COMMENT ON LEGAL ISSUES RELATING TO OIL AND GAS PIPELINES

By R. C. Nicholls*

INTERSTATE PIPELINES**

One of the aspects of pipelines in Australia which was outside the scope of D. Gately's paper was interstate pipelines. There is, so far as the writer is aware, still only one such pipeline in existence in Australia. It is the natural gas pipeline used by the Commonwealth Pipeline Authority for the transportation of natural gas from the Cooper Basin in South Australia to the Sydney market and other provincial markets in New South Wales and the Australian Capital Territory.

The history of that pipeline has been referred to in J. Gardam's paper.[1] In that paper Gardam points out that '. . . there are significant legal problems for the (Pipeline) Authority which could arise at any time'. One of those problems relates to the construction of intrastate pipelines by the Pipeline Authority. No comment on that matter is made here. Let us proceed on the assumption that the Authority confines its future operations to the construction and operation of interstate pipelines.

The constitutional implications of the Pipeline Authority Act 1973 (the Pipeline Act) have been canvassed at length in Gardam's paper. There are, however, a few points that may be noted. On the basis that the Pipeline Authority is not entitled to the Shield of the Crown — the writer agrees with Gardam that it should not be so regarded — state legislation and, in particular State pipelines legislation would, prima facie, apply to the Pipeline Authority. That immediately raises section 5(4) of the Pipeline Authority Act which provides that 'the Authority is not subject to any requirement, obligation, liability, penalty or disability under a law of a state or territory to which the Commonwealth is not subject'. As Gardam points out, if this section is 'valid, the practical effect is to give the Authority the immunity from state laws enjoyed by a body wihtin the shield of the Crown and in addition the constitutional immunities of the Crown itself whatever they may be'. She points out that section 5(4) will need to rely on the incidental power of section 51(xxxix) of the Commonwealth Constitution and comes to the conclusion that section 5(4) is prima facie invalid.

She then considers whether section 15A of the Acts Interpretation Act will allow section 5(4) of the Pipeline Authority Act 'to be read down so as to enable it to operate in relation to some (only) state laws'. After

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** The writer wishes to acknowledge the contribution made to this section by his colleague Marc Hutchinson, Solicitor, Sydney.

1 'The Constitutional Implications of the Commonwealth Pipeline Authority Act 1973' [1986] *AMPLA Yearbook.*

considering the decisions of the High Court in *Pidoto v. Victoria*[2] and the *Concrete Pipes* case[3] Gardam does not attempt a definite answer to this question. She goes on to say that if section 5(4) is invalid it could be severed. She considers that '... the severance of section 5(4) would still leave a consistent, workable and effective law. Without section 5(4) the Authority, leaving aside the operation of section 92, is subject to all state laws with the exception of state taxes from which the Authority is exempt by the operation of section 33(2) of the Act'. The writer wishes to address the question of whether section 5(4) is indeed a valid law.

To be a valid federal law, the provision must be referable to one or more federal heads of power. In *Australian Coastal Shipping Commission v. O'Reilly*[4] a similar provision which purported to relieve the federal Australian Coastal Shipping Commission from liability to state tax was characterized as a valid law with respect to interstate and foreign trade and commerce[5] because the Commission was validly charged under its incorporating statute with providing shipping services in that trade. In other words, the validity of the provision flowed from the validity of the establishment of the Commission.

Thus, in the present case, it is necessary to ascertain whether the Pipeline Authority Act validly establishes the Pipeline Authority.

This in turn poses two questions:

- Does federal legislative power extend to cover the activities purportedly given to the Pipeline Authority?
- If so, is the Pipeline Authority Act a valid exercise of that power?[6]

As to the first question, federal Parliament has power to make laws with respect to interstate and foreign trade (section 51(i) Constitution) and trading corporations (section 51(xx) Constitution) together with appropriate incidental powers[7] (section 51(xxxix) Constitution). As Professor Campbell wrote in her 1984 AMPLA paper:[8]

> The federal trade and commerce power, it is now well established, enables the Commonwealth to engage in competitive enterprises which of their nature involve trade and commerce as between States, *e.g.*, transportation across State boundaries.

It was common ground in the *O'Reilly* case that the Shipping Commission was apparently supportable only under the trade and commerce power although Murphy J. in *Kathleen Investments (Australia) Limited v. Australian Atomic Energy Commission*[9] has asserted that the corporations power is wide enough to support any federal legislation forming a trading or financial corporation irrespective of the nature of the functions given to the corporation.

2 (1943) 68 C.L.R. 87.
3 *Strickland v. Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468. (*Concrete Pipes*).
4 (1962) 107 C.L.R. 46.
5 Constitution of Australia s. 51(i).
6 (1971) 124 C.L.R. 468, 484.
7 Constitution of Australia s. 51(xxxix).
8 Campbell E. 'Legal Problems Involved in Government Participation in Resource Projects' [1984] *AMPLA Yearbook* 126, 131.
9 (1977) 139 C.L.R. 117, 159.

'Trade and commerce' are certainly apt to cover the case of a pipeline for the transportation of goods[10] and it is clearly established the Commonwealth may, in reliance upon its trade and commerce power, pass a law to establish an authority to construct an interstate pipeline.

The second question is less easy to answer.

Section 13(1), specifying the broad functions of the Pipeline Authority (constructing pipelines, conveying petroleum, trading in petroleum, providing advice) if it stood alone and without qualification, would not be a valid law since it is not limited, even by implication, to any particular head or heads of constitutional power. However, section 13(2) purports to provide a qualification and the fundamental question in this whole matter is whether it has successfully done so. As far as the writer is aware, a limitation in this form has not yet been judicially considered. We are accustomed to strictly worded limitations of the functions of federal authorities of which examples are:

- the Australian Coastal Shipping Commission's Services were 'limited to interstate and overseas carriage and carriage to Territories';[11]
- the Australian Atomic Energy Commission's functions under the Atomic Energy Act 1953 (Cth.) are limited in that its functions 'shall be performed only — for the purpose of ensuring the provision of uranium or atomic energy for the defence of the Commonwealth,' uranium to be supplied between Governments or for a Commonwealth purpose *etc.*, the limitations effectively tying the functions by reference to the defence power, the Commonwealth dealings power, the Territories power and the incidental power.

As Gibbs J.[12] and Mason J. pointed out in *Kathleen Investments (Australia) Limited* case that limitation was essential if the Act and the Commission were not to go beyond constitutional power. However, the limitation in section 13(2) of the Pipeline Authority Act 1973 is not in these terms. It says the Pipeline Authority may perform its functions to the extent that they are within power (including the corporations power — which it is assumed is a reference to the idea of Murphy J. in *Kathleen Investments (Australia) Limited*:

> and, in particular, may perform its functions:
> (a) in a Territory;
> (b) by way of, or so as to facilitate, trade and commerce with other countries, among the States, between Territories or between a Territory and a State;
> (c) for the purpose of ensuring the availability, where a state of war, or danger of war, exists, of petroleum in each State and Territory for use for the purposes of the defence of Australia;
> (d) in respect of matters incidental or related to the performance of its functions in accordance with the above paragraphs.

Thus the nationhood, Commonwealth dealings, trading corporations, Territories, trade and commerce, defence and incidental powers are relied upon to support the Act.

10 Lane P.H. 'The Australian Federal System' 58.
11 Dixon C.J. in *O'Reilly*, 53.
12 (1977) 139 C.L.R. 117, 138 and 152.

There are in effect two attempts at limitation: the general, directed to not exceeding constitutional power (without further definition) and the specific, directed to areas referable to heads of federal power. However, the second 'limitation' is not in fact a limitation being distinctly permissive in its terms.

The first limitation, so far as the writer is aware, has not been judicially considered, but it is open to the objection made by Dawson J. (before his elevation to the High Court) that 'to define the functions of an instrumentality in terms of broad constitutional powers is . . . a failure to face up to constitutional problems. More than that, it is irresponsible when the problems are flung at the instrumentality itself, the courts and, most important of all, members of the public dealing with the instrumentality'.[13]

The second limitation is similarly untested, but bears a resemblance to the form of purported constitutional limitation in the *Concrete Pipes* case. There, a general duty to register examinable restrictive trading agreements in section 35 of the Trade Practices Act 1965 was qualified in section 7 in terms that the restrictions in the agreements 'referred to' include restrictions applicable to or engaged in in relation to, or that tend to prevent or hinder, transactions, acts or operations:

- in the course of foreign or interstate trade;
- in the supply of goods to the Commonwealth;
- in a Territory;
- of a foreign, financial or trading corporation.

It was further provided that 'the preceding provisions of this section shall not be construed as limiting the operation of this Act'. The Court considered that section 7 was 'a virtually meaningless attempt to state situations in which the Act might have applied'.[14] For Menzies J.[15] and Walsh J.[16] it was this further provision against limitation of operation of the Act that destroyed the limiting effect of the earlier provisions, which does suggest that those two Justices would otherwise have held the 'inclusive' limitation to have been successful. Barwick C.J.[17] held that as section 35 could apply in a variety of aggregated situations in section 7, this took the Act beyond any single head of power. Owen J. agreed[18] and Windeyer J.[19] also seems to have agreed. Gibbs J., dissenting on this point, said section 7 could provide a basis for severance under section 15A of the Acts Interpretation Act 1901 (Cth) and McTiernan J.[20] said the same. In summary, if the offending provision (to the effect that the earlier parts of section 7 did not limit the operation of section 35) had been removed, it may have been that the Act would have been upheld by a majority of the Court.

13 Campbell *op. cit.* 132.
14 Donald B.G. and Heydon J.D. 'Trade Practices Law' 1978, Vol. 1, 41.
15 *Concrete Pipes* case *op. cit.* 501.
16 *Ibid.* 521.
17 *Ibid.* 495–498.
18 *Ibid.* 513.
19 *Ibid.*
20 *Ibid.* 499.

The *Concrete Pipes* case provides, it is submitted, quite respectable arguments to support an attack on the validity of section 13(1) of the Pipeline Authority Act on the basis that sub-section (2) of that section does not effectively limit the operation of sub-section (1). That would bring the whole Act down.

Gardam considers the implications of section 92 for a Pipeline Authority Act from which section 5(4) has been severed. She concludes that while the Authority can be stymied (that is the writer's word not hers) at the stage of construction or extension of a pipeline it would '. . . be able to establish that the provisions of the (relevant state pipeline) legislation which require it to hold a licence to carry out its operation activities are contrary to section 92'.

It is suggested that such a result would hardly be one which would be faced with any degree of equanimity by the Pipeline Authority. The Commonwealth would therefore, probably need to consider whether it wished to proceed to build the pipeline in question on a long thin strip of Commonwealth land. That suggestion will probably not sound so strange to those of you who are old enough to remember what Patrick Lanigan described some time ago as 'the long thin lease' sought to be utilized for the construction of railway lines under earlier taxation regimes providing for write-off of expenditure on capital works on leased land.

Another approach for the Commonwealth, if rebuffed by the states which an interstate pipeline would cross, might be to wait and see if someone else is prepared to build a pipeline where the Pipeline Authority wanted to have a line and then have the Pipeline Authority to acquire the newly constructed pipeline. It is submitted that it would first be necessary for the Pipeline Authority Act to be amended to permit such an acquisition. The writer does not consider such an acquisition would presently be permitted under the Pipeline Act. It would be interesting to see whether any company (or more importantly its lenders) would be prepared to undertake the construction of an interstate pipeline knowingly facing the possibility which has been raised.

In conclusion on this point it appears that the late R. F. X. Connor's contributions to a lawyer-led economic recovery may not yet be exhausted.

FIXTURES

Any discussion of pipelines would not be complete without some reference to the implications for income tax and stamp duty, to say nothing of the financier's security, of the question of whether the relevant pipeline is a fixture. That question is one which does or, in the writer's opinion, at least should, always exercise the minds of those considering a pipeline project. The writer has recently written at some length on the question.[21] It is pointed out that, in the case of the Northern Territory section 59 of the Energy Pipelines Act expressly preserves ownership of the pipeline in the licensee (or assigns) 'whether or not the pipeline is affixed to land'.

21 Nicholls R.C. 'Problems in Project Finance — Fixtures, Force Majeure, Frustration and Fundamental Breach', *The Law of Public Company Finance* (Ed. Austin and Vann, Law Book Company 1986 forthcoming).

As pointed out in the recent work referred to, it may be relevant to consider whether in particular circumstances, although a pipeline has not become a fixture it has lost its character for particular purposes of the chattel. While legislation such as section 59 of the Energy Pipelines Act (N.T.) solves many of the problems for security purposes and some of the stamp duty problems it does not necessarily render the pipeline goods for the purposes of those provisions which one usually finds in stamp duties legislation providing for lower levels of stamp duty on instruments relating to the sale of goods rather than of interests in land. On the other hand a conclusion that a pipeline does not constitute goods may well be desirable in an effort to avoid stamp duty on leases of 'goods'.

The Court in *North Shore Gas Co. Ltd. v. Commissioner of Stamp Duties (N.S.W.)*[22] held that although a gas reticulation pipeline which was embedded in the soil remained, by virtue of the relevant statute, in the ownership of the gas company, the pipeline was not 'goods' for the purposes of a 'goods, wares and merchandise' exception in the Stamp Duties Act 1920 (N.S.W.). *Commissioner of Main Roads v. North Shore Gas Co. Ltd.*[23] decision pointed out that in order to hold that such a pipeline so imbedded was not 'goods' did not mean that the pipeline was a fixture so as to constitute land or an interest in land. Such a conclusion 'seems to us to result from a lawyer's tendency to assimilate [statutory rights to lay and maintain pipes] to some category known to the common law'.

It is interesting to compare the provisions of the Northern Territory and New South Wales Stamp Duties Legislation as they relate to the definition of 'goods'. The New South Wales Stamp Duties Act specifically includes a reference to fixtures which are severable from the realty.

LEGAL STRUCTURES

Gately states that the choice of a legal structure for a pipeline project ultimately

> seems to lie between:
> — an incorporated structure, being a special purpose company (a 'pipeline company'), where the participants become shareholders in a corporate vehicle to pursue common business objectives, or
> — an unincorporated structure in the nature of the now familiar unincorporated joint venture (simply referred to in this paper as a 'joint venture'), where the participants contribute a share of certain costs and individually receive a share of the output.

That, like so many things that lawyers say and write, has to be read in context. The context includes the earlier statement by Gately that '... the choice of structure will depend upon the circumstances of each particular operational project, of each phase or stage of it, and of each particular participant in it: regard must be had to the effect of the proposed structure on the relationship of the participants, the management of the business, cash input and revenue return.'

There are, of course, other structures which have been used in Australia for pipeline projects. Some of these were referred to in R.

22 (1940) 63 C.L.R. 52.
23 (1967) 120 C.L.R. 118, particularly 127.

Argyle's 1980 AMPLA paper[24] and also in H. King's paper. In the recent Northern Territory Pipeline Project to transport natural gas from the Amadeus Basin to Darwin, the legal structure was different from the two broad choices described in Gately's paper. The central legal structure was a unit trust which each participant in the pipeline held its relevant participation. The gas is acquired by the pipeline operator (albeit indirectly) from the producers and transported through the pipeline which it has constructed, sold to the financier and leased back on a leveraged lease basis. The gas is onsold to the principal consumer under a Gas Sales Contract which provides in essence for reimbursement of the cost of the gas plus various elements which go to make up the transportation tariff. The unit trust, through a corporate trustee (which is the operating vehicle and the shares in which are owned by the participants in the unit trust) is the lessee under the leveraged lease of the pipeline. The lease payments are, in general terms, to be funded out of minimum throughput obligations under a Gas Sales Agreement between the pipeline operating vehicle and the principal consumer.

The Northern Territory Government was involved both as an ultimate purchaser and principal consumer of the gas (through the Northern Territory Electricity Commission) and as an equity participant in the pipeline project. Only one of the producers of the gas is an equity participant in the pipeline project, although the relevant producer consortia have options to acquire an equity interest in the pipeline.

This project is mentioned principally as an interesting example of a legal structure, not only in terms of construction ownership and operation of the pipeline but also in terms of its financing, which is different from the structures Gately describes.

The writer would like to touch in very general terms upon two taxation aspects of the Northern Territory project. Obviously some of the considerations in the Northern Territory project would have been:

- the desire to avoid company tax on the profits of the operating vehicle which would have been payable had it been a company in which each participant simply held shares instead of the operating vehicle being a trustee under a unit trust with the income being derived directly by the participants in the Pipeline Project;
- Division 10AAA of the Income Tax Assessment Act would not be applicable because, in terms of section 123A(1A) the pipeline was either 'transport that forms part of a system of reticulation to consumers or is provided for the purposes of a particular consumer or consumers' this meant that it was open to the owners of the pipeline to claim depreciation and, in the particular circumstances of the case, investment allowance deductions.

Apart from the impact of the imputation of dividends changes to the Income Tax Legislation which will probably lessen the incentive for the use of non-corporate vehicles, the first aspect could also be achieved by the use of an unincorporated joint venture vehicle to construct and own the

24 Argyle R.E.S. 'The Ownership and Financing of Infrastructure including Pipelines' (1980) 2 *A.M.P.L.J.* 204.

pipeline, with utilization and operation of the pipeline proceeding on a several, as opposed to a joint basis, as described in Gately's paper.

The second aspect may not, however, be achievable where what is being transported is crude oil which is to be sold under the Crude Oil Allocation Scheme. This is because a question arises as to whether the purchasers of such crude oil (which has to be refined into petroleum products) may correctly be described as consumers of petroleum for the purpose of section 123A(1A). It is also pointed out that it does not assist an argument that Division 10AAA is inapplicable if your crude oil pipeline simply connects up to another crude oil pipeline through which crude oil is transported to the purchasers under the Crude Oil Allocation Scheme.

FINANCING

Gately makes the point in his paper that a pipeline project presents as a prime candidate for financing on a limited or non-recourse basis and that the key to such financing is commonly a throughput structure under which the rights of the lender to repayment would be limited to tariffs payable by users of the pipeline and to the assets comprised in the pipeline licence and hardware and Transportation Agreements. The writer has recently described and analysed in some detail[25] some of the legal problems which are considered relevant to such a financing in the context of *force majeure*, frustration and fundamental breach. It was there suggested, in effect, that things may not always turn out the way in which the parties intended, and even believed their financing documents effectively provided. Some of you may find what has been written to be of interest.

TRADE PRACTICES

As Gately well knows, the writer agrees with the views he has expressed in relation to the trade practices implications of arrangements made between two or more participants in a pipeline project on common tariffs and throughput entitlements and market sharing. In some ways, of course, the position which Gately describes, assuming that he and the writer are right, is the result of what might be regarded as special circumstances. One will need to examine very closely the precise circumstances in each case before determining whether:

- all the circumstances lead to the conclusion that there is no trade practices problem;
- there is, or may be, a trade practices problem which is capable of being overcome by authorization which should be applied for; or
- there is, or may be, a trade practices problem which is either not capable of being overcome by authorization or it is inappropriate to apply for authorization. In such a case consideration will need to be given to an approach for special legislation or regulations, taking advantage of the provisions of section 51(1)(b) and (c) of the Trade Practices Act.

25 See n. 21 above.

In relation to the reasoning in Gately's paper the writer will elaborate upon his reference to the 'joint venture exclusion' in section 45A(2) and to remind you of a change in the Trade Practices Act arising from the Trade Practices Revision Act 1986. The significance of having your common tariff arrangements outside section 45A is that you can then argue the competition test which is available under section 45 — however slim you may regard your chances of success. The argument runs that the common tariff arrangement is within section 45A(2) — and therefore outside of section 45A(1) — because it was 'for the purposes of a joint venture' and relates to:

- the joint supply by the joint venture parties of services in pursuance of the joint venture (section 45A(2)(b) ('the first limb'));
- the non joint supply by the joint venture parties of services where such supply is made in proportion to the parties' interests in the joint venture and the supply is made in pursuance of the joint venture *and* the services are made available as a result of the joint venture (section 45A(2)(b) ('the second limb')); or
- the supply by a joint venture company of services in pursuance to the joint venture, other than services supplied on behalf of the joint venture company by one of its shareholders or a related corporation of one of such shareholders (section 45A(2)(c)(ii)).

A 'joint venture' is defined (section 4J) as:

> an activity in trade or commerce:
> (a) carried on jointly by two or more persons, whether or not the partnership; or
> (b) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital of that body corporate.

In the case of a joint venture company which is to construct and operate a pipeline there would appear to be no difficulty at all in bringing yourself within section 45A(2)(c)(ii).

In the case of an unincorporated joint venture, although there may be an 'operating company' which is jointly owned that company is not carrying on the joint venture. It is the participants in the unincorporated joint venture which are carrying on the joint venture. Therefore you are thrown back onto coming within either the first or second limb of section 45A(2)(b).

You cannot rely on the first limb of section 45A(2)(b) because it is of the very essence of a pipeline project which is owned by the participants through an unincorporated joint venture that there is no *joint* supply of services. If there were you would be heading towards if not arriving at being a partnership, at least for tax purposes. We come then to the second limb of section 45A(2)(b). There again you may still have a problem because, although the services (*i.e.* the transportation of petroleum) may be severally provided by the pipeline owners in proportion to their respective participations in the joint venture, you probably cannot say that the services are being provided in *pursuance* of the joint venture *even though* you may be able to successfully argue that the services are made available as a result of the joint venture. This, again, is because it is of the very essence of a pipeline project which is constructed and owned by participants in an unincorporated joint venture that the scope of the joint

venture — the activity in trade or commerce carried on jointly (for the purposes of section 4J) — is limited to the construction and ownership of the pipeline. The making of transportation agreements for the transportation of petroleum through the pipeline and the operation of the pipeline — the activities which generate the income — are activities which are *not* carried on jointly but are activities carried on severally — albeit through a common manager.

Inability to bring oneself within the second limb of section 45A(2)(b) is a harsh result and does not seem to have been intended. Nonetheless, although there are arguments for a less stringent approach to section 45A(2)(b), I submit that there must be a risk that such result would follow.

On the basis of the reasoning in *Smith v. Anderson*[26] in the case of a pipeline project operated through a unit trust which was a trading trust the use of the corporate trustee would appear to bring common tariff arrangements within section 45A(2)(c)(ii). The writer says 'appear' because, in order to come within that section the activity must not only be carried on by a body corporate, it must be a body corporate formed by the shareholders in that body corporate for the purpose of enabling them to carry on the activity *jointly* by means of their joint control or by their ownership of shares in the body corporate. The writer queries whether it is correct to describe unitholders in a unit trust who have formed and are also shareholders in a corporate trustee which runs the business of the unit trust as having formed the company for the purpose of enabling them to carry on a business jointly. It is at least arguable that they have no such 'joint' purpose. However, on balance, the writer considers that such a corporate trustee should be able to be brought within section 45A(2)(c)(ii).

The change in the Trade Practices Act to section 4D,[27] which has been described as seeking to overcome the difficulty which arose in *Trade Practices Commission v. TNT Management Pty. Ltd.*[28] could, it is suggested, have the effect of eliminating that part of Gately's argument that depends on section 4D(1)(b) not applying.

If you consider that there is or may be a trade practices problem which is capable of being overcome by authorization then you should not only carefully comb through the Trade Practices Commission's reasoning in the *Woodside* and *Wapet* authorizations referred to in footnote 19 of Gately's paper but also the TPC's authorization decisions relating to the joint venture agreement to construct an aluminium smelter at Gladstone,[29] the tug service joint venture[30] and the fixing of common charges for use of coal loaders in Newcastle Harbour.[31]

26 (1880) 15 Ch.D. 247, see also Ford H.A.J. 'The Unit Trust as a Production Joint Venturer' [1985] *AMPLA Yearbook* 1.

27 Trade Practices Revision Act 1986 s. 6.

28 [1985] ATPR 40-512.

29 Comalco Ltd. — Gladstone Aluminium Joint Venture A90265–A90271, 21 August 1979.

30 J. Fenwick Pty. Ltd. and Adelaide Steamship Industries Pty. Ltd. A3520, 29 July 1976.

31 Port Waratah Coal Services Ltd., Kooragang Coal Loader Ltd. and Maritime Services Board of New South Wales A90383, 13 April 1983 (1983) ATPR (Com.) 50-056.

You may decide that you will be unlikely to bring your case within the principles expressed or implied in those decisions. You may decide that there are good commercial considerations militating against approaching the Trade Practices Commission for an authorization. In such case you should consider the legislative approach — seeking to take advantage of sections 51(1)(b) or (c). That, of course, was the approach taken by the Cooper Basin Producers as reflected in the Cooper Basin (Ratification) Act 1975 section 16.[32] You should note that there is an argument that an arrangement to approach a government for assistance under section 51(1)(b) or (c) is itself an arrangement which comes within the Trade Practices Act. There is a further question as to whether, assuming such an arrangement would otherwise be caught by the Trade Practices Act it may be authorized retrospectively. In other words, there is a question as to whether the state or territory action contemplated by section 51(1)(b) or (c) should be permitted to have retrospective effect. That question is left with you.

THIRD PARTY LIABILITY

The following comments are made:

— The writer agrees that there seems little room for argument that natural gas, particularly that being transported under pressure is a dangerous substance and that petroleum is also likely to be so considered on account of its volatility. In addition to the references made by Gately in footnotes 35, 36 and 37 refer to the judgment of Windeyer J. in *Benning v. Wong*[33] where he says 'the position of gas mains is expressly covered by authority of the rule in *Rylands v. Fletcher* "is not limited to cases where the defendant has been carrying on or accumulating the dangerous thing on his own land it applies equally in the case where the appellants were carrying the gas in mains laid in the property of the City (that is in the sub-soil) in exercise of a franchise to do so".'[34]

— The notion that a use which is for the benefit of the community is a natural use comes from *Rickards v. Lothian*[35] and reflected in *Dunne v. North West Gas Board* which is referred to in Gately's paper. It is submitted that this notion should be regarded as inconsistent with the older cases. Although Windeyer J. in *Benning v. Wong*[36] says 'I would have thought that putting gas mains under streets so was today a natural and ordinary use of land', I submit such statement, and the passage in *Dunne v. North West Gas Board* to which Gately has referred, should be regarded as confusing the fact that something is regarded as nowadays common with the question whether what is being done is an unnatural use of land for

32 That legislation was considered by the Trade Practices Commission in its authorization decision Australian Gaslight Company (1986) ATPR (Com.) 50-114.
33 (1969) 122 C.L.R. 249, 294.
34 *North Western Utilities Ltd. v. The London Guarantee and Accident Co. Ltd.* [1936] A.C. 108, 118.
35 [1913] A.C. 263, 280.
36 (1969) 122 C.L.R. 249, 302.

the purposes of the rule in *Rylands v. Fletcher*. Even Windeyer J. himself referred to the phrase 'non natural use' of land as having 'clouds of ambiguities and uncertainties'.[37]

— It is submitted the correct approach is that one should proceed on the basis that liability for escape of gas or oil from pipelines is prima facie within the rule in *Rylands v. Fletcher* and that liability for such escape is strict, at least prima facie. One then has to choose between the opposing views in *Benning v. Wong* between Menzies and Owen JJ. on the one hand and Barwick C.J.[38] and Windeyer J. on the other which have been well described in Gately's paper as to whether the rule in *Rylands v. Fletcher* applies to the escape of something dangerous which has been brought upon land under statutory authority.

For what it is worth, the writer's view is that the court is more likely than not to come out on the side of the reasoning of Owen and Menzies JJ.[39] However, in view of the fascinating total divergence of opinion between the two sides, culminating, for the writer with Barwick C.J. and Menzies J. quoting the same passage from the decision of Kitto J. in *Thompson v. Bankstown Corporation*[40] as authority for diametrically opposing propositions, the writer would not be as robust as Gately in advising a client that he should proceed on any basis other than strict liability. From his 1980 AMPLA paper[41] Argyle appears to have held then the same view. You should note, however, that the decision of the Court of Appeal in the *Gulf Oil* case[42] to which Argyle referred was reversed in the House of Lords.[43]

— Although there was a public utility aspect in many of the decided cases, which may be contrasted with the essentially private nature of pipeline licences granted for either the transport of a pipeline operator's own petroleum or the petroleum of others, the writer considers that whatever the outcome of the divergence in views in *Benning v. Wong*, the result will apply whether or not the pipeline licensee can be described as a 'public utility'. Whichever way it goes, however, there will need to be close examination of the precise provisions of any relevant legislation.

— There is much to be said for the proposition that governments should move to resolve any uncertainties in advance of a major ecological or other disaster occurring.

37 *Ibid.* 301.
38 *Ibid.* 273.
39 *Ibid.* 282.
40 (1953) 87 C.L.R. 644.
41 See n. 24 above, 220.
42 *Allan v. Gulf Oil Refinery Ltd.* [1979] 3 All E.R. 1008.
43 [1981] 1 All E.R. 353.