THE VALIDITY OF THE FOREIGN INVESTMENT GUIDELINES

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1.. THE FOREIGN INVESTMENT GUIDELINES

The current policy of the Commonwealth Government in relation to foreign investment is set out in the Ministerial Statement of the Treasurer, Mr Lynch, to the House of Representatives on 1 April 1976.[1] This policy is generally referred to as the Foreign Investment Guidelines ("the Guidelines").

In the final essence, the responsibility for decisions in relation to foreign investment is to be taken by the Treasurer, in consultation with other appropriate Ministers, particularly the Minister for National Resources. The Treasurer will be assisted, purely in an advisory capacity, by the newly constituted Foreign Investment Review Board.

It would not be appropriate here to examine the history of the control of foreign investment in Australia, or to traverse the political arguments which have arisen since the making of the Ministerial Statement.[2]

The essential statements of the policy were stated by the Treasurer to be the following:

> "To provide the maximum opportunity for Australians to participate as fully and effectively as practicable in the ownership and control of the country's industries and natural resources;
>
> To make use of foreign capital especially where it is accompanied by new technology and expertise as an integral component of Australian economic and social developments;
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> To place major emphasis on Australian participation in new projects but without preventing projects that are clearly not against the national interest from proceeding;
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> To welcome proposals to increase the level of Australian participation in existing foreign companies whilst avoiding the costly option of repurchasing such companies; and
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> To restrict foreign investment in certain basic sectors of the economy (banking, radio, television, daily newspapers and certain aspects of civil aviation)."

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1. Daily Hansard, 1st April 1976 p. 1283 et seq.
2. E.g. The National Times, 25th October 1976 p. 57.

The statement defined certain "key areas" of the economy, which are:

— the production and development of oil, natural gas and all other minerals including uranium—both onshore and offshore;
— agricultural and pastoral projects; and
— forestry and fishing projects.

In relation to the key areas the following provisions will apply. A project involving investment by foreign interests in uranium, not already in production, would only be allowed to proceed provided it has a minimum of 75% Australian equity and is Australian controlled. The desirable Australian equity is to be achieved by the time the project comes into production and in this area alone regard will be had to "portfolio" investment. The Guidelines specifically exclude uranium enrichment and other investments in the nuclear fuel cycle, apart from mining and production to the yellow-cake stage, from the 75% rule.

In addition, it would appear that the project must also be "Australian controlled", though no specific percentage of voting strength is indicated in relation to the definition of "Australian controlled". On the basis that *de facto* control can be secured with as little as 15% of the voting rights, it might be argued that if 15% of the voting rights were beneficially owned by Australians, the company would be "Australian controlled".[3] If such shares attracted 75% or 50% of the rights to dividends and a return of capital, there could be a further argument that there is compliance with the appropriate guideline.

In relation to other key areas involving investment by foreign interests of one million dollars or more, and which are not "contrary to the national interest", the Guidelines prescribe a minimum of 50% Australian equity together with at least 50% of the voting strength on the board to be held by Australian interest. The criteria for determining whether a foreign investment proposal is "contrary to the national interest" are noted below. Where the government judges that the unavailability of sufficient Australian equity capital on reasonable terms and conditions would unduly delay the development of Australia's natural resources the project may still proceed with a lower Australian equity subject to satisfactory arrangements for the Australian equity to be increased to at least 50% within an agreed period.

Australian participation will not be necessary in relation to mineral exploitation prior to the stage at which there is a reasonable expectation that the project will proceed to development. Monitoring of exploration

[3] E.g. the requirement for the disclosure of substantial shareholdings in Div. 3A of Pt. IV of the *Companies Act* 1961 (N.S.W.).
Note also that by Press Release number 101 of 28th May 1976 the Treasurer and Minister for National Resources signalled an intention to ignore individual foreign portfolio shareholdings of less than 10% in Australian uranium companies for the purposes of the Guidelines.

projects will be carried out on an annual basis by the Foreign Investment Review Board which will require details of all forward exploration programs.

A number of categories of investment, apart from those already mentioned, will be examinable. These are:

— proposals involving the establishment of new non-bank financial institutions and insurance companies;

— all proposals involving the acquisition of Australian real estate, except those specifically exempted which fall basically into a non-speculative form of investment;

— in order to incorporate the *Foreign Takeovers Act* 1975 and to ensure that matters under that Act may be referred to the Foreign Investment Review Board for advice and that the same Guidelines apply to foreign investment generally as applied to takeovers, all proposals under that Act will also be examinable under the Guidelines. (It will be noted that no criteria or guidelines are contained in the *Foreign Takovers Act* 1975 itself.)

The Guidelines define "foreign investment" as funds to be invested by a "foreign interest" in shares or fixed assets whether financed from equity or loan funds, and whether financed from whatever source within Australia or overseas. "Foreign interest" is defined as:

(a) a natural person not ordinarily a resident of Australia (this would of course include expatriate Australian investors);

(b) a foreign controlled corporation (or business); or

(c) any corporation (or business) in which there is a single or associated beneficial foreign interest of 15% or more or in which there is an aggregate beneficial foreign interest of 40% or more, regardless of whether or not the corporation (or business) is foreign controlled.

The definition of "foreign interest" under the Guidelines seems to cast a wider net than analogous provisions in the *Foreign Takeovers Act* 1975. Under the Act, corporations can be excluded from the definition of a "foreign controlled corporation" where the Treasurer is satisfied that in fact a foreign person is, or foreign persons are, not in a position to determine the policy of the corporation concerned. In the Guidelines, the inclusion of corporations by the operation of paragraph (c) above, does not appear to be rebuttable.

The Guidelines provide for a decision on a foreign investment proposal to be made within a maximum period of 90 days from the date of submission. If no decision is made a party will not be prevented from proceeding with its proposal. In relation to a proposal falling within the scope of the *Foreign Takeovers Act* 1975, the time periods set out in that Act will apply.

Certain criteria to be considered in the examination of foreign investment proposals are set out in the Ministerial Statement. The criteria suggest that each proposal will be examined in two stages. The primary purpose of the criteria is to guide the Board in determining whether the proposal is "contrary to the national interest".

In the first stage the proposal will be examined as to whether, against the background of existing circumstances in the relevant industry, the proposal would produce either directly or indirectly, net economic benefits to Australia in relation to a number of matters. These are:

1. competition, price levels, and efficiency;
2. introduction of technology or managerial or workforce skills new to Australia;
3. improvement of the industrial or commercial structure of the economy or of the quality and variety of goods and services available in Australia; and
4. development of or access to new export markets.

If the proposal is then judged not to be contrary to the national interest on the basis of the above criteria certain additional criteria will be taken into account. These are:

(a) whether the business concerned could subsequently be expected to pursue practices consistent with Australia's best interests in respect of such matters as:
   (i) local processing of materials, utilisation of Australian components and services;
   (ii) involvement of Australians on policy-making boards of businesses;
   (iii) research and development;
   (iv) royalty, licensing and patent arrangements; and
   (v) industrial relations and employment opportunities;

(b) whether the proposal would be in conformity with other government economic and industrial policies and with the broad objectives of national policy concerned with such matters as Australia's defence and security, Aboriginal interests, decentralisation and the environment, as well as with our obligations under international treaties;

(c) the extent to which Australian equity participation has been sought and the level of Australian management following implementation of the proposal;

(d) in key areas, the level of Australian ownership and control following implementation of the proposal;

(e) taxation considerations; and

(f) the interests of Australian shareholders, creditors and policy holders affected by the proposal.

It seems clear from the Treasurer's statement itself, that compliance with all criteria is certainly not essential for approval, and outside of the "key areas" (broadly speaking natural resources and real estate) it would appear that proposals which can be shown to be "Australian controlled" will generally be approved. Even in the "key areas", a less rigorous approach will be taken in respect of proposals which can be shown to be "Australian controlled".

Until the Government indicates that any proposal is not inconsistent with the Guidelines, it seems that the Reserve Bank will refuse to grant any necessary approval under the *Banking (Foreign Exchange) Regulations* (Cth).[4] As an added incentive to observance of the Guidelines, a foreign investor is specifically assured that as far as export permits are concerned, he will not be disadvantaged because of the degree of foreign participation in the proposed venture, provided the foreign investment aspects have been approved.

Justification for the refusal to grant approval under the *Banking (Foreign Exchange) Regulations* (Cth) based on foreign investment policy considerations, raises a number of constitutional and other legal issues.

The relationship between the guidelines and the *Banking (Foreign Exchange) Regulations,* and the regime established for the granting of export permits will be considered at the end of this paper. It is first, however, proposed to consider the validity of the Guidelines independently of this relationship. Such an independent examination is essential, for the guidelines envisage the regulation of transactions which do not require either approval by the Reserve Bank or an export permit. Thus the definition of "foreign investment" (supra) as including investment by a foreign interest from whatever source within Australia or overseas, would include investment by a foreign owned but Australian incorporated corporation with Australian raised finance. This would not presumably require Reserve Bank approval.

2. THE LEGAL STATUS OF THE GUIDELINES

It is proposed now to consider the question whether, if the Guidelines were transposed into Federal legislation, they would be a valid exercise of the legislative powers of the Commonwealth. Then, the further question would arise, as to whether they are valid in their present form as an exercise of the executive powers of the Commonwealth.

[4] Regulations came into operation on 1st January 1947 and have been specifically preserved by an instrument under s. 29(1) of the *Banking (Transitional Provisions) Act,* 1959 (Cth), and by Statutory Rule No. 265 of 1974. See a note on changes in the "Law Relating to Control of Foreign Exchange" (1975) 49 *A.L.J.* 145; also *Talga Ltd* v. *M.B.C. International Ltd* (1976) 50 A.L.J.R. 619 (post).

In testing the validity of the Guidelines if they were to be transposed into legislation, it is essential that they be characterised as an exercise of one or more of the legislative powers granted to the Commonwealth. These powers are contained in the enumerated powers expressed in the Constitution itself, including the express incidental power, s. 51(xxxix), as well as powers implied in the Constitution and inherent in the formation of the Commonwealth and its emergence as an international state. In relation to the incidental power, it is clear that a grant of power under the Constitution incorporates a power to do all things necessary to give effect to the main power. It appears from the decision of the Privy Council in *Attorney-General (Cth)* v. *Colonial Sugar Refining Co. Ltd*[5] that the express incidental power in s. 51(xxxix) cannot be called in aid except to support existing main legislation. Professor Lane would, however, extend s. 51(xxxix) to at least matters incidental to proposed legislation.[6] Further, the High Court in *Le Mesurier* v. *Connor*[7] suggests that s. 51(xxxix) deals with matters which are incidental to the execution of the legislative power, and the implied incidental power deals with matters incidental to the subject matter of the main power.[8]

In dealing with this distinction, Jacobs J. in the *Austalian Assistance Plan*[9] said

> "Whatever is incident . . .to the subject matter of power comes within the ambit of the main power. It is incident to that power in that it naturally appertains and attaches to that power. However, what is incidental to the execution of a main power includes every matter which occurs or is liable to occur in subordinate conjunction with the execution of that power, even though it forms no essential part of the main power itself. It is subordinate but just as importantly it is in conjunction. Thus a subject matter incidental to the execution of a power may have a wider ambit than the power implied in respect of the incidents of a subject matter of power."

2.1 *The Inherent Powers of the Commonwealth*

In the *Australian Assistance Plan* (supra), Barwick C.J. stated that some powers, both legislative and executive, may come from the very formation of the Commonwealth as a polity and its emergence as an international State. The Chief Justice suggested that the powers of the Commonwealth Parliament and Government are not limited to those expressly enumerated in the Constitution. There are some powers that are inherent in the fact of nationhood.[10]

[5] [1914] A.C. 237.
[6] P. H. Lane, *The Australian Federal System with United States Analogues* (Sydney, Law Book Co., 1972) p. 280.
[7] (1929) 42 C.L.R. 481.
[8] Ibid. per Knox C.J., Rich and Dixon JJ. pp. 497-498.
[9] *Victoria* v. *Commonwealth* (1976) 50 A.L.J.R. 157, 184.
[10] Ibid. p. 164.

The stricture by Barwick C.J. (with whom Gibbs J. apparently agreed[11]) that merely because a matter is of national interest or concern does not in itself attract this power, is most pertinent in attempting to justify the Guidelines as a valid exercise of the powers of the Commonwealth. The Chief Justice illustrated his dictum with a reference to the national economy. Whilst the national economy is of national concern, there is no specific federal power over the economy. As such, it is not a subject matter within Commonwealth power, and such control as the Commonwealth exercises is through the other powers, for example, banking, customs and excise, and the Budget.[12] It would follow then, according to His Honour's reasoning, that the Guidelines could not be justified under the inherent power.

Mason and Jacobs JJ. seem to see a wider operation of the inherent power than Barwick C.J. or Gibbs J. would allow. Their view of the inherent power coupled with the incidental and, where appropriate, the executive power, seems wider than the narrower view presented by Barwick C.J. and Gibbs J. and might justify the Guidelines both as legislative and executive acts.[13]

The inherent power has previously been referred to as a justification for laws against sedition,[14] and in the embryonic federation that constitutes the European Communities, the Court of Justice has developed a similar theme concerning the existence of a power inherent in the formation of the Communities.[15]

It is, however, doubtful, having regard to the strictures placed on the inherent power by Barwick C.J. and Gibbs J. (supra) that the power would, in Their Honours' view, justify the Guidelines. Whilst the majority upheld the validity of the appropriation for the *Australian Assistance Plan,* the decision is in effect an extension of the appropriation power in s. 81 beyond the enumerated powers of the Constitution, and the Guidelines do not involve this extended interpretation of the appropriations power. Notwithstanding the doubtful support that the inherent power could give to the Guidelines, it is submitted that the trade and commerce power, the banking power, the corporations power and the incidental power would be of utility in justifying the Guidelines.[16]

[11] Ibid. p. 168, 169; McTiernan and Murphy JJ. determined the issue of the validity of the appropriations under s. 81 of the Constitution for "purposes of The Commonwealth" as one for the legislature (ibid p. 167 and 185) and Stephen J. denied standing to the Victorian Attorney-General (ibid. p. 175).

[12] Ibid. p. 165.

[13] Ibid. pp. 177, 178, 181 and 183.

[14] *R.* v. *Sharkey* (1949) 79 C.L.R. 121, 135; see *Australian Communist Party* v. *Commonwealth* (1951) 83 C.L.R. 1, 187.

[15] AETR case 22/70 *Commission* v. *Council* Rec. XVII 263; (1971) C.M.L.R. 335.

[16] In addition, reliance might be had on the currency and territories power (s. 51(xii) and s. 122).

2.2. *The Trade and Commerce Power*

The Commonwealth has power under s. 51(i) of the Constitution to legislate with respect to trade and commerce with other countries and among the States. This power should be read with the incidental power contained in s. 51(xxxix) which gives power to make laws with respect to (inter alia) "matters incidental to the execution of any power vested by this Constitution in the Parliament".

There are express restrictions on this power. Thus, s. 92 provides that trade, commerce and intercourse among the States shall be absolutely free, and s. 99 provides that the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or part thereof.[17] It will be recalled that s. 92 binds both the Commonwealth and the States,[18] but unlike s. 51(i) does not extend to matters incidental to trade, commerce and intercourse among the States.[19]

The question initially arises as to whether the control of the inflow of foreign investment falls for consideration under s. 51(i). Indeed s. 51(xiii) grants a power to the Commonwealth in respect to banking, and it might therefore be concluded that s. 51(xiii) exclusively deals with banking. However the High Court and the Privy Council in the *Bank Nationalisation* case[20] rejected the argument that banking is not in itself trade and commerce but is merely an instrument used in relation to trade and commerce. In that decision, legislation of the Commonwealth Parliament nationalising all Australian private banks was held to be invalid on various grounds, including the ground that the legislation offended s. 92 of the Constitution. It is settled that trade and commerce mean the same thing in s. 92 as in s. 51(i), although they do not cover the same area.[21] Accordingly, it can be argued that a facet of international banking, for example foreign investment, falls within the overseas trade and commerce power. Dixon J. (as he then was) in a passage adopted by the Privy Council in the *Bank Nationalisation* case observed[22]

> "In my opinion a large part of the business of banking, transacted across State lines, involves trade, commerce and intercourse among the States. The presence in the Constitution of s. 51(xiii) affords no reason for treating the trade and commerce power conferred by s. 51(i) as inappropriate to banking transactions if they are carried out with other countries or among the States. Section 51(xiii) was placed in the

17 Sections 51(ii), 51(xxxi), s. 114 and s. 117 also contain constitutional prohibitions which impinge on the exercise of federal powers.
18 *James* v. *Commonwealth* (1936) 55 C.L.R. 1.
19 *Grannall* v. *Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55.
20 *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1 (H.C.); (1949) 79 C.L.R. 497 (P.C.).
21 *James* v. *Commonwealth*, op. cit. p. 60.
22 *Bank Nationalisation* case, op. cit. p. 383.

> Constitution because it was desired that the subject of banking as a whole should fall under Federal legislative authority: not because it was considered that so much of banking as involved transactions with other countries or among the States could not fall under s. 51(i)."

From this decision, it is clear that the international banking aspects of foreign investment fall for consideration under the trade and commerce power. It is submitted that the trade and commerce power could justify quantitative limits on the inflow of foreign investment into Australia, and probably, on similar principles, the repatriation of income and capital.

However, an examination of the Guidelines indicates that the Commonwealth proposes not merely to control the global investment inflow, but proceeds further to make specific provisions in relation to foreign investment within "key areas" of the economy. Indeed, within the concept of "key areas", uranium mining and production receive special treatment. Further, there is provision to enable embryonic projects to proceed with an Australian equity lower than provided in the Guidelines, subject to satisfactory arrangements for the subsequent increase of that Australian equity. In addition, the Foreign Investment Review Board is apparently to receive the power to monitor projects.

Thus, not merely do the Guidelines purport to control the original foreign investment, but they go further and appear to authorise a specific examination and determination in relation to the placing of that foreign investment. Indeed, it would appear that conditions may be attached to the approval of specific foreign investment proposals.

Clearly, the Commonwealth has no specific constitutional power to control investment in, for example, agricultural and pastoral projects, forestry and fishing projects, and real estate, at least in the States. Different considerations would apply to such investment in the Territories, having regard to s. 122 of the Constitution.

However, it is clear that if a law can be characterised as within a specific power under s. 51 of the Constitution, the fact that the legislature may have some other motive in passing the legislation does not thereby invalidate the law. In *Fairfax* v. *The Commissioner of Taxation*,[23] the High Court considered provisions in the *Income Tax Assessment Act*, 1936 (as amended) granting favourable treatment to superannuation funds in relation to income taxation. In order, however, to encourage investment in public securities, the favourable taxation treatment would be lost unless there were certain specified investment in public securities. It was obvious that the Parliament was attempting to encourage investment in those types of securities. It was also quite clear that the Commonwealth had no direct power to require superannuation funds to invest in those securities. However, by the use of the taxation power, the Common-

[23] (1965) 114 C.L.R. 1.

wealth achieved the same results; the penalising nature of income taxation was a sufficient incentive for superannuation funds to invest in public securities. The Court upheld the provisions as a valid exercise of the taxation power, notwithstanding that the Parliament had used its legislative power with respect to taxation in order to promote a purpose that it desired to promote. The law was not thereby rendered invalid. The Court said the only question was "[I]s it properly described as a law with respect to taxation?"[24]

There are limits to the exercise of the power and the answer to the question posed above will obviously not always be in the affirmative. Menzies J. indeed suggested in *Fairfax*[25] that a prohibitive tax derived from the sale of heroin may not be a law with respect to taxation, but a law for the suppression of the drug trade, and therefore *ulta vires* the Commonwealth. It is, however, difficult to reconcile this with the purport of *Fairfax*.

The fiscal legislation of the Commonwealth abounds with other examples of the use of the taxation power for purposes other than the collection of revenue; for example, the encouragement of scientific research, assistance to primary producers, and the encouragement of new investments.

Again, the trade and commerce power has also been validly utilised to support legislation with the motive of outlawing and prohibiting the possession of certain narcotic goods. Thus, in *Milicevic* v. *Campbell and The Commonwealth,*[26] the High Court upheld the validity of s. 233B of the *Customs Act* 1901, which provides that any person who without reasonable excuse has in his possession any prohibited imports or narcotic goods shall be guilty of an offence. Proof of reasonable excuse lies upon any person charged. Jacobs J. construed the provision as recognisably ancillary to the matter of importation.[27]

> "It gives practical effect in one important respect to the purpose of prohibiting the import of goods of the prohibited kind, namely, the prevention of the presence of such important imports in Australia. . . . In my view such a provision must be regarded as a control in aid of the power to prohibit imports and effectively to forbid the presence or use in this country of imported goods, the importation of which is prohibited."

Further, it will be recalled that the trade and commerce power is also supported by the incidental power implied in s. 51(i) and the specific incidental power contained in s. 51(xxxix). It is quite correct to state that the Commonwealth has no constitutional power to control invest-

[24] Ibid. per Windeyer J. p. 18.
[25] (1965) 114 C.L.R. 1, 17, 18. The writer's attention has been drawn to a similar example given by Isaacs J. in *The King* v. *Barger* (1908) 6 C.L.R. 41, 97 where His Honour came to an opposite conclusion to that of Menzies J. in *Fairfax*.
[26] (1975) 49 A.L.J.R. 195.
[27] Ibid. pp. 201, 202.

ment in, for example, agricultural and pastoral projects, forestry and fishing projects, real estate and mining. But it is clear that a law may regulate matters in these fields if it is a law which can be characterised within the powers of the Commonwealth, aided by the incidental power. By utilising this approach, a law empowering the Governor-General to make regulations with respect to the subject of employment of persons offering for, or engaged in, work of a particular class in relation to trade and commerce with other countries and among the States has been held to be valid.[28] Legislation giving preference of employment to waterside workers who are members of the union was held to be a valid exercise of the trade and commerce power in that decision.

Another example of the breadth of the trade and commerce power can be seen in the comment of Fullagar J. in *O'Sullivan* v. *Noarlunga Meat Ltd,*[29] that whilst the Commonwealth possesses no specific power with respect to slaughter houses, the power to legislate with respect to trade and commerce with other countries includes a power to make provisions with respect to the condition and quality of the meat or any other commodity to be exported. The power was held not to stop there. The Court concluded that not only the grade and quality of goods, but packing, get up, description, labelling, handling and anything at all that may be reasonably considered likely to affect an export market by developing it, or entering it, comes within the power.

Without specifying how far back in the chain of commercial activity preceding the act of export the Commonwealth power might go, the Court held that the power extended to the supervision and control of all actual processes which could be identified as being done or carried out for export. This, the Court held, extended as far as the slaughter of stock for export.

Again, in *Redfern* v. *Dunlop Rubber Australia Ltd*[30] the High Court rejected an argument that the provisions of the *Australian Industries Preservation Act* 1906 creating a right of action for treble damages in relation to contracts and combinations in restraint of trade made in the course of trade or commerce with other countries or among the States was not a valid exercise of the trade and commerce power, for reasons which included the fact that the provisions would catch intrastate trade as well as interstate trade. The Court held that in circumstances where intrastate trade and commerce is inseparably connected with interstate trade and commerce, it is included within the trade and commerce power.

More recently, in *Murphyores Incorporated Pty Ltd* v. *The Commonwealth of Australia and ors,*[31] the Court unanimously held that the Minister for Minerals and Energy was entitled, in considering an appli-

[28] *Huddart Parker Limited* v. *The Commonwealth* (1931) 44 C.L.R. 492.
[29] (1964) 92 C.L.R. 565, 597.
[30] (1964) 110 C.L.R. 194.
[31] (1976) 50 A.L.J.R. 570.

cation for approval for the export of concentrates mined on Fraser Island, to have regard to the environmental aspects of the mining operation. This was notwithstanding the fact that the Commonwealth has no specific power to legislate with respect to environmental matters.

The plaintiffs were holders of mining leases on Fraser Island, and intended to export zircon and rutile concentrates to be produced from the minerals extracted. Section 112 of the *Customs Act* 1901 confers a power to prohibit by regulation the export of goods from Australia either absolutely or conditionally. Regulation 9 of the *Customs (Prohibited Exports) Regulations* (Cth) ("the Regulations") prohibits, inter alia, the exportation of concentrates without an approval in writing issued by the Minister or by a person authorised in writing by him being produced to the Collector of Customs.

Upon an application by the plaintiffs, on 13th December 1974, the Minister indicated approval would be forthcoming on certain conditions. On 17th December 1974, the *Environmental Protection (Impact of Proposals) Act* 1974 received Royal Assent. On 12th July 1974, the Hon. E. G. Whitlam, then Minister of State administering the Act, directed an inquiry to be conducted in respect of the environmental aspects of the making of decisions by the Australian Government in relation to the exportation of minerals from Fraser Island. An attempt was made by the plaintiffs to restrain the making of the inquiry. However, Mason J. granted an interlocutory injunction restraining the Commissioners from compelling the plaintiffs to give evidence and produce documents before the inquiry.[32] In any event, the inquiry was completed without the participation of the plaintiffs who declined an invitation to give evidence. Subsequently, at the hearing, the plaintiffs sought an injunction restraining the Commissioners from presenting their report to the Minister, and a declaration that the Minister for Minerals and Energy was not entitled in considering any application under the Regulations to take into account the environmental report. It was argued by the plaintiffs, inter alia, that the *Environmental Protection (Impact of Proposals) Act* 1974 was invalid to the extent that it purported to authorise the conduct of the inquiry, and that if Regulation 9 were construed to impose a duty on the Minister to consider and determine an application for export approval, that the Regulations and the *Customs Act* 1901 had to be construed so as to limit consideration to matters of trade and trading policy. This was, it was submitted, because considerations of other matters would be beyond the power of the Parliament to legislate under the trade and commerce power.

Murphy J. categorically stated that the *Environment Protection (Impact of Proposals) Act* 1974 and Regulation 9 of the *Customs (Prohibited*

[32] Ibid. p. 576.

Exports) Regulations (Cth) were valid.[33] Stephen J. (with whom Barwick C.J. expressed himself in general agreement) succinctly stated the answer to the plaintiffs case: whilst the control of mining operations and their effect on the local environment is essentially a matter for the State of Queensland, nevertheless, an exercise of the Commonwealth power to prohibit exports would be inherently capable of having an impact on the plaintiff's mining operations, and hence an impact upon the environment of Fraser Island.[34] His Honour categorised the trade and commerce power as involving a non-purposive subject matter and therefore it would not be necessary in determining constitutional validity to have regard to the purpose of the legislation under consideration. This applied no less to administrative acts than to legislation.[35] The prohibition of exports was central to the trade and commerce power, and accordingly regulations implementing that prohibition would also be within power, as would be an administrative decision relaxing or failing to relax a prohibition in a given case.

Mason J., in also stating that a law absolutely or conditionally prohibiting the exports of goods was within the trade and commerce power, held that a law would still be within power if it conferred a discretion, unlimited in scope, to permit exportation of particular goods. He further observed that in the exercise of that discretion, the fact that the decision might be made by reference to criteria having little or no relevance to trade or commerce did not invalidate the law.[36]

McTiernan J. relied on dicta in *The Herald & Weekly Times Ltd* v. *The Commonwealth,*[37] where it was said that a law which qualified an existing statutory power to relax a prohibition is necessarily a law with respect to the subject of the prohibition.[38] It did not matter that the qualification extended to matters not the subject of federal legislative power.

Both Barwick C.J. and Murphy J. found the *Environment Protection (Impact of Proposals) Act* 1974 valid, and Gibbs J. found all of the Act, relating to inquiries, to be valid.[39] Stephen, Mason and Jacobs JJ. having found that the Minister might validly take into account environmental aspects or considerations, did not have to rule specifically on the validity of the Act.[40]

If the principles expressed by the court in *Murphyores* are applied to the Guidelines, the prohibitions contained therein against forms of foreign investment which can be relaxed, conditional upon a certain minimum

[33] Ibid. p. 580.
[34] Ibid. pp. 571, 573.
[35] Ibid. p. 574.
[36] Ibid. p. 577.
[37] (1966) 115 C.L.R. 418, 434.
[38] *Murphyores,* op. cit. p. 572.
[39] Ibid. pp. 571, 580, 573.
[40] Ibid. pp. 574, 575, 577, 580.

Australian shareholding being attained at some date, should not mean that the Guidelines are not thereby categorised as being with respect to trade and commerce.

Moreover, the Guidelines specifically refer to a relationship (inter alia) with the granting of export permits. If, in the granting of export permits, regard is had to prior compliance with the Guidelines, *Murphyores* would be direct authority for the proposition that this in itself would not be an extraneous consideration and any decision on an application for an export permit would not thereby be vitiated.

2.3. *The Corporations Power*

In addition to the trade and commerce power, or as an alternative, the corporations power may offer justification to at least a portion of the Guidelines.

It is clear that s. 51(xx) of the Constitution does not mean that any law, which in the range of its command or prohibition includes foreign corporations, or trading or financial corporations formed within the limits of the Commonwealth, is necessarily a law with respect to the subject matter of the section.[41]

In relation to the first category of corporation, it is to be noted that a "foreign corporation" for the purposes of s. 51(xx) has a different meaning from the apparently analogous terms in the Guidelines. A "foreign controlled corporation" for the purpose of the Guidelines could be a corporation incorporated under state law, which is under the control of "foreign interests". It is submitted that such a corporation would not be a foreign corporation for the purposes of s. 51(xx) of the Constitution.

A foreign corporation appears, for the purposes of s. 51(xx), to be a corporation which is incorporated beyond the limits of the Commonwealth, and not, as in state company law, a corporation which is incorporated in another state.[42]

The view that the words "foreign corporations" for the purposes of s. 51(xx) have a different meaning to a "foreign company" under state law is emphasised by the wording of s. 51(xx). The section indicates that the words "formed within the limits of the Commonwealth" refer only to trading or financial corporations and not to foreign corporations.

There is a suggestion by Barwick C.J. in *Concrete Pipes* that the range of activities which may be controlled under the corporations power may be wider in the case of foreign corporations.[43] It was argued in the *Bank Nationalisation* case that the power of the Commonwealth to make laws

[41] *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468, 492.
[42] J. Quick and R. R. Garran, *The Annotated Constitution of The Australian Commonwealth* (Sydney, Angus and Robertson, 1901) p. 605; J. L. Taylor, "The Corporations Power: Theory and Practice" (1972) 46 *A.L.J.* 5.
[43] (1971) 124 C.L.R. 468, 490.

under s. 51(xx) in relation to foreign corporations is absolute, that it takes effect at the entrance gates, and attaches to foreign corporations' freedom of action within Australia.[44] But Rich and Williams JJ. expressed a narrower view that corporations formed within the limits of the Commonwealth are subject to s. 51(xx) to the same extent as foreign corporations.[45]

The second category of corporation in s. 51(xx) is a "financial corporation". It would appear from the *Bank Nationalisation* case[46] that financial corporations, when engaged in banking, are subject to the banking power under s. 51(xiii). The dicta in that decision suggest that the two powers do not over-lap, unlike the trade and commerce power and the banking power.

The remaining category is the "trading corporation". Previous cases have suggested a limited meaning to "trading corporations". Early dicta suggest that manufacturing, mining, municipal, religious, and charitable corporations are excluded from the power.[47] In *St. George County Council,*[48] Gibbs J. held that a trading corporation is one formed for the purposes of trading.[49] The fact that it traded was not in itself sufficient to make it a trading corporation.[50] There the County Council had been formed for the purpose of local government and accordingly it was not a trading corporation within the meaning of s. 51(xx). The limits to which the Court may be prepared to interpret "trading" can be seen in another context. In interpreting s. 92, the view has been expressed that to manufacture is not of itself to trade.[51] Obviously a distinction can readily be drawn between "trade" in s. 92 and "trading corporation" in s. 51(xx), but future decisions of the Court must be awaited to indicate the parameters of this category of s. 51(xx) corporation.

[44] (1948) 76 C.L.R. 1, 60, Evatt K.C. arguende.
[45] Ibid. pp. 255, 256.
[46] Ibid.
[47] *Huddart Parker and Co. Pty Ltd* v. *Moorehead* (1908) 8 C.L.R. 330, 392, 393.
[48] *R.* v. *Trade Practices Tribunal; Ex parte St. George County Council* (1974) 48 A.L.J.R. 26; 130 C.L.R. 533.
[49] Ibid. p. 562, Menzies J. agreed but McTiernan J., who was also in the majority, based his decision on statutory construction. Barwick C.J. and Stephen J. dissented.
[50] If the "purposes of formation" approach is accepted, the questions arise as to how and when the purposes are to be determined. Are they to be determined by reference to the objects in the Memorandum, which are alterable? (E.g. s. 28, *Companies Act* 1961 (as amended) (N.S.W.)). Are the purposes to be chosen not from the objective intention of the shareholders or promoters, but as the Court held in reference to s. 103A(2)(c) of the *Income Tax Assessment Act* 1936 (as amended), from an objective conclusion to be drawn from the circumstances of the operation of the company. This seems to lead us on a circular route back to the dissenting judgments in *St. George County Council* (supra) (*Cappid* v. *Federal Commission of Taxation* (1971) 71 A.T.C. 4121 per Barwick C.J. p. 4124.) Quaere whether the fact that the objects are alterable is of relevance? (Ibid. at 4124; and *Luceria Investments Pty Ltd* v. *Federal Commissioner of Taxation* (1975) 75 A.T.C. 4123, 4127.
[51] *Beal* v. *Marrickville Margarine Pty Ltd* (1966) 114 C.L.R. 283, per Menzies J. p. 306.

Having regard to the reticence of the High Court in *Concrete Pipes* to define the limits of the power conferred by s. 51(xx),[52] the propriety of which cannot be questioned, it is still necessary to recall the various judicial dicta on s. 51(xx).

Although *Huddart, Parker and Co. Pty Ltd* v. *Moorehead*[53] was disapproved in *Concrete Pipes,* the opinions expressed there, particularly that of Isaacs J., must still be considered.

The opinions of the judges are as follows:[54]

1. Section 51(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 operation of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States".[55]
2. "[T]he field of legislation marked out for the Commonwealth Parliament extends no further than the regulation of the conditions on which corporations of the class described shall be recognised, and permitted to carry on business throughout the Commonwealth."[56]
3. "The Federal Parliament can regulate corporations as to status, capacity, and the conditions on which business is permitted. But it is for the State Parliament to regulate what contracts or combinations a corporation may make in the course of the permitted business."[57]
4. Section 51(xx) "entrusts to *the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public*".[58]
5. "The language of the placitum indicates an intention to give the Commonwealth Parliament power to make laws from time to time with the respect to the conditions, subject to the performance of which, corporations of all kinds created beyond Australia and trading and financial corporations incorporated in Australia should be entitled to carry on business throughout Australia or in any part thereof."[59]
6. "[T]he power authorises the Commonwealth to govern and regulate the operation of these companies but would not authorise the suppres-

[52] (1971) 124 C.L.R. 468, per Barwick C.J. p. 493; Menzies J. p. 511; Walsh J. p. 515.
[53] (1909) 8 C.L.R. 330.
[54] See Taylor, op. cit. passim.
[55] Ibid. per Griffith C.J. p. 354; disapproved in *Concrete Pipes* (1971) 124 C.L.R. 468 per Barwick C.J. 486-491; per Menzies J. p. 509.
[56] Ibid. per O'Connor J. p. 371; disapproved in *Concrete Pipes,* op. cit., per Menzies J. p. 511.
[57] *Huddart Parker & Co. Pty Ltd* v. *Moorehead,* op. cit., per Higgins J. p. 414; disapproved in *Concrete Pipes,* op. cit., per Menzies J. p. 510.
[58] Ibid. per Isaacs J. p. 395 (His Honour's emphasis).
[59] *Bank Nationalisation Case* (1948) 76 C.L.R. 1 per Rich and Williams JJ. p. 255.

sion of all such corporations or the nationalisation of their activities. Thus, the carrying on of business in Australia by these corporations might be prohibited absolutely or except upon certain conditions and the exercise of their powers in Australia might be regulated and so forth."[60]

7. "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."[61]
8. "[A] law such as s. 5 of the *Australian Industries Preservation Act* governing the conduct of its business by a trading corporation formed within the limit of the Commonwealth is within the power of the Parliament by virtue of s. 51(xx)."[62]

2.4. *The Application of judicial comment on the corporations power to various factual situations*

It is proposed to consider various factual situations involving a potential application of the corporations powers in the light of the judicial comments evinced above.

(1) The Proposed Investing activity inside Australia of a Foreign Corporation

Here we are assuming that the corporation is one formed outside the limits of Australia. In the light of Barwick C.J.'s dicta (supra) that the corporations power here might be wider than in the case of other corporations, the investing activity of such a corporation might fall clearly within the corporations power.

(2) The Investing Activity of an Australian Corporation in Partnership with a Foreign Investor

Where the foreign investor is not incorporated, or where it is assumed, contrary to the suggestion in paragraph (1) above, that the corporations power does not extend to the investing activity of the foreign corporation, it will be relevant to consider whether the investing activity of the Australian corporate partner is within the scope of the power. It would be firstly essential, in the light of *St. George County Council* (supra), to consider whether the corporation is a trading or financial corporation. If it falls outside those categories the Commonwealth cannot rely on

[60] Ibid. per Starke J. p. 304.
[61] *Strickland* v. *Rocla Concrete Pipes Limited* (1971) 124 C.L.R. 468 per Barwick C.J. at p. 490.
[62] Ibid. per Menzies J. p. 511.

s. 51(xx). Provided that the corporation is indeed a trading or financial corporation, could it be said that investing activity is one of the activities within the purview of the placitum? In *Concrete Pipes* Barwick C.J. describes those activities as "activities in trade with which the law has been familiar for centuries" (supra). Certainly investment activity is something with which the law has been familiar for centuries.

(3) THE ESTABLISHMENT OF A JOINT VENTURE CORPORATION

It is here assumed that the foreign investor, corporate or unincorporate, joins with an Australian investor, again corporate or unincorporate, and the investment is carried on through a corporation formed within the limits of the Commonwealth. Provided that the corporation can be said to be formed as a trading or financial corporation, it should not logically be of any consequence whether the corporation was formed some years previously or has only recently been formed. Indeed, although not judicially confirmed in Australia, the Trade Practices Commission has interpreted the merger provisions of the *Trade Practices Act* 1974 as applying to joint venture corporations, without however stating whether this is a valid exercise of the corporations power or the trade and commerce power.[63]

Let us assume that both the foreign and the Australian shareholders in the joint venture corporation are not incorporated. For the regulation of the corporation by the Guidelines to be then supported as a valid exercise of the corporations power, the regulation would not be of the *activities* of the joint venture corporation, but of the *shareholding* in the joint venture corporation itself. This would seem a dramatic extension of the corporations power.

Rich and Williams JJ., in the *Bank Nationalisation* case,[64] suggested that the placitum would not permit the Commonwealth to legislate to alter the internal regulation of a corporation. However, Their Honours indicated that the Commonwealth could impose conditions concerning the carrying on of a business which might require a corporation engaged in the relevant field of activity to alter its internal regulations. From this it could be argued that the Commonwealth could require that for a corporation to engage in, for example, uranium mining, it would need to provide in its Articles that 75% of the shareholding be Australian.

(4) A TAKEOVER OR ACQUISITION OF SHARES IN AUSTRALIAN CORPORATION

The case of a proposed takeover, or acquisition of shares, in an Australian corporation, must be examined in the light of a consideration

[63] See clearance granted for agreement between Abbott Laboratories and Ciech Centrala Importowa Eksportowa Chemicallii Sp. Z.D.O. to form Tasmania Alkaloids Pty Ltd (Reg. C472-C473 6th March 1975).

[64] (1948) 76 C.L.R. 1, 255, 256.

of the juristic status of the acquirer. If the acquirer is a foreign corporation, presumably the corporations power could regulate the investing activity of that corporation. Again, on the basis of the argument presented in paragraph (3) above, it might be possible to require the target corporation to amend its Articles to conform with rules as to minimum Australian equity requirements if it wishes to engage in certain specified business activities. Would a situation where the acquirer is not incorporated and the target corporation is not a trading or financial corporation escape from the Guidelines? Perhaps here reliance might be had on the trade and commerce power or alternatively on a submission that in order to effectuate the main purpose of the grounds of power contained in s. 51(xx), it would be necessary to invoke a power incidental to the corporations power to cover these forms of investment.[65]

(5) A Joint Venture

Again, if the foreign joint venturer is incorporated, presumably the power in relation to foreign corporations will cover this situation. If the foreign venturer is not incorporated but the Australian venturer is, the Commonwealth might be able to rely on a categorisation of the Australian joint venturer as a trading or financial Corporation. Presumably, joint venture activity is an activity "with which the law has been familiar for centuries" (supra) . . .and this would be the type of activity which can be regulated under s. 51(xx). If neither venturer is incorporated, or neither is a corporation within the purview of s. 51(xx), the Commonwealth would need to rely on a similar submission to that advanced in paragraph (4) above.

(6) Investment Activity by an Australian Subsidiary of a Foreign Corporation

Here, on the basis of the submissions above (paragraphs 1 and 2 respectively), the corporations power might apply firstly in relation to the Australian subsidiary, provided that is a trading or financial corporation, and secondly, in relation to the investment activity of the foreign corporation itself.

(7) Foreign Investment by an Unincorporated Foreign Investor

Here, without the formation of a partnership or joint venture with a trading or financial corporation formed within the limits of the Commonwealth, or without the investment being channelled into an Australian corporation, it might be difficult to justify control of this investment through the corporations power unless a version of the submission raised in paragraph (4) above could be sustained. It is submitted that such a

[65] *O'Sullivan* v. *Noarlunga Meat Limited* (1954) 92 C.L.R. 565; *Granall* v. *Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55.

wide interpretation would be most unlikely, having regard to the guarded dicta of the High Court (supra).

It therefore appears that the corporation power would seem to give only a patchwork validity to the Guidelines. These are factual situations where the reach of the power may at best be doubtful, and accordingly reliance should also be had on other powers.

It is now proposed to consider the relevance of the banking power.

2.5. *The Banking Power*

It has been noted above that a large part of banking is in itself trade and commerce. In addition, s. 51(xiii) grants a power to make laws with respect to banking, other than state banking. In the *Bank Nationalisation* case (supra) the Court held that banking could have only the wide meaning and flexible application of a general expression designating, as a subject of legislative power, a matter forming part of the commercial, economic and social organisation in the community.

It is relevant here to note that s. 39(1) of the *Banking Act* 1959 (the "Banking Act") provides that

> "[w]here the Governor-General considers it expedient to do so for purposes related to:
>
> (a) foreign exchange or the foreign exchange resources of Australia;
>
> (b) the protection of the currency or the protection of the public credit or revenue of Australia;
>
> (c) foreign investment in Australia, Australian investment outside Australia, foreign ownership or control of property in Australia or of Australian property outside Australia, or Australian ownership or control of property outside Australia, or of foreign property in Australia,
>
> then he may make regulations, not inconsistent with this Act, in accordance with this Section."

Pursuant to the *Banking Act,* regulations have been made known as the *Banking (Foreign Exchange) Regulations* (Cth).

The validity of one section, s. 5(1)(a) inserted by the 1964 amendment to the *Banking Act,* was questioned in *Talga Ltd* v. *M.B.C. International Ltd.*[66] Section 5(1)(a), in the words of Gibbs J., "in effect requires a court, in proceedings in which the validity of transactions has been called in question by reason of such a failure, to treat the transactions as never having been invalid for that reason only, if the court holds that it is just and equitable they should be treated as being valid".[67]

The facts in *Talga* involved various complicated financial transactions. Briefly, the need to repay a foreign loan was denied on the grounds that the necessary authority of the Reserve Bank was not obtained before

[66] (1976) 50 A.L.J.R. 619.
[67] Ibid. p. 628.

certain agreements in support of the loan were made. It was alleged that in consequence the agreements were illegal and unenforceable. The defendants relied on s. 5(1)(a) of the *Banking Act.* Alternatively, inter alia, the defendants set up the invalidity of various sections of the *Banking Act.*

At first instance, Gibbs J. applied s. 5(1)(a), finding that whilst there was lack of compliance with the *Banking (Foreign Exchange) Regulations,* it was just and equitable that the transaction should be treated as valid. An appeal by the plaintiff to the full High Court failed and the plaintiff's demurrer raising the question of the invalidity of s. 5(1)(a) of the *Banking Act* was overruled. The arguments challenging the validity of that section, based on the separation of powers contained in the Constitution, are not relevant to the matter under discussion herein, but the Court also rejected a contention that s. 5(1)(a) was a law with respect to contracts and not with respect to a subject on which the Commonwealth Parliament had power to legislate.

The latter aspect of the decision of the High Court is of interest, for it is submitted that it would similarly overrule any submission that the interconnecting provisions of the Guidelines and the *Banking (Foreign Exchange) Regulations* were invalid. As the matter was not argued, the validity of the *Banking (Foreign Exchange) Regulations* could still be challenged. It is submitted that having regard to the decision in the *Bank Nationalisation* case and the Court's disposal of one of the arguments referred to above in *Talga* on the validity of s. 5(1)(a) of the *Banking Act,* that the regulations are valid. Further, from the decision in *Murphyores* (supra),[68] it would seem that in granting or refusing authority or a foreign exchange transaction, the Reserve Bank may have regard to decisions made by other Commonwealth instrumentalities based on non-banking criteria, namely on the foreign equity interests in the relevant project.

2.6. *The Executive Power*

Perhaps purposefully, the Guidelines have not been given legislative force, so that their variation and, to a wide extent, their interpretation remain within the competence of the Executive. It is clear that the Federal Government is not restricted in the exercise of its powers merely to those delegated or authorised by Acts of Parliament. Section 61 of the Constitution provides that

> "The Executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution and to the laws of the Commonwealth."

[68] (1976) 50 A.L.J.R. 570.

In determining the meaning of this section of the Constitution, reference must be made to the extent of the power of the Crown at the time of the enacting of the Constitution.

It has long been accepted in British constitutional practice that the Executive, the Crown, has a power to act without statutory authority. In Australia, the Royal Prerogative remains as it was in 1900 to the extent that it is not affected expressly or by implication by the Constitution or by statute, including the implication that would arise on the grant of legislative power to the Commonwealth.[69] The High Court has recognised that the executive power of the Commonwealth includes the existing prerogative powers of the King of England as are applicable to a body politic with limited powers.[70] Evatt J., in *Federal Commissioner of Taxation* v. *Official Liquidator of E.O. Farley Ltd,*[71] distinguished between the so called executive prerogatives and the prerogatives of preference and immunity, and the prerogatives involving proprietary rights. The legislative indicia provided for in sections 51 and 52 of the Constitution are only useful in connection with the executive prerogatives. More recently, it has been held that the powers of the Executive which extend to the execution and maintenance of the Constitution, include for example, the determination of the number of members of the House of Representatives to be chosen in each State in accordance with the Constitution and in the absence of legislation.[72] The Guidelines therefore will appear to be constitutionally valid only if they can be the subject of valid Commonwealth legislation. This is the view of Barwick C.J., Gibbs and Mason JJ., in the *Australian Assistance Plan.*[73] However, Jacobs J. seems to suggest that the power extends further than the enumerated powers of the Commonwealth.

> "The area of its exercise on the advice of Australian Ministers is limited by the terms of the Constitution. Primarily its exercise is limited to those areas which are expressly made the subject matters of Commonwealth legislative power. But it cannot be strictly limited to those subject matters. The prerogative is now exercisable by the Queen through the Governor-General acting on the advice of the Executive Council on all matters which are the concern of Australia as a nation. Within the words 'maintenance of this Constitution' appearing in s. 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which

[69] *Bonanza Creek Gold Mining Co.* v. *King* [1916] 1 A.C. 566.
[70] *Australian Communist Party* v. *Commonwealth* (1950) 83 C.L.R. 1 per Williams J. p. 230.
[71] *Federal Commissioner of Taxation* v. *Official Liquidator of E.O. Farley Ltd* (1940) 63 C.L.R. 278, 319-323. See H. V. Evatt, *Certain Aspects of The Royal Prerogative: A Study in Constitutional Law,* a doctoral thesis, University of Sydney, 1924 pp. 39-41.
[72] *The Attorney-General for Australia (ex rel McKinlay)* v. *Commonwealth* (1976) 50 A.L.J.R. 279 per Barwick C.J. p. 287.
[73] (1976) 50 A.L.J.R. 157, 165, 171, 178.

> the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of various States."[74]

Although Jacobs J. was in the majority in upholding the validity of the Australian Assistance Plan, the other Justices directed their judgments to other constitutional issues, although Barwick C.J. seems to suggest that there are powers, as yet not fully explored, over and above the enumerated powers, and that these powers are implicit in the fact of nationhood and of international personality.[75] But Barwick C.J. does not say the executive power is wider than the legislative power. Gibbs J., on the width of the executive power, could not see that it would allow activity which could not be the subject of valid legislation.[76]

In confirming that legislation is not necessary prior to the exercise of the prerogative, Jacobs J. pointed out that

> "If legislation were a prerequisite it would follow that the Queen would never be able to exercise the prerogative through the Governor-General acting on the advice of the Executive Council; she would always exercise executive power by authority of the Parliament. This cannot be suggested. It would, if correct, result in an inability of Australia to declare war, make treaties, appoint officers of State and members of the Public Service of the Commonwealth and do all the multitude of things which still fall within the prerogative, unless there was a general or special sanction of an Act of Parliament."[77]

British precedents support this view. In referring to the Criminal Injuries Compensation Board, Diplock L.J., in *R.* v. *Criminal Injuries Compensation Board*,[78] commented on the birth of the Board in the following words

> "In the present case we are concerned with an inferior tribunal lawfully constituted in time of peace by an act of government. It may be a novel development in constitutional practice to govern by public statement of intention made by the executive government instead of by legislation. This is no more, however, than a reversion to the ancient practice of government by royal proclamation, although it is now subject to the limitations imposed on that practice by the development of constitutional law in the seventeenth century."

Accordingly, there would appear to be no constitutional impediment to the issue of the Guidelines by the Executive. It is now proposed to discuss the relationship between the guidelines and the *Banking (Foreign Exchange) Regulations* (Cth).

[74] Ibid. p. 181.
[75] Ibid. pp. 164, 165.
[76] Ibid. p. 171.
[77] Ibid. p. 181; Jacobs J. later points out that subsequent legislation could affect the prerogative, ibid. p. 181.
[78] [1967] 2 All E.R. 770, 780.

3. THE GUIDELINES AND THE *BANKING (FOREIGN EXCHANGE) REGULATIONS* (CTH)

Section 39 of the *Banking Act* has been referred to above. The section provides that where the Governor-General considers it expedient for purposes related to, inter alia, foreign investment in Australia he may make regulations not inconsistent with the Act. It is provided that the regulations authorised to be made by the section are regulations (being regulations with respect to matters with respect to which the parliament has power to make laws) making provision for or in relation to a miscellany of matters. These extend to the control or prohibition of various transactions in support of foreign investment.[79]

The *Banking Act* then gives a dispensing power in any regulations made by the Governor-General. Without limiting the generality of his power, the regulations may

"(a) for any purpose of the Regulations, prohibit the doing of any act or thing (including the importation or exportation of goods) specified in the regulations either absolutely or subject to conditions, being conditions which may prohibit the doing of the act or thing without the authority of the Reserve Bank or except in pursuance of a license granted under the regulations; . . .

(c) make provision for or in relation to the granting of exemptions, either unconditionally or subject to conditions determined by the Reserve Bank, from the application of any provision of the regulations" (s. 39(3)).

In addition, the *Banking Act* specifically provides that the regulations may provide that in the exercise of its powers or the performance of its functions under the regulations, or under a particular provision of the regulations specified in the regulations, the Reserve Bank is subject to the directions of the Treasurer (s. 39(7)).

The relevant features of the regulation—making power of the Governor-General under s. 39 appear to be

(i) The regulations may be made where the Governor-General considers it expedient or related to the specified purposes;

(ii) the regulations must not be inconsistent with the Act;

(iii) the regulations must be with respect to matters with respect to which the Parliament has power to make laws;

(iv) the regulations must make provision for or in relation to the matters specified in s. 39(2);

(v) the regulations may contain a dispensing power for the Reserve Bank, and

(vi) the regulations may provide generally or in specific regulations, that the Reserve Bank is subject to the directions of the Treasurer.

Pursuant to the *Banking Act,* regulations known as the *Banking (Foreign Exchange) Regulations* (Cth) ("the Regulations") make general

[79] Section 39(2) of the *Banking Act.*

provision for monetary control in Australia. Part II prohibits various currency transactions and dealings "except with the authority of the Bank".[80]

It would therefore appear, having regard to the prohibitions contained in Part II of the *Regulations* which create exceptions from the prohibitions where the authority of the Reserve Bank (or in an appropriate case its agent) is given, that foreign investment in Australia is subject to the discretion of the Reserve Bank in its administration of the currency.

It therefore seems that a proposal for foreign investment may involve an individual application to the Reserve Bank for approval for the monetary aspects of the transaction. Not all proposals for foreign investment (e.g. a proposal by a "foreign interest" within the Guidelines, which is a resident within the Regulations and which involves raising finance in Australia) need Reserve Bank approval.

In the Guidelines, the interlocking aspects of the guidelines and the *Regulations* is explained thus

> *"Relationship to Exchange Control Regulations.* The foreign investment machinery does not affect the legal requirements of the *Banking (Foreign Exchange) Regulations.* However, where Reserve Bank approvals are required in respect of a proposal falling within the ambit of foreign investment policy, the Bank will continue its practice of withholding approval until the Government has indicated that the proposal is not inconsistent with the policy."[81]

The Guidelines therefore impose a veto on the Reserve Bank approving any proposals which the Government indicates are inconsistent with the Guidelines.

Regulation 39, which is specifically within the power contained in s. 39(7) of the *Banking Act* provides

> "(1) Subject to any directions of the Treasurer, the grant of any authority by the Bank under any provision of these regulations shall be in the aboslute discretion of the Bank, and the authority may be granted either unconditionally or subject to such conditions as the Bank thinks fit for a purpose in relation to which these Regulations make provision. . . .
>
> (3) Subject to any directions of the Treasurer, the Bank may revoke or vary any authority granted by the Bank under any provision of these Regulations."

[80] *Banking (Foreign Exchange) Regulations* (Cth), regs 5-12.

[81] The guidelines also refer to a relationship to export permits thus:

> *"Relationship to Export Permits*
> So far as export permits are concerned a foreign investor to whom the screening machinery applies is assured that in consideration of his application for an export permit he will not be disadvantaged because of the degree of foreign participation in the venture, provided the foreign investment aspects have been approved by the Government as not being inconsistent with its foreign investment policy."

The decision in *Murphyores* (supra) would support the use of the powers over export permits to enforce the guidelines.

It would appear that the directive powers of the Treasurer contained in Regulation 39 overcome one of the problems traversed by the High Court in *The Queen* v. *Anderson; Ex parte Ipec-Air Pty Ltd.*[82] In that case one of the matters in issue was whether, when the Director-General of Civil Aviation received a request for permission to import freight aircraft for the purpose of carrying freight between cities in the Commonwealth, he might refuse to grant permission where government policy did not favour the importation of aircraft involving the provision of further facilities. The Government believed that a further entrant into this market would not be justifiable on economic grounds.

Ipec-Air therefore applied for the issue of a writ of mandamus directing the Director-General to grant permission in writing to import the aircraft, or alternatively directing him to consider and determine its application according to law.

The High Court refused the application; Taylor and Owen JJ. on the ground that the regulation in question did not create a duty the peformance of which could be enforced by mandamus;[83] Windeyer J. on the ground that in exercising his decision whether or not to give permission, the Director-General was under a duty to obey all lawful directions of the Minister, for the Minister himself was answerable to Parliament.[84]

Kitto J. posed the question whether the Director-General in truth had left the decision to the Government instead of making it himself.[85] His Honour came to the conclusion that the Director-General had not in fact properly come to a decision as the Regulations had entrusted that power only to him, and in this conclusion Menzies J. concurred.[86]

His Honour then found it unnecessary to answer a second question he had earlier posed, namely whether, if the Director-General made the decision himself, but was influenced by a view expressed by the Government, was his decision invalid as having been reached on the basis of an extraneous and inadmissable consideration?

Ipec-Air does not, it is submitted, delineate the extent to which an administrative body may be influenced by government policy in relation to the exercise of a discretion given by regulation.[87] Of the majority, only Windeyer J. answered this question, relying on the duty of the permanent head to obey the lawful instructions of the Minister. Any problem in this regard in relation to the Guidelines would seem to be overcome by

[82] (1965) 113 C.L.R. 177.
[83] Ibid. p. 198. The regulation in question was Regulation 4 of the *Customs (Prohibited Imports) Regulations.*
[84] Ibid. p. 206.
[85] Ibid. p. 189.
[86] Ibid. p. 201.
[87] The administrative body may adopt its own general policy, *The King* v. *Port of London Authority* [1919] I K.B. 176; whilst however adopting a general policy, each application for the exercise of a discretion must be considered as an individual case, see *Water Conservation and Irrigation Commission (N.S.W.)* v. *Browning* (1947) 74 C.L.R. 493, per Dixon J. pp. 501-506.

Regulation 9, and s. 39(7) of the *Banking Act* which allows specifically for directions from the Treasurer.

In determining whether Part II of the *Regulations* imposes a duty on the Reserve Bank to consider and determine applications for grants of authority, the answer may be found, it is submitted, by reference to *Murphyores*[88] and *Ipec-Air*. In *Ipec-Air*, a majority of the High Court, Kitto, Menzies and Windeyer JJ., held that the regulation in question created such a duty.[89] It will be recalled that Kitto and Menzies JJ. were in dissent in the final decision.

In *Murphyores*, Gibbs, Mason, Jacobs and Murphy JJ. held that Regulation 9 of the *Customs (Prohibited Exports) Regulations* (Cth), which prohibited certain exports without the production to the Collector of Customs of the approval in writing of the Minister for Minerals and Energy or a person authorised by him in writing, imposed a duty on the Minister or the person authorised to consider and determine applications.[90]

Accordingly, it would appear that the Reserve Bank is under a similar duty in relation to the *Banking (Foreign Exchange) Regulations* (Cth) subject to "directions from the Treasurer".

Presumably, the Reserve Bank will treat the Guidelines as "directions of the Treasurer". Is the Treasurer then under a duty to consider and determine each application, such duty being co-existent with that of the Reserve Bank?[91]

If the singular word "direction" had been used, a stronger argument for individual consideration would appear to be available; the use of the plural seems to envisage a general policy without creating a duty in the Treasurer of considering each application.

4. CONCLUSION

The conclusion of this article is that the Guidelines can be supported as a valid exercise of the Commonwealth's powers. The enumerated powers of s. 51 of the Constitution referred to above should be sufficient to support this proposition; moreover, the fact that the Guidelines are not in the form of legislation appears to impose no impediment to their validity. Finally the use of the powers under *Banking (Foreign Exchange) Regulations* (Cth) to ensure observance of guidelines could not, it is submitted, be challenged. That there is a duty enforceable by mandamus on the Reserve Bank to consider each application appears to be established and reference by the Reserve Bank to the Guidelines would appear to be expressly sanctioned.

[88] *Murphyores Incorporated* v. *The Commonwealth and ors.* (1976) 50 A.L.J.R. 570.
[89] (1965) 113 C.L.R. 177, 189, 201 and 204-205.
[90] Op. cit. pp. 573, 576, 577, 580.
[91] If the regulations impose a duty on the Treasurer, a further problem arises as to whether mandamus will lie, see *Ex parte Cornford; Re Minister for Education* (1962) 62 S.R. (N.S.W.) 220, 223-224.