and not on breach of statutory duty, *Kakouris's* case[57] removes any doubt that these remarks are equally applicable, outside New South Wales,[58] to a claim based on breach of statutory duty. One is left to ponder the question, why should a worker in Victoria be treated differently from his counterpart in New South Wales?

DAMIEN J. CREMEAN

STRICKLAND v. ROCLA CONCRETE PIPES LTD[1]

Constitutional law—Corporations power of the Commonwealth—Trade Practices Act 1965-69—Constitution, section 51 (20)—Severance.

The Trades Practices Act 1965-69 (Cth) became fully operative on 1 September 1967. The Act enumerated a set of business practices and agreements prescribing them as 'examinable'.[2] Examinable agreements were made registerable[3] and details of them had to be furnished to the Commissioner of Trade Practices.[4] Any failure to do this was declared an offence, the penalty for which was a fine not exceeding $2000.[5]

The draftsman had before him the difficult task of framing an Act which would be *intra vires* the Parliament of the Commonwealth. To achieve its purpose the Act had to apply to both inter- and intra-state agreements and so the inter-state trade and commerce power[6] was not an adequate justifying head of power: agreements relating to goods produced and consumed in the one state and which thereby never became the subject of inter-state trade would not come within its terms. The power on which he most relied was section 51 (20) of the Constitution which provides that the Parliament shall have power to make laws with respect to—

> Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

The form of words adopted was less straightforward than might have been expected. When the Australian Industries Preservation Act 1906-07 (Cth) (the forerunner of the Trade Practices Act) was framed shortly after federation, it was phrased in such a way as to include the words 'foreign corporation, or trading or financial corporation formed within the Commonwealth'.[7]

Section 35 of the Trade Practices Act was far more widely drawn. It provided that—

> 35(1) . . . an agreement is an examinable agreement for the purposes of this Act if . . . it is an agreement the parties to which are or include two or more *persons* carrying on businesses that are competitive with each other . . . (italics added).

[57] [1970] V.R. 502.

[58] Contributory negligence is no defence to breach of statutory duty in New South Wales. See Statutory Duties (Contributory Negligence) Act 1945 (N.S.W.). See also Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.), s. 7.

[1] (1971) 45 A.L.J.R. 485. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ.

[2] Ss 35 and 36.

[3] S. 41(1).

[4] S. 42.

[5] S. 43.

[6] Constitution, s. 51(1).

[7] Australian Industries Preservation Act 1906-07 (Cth), ss 5(1) and 8(1).

Thus, read alone, it applied not only to corporations but also to sole traders, partnerships, and unincorporated associations. But by section 7[8] the section 35 restrictions were deemed to 'include' restrictions relating to overseas and inter-state trade and commerce;[9] restrictions relating to Commonwealth authorities or instrumentalities;[10] restrictions relating to territories;[11] and restrictions, a party to which was a foreign corporation or a trading or financial corporation formed within the Commonwealth.[12] Section 7, however, went on to make it clear that the listing of these categories of restrictions was not to be regarded as limiting the operation of section 35[13] or as excluding the application of section 15A of the Acts Interpretation Act 1901-64 (Cth).

The CONCRETE PIPES *case*[14]

A number of Australia-wide corporations which manufactured concrete pipes became parties to an examinable agreement which was operative in all States and duly registered with the Commissioner of Trade Practices. Having considered it, the Commissioner instituted consultations as required by the Act. Following these consultations the manufacturers apparently reached the conclusion that their agreement was destined to be referred to the Trade Practices Tribunal. In an effort to avoid this situation they abandoned their national agreement and replaced it with a series of intra-state agreements which fell within the scope of section 35. These were not registered and one Strickland, a Commonwealth policeman, laid an information under section 43.

The case came on for hearing before a full bench of the Commonwealth Industrial Court.[15] The importance with which the Commonwealth regarded the case was indicated by the appearance (for the prosecution) of two senior counsel including the Federal Attorney-General.

The facts outlined above were admitted by the defendants. They pleaded, however, that the facts disclosed no case to answer because the Commonwealth

[8] '7(1) The restrictions referred to in section 35 of this Act, and the practices referred to in section 36 and Part IX of this Act, include restrictions and practices that are (whether exclusively or not) applicable to, or engaged in in relation to, or that tend to prevent or hinder, transactions, acts or operations—*(a)* in the course of trade or commerce with other countries or among the States; *(b)* in or for the production, supply or acquisition of goods or services for, or goods or services required for, the purposes of any such trade or commerce; *(c)* in or for the production, supply, acquisition or disposal of goods or other property, or services, by or to the Commonwealth or any authority or instrumentality of the Commonwealth; *(d)* in a Territory, in respect of property in a Territory or in the course of any trade or commerce of a Territory; or *(e)* in or for the production, supply or acquisition of goods or services for, or goods or services required for, the purposes of any trade or commerce of a Territory.

(2) The restrictions referred to in section 35 of this Act include restrictions, coming within the terms of that section, accepted under an agreement by a party to the agreement who is a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth.

. . .

(4) The preceding provisions of this section shall not be construed as—*(a)* limiting the operation of this Act; or *(b)* excluding the application of section 15A of the Acts Interpretation Act 1901-1964 to this Act (including this section).'

[9] Constitution, s. 51(1); Trade Practices Act 1965-69 (Cth), s. 7(1)(a) & (b).

[10] Constitution, s. 51(39); Trade Practices Act 1965-69 (Cth), s. 7(1)(c).

[11] Constitution, s. 122; Trade Practices Act 1965-69 (Cth), s. 7(1)(d) & (e).

[12] Constitution, s. 51(20); Trade Practices Act 1965-69 (Cth), s. 7(2).

[13] Trade Practices Act 1965-69 (Cth), s. 7(4)(a).

[14] (1971) 45 A.L.J.R. 485.

[15] Spicer C.J., Joske and Smithers JJ.

Parliament had no power to require registration of intra-state restrictive agreements. The basis of the plea was the decision of the High Court in *Huddart Parker & Co. Pty Ltd v. Moorehead.*[16] In issue in that case were sections of the Australian Industries Preservation Act 1906-07 (Cth) which had the effect, *inter alia,* of controlling purely intra-state commercial transactions. In holding these sections invalid the Court (Isaacs J. dissenting) adopted a very restrictive interpretation of the corporations power. Griffith C.J. expressed the view 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'.[17] Similarly, O'Connor J. said that the power given by section 51(20) 'extends no further than the regulation of the conditions on which corporations of the class described shall be recognized, and permitted to carry on business throughout the Commonwealth'.[18] Certainly, section 51(20) did not empower the making of laws controlling purely intra-state commercial agreements.

The Industrial Court unanimously held itself bound by *Huddart Parker*[19] and dismissed the prosecution.[20]

The Commonwealth appealed from this decision to the High Court. The Court was unanimous in over-ruling *Huddart Parker.*[21] The *Huddart Parker* interpretation of section 51(20) was attributed to the then prevailing doctrine of reserved powers which was subsequently rejected in the *Engineers'* case.[22]

The Court, however, was not prepared to define the scope of section 51(20) except insofar as was necessary for the resolution of the issue before it.[23] Consequently, the positive statements which can be made with respect to the application of the corporations power are limited to two:

(i) Sections 5 and 8 of the Australian Industries Preservation Act 1906-07 (sections in issue in *Huddart Parker*) were valid;[24] and

(ii) The Commonwealth Parliament could make laws to regulate restrictive practices engaged in by foreign corporations and trading and financial corporations formed within the limits of the Commonwealth irrespective of whether the relevant practices and agreements operated on a purely intra-state basis or not.[25]

16 (1909) 8 C.L.R. 330.
17 *Ibid.* 354.
18 *Ibid.* 371.
19 *Ibid.*
20 This decision was subsequently described by Barwick C.J. as proper: *Strickland v. Rocla Concrete Pipes Ltd* (1971) 45 A.L.J.R. 485, 486.
21 (1909) 8 C.L.R. 330.
22 (1920) 28 C.L.R. 129. See *Strickland v. Rocla Concrete Pipes Ltd* (1971) 45 A.L.J.R. 485, 488-9 (*per* Barwick C.J.), 494 (*per* McTiernan J.), 498-9 (*per* Menzies J.), 499 (*per* Windeyer J.), 500 (*per* Owen J. and *per* Walsh J.), 503-4 (*per* Gibbs J.).
23 *Strickland v. Rocla Concrete Pipes Ltd* (1971) 45 A.L.J.R. 485, 490 (*per* Barwick C.J.), 499 (*per* Menzies J.), 500 (*per* Walsh J.), 504 (*per* Gibbs J.).
24 *Ibid.* 490 (*per* Barwick C.J.), 494 (*per* McTiernan J., agreeing with Barwick C.J. on this point), 499 (*per* Menzies J., although referring only to s. 5 and *per* Windeyer J.), 500 (*per* Owen J. and *per* Walsh J., agreeing with the Chief Justice), 504-5 (*per* Gibbs J.).
25 *Ibid.* 491 (*per* Barwick C.J.), 499 (*per,* by implication, Menzies J.), 500 (*per,* by implication, Walsh J.), 506 (*per* Gibbs J.).

Despite its attitude to *Huddart Parker* a majority of the High Court still felt bound to dismiss the appeal. The problem was one of severance. As has already been mentioned, section 35 of the Act defined an examinable agreement as one entered into by 'two or more *persons*'(not corporations) in certain circumstances. A failure to furnish particulars of such an agreement rendered 'every person who was a party to the agreement' liable to a penalty not exceeding $2000.[26]

Read in isolation these sections were clearly beyond the power to legislate granted by section 51(20). The question thus became: could they be read down? There were two possible means by which this could be done: section 7[27] of the Trade Practices Act[28] and section 15A of the Acts Interpretation Act 1901-64.[29]

Barwick C.J. found section 7 of no assistance because of what he saw as internal self-contradictions. Section 7(1)(a) directed that section 35 be read down to refer to restrictions on foreign and inter-state trade. This combination of section 35 and section 7(1)(a) and no more, Barwick C.J. said[30] would be within the trade and commerce power.[31] But section 7(2) related not to the area in which the restrictions operated but rather to who agreed to apply them: the restrictions referred to in section 35 were said to include *all* restrictions imposed by the type of corporations listed in section 51(20). It would have been possible, theoretically, to have read down section 35 into a series of separately valid laws following the paragraphs of section 7. But this Barwick C.J. was not prepared to do. Section 35 was a 'single provision'[32] and any attempt to disintegrate it in this way would be an attempt to legislate.

Menzies J. adopted a less complex approach to section 7. Sub-section (4)(a) expressly stipulated that section 7 was not to be read as limiting the operation of the Act. Moreover, sub-sections (1), (2) and (3) all contained the word 'include' which led His Honour to the conclusion that section 7 did not add to or detract from section 35; it merely pointed out elements of the totality of section 35 and as such provided no assistance at all in the severance process.[33] Walsh J. took a similar position in relation to section 7. In his view the fact which told most heavily against the effectiveness of section 7 was sub-section (4) which prevented section 7 being read as limiting the generality of sections 35 and 43.[34]

Windeyer J. adopted an attitude parallel to that of Barwick C.J.[35] and Owen J. agreed in the conclusions of both Barwick C.J. and Menzies J.[36]

[26] Trade Practices Act 1965-69 (Cth), s. 43.
[27] See n. 8 *supra*.
[28] See *supra* p. 502.
[29] Section 15A is in the following terms:
'Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.'
[30] (1971) 45 A.L.J.R. 485, 492.
[31] Constitution, s. 51(1).
[32] (1971) 45 A.L.J.R. 485, 493.
[33] *Ibid.* 495.
[34] *Ibid.* 503.
[35] *Ibid.* 499.
[36] *Ibid.* 500.

On the other hand stands the view of Gibbs J. with which the writer respectfully agrees. His Honour was prepared to give effect to section 7 as providing a foundation for the operation of section 15A of the Acts Interpretation Act 1901-64 and as providing 'a number of standards and tests to be applied to preserve the validity of the [Trade Practices] Act'.[37] Section 7 was not to be regarded as being 'a mere piece of surplusage designed for no reason to state what was already obvious'.[38] On the current facts, trading corporations were involved in the imposition of restrictions. Section 35, read down by reference to section 7(2), prohibited such corporations from imposing the type of restrictions which they were admittedly imposing. To this extent section 35 was within the legislative competence of the Parliament by virtue of section 51(20).

In dealing with the relationship between sections 7, 35 and 43, the High Court had at least two alternatives open to it: one course was to engage in a strictly literal interpretation and no more; the other was to give effect to the obvious legislative intention. The former course, that adopted by the majority, concentrating as it did on mere form, resulted in a substantial finding for Commonwealth power but made necessary a costly redrafting exercise to give effect to that finding. The latter alternative, that supported by McTiernan and Gibbs JJ., had more regard to the practicalities of the situation: they were prepared to look to the obvious legislative intention of limiting the operation of the Act within the scope of constitutional power. In so doing, their Honours reached the same result as the majority without the necessity of new legislation.

The second aid available in the reading down process was section 15A of the Acts Interpretation Act 1901-64. The attitude taken to its use by the various judges was largely dictated by the approach they had previously adopted to section 7 of the Trade Practices Act. It was common ground that section 15A could not be used to recharacterize the invalid subject matter of legislation with a view to bringing it within a head of power; it can do more than preserve that part of a law which, but for its association with *ultra vires* provisions of the same statute, would be regarded as constitutionally valid. The majority, looking at sections 35 and 43 unaided by section 7, found them wholly *ultra vires*. The minority, who were prepared to read section 35 in accordance with the directions of section 7, thereby creating a series of provisions related to different heads of power, determined to use section 15A to preserve the constitutionally valid provisions thus isolated. Corporations were required to register examinable agreements,[39] which in the light of the overruling of *Huddart Parker* included agreements operating on a purely intra-state basis, and therefore the concrete pipe manufacturers were properly convicted.

Seeds for future development

As has already been said,[40] the Court was not prepared to define the scope of section 51(20) further than was necessary for the purpose of deciding *Concrete Pipes*.[41] To what extent will the corporations power justify Commonwealth laws dealing with corporations other than laws designed to preserve

[37] *Ibid.* 505.
[38] *Ibid.* This extract appears to be designed as a direct reference to Menzies J's contention that 'the section [s. 7] is mere surplusage'. *Ibid.* 495.
[39] Trade Practices Act 1965-69 (Cth) ss 41, 35 and 7(2).
[40] See *supra* p. 503.
[41] (1971) 45 A.L.J.R. 485.

competition? The wording of section 51(20) presumes that corporations must be in existence before Commonwealth legislative competence arises. Laws creating corporations would thus be *ultra vires* the Commonwealth Parliament given that section 51(20) is the only justifying head of power. This view was unanimously adopted in *Huddart Parker*,[42] in *Bank Nationalization*,[43] Latham C.J. described it as 'the one thing that is clear' about [section 51(20)];[44] and there is nothing in *Concrete Pipes*[45] to suggest that it is no longer good law.

On the positive side, Barwick C.J. considered that section 51(20) justified laws 'controlling the trading activities' of relevant corporations.[46] Menzies J., in saying that section 51(20) is to be 'construed broadly',[47] can probably be taken as agreeing with this approach; as too can Gibbs J. who impliedly adopts[48] Isaacs J's reasoning in *Huddart Parker*[49] where His Honour said that section 51(20) 'entrusts to the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public'.[50] At first sight Isaacs J's 'transactions with or as affecting the public' would appear to cover a far wider area of company operations than Barwick C.J's 'trading activities', but it is to be noted that Barwick C.J. adopted a very wide interpretation of what he considered to be 'trading activities'. In his view 'trade' for constitutional purposes is not limited to dealing in goods but has the wide meaning accorded it in *Bank Nationalization*.[51] This includes 'traffic in intangibles',[52] and, more generally, is a term which is to be defined by reference to 'use, regularity and course of conduct' rather than be concerned with dealings in commodities.[53] It would thus appear that, at minimum, any activity of a corporation which current usage regards as relating to trade is susceptible to Commonwealth control under section 51(20).

It may be that the concept of Isaacs J. goes further. He included within the ambit of Commonwealth power legislation touching on internal company administration 'such as balance sheets, registers of members, payment of calls, etc.' which have a direct relation on outward transactions. He also included 'legal proceedings, remedies, and so on, including winding up proceedings so far as necessary to satisfy creditors, but not so far as extinction'.[54]

In view of the support for Isaacs J.'s *Huddart Parker*[55] judgment which is evident in *Concrete Pipes*,[56] it would seem likely that if the issue arises for clarification the internal transactions he lists will also be held capable of Commonwealth legislative control.

It probably bears noting that, on either the Barwick or Isaacs view, the Commonwealth would seem to have power to venture into the thorny field of

[42] (1909) 8 C.L.R. 330.
[43] *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R. 1.
[44] *Ibid.* 202.
[45] (1971) 45 A.L.J.R. 485.
[46] *Ibid.* 490.
[47] *Ibid.* 499.
[48] *Ibid.* 504.
[49] (1909) 8 C.L.R. 330.
[50] *Ibid.* 395.
[51] (1948) 76 C.L.R. 1.
[52] *Ibid.* 284 *per* Rich and Williams JJ.
[53] *Ibid.* 381 *per* Dixon J.
[54] (1909) 8 C.L.R. 330, 395.
[55] (1909) 8 C.L.R. 330.
[56] (1971) 45 A.L.J.R. 485, 489 (*per* Barwick C.J.), 500 (*per* Walsh J., agreeing with Barwick C.J. on this matter), 504 (*per* Gibbs J.).

price control which for so long politicians have claimed they had no power to do.[57] A law requiring corporations to justify proposed price increases before a prices justification tribunal could be argued to be analogous to the process requiring justification of trade restrictions. But some caution is called for. In the words of Professor Sawer: 'The *Concrete Pipes* case is certainly an invitation to have a lash [at more extensive corporate legislation] but it is no guarantee of success.'[58]

The wording of section 51(20) contains its own inbuilt restriction on Commonwealth power. The section only applies to corporations formed within the Commonwealth if they are *'trading or financial'* corporations. *Concrete Pipes*[59] is unhelpful in giving meaning to these two words. There are some general statements about their being 'construed broadly'[60] and their including the supply of goods[61] together with the references to 'trading' in the context of company activity (as opposed to the type of corporation) already dealt with,[62] but no more.

Huddart Parker, however, provides some assistance. Isaacs J. said that the following corporations, characterised by reference to their *raison d'etre,* were not trading or financial corporations for the purposes of section 51(20): those established for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes 'and possibly others more nearly approximating a character of trading.'[63]

Bank Nationalization[64] takes the matter a little further. 'Banking corporations are financial corporations'[65] but 'pl. xx should be regarded as not applying to corporations so far as they are engaged in banking'.[66] In other words, the power to legislate with trading or financial corporations is to be read down by the application of the maxim *generalia specialibus non derogant.* Thus where corporations are engaged in activities over which the Commonwealth Parliament has power by virtue of other sub-sections of section 51 (such as banking,[67] insurance,[68] bills of exchange and promissory notes,[69] etc.), Parliament may only legislate for trading and financial corporations within the limits contained in those sub-sections.

The only extensive attempt at a definition of trading and financial corporations is that of Isaacs J. in *Huddart Parker.* It is of considerable assistance but leaves unanswered the question of whether a corporation established primarily for a non-trading, non-financial purpose but which nonetheless incidentally engages in some trading or financial activities, falls within the category of corporations contemplated by section 51(20). The answer is probably 'no'.

[57] See Professor P. H. Lane's comments: New South Wales *Sydney Morning Herald,* 24 February 1972, 6.
[58] Victoria, *The Age,* 9 September 1971, 8.
[59] (1971) 45 A.L.J.R. 485.
[60] *Ibid.* 499 *per* Menzies J.
[61] *Ibid.* 504 *per* Gibbs J.
[62] See *supra* p. 506.
[63] (1909) 8 C.L.R. 330, 393.
[64] (1948) 76 C.L.R. 1.
[65] *Ibid.* 202 *per* Latham C.J.
[66] (1948) 76 C.L.R. 1, 204 *per* Latham C.J. See also *per* Rich and Williams JJ. *ibid.* 256.
[67] S. 51(13).
[68] S. 51(14).
[69] S. 51(16).

The power to legislate with respect to 'foreign corporations' is not limited by the need for them to be trading or financial corporations. The wider scope for legislation with respect to these corporations was recognised by Barwick C.J. in *Concrete Pipes* where he said: 'No doubt, laws which may be validly made under s. 51(xx) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities'.[70] But while Barwick C.J. recognized the increased scope for legislation, it is submitted that he does not correctly state what that scope is. He suggests that the potential lies in the regulation of more of the activities of foreign corporations than other corporations when the potential, it is submitted, lies not there but with the power to legislate with respect to all foreign corporations, not merely those which can be characterised as trading and financial. In determining what activities of foreign corporations and trading or financial corporations formed in Australia could be regulated under section 51(20) neither Isaacs J's 'transactions with or as affecting the public' test or Barwick C.J's own 'trading activities' test make any distinction between foreign and Australian corporations: they are equally applicable to both. Moreover, a literal reading of the section provides no warrant for making any distinction: if a corporation is one of a type listed in section 51(20) then Parliament has power to make laws with respect to it; there is nothing to suggest that the power is any greater in respect of one type of corporation than another.

A judicial oversight

There was a delay of some six months between the hearing of argument in *Concrete Pipes*[71] and the handing down of decision. It is a fair assumption that the cause of delay was the combination of the importance of the issue and the pressure of work on the justices involved.

This situation perhaps explains a notable judicial error which was seized upon by journalists who reported the decision in the daily press. On the last page of his judgment Barwick C.J. declared the Trade Practices Act to be 'wholly invalid'.[72] The learned Chief Justice cannot have read the entire Act. Had he done so he would have read Part XA—the overseas cargo shipping provisions which required *inter alia,* the filing of certain conference shipping agreements. There would seem to be no doubt that this whole Part is a valid exercise of the overseas trade and commerce power.[73] Since the Part assumed the existence of a Trade Practices Tribunal,[74] Part II of the Act, which provided for the constitution of the Tribunal would also, it is submitted, be valid.

It is not desired to make a great deal out of a seemingly small point. However, this mistaken remark was widely publicized because of its suitability[75] as a summary of the decision. If the error was the result of pressure of work then it may well be that the time has come for an increase in the number of High Court justices. Such an increase would take the authorized number beyond seven, a maximum originally set in 1912.

RICHARD R. S. TRACEY*

[70] (1971) 45 A.L.J.R. 485, 490.
[71] (1971) 45 A.L.J.R. 485. Argument concluded on 9 March 1971 and judgment was handed down on 3 September 1971.
[72] *Ibid.* 494.
[73] Constitution, s. 51(1).
[74] Trade Practices Act 1965-69 (Cth) s. 90N(1)(c).
[75] *I.e.* suitability for the Press.
* LL.B. (Hons); Tutor in the Faculty of Law in the University of Melbourne.