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'.[9] One test of validity advanced by Barwick C.J. was the existence of a 'substantial connection between the topic and the law'.[10] 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[11] and courts[12] 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

[9] *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468, 490 (*per* Barwick C.J.).
[10] *Ibid.* 491.
[11] *E.g.* Companies Act 1961 (Vic.) ss. 374C, 374D.
[12] See the comments of Windeyer J. in dissent, in *Gorton v. F.C.T.* (1965) 113 C.L.R. 604, 627.

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ended. In October 1975 the judgments were handed down in *Western Australia v. Commonwealth*,[1] the *Territory Senators* case. This was followed six weeks later by *Attorney-General for Australia, ex rel. McKinlay v. Commonwealth* on redistricting.[2] The latest development, on 1 February 1977, has been *Attorney-General for New South Wales, ex rel. McKellar v. Commonwealth*,[3] which concentrated mainly on the nexus requirement of s. 24, the distribution of M.H.R.s among the States and the meaning of the expression 'the people of the Commonwealth' in that section. Each of these cases decided a few immediate issues but left unanswered a formidable array of questions for the future. Moreover even the extent to which the immediate issues have been settled may now be in doubt.

The centre of disturbance is *Territory Senators*, in which it was decided, *inter alia*, that the Senate (Representation of Territories) Act 1973 (Cth), in which Senate representation was provided for the Australian Capital Territory and the Northern Territory for the first time, is a valid exercise of power under s. 122 of the Constitution. The trouble was, and is, that the carefully delineated relationship between the Senate and the House of Representatives which is set out in Chapter I of the Constitution does not harmonize with the creation of Territory senators under s. 122. Before the *Territory Senators* case it could be argued with equal cogency that Chapter I prevailed over s. 122 or that s. 122 prevailed over Chapter I. *Territory Senators* decided, possibly only for the time being, that s. 122 prevailed. This gave rise to questions, which the court did not answer on that occasion, about the effect which Territory Senate representation was going to have on the balance preserved hitherto, in accordance with s. 24, between the numbers of senators and the numbers of members of the House of Representatives. The decision was by the narrowest possible majority, four to three. The dissenting judges, Barwick C.J., Gibbs and Stephen JJ., are still on the court. So are three of the majority, Mason, Jacobs and Murphy JJ. The fourth member of the majority however, McTiernan J., has in the interim retired and been replaced by Aickin J., whose views on the *Territory Senators* case are not known. In *McKellar* Barwick C.J. has now gone out of his way to make clear that he would like to see the Territory senators' question reopened. At the time of writing Queensland has responded to the invitation.[4] Other States may follow. The stage is therefore set for a re-run.

Since much of the reasoning in *McKellar* depends upon acceptance of the decision in *Territory Senators*, quite monumental confusion may be just around the corner. The character of the confusion is by no means confined to legal theory. In reliance on the Senate (Representation of Territories) Act 1973 (Cth) and the decision in *Territory Senators*, four Territory senators have been duly elected and now sit, debate and vote in the Senate. Quite what the effect of a reversal of *Territory Senators* would be from their point of view, it is hard to say. One should however not worry too much about this aspect of the matter at this stage. It is by no means clear that, however much some of his brethren may share Barwick C.J.'s regret that *Territory Senators* went the way it did, they share also his desire to have the question reopened, still less answered differently. It is not to be assumed that Gibbs and Stephen JJ. will be attracted to quite such a cavalier view of the importance of precedent. The question was a fundamental one and the decision has been relied on and acted upon with significant legislative consequences. Aickin J. may well not regard himself as free to make an unfettered decision merely because he was not on the court when *Territory Senators* was decided. Moreover he may agree with that

[1] (1975) 50 A.L.J.R. 68.
[2] (1975) 50 A.L.J.R. 279.
[3] (1977) High Court of Australia. Since this case remains unreported at the time of writing, quotations from the judgments cannot be given page citations.
[4] *Financial Review* (Sydney), 23 February 1977.

decision in any event. Add to these considerations the expectation that Mason, Jacobs and Murphy JJ. are hardly likely to change their minds, and Barwick C.J.'s chances of getting the decision reversed do not seem to be high. Nevertheless the possibility exists and it is against that background that *McKellar* must be read.

The case reached the Full Court in the form of six questions referred by Gibbs J. The first was whether s. 1A of the Representation Act 1905-1973 (Cth)[5] is valid. This section was inserted into the Representation Act by the Representation Act 1973 (Cth), which was one of the bills passed at the joint sitting of July 1974 after the double dissolution and election of April-May 1974. All it says is that in the main Act the expression 'the people of the Commonwealth' does not include the people of any Territory. It was an amendment consequential upon the decision to provide for Senate representation of the Territories in separate legislation, leaving the Representation Act to govern matters pertaining to electors who reside in the States. Since the expression 'the people of the Commonwealth' is also used in s. 24 in two places, the point raised was whether limiting the Representation Act to electors in the States in this way conflicted with s. 24. The whole court agreed that in the context of s. 24 the expression 'the people of the Commonwealth' must mean the people of the States voting for members elected from those States. Section 1A was consistent with this interpretation of s. 24 and therefore valid. In other words it is not possible to read s. 24 in such a way as to enable electors in the Territories to vote for members elected from the States or to affect the quota provisions of the second paragraph of s. 24.

Leaving aside the second question referred by Gibbs J. for the moment, the third asked whether ss. 6, 7, 8 and 9 of the Representation Act 1905-1973 (Cth) were valid. These are purely machinery sections which have been without practical effect since ss. 2, 3 and 12(a) of the Act were invalidated in *McKinlay's* case. Nothing seems to turn on them, and indeed it is not altogether clear why this question was raised at all, for almost none of the argument in the High Court was directed towards it. The court was virtually unanimous in holding these sections valid.[6] Leaving aside question four for the moment, question five arose only if the answer to any of the preceding questions was no. Since they were all answered yes, it was unnecessary to answer question five, so most of the court did not.[7] Question six arose only if part of question 5 was answered yes. Since none of question five was answered, question six lapsed in similar fashion.

The substance of the case therefore was questions two and four. They related to the validity of s. 10 of the Representation Act. Section 24 of the Constitution requires *inter alia* that the number of members of the House of Representatives chosen in the States 'shall be in proportion to the respective numbers' of the people of the States. It goes on to provide that until Parliament legislates otherwise the method of establishing the proportion shall be the method set out in s. 24 itself. This starts by requiring 'the number of the people of the Commonwealth' to be divided by twice the number of senators. The figure so produced is called a quota. The next step is to divide 'the number of the people' of each State separately by the quota figure. The number of times that the quota figure goes into the population of each State is the number of members of the House of Representatives who have to be elected from

[5] Notwithstanding s. 6(1) of the Acts Citation Act 1976 (Cth), it is necessary to use two dates when citing the Representation Act in the course of this note. The reason becomes apparent in the text. Do not confuse this Representation Act with the Representation Act 1948-1973 (Cth), which is a quite separate statute.

[6] Barwick C.J. made a minor and immaterial reservation with respect to s. 9, but his view is that the whole Act was effectively invalidated by *McKinlay* in any event.

[7] Barwick C.J. and Aickin J. found it necessary to give consequential answers to questions five and six.

that State. If the figures work out perfectly, the totals of the numbers of members from the various States will fulfil the requirement of the first paragraph of s.24 that the total membership of the House of Representatives shall be twice the number of the senators.

Obviously, however, it is most unlikely that the figures will work out with such precision. When the quota is divided into the population of each State, the result in each case is likely to be a whole number and a fraction. You cannot have a fraction of a member. Therefore something has to be done about the fractional remainders. Section 24 deals with this problem by providing that if 'there is a remainder greater than one half of the quota, one more member shall be chosen in the State'. In other words, the fractions are rounded out to the nearest whole figure. If the remainder is more than half, that State gets an additional member. If it is less than half, the State does not get an additional member. Although the High Court in *McKellar* was not unanimous on the point, the most obvious explanation of the qualification in the first paragraph of s. 24, that the numbers of the House of Representatives should not be absolutely twice the number of the senators but only 'as nearly as practicable', is that it anticipates the problem of fractional remainders. Normally it is impossible to conform at one and the same time both with a requirement that the House of Representatives be exactly twice the size of the Senate and with a requirement that the numbers of M.H.R.s represent each of the States exactly in proportion to their populations. Hence 'as nearly as practicable'.

Section 10 of the Representation Act is designed to replace the formula in s. 24, Parliament acting under its power otherwise to provide. Until 1964 however, Parliament might just as well not have bothered, for the relevant part of the wording of s. 10 merely reproduced the formula which was already in s. 24 of the Constitution. In 1964 a change was made. Section 10(b) was varied from the s. 24 formula to have the effect that any fraction left after dividing the population of a State by the quota was to be rounded up to the next *highest* figure. The result was that *any* remainder gave the relevant State an extra member. This meant that thereafter the total membership of the House of Representatives was likely to depart further from twice the Senate than would have been the case under the formula set out in s. 24 of the Constitution. The initial question was whether this amendment to s. 10(b) was valid. The High Court answered unanimously that it was not, on the simple ground that since it produced an even less perfect result than the formula set out in s. 24, it contravened the 'nearly as practicable' requirement.

There then arose the consequential question of what was the effect of the invalidity of the 1964 amendment upon s. 10 as a whole. Two results could follow. Either s. 10 remained valid in its form up to 1964, or it became totally invalid. The High Court decided unanimously, that since the 1964 amendment merely took the form of deleting a few words from s. 10, as opposed to repealing and re-enacting the whole section, and since that purported deletion was itself ineffective, s. 10 remained valid in the form which it took up to 1964. The result is that for some period since 1964, and certainly at present, the House of Representatives is improperly composed so far as the numbers of members elected from the States are concerned. It seems unlikely that this can have any retrospective effect, because the imperfection cannot be identified with any particular member from any State affected. The information that the House of Representatives is invalidly constituted has practical importance for the future however, for it provides a ground upon which the High Court may issue an injunction forbidding the holding of a general election until the fault has been corrected.

The interest of *McKellar* is by no means limited to the answers to the questions asked. In the course of deciding the meaning of 'people of the Commonwealth' and

'as nearly as practicable', some members of the court took up also the meaning of 'senators' in s. 24, the nexus and some of the implications of *Territory Senators*. It is convenient to start with the judgment of Stephen J. because Mason J. concurred in it, whereas everyone else gave a separate judgment. Having said the minimum which he regarded as necessary for the purpose of answering the questions asked, Stephen J. turned to the relationship between the nexus requirement and senators and representatives from the Territories. He first gave his understanding of the basic point established by the *Territory Senators* decision as being that s. 122 of the Constitution operates as a proviso or exception to s. 24, and also to s. 7, which opens by saying:

> '[t]he Senate shall be composed of senators for each State'.

From this premise he argued that:

> 'the particular form of representation of a territory which Parliament may allow need in no way conform to the requirements of the first paragraph of s. 24'.

This in turn led him to the position that:

> 'the nexus requirement operates only in the case of members of the House of Representatives elected in the States and then only in relation to senators for the States'.

He concluded by expressly accepting that this means that the balance of membership between the two Houses in a joint sitting under s. 57 may be disturbed by Territory representation and that members of the House of Representatives from the Territories can be full members of Parliament even though not 'directly elected' by the people of the Territories, for this requirement of s. 24 is not reproduced in s. 122.

Gibbs J. approached the effect of *Territory Senators* in a slightly different way, stressing not so much the fact that since that decision s. 122 operates as an exception or proviso to s. 24, as that it operates as a plenary grant of power with respect to, *inter alia*, parliamentary representation for the Territories. If anything in s. 24 is allowed to have any bearing on Territory representation it must operate as a restriction on s. 122, the very consequence which *Territory Senators* forbids. From here he concludes similarly that the nexus provision of s. 24 has no application to Territory senators or members. He supports this further by observing that if it were otherwise at least two anomalies could follow. One would be where Parliament provides for M.H.R.'s from the Territories but not for senators. If s. 24 applied to the M.H.R.s from the Territories, it could only be at the expense of members from the States, for the nexus provision would mean that no total increase in the size of the House of Representatives could take place. The second possible anomaly derives from the position under present legislation, whereby the Territories have more senators than they do M.H.R.s. In this case, since the nexus requires the number of M.H.R.s to be twice the number of senators, if the nexus included Territory senators it would become necessary to provide more M.H.R.s from the States even though the States had not acquired more senators.

It is noteworthy that Gibbs and Stephen JJ. were in the minority in *Territory Senators* but now show themselves perfectly prepared to follow through the implications of that decision with inexorable logic. Aickin J. however took an exceedingly interesting line of his own. He read *Territory Senators* as modifying s. 7 of the Constitution but not s. 24. Since the decision that full senators can be created under s. 122 means that the opening words of s. 7, that 'the Senate shall be composed of senators for each State', cannot be read in an unqualified sense, it follows that there is no need to read down the meaning of the word 'senators' in s. 24. Aickin J. would therefore include Territory senators for the purpose of the nexus. As far as he is concerned therefore, the House of Representatives can be increased in size by creating Territory senators. He accepted the consequence pointed out by Gibbs J. that this

means that more M.H.R.s can be created for the States by creating more Territory senators. He did not however accept the other apparent consequence, that if Territory M.H.R.s are created in numbers which exceed twice the numbers of Territory senators, they can take their seats only at the expense of M.H.R.s from the States. In Aickin J.'s view M.H.R.s from the Territories stand altogether outside s. 24 and are simply to be added on to whatever number is arrived at by applying the nexus as he interprets the nexus.

This is a truly original way of approaching the matter. In effect Aickin J., instead of reading s. 24 as a guarantee that the Senate will never be outnumbered by the House of Representatives by more than two to one, reads it in the opposite sense as a guarantee that the House of Representatives shall never outnumber the Senate by less than two to one. This ingeniously changes the emphasis of the section to conform with ideas about the primacy of the popularly elected House which are perhaps more current now than they were in 1900. This position is then reinforced by adding on M.H.R.s from the Territories on the simple ground that if s. 24 operates only as a minimum guarantee for the House of Representatives, there is no objection to adding to the strength of that guarantee. Those who seek ways of modifying the influence of a highly conservative institution in this matter of representation of the people may draw much encouragement from Aickin J.'s approach. It certainly suggests that he would be unsympathetic to any attempt to reverse the *Territory Senators* case.

The judgments of Jacobs and Murphy JJ. call for little comment. On the relation of Territory senators and M.H.R.s to s. 24, Jacobs J.'s language is not altogether clear, at least to this commentator, but appears to mean that he takes the same position as Gibbs, Mason and Stephen JJ. Certainly he arrives at the same answers to the relevant questions. Murphy J.'s judgment is most disappointing. It consists of a short statement of dogmatic conclusions unsupported by reasoning.[8] This may be because he was of the view that all the important questions had been sufficiently ventilated already. In that event it would have been better for him to follow the course taken by Mason J. and adopt one or other of his brethren's judgments. Instead, he makes an almost sporadic selection of observations, some of which may well prove to have nuisance value in the future. Perhaps for the present purpose the main point is that he clearly agrees with the view that there is no connection between s. 24 and s. 122.

The judgment of Barwick C.J. has been left to last because in its opening passages it includes what can only be construed as a direct invitation to the States to re-litigate the issue decided in the *Territory Senators* case. Opinions will differ as to the judicial propriety of taking such a course of action. Having taken it however, to the accompaniment of remarks which leave no doubt that he thinks that the *Territory Senators* decision was little more than wrong-headed, he then proceeds to deal with the questions in *McKellar* by a straightforward application of the main point in *Territory Senators*. This appears to put him in the same camp with everyone else except Aickin J. on the lack of interplay between s. 24 and s. 122. He does not however expressly indicate his acceptance of the implications of this position in terms of relations between the Senate and the House of Representatives, perhaps because he regards it as unnecessary if *Territory Senators* is to be re-litigated.

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[8] For another instance of this highly unhelpful approach see his judgment in *Bistricic v. Rokov* (1976) 11 A.L.R. 129, 138-41.

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