COMMENT ON SECTION 51(xx)

BY GEORGE WINTERTON*

What effect did the *Franklin Dam* case[1] have on the previous position of the corporations power, s 51(xx)? Three main areas should be noted.

1 EXTENSION BEYOND MATTERS RELATING TO TRADING ACTIVITIES

The *Franklin Dam* case wrought little significant change on this aspect of the power.

In *Actors Equity*[2] three justices — Mason, Murphy and Aickin JJ — maintained that there was no justification for confining s 51(xx) to laws regulating (including protecting) the *trading activities* of trading corporations.[3] In the *Franklin Dam* case the position was essentially the same; there were still only three justices, not a majority, who held this view, with Deane J replacing Aickin J. But their position was strengthened slightly because:

(a) Whereas this interpretation of s 51(xx) was merely *obiter* in *Actors Equity*, it was part of the *ratio decidendi* of Mason, Murphy and Deane JJ in the *Franklin Dam* case. Their Honours implemented this interpretation of placitum (xx) by holding valid s 10(2) and (3) of the World Heritage Properties Conservation Act 1983 (Cth).

(b) Deane J delivered a full judgment in the *Franklin Dam* case giving cogent reasons why the power should not be confined to regulation of trading activities whereas, in *Actors Equity*, Aickin J merely concurred with Mason J; and

(c) In the *Franklin Dam* case, Mason J appears to have adopted as the "natural and literal construction" of s 51(xx)[4] the view of Griffith CJ in *Huddart Parker & Co Pty Ltd* v *Moorehead*[5] as to its literal meaning: that any law in the form "Every trading or financial corporation formed within the Commonwealth shall/shall not" do something would be within the power.[6]

While Deane J expressly declined to adopt this view,[7] (leaving the question open) his reservation appears to be more in the nature of an "escape clause" because his interpretation of s 51(xx), and some of his reasons for adopting it, are essentially indistinguishable from those of Mason J.[8]

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[1] *Commonwealth* v *Tasmania* (1983) 46 ALR 625.

[2] *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 40 ALR 609.

[3] *Ibid* 636-637, 640-641.

[4] (1983) 46 ALR 625, 712.

[5] (1909) 8 CLR 330, 348.

[6] (1983) 46 ALR 625, 711-712.

[7] *Ibid* 816.

[8] *Ibid* 813-815.

2 THE MEANING OF "TRADING CORPORATION"

There was no change from the *State Superannuation Board* case[9] (although that case concerned a "financial corporation"). The *Franklin Dam* majority applied the test adopted there: whether the trading activities were a significant or substantial proportion of the corporation's activities; the minority essentially persisted in the view they had taken in *State Superannuation Board*, declining (impliedly) to accept the interpretation of the majority in that case. This contrasts with their somewhat grudging acceptance of *Adamson's*[10] endorsement of the "activities" test in *State Superannuation Board* itself.[11]

3 ACTS DONE "FOR THE PURPOSES OF TRADING ACTIVITIES"

Section 10(4) of the World Heritage Properties Conservation Act 1983 (Cth) employed the novel formula of forbidding a relevant corporation from doing certain acts if done "for the purposes of its trading activities". This sub-section was held valid by five justices — the four of the majority (Mason, Murphy, Brennan and Deane JJ), and Gibbs CJ.

This is quite significant, as Mr Lindell has noted,[12] since it extends the ambit of *placitum* (xx) — presumably through the express and implied incidental powers — even for those judges, like Gibbs CJ (and, possibly, Brennan J), who confine the ambit of the power essentially to regulation (including protection) of the *trading activities* of trading corporations. Even on that narrow view of s 51(xx), it ought to enable the Commonwealth to regulate matters antecedent to trade, such as manufacturing and mining. Henceforth, the Commonwealth could regulate manufacture and mining antecedent to all trade by trading corporations — including *intra-state* trade — without the uncertainty arising from the application of the cases on s 51(i), especially *O'Sullivan* v *Noarlunga Meat Ltd*[13] and Owen J's dissenting judgment in *Swift Australian Co (Pty) Ltd* v *Boyd Parkinson*.[14]

Indeed, it appears that Dawson J regards the implications of this view as so wide that he equates it for practical purposes with the "literal" view apparently adopted by Mason J.[15] In his Southey Memorial Lecture in Melbourne in October 1983 he remarked:

> I think it may fairly be said that, after the *Dams* case, if the view of the majority is to be accepted without qualification, there are, apart from express constitutional prohibitions, no practical limits upon the laws which the Commonwealth Parliament can make with respect to trading and financial corporations. . . . Any law which, in effect, begins 'a trading or a financial corporation shall . . .' or 'a trading or financial corporation shall not . . .' is, as I understand the view, a law with respect to trading and financial corporations. It is important to realize the extent of this. . . . [T]he corporations

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[9] *State Superannuation Board* v *Trade Practices Commission* (1982) 44 ALR 1.

[10] *R* v *Federal Court of Australia, ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190.

[11] (1982) 44 ALR 1, 7.

[12] G J Lindell, above 227.

[13] (1954) 92 CLR 565.

[14] (1962) 108 CLR 189, 226.

[15] See *supra* text accompanying nn 4-6.

> power deals with . . . corporate persons, and with respect to them, the current view appears to be that the Commonwealth may make a law upon *any subject*.[16]

Although this opinion may merely reflect the reality of Deane J's view that "it is quite impossible to isolate the non-trading activities of a trading corporation from its trading activities",[17] because "[f]ailure on one side is likely to involve failure of the whole",[18] with all respect, Dawson J's statement of the *majority* position appears to be overstated, as the decision of Gibbs CJ that construction of the dam could not be halted under s 10(4) (which he held to be valid)[19] demonstrates.

In sum, the expansion in the practical effect of s 51(xx) as a result of the *Franklin Dam* case, although modest, was certainly not insignificant. Since the corporations power is a power of more general utility than the external affairs power (which will usually require the existence of an appropriate treaty) or race power, undeniably the *Franklin Dam* case represents an important advance in the growth of Commonwealth power, even putting aside the wide ("literal") view of three justices. Moreover, it was the first case to involve s 51(xx) in a setting outside the Trade Practices Act since the *Bank Nationalisation* case,[20] and demonstrates the wide range of situations in which that power can be employed.

To comment briefly on the appropriate view of the ambit of *placitum* (xx), I find the interpretation of Mason, Murphy and Deane JJ persuasive, since, in my opinion, the minority interpretation reads into s 51(xx) a requirement which is not there, namely a connection between the essential characteristic of a trading corporation (trading on the appropriate scale) and the content of the law regulating the corporation. The basis for the introduction of this additional element was expressed well by Dawson J:

> For a law to be a valid law with respect to a trading or financial corporation *the fact that it is a trading or financial corporation should be significant in the way in which the law relates to it*.[21]

Applying this, his Honour concluded:

> In the present case . . . there is no significance in the way in which s 10 of the Act relates to corporations in the fact that they are trading or foreign corporations or, indeed, in the fact that they are corporations at all. They are selected merely as pegs upon which Parliament has sought to hang legislation on an entirely different topic.[22]

With all respect, this is an unwarranted assumption, which essentially introduces a purposive element into a power which is universally conceded not to be purposive in nature.[23] In any event, His Honour does not refer

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[16] Sir Daryl Dawson, *The Constitution — Major Overhaul or Simple Tune-Up?* (unpublished Southey Memorial Lecture, University of Melbourne, 19 October 1983), 18-20 (italics added).

[17] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 815.

[18] *Ibid* 814.

[19] *Ibid* 687.

[20] *Bank of New South Wales* v *Commonwealth* (1948) 76 CLR 1.

[21] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 853 (italics added). See, likewise, 684 *per* Gibbs CJ (adopting his remarks in *Actors Equity* (1982) 40 ALR 609, 616); 756 *per* Wilson J.

[22] *Ibid* 853. See similarly 755-756 *per* Wilson J.

[23] See *eg ibid* 714 *per* Mason J; 790 *per* Brennan J.

to any evidence in order to demonstrate that Parliament might not (for whatever reason) have been more concerned about destruction of the environment by corporations than by individuals. One can certainly envisage Parliament being more concerned to stop foreign corporations damaging the environment than Australian corporations, as illogical and chauvinistic as that may be; interestingly, Dawson J expressly mentioned "foreign corporations" in the passage quoted.

Mr Lindell remarks that "[t]he two competing approaches are . . . equally tenable, *at least* if the need to give s 51(xx) an interpretation which accords with the federal character of the Constitution, is put aside".[24] For the reasons mentioned, and those given by Mason[25] and Deane JJ,[26] I cannot agree —indeed this is the only significant point on which I differ from Mr Lindell. Surely, it is *only if* the untenable concept of "federal balance" is taken into account that one could possibly regard the two views as "equally tenable".

As Mr Lindell recognises, "[t]he current . . . does seem to be flowing in favour of the acceptance of the wide view".[27] It seems likely that Brennan J will endorse it, at least substantially, as Mason J appeared to believe in the *Franklin Dam* case,[28] especially when it is recalled that even as non-centralist a judge as Aickin J refused to confine *placitum* (xx) to regulation (including protection) of trading activities in *Actors Equity*, in which he concurred with Mason J.[29] Adoption by a majority of the wide, "literal" view of Mason J[30] should enable the Commonwealth to regulate (subject to constitutional prohibitions) all activities of s 51(xx) corporations, including their internal affairs, industrial relations, trading in their securities and, of course, non-trading activities generally, although it would not necessarily include the power to incorporate bodies, as Murphy J believes.[31] This power is, of course, very substantial; to take one example, the power to regulate the industrial relations of trading, financial and foreign corporations directly, without employing conciliation and arbitration, would give the Commonwealth direct control over virtually all significant industrial relations in the private sector.

Mr Lindell's paper discusses the corporations and race powers very well and so thoroughly that there is very little to add. I should like to make just three additional observations on the corporations power.

(1) Mr Lindell raised the spectre of it being argued that the Commonwealth could have stopped construction of the dam under s 51(xx) even if the State Government itself, rather than the Hydro-Electric Commission (a trading corporation), had been involved, on the ground that the Crown may be a corporation sole.[32] This is certainly an interesting prospect, but

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[24] G J Lindell, above 231 (italics added).

[25] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 711.

[26] *Ibid* 814.

[27] G J Lindell, above 231.

[28] (1983) 46 ALR 625, 710.

[29] *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 40 ALR 609, 643. See also *ibid* 646, 648-649 *per* Brennan J.

[30] *Supra*, text accompanying nn 4-6.

[31] *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 40 ALR 609, 640; *Kathleen Investments (Australia) Ltd* v *Australian Atomic Energy Commission* (1977) 139 CLR 117, 159.

[32] G J Lindell, above 241

the odds of an affirmative answer to this argument are poor for a number of reasons. First, judging from their comments on the meaning of "trading" and "financial" corporations (especially in the context of corporations also exercising governmental functions) in the *State Superannuation Board*[33] and *Franklin Dam*[34] cases, the possibility of Gibbs CJ, Wilson and Dawson JJ accepting the argument is virtually zero. Secondly, it is questionable whether it could be said of any State Government now, or in the foreseeable future, that trading represented a substantial proportion of its overall activities.[35] Finally, it should be borne in mind that the framers of the Constitution would not have envisaged the Crown as a "trading corporation" in view of the doctrine of the indivisibility of the Crown then prevailing,[36] if for no other reason. It could hardly have been supposed that a little trading here and there in the Empire would constitute the one Imperial Crown of Great Britain, Canada, India, Jamaica, Australia, etcetera, a "trading corporation". Nevertheless, this argument may turn out to be unpersuasive, since it really relates only to the *denotation* of the term "trading corporation" in 1900, not to its connotation.[37]

In any event, even if a State Crown as a whole is very unlikely to be considered a "trading corporation", an incorporated State government department is in a very different position. If trading constitutes a substantial proportion of its activities, there is no reason whatever why it should not be considered a "trading corporation".

(2) Would s 51(xx) enable the Commonwealth to enact legislation dealing with

(a) a specific trading or financial corporation (such as BHP Pty Ltd or General Motors Acceptance Corporation), or a number of them?;

(b) a particular type of corporation which, in fact, but not necessarily in law, inevitably will be a trading or financial corporation (such as, for example, "corporations which manufacture and sell steel")?; or

(c) a particular type of trading, financial or foreign corporation, such as "trading corporations which manufacture steel"?

Or is *placitum* (xx) confined to the enactment of laws dealing with *all* trading or financial or foreign corporations subject, perhaps, to specific exceptions? (Let it be assumed, to take a stronger case, that the law only

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[33] *State Superannuation Board* v *Trade Practices Commission* (1982) 44 ALR 1, 8, 9 *per* Gibbs CJ and Wilson J, dissenting.

[34] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 683-684 *per* Gibbs CJ, 854 *per* Dawson J; see also *Fencott* v *Muller* (1983) 46 ALR 41, 51-52, 70 *per* Gibbs CJ and Wilson J respectively (dissenting).

[35] The general definition of a "trading corporation" adopted by the majority in *State Superannuation Board* (1982) 44 ALR 1, 15-16, and *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 789 *per* Brennan J; 833 *per* Deane J. See also *R* v *Federal Court of Australia, ex parte Western Australian National Football League (Inc.)* (1979) 143 CLR 190, 208 *per* Barwick J; 233 *per* Mason J; (Jacobs J concurring); 239 *per* Murphy J.

[36] See *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152; WA Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed 1976),391-92.

[37] But *cf R* v *Trade Practices Tribunal, ex parte St George County Council* (1974) 130 CLR 533, 564-565 *per* Gibbs J; *State Superannuation Board* v *Trade Practices Commission* (1982) 44 ALR 1, 9 *per* Gibbs CJ and Wilson J, dissenting.

regulates the trading activities of the individual trading corporation or subgroup of trading corporations.)

It is difficult to see any impediment to the validity of legislation in category (c); surely the fact that the plural "corporations" is used in s 51(xx) cannot confine the power to one to make laws dealing with *all* corporations of the specified kind. Can it be argued seriously that the Commonwealth could not regulate the activities of European or American or Soviet corporations in Australia without regulating the activities of *all* foreign corporations? But the position of legislation in categories (a) and (b) is less clear. The validity of such laws, and parallel legislation under the aliens power (s 51(xix)), has not been addressed directly by the High Court, although there are a few *dicta* relating to it in the *Franklin Dam* case.[38] Murphy J held that s 51(xx) "enables Parliament to make laws covering all internal and external relations of all *or any* foreign corporations and trading or financial corporations".[39] On the other hand, as Mr Lindell noted,[40] Wilson J leaned toward the opposite view, remarking that it was not necessary to consider whether "the nature of the power precludes its exercise in a manner which confines its operation . . . to one corporation",[41] but that, "[a]s at present advised, it seems to me that there is a *necessary generality* attending a law with respect to any of the corporations mentioned in s 51(xx)."[42] Moreover, Deane J (like Gibbs CJ in *Actors Equity*[43]) remarked that he should not be taken "as suggesting that a law comes within the power . . . 'simply because' it happens to apply to corporations of the kind described" in *placitum (xx)*[44] which could possibly be read as supporting the view of Wilson J, although his reference[45] to the *Concrete Pipes* case[46] suggests that Deane J was alluding to the problem of "reading down" undistributed laws of general application to apply to corporations of the type referred to in s 51(xx),[47] and not the issue addressed by Wilson J.

As I read Mr Lindell's comments,[48] he can see no reason why laws in categories (a) and (b) — and, presumably, *a fortiori* category (c) — would not fall within s 51(xx). I agree, subject to an important limitation: a law regulating the activities of an individual trading corporation or a group of them could fall foul of the principle of the *Communist Party* case,[49] which may have been applied by Brennan J in *Actors Equity* in 1982 to invalidate s 45D(5) of the Trade Practices Act 1974 (Cth),[50] and the separation-of-

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[38] *Commonwealth* v *Tasmania* (1983) 46 ALR 625.
[39] *Ibid* 736. (italics added).
[40] G J Lindell, above 236
[41] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 756.
[42] *Ibid* (italics added).
[43] *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 40 ALR 609, 616.
[44] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 816.
[45] *Ibid.*
[46] *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
[47] See *ibid* 493, 495 *per* Barwick CJ, 503-507 *per* Menzies J, 512-513 *per* Windeyer J, 513 *per* Owen J, 516-520 *per* Walsh J.
[48] Above p 000.
[49] *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1.
[50] *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 40 ALR 609, 649-650, see also 639 *per* Mason J.

judicial-power principle applied there by Murphy J to the same effect.[51] It would, accordingly, be necessary for the applicability of the legislation to depend upon a judicial determination that the individual corporation was, or group of companies were, and continued to be, foreign, trading or financial corporations.

(3) One intriguing question which did not arise in the *Franklin Dam* case, but is raised by s 10(2) of the World Heritage Properties Conservation Act 1983 (Cth) is: to what extent can the Commonwealth regulate the activities of corporations incorporated in a territory, and persons dealing with them? (Section 10(2), it will be recalled, forbad such a corporation, like trading or foreign corporations, from engaging in specified activities without the written consent of the Minister.) The Commonwealth's power in regard to territorial corporations, it is submitted, can be summarized as follows:

(a) The Commonwealth has an unlimited power (subject to constitutional prohibitions) to make laws regarding such corporations within the territories and Commonwealth places.

(b) Section 51 (xx) gives the Commonwealth power to make laws with respect to "trading or financial corporations formed within the limits of the Commonwealth". The expression "the Commonwealth" is clearly being employed in a geographical sense in the phrase "the limits of the Commonwealth"; this is corroborated by the juxtaposition of "foreign corporations", namely those incorporated outside Australia. Thus, "the Commonwealth" in *placitum* (xx) includes the territories; this conclusion is supported by the remarks of Barwick CJ in *Spratt* v *Hermes*.[52] It follows that trading or financial corporations incorporated in a territory fall within s 51(xx).[53]

(c) *Lamshed* v *Lake*[54] and subsequent cases recognised that laws enacted under the territories power (s 122) can apply in the States; accordingly, there would seem to be no valid reason why the Commonwealth could not legislate to control the activities — *all* activities — of its creation (which, of course, is what a corporation formed in a territory is) both in the territories and beyond. However, without pursuing the matter further here, I doubt whether the territories power would enable the Commonwealth to go very far in protecting *private* corporations formed in a territory from the actions of individuals, corporations or States outside the territories or Commonwealth places. I doubt, for example, whether a law protecting a *private* corporation formed in a territory, which was neither a trading nor a financial corporation (and, hence, not within s 51(xx)), from secondary boycotts in a State could be considered to be one "for the government of" a territory within s 122 of the Constitution. The position of a *public* corporation

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[51] *Ibid* 642. Murphy J expressly mentioned the *Communist Party* case.

[52] (1965) 114 CLR 226, 247.

[53] *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 488 *per* Barwick CJ; *Huddard Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330, 349 *per* Griffith CJ.

[54] (1958) 99 CLR 132.

formed in a territory is, of course, in a very different, and much stronger, position.[55]

[55] *Cf Australian Coastal Shipping Commission* v *O'Reilly* (1962) 107 CLR 46, and *A-G of Western Australia, (ex rel Ansett Transport Industries (Operations) Pty Ltd* v *Australian National Airlines Commission* (1976) 138 CLR 492, 514-515 per Stephen J.