Fontana films
 - Law that merely grants money to trading corp: Williams No 2
 - BUT might survive if grant was incidental to some form of statutory regulation of trading corp, its activities, functions, relationships or biz
 - NOTE – there is ambiguity as to whether a law that regulates corp AND grants it money will be supported by s51(20) OR whether part of law conferring grant will not have a sufficient connection w HOP
 - Incorporation of companies: Incorporation case
- A law supported by corp power can bind non-corps if law is for the purpose of protecting trading activities of trading corps: Fontana films

○ Cases:

- Fontana films – provision that deemed action of 2 or more members of a trade union to be the actions of that union for the purposes of the Act was NOT supported by s51(20) cus the law was about trade unions w only a v remote connection to corps
- Work choices case – s51(20) supported amended law cus:
 - 1) "employer" was defined in legislation as a constitutional corp
 - 2) law regulated activities, functions, relationships & biz of a constitutional corp
 - 3) under s51(20), Cth had an almost unlimited capacity to regulate trading, financial & foreign corps in Aus
- Williams No 2 – s51(20) did NOT support chaplaincy scheme cus:
 - 1) law did not regulating or permitting any act by/on behalf of any trading corp
 - 2) law did not regulate activities, functions, relationships or biz of a trading corp