COMMENT ON THE CORPORATIONS POWER AND THE RACES POWER

BY DENNIS ROSE*

1 THE CORPORATIONS POWER

In commenting on Mr Lindell's excellent paper, it is convenient to begin with the important advance made with the majority decision by five Judges in the *Franklin Dam* case that the power with respect to Australian trading corporations extends to controlling activities engaged in by a trading corporation *for the purposes of its trading activities*.[1]

One question of some interest is why the Chief Justice[2] thought that the building of the dam was not something being done for the purposes of the Hydro-Electric Commission's trading activities (even though he thought it was something "preparatory" to those activities).[3] One possible explanation is that he saw the HEC as charged with carrying out separate statutory functions of (a) building the dam, and (b) selling the electricity, and thought that building the dam was not done for the purpose of selling electricity but rather for the purpose of fulfilling its separate statutory duty to build the dam. (Professor Zines suggested that the comment by Gibbs CJ[4] that the dam construction was "anterior even to the generation of the electricity which is to be supplied" might indicate that his conclusion was simply based on considerations of "remoteness".)

On this basis (or on the alternative suggestion by Professor Zines) the conclusion by Gibbs CJ would not be relevant in the ordinary cases such as those mentioned by Mr Lindell[5] — for example, an ordinary trading corporation slaughtering meat for sale. Presumably there would be a substantial majority, if not unanimity, as to the validity of Commonwealth legislation controlling the slaughtering in such a case.

I suppose that, in relation to Commonwealth legislation on "trading corporations", a State could take evasive action, not only by absorbing a statutory corporation into its Departmental structure as Mr Lindell suggests,[6] but also by dividing the statutory corporation into two separate corporations. For example, one such corporation could be established in order to construct a dam and even to generate the electricity, and another to sell the electricity. The first corporation would be outside the reach of the corporations power so that its construction activities would not be subject to a Commonwealth law under that power. It may well be possible to divide ordinary companies in a similar way, and it would be interesting to hear from corporate lawyers on that point.

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[1] See G J Lindell, above p 222.

[2] *Commonwealth* v *Tasmania* 46 ALR 625, 687.

[3] *Ibid* 684.

[4] *Ibid*.

[5] G J Lindell, above 227.

[6] *Ibid* p 241.

The device of absorbing a statutory corporation into the Departmental structure, or the alternative of dividing it into separate statutory corporations, also seems to be available in order to avoid a Commonwealth law (based on the widest view of the corporations power) seeking to cover activities that are neither trading activities nor activities engaged in for the purposes of trading activities. This may not be very significant in practice if Mr Lindell is correct in saying that "most activities by trading corporations are for trading".[7] But some examples come to mind — for example, the W.A. Football League.[8]

It seems that the question whether activities unrelated to trading are within the Commonwealth power with respect to Australian trading corporations could sometimes be important. Consider, for example, a trading corporation with financial activities unconnected with the trading side of its business, but not sufficient to make it a financial corporation as well. (It seems clear that a corporation could be both a "trading" and a "financial" one.) Given Brennan J's judgment in *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd*[9] the corporations power would extend to those financial activities — being part of the *business* of the trading corporation. If that step is taken, we abandon, as a matter of logic, any requirement that the law should be limited to matters concerning the trading aspects of the corporation. Once that connection is severed, can we really stop short of the widest view?

Furthermore, the reach of the corporations power is now so extensive that there seems little point in maintaining that a law is with respect to a trading or financial corporation only if it is limited to the corporation's business activities. The Commonwealth can control conduct for the purposes of its trading or financial activities respectively. It can tax the corporation in any way (subject to certain restrictions such as s 99 of the Constitution). It can prohibit it from trading (subject to ss 92 and 99) except on condition that it complies with requirements as to any of its activities as Mr Lindell rightly says.[10] Rejection now of the widest view would only give rise to troublesome distinctions and uncertainties in practice — for example, in applying a Commonwealth law to employees working in management positions where they are dealing with all the activities of a corporation. The limits on constitutional power might not be worth the social price involved in distinctions that are complex and artificial in the real world. Furthermore, I have already mentioned that in any case, a trading corporation could avoid the widest reaches of the power by hiving off its non-business activities into a subsidiary that would not be subject to s 51(xx). In all these circumstances, is there any point in resisting the widest view of the power?

Turning to another point made by Mr Lindell[11] — the question of employment conditions — I agree that, even before the *Franklin Dam* case, a trading corporation could have been controlled as to the prices paid for its inputs of goods and services, and probably also the prices paid for its

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[7] *Ibid* 228.
[8] *Ex parte Western Australian National Football League* (1979) 23 ALR 439.
[9] (1982) 40 ALR 609, 647-648.
[10] G J Lindell, above 227-228.
[11] *Ibid* 232.

labour inputs as well (that is, wages), and also the inseparably related non-wage terms and conditions.

I note with interest Mr Lindell's views[12] on the use of the corporations power to protect corporations against State laws. The Commonwealth could at least protect the trading activities of a trading corporation against State taxes and State laws (for example, laws protecting the environment). It seems correct, on the principles established in the *Franklin Dam* case, to say that the Commonwealth could also protect manufacturing for trading purposes from prohibitions or restrictions under State law. Some hypothetical examples may be given. Suppose that a State law simply prohibited the manufacture and sale of margarine. Could Commonwealth law validly provide that, notwithstanding this State law, a trading corporation could manufacture margarine for the purposes of sale and could sell it? (Even if there are difficulties for such a Commonwealth law, I do not think that they arise from the decision in *Gazzo* v *Comptroller of Stamps (Vic).*[13] In the case we are considering, the Commonwealth law would be dealing with activities in the centre of the power and not on the "incidental" fringe. In any case *Gazzo* seems, with respect, to be wrong for a galaxy of reasons.)

I agree with Mr Lindell[14] that there seems to be no sufficient justification for the suggestion by Wilson J in the *Franklin Dam* case[15] that a s 51(xx) law might have to be *general.* With respect, I do not myself see why it should not support a Commonwealth law giving protection, for example, to a particular trading corporation's trading activities.

Some minor points to finish concerning the corporations power—

(1) Is Mr Lindell correct in suggesting[16] that Wilson and Dawson JJ might have rejected the established view about "dual characterisation"? I do not myself read them as committing that error. Having taken the narrow view of the power, it followed that a prohibition on building a dam was *not* a law with respect to trading corporations. It was not necessary for them to say what it *was* a law with respect to. All that Wilson J seems to have been doing in the passage referred to by Mr Lindell[17] was to suggest a possible characterisation.
(2) Why did Mason J[18] (quoted at 230) think it impossible to limit the financial corporations power to financial activities?
(3) What were Deane J's reasons for holding that s 100 of the Constitution did not apply to s 10(4) of the Commonwealth Act?

2 THE RACES POWER

Mr Lindell expresses some sympathy[19] for the minority view in the *Franklin Dam* case that s 11 of the Act was not a "special" law because it was protecting property that was not only of special significance to the

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[12] *Ibid* 233-235.
[13] (1981) 38 ALR 25.
[14] G J Lindell, above 235-236.
[15] (1983) 46 ALR 625, 756.
[16] G J Lindell, above 225.
[17] *Ibid.*
[18] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 711.
[19] G J Lindell, above 248.

Aboriginal race, but was also of significance to other persons as part of the world heritage. With respect, if stated in those broad terms, that view has some strange implications: the protection of any item of a race's cultural heritage would apparently be outside s 51(xxvi) if it was considered beautiful or historically or otherwise valuable by any other persons.

It is true that an area was legally not an "Aboriginal site" unless (*inter alia*) it was, or was situated within, property forming part of the "cultural heritage" or "natural heritage". However, an item being, or being within, part of the world heritage was merely a pre-condition to the operation of a law (s 11) expressed by Parliament to be enacted for the benefit of Aborigines. The minority in the *Franklin Dam* case seem to say, in effect, that the law was really being enacted as well for the benefit of the world generally. But the fact that s 11 does have such wide beneficial effects does not seem to me to justify a decision that it is passed for that *purpose* and to preclude it from being (as the majority held) a "special" law for Aborigines.

Perhaps one could defend the minority in this regard on the basis of the context of s 11 in the Act.[20] But there are problems with that defence, one being that each of the minority found that all the other provisions were invalid and therefore should have approached s 11 on the basis that, if valid, it would have been the only valid provision and would therefore be a "special" law.[21] In any case, this part of the minority's reasoning could have been easily circumvented by putting the special provisions in a separate Act and naming the sites without reference to the world heritage. To make doubly sure, such an Act could have been passed before other laws (if any) were enacted to protect the sites under other constitutional powers.

A problem with the minority judgments is that they state that Aboriginal sites themselves had to *be* "identified property".[22] However, it was also enough to be *within* it. In the latter case, it did not follow that an Aboriginal site necessarily possessed any of the features that made the larger area part of the world cultural or natural heritage. It so happens, however, that regulations had in fact identified the very sites as *being* items of the world heritage, and judgments could no doubt have been written to meet the point just raised. But the fact remains, with respect, that the minority reasoning is inaccurate in that regard.

The Chief Justice takes what seems to me, with respect, to be an extraordinarily narrow view in saying[23] that s 51(xxvi) applies only where the law confers special legal rights or imposes duties on the people of the race concerned, or on other persons in relation to their dealings with such people. On that view, s 51(xxvi) would not enable a law protecting property of great significance to a particular race, if they were not given special legal rights over it, even though it was not thought appropriate to give such special rights but only to give protection to the site. The majority view is, with respect, wholly convincing in rejecting that narrow view.

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[20] (1983) 46 ALR 625, 757 *per* Wilson J.

[21] The Chief Justice does not seem to have taken that approach to s 11 — see his reference to s 13(5), (1983) 46 ALR 625, 678.

[22] *Ibid* 677, 757, 856-857.

[23] *Ibid* 678; also 856 *per* Dawson J.

Perhaps the most interesting issue discussed by Mr Lindell in relation to s 51(xxvi) is whether a "special" law for the people of any race must be limited to special features of that race or matters relating to it (for example, their special needs, or a special threat constituted by them). Could the Commonwealth legislate, for example, for the benefit of wholly assimilated and wealthy Aboriginals? It can be argued, for example, that a power to make special laws with respect to "lawyers" would not support laws of all kinds dealing with the conduct or rights of lawyers, but would be limited to circumstances related to, or arising out of, their activities or status as lawyers. The same argument exists, of course, in relation to aliens and foreign, trading and financial corporations (though, even on that view, the scope for laws concerning aliens and foreign corporations would be extremely wide in view of the extensive prohibitions and controls "traditionally" exercised over foreigners as such). I am inclined to think that, if such a limitation exists in s 51(xxvi), it does not really depend upon the reference to "special" laws. The argument for such a limitation seems equally available, for example, whether we talk of a "law with respect to lawyers" or a "*special* law with respect to lawyers". The word "special" might not have any significance for *this* aspect of s 51(xxvi): for example, a law controlling *any* conduct by Aborigines seems to be a "special" law within s 51(xxvi). The word "special" might be relevant only to a law such as s 11 of the Act which is not imposing legal duties *etc* only on the people of a particular race. Finally, I suggest that if the High Court rejects any such limits on the trading and financial corporations powers, consistency would require the same conclusion on s 51(xxvi) so far as it concerns laws controlling, for example, the conduct of people of any race.