CONSTITUTIONAL ASPECTS OF THE TRADE PRACTICES ACT.

BRADKEN CONSOLIDATED LTD v. BROKEN HILL PTY CO ADAMSON, EX PARTE W.A.N.F.L.:

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Two cases recently decided by the High Court have partially settled some issues concerning the kinds of legal entities subject to the Commonwealth's trade practices legislation, whilst leaving some intriguing questions unresolved.

In *Bradken Consolidated Ltd.* v. *Broken Hill Pty. Co. Ltd.* (hereafter *Bradken*)[1] a company that manufactured specialised railway equipment brought an action against the Commissioner for Railways of Queensland and several other companies that had agreed, under contract, to supply railway equipment to the Commissioner. *Bradken* complained that the contract would have the effect of substantially lessening competition contrary to s.45(3) of the Trade Practices Act 1974. Alternatively it was alleged that a contract between the Commissioner and one of the suppliers amounted to the practice of exclusive dealing contrary to s.47(2) of that Act.

In his defence, the Commissioner denied that he was a "trading corporation" to which the Act applied. He claimed also that he was an instrumentality or agent of the Crown in right of the State of Queensland entitled to all rights, powers, privileges and immunities of the Crown, and that as such the Trade Practices Act did not apply to him because it was not intended to bind the Crown in right of a State.

It has been a hallmark of the High Court's decisions concerning the ambit of s.51(xx) of the Constitution, the "Corporations" power, since the landmark decision in the *Concrete Pipes* case[2] in 1971, that the various Justices have been cautious and hesitant in exploring issues concerning the scope of that power.

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1 (1979) 24 A.L.R. 9.

2 Strickland v. Rocla Concrete Pipes Ltd. (1971) 124 C.L.R. 468. See also Re Wise; Ex parte CLM Holdings Pty. Ltd. (1977) 13 A.L.R. 273.

In *Bradken,* the Court comprising five Justices proved reluctant, apart from Murphy J., to pronounce whether or not a governmental concern such as the Commissioner would qualify as a "trading corporation" within the meaning of that term in s.51(xx). Gibbs J. avoided the question as one that did not logically require to be answered, since the case could be disposed of by deciding the constructional issue whether the Act was intended to bind State instrumentalities. Having said that he need not decide whether the Commissioner was a trading corporation, his Honour nevertheless took the opportunity, "to avoid possible misunderstanding", to add that "as at present advised I am clearly of the opinion that the Commissioner is not a trading corporation within the Trade Practices Act—his position seems to me stronger than that of the county council considered in *R.* v. *Trade Practices Tribunal; Ex parte St. George County Council* (1974) 130 C.L.R. 533."[3]

The only other judge to comment on the issue was Murphy J.[4] He was troubled by the fact that the question whether the Commissioner was a trading corporation had not been argued, and in particular the correctness of the decision in the *St. George County Council* case had not been questioned. He indicated that he had the gravest doubts about a concession that the Commissioner was not a trading corporation. In his opinion "those trading corporations of the Crown in right of a State such as the Commissioner for Railways of Queensland, are within the constitutional meaning of "trading corporations" within para. 51(xx)."[5]

The alternative defence asserted by the Commissioner relied on two steps. The first was the argument that the Commissioner was an instrumentality or agent of the Crown in right of the State of Queensland. If that were accepted, the further proposition was put that the legislative intention of the Trade Practices Act was that it should not bind the Crown in right of a State. All five Justices accepted the first contention.[6] The major considerations prompting this result were first, as a matter of construction, it was clear from the relevant legislation that established the Commissioner as a corporation sole, namely the Railways Act, 1914 (Qld.) that he represented the Crown and was entitled to exercise all the powers, privileges, rights and immunities of the Crown. Secondly, the Commissioner was a body subject to direct ministerial control, whilst, thirdly, all monies payable to the Commissioner were payable into consolidated revenue. Finally, all contracts entered into by the Minister

[3] Supra n.1 at 15.
[4] Id. at 34.
[5] Id. at 34-35.
[6] Per Gibbs A.C.T. at 15-16; per Stephen J. at 24-25; per Mason and Jacobs JJ. at 30; per Murphy J. at 34.

were subject to ministerial approval and were to be "binding upon the Commissioner on behalf of the Crown".

Aiding in this conclusion was the fact that historically the conduct of railways was regarded as a proper governmental function of the States.[7]

Once it was accepted that the Commissioner enjoyed the immunity of the Crown in right of the State, the further issue arose whether the State itself was subject to the Commonwealth legislation. The normal rule is that a statute will only bind the Crown if the Crown is expressly mentioned therein or if it appears by necessary implication that it intended to bind the Crown. The authority usually cited for this is *Province of Bombay* v. *The Municipal Corporation of Bombay*[8]. The application of that rule creates no great problem when the question is simply one concerning unitary legislatures. However, the problem is much more complicated when the issue is whether the laws of one governmental system in a *federation* cast liability on any counterpart system.

The legislation in question, the Trade Practices Act, was expressed to bind the Crown in right of the Commonwealth, but was silent as to whether it bound the Crown in right of a State. Two views could be taken as to the appropriate presumption to apply in such circumstances. On what can be described as the narrow view, the presumption that the Crown is not bound except by express mention or necessary implication only applies to the legislating government. It would follow that where Commonwealth legislation is in issue, the States would be taken to be bound, along with the subjects of the Crown, unless expressly excluded. The contending wide view, for which support could be found in the majority judgments in *Minister for Works (W.A.)* v. *Gulson*[9] and the *Commonwealth* v. *Rhind*[10] presumes that neither the Crown in right of the Commonwealth, nor the Crown in right of the States, should be regarded as bound by legislation which is otherwise silent on the matter, and from which no necessary implication of intended liability arises. It was this wide view that commended itself to the majority (Gibbs ACJ, Stephen J, and Mason & Jacobs JJ) though Murphy J held a contrary view on this point. Since it did not appear by express words or necessary implication that the Trade Practices Act was intended to bind the Crown in right of a State, it followed that the Commissioner was not subject to the Act's provisions. In coming to this conclusion their Honours were able to avoid the difficult conceptual problems that arise

7 See Gibbs A.C.J. at 16.
8 [1947] A.C. 59,61.
9 (1944) 69 C.L.R. 338.
10 (1969) 119 C.L.R. 584.

from the theory that the Crown is one and indivisible.[11] The schizophrenic problems of accommodating various governmental systems to a notion of corporate Crown unity may be regarded as an unnecessary and inappropriate construct in these times. The doctrine of Crown indivisibility might have made sense at a time when, symbolically, governmental sovereignty was closely associated with a personal monarch but as pointed out by Gibbs ACJ the doctrine of Crown indivisibility now "seems more remote from practical realities than when the *Engineers'* case was decided".[12] That mystical and obscure doctrine merely disguises, it is submitted, the fact that what is really involved is the inter-relationship of two different governmental systems. The approach of the Justices in *Bradken* is therefore a refreshing refusal to resort to outmoded and inappropriate symbolism.

Perhaps the most significant point that was decided in *Bradken* however, was that not only was the Commissioner held to be excluded from the intended operation of the Act, but also the other defendants who were in a contractual relationship with him were held not to be affected by the operation of the Act. The majority[13] (Murphy J again dissenting)[14] considered that if those in a contractual relationship with the Commissioner *were* held to be subject to the Act, whilst he was not, the result would be the same as if the Commissioner were bound. He was not to be indirectly deprived of the fruits of his immunity by subjecting contracts into which he had entered to the full force of the Act.

The intriguing prospect, and one which will not escape legal advisers to commercial parties, is that the prospect now exists for corporations to shield themselves from the operation of the Act by involving a Crown party in their contracts. One can foresee an element of fabrication here. The short answer, so far as the Commonwealth is concerned, would be to amend its legislation so as to bind the Crown in right of the States. If that were done, wider issues of Crown immunity might arise. For the States, it might be argued that such express treatment in the Commonwealth's law amounted to unconstitutional discrimination of the kind recognised in the *State Banking* case[15] as a ground for invalidity. However the better view, it is submitted, would be that such express mention would merely assimilate the Crown to the situation occupied by all other persons to whom the Act applies, giving the legislation a uniform and universal application.

11 See Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129 at 152 for an elaboration of this view.

12 Supra n.1 at 21.

13 Id. per Gibbs A.C.J. at 22-23; per Stephen J. at 26; per Mason and Jacobs JJ. at 33.

14 Id. at 35-36.

15 Melbourne Corporation v. The Commonwealth (1947) 74 C.L.R. 31.

If a provision binding the Crown in right of a State were introduced, it would appear to eliminate the loophole exposed in *Bradken*. It would, however, turn attention to the issue which the Court was able to avoid in that case, namely, whether a State Government instrumentality, established by statute for the purpose of engaging in trade, is a "trading corporation" within the meaning of s.51(xx) of the Constitution.

It is for that reason that the decision in *Adamson's* case[16] becomes pertinent. Of particular relevance here, is whether *Adamson's* case has effectively overruled the decision in *R. v. Trade Practices Tribunal, ex parte St. George County Council*[17] as to what constitutes a "trading corporation". The significance of whether a given corporation is a trading or financial, or a foreign corporation is that if a corporation is not so characterised, it falls entirely outside the range of federal power under s.51(xx). In the somewhat unsatisfactory decision in *St. George County Council,* Barwick CJ took the view that it was the actual *activities* in which a corporation engaged that determined whether or not it was a trading corporation.[19] If it traded, then it qualified, irrespective of the *purposes* for which it was originally established. Menzies, Gibbs and Stephen JJ[20] took the view that the *purpose* for which a corporation was established was decisive. The key test was to look to the Act or charter under which a corporation was set up so that if it was established to operate as a local government body, it would not be a trading corporation notwithstanding that it may engage in some trading activities. Gibbs J said the question was what was the "true character" of the corporation.[21] This was to be determined on the face of the Act that set the corporation up. In his view the County Council had been established to provide a particular service and such it should not fall in the description of a "trading corporation". Stephen J likewise treated the issue as one to be decided according to the original purpose of establishment, but concluded that it was established to trade.[22]

With that as background, one can assess the impact of *Adamson.*

16 R. v. Judges of the Federal Court and Adamson; Ex parte the Western Australian National Football League (1979) 23 A.L.R. 439.

17 (1974) 130 C.L.R. 533.

18 Unsatisfactory because of the lack of a consensus among the individual justices about whether a municipal corporation that engaged in the sale of electricity was a trading corporation within s.51(xx), Barwick C.J. and Stephen J. holding that it was, Menzies and Gibbs JJ. holding that it was not, with McTiernan J. deciding the case as a matter of statutory construction. See also P. H. Lane, "The Federal Control of Trading Corporations" 48 A.L.J. 233.

19 Supra n.17 at 543.

20 Id. at 549-554 per Menzies J; 555-565 per Gibbs J.; 566-570 per Stephen J.

21 Id. at 565.

22 Id. at 570.

There an Australian Rules footballer alleged that he was prevented, by the combined effect of the Rules of the Western Australian and South Australian National Football Leagues (both incorporated bodies), from playing football with a South Australian club, he be initially engaged to a West Australian club (also incorporated). He commenced proceedings under the Trade Practices Act alleging a contravention of s.45 which prohibits agreements in restraint of trade. That section is directed to restraining conduct engaged in by a "corporation" which is defined in s.4 of the Act to include, inter alis, a "trading corporation", in the constitutional sense.

In addressing the question whether bodies such as the respective National Football Leagues, or the West Perth Football Club was a trading corporation, Barwick CJ, Mason, Jacobs and Murphy JJ. held in the affirmative, whilst Gibbs, Stephen and Aikin JJ were of the contrary view.

As a first step towards these conclusions, it was necessary to decide whether the National Football League and Football Club were in fact corporations. Since they were incorporated under the Associations Incorporation Acts of their respective States, their corporate identity was held to exist.[23]

Leading for the majority on the further question of whether they were trading corporations, Barwick CJ indicated[24] that the proper test was: Is trading a *principal corporate activity* of the body. If so, the body falls within s.51(xx). He distinguished the *St. George County Council* case (in which strictly speaking he was in the minority) by regarding that case as being narrowly confined to its particular facts. Here, it is significant, he indicated that the Municipal Corporation was to be regarded as a *government* body supplying electricity as a *public service* rather than as a trading corporation. He thereby rejected the notion that the case was decided solely on the basis of the purpose of the corporation to the exclusion of any consideration about what a "corporation" actually did, and, in particular, whether it engaged in trade. As to whether the relevant football bodies fell within the description, he held that they engaged in trade and therefore were within the scope of the Act.

What is notable, particularly in the context of *Bradken,* is that he was prepared to preserve the authority of the *St. George County Council* case with respect to governmental bodies supplying services. This would obviously apply to instrumentalities such as the State Energy Commissions and Railways.

Mason J with whom Jacobs J agreed, rejected the interpretation of *St.*

[23] Supra n.16, 444 per Barwick C.J.; 471-472 per Mason J.
[24] Id. at 452-453.

George County Council to the effect that one must exclusively have regard to the purpose of establishment, without considering the current activities of a corporation. He alluded to the fact that the case was decided on the views of three Justices, and indicated that he preferred the minority view, particularly that of Barwick CJ. To qualify as a trading corporation, the companies trading activities must "form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation".[25] He conceded that "not every corporation which is engaged in trading activities are trading corporations."[26] He instanced the situation where the trading activity of a corporation may be so slight and so incidental in relation to some other principle activity (such as religion or education, in a case of a church or school) that it could not be described as a trading corporation. This must be of some consolation to university book shops and church coffee bars. Having regard to the trading activities of the bodies before him, as a question of fact and degree, he decided that the leagues and the football club were trading corporations.[27]

Murphy J held that "the constitutional description of a trading corporation includes those bodies incorporated for the purpose of trading; and also those corporations which trade it". For his Honour "as long as the trading is not insubstantial, the fact that trading is incidental to other activities (such as sporting, religious or governmental, does not prevent it being a trading corporation."[28] His Honour was the only Justice to assert that *St. George County Council* was wrongly decided and it should be overruled.[29]

In the minority, Gibbs J.[30] softened his view in *St. George County Council,* and was not, it is submitted, as distant from the majority in *Adamson* as may appear at first. As he saw it, the decision in *St. George County Council* should be seen as rejecting the proposition that simply because a corporation trades it was a trading corporation. On the other hand he conceded that the memorandum of incorporation was not the sole source of information to the character of a corporation. It was relevant to consider whether the corporation in question did trade. This was for the purpose of deciding what was "predominant and characteristic activity" of the corporation. On the facts, he held that the club and the leagues were not trading corporations.

25 Id. at 472.
26 Id. at 473.
27 Id. at 475.
28 Id. at 477.
29 Id. at 478.
30 Id. at 456.

Stephen J,[31] with whom Aikin J agreed,[32] did not find it necessary to settle which of the tests alluded to in *St. George County Council* was correct. As he saw it, whatever test was applied, the bodies concerned were not trading corporations. This was because their trading activities were subordinated to the promotion of football. The latter was the main purpose of the bodies whereas trading was ancillary or incidental to that purpose.[33] In coming to that conclusion, his Honour equated the intended purpose of the bodies with their actual activities.

By way of summary, one could say that none of the judgments (apart from that of Murphy J.) can be said, on their terms, to expressly overrule *St. George County Council.* It is possible to reconcile the various judgments on the basis that neither purpose nor current activities can be regarded exclusively as the determining factor. Where the difference lies is in thc emphasis that is placed on the degree to which a corporation engages in trade and the function that the trading activity serves in promoting the objects of the body. Even confined to its narrowest scope, *St. George County Council* would suggest that corporations providing an essentially governmental service fall outside Commonwealth's power under s.51(xx),[34] thus offering the prospect of the extended immunity, suggested in *Bradken,* that might ensue from including contracts that involve State statutory authorities.

31 Id. at 461.

32 Id. at 478.

33 Id. at 462.

34 Note, however, that the Commonwealth might be able to argue that the Act applies as an exercise of the power under s.51(i) of the Constitution, if interstate trade and commerce is present. In *Adamson* no Justice was prepared to hold that the staging and promotion of football involved interstate trade and commerce. State Railways systems, on the other hand, probably do (see Australian National Airways Pty. Ltd. v. The Commonwealth (1945) 71 C.L.R. 29).