

DOES THE CORPORATIONS POWER EXTEND TO RE-CONSTITUTING CORPORATIONS?

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THE CORPORATIONS POWER: WHAT LIMITS?

Overview

This article examines the breadth of the corporations power in s 51(xx) of the *Australian Constitution*. The issue we address can be posed in a couple of ways. Once formed, to what degree does the national Parliament have power to 're-form' corporations? Or, to put it in a more neutral way, once incorporated, what power does the national Parliament have over a corporation's constitution?¹ Addressing this issue requires us to explore the vision or model of the corporation which underlies the limit, recognised in the *Incorporation Case* of 1990, that the Commonwealth may only wield power over corporations already 'formed'.²

As well as being of considerable theoretical interest, this question has importance from a more practical, federal perspective. Can the national Parliament legislate under the corporations power to regulate the formation, composition, operation and dissolution of the key corporate decision-making bodies, namely the board of directors and the general meeting? Could the corporations power, for instance, be used to mandate employee or environmental representation, or gender balance, on the boards of trading corporations nationwide?³ Does it extend to regulating board remuneration and the role of the general meeting in that contentious field? Many aspects of board composition and remuneration are currently dealt with by means of the *ASX Principles of Corporate Governance* ('the Principles'), with which listed companies are expected to 'comply or explain'. However, legislative intervention might be required in areas

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1 'Neutral' since to talk of a power to 're-form' corporations might imply that since the Commonwealth lacks power over corporate 'formation' it lacks power over re-formation. But creation is arguably distinct from re-modelling, especially when we are dealing with an artifice like corporate structure.

2 *New South Wales v Commonwealth* (1990) 169 CLR 482 ('*Incorporation Case*').

3 A controversial law requiring listed companies to raise the proportion of women on their boards to 40% by 2016 is currently before the French Parliament: see 'La Vie en Rose', *The Economist* (London), 8 May 2010, 70. Currently only 10.5% of directors of CAC-40 listed companies are female. Norway introduced a similar rule in 2003 and now has the highest proportion of female directors of listed companies in the world at 44.2%: see 'French Plan to Force Gender Equality on Boardrooms', *The Guardian* (London), 3 December 2009, 20.

covered by the *Principles* if the federal government were dissatisfied with the contents of the *Principles*, which are, after all, aimed at protecting the interests of participants in the capital markets. Similarly, the federal government might take the view that it would be inappropriate for certain regulatory objects to be left to soft law and market forces, either because they run counter to the interests of capital market participants, or because the issue is of such importance that mandatory regulation is required. Finally, the federal government might want to regulate unlisted public companies, which currently lie beyond the reach of the *Principles* and the 'comply or explain' principle.

At present this issue may be forestalled by the fact of State referral of power to create a national Corporations Law. But such referrals are hardly set in stone. On the contrary, if the national Parliament were to move on any of these issues, it might trigger more conservative States to withdraw their referrals. Conversely, bold legislation on those issues probably has to be national, given the risk of corporate flight to any States not covered by such regulation.

Further, given the wide net the courts have cast over 'trading corporations',⁴ a host of important not-for-profit and State entities, not answerable to the *Corporations Act 2001* (Cth), can be regulated under the s 51(xx) power.⁵ These include higher education institutions, State owned utilities,⁶ and local governments. Arguably even industrial associations are covered. If the corporations power extends to re-constituting corporations already formed, then the Commonwealth could, for instance, control the shape of university senates.⁷ Indeed, it was Howard government policy to trim university senates to reduce the influence of academic and student members and mandate more involvement from outsiders with commercial expertise.⁸ But it only attempted this indirectly, via its fiscal power:⁹ if the corporations power extends to re-constituting, it could have done so directly.

⁴ For thorough treatments of what bodies are classed as 'trading corporations' see Nicholas Gouliaditis, 'The Meaning of "Trading or Financial Corporations": Future Directions' (2008) 19 *Public Law Review* 110 and Rosemary Owens, 'Unfinished Constitutional Business: Building a National System to Regulate Work' (2009) 22 *Australian Journal of Labour Law* 258.

⁵ A corporation's guiding purpose, even not-for-profit status, is irrelevant: *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190. Section 109 of the *Constitution* ensures valid Commonwealth law trumps State law otherwise governing the corporation. The only exception would be the *Melbourne Corporation* principle, covering corporations that lie at the heart of State governmental affairs (see *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31): this might protect some aspects of the 'constitution' of local councils.

⁶ For example, the Hydro-Electric corporation embroiled in *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

⁷ Modern universities are trading corporations given their reliance on fee-paying courses and investment income: eg, *Quickenden v O'Connor* (2001) 109 FCR 243.

⁸ See Commonwealth Government, *National Governance Protocols* (2004) Department of Science, Education and Training <http://www.dest.gov.au/archive/highered/governance/docs/nat_gov_prot.pdf>. Fiscal benefits were to flow to complying universities under the *Higher Education Support Act 2003* (Cth) s 33-15 (as it then was).

⁹ The Commonwealth provides a large share of the funding for universities. However the carrot and stick of funding an area does not permit comprehensive or mandatory legislation: *British Medical Association in Australia v Commonwealth [No 2]* (1949) 79 CLR 201 ('*Pharmaceutical Benefits Case*'). See further Greg Craven, 'Commonwealth Power over Higher Education: Implications and Realities' (2006) 1 *Public Policy* 1.

Alternatively, is there something in the text, precedents or policy arguments surrounding s 51(xx) to deny its extension to the constitution of corporations? If so, where does such a restriction to an otherwise plenary power over existing corporations come from? It might be thought that an answer would be found in corporate law theorising about the inter-relationship of the general meeting, the board of directors and the incorporated entity. Consequently, this article explores the extent to which the corporate legal entity has an existence separate from the human beings who control and decide upon its activities. As a legal entity, can a corporation be said to have been 'formed' independently of the designation in its constitution of those human beings who will act for it or on its behalf? This requires a consideration of the debate over whether the general meeting and, more particularly, the board, are organs or agents of the corporation. Corporate law, however, turns out to be unsettled and inconclusive of the matter.

When it comes to constitutional case law, the dicta we have uncovered do point to *some* area of the corporate constitution being off-limits to the national Parliament, under an assumption that certain 'internal management' structures must accompany corporate formation. This may be consonant with a view of the general meeting and board as 'organs' of the corporate entity and therefore indivisible from it. Yet, as we show, that conclusion is not necessitated by the logic of s 51(xx), by constitutional precedent or by corporate law theory. Indeed, in our view it makes more sense of corporate law to conceive of the board as an agent of the corporation and, for policy reasons, to read s 51(xx) as permitting national regulation of crucial corporate governance matters such as board composition.

Background

Section 51(xx) of the *Constitution* grants the national Parliament power to make laws:

with respect to foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth.

For ease of reference, the three types of corporations are often called 'constitutional corporations' and the power has long been dubbed the 'corporations power'.¹⁰

The terms of s 51(xx) are short, but deceptively simple, so that its scope has been notoriously difficult and controversial. The past century of judicial interpretation and legislative experimentation divides into two periods. The first lasted for over 60 years, during which the power lay dormant thanks to the narrow reading in *Huddart Parker & Co Ltd v Moorehead*.¹¹ Then, over the last 40 years, the power has been read expansively. In a series of cases stretching from *Strickland v Rocla Concrete Pipes Ltd*¹² to the *WorkChoices Case*,¹³ the scope of the power has broadened in the two questions which have dominated attention. Those have been the 'who' and the 'what' questions:

¹⁰ There are of course corporations that are not covered by s 51(xx), in particular corporations that do little or no trade, such as some charitable, governmental and trustee corporations.

¹¹ *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 ('*Huddart Parker*'). Though during those decades the power was assumed to be narrow, there were manifold theories seeking to define its limits: John L Taylor, 'The Corporations Power: Theory and Practice' (1972) 46 *Australian Law Journal* 5, 5–6.

¹² *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 and *Mikasa (NSW) Pty Ltd v Festival Industries* (1972) 127 CLR 617.

¹³ *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices Case*').

- (a) 'who' is covered? (In particular, which bodies qualify as 'trading corporations'.)¹⁴
- (b) 'what' corporate affairs can be regulated?¹⁵

This paper relates to the 'what' question, or rather one neglected aspect of it. That is, the extent to which s 51(xx) permits national regulation of the constitution of corporations, or whether there is some implied limitation on the power to regulate the corporate form, organs or core governance structures.

With one glaring exception, the trajectory of the last 40 years, across each of the 'who' and 'what' questions has been to read the power increasingly expansively, as if there were a kind of Hubble's constant informing judicial interpretation. Freed of the gravitational restraint of the doctrine of reserved State powers and of attempts to restrain the corporations power to cover only inter-state matters, 'trading or financial' affairs or 'external' relationships, the power's scope has broadened in decision after decision. The exception to this expansive trajectory was the *Incorporation Case*. There, a 6:1 majority of the High Court decided that the Commonwealth had no power under s 51(xx) to regulate the creation of corporations.

A POWER OVER THE CORPORATE CONSTITUTION?

The question animating this article has elicited almost negligible judicial attention and, with the notable exception of Leslie Zines, little academic attention. Even then, 'the internal management of corporations' warrants just three pages in the fourth edition of Zines' *The High Court and the Constitution*, and two pages in the latest edition.¹⁶

At first glance, this neglect is surprising. After all, questions of the constitution of corporate entities go to the very heart of their definition, nature and governance. Indeed, they go to the root of the idea of 'corporateness': they would be primary questions for even the narrowest reading of which corporate affairs can be regulated under a 'corporations power'.

The question appears to have been neglected for two reasons. One is that regulatory attention has been centred on activities and conduct. As Corcoran observed in 1994, outside the *Incorporation Case* the focus of legislators has been 'not on federal regulation of corporations as such, but rather on the control of certain kinds of activity engaged in by persons who happen to be corporations'.¹⁷ This is understandable. Trading corporations have come to dominate large swathes of economic and even social life. Realising this, the Commonwealth has sought to invert 'Higgins' horrors' – a list of

¹⁴ All that is required is that a 'significant' or not insubstantial share of the organisation's revenue comes from trading in the sense of selling or supplying things at a price. See further Gouliaditis, and Owens, both above n 4. Although it is the governing test, the activities test has been criticised: see Gouliaditis at 119–28, including at 120–1 discussion from the High Court bench suggesting several judges have doubts about its over-inclusiveness.

¹⁵ We use the term 'affairs' in a broad sense: 'activities' would beg the question. Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 804 similarly use the phrase 'aspects or activities'.

¹⁶ Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 104–7 and (Federation Press, 5th ed, 2008) 137–8.

¹⁷ Suzanne Corcoran, 'Corporate Law and the Australian Constitution: A History of Section 51(xx) of the Australian Constitution' (1994) 15 *Journal of Legal History* 131.

areas where the early, States-rightist High Court feared a broad reading of the corporations power would lead the Commonwealth¹⁸ – into a list of honourables. It has used the power to pursue goals as diverse as bespoke environmental protection (the *Tasmanian Dam Case*) and generalised competition and consumer law (under the *Trade Practices Act 1974* (Cth)). This focus of regulatory attention on corporate 'activity' culminated in the recent *WorkChoices Case*, which upheld a national law covering the field of employment within corporations.

Case law challenges to legislative competence have thus been concerned with which activities, during the ongoing life of corporations, are amenable to national regulation. Even when judges have asserted, as in *Fontana Films*, that the test is not limited to the activities of corporations, least of all activities of a particular kind,¹⁹ they have done so in the context of activities affecting corporations (in that case, industrial boycotts). After *WorkChoices*, the assumption of legal commentators has been that – creation of corporations aside – the Commonwealth can do anything it likes to or with corporations. All it has to do is frame the law as one that uses constitutional corporations, or a sub-set of them, as a discrimen: that is, to frame legal provisions as either regulating or protecting constitutional corporations.²⁰ The focus on activities has tended to beg the question of the scope of the power.

A second reason why s 51(xx)'s potential in relation to corporate constitutions has been neglected is that, for the most economically significant corporations, there has been a fair degree of political consensus over the key aspects of corporate law since at least the 1960s. This is witnessed in the various co-ordinated endeavours, ranging from uniform companies codes through co-operative schemes to the truly national *Corporations Act 2001* (Cth) based on the referral of State powers.²¹ Without consensus, such co-operative federalism would never have borne fruit. Whether Labor or Liberal, governments have worked within the same core assumptions about the scope of corporations law: namely that it should encompass the relations between directors, shareholders and – to a lesser extent – creditors, with other interests being dealt with by specific legislation. While there was some slippage from uniformity in the 1960s and 1970s, the move to a national law was not driven by division over the scope of corporations law or the optimal default rules for the corporate constitution, but by concerns to limit the transaction costs and confusion arising from the parochialism of State-based registration and corporate law bureaucracies.

What constitutes a corporation?

This question is almost an ontological one: what is the essence of a corporation? On one view, which would enlarge Commonwealth power, a corporation is nothing more than a convenient legal fiction. The law – for a number of economic and other policy reasons – is responsible for imputing entity status and a 'body' (as the etymology

¹⁸ *Huddart Parker* (1909) 8 CLR 330, 409–10.

¹⁹ '[T]he power is not expressed as one with respect to the activities of corporations, let alone activities of a particular kind ...': *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 207. In Brennan J's terms (at 222) 'it is a power to make laws with respect to corporate persons, not with respect to functions, activities or relationships'. Murphy J held similarly.

²⁰ Including laws aimed at a sub-set of corporations. See the targeting of a single, State owned corporation in the *Tasmanian Dam Case* (1983) 158 CLR 1.

²¹ Pursuant to *Constitution* s 51(xxxvii).

implies) to the corporation.²² The law then treats that entity as a juristic person, separate from the natural persons in the real world such as the directors and employees who work towards a common goal under the aegis of the corporation's interests or the investors who contribute finance. This legal construction has no counterpart in the physical world, where a corporation is little more than a name and number in a registry. Since the mere act of registration and the legal grant of entity status would suffice for a corporation to be 'formed', on this view the Commonwealth's power 'with respect to' corporations would truly be plenary.

It is often said that the corporations power is a 'persons' power, over a type of juristic person, rather than one over 'a function of government, a field of activity or a class of relationships'.²³ From this angle, the power is distinct from the bulk of other Commonwealth legislative powers dealing with fields of activity (such as trade or commerce and banking) or purposes (notably defence).²⁴ The distinction implies a commonality with other powers over actual persons, such as aliens or people of particular races. Except that a corporation is *not* a natural person like a foreigner. Indeed, it is not even a physical entity, such as a lighthouse, with an existence that pre-dates the law. A corporation is a purely legal construct, an artifice more akin to a copyright or patent.²⁵

In the alternative, a rival view paints the corporation as a legal fiction, but one which stands in for the association of members which created it and who have a residual claim to its profits. In this view, the essence of the corporation lies in its written constitution (formerly its memorandum and articles of association), the terms of which regulate the role of, and relationship between, its shareholder members and its board of directors. This view sees the 'corporation' as legal shorthand for the older concept of an association as a contractual gathering of people with a mutual purpose; an idea evident in the etymology of the word 'company'.²⁶ In this view, a patent or

²² 'Corporation' derives from Latin 'corpus', meaning 'body'.

²³ *Incorporation Case* (1990) 169 CLR 482, 497.

²⁴ Compare also Dixon J in *Stenhouse v Coleman* (1944) 69 CLR 457, 471. In truth, such categorisations are merely suggestive as there are no hard and fast distinctions: eg 'lighthouses' are physical entities but they are also a public service activity. At worst, they dissolve into the quixotic, like the classifications of 'animals' in Jorge Luis Borges's 'The Analytical Language of John Williams' in Borges, 'Other Inquisitions 1937-1952' (Ruth K C Simms trans, University of Texas Press, 1993): animals belonging to the Emperor, stray dogs, mermaids, etc.

²⁵ This approach might be contrasted with the 'corporate realism' of Gierke and Savigny which recognised the moral identity of the corporate person as a voluntarily created institution analogous to partnership. For an updated version of this theory, see Gunther Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) 36 *American Journal of Comparative Law* 130, 137-40, arguing that, in granting legal personality to the corporation, the law takes its lead from society's recognition of the firm's capacity for collective action.

²⁶ This idea has been revived since the 1980s in the US law and economics literature: see for example Easterbrook and Fischel's highly influential (economic) argument that the corporation is simply 'shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves.' In essence, the corporation is merely a 'nexus of contracts' and the board of directors are the - economic, if not legal - 'agents' of the shareholders under incomplete contracts: Frank

copyright is less the analogy than a marriage or partnership: the law merely recognises a relationship which could – albeit at considerably higher transaction cost – be created by means of a bespoke contract.²⁷

This rival view, with its shareholder-centricity has had considerable influence on corporate governance debates. But both in its old partnership variant and its modern, nexus of contracts version, this view can be criticised for downplaying the functional significance of the separate legal entity, which allows investors to make irrevocable commitments of capital towards a business purpose and permits asset partitioning, to protect members' assets from creditors of the corporation and corporate assets from creditors of the members.²⁸

This view also runs up against a distinct empirical problem when one realises that not all corporations fit this company model. This is obvious in the cases of statutory corporations, such as universities, the one-person corporation now permitted under the legislation, and the corporation sole or corporation without incorporators, such as a government-owned bank.²⁹ As Taylor noted, the word 'formed' in s 51(xx) is perfectly apt to cover the corporation sole, whereas the term 'incorporated' might have implied the model of a company beginning as an association of persons.³⁰ The deficiencies of the company model also become apparent when one ventures away from the world of corporations as investment vehicles, and into the realm of public purpose corporations. Universities may issue 'membership' numbers to their staff and students, but they are surely neither owned nor governed by them. Local governments, also, have tended to be incorporated, but were clearly mini-polities even before the franchise moved from ratepayers to residents. Yet as we have noted, State banks, universities and most local governments are classed as trading corporations today.

CORPORATE THEORY AND STRUCTURE: ORGANS, AGENTS AND CAPACITY

In this section we consider how corporate law theory describes the core of the corporation. As a purely legal entity, a corporation can of course only act through humans. The question of which humans act on behalf of or as the corporation is generally viewed as separate to the question of corporate capacity (that is whether the company has the ability, in law, to do the act in question).³¹

Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991), especially 12–36.

²⁷ The examples given are all drawn from other Commonwealth powers: s 51(i) trade and commerce, 51(xiii) banking, 51(vi) defence, 51(xix) aliens, s 51(xxvi) races, 51(vii) lighthouses, 51(xviii) copyrights etc and 51(xxi) marriage.

²⁸ See, eg, Margaret M Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century' (2003) 51 *UCLA Law Review* 387 and Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 110 *Yale Law Journal* 387.

²⁹ As was the case with the original Commonwealth Bank: see the *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*'), below n 95.

³⁰ Taylor, above n 11, 8.

³¹ Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (LexisNexis/Butterworths, 14th ed, 2010) [8.070] note that 'there is no scope for confusion of corporate powers and directors' powers of the kind that occurred in some English cases

Under modern Australian law, capacity is regulated by s 124(1) of the *Corporations Act 2001* (Cth), where it is clearly treated as an incident of incorporation. Once incorporated, a company is granted the same legal capacity and powers as an individual and also has all the powers of a body corporate. At this point the powers and capacity exist merely as potentialities, and will be exercised only if the relevant human actors decide that they should be exercised.

In addition to capacity, the *Corporations Act 2001* (Cth) deems that the 'replaceable rules' supplied in the legislation and any additional bespoke rules embodied in a formal corporate constitution have effect as a statutory contract.³² One of these replaceable rules operates by default to vest a general power to manage the business in the directors (widely understood to mean the board).³³ Some other powers are given to the general meeting by default, and certain specific powers are reserved to the general meeting by the legislation.³⁴

Australian law does not mandate the identity or arguably even the existence of these two groupings as such. As regards the general meeting, the legislation reserves certain powers to the 'company' and so clearly anticipates that there will be a grouping of humans capable of passing resolutions which bind the corporation, while the statutory definition of 'special resolution' clearly anticipates that the members of the company will vote.³⁵ As regards the directors, there is no reference in the legislation to the 'board' as such,³⁶ and it is possible to replace the default provision vesting management in the directors with a bespoke provision for a governing director, or a clause naming a particular individual or individuals to manage the business. It would also be possible – if ill-advised – to vest management powers in the general meeting. A further question then arises: if the shareholders in general meeting deleted the default provision allocating management power to the board, as well as the replaceable rule allowing them to appoint directors, who would be responsible for management? It seems likely that a court would rule that management powers revert to the general meeting, since to rule otherwise would leave the corporation without a grouping responsible for management.³⁷ The essential point is that few would contend that a

and which was untangled in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] 1 Ch 246.' The distinction in Australian law is explained by McPherson J in *ANZ Executors and Trustees Co Ltd v Qintex Australia Ltd* [1991] 2 Qd R 360.

³² *Corporations Act 2001* (Cth) s 140(1).

³³ *Ibid* s 198A(1).

³⁴ *Ibid* s 203C lays down a default rule for proprietary companies that the shareholders can remove the directors by majority vote, while s 203D makes the rule mandatory for public companies. In addition, s 136(2) lays down a mandatory rule that the constitution should remain under the control of the 'company' (ie the general meeting) by special resolution.

³⁵ *Ibid* s 9. There are occasional statutory references to the general meeting. For example, s 250N requires public companies to hold an annual general meeting.

³⁶ Part 2G.1 of the *Corporations Act 2001* (Cth) refers to and regulates 'directors' meetings', while pt 2G.2 deals with 'members' meetings', and specifies who may call them, but, leaving s 250N aside, there is no legal requirement that these meetings actually take place.

³⁷ See, eg, *Barron v Potter* [1914] 1 Ch 895 in which the court held that, in the event of board deadlock, management power would be taken over by the general meeting. Deadlock was interpreted narrowly in *Massey v Wales* (2003) 177 FLR 1, where the court held that there would be no deadlock – and therefore management power would remain vested in the board – so long as the general meeting had a constitutional power to appoint additional directors.

corporation with such a constitution had not been created; it would simply be viewed as dysfunctional.

The main corporate law question for the issue addressed in this article is how the decisions and actions of the board and general meeting are attributed to the corporation. These groupings could in principle be treated as either organs or agents of the corporation. If the board of directors and the general meeting are treated in law as organs rather than agents, then this means that they act *as* the corporation, rather than on its behalf. If the law grants such status – however metaphorical it is – to these groupings of individuals, this would provide powerful support for the position that incorporation necessarily presupposes or implies prior designation of the organs; without organs, a corporation can have no meaningful existence or autonomy. On the other hand, if the law treats either or both of these groupings as mere agents, then it could be argued that the corporation as a separate entity pre-exists them, or at least has a viable existence without them. In general, academic works in the United Kingdom and Australia accept the general meeting as an organ of the corporation, although there is little by way of judicial authority on the point.³⁸ Moreover, what little judicial authority exists for treating the board of directors as an organ rather than an agent is not entirely convincing.

As we foreshadowed earlier, the privileged, organic position of the shareholders, whose collective decisions are treated as decisions of the company, is a remainder from the days when the general meeting of the partnership was 'the company', and its decisions obviously bound not only itself but also the agents of the partnership, the managing partners. Yet it can be argued – at least from a normative perspective – that the general meeting should be treated in law as an agent rather than an organ. The shareholders' privileged position as an organ whose collective decisions are attributed by law to the separate corporate entity is a legacy from partnership days, prior to the separate legal entity principle. The courts began to come to terms with the implications of the interposition of the separate legal entity for the board-shareholder relationship, when they rejected the idea that the board was merely the agent of the shareholders. However, the continued insistence that the general meeting is an organ of a 'separate legal entity' highlights the incompleteness of the transition from partnership law and norms to a system of corporate law which seriously treats the corporation as a distinct legal entity with its own interests. It would arguably be more coherent to jettison the notion of organs altogether and move entirely to agency, although this would raise the

³⁸ For example, Len Sealy and Sarah Worthington, 'Shareholders as an Organ of the Company', ch 4 of *Cases and Materials in Company Law* (OUP, 8th ed, 2008); Austin and Ramsay, above n 31, [7.070]; Elizabeth Boros and John Duns, *Corporate Law* (OUP, 2nd ed, 2010), 5.1. However, apart from the analysis discussed below, Gower and Davies do not address the current position explicitly. There is actually very little in the case law on the relation of the general meeting to the company. One important exception is the dictum of Jordan CJ in *Clifton v Mount Morgan Ltd* (1940) 40 SR (NSW) 31, 44 suggesting that a company

'is incapable of acting except through the medium of agents. The Articles of Association ... prescribe the various agencies which may act on behalf of the company, the manner in which these agencies may be set in motion, and the scope of their respective authorities.'

He rejected an argument that the shareholders could interfere with the board on the basis that it 'confuses the corporation with the persons who are its members' (at 49).

possibility of a fiduciary duty on the general meeting to act in the best interests of the corporation.³⁹

The position of the board is more complex. Australian texts generally assume that the board is an organ of the company,⁴⁰ as do many English text books.⁴¹ However, case law support for this proposition is less than unequivocal and the issue requires more detailed consideration.

Gower and Davies' text on company law explains that

until the end of the nineteenth century, it seems to have been generally assumed that the proposition remained intact that the general meeting was the supreme organ of the company and that the board of directors was merely an agent of the company subject to the control of the company in general meeting.⁴²

However, earlier cases such as *Isle of Wight Railway Co v Tahourdin*,⁴³ which treated the board as agent of the general meeting – and therefore subject to its authority in the form of a majority resolution – were distinguished, and account taken of the legislative imposition of a separate legal entity, in *Automatic Self-Cleansing Filter Syndicate Ltd v Cuninghame*.⁴⁴ In that case, Collins MR described the relationship between the board and the company as follows:

It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the minority may be over-borne, but that can only be done by special machinery in the shape of special resolutions. Short of that the mandate which must be obeyed is not that of the majority – it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves. I do not think I need say more.⁴⁵

³⁹ Austin and Ramsay, above n 31, [11.040] note that current developments suggest that the law might evolve so as to impose a fiduciary duty on 'corporate controllers as such, whether they exercise their control through occupying positions as directors or through voting as members.' There could conceivably also be implications for the general meeting if it took decisions which adversely affected creditors, although under the default rules this would not happen: management power is vested in the board.

⁴⁰ For example, *ibid* [7.070] and [13.060], and Boros and Duns, above n 38, 84–5.

⁴¹ Sealy and Worthington title a chapter of their text as 'The Board of Directors as an Organ of the Company', although they do not address the point explicitly: above n 38, ch 5. In contrast, Hannigan appears to treat the board of directors as an agent, referring to a possible 'lack of authority, perhaps on the part of the board': see Brenda Hannigan, *Company Law* (LexisNexis/Butterworths, 1st ed, 2003) 177.

⁴² Paul Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 8th ed, 2008) 369.

⁴³ (1884) LR 25 Ch D 320.

⁴⁴ [1906] 2 Ch 34.

⁴⁵ *Ibid* 42–43.

This dictum treats the directors as agents of the legal entity, with the shareholders only able to give instructions or change the mandate of the directors by means of changing the memorandum and articles by special resolution or unanimous agreement.⁴⁶ Only when it acts in this way is the general meeting treated as the 'principal' or as an organ of the company, with 'the whole entity made up of all the shareholders' giving a mandate to the directors. In contrast, and since their mandate issues from the corporate entity, the board of directors are 'agents' rather than an organ of the corporation.⁴⁷ Further support for this interpretation could be drawn from the Court of Appeal's insistence that the shareholders can vary the identity of the management grouping and the scope of its powers by altering the constitution by special resolution. One would expect that it is not possible to change an organ whilst a body continues to function!

Although one contemporaneous case created some doubt about the universality of the *Cunninghame* principle,⁴⁸ the general principle was confirmed by the English Court of Appeal in *John Shaw & Sons (Salford) Ltd v Shaw*:

The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.⁴⁹

A similar approach was taken in *Winthrop Investments Ltd v Winns Ltd*, where the New South Wales Court of Appeal emphasised that the general meeting has

no general power to transact the company's business or to give effective directions about its management ... The general meeting is not, I think, the proper forum to determine matters of management, however critical they may be. The area of management is one in which the shareholders have no directly effective will.⁵⁰

These dicta confirm that the articles (and now the replaceable rules and the constitution) of the corporation divide power between the board and general meeting, and that both groupings exercise the company's powers in the spheres carved out for them by the constitution. The argument is that the general meeting acts as an organ with its acts automatically attributed to the corporate entity, but the board of directors acts as an agent of the corporation, both in managing its business generally and in

⁴⁶ Although Cozens-Hardy LJ agreed (ibid 45) 'entirely' with Collins MR, he rejected the idea that the directors were 'agents of the company' (by which he appears to have meant agents of the association of shareholders), preferring the idea that they are 'in the position of managing partners appointed to fill that post by a mutual arrangement between all the shareholders.'

⁴⁷ This argument appears to find support in Paul Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 7th ed, 2003), which states at 300 that it is not inappropriate in English law to view the directors as obtaining powers by delegation from the shareholders. However, 'this does not make the directors the agents of the shareholders, but it does produce, as between the directors and the company, a relationship akin to agency.'

⁴⁸ *Marshall's Valve Gear Co Ltd v Manning Wardles & Co Ltd* [1909] 1 Ch 267.

⁴⁹ *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, 134.

⁵⁰ *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 683-4 (Samuels JA).

making specific contracts on its behalf. This argument found support in the sixth edition of *Ford's Principles of Corporations Law*:

Although the board is not a delegate of the general meeting, the board's decisions are made *for* the company and not *by* the company. The only decisions made *by* the company are those made by the company in general meeting, that is to say, a general meeting of the members. One sign of the difference is that the directors are in a fiduciary relationship to the company ... but the general meeting is not.⁵¹

However, later editions of *Ford's Principles* appear to have resiled from this view, and in the current, fourteenth edition of *Ford's Principles*, a 'principal argument for the organic approach', is said to be that 'it is an inevitable consequence of the view that on incorporation, a company is a discrete entity.'⁵² There seems to be an assumption that if the board of directors is no longer the agent of the shareholders, then it must be an organ of the company. With respect, *Cunninghame* and *Shaw* provide no support for an argument that the board is an organ of the company. Instead they simply support the – legally unproblematic – proposition that the constitution carves out a sphere of protected decision making, within which the shareholders cannot interfere otherwise than by altering the constitution. This says nothing about whether the board's decisions are attributed to the corporation via the organic route or via more standard agency principles. Yet the current edition of *Ford's Principles* states that a 'now widely accepted' approach 'treats both the board and the members in general meeting as corporate organs.'⁵³ Later, it states unequivocally that 'the board is more than an agent; it is also a primary organ of the company.'⁵⁴

Three Australian cases are relied upon in support of this conclusion that the board is an organ. However, none of these cases provide direct, unequivocal support for this conclusion. The first case, *Richardson v Landecker*,⁵⁵ concerned a challenge to a lease which was signed by the company's managing director, rather than executed under its seal. Street CJ emphasised that '[a] company requires some human agency in order to manifest its intention, and the signature ... merely gave an operative effect to the name of the company already printed on the document.'⁵⁶ This distinction between

⁵¹ Harold Ford and Robert Austin, *Ford's Principles of Corporations Law* (Butterworths, 6th ed, 1992) [1409] (emphasis in original). The equitable duty of the board to act in the interests of the company (the principal) is a convincing indicator of an agency relationship. In contrast, and from a metaphorical perspective, there would be no need to impose such a duty on an organ of the company since its continued existence is tied up with the survival of the body of which it is a constituent part.

⁵² Austin and Ramsay, above n 31, [7.070].

⁵³ *Ibid.*

⁵⁴ *Ibid* [13.060]. It states – rather confusingly – that '[b]ecause on matters within the actual authority given by s 198A the board gets authority directly from the Corporations Act the board is more than an agent; it is also a primary organ of the company. But it still exercises an actual authority like an agent.' The difficulty with this argument is that s 198A is a replaceable rule, and thus vests powers in the board by default through the effect of s 140, which provides that 'A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract ...'. Further confirmation that the replaceable rules are generally treated as default terms of the corporate contract rather than rules of law is found in s 135(3), which provides that 'A failure to comply with the replaceable rules as they apply to a company is not of itself a contravention of this Act ...'.

⁵⁵ (1950) 50 SR (NSW) 250.

⁵⁶ *Ibid* 259.

authenticating consent and actually giving consent as an agent allowed the court to hold the lease valid, relying on statutory provision recognising express or implied authority. The court therefore concluded that the managing director had authority – which was not disputed in the case – to act as an agent to authenticate the company's execution of the contract. However, the case nowhere explains how the company gave its assent to the lease. It does not say that the board approved the lease as the company, and it could equally be argued that the board approved the lease as agent of the company, with the managing director simply authenticating the company's approval by signing the documentation.

The second case is *Black v Smallwood*.⁵⁷ This High Court decision concerned whether Smallwood and another, who had signed a contract as directors of a company that they believed existed but was in fact non-existent, would be personally liable on the contract. The majority concluded that Smallwood and colleague did not enter into any contract. The case provides no authority for the proposition that the board of directors acts as an organ of the company.

In the third case, *MYT Engineering Pty Ltd v Mulcon Pty Ltd*,⁵⁸ a deed of arrangement was executed by affixing the company seal witnessed by one person who purported to attest as director and secretary. This did not comply with the requirement of the articles of association that it be countersigned by a second director. The statutory rule also required dual attestation. However, a High Court majority held that a deed of company arrangement did not have to be executed as a deed,⁵⁹ and that the statutory requirement that "'the company" execute the instrument' should be understood to require 'a visible expression of the company's assent to the terms'.⁶⁰ In this case the company assented to the deed of arrangement by means of the *Duomatic* principle: 'All the incorporators agreeing that the instrument should be executed, there is no separate question about whether the company assented to it. The question is about the sufficiency of the manifestation of the assent'.⁶¹ In other words it was the general meeting – acting by the unanimous consent of shareholders – that was the relevant organ for these purposes, so the case is *not* authority for the proposition that the board of directors acts as an organ whose decisions are decisions of the corporation.

Ramsay, Stapledon and Fong argue that there is a distinction between the 'substantive authority' of officers to exercise corporate power, and the 'formal authority' of officers to provide the company's assent in the proper form, with the statutory assumption of due sealing relating only to the latter.⁶² This is important, they suggest, because it remains necessary to demonstrate that the company authorised the transaction for it to be binding. On the question of where substantive authority might be found, Ramsay, Stapledon and Fong suggest that a third party might rely either on 'common law agency principles, to show that a person who dealt with them on behalf of the company had (express or implied) actual authority or ostensible authority to

⁵⁷ (1966) 117 CLR 52.

⁵⁸ (1999) 195 CLR 636.

⁵⁹ *Ibid* 646.

⁶⁰ *Ibid* 645.

⁶¹ *Ibid* 649. See *Re Duomatic Ltd* [1969] 2 Ch 365.

⁶² Ian M Ramsay, G P Stapledon and Kenneth Fong, 'Affixing of the Company Seal and the Effect of the Statutory Assumption in the Corporations Law' (1999) 10 *Journal of Banking and Finance Law and Practice* 38, 39.

commit the company to the transaction in question' or the statutory assumptions.⁶³ They do not argue that the board of directors may act as an organ of the corporation for the purposes of concluding a contract. It seems equally — if not more — plausible that a decision of the board of directors that a corporation should enter a particular contract might be attributed to the separate legal entity by agency principles. However, although the latest edition of *Ford's Principles* maintains this distinction between formal and substantive assent, it argues that 'not only must the act be authorised by an organ of the company but also the company must manifest in proper form its intention to be bound.'⁶⁴ While this formal and substantive authority distinction is doubtless a correct statement of the law, there is nothing in any of the case law to indicate that substantive assent has to be given by an organ as opposed to an agent with appropriate authority. It could be argued, following *Cunninghame*, that the replaceable rule, empowering the directors to manage the corporation,⁶⁵ makes the board of directors an agent with unlimited authority to manage the company's business and to enter into contracts on its behalf, subject only to fiduciary duty.

A final authority requiring consideration in this context is *Meridian Global Funds Management Asia*.⁶⁶ In that case, Lord Hoffmann gave the Privy Council's seal of approval to the organic approach as a rule of attribution. However the question arose in the highly specific context of when and how a state of mind can be attributed to a corporation for the purposes of particular provisions of civil and criminal law. In going considerably further than earlier authority, in which courts had concluded that it was necessary to identify an alter ego or organ of the company, Lord Hoffmann said:

Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a *persona ficta* shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a *persona ficta* to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution'.

The company's primary rules of attribution will generally be found in its formal constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or, 'the decisions of the board in managing the company's business shall be the decisions of the company'. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as 'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company ...'.

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the corporation could be expected to be the subject of a resolution of the board or a unanimous decision of the

⁶³ Ibid 50-1.

⁶⁴ Austin and Ramsay, above n 31, [14.010].

⁶⁵ *Corporations Act 2001* (Cth) s 198A: the board has full powers, except those reserved by the constitution to the general meeting.

⁶⁶ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ('*Meridian Global Funds Management Asia*'). For a detailed discussion of this case, see Ross Grantham, 'Corporate Knowledge: Identification or Attribution?' (1996) 59 *The Modern Law Review* 732.

shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency.⁶⁷

Moreover, Lord Hoffmann emphasised, the relevant statute may, on its true construction, impose a specific attribution rule which differs from both of the above. Three points should be noted about Lord Hoffmann's judgment. First, the actions under consideration were committed below board level (by 'chief investment managers'). Hence his comments that the actions of boards are attributed to companies through the 'primary' organic principle are strictly obiter. Second, neither the replaceable rule in Australia, nor the default rule in the new United Kingdom model constitution, state explicitly that decisions of the board are decisions of the corporation. Both provisions could equally – and according to our interpretation of the case law should – be interpreted as the board managing the business of the corporation as agent (with unlimited authority, subject only to fiduciary duty and to the shareholders' limited power to act as 'principal'). Third, and perhaps most importantly, *Meridian Global* was a response to the difficult question of which human being's state of mind should be attributed to the corporate entity for the purposes of criminal liability. There is no necessary reason to assume that this limited doctrine should be applied more generally to the law of corporate governance.⁶⁸

THE LIMITATIONS OF CORPORATE LAW AND THEORY

Ultimately, the precise nature of the legal relation between the board and the legal entity is unlikely to arise for determination in the ordinary course of corporate litigation. Whether it is an agent or an organ, the board has full internal management power under the default rules. Third parties dealing with a British corporation can rely upon s 40 of the *Corporations Act 2006* (UK), which states that 'the power of the directors to bind the company, or authorize others to do so, is deemed to be free of any limitation under the company's constitution.' This appears to anticipate that the power of the board to bind the corporation might be restricted under its constitution; which might provide further support for the argument that the board is an agent rather than an organ, since the decisions of an organ automatically become decisions of the corporation and therefore cannot be restricted. As we saw above, the Australian *Corporations Act 2001* (Cth) allows a company to execute a document if it is signed by two directors, and permits outsiders to rely on such a document. In an appropriate case it might be possible to argue that this provision merely relates to formal authority, and that the question of substantive authority to enter the transaction must also be addressed. However, this is unlikely to arise in practice since those dealing with companies in large transactions (for which board approval would be required) will invariably insist on seeing a board resolution approving the transaction or giving very

⁶⁷ *Meridian Global Funds Management Asia* [1995] 2 AC 500, 506.

⁶⁸ Indeed, a close reading of earlier cases on the attribution of a state of mind to a company arguably shows that the courts did not intend to develop a wide-ranging substitute for, or supplement to, the agency principle. Compare *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (Viscount Haldane LC) with *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 (Hoffmann LJ) and see *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (Lord Diplock).

wide authority to an individual agent.⁶⁹ The cumulative effect of these considerations is that the legal status of the board is unlikely to arise for determination in private litigation. Perhaps ironically, then, if the organ or agent question is ever to be directly considered by Australian courts, it is likely to be in the context of the corporations power under the *Constitution*.

Resolving the board's status in corporate law could provide a potential pathway to addressing the extent of the national Parliament's power to re-constitute the corporation. If the board is an organ, there is an argument that it is an irreducible incident of corporate existence, and once a corporation is incorporated under law derived from State power, the identity, composition and function of those organs cannot be regulated by the national Parliament. Alternatively, if the constitution makes the board an agent of the corporation, then the argument that s 51(xx) permits regulation of the board is much stronger, since it is then nothing more than the means by which the corporation exercises its capacities.

Realistically, however, corporate theory may never resolve our constitutional question definitively. Both agency and organic theory have their philosophical limitations – unsurprisingly since there is no necessary ontology or essence to an artifice such as a corporation. The organic approach, insofar as it applies to the shareholders in general meeting, has deep roots in company law history. As we have shown, there is little or no explicit case-law supporting the idea that the board of directors is an organ. There is no compelling reason why this historical remnant should be expanded and used to explain the relationship between the board and the corporation. As we have suggested, the agency approach has certain attractions because it draws on a well-established principle from contract and commercial law. It may have been sensible to think of the board as an agent or delegate for the partnership and may now be sensible to treat the board as an agent of the corporation. Alternatively, and given the fictional status of the corporate principal, it may still be preferable – as both Davies and Gower, and the contemporary *Ford's Principles* insist – to treat the board as an organ of the company and thereby reinforce directors' decisional autonomy from the general meeting (if only until the shareholders' next opportunity to vary the constitution or remove the board).

More importantly, the language which is used to describe the law's attribution process should not be conclusive. Both the corporate body and its organs are legal fictions which serve depictive rather than definitive purposes. The concept of agency is invoked, but the principal is a mere legal person. All these terms are simply labels for the law's existing policy that shareholders should be placed and maintained at the centre of corporate governance, but with their liability limited and their personal property insulated from the risks of the business venture. The constitutional question for any court looking at this issue is whether it is implicit in the *Constitution* that the shareholders' status as decision-makers must be maintained free from interference by the national government, or whether the issue of control and power within corporations is an economic and political question of the greatest importance to be resolved by the government of the day in pursuit of their version of the public good.

⁶⁹ And can then rely on *Corporations Act 2001* (Cth) s 129(7) to assume that the board resolution is genuine.

THE HIGH COURT ON S 51(xx) AND THE CORPORATION

If corporate law theorising can offer no clear solution to the question of whether the corporation has an irreducible core, constitutional law is no more definitive, since the question has received little direct discussion in constitutional precedent. There is, of course, the *Incorporation Case*, to which we will shortly turn, although strictly speaking it only discussed the question of 'formation' in the sense of creation, and it is far from clear whether 'formation' includes the division of powers under the constitution.⁷⁰ Since the question of 'formation' was also discussed in *Huddart Parker*, that case will be discussed as well. In particular Isaacs J's judgment deserves attention since it is the closest any judge has come to giving any sustained attention to our question. The other two cases whose entrails bear examination happen to be amongst the greatest – in political magnitude and judicial prolixity – in the High Court's history. These are the 200 pages of judgments in the *Bank Nationalisation Case* of 1948 and the almost 400 pages of judgments in the *WorkChoices Case* of 2006. We will now turn to these four cases, keeping in mind they are at best a source of suggestive dicta on whether the corporations power extends to the corporate constitution.

*Huddart Parker*⁷¹

This 1909 case concerned the reach of the corporations power over corporate activities, in particular anti-competitive activities. In the course of their judgments however, all the members of the High Court agreed that s 51(xx) does not empower a national law for the creation of trading or financial corporations. Our interest is in how the judges understood the notion of the 'creation' of a corporation.

Griffith CJ said that the Commonwealth would have power to regulate the operations of corporations in specific fields, but not their capacity to act. As he put it:

I think that pl xx empowers the Commonwealth to prohibit a trading or financial corporation formed within the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States.⁷²

Not much weight however can be put on statements like this in considering whether the Commonwealth could regulate the identity of those groupings (such as board and general meeting) exercising corporate capacity. The capacity discussion in

⁷⁰ The concession theory of the corporation suggests that corporations exist only because a State has given them entity status. This was certainly convincing when corporate status was conferred by Act of Parliament. However, incorporation is now available as of right, and occurs when the incorporators go through the registration process: see *Corporations Act 2001* (Cth) s 119. Concession theory has now fallen out of favour with the rise of the contractual theory of the corporation which dominates law and economics. In any event, although it accepts that the state has a right to regulate corporations, concession theory does not offer an answer to the question addressed in this article, namely whether the existence of the legal entity presupposes a constitution which allocates power to different human actors. For a law and economics critique of concession theory, see Gary M Anderson and Robert D Tollison, 'The Myth of the Corporation as a Creation of the State' (1983) 3 *International Review of Law and Economics* 107.

⁷¹ *Huddart Parker* (1909) 8 CLR 330.

⁷² *Ibid* 354.

Huddart Parker was infected with assumptions about reserving regulatory control of corporate activities to the States.

Barton J's judgment similarly sheds no light on our question. He simply agreed that 'formed' meant 'already in being' and that regulation of intra-state trading was reserved to the States. None of these dicta shed any light on whether the States' exclusive right to 'creation' encompasses an exclusive right to regulate the corporate constitution.

O'Connor J went a little further in this direction. Like Griffith CJ, O'Connor J cited Westlake's *Private International Law* to the effect that

[t]he regulation of any artificial person, in matters concerning only itself or the relations of its members, if any, to it and to one another, must depend on the law from which it derives its existence. That law is its personal law, or in other words it is domiciled in the country of that law.⁷³

He then held that the power was confined to 'corporations already created, or to use Westlake's expression, "artificial persons" already in being.'⁷⁴ Without argument, he concluded that

[s]peaking generally, therefore, the power of creating corporations, that is, the power to give them legal existence and to regulate their form, their incidents, the relations of their members to the corporation and to one another, is left to the States.⁷⁵

Higgins J emphasised that he was not 'giving any final or exhaustive definition' but, like his fellow judges, concluded that s 51(xx) 'does not give any power to incorporate companies.'⁷⁶ Any Commonwealth power to deal with incorporation is 'implied, not express, not direct and independent, but ancillary, incidental to its other powers.'⁷⁷ This would allow the national Parliament to

regulate such companies as to their status, and as to the powers which they may exercise within Australia, and as to the conditions under which they shall be permitted to carry on business ... The Federal Parliament can, in my opinion, prescribe what capital must be paid up, probably even how it must have been paid up (in cash or for value, and how the value is to be ascertained), what returns must be made, what publicity must be given, what auditing must be done, what securities must be deposited.⁷⁸

On this basis, the 'Federal Parliament controls as it were the entrance gates... the right to do business and continue to do business in Australia'.⁷⁹ This view is not at odds with a law regulating the corporate constitution.

It was left to the dissenting judgment, of Isaacs J, to give opinions closest to the question we are considering. Notoriously, his judgment was informed by the belief that the adjectives 'trading' and 'financial' guided the interpretation of s 51(xx):

Just as their incorporation distinguishes them from natural individuals, so their trading or financial capacities distinguish them from other corporations, and it is as necessary to give effect to the words 'trading' and 'financial' as to the word 'corporation.' *A power to alter their internal management would not give that effect, but would cross the line of demarcation*

⁷³ Ibid 370-1.

⁷⁴ Ibid 371.

⁷⁵ Ibid.

⁷⁶ Ibid 412.

⁷⁷ Ibid.

⁷⁸ Ibid 412-3.

⁷⁹ Ibid 413.

between these and other corporations as plainly as a general criminal law would obliterate the distinction between corporate bodies and ordinary individuals.⁸⁰

In similar vein:

The power does not look behind the charter, or concern itself with purely internal management, or mere personal preparation to act; it views the beings upon which it is to operate in their relations to outsiders ...⁸¹

Isaacs J's ultimate conclusion that corporate activities were within power is more modern than that of his brethren. Indeed he alone realised that the majority approach in *Huddart Parker* rendered s 51(xx) a 'mere shadow'.⁸² Nevertheless, Isaacs J shared the Court's view that s 51(xx) only covered already existing corporations. More relevantly to our question, he argued that the word 'formed'

would be meaningless if the power of creation, either in the first instance, or by way of adding capacities were included. Indeed, this follows from the nature of a corporation. It is entirely a legal conception. Nowhere is the notion better stated than in the celebrated *Dartmouth College v Woodward*, where *Marshall* CJ said: — 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.'⁸³

Accordingly, by the time the national Parliament comes to consider what it may do with s 51(xx) corporations

[i]t finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction, and it has no more to do with the creation of the one class than with that of the other.⁸⁴

Perhaps the key passage of Isaacs J's judgment is his argument that 'internal administration [was] a subordinate power to that of creation', so that s 51(xx) only covered 'a corporation as a completely equipped body ready to exercise its faculties and capacities'.⁸⁵ He therefore rejected the idea that the Commonwealth could prescribe wages and hours or require directors to have certain qualifications, on the grounds that these are 'purely internal management and equipment'.⁸⁶

Isaacs J went on to also reject the view that

the Constitution has handed over to the Federal Parliament ... the body of company law. That would include all the prohibitory and creative provisions contained in the State Statutes; it would also include the power to alter the conditions of a company's existence, which is equivalent to creation, and to annihilate the corporation altogether — which I think is, equally with creation, outside the region of federal competency.⁸⁷

A strong organic theory is reflected in Isaacs J's idea that 'the power to alter the conditions of a company's existence ... is equivalent to creation'. Yet once more

⁸⁰ Ibid 397–8 (emphasis added).

⁸¹ Ibid 395.

⁸² Ibid 398.

⁸³ Ibid 394.

⁸⁴ Ibid.

⁸⁵ Ibid 396. See also 395.

⁸⁶ Ibid 396. But note, again, how this passage rests on the heresy of an 'internal/external' distinction.

⁸⁷ Ibid 394–5.

assertion is involved rather than argument. It is far from obvious that dissolution is necessarily the mirror image of creation.⁸⁸

Isaacs J concluded that s 51(xx) was

a power to act upon certain beings, which are found and remain in actual existence, possessing a fixed identity, a defined ambit of potentiality, having certain capacities and faculties unalterable by the Commonwealth, beings ready to act within their sphere of capabilities in relation to the people of the Commonwealth.⁸⁹

Isaacs J's ultimate concern to protect 'internal management' was tainted by the pre-modern search for limits to the corporations power. A few later judges, notably Gibbs CJ, took up the idea that 'trading' or 'financial' were magic words capable of sensibly delimiting Commonwealth power.⁹⁰ But that approach is now dead; as is the correlated search for a distinction between 'internal' and 'external' affairs.

The passages we have quoted from Isaacs J are redolent of the organic view, but encompass a significant metaphorical slippage. The corporation is, in one breath an artifice, impliedly in need of organs. Yet in the next breath it is assimilated with 'natural beings', who have inherent qualities, determined by evolution and physical fact, which predate any law. Even if the organic view is necessarily true, it is never explained why the organs must be *fixed* so that Commonwealth power would not extend to re-forming them. Perhaps this is why the metaphorical slippage is required: Isaacs J wants us to imagine the corporation as a natural person. Tinkering with the organs someone was born with conjures a sense of danger or a god-like attempt to reinvent the person.⁹¹ Yet the metaphor is at best partial: the organs are artificial to begin with and subject to human rather than natural law.

The judgments in *Huddart Parker* are probably guilty of failing to take sufficiently seriously the separate legal personality of the company. Isaacs J, in particular, assumes that the question of whether capacity exists and the question of the identity of the actors or organs who decide how a corporation should exercise that capacity are inseparable. It could equally be argued that corporate capacity is an incident of incorporation, while the manner in which that capacity is to be exercised is a question of the entity's ongoing operation. O'Connor and Barton JJ did not go as far as this, confining themselves to the observation that the Commonwealth could not regulate the relations between members. Griffith CJ stopped considerably short of this position, insisting only that capacity is a question for the State of incorporation. Thus for him the question of *ultra vires* (or a corporation exceeding its constitutional capacity) remained a matter for the States; whether he intended this to encompass not only the objects of

⁸⁸ There has been contention over whether s 51(xx) includes a power to dissolve corporations since Quick and Garran's *Annotated Constitution of the Commonwealth of Australia* (1901, LexisNexis 2002 reprint) at 606 stated that 'corporations may be both created and wound up under the provisions of Federal Law'. Of course the first part of that statement was rejected in the *Incorporation Case*. But that does not necessarily invalidate the claim about winding up: dissolution is not the mirror of creation any more than death is the negation of birth (as opposed to the termination of life). In any event, the most common kind of corporate dissolution must be a necessary incident of the insolvency power (s 51 xvii).

⁸⁹ *Huddart Parker* (1909) 8 CLR 220, 395.

⁹⁰ See especially *Tasmanian Dam Case* (1983) 158 CLR 1, 116-7 (Gibbs CJ).

⁹¹ Except of course if the organs are failing.

the company, but also the identity and composition of the entities capable of making decisions on behalf of the company, is unknowable.

Higgins J's position is the most ambiguous: he suggests that the national Parliament can make laws in relation to capacity, status and the conditions for carrying on business. This would seem to imply that Parliament can regulate the corporate constitution including the composition of its organs. Even Isaacs J would allow this if it were 'necessarily incidental' to the control of corporate activity in relation to outsiders.⁹² This would arise where a regulatory strategy over internal governance is needed to achieve a particular outcome, like the protection of third parties. An example is where command and control regulation is incapable of achieving regulatory goals, for example where transaction costs are prohibitive or the regulatory context complex and differentiated. Indeed it has been recognised, at least since Stone's *Where the Law Ends*, that the most viable way to ensure corporate responsibility is via the corporation's internal mechanisms.⁹³

To summarise *Huddart Parker*, none of the judges ruled out the prospect that the national Parliament could intervene in the corporate constitution. But none, with the possible exception of Higgins J, appears to have condoned it. On the contrary, Isaacs J attempted to erect barriers to such regulation by implicitly invoking an organic theory of the corporation. Yet, as we noted earlier, shorn of Isaacs J's assumptions that 'trading' or 'internal' affairs limit s 51(xx)'s scope, on any literal reading of s 51(xx) the Commonwealth would have power to re-constitute corporations once formed. Mining *Huddart Parker*, a century on, remains a difficult exercise, since much of the reasoning is infected with approaches now overruled. The case also arose barely three years after *Cuningham*, at a time when it was still not clearly established that the board was not a mere agent of the shareholders.⁹⁴

The Bank Nationalisation Case⁹⁵

The *Bank Nationalisation Case* thwarted the Chifley government's attempt to nationalise the banking sector, by forbidding private banks from operating or compulsorily acquiring them. The attempt foundered constitutionally, on findings that the compensation mechanism was not 'just' and, more crucially, on the then fashionable view that interstate trade was guaranteed as a matter of individual right.⁹⁶ The case is of present interest since the Commonwealth sought to defend the nationalisation via the corporations power. While the nationalisation Act centred on activities, it effectively sought to eradicate a type of corporation (the private banks) and provided for the dissolution of their boards and appointment of government officials in their stead.

⁹² *Huddart Parker* (1909) 8 CLR 220, 396.

⁹³ Christopher Stone, *Where the Law Ends: the Social Control of Corporate Behavior* (Harper & Row, 1975).

⁹⁴ See above, text accompanying nn 44–8.

⁹⁵ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*') While the case went to the Privy Council, the opinion there only covered appeal procedure and the width of s 92's guarantee of freedom of interstate commerce.

⁹⁶ Cf *Cole v Whitfield* (1988) 165 CLR 360. The Commonwealth today could nationalise not just banking, but a host of other corporate-dominated sectors, if only it could afford just terms.

Latham CJ, after noting debate about the defensibility of *Huddart Parker*, stated that [t]he one thing that is clear ... is that [the corporations power] assumes the existence of corporations ... If the corporation is already formed, it derives its existence and its capacity from the law which provided for its formation. ... [T]he existence and the powers and capabilities of any corporation to which s 51(xx) applies depend upon some law other than a law made under that provision.⁹⁷

The statement is hardly emphatic. 'Existence' could be read as merely referring to the corporation having been formed as a separate legal entity, consistent with the agency view. Alternatively, 'existence' may have some irreducible core, as implied by the organic theory.

A clearer suggestion of post-formation limits to the corporations power is contained in the joint judgment of Rich and Williams JJ:

It was contended that the power was sufficiently wide to enable the Commonwealth Parliament to prohibit [constitutional] corporations carrying on business at all in Australia. But the power operates on such corporations as existing entities ... it would be inconsistent with a power to legislate depending on such a basis to construe the power as wide enough to authorize [prohibition of carrying on business at all] ... *It was also contended that [the power] would authorize the Commonwealth Parliament to legislate directly to alter the regulations of [constitutional corporations], but since the power is with respect to existing corporations and the regulations are part of their formation, such legislation would be beyond power.*⁹⁸

While Rich and Williams JJ did not define what they meant by the 'regulations' of a corporation, they presumably envisaged essential features of the memorandum and articles of association. A corporation's board and general meeting might comprise the minimum entities needed for the corporation to be self-governing. While little can be gleaned from this Delphic reference as to the scope of these 'regulations', their Honours seem to be endorsing Isaacs J's view that some irreducible aspects of internal governance are reserved to State power.

A fourth judge, Starke J, made tangential but possibly suggestive comments the other way. In discussing the banking power, he drew a distinction between regulating activities (banking) and entities (corporate structure). The banking power, he argued, did not drill so deep that the Commonwealth could 'ignore the internal structure and regulation of the trading banks and shape that structure and those regulations as it pleases. *Legislation of that character would relate to companies or corporations ... and not to banking.*⁹⁹ This remark could suggest that the corporations power includes a power to regulate corporate 'internal structure and regulation'. But it could also be consistent with Rich and Williams JJ's suggestions that the constitution of a corporation, once formed, is outside Commonwealth power.¹⁰⁰

Ultimately, the *Bank Nationalisation Case*'s significance for s 51(xx) is limited, since all the judges assumed that the banking power carved out its own space, such that the corporations power was inapplicable to the attempt to regulate banking

⁹⁷ *Bank Nationalisation Case* (1948) 76 CLR 1, 202.

⁹⁸ *Ibid* 255–6 (emphasis added).

⁹⁹ *Ibid* 315 (emphasis added).

¹⁰⁰ Indeed like Starke J (*ibid* 315), Rich and Williams JJ (at 257–8) argued that the banking power was not a power to regulate the structure of banks already formed under State law.

corporations.¹⁰¹ After many days of hearings, centred on intricate disputes about the banking power, just terms and interstate trade, a conservative bench, clearly minded to strike down a socialist law, was barely focused on the corporations power.¹⁰² Even if the passages we have cited were not all obiter, they would be thin gruel. In addition, the case was decided in *Huddart Parker's* shadow. By contrast, the *Incorporation Case* dealt with the concept of 'formation' at a time when *Huddart Parker's* very narrow view of 'what affairs' fall within the corporations power had been hosed away.

The *Incorporation Case*¹⁰³

This case considered the constitutionality of a national law, made under s 51(xx), for the incorporation of trading and financial corporations, an issue foreshadowed in an academic exchange in 1974.¹⁰⁴ The High Court majority concluded that the power did not extend to bringing into 'existence the artificial legal persons upon which laws made under the power can operate.'¹⁰⁵ The majority relied heavily on a literal or grammatical argument that 'formed' was a 'past participle',¹⁰⁶ in the sense 'which have been formed'. The majority also relied on its reading of Convention Debates and drew a distinction between recognising the 'status' of an existing corporation and creating new corporations. It felt this argument was buttressed by the presence of the class of 'foreign corporations' in s 51(xx).

The majority thus endorsed the unanimous opinion in *Huddart Parker* that s 51(xx) was not a power to create corporations. But unlike *Huddart Parker*, the judges were wary of straying into obiter discussions of the extent of the power. If the issue of the power to re-constitute corporations entered their minds, their Honours chose to stay silent. They gave no detail about what it means to legislate for the creation of corporations, and no guidance as to whether the limit against creating corporations extends beyond the mere act of granting personality to a legal fiction. The closest they came was to cite *Huddart Parker's* rejection of a Commonwealth power to create corporations based on a textual (rather than reserved powers) analysis, and to quote Isaacs J's view that s 51(xx) 'finds the artificial being in possession of its powers, just as it finds natural beings'.¹⁰⁷ The issue of where the line is to be drawn between creation and regulating the corporate constitution should not however have been overlooked. By 1990 there was clear momentum to read s 51(xx) as a plenary power.

¹⁰¹ Contrast how the *WorkChoices Case* denied that the specific industrial disputes power in s 51(xxxv) meant that the corporations power could not support a general industrial relations law for corporations. Explicit limits in one power however may apply to overlapping powers: eg the exclusion of 'State [run] banking' from the banking power extends to the corporations power.

¹⁰² Sarah Joseph and Melissa Castan, *Federal Constitutional Law: a Contemporary View* (Law Book Co, 2nd ed, 2006) 103.

¹⁰³ (1990) 169 CLR 482.

¹⁰⁴ Taylor above n 11; O I Frankel and John Taylor, 'A 1973 National Companies Act? The Challenge to Parochialism' (1973) 47 *Australian Law Journal* 119 argued for Commonwealth power to enact a complete corporations law; P H Lane, 'Can there be A Commonwealth Companies Act?' (1972) 46 *Australian Law Journal* 407, denied such power.

¹⁰⁵ *Incorporation Case* (1990) 169 CLR 482, 498.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* 499–500.

In contrast to the rather declamatory but narrow target approach of the majority, Deane J's dissent gave greater consideration to the scope of the power, including the scope for federal intervention in internal management. He began with the notion that '[i]ncorporation means the acquisition or conferral of corporate personality under the law.'¹⁰⁸ However he rejected a narrow interpretation of s 51(xx) rooted in the word 'formed'. Instead, he offered a rival literal meaning:

[Reading] the phrase 'formed within the limits of the Commonwealth' in contradistinction to 'foreign', the word 'formed' is properly to be understood as [a] past participle as part of an adjectival phrase which is without temporal significance.¹⁰⁹

That is, 'formed' merely meant 'formed within Australia' as opposed to 'foreign'. The States could form corporations, but once the Commonwealth enacted a law permitting incorporation of a trading or financial entity, that law overrode State laws on the topic.

Deane J confronted the judgments in *Huddart Parker* head-on, including that of Isaacs J. As regards Isaacs J's conclusion that the power does not extend to laws about the corporation as such, merely its external conduct, Deane reasoned that '[a] careful examination of Isaacs J's judgment discloses no acceptable reason for such a strangely distorted construction' of s 51(xx).¹¹⁰ Isaacs J's conclusion that 'laws with respect to the internal management of local trading or financial corporations' were beyond s 51(xx), was, Deane J claimed, 'largely left as a matter of assertion'.¹¹¹

In particular, Deane J argued that Isaacs J's notion that corporations exist only in contemplation of the law should 'support an expansive rather than a restrictive construction of a legislative power conferred "with respect to" such corporations'.¹¹² That is, the fact that corporations were purely creatures of the law was no reason to adopt a restrictive reading of s 51(xx). On the contrary, to Deane J a broad reading of s 51(xx) was consistent with the post-*Engineers* approach to interpreting Commonwealth powers broadly:

To deny that laws dealing with the capacities, the capital, the internal management or the liquidation of local trading or financial corporations fall within the scope of a legislative power with respect to such corporations seems to me to involve a denial that the words of the constitutional grant of legislative power mean what they say. Once that conclusion is reached, Isaacs J's judgment offers no acceptable support for a conclusion that the legislative power conferred by par (xx) does not extend to incorporation. To the contrary, much of his Honour's judgment is concerned with demonstrating the impracticability of separating legislative powers with respect to the powers, internal management and liquidation of corporations from a legislative power with respect to incorporation.¹¹³

Of course Deane J's judgment is in a minority of 6:1. The *Incorporation Case* leaves us with a clear ruling that the Commonwealth has no general power over incorporation, yet no guidance from the majority as to the width of that ruling. In contrast, Deane J's judgment presents a lone, but clear, even totalising, internal logic, which won

108 Ibid 504-5.

109 Ibid 506.

110 Ibid 509.

111 Ibid 509-10.

112 Ibid 510.

113 Ibid 510-1.

endorsement from commentators.¹¹⁴ His view that 'internal management' issues were not beyond s 51(xx) have since been effectively endorsed in the *WorkChoices Case*, which rejected any internal/external distinction.

The *WorkChoices Case*¹¹⁵

This case involved the Howard government's use of s 51(xx) to underpin a general industrial law. The government sought to bypass both the State industrial relations systems and the historical reliance on the industrial disputes power. This legislative gambit was upheld, in a joint, five judge opinion. In short, in answering the 'what laws' question, the majority jettisoned the narrower 'distinctive character' in favour of a 'discriminatory operation' test (thereby repudiating Isaacs J's approach). The 'distinctive character' test focussed on whether corporate 'trading' was significantly implicated by the law; the 'discriminatory operation' test merely asks whether the legislation addresses or singles out corporations as a type of juristic person.

In formulating its test for the question of 'what' corporate affairs are within Commonwealth power, the majority relied heavily on earlier judgments of Gaudron J, in cases involving less far-ranging industrial laws.¹¹⁶ In particular, they 'adopted' her 1995 understanding, in *Re Dingjan*, that the corporations power extends 'at the very least to the business functions and activities of constitutional corporations and to their business relationships.'¹¹⁷ The *WorkChoices* majority approvingly cited her amplification of this in *Re Pacific Coal*, according to which s 51(xx):

extends to the regulation of the activities, functions, relationships and the business of a [constitutional] corporation, 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.¹¹⁸

This statement reads compendiously, reiterating a mantra of corporate 'activities, functions, relationships or business'. It is unclear, however, whether these categories encompass the organ or organs of a corporation; although 'relationships' and 'those through whom it acts' might be interpreted as encompassing the corporation-board – and perhaps even the corporation-shareholder – relationship.¹¹⁹ Gaudron J, in 1995, made clear that her definition was inclusive, not exclusive: the power extended 'at the very least' to corporate activities, functions, relationships and business.¹²⁰

¹¹⁴ Geoffrey Kennett, 'Constitutional Interpretation in the Corporations Case' (1990) 19 *Federal Law Review* 223; James Crawford, 'The High Court and the Corporations Power' (1990) 3 *Australian Corporation Law Bulletin* 32.

¹¹⁵ (2006) 229 CLR 1.

¹¹⁶ *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; *Re Pacific Coal Pty Ltd; Ex parte Construction, Mining and Forestry Union and The Commonwealth of Australia* (2000) 203 CLR 346.

¹¹⁷ *Ibid* 365.

¹¹⁸ *WorkChoices Case* (2006) 229 CLR 1, 114–5, quoting *Re Pacific Coal* (2000) 203 CLR 346, 375 (Gaudron J).

¹¹⁹ This argument might draw support from the fact that the contemporaneous 1992 edition of *Ford's Principles* treated the board as agents of the corporate entity; see, above, text accompanying nn 51–2.

¹²⁰ *Re Dingjan* (1995) 183 CLR 323, 365.

On the one hand, Gaudron J's definition seems to envisage that the Commonwealth can regulate the conduct of agents ('the conduct of those through whom it acts', to which she expressly adds 'shareholders'). On the other hand, the term 'conduct' could impliedly exclude such prior questions as the identity or composition of the board or the shareholders' power to elect directors. This approach might be consistent with Isaacs J's argument that the company does not have capacity and therefore meaningful existence without organs. But again, we are in the realm of speculation.

Commentary following the *WorkChoices Case* has depicted it as painting a limitless vista as to 'what' corporate affairs lie within the corporations power. Admittedly, the majority avoided endorsing the phrase 'plenary power', which had peppered the judgments of Justices Mason, Deane and Murphy in earlier cases. However it also avoided setting any limits to the power, other than those already established.¹²¹ The majority sensed the plaintiff States were groping to argue that it was 'necessary to limit the reach of the power' conceived otherwise as a 'power with respect to persons'.¹²² The majority dismissed that sense of necessity as resting on two related heresies about the consequences of reading Commonwealth powers broadly. One was an illegitimate, reserved powers approach to the federal-state balance. The other was a fear of a rampant centralist government enacting laws that were not only bad, but far-reachingly bad. The majority pooh-poohed this, denying that constitutional interpretation should be inhibited or spooked by 'extreme examples or distorting possibilities'.¹²³

In the end, nothing in the dicta or judgments to date suggests that the question of *who* represents the company as agent lies outside the federal power. (Indeed, those who can bind the company to third parties falls squarely within what Isaacs J assumed was the purpose of the power.) Informed by a reading of Gaudron J's dictum in *Re Dingjan*, the endorsement of Gaudron J's definition in *WorkChoices* is quite consistent with the national Parliament having power over the composition of corporate boards. Indeed if, as Gaudron J suggested in a later passage in *Dingjan*, her interpretation implies that the power extends to 'the persons by and through whom they carry out those functions and activities',¹²⁴ the use of the word 'by' could even suggest that the regulatory power extends to the identity of the corporate organs.

TEXTUAL AND PRACTICAL CONSIDERATIONS

The case law leaves us with a curious disjuncture. The corporations power, freed of the heresies of *Huddart Parker*, has been read broadly and literally. However the plenary trajectory of the power must accommodate the limitation in the *Incorporation Case*. From there, the reservations of Isaacs J in *Huddart Parker* re-emerge as possible limitations. The term 'formed' invites speculation as to what the irreducible core of a corporation may be, if anything. Yet literal and textual considerations give little guidance. Sometimes it is argued that 'foreign corporations', also within s 51(xx)'s purview, have a taken-for-granted status. It would make little sense for the national Parliament to try to re-constitute the board or voting powers within a corporation

121 Namely the denial of power to create corporations and the recognition that the relevance of the law to corporations could not be too indirect.

122 *WorkChoices Case* (2006) 228 CLR 1, 116.

123 *Ibid* 117-8.

124 *Ibid* 115.

domiciled in, say, Delaware. But that is more a brute fact of the limitations of extra-territorial law-making — so that s 51(xx) must necessarily focus on foreign corporate activity in Australia¹²⁵ — than it is a guide to any limitation on power over local corporations. As the majority in *WorkChoices* recognised:

Treating the character of the corporations mentioned in s 51(xx) [foreign, trading or financial] as the consideration on which the power turns produces awkward results. Why should the federal Parliament's power with respect to Australian corporations focus upon their activities, but the power with respect to foreign corporations focus only upon their status?¹²⁶

Zines has reasoned instead that since the *Incorporation Case* grants to the States the 'sole authority to create' most trading and financial corporations, 'it is not an unreasonable argument that those matters part and parcel of creating a corporation and without which the corporation would be an empty shell, incapable of functioning as a juristic person at all, are similarly outside Commonwealth power'.¹²⁷ As Joseph and Castan note, 'it is during the process of incorporation that companies set out' internal management rules.¹²⁸

These views seem to encompass the organic view of the corporation. To Zines, there are 'policy and logical arguments for limiting' Commonwealth laws over corporate 'internal organisation'.¹²⁹ When Winterton and others replied that Zines' claim of logic was 'overstated', though to be fair Zines had admitted his opinion was 'not, of course, conclusive'.¹³⁰ Zines was also, however, making a claim from practicality. It might appear inefficient or meddlesome if a corporation formed under State law could have its constitution altered by federal law. In Zines' lament, there is always a risk that the High Court will opt for 'abstract and conceptual reasoning', rather than taking 'social results or the efficiency of the governmental structure into account'.¹³¹

Is recognising a national power over corporate constitutions any less practical, however, than denying such power? In his contemporary commentary on the *Incorporation Case*, Crawford assumed that the precedent went no further than denying the national Parliament a general power of incorporation: it could still deal with 'internal administration, and schemes of arrangement, management and voluntary or involuntary winding up'.¹³² Given the vital place occupied by questions of corporate governance in the nation's economic and social life, there are good policy arguments to ensure a national power over such key questions as the composition of the corporate board.

If there is a concern with Commonwealth law meddling in the constitution of local governments, universities and other 'public' corporations, the answer may be to rein in

¹²⁵ Ibid 114.

¹²⁶ Ibid 104 (emphasis in original).

¹²⁷ Zines, 5th ed, above n 16, 138.

¹²⁸ Joseph and Castan, above n 102.

¹²⁹ Zines, 4th ed, above n 16, 106. Compare Kennett, above n 114, 226, countenancing a 'plenary power' covering, inter alia, 'how companies are constituted'.

¹³⁰ George Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials* (LBC, 2nd ed, 2007) 302; Zines, 4th ed, above n 16, 107.

¹³¹ Zines, 4th ed, above n 16, 107. From an efficiency perspective, the *Incorporation Case* was probably a failure; but Zines is implying that once the national Parliament was denied power over corporate formation, it is best it does not meddle in their re-formation.

¹³² Crawford, above n 114, 34.

the expansive interpretation of the 'who' side of the scope of the power. That would involve revisiting the need for limits on the types of 'trading corporations' caught by s 51(xx), so as to exclude entities for whom trade is merely incidental to their public or charitable purposes. This would still leave s 51(xx) as the key national economic power – including ensuring a national power over the constitution of profit-making corporations, regardless of State referrals.

THE SCOPE OF THE CORPORATE 'CONSTITUTION'

So far we have avoided giving any definitive scope to the 'core' or 'constitution' of the corporation. It is not something addressed by the High Court, except in vague terms such as 'internal management' and 'regulations'. At the opening of this paper we mapped the potential terrain in these terms: Can the federal Parliament legislate under s 51(xx) to regulate the formation, composition, operation and dissolution of key corporate mechanisms such as boards of directors or general meetings?

If a broad approach were taken to s 51(xx), founded in a view of the corporation as a legal shell, a definition of the corporate constitution would barely be needed. All trading and financial corporations incorporated in Australia would be subject to 're-formation' under s 51(xx),¹³³ except for a few purely formal matters such as their name, number or seal in the original register of incorporation.¹³⁴ The composition of boards and even voting rights of shareholders would all be treated as aspects of the ongoing operation and governance of the corporation, no less susceptible to the corporations power than say CEO remuneration clearly is, post *WorkChoices*.

But assuming such a clean but expansive approach did not find judicial favour, there is a need to define which aspects of the corporate constitution are off-limits to the national Parliament. (And the suggestions from both *Huddart Parker* and the *Bank Nationalisation Case* are that it would not find favour.) Isaacs J talked vaguely of the corporation as a 'completely equipped body ready to exercise its faculties and capacities'.¹³⁵ O'Connor J talked of corporations and their 'form, their incidents, the relations of their members [ie shareholders] to the corporation and to one another'. Rich and Williams JJ wished to protect the 'regulations' of the corporation. There is a whiff in such phrases of the standard conception of the written constitution of an association as a contract between members.

It would be letting private law dictate constitutional law, however, to imagine that whatever the memorandum and articles of association may potentially contain is off-limits to the Commonwealth under s 51(xx). It would be formalistic as well, since those documents have long ceased to be the product of some foundational compromise between the associating members of a company. Rather they are today merely a default set of replaceable rules designed to appeal to most businesses and, as such, commonly adopted. It would also make no sense when it comes to a public corporation established under State law, such as a university or utility. The State legislation

¹³³ With the exception of the *Melbourne Corporations* limitation applying to some core State government entities.

¹³⁴ Though we have argued the analogy is generally inapt, to this extent the corporations power would share something with a power over persons: the fact of incorporation is no more amendable than the fact of birth, recorded in a register of births.

¹³⁵ *Huddart Parker* (1909) 8 CLR 220, 396.

founding such bodies typically covers many issues, including activities such as trading that are clearly regulable by the federal Parliament under s 51(xx).

The term 'constitution' has a public law flavour, and we might look to that body of law for an essence to the concept. In public law the 'constitution' suggests an irreducible core of governance structures and organs, without which there is no state as such, and whose overthrow is a treasonable offence. In Australian State constitutional law there is also a well worn phrase 'the constitution [meaning composition], powers and procedure of the Parliament'.¹³⁶ Rules within that phrase can be entrenched. By analogy, the composition, powers and procedure of the general meeting and board of directors would fall outside s 51(xx). Political science also gives us the concept of the 'thin constitution': this conceives of the essential constitution as limited to the composition and election of parliament. In corporate law, this could be analogised to the rules about the qualifications and election of the board of directors, particularly through the 'franchise' of the shareholders in general meeting.

But these public law analogies break down when one realises that there is no overriding principle such as the universal franchise in corporate law or culture: some shares have voting rights, others do not; the voting power of shareholdings can be diluted through new issues, and so on. Further, the general meeting serves roles that have no analogue in public law: for example, electors do not set parliamentary salaries, whereas in listed companies general meetings have some control over increases in non-executive directors' fees and termination benefits for employees, as well as an advisory vote on executive payments.¹³⁷ Nevertheless, a law regulating the setting of executive remuneration is clearly valid under s 51(xx), following *WorkChoices*. Just as we cannot anchor our understanding of modern commercial corporations in visions from old company or associations law, nor can we map public law visions onto them.

Zines follows Issacs J in invoking the terminology of 'internal management' or 'organisation'.¹³⁸ (At first glance such phrases may seem tautological: is not all 'management' internal? But they usefully distinguish autonomous management from 'external management' by a court appointed liquidator or administrator.) Can terms from organisational theory help delimit the reach of s 51(xx)? Corporate governance and management are certainly terms of art within corporate practice; however their meaning in that parlance is much wider than Zines or Isaacs J appear to imply by 'internal management'. For example, there is no more important management or governance decision for a board of directors than the hiring or firing of the corporation's key employee, the managing director or CEO. Yet *WorkChoices* implies not merely that CEO remuneration and conditions are firmly within the corporations power, but so too would be laws regulating CEO qualifications and the manner of CEO recruitment, selection and dismissal. A law requiring each board to establish a recruitment sub-committee or for the board to unanimously agree the terms of hiring, for instance, would be incidental to such affairs and hence within the corporations power. Unless, that is, a Court decided to view the 'procedures' of the board as essential elements of the corporation as formed. What then of a law regulating the CEO's ability to sit on the board of directors? That could equally be characterised as a

¹³⁶ Dating to the 19th century and now found in the *Australia Acts* (Cth and UK) s 6.

¹³⁷ Australian Securities Exchange, *Listing Rules* (at 24 January 2011) rr 10.17, 10.19; *Corporations Act 2001* (Cth) s 250R(2).

¹³⁸ Zines, 5th ed, above n 16, 138.

law about the composition of the board and a law about the duties of the CEO. In short, terms like 'internal management' may mask, rather than resolve, the problem of defining any restriction on Commonwealth power to re-constitute corporations.

CONCLUSION

The question of Commonwealth power over the constitution of corporations is an important one in several respects. At an abstract level it has significant intrinsic interest. It invites us to reflect on the nature of a corporation. Textually, it forces us to reconsider such deceptively simple-looking terms as 'formed' and 'corporation' in s 51(xx). And practically, corporate governance and social responsibility debates suggest a variety of situations where a national Parliament might wish to regulate the corporate 'constitution', particularly in relation to the qualifications, composition and remuneration of the board of directors. More specifically, legislative intervention might be required in situations where the regulatory object runs counter to the shareholder interest, and therefore falls outside the scope of the *ASX Principles of Corporate Governance*. At a political level, it is possible that a State will, in the future, withdraw its referral of power in whole or part, thereby tempting a Commonwealth government once again to test the reaches of the power.

We have covered a wide terrain of potential arguments in search of an answer to the question of the scope of the Commonwealth's power over the corporate constitution. Some High Court dicta (mostly of Isaacs J) seem consonant with the 'organic' theory of the board of directors. But ultimately, neither dicta nor corporate law theory are conclusive. The dicta are tainted by the now discredited 'internal'/'external' approach to the scope of the corporations power. Further, as we have demonstrated, corporate theory could just as well conclude that the board was an agent, rather than an organ, of the incorporated entity. Some may argue that it is only logical that the *Incorporation Case* barrier to Commonwealth law to 'form' corporations must extend to protecting some essential governance structures or mechanisms. But they will need to define what is and is not protected: the composition of the general meeting, or its process as well? And what of the composition and qualifications of the board?

One practical advantage of recognising a barrier against Commonwealth laws affecting the 'constitution' of incorporated bodies, is that it avoids the spectre of Canberra 'meddling' in the governance of State owned or not-for-profit bodies. However, that result could also be reached by modifying the definition of 'trading corporations', to focus on for-profit corporations established with the central purpose of trading.¹³⁹ It may otherwise be impractical to deny a national power to regulate the corporate constitution, particularly the composition of boards, given their centrality to corporate governance.

If and when the question arises for judicial determination, neither doctrine nor legal theory will determine the answer. Here, we have presented a smorgasbord of arguments each way. Our position is that the corporations power should be read broadly, to include a power to reconstitute corporations. Zines, as we noted, has lamented a general judicial tendency to favour abstract over policy reasoning. Not dissimilarly, Hanks has argued that it has been a conceit to see questions of

¹³⁹ As to which see criticisms of the 'trading activities' test, above n 14.

characterising Commonwealth power as depoliticised.¹⁴⁰ Besides the politics of federalism, in judging the validity of legislation there are inevitably values oriented questions of the proper role of governments and markets. The *Bank Nationalisation Case* is an obvious example; but so too would be any use of the corporations power to regulate the corporate constitution, whether it covered commercial boards or university senates.

In the end, an answer to this question cannot be found within legal doctrine because the corporation is a legal construct which reflects the dominant values of a society. We would argue that the courts should recognise that constitutional principles inevitably shift over time in line with dominant ideas about the proper balance between regulation and market forces. It is far from convincing to argue that the *Constitution* contains a fully formed model of corporate governance dating back to the time it was drafted. Even if it did, that model would be unlikely to be suitable for a twenty-first century system of globalised capital. An elected government might decide to use regulation to alter the allocation of power within corporations, to solve a perceived market failure or to address socially important goals: for example by regulating excessive pay, addressing failures to take account of non-shareholder interests or by mandating levels of expertise or gender balance on corporate boards. In that situation, the courts should be wary of interfering with that decision, whether they do so on the basis of legal doctrine or metaphysical allegories.

¹⁴⁰ Peter Hanks, 'The Political Dimension of Constitutional Adjudication' (1987) 10 *University of New South Wales Law Journal* 141.

