

## CASE NOTES

### IN THE MATTER OF AN APPLICATION FOR A WRIT OF PROHIBITION AGAINST THE JUDGES OF THE AUSTRALIAN INDUSTRIAL COURT AND ANOTHER: EX PARTE C.L.M. HOLDINGS PTY LIMITED AND ANOTHER

*Constitutional Law — Corporations Power — Incidental Power — Trade Practices Act 1974 (Cth), ss. 4(1), 6(2), 6(3), 53, 79*

The decision of the High Court in the *C.L.M. Holdings* case<sup>1</sup> is the third in a series of recent cases on the scope of the corporations power (Commonwealth Constitution, s. 51(xx)). It was described in the press<sup>2</sup> as a 'milestone . . . which significantly extends the scope of the Commonwealth's corporations power'. In fact, its constitutional importance is somewhat less than that so grandiloquently claimed for it. Nevertheless, there are several significant aspects of the decision which should be noted.

The two earlier cases in the series were *Strickland v. Rocla Concrete Pipes Ltd*<sup>3</sup> and *R. v. Trade Practices Tribunal; ex parte St. George County Council*.<sup>4</sup> Both were concerned with the scope of s. 51(xx) in the context of trade practices legislation. The *Concrete Pipes* case overruled the 60 year old decision of *Huddart, Parker & Co. Pty Ltd v. Moorehead*<sup>5</sup> to establish that s. 51(xx) could support Commonwealth legislation to control the trading activities of trading corporations, although the legislation actually before the court, the Trade Practices Act 1965-1969 (Cth), was declared invalid. The *St. George County Council* case was concerned with a different aspect of the power: the types of corporation to which it extended. Neither decision gave much guidance on the application of the corporations power to purposes other than trade practices, beyond emphasizing that the law must be one 'with respect to' the power, providing 'a substantial connection between the topic and the law'.<sup>6</sup> In particular, the extent to which the power might be used to support Commonwealth securities industry legislation and a national Companies Act which included provision for the incorporation of companies remained obscure. For this reason, further judicial pronouncement on the corporations power was awaited eagerly.

The *C.L.M. Holdings* case also was concerned with trade practices legislation, which partially accounts for its limited usefulness as the expected guide to the ambit of s. 51(xx). However, the actual legislation before the court, the Trade Practices Act 1974 (Cth), was substantially different to the Trade Practices Act 1965-1969 (Cth) declared invalid in the *Concrete Pipes* case. The latter Act had been drafted in terms of general application, with an interpretation section designed to guide the

<sup>1</sup> Handed down on 10 February 1977: unreported at the time of writing.

<sup>2</sup> *Financial Review* (Sydney), 11 February 1977.

<sup>3</sup> (1971) 124 C.L.R. 468.

<sup>4</sup> (1974) 130 C.L.R. 533.

<sup>5</sup> (1909) 8 C.L.R. 330.

<sup>6</sup> *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468, 491 (per Barwick C.J.).

court to read the Act distributively in relation to an assortment of Commonwealth powers. The court had refused to construe the Act in this way:

Parliament cannot direct courts to reconstruct out of the ruins of one invalid law of general application a number of valid laws of particular application.<sup>7</sup>

Part of the significance of the *C.L.M. Holdings* case lies in the fact that the legislation in issue had been designed to avoid the defects of the earlier legislation while drawing upon as many heads of power as possible, but had not yet been tested in the court.

Most of the substantive sections of the Trade Practices Act 1974 (Cth) are drafted by reference to the activities of corporations. A corporation is defined in s. 4(1) of the Act as

a body corporate that —

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia, or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

It can be seen from this definition that the Act is intended to rely primarily on the corporations power, supplemented by the territories power.

An exception to primary reliance on the corporations power in the body of the Act is s. 55, which forbids misleading conduct to which the Industrial Property Convention applies on the part of any person. The intended constitutional support for this section is the external affairs power (s. 51(xxix)).

In addition to its primary operation certain parts of the Act are given an extended operation by s. 6(2) and s. 6(3). Section 6(2) purports to extend the operation of these parts to activities in relation to trade and commerce with other countries, between the States, or by way of the supply of goods or services to the Commonwealth or its instrumentalities. Section 6(3) purports to effect a similar extension to conduct involving the use of postal, telegraphic or telephonic services. The major intended constitutional bases for these provisions are s. 51(i) and s. 51(v) respectively.

The issue before the court in the *C.L.M. Holdings* case arose under s. 53(a) of the Act which forbids false representation by a corporation that goods which it supplies in the course of trade or commerce are of a particular standard, quality, grade, style or model. It was alleged that a company, C.L.M. Holdings Pty Limited, had contravened this section in an advertising brochure distributed before an auction sale of antiques and *objets d'art* which misrepresented the quality, standard or model of ten of the items subsequently sold. Charges were laid against the company itself, and against one of its directors, Greenslade. In due course C.L.M. and Greenslade applied to the High Court for a writ of prohibition against the judges of the Australian Industrial Court.

The leading judgment was delivered by Mason J., with whom the rest of the court, Barwick C.J., Gibbs, Stephen, Jacobs and Murphy JJ., agreed. Barwick C.J. and Gibbs J. also made brief additional comments.

Contravention of Part V of the Trade Practices Act 1974 (Cth), including s. 53, is created an offence by s. 79 of the Act. Separate penalties are prescribed under s. 79 for contravention of the Act by a person not being a body corporate, and for contravention by a body corporate. C.L.M. Holdings was charged under this section. In its application to the High Court it argued that s. 79 was *ultra vires* the Common-

<sup>7</sup> *Ibid.* 506 (per Menzies J.).

wealth Parliament because it made it an offence for persons other than corporations within the scope of s. 51(xx) to contravene the provisions of Part V. The argument was easily dismissed by Mason J. Section 79 was no more than a machinery provision, prescribing consequences for breach of Part V of the Act. As such, it was supported by whatever heads of power supported the substantive sections. The provision for punishment of persons other than corporations was explicable on two grounds. Firstly, s. 55, which was also within Part V of the Act, purported to proscribe certain conduct on the part of individuals. Secondly, an extended application of the Act by virtue either of s. 6(2) or s. 6(3) would create offences capable of being committed by a variety of natural and artificial persons. Consequently the attack on the validity of s. 79 failed.

In reaching this conclusion Mason J. assumed the validity of the primary application of Part V of the Act to s. 51(xx) corporations. In doing so he implicitly affirmed the statements of the court in the *Concrete Pipes* case that s. 51(xx) will support legislation with respect to the trading activities of trading corporations, and approved the drafting technique in the 1974 Act whereby this had been achieved. In passing he cast doubt on the question whether s. 51(xx) can support legislation with respect to the holding companies of foreign, trading or financial corporations. He referred to the definition of 'corporation' in s. 4(1) and remarked that the presence of para. (d), which relates to holding companies 'might be a ground for disturbing the validity' of the assumption that the Act was valid in its application to corporations. The question was not raised in the case before the court, and therefore was not decided. Nevertheless the implications of the doubt expressed are serious for the scope of future national companies or securities industry legislation.

In addition, in order to explain the provision of penalties for persons other than s. 51(xx) corporations in s. 79, it was necessary for the court to advert both to the presence of s. 55 in Part V of the Act, and to the possible extensions of the operation of the Act pursuant to s. 6(2) and s. 6(3). In neither case was it necessary for the court conclusively to determine the validity of these provisions, nor did it do so: it was sufficient that their presence explained the wording of the section in issue. Nevertheless, the attitude of the court towards them is of some interest.

Section 55 proscribes misleading conduct as to the 'nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods'. It purports to give effect to a provision of the *Paris Convention for the Protection of Industrial Property*, and thus depends for its validity on the external affairs power (s. 51(xxix)). Section 2(2) of the Act precludes the operation of s. 55 before the Paris Convention comes into force for Australia. This took place on 27 September 1975. The section was proclaimed to come into operation on the same day.

Mason J.'s primary concern with s. 55 was whether its deferred commencement affected the construction of s. 79 in relation to persons who were not corporations. He decided that it did not. In doing so he accepted that s. 51(xx) either alone or in combination with the incidental power could sustain s. 55 'in an anticipatory way'. Gibbs J. was more cautious. In the brief remarks in his judgment in which he concurred generally with Mason J. he expressly reserved his decision on the validity of s. 55. This matter therefore remains unsettled.

The extended operation of the Act by virtue of s. 6(2) and s. 6(3) is examined and explained by Mason J. He concludes that this accounts in part for the provision of penalties for persons other than corporations in s. 79, and that in consequence s. 79 may be supported by whatever heads of power support s. 6(2) and s. 6(3). The main relevant heads of power in fact are the trade and commerce power (s. 51(i)) and the posts and telegraphs power (s. 51(v)) respectively. The use of the trade and

commerce power for such purposes is unremarkable, but the purported extension of the legislation on the basis of the posts and telegraphs power is an innovation capable of leading to a considerable expansion of Commonwealth power in commercial areas generally if it is accepted by the court. Mason J. did not expressly approve the use of s. 51(v) for such purposes, nor did he expressly disapprove it. The other members of the court did not advert to it at all. It would be an exaggeration to construe this as positive encouragement for the use of s. 51(v) to support legislation of this type. On the other hand, there may be significance in the absence of a suggestion that s. 51(v) may not be used for such purposes.

Charges were also laid against a director of C.L.M. Holdings, Greenslade, as a result of the alleged contravention of s. 53(a) of the Act by the company. In her case the charges were not laid under the Act itself, but under s. 5 of the Crimes Act 1914 (Cth) which provides in part that

[a]ny person . . . knowingly concerned in . . . the commission of any offence against any law of the Commonwealth . . . shall be deemed to have committed that offence and shall be punishable accordingly.

It was argued on behalf of Greenslade that as a natural person could not contravene s. 53(a) it was not possible for a natural person to commit an offence under s. 79, and therefore, by necessary inference, a natural person could not be deemed by the Crimes Act to have committed the offence in s. 79. The argument was rejected on two grounds: firstly, that it was an incorrect construction of the Act that a natural person could not commit an offence under s. 79; and secondly, that the operation of s. 5 of the Crimes Act was not restricted to cases in which the person charged would have been capable of committing the principal offence. There was no constitutional impediment to such a provision:

[I]f a head of constitutional power enables the Parliament to legislate so as to create a particular offence, then that head of power or the incidental power will authorize a provision having the same effect as s. 5 of the Crimes Act in its application to a person who is knowingly concerned in the commission of the offence.

It followed therefore that in relation to this offence s. 5 of the Crimes Act was a valid enactment of the Commonwealth Parliament pursuant to s. 51(xx) of the Constitution.

It was this aspect of the case for which the greatest significance was claimed when the decision was released — on the ground that it confirmed the power of the Commonwealth to regulate the behaviour of directors of corporations, and thereby strengthened generally the capacity of the Commonwealth Parliament to pass valid companies and securities industry legislation. Nevertheless, it is doubtful that in itself the case has this significance.

First, a word of caution. The section of the Crimes Act in question is an ancillary provision to assist in the enforcement of Commonwealth laws. It is accompanied in the Crimes Act by a number of other provisions to similar effect, dealing with accessories after the fact, attempts to commit offences, and inciting the commission of offences. As such, it is an ordinary and unremarkable example of the use of the incidental power of the Commonwealth to effectuate the purpose of the main grant of power. Its validity as an exercise of the incidental power had been raised before the court and upheld<sup>8</sup> in an earlier case in relation to the prosecution of an Australian born citizen for aiding and abetting a contravention of the Immigration Act 1901-1935 (Cth). The apparent novelty of the operation of the section in the present case can be attributed to the peculiar characteristics of corporations as legal persons and the fortuitous circumstance that the person charged under s. 5 of the Crimes Act was a

<sup>8</sup> *R. v. Goldie; ex parte Picklum* (1937) 59 C.L.R. 254, 264 (per Starke J.).

director of a corporation charged with contravention of a Commonwealth statute. It is a considerable step from the validity of Commonwealth legislation of this kind to the validity of Commonwealth legislation with respect to the activities of directors of companies generally.

Nor is it a step which needs to be taken. It is highly arguable that the Commonwealth could enact valid legislation with respect to the activities of company directors *qua* company directors in reliance on the corporations power itself, independently of the incidental power or of the decision in *C.L.M. Holdings*. Although the court refused to define the ambit of the power in *Concrete Pipes*, it emphasized also that the question of the validity of legislation purporting to be based upon s. 51(xx) should not be 'approached in any narrow or pedantic manner'.<sup>9</sup> One test of validity advanced by Barwick C.J. was the existence of a 'substantial connection between the topic and the law'.<sup>10</sup> It would be hard to dismiss as insubstantial the connection between s. 51(xx) and legislation with respect to the activities of company directors acting in their capacity as directors. This conclusion is supported by the gradually increasing tendency both in legislatures<sup>11</sup> and courts<sup>12</sup> to lift the corporate veil where the circumstances are considered to warrant it.

The decision in *C.L.M. Holdings* is significant in several respects. It confirms, if it were seriously doubted, that the drafting technique whereby the Trade Practices Act 1974 (Cth) is supported on a variety of constitutional bases, is valid. It provides some slight indication of the likely attitude of the High Court to such matters as the validity of Commonwealth legislation enacted pursuant to s. 51(xx) with respect to the holding companies of foreign, financial and trading corporations, or the use of the posts and telegraphs power as a basis for commercial legislation. It confirms that the incidental power may be used to support the enforcement of Commonwealth laws enacted pursuant to the corporations power in the same way as Commonwealth laws enacted pursuant to other heads of power. In doing so it provides an indirect method whereby the Commonwealth may legislate to control some activities of company directors. But it does nothing to clarify such major conundrums which still surround the corporations power and limit its potential usefulness as whether the Commonwealth can legislate for the formation of corporations or to control the activities of third parties dealing with corporations. The case which resolves these matters will be a milestone indeed.

CHERYL SAUNDERS\*

ATTORNEY-GENERAL FOR NEW SOUTH WALES, EX REL.  
MCKELLAR v. COMMONWEALTH

*Constitutional Law — Size and Composition of House of Representatives — Commonwealth Constitution ss. 24, 122 — Representation Act 1905-1973 (Cth).*

After three quarters of a century of neglect, s. 24 of the Constitution, which deals with the size and composition of the House of Representatives, has become the focus of a flurry of litigation which appears at the time of writing to be by no means

<sup>9</sup> *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468, 490 (per Barwick C.J.).

<sup>10</sup> *Ibid.* 491.

<sup>11</sup> *E.g.* Companies Act 1961 (Vic.) ss. 374C, 374D.

<sup>12</sup> See the comments of Windeyer J. in dissent, in *Gorton v. F.C.T.* (1965) 113 C.L.R. 604, 627.

\* B.A., LL.B., Ph.D.; Lecturer in Law, University of Melbourne.