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CONTINUING PROFESSIONAL EDUCATION SEMINAR

"51(xx) - The Ambit of the Corporations Power"

by

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"51(xx) - The Ambit of the Corporations Power"

Introduction

1. At the time of preparing this paper the Government had yet to present draft legislation detailing its much anticipated 'second wave' workplace relations reforms in Federal Parliament. However, a policy announcement on 9 October 2005 confirmed that the reforms would include legislation aimed at creating a unitary industrial relations system across the Commonwealth[1].

2. Given that much of the proposed legislation is evidently to be enacted pursuant to section 51(xx) of the Commonwealth Constitution ("**the Corporations Power**")[2], this paper aims to deal with some aspects concerning the ambit of this head of power with a view to identifying certain issues which may arise in the course of providing advice on these matters.

3. The validity of the proposed legislation will be subject to its characterization as a law 'with respect to' an enumerated head of Constitutional power[3]. An issue central to the determination of the validity of the proposed laws will be the question of whether or not the scope of the Corporations Power extends to matters involving the internal management of corporations.

Constitutional Support for Federal Industrial Legislation based on Section 51(xx)

4. Does the Corporations Power support Federal legislation directed to the control and management of the internal affairs of constitutional corporations?

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[1] 'Workchoices' booklet – many of the reforms detailed in Workchoices were previously foreshadowed by the Prime Minister in a speech to Parliament on 26 May 2005

[2] 'Workchoices' page 11; Transcript of Media Release by the Hon Kevin Andrews MP on 9 October 2005 "Workchoices: Moving Towards a Simpler, National Workplace Relations System".

[3] Subject to other provisions and implications found in the Constitution.

5. Under section 51(xx) of the Constitution, Federal Parliament has (subject to the Constitution) "*power to make laws for the peace order and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth*".

6. The Corporations Power has been described (and construed) as a plenary power[4]. Originally however, the Corporations Power was narrowly construed. In *Huddart, Parker v Moorehead* (1908) 8 CLR 330, the High Court held the provisions of the *Australian Industries Preservation Act 1906* (Cth), which prohibited contracts and combinations in restraint of trade, to be invalid. The majority concluded that the grant of legislative power in section 51(xx) should be narrowly construed as excluding any general legislative power to regulate or control the actual conduct and activities of such corporations. However there was no unanimity on the question of what laws section 51(xx) did empower the Parliament to make. For example, O'Connor J thought the power section 51(xx) conferred was to make laws with respect to the recognition of corporations as legal entities throughout the Commonwealth.

7. The majority judgments in *Huddart Parker* were permeated by the 'reserved powers doctrine' under which the legislative powers of the Commonwealth were interpreted restrictively upon the basis that certain powers were reserved by the to the States. This approach, which involved Constitutional interpretation by reference to preconceptions of the extent of the residue of legislative power retained by the States, was later definitively rejected in the *Engineers' Case* (1920) 28 CLR 129.

8. Since the *Engineers Case,* the general principles which are applied to determine whether a law is with respect to a head of legislative power have continued to be

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[4] See for example *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 ("*Re Dingjan*") at 333–4 (Mason CJ), 352–3 (Toohey J), 364–5 (Gaudron J), 369 (McHugh J); *Commonwealth v Tasmania* (1983) 158 CLR 1 ("*Tasmanian Dam Case*") at 148–9 (Mason J), 179 (Murphy J), 268-271 (Deane J).

the subject of much debate (including in the present High Court[5]), however can be taken to include the following:

i. the constitutional text is to be construed with all the generality which the words used admit[6];

ii. the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates[7];

iii. the law's practical as well as legal operation must be examined to determine whether there is a sufficient connection between the law and the head of power[8];

iv. if a connection exists between the law and the relevant head of power, the law will be with respect to that head of power unless the connection is so insubstantial, tenuous or distant that it cannot sensibly be described as a law 'with respect to' that head of power[9].

9. Isaacs J dissented in *Huddart Parker.* His reasoning was not infected with the reserved powers fallacy[10]. Isaacs J would have held the impugned provisions of the *Australian Industries Preservation Act 1906* (Cth) to be valid, however would have limited the ambit of the Corporations Power to subject matter which "includes or is necessarily incidental to the control of the conduct of the corporations in relation to outside persons". Accordingly, Isaacs J did not consider the scope of the Corporations Power to extend to the internal management of the Corporation *vis a vis* its employees.

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[5] See *Al Kateb v Godwin* (2004) 208 ALR 124.

[6] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[7] See also *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225; see also *Singh v The Commonwealth* (2004) 209 ALR 355.

[8] *Cunliffe v Commonwealth* (1994) 182 CLR 272 per Brennan J at 318

[9] and see *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at [35] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

[10] Isaacs J followed the method of interpretation laid out by the Privy Council in *Webb v Outtrim* (1907) 4 CLR 356 rather than that adopted by *Chase* CJ in *US v Dewitt* 9 Wall. 41 (and felt bound to do so).

10. Notwithstanding the decision in the *Engineers Case,* the Corporations Power continued to be given a narrow construction by the High Court in subsequent decisions involving Banking[11] and Insurance[12] legislation. The enlargement of Commonwealth power with respect to corporations was not realized until 1971.

11. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 concerned the validity of section 35 of the *Trade Practices Act 1965* (Cth) which defined certain agreements (in restraint of trade) between parties to be 'examinable' if one of the parties was a constitutional corporation. An information was laid before the Commonwealth Industrial Court charging 3 public companies with failing to register particulars of an examinable agreement (to sell and supply goods *in* Queensland). The Industrial Court considered itself bound by *Huddart Parker* and declared the relevant provisions invalid. The High Court overruled *Huddart Parker,* however the Justices were not prepared to define the outer limits of the reach of the Corporations Power[13], save as to hold that for the purposes of the case the Commonwealth had power to regulate trading activities that were anti-competitive. Barwick CJ (and Menzies J) however cautioned against a conclusion that any law which was addressed specifically to constitutional corporations was therefore a law with respect to the subject matter of section 51(xx).

12. In *Actors Equity v Fontana Films Pty Ltd* (1982) 150 CLR 169 the validity of provisions in section 45D of the *Trade Practices Act 1974* (Cth) were in issue. Fontana Films produced films and employed actors. Actors Equity demanded that Fontana Films employ only members of the union. An application was made under section 45D for an injunction against the union to restrain them from acting in concert with any person to prevent the supply of actors by theatrical agents. An interim order was made based on the evidence filed and the deeming provisions in the legislation which provided, *inter alia,* in effect that conduct by the union's

[11] *Bank of NSW v Cth* (1948) 76 CLR 1 ("*the Bank Nationalisation Case*").
[12] *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78
[13] See Barwick CJ at page 490.

members was to be treated as conduct by the union, unless the union could establish it had taken all reasonable steps to prevent the conduct.

13. The High Court, by majority, upheld the secondary boycott provisions in section 45D (subject to some qualifications), however held the deeming provisions invalid. The Court was split in its construction of the Corporations Power. Gibbs CJ (with Wilson J agreeing) opined that laws with respect to the trading activities of Trading Corporations would be within power. Stephen and Brennan J agreed that the Corporations Power at least empowered legislation with respect to the trading activities of Trading Corporations, and left for a future date the question of whether the ambit extended beyond the scope of trading activities. Mason, Murphy and Aickin JJ were of the view that the power conferred by section 51(xx) is not expressed as a power with respect to a function of government, a field of activity or a class of relationships but as a power with respect to persons, namely, corporations of the classes therein specified[14]. That is, the subject matter of the Corporations Power is not confined to the trading activities of trading corporations.

14. Somewhat ironically, it was the Justices who expressed the narrowest view of the Corporations Power who would have held the deeming provisions of the Act to be valid (relying on the incidental power inherent in section 51(xx)[15]). The majority, including those members of the Court who took the broad view of the power, held in effect that the deeming provisions were laws with respect to trade unions, not corporations, and therefore invalid.

15. A broad view of the Corporations Power was also taken by (at least) 3 of the 7 Justices in the *Tasmanian Dam Case*[16]. The Commonwealth sought to rely on section 51(xx) to support the *World Heritage Properties Conservation Act 1983*

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[14] *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at pp 181, 216; and see *Tasmanian Dam Case* (1983) 158 CLR 1 at pp 157, 202, 240, 269, 314.
[15] See *Grannall v Marrickville Margerine* (1955) 93 CLR 55 at 77 per Dixon CJ.
[16] Mason J (at 146-52), Murphy J (at 179) and Deane J (at 268-272).

(Cth), an Act which *inter alia* prohibited any work on a site whose protection was an international obligation for Australia. The Commonwealth sought declarations that it would be unlawful for the Tasmanian Hydro Electricity Commission to construct a dam on a proclaimed World Heritage site. Tasmania countered seeking declarations that the Commonwealth legislation was invalid. Mason, Murphy and Deane JJ, in *obiter*, were supportive of the broad view of the Corporations Power, that is, that a corporation's trading *and* non-trading activities were amenable to regulation by Federal legislation enacted by dint of the Corporations Power.

16. In *Re Dingjan*; *Ex parte Wagner* (1995) 183 CLR 323, the issue was whether a law which purported to confer power on the Australian Industrial Relations Commission to review contracts on the grounds of unfairness was *ultra vires* the Corporations Power. Section 127C(1)(b) of the *Industrial Relations Act 1988* (Cth) provided that the provision empowering the review applied *inter alia* "in relation to a contract relating to the business of a constitutional corporation".

17. A majority of the High Court held section 127C(1)(b) to be invalid as it did not have a sufficient connection to the Constitutional head of power. The provision failed to attract the support of section 51(xx) *inter alia* "because the words "relating to the business" do not import a requirement that the business be materially affected[17]".

18. Most of the Justices in *Re Dingjan* (except for Dawson J) took a broad view of the Corporations Power. McHugh J reiterated the (now orthodox) view that section 51(xx) was a power to make laws with respect to corporate persons, and not with respect to trading activities *per se*. As to whether a law could be said to have a sufficient or reasonable connection with a head of power, McHugh J stated (at page 370):

[17] Brennan J at (1995) 183 CLR 323 at 340

"*[s]o, where a law seeks to regulate the conduct of persons other than s.51 (xx) corporations or the employees, officers or shareholders of those corporations, the law will generally not be authorised by s.51 (xx) unless it does more than operate by reference to the activities, functions, relationships or business of such corporations. A law operating on the conduct of outsiders will not be within the power conferred by s.51 xx) unless that conduct has significance for trading, financial or foreign corporations. In most cases, that will mean that the conduct must have some beneficial or detrimental effect on trading, financial or foreign corporations or their officers, employees or shareholders. Thus, laws that regulate conduct that promotes or protects the functions, activities, relationships or business of such corporations or laws that regulate conduct conferring benefits on those corporations are laws with respect to s.51 (xx) corporations even though they are also laws with respect to that conduct.... But a law that does no more than make some activity of a s.51 (xx) corporation the condition for regulating the conduct of an outsider will ordinarily not be a law with respect to those corporations*".

19. If an entity is incorporated, then it will be a constitutional corporation in its own right if it satisfies the relevant characterization test (discussed below). This however does not mean that entities which do not otherwise satisfy the characterization tests cannot in any event come within the reach of Federal legislation which has a sufficient connection to the subject matter of the Corporations Power so that the law can be described as a law with respect to trading or financial corporations (notwithstanding that the law may be directed to persons or entities other than constitutional corporations: *Actor Equity v Fontana Films* (1982) 150 CLR 169; *Re Dingjan*); or relies on another head of Constitutional power.

20. The Corporations Power has already been drawn upon to support the provisions governing the making of Australian Workplace Agreements and certified agreements with constitutional corporations in the *Workplace Relations Act 1996*

(Cth) [18]. The validity of former provisions relating to federal certified agreements as supported by the Corporations Power was upheld in the context of the former *Industrial Relations Act 1988* (Cth): *Victoria v Commonwealth* (1996) 187 CLR 416[19].

21. Based on an assessment of the ratio in *Re Dingjan,* it appears likely that legislation with respect to the '*activities, functions, relationships, and business*' of a foreign, trading or financial corporation will be within Commonwealth power if those activities have some significance for the corporation itself (whether detrimental or beneficial). On this argument, industrial relations matters within corporate enterprises would arguably fall within the subject matter of section 51(xx): and see *Re Dingjan* at 364–5; *Re Pacific Coal Pty Ltd, Ex parte CFMEU* (2000) 203 CLR 346 ("*Re Pacific Coal*") at 375 (per Gaudron J).

Characterizing Corporations for the Purposes of Section 51(xx)

(i) Trading Corporations

22. Two tests have been used to determine whether a corporation is a trading corporation:

(1) a factual test as to the precise nature of a corporation's established activities, referred to as the 'activities' test; and

(2) a 'nature and purpose test' based on the objects of a corporation[20].

23. A trading corporation whose trading activities take place so that it may carry on some other primary or dominant undertaking (which is not trading) may

[18] See Ford W J, 'Reconstructing Australian Labour Law: A Constitutional Perspective' (1997) 10 Australian Journal of Labour Law 1 esp. at 20-30.
[19] although this was in the face of a critical concession made by the Applicant in that case
[20] *Fencott v Muller* (1983) 152 CLR 570

nevertheless be a trading corporation: *Tasmanian Dam* per Mason J at 156; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282. That is, a trading corporation is to be identified primarily by reference to its activities - not by its predominant or characteristic activities - but by any of its significant or substantial activities.

24. In *Quickenden v O'Connor* (2001) 184 ALR 260, the characterization of a University as a trading and financial corporation was in issue. The University of Western Australia was established by the *University of Western Australia Act 1911* (WA) as a body corporate. The primary objective of the legislation, set out in its preamble, was to provide for "*instruction in those practical arts and liberal studies which are needed to advance the prosperity and welfare of the people*". The legislation also conferred expansive powers to, *inter alia*, invest monies and otherwise deal with property.

25. The Full Court (Black CJ & French J; with Carr J agreeing but publishing separate reasons) held in accordance with the relevant authorities set out above that a corporation is a trading corporation if trading is a substantial or significant part of its activities. This determination was irrespective of the purpose for which the corporation was formed[21].

26. Examples of organisations held to be trading corporations include:

    a. *Adamson's case*; the Western Australian Football League and West Perth Football club;
    b. *Hughes v Western Australian Cricket Assn (Inc)* (1986) 19 FCR 10; 69 ALR 660: the Western Australian Cricket Association (but not the individual district cricket clubs);

[21] Special Leave to Appeal this decision was refused: *Quickenden v Commissioner O'Connor of the AIRC & Ors* P13/2001 (31 May 2002)

c. The *Tasmanian Dams Case* (1983) 158 CLR 1; the Tasmanian Hydro-Electric Commission[22];

d. *Sun Earth Homes Pty Ltd v Australian Broadcasting Corp* (1990) 98 ALR 101; the Australian Broadcasting Corporation;

e. *E v Australian Red Cross Society* (1991) 27 FCR 310; 99 ALR 601; Royal Prince Alfred Hospital, Sydney, the Australian Red Cross Society, and the New South Wales Division of the Australian Red Cross Society;

f. *Quickenden v O'Connor* (2001) 184 ALR 260: the University of Western Australia.

27. Examples of organisations held not to be trading corporations include:

a. A body corporate formed in connection with a residential development: *Coastalstyle Pty Ltd v Proprietors 'Surf Regency' Building Units Plan No 4246* [1995] 1 Qd R 132;

b. A sporting organisation that sold rule books by a on a small scale only: *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241

(ii) Financial Corporations

28. A corporation is a 'financial corporation' for the purposes of section 51(xx) if it engages in substantial financial activities or intends to do so. It is not necessary that financial activities be the predominant or characteristic activity of the corporation, and a corporation which engages in substantial financial activities in the course of carrying on its primary business will be classified as a financial corporation: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304 per Mason, Murphy and Deane JJ.

29. A financial activity is a transaction which has as its subject matter finance as distinct from one which, although requiring a transfer of money, has a different

[22] at 156 per Mason J; at 179 per Murphy J; at 240 per Brennan J; and at 293 per Deane J.

subject matter: *Re Ku-ring-gai Co-op Building Society (No 12) Ltd* (1978) 22 ALR 621 at 642 per Deane J. 'Financial' refers to commercial dealing, or engaging in transactions of which the object is finance (such as borrowing and lending money): *Fencott v Muller.*

30. In *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 it was held that investment in loan transactions, including short term loans and use of the skill and advice of persons with expertise in matters of finance to form financial judgments on investment decisions, gave the Board the character of a financial corporation, such activities being carried out on a sufficiently significant scale.

31. In *Quickenden v O'Connor* (2001) 184 ALR 260, the University of WA placed substantial funds and deposits on the short-term money market and in short-term bills. In one year the University earned $29 million from investing funds in the short term money market and a further $19 million in buying short-term bills, representing approximately 5% of the total assets of the University. These activities, involving the loan of moneys to 'outside' parties were found to have been undertaken on a substantial scale, sufficient to satisfy the characterization test.

Some Issues Arising out of the Characterization Tests

(i) Are all Corporations Amenable to the Relevant Characterization?

32. The connection between the corporation and the Government of a State will not take it outside 51(xx): *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Tasmanian Dams.*

33. Similarly, the classification of an organization as a non profit organisation does not *ipso facto* preclude its characterization as a constitutional corporation. There

have been findings that the various entities in the following cases were trading corporations:

- *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346
- *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* [2002] FCA 860 (5 July 2002)
- *E v Australian Red Cross Society* (1991) 27 FCR 310

34. It is quite clear that more recent decisions including those of the High Court have squarely focused on the activities test as the preferred test. However in *R v Trade Practices Commission; Ex parte St George County Council* (1974) 130 CLR 533 ("*St George*") the High Court held by majority, *inter alia*, that a municipal corporation formed for local government purposes was to be distinguished from a trading corporation notwithstanding that it engaged in trading activities.

35. In *St George,* the St George County Council had been created as a corporation for local government purposes by the *Local Government Act 1919* (NSW). The sole activities of the Council were the supply of electricity and the supply and installation of electrical fittings and appliances. It had the power to levy rates and was required to supply electricity as cheaply as possible to the consumer.

36. The majority held that the Council was not a trading corporation based on a nature and purpose test; that is, the nature and purpose of the Council was not found to be trading activities[23]. Notwithstanding that the majority found the Council was "*unquestionably a corporation for local government purposes which has defined trading powers*" (eg per Menzies J at page 552) and a trading corporation using a test based on the substantial trading activities of the Council, it was held that there

[23] see at 549-550 per McTiernan J, at 551-2 per Menzies J, at 562 per Gibbs J; and see *Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co. Ltd* (1911) 12 CLR 398 where Griffith CJ referred to the supply of electricity to consumers by "a municipal corporation" as "municipal trading" (at p 415)

was a difference between a trading corporation and a municipal corporation (as was recognized in *Huddart Parker* at p 393 per Isaacs J).

37. *St George* has been criticized in subsequent decisions. For example, the High Court in *R v Federal Court of Australia and Adamson; Ex parte WANFL* (1979) 143 CLR 190 ("*Adamson's case*") adopted the activities test for the purposes of characterization of state football leagues and a football club as trading corporations, notwithstanding that trading was not their predominant activity.

38. The High Court in *Fencott v Muller* (1983) 152 CLR 570 appeared to adopt a 'nature and purpose' test at least for the purpose of determining whether a corporation which had not yet commenced trading could be characterized as a trading corporation. This generally involved an examination of a corporation's objects as stated in its constitution or governing legislation. If the objects of a company (at least one that has not yet commenced trading) include trading then *Fencott v Muller* may be taken to suggest that a corporation may, without more, be a trading corporation[24].

39. It remains an open question as to whether or not characterization as a trading corporation can be established on the basis of nature and purpose beyond the limited application of the test in *Fencott v* Muller, and regardless of the application of the activities test.

(ii) The Degree of Involvement required to Satisfy the Activities Test

40. It has not yet been finally decided whether trading is a substantial activity when measured in absolute dollar terms or whether substantiality is a relative term: see discussion by Carr J in *Quickenden v O'Connor* (2001) 184 ALR 260 at [101]. This uncertainty may derive in part from the tests in *Adamson* which included

[24] at 602 per Mason, Murphy, Brennan and Deane JJ; cf *State Superannuation Board v TPC* (1982) 150 CLR 282 at p 304 per Mason, Murphy and Deane JJ.

consideration of whether trading activities were "substantial", "not insubstantial" or "a sufficiently significant proportion of its overall activities" (the latter being a relative assessment).

41. Murphy J in *Adamson* (at 239) appears to have regarded substantiality as being an absolute rather than a relative concept. Stephen J (at 219) and Mason J (at 234) appear to consider that revenue received from trading activities is relevant, but that the percentage of trading activities as compared to other non-trading activities is more important.

42. Wilcox J in *E v Australian Red Cross Society* (1991) 27 FCR 310 applied an absolute as opposed to proportional test. Wilcox J held that the Society's "*[t]rading activities yielding some $18 million per year can only be described as substantial...* [notwithstanding] *that these amounts were dwarfed by its State government subsidy*" (at page 345)[25].

43. In *Quickenden v O'Connor* the Full Court of the Federal Court considered the status of the University of WA. The University was involved in a number of trading activities which included buying, selling and renting of property and investing. This represented approximately 17% of the University's total operating revenue. In addition it was also engaged in other activities such as the sale of publications and services, parking and student accommodation. The Full Court found that the trading activities were substantial, regardless of the fact that it was not the University's predominant activity.

(iii) What is an 'Activity' for the Purposes of the Charactisation Test?

44. Courts typically approach the (relativity-based) activities test by comparing income from trading activities to overall revenue. However, some 'activities' carried on by organizations are intangible and unable to be easily quantified in

[25] See also analysis by Toohey J in *Hughes v The WACA* 69 ALR 660.

dollar terms. If such intangible activities were somehow able to be accounted for, it is conceivable that the total activity may dwarf the trading activities. This would have significant for the purposes of characterization if the activities test is based on a relative rather than absolute assessment.

45. Toohey J seemed to grapple with this issue in *Hughes v The WACA* 69 ALR 660 which concerned the characterization of various domestic cricket clubs and the governing association. In his reasons (relevantly extracted from [56]) Toohey J stated:

"*The membership of the clubs is mainly made up from those interested in playing cricket although some members are supporters only.*

Where all activities are income producing, it may not be hard to single out some as trading activities and quantify their significance, even if only in a broad way. But where some activities are income producing and others are not, the exercise is not so straight-forward. For instance, it is apparent that most of the time spent by members of the clubs is on the playing of cricket, whether at training sessions or at matches. This is an activity which does not directly produce income at the club level though of course it has incidents such as sponsorships which are income producing. How then is the comparison to be made?

It is apparent that bar trading represents a substantial source of revenue to the clubs [ranging up to 63% of gross income].

The principal activity of the clubs is the playing of cricket, a game which is played for pleasure rather than reward, though the playing of district cricket is undoubtedly the means by which players are selected for shield matches and in turn for test matches, at which point reward becomes an important consideration. Although the clubs have activities which are of a trading nature, in particular the

provision of bar facilities, I do not regard these as so significant as to impose on the clubs the character of a trading corporation". (emphasis added)

46. The aspect of Toohey J's approach which puts an emphasis on the nature and purpose of the corporation notwithstanding that it satisfies the activities test may not be entirely consistent with the more recent approaches taken by the Courts[26]. However, even accepting that Toohey J's approach may be out of step in the above respect, it leaves open the question raised by His Honour's examination of what constitutes 'activities', some of which may be income producing and others not. This area appears to be otherwise free of judicial scrutiny.

(iv) What is a Trading Activity?

47. As the activities test requires a determination of whether trading is a 'substantial corporate activity', the identification of which activities are properly understood to be 'trading' becomes critical: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304 per Mason, Deane and Dawson JJ.

48. 'Trading' is not limited to buying and selling at a profit; it extends to business activities carried on with a view to earning revenue: *Adamson's case* at 235 per Mason J[27]; *E v Australian Red Cross Society* (1991) 27 FCR 310.

49. In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 the High Court considered the phrase "in trade and commerce". For example, Toohey J at 613 thought that "the words 'trade or commerce' are of wide import ... But their focus is on commercial activity, the providing of goods and services for reward." McHugh J (albeit in a minority opinion on the result) said at 620, "the words 'in

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[26] *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* [2002] FCA 860 (5 July 2002); *E v Australian Red Cross Society* (1991) 27 FCR 310.

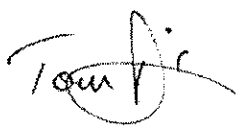
[27] See also *Monroe Topple & Associates Pty Ltd v The Institute of Chartered Accountants* [2001] FCA 1056 (6 August 2001) per Lindgren J (and upheld on appeal); and *Fennell v Australian National University* [1999] FCA 989 for further discussion on 'trading'.

trade or commerce' .. in my opinion cover the whole range of activities which are directed to the exchange of goods and services in Australia." In *Tasmanian* Dam, the construction of a dam as an activity preparatory to trade was considered by some members of the Court to constitute trade.

Conclusion - The Reach of Federal Legislation into the Field of Workplace Relations

50. As discussed above, the existing view is that section 51(xx) of the Constitution is a plenary power, and would probably be held to support legislation directed at usurping State industrial relations systems.

51. A Federal law fixing upon events or circumstances that impact upon, or have significance for, a corporation by, at least, affecting the activities, functions, relationships or business of the corporation would arguably be within power. Accordingly, once a corporation is characterized as a constitutional corporation for the purposes of section 51(xx) - any law, including a law directed at the internal affairs and workplace relations of a corporation that has a sufficient connection with the subject matter of the Corporations Power, would arguably be within power[28].



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[28] Subject to other provisions and implications found in the Constitution.