CASE NOTES

STRICKLAND v. ROCLA CONCRETE PIPES LTD AND OTHERS[1]

Constitutional law — Commonwealth power to make laws with respect to foreign corporations and trading and financial corporations formed within the limits of the Commonwealth — Constitution section 51(xx.) — Binding nature of earlier decisions of the Court — Severability of statutes — Acts Interpretation Act 1901-1966 (Cth) section 15A.

Appeals from a decision of the Commonwealth Industrial Court unanimously dismissing charges laid against three defendants, the present respondents, under the Trade Practices Act 1965-1969 (Cth) section 43. The respondents were charged for that each of them, being either a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth, was a party to an agreement made on 11 April 1969 regulating the sale and supply of concrete pipes in the State of Queensland; and that particulars of that agreement were required by the Act Part V to be lodged with the Commissioner of Trade Practices but had not been so lodged. Both the charges and the appeals were heard together.

The resolution of these appeals presented two main questions to the Court. The first was the scope of Constitution section 51(xx.): the power to make laws with respect to "Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth" (hereinafter called "the corporations power"). This question raised the subsidiary question whether the Court would consider itself bound by its former decision in *Huddart, Parker & Co. Pty Ltd* v. *Moorehead*[2] as to the scope of section 51(xx.). The second question was whether the Act, or at least Parts IV and V of it, was supported by section 51(xx.).

Scope of the Corporations Power

The Court was unanimous[3] in rejecting the narrow interpretation of the corporations power laid down in the judgments of the majority of the Court in *Moorehead's* case. In that case, the Court (Isaacs J. dissenting) had held invalid provisions of the Australian Industries Preservation Act 1906 (Cth) which operated squarely on the trading operations of foreign corporations and of trading and financial corporations formed within the limits of the Commonwealth. The short

[1] (1971) 45 A.L.J.R. 485; [1972] A.L.R. 3. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ.

[2] (1909) 8 C.L.R. 330.

[3] 45 A.L.J.R. 485, 489, 494, 498, 499, 500, 504.

reason of the decision of the majority of the Court was that the impugned provisions operated on the intra-State trading activities of the corporations sought to be affected. The rule of constitutional interpretation currently ascendant in the High Court was that Constitution section 51(i.) operated as a positive denial of Commonwealth power to control the domestic affairs of States, including trade and industry conducted within State borders. Any Commonwealth law which purported to intervene in the domestic trade or commerce of a State was therefore invalid; the impugned provisions did operate on intra-State trading activities and fell accordingly.

The rule of constitutional interpretation referred to did not, however, survive the *engineers'* case.[4] Logically, its displacement then threw open the question of the scope and purpose of section 51(xx.), yet sixty years elapsed before the Court was called upon for a second time to construe the corporations power. In the instant appeals, the Court did not hesitate to hold that section 51(xx.) would support a law requiring a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth to lodge with a public officer particulars of agreements restrictive of trade entered into by it in the course of its trading activities. That is to say, consistently with the rule of constitutional interpretation ushered in by the *Engineers'* case and never doubted since, that the Constitution is to be construed as an ordinary legal document in accordance with established common law maxims of interpretation, the Court held unanimously that a law of the Commonwealth Parliament could be valid which operated on an activity within a State of a foreign corporation or trading or financial corporation formed within the limits of the Commonwealth. The decision of the Court in these appeals is therefore authority for the very significant proposition that the Commonwealth is authorized by the Constitution to regulate some intra-State activities of corporations of the kind described in section 51(xx.). That was the proposition denied by the majority of the Court in *Moorehead's* case. Accordingly, the decision in *Huddart, Parker & Co. Pty Ltd* v. *Moorehead* was overruled. That proposition apart, however, the reasons for judgment in the instant appeals contain very little by way of exposition of the corporations power. Indeed, the members of the Court explicitly chose not to embark upon a lengthy interpretation of the power, preferring to leave that to the course of decision.[5] The judgments only of Barwick C.J., with whom McTiernan J. agreed on this point,[6] and of Menzies J., contain discussions of principle.

The learned Chief Justice held that a law will not necessarily be supported by section 51(xx.) merely because it operates upon or in respect of corporations, whether expressly or impliedly, directly or

[4] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

[5] 45 A.L.J.R. 485, 490, 499, 500, 504.

[6] *Id.*, 494.

indirectly. Yet the power is not to be construed "in any narrow or pedantic manner".[7] Any law will be valid which has a connection in substance and not merely in form with the power. His Honour was disposed to take the view that the central area of this power is the external activities of corporations qualified adjectivally, and not nominatively. Thus the main factor connecting foreign corporations with the power is their foreignness, and the main factor connecting trading and financial corporations with the power is their trading and financial activities. In no case is the main connecting factor mere corporate personality. On this view, there may be no power conferred on the Commonwealth by section 51(xx.) to control, say, the activities of investment companies formed within the limits of the Commonwealth, whatever the nature of their assets, while there may be a power over foreign companies of a similar nature: that is, the power may be wider in its application to foreign corporations.[8] Nor would there be a power to control, say, the non-trading activities of trading companies, for example, for environmental purposes.

Menzies J. agreed with the Chief Justice that section 51(xx.), like the other placita of section 51, does have a core or central stream, with which laws must have a substantial connection and that some laws operating even expressly or directly upon the subject described might be invalid. Menzies J. went on to explore the predicament posed by section 51 in containing placita two or more of which cover some common ground, and posed but did not answer the stimulating question whether the Commonwealth Parliament could by a law clearly based on one head of power in one placitum of section 51 override limitations expressly or impliedly contained in the grant of power in another placitum of section 51. For example, it might antecedently have been argued that section 51(xx.) conferred on the Commonwealth Parliament power to make laws with respect to banking institutions including State banking institutions, being financial corporations, despite the limitations in section 51(xiii.).[9] Or, that section 51(xx.) conferred power to regulate the industrial relations of corporations whether the corporations employed persons in only one State or in more than one State, despite the limitations in section 51(xxxv.). The issues involved here are basically different from and much nicer than those surrounding the "reserved powers" doctrine, referred to above,[10] and await solution by the Court. The answer seems to lie in the adoption of a rule analogous to that expressed by the maxim *generalia specialibus non derogant:* given a law supported by one power but implicitly forbidden by another power, the Court must characterize the subject-matter of the law, select the power which has the preponderant connection with that subject-matter, and adjudicate upon validity upon the basis that the power with

[7] *Id.*, 490.
[8] *Ibid.*
[9] This argument was rejected in *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1, 204 *per* Latham C.J., 256 *per* Rich and Williams JJ.
[10] *Supra* p. 136.

that more preponderant connection is the only available power. Thi is an aspect of the principle of constitutional interpretation that th Constitution must be read as a whole and so as to be internally con sistent.

These comments of Barwick C.J. and Menzies J. were largely by th way; the main point to be noted so far is the unanimous decision o the Court that some intra-State activities of corporations of the kin described in section 51(xx.) can validly be regulated by the Com monwealth Parliament.

The Validity of the Act

The question of the extent of constitutional power contained i section 51(xx.) having been resolved in favour of the Commonwealth the next question for decision was whether the Trade Practices Ac 1965-1969 (Cth) was authorized by the Constitution. The only relevan source of Commonwealth power in these prosecutions was Consti tution section 51(xx.)—there being no connection between the agree ment the subject of the charges and either inter-State or overseas trad and commerce (section 51(i.)), or commerce to and from a Territor of the Commonwealth (section 122). The defendants were, assumedly either foreign corporations, or trading or financial corporations forme within the limits of the Commonwealth.

On the question of the Act's validity, the Court divided. The majorit decided that the Act exceeded the power and could not be severed s as to have even an abbreviated valid operation on the activities of th respondents, while the minority could find no constitutional barrier t the conviction of the respondents.

The charges were laid under the Act, section 43. That provision did in combination with sections 41 and 42, impose obligations on ever person a party to "an examinable agreement" to effect the lodgmen for registration of particulars of that agreement—that is, the Ac sought to oblige both corporations and natural persons to effect tha lodgment. The statutory concept of the "examinable agreement" wa defined in section 35 in general terms and without reference to th nature or personality of the parties to the agreement. So far then, th Act could be viewed in a relevant sense as a law which was to som extent outside power, insofar as it purported to oblige natural persons and to some extent inside power, insofar as it attempted to oblige cor porations. Without more, the Act would have been invalid.[11] But like al other Commonwealth statutes, the Act was to be read as if it containe the Acts Interpretation Act 1901-1966 (Cth). Section 15A of that Ac presumptively requires a distributive interpretation of Commonwealt statutes[12] to the intent that where an Act read literally is partly withi

[11] *The Owners of S.S. Kalibia* v. *Alexander Wilson* (1910) 11 C.L.R. 689.

[12] For discussion of s. 15A, see *The King* v. *Poole; Ex parte Henry (No. 2)* (1939) 61 C.L.R. 634, 652 *per* Dixon J.; example of operation of s. 15A, se *Huddart Parker Ltd and Others* v. *The Commonwealth* (1931) 44 C.L.R. 492 512-513.

and partly without power the particular Act shall be read and construed as if it contained no more than the part within power. But section 15A cannot save a law where its application in its notionally diminished form leads to an operation on its remaining subjects different from that which would have obtained without such diminution. Nor can section 15A preserve a law from invalidity where it is a single and indivisible enactment. Finally, no Act will be valid to which section 15A must be applied unless the resulting law is internally consistent, workable and effective.

The majority of the Court decided that section 15A of the Acts Interpretation Act could not save the Trade Practices Act from invalidity.[13] The obstacle to its successful application in this case and by reference to Constitution section 51(xx.), was the form of section 35 of the Trade Practices Act. That was a single undivided provision defining the statutory concept the "examinable agreement" without reference to any subject-matter that was constitutionally significant. In the opinion of the majority, section 15A did not warrant an interpretation of section 35 by restrictive reference to the relevant head of Commonwealth power, section 51(xx.).[14] Despite the fact that there was nothing in section 35 itself which precluded its disintegration into such terms as would confine its operation to matters within Commonwealth legislative competence, the majority felt that section 15A was not intended to yield from a provision like section 35 (which operated by reference to no single head of Commonwealth power) a set of different valid laws with respect to different heads of Commonwealth power. In the abstract, there were three heads of Commonwealth power available to support section 35: Constitution sections 51(i.), 51(xx.) and 122. Consistently with authority[15] the Court could neither speculate as to the power intended to be relied on by Parliament nor concede section 35 an operation which varied according to the factual requirements of any particular case, on the basis alone of section 15A. There was nothing in section 35 which authorized the Court to lean in favour of section 51(xx.) as the power by reference to which section 35 should be read down, rather than section 51(i.) or section 122; so the Court would have been acting arbitrarily if it had decided, relying on section 15A alone, that in truth section 35 was a law with respect to corporations, and not, say, a law with respect to trade and commerce. Section 15A gave the Court insufficient guidance to enable it to prefer any one head of available power to another head.

Yet arguably the Parliament had provided the Court with further guidance as to its intention in section 7 of the Trade Practices Act. Relevantly, that section provided:

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[13] 45 A.L.J.R. 485, 492, 497, 499, 500-501. Gibbs J. (at 505) held that the Trade Practices Act s. 7 together with the Acts Interpretation Act s. 15A could save the Act, but did not decide that s. 15A alone could have preserved the Act.

[14] Walsh J. (at 503) expressly left open the question whether the Act could have a valid abbreviated operation by restrictive reference to Constitution s. 51(i.) in an appropriate case.

[15] *Pidoto* v. *The State of Victoria* (1943) 68 C.L.R. 87.

7.—(1.) The restrictions referred to in section 35 of this Ac
. . . *include* restrictions . . . that are (whether exclusively or not
applicable to, or engaged in in relation to, or that tend to preve
or hinder, transactions, acts or operations—

(a) in the course of trade or commerce with other countri
or among the States;

(b) . . .

(c) in or for the production, supply, acquisition or disposal
goods or other property, or services, by or to the Commonweal
or any authority or instrumentality of the Commonwealth;

(d) in a Territory, in respect of property in a Territory or
the course of any trade or commerce of a Territory; or

(e) . . .

(2.) The restrictions referred to in section 35 of this Act *inclu*
restrictions . . . accepted under an agreement by a party to t
agreement who is a foreign corporation, or a trading or financi
corporation formed within the limits of the Commonwealth.

(3.) . . .

(4.) The preceding provisions of this section shall not be co
strued as—

(a) limiting the operation of this Act; or

(b) excluding the application of section 15A of the *Acts Inte*
pretation Act 1901-1964 to this Act (including this section).

If the section had any purpose, clearly it was to push the applicati
of the Act to the outer limits of available Commonwealth power.
a matter of drafting technique, the section stumbled at two points: fir
in the use of the word "includes" in sub-sections (1.) and (2.), inste
of "means"; and secondly, the inclusion of section 7(4.)(a). These t
elements did in strictness cause the section to be meaningless,
Menzies J. caustically observed.[16] The majority of the Court treat
section 7 as being inconsequential, as having no bearing on the valid
of the Act.[17] The Chief Justice observed that section 7 might have be
significant if it did not contain sub-section (4.)(a) and if either a sin
paragraph of section 7(1.) stood alone or if section 7(2.) stood alo
in that event, it might have had a limiting effect on sections 35 and 3
The majority saw the case as on all fours with *Pidoto* v. *The State*
Victoria.[19]

There, the Court had been required to consider among other matt
the validity of three of the National Security (Supplementary) Re
lations. The first regulation operated on one criterion, the seco
regulation on another criterion, and the third regulation had a gene

[16] 45 A.L.J.R. 485, 495.
[17] *Id.*, 493, 495, 499, 500, 503.
[18] *Id.*, 492-494.
[19] (1943) 68 C.L.R. 87.

operation and was therefore *ex facie* invalid. It would have been valid if capable of being interpreted to operate only on one or other of the two criteria on which the first and second regulations respectively operated. Those two criteria were, however, different and the Court held by a majority[20] that to choose a criterion of valid operation of the third regulation would have been speculation and in such a case section 46(b) of the Acts Interpretation Act could not save the regulations. That section directs an interpretation of Commonwealth regulations similar to the interpretation of Commonwealth statutes directed by section 15A. Sir John Latham said:

> In the absence of any guide to legislative intention, the court would be quite unable to determine, except in an arbitary manner, whether to apply one possible limitation to the exclusion of the others, or two or three possible limitations, or all possible limitations. Any selection among these possibilities would result in the content of the law depending upon the mere choice of the court, not based upon any principle. In my opinion the *Acts Interpretation Act* does not authorise a court to adopt such a method of promulgating a law under the guise of ascertaining it. . . . [I]f a law can be be reduced to validity by adopting any one or more of a number of several possible limitations, and no reason based upon the law itself can be stated for selecting one limitation rather than another, the law should be held to be invalid. In such a case the law cannot be saved by the *Acts Interpretation Act*.[21]

In that case, the Court was in a true dilemma as to which head of power it should refer in its attempt restrictively to construe the regulations into validity, it having been decided earlier in the case that it would not be legitimate to refer to all available heads of power separately.[22]

No doubt, the Trade Practices Act apart from section 7 was open to objection on the score that it left the Court guessing where to turn in its task of finding a valid construction of the Act, there being more than one available head of legislative power. But arguably section 7 altered the picture. By a generous interpretation of section 7 as a whole, it was possible, as a matter of reason, to infer a parliamentary intention that the Act should be allowed to operate validly by reference to more than one head of power. The Act's operation as to manner of obligation and liability would have been the same throughout, but as to subject-matter would of course have been different. This is to treat section 7 as prescribing not a rule of interpretation, but a rule of operation; as prescribing that the Act should be valid as it stands yet capable of imposing obligations and liabilities only on the subject-matter described in all the various respective paragraphs of section 7(1.) and (2.). This was the way Gibbs J.,[23] with whom McTiernan J.

[20] McTiernan J. dissented on this point.
[21] (1943) 68 C.L.R. 87, 110-111.
[22] *Id.*, 108-109.
[23] 45 A.L.J.R. 485, 505.

agreed on this point without lengthy reasoning,[24] treated section 7. Both these learned justices read section 7 as a declaration that the provisions of section 35 of the Act should have a distributive operation so as to leave the Act validly applying to restrictions contained in agreements of any one or more of the kinds referred to in the various paragraphs of section 7(1.) and section 7(2.). In the opinion of Gibbs J., section 7 had to have some useful effect; its most probable intended effect was that the main provisions of the Act, and in particular sections 35 and 36, should operate on every restriction or practice within Commonwealth legislative power to regulate, taking heads of Commonwealth power separately and not cumulatively. This treats section 7 as a command from Parliament that sections 35 and 36 are to have valid application to restrictions or practices falling within their respective terms which the Commonwealth, by a properly framed law based on a single head of power, could have regulated. That command was quite legitimate, and overcame the problem presented to the draftsman by the decision in *Pidoto* v. *The State of Victoria.*[25] It did not involve the Court either in speculation or legislation.

Gibbs and McTiernan JJ. found the Act valid as enacted. The majority held the Act incapable of validly applying to corporations of the kind described in section 51(xx.). In particular, Barwick C.J. (with whom Owen J. agreed) held the Act to be wholly invalid;[26] Walsh J. on the other hand, while assenting to the order of the Court, agreed with Gibbs J. that the Act might have a valid operation on restrictions or practices accepted or entered into in the course of trade and commerce, among the States or with overseas countries.[27] The Court's order, however, was that the charges against the respondents be dismissed.

There was no discussion in the judgments of the validity of the 1971 amendments to the Trade Practices Act, that is, those amendments enacting the resale price maintenance legislation. Those amendments were enacted after the instant charges had been laid. The justices variously referred to the Act as the Trade Practices Act 1965-1969,[28] the Act 1965-1967[29] or simply as the Act.[30]

In a proverbial sense, the respondents won a battle only to lose the war. By Act No. 138 of 1971 the Commonwealth Parliament repealed all its earlier trade practices Acts, including the 1971 Act,[31] and enacted in its place provisions substantially similar to the earlier provisions but applying only to "corporations", defined to *mean* foreign corporations and trading or financial corporations formed within the limits of the

[24] *Id.*, 495.
[25] (1943) 68 C.L.R. 87.
[26] 45 A.L.J.R. 485, 494, 500.
[27] *Id.*, 503.
[28] *Id.*, 486, 494, 500, 503.
[29] *Id.*, 494 (McTiernan J.).
[30] *Id.*, 499-500 (Windeyer and Owen JJ.).
[31] S. 4.

Commonwealth.[32] The new Act Part VII enacts resale price maintenance legislation which imposes obligations on "corporations", and on persons other than "corporations" in their dealings with "corporations".[33] The Act came into operation on 2 February 1972 and required the registration on or before 2 March 1972 of particulars of all agreements and practices to which it applies. It is estimated that the Act will catch ninety-five per cent of all restrictive trade agreements and practices entered into in Australia.

The State of the Corporations Power

A cloud of uncertainty continues to enshroud Constitution section 51(xx.). The decision in the instant appeals does of course support the narrow proposition that the power authorizes enactment of a law which requires a trading corporation to register particulars of agreements restrictive of trade entered into by it in the course of its trade whether intra-State or inter-State or with foreign nations. Logically, the decision must imply that the Commonwealth can, subject to Constitution section 92, regulate all the trading activities within the Commonwealth of trading corporations, all the borrowing and lending activities within the Commonwealth of financial corporations and perhaps every activity within the Commonwealth of foreign corporations. So far, the power has been conceded to be regulatory in nature, and it remains to be seen whether the power will support prohibitive laws; there is nothing in section 51(xx.) to militate against the view that the Parliament can prohibit the activities—or some of them—of corporations of the kind described in section 51(xx.). If the Parliament does have power to prohibit activities, it has power to prohibit them absolutely or upon conditions. Where there is conditional prohibition, it is settled that the conditions imposed need have no connection with the power additional to their connection to the prohibition.[34] This being the case, Commonwealth power looms very large over corporations.

The course of future interpretation of section 51(xx.) will probably be channelled in two directions: first, it will be necessary to resolve the width of the descriptions "foreign", "trading" and "financial" in relation to corporations. Secondly, it will be necessary to resolve what kinds of laws the Parliament can enact on the subject of foreign, trading and financial corporations, as defined. On the former task, little can usefully be said at the present; the latter task will involve resort first to the instant decision, and secondly to earlier dicta which are not inconsistent with the instant decision. There are opinions in *Moorehead's* case and in the *Bank Nationalization* case which may have retained validity. Thus, it is probable that section 51(xx.) gives the Commonwealth no power over the terms and conditions on which corporations of any kind

[32] S. 5.
[33] S. 66.
[34] *Herald and Weekly Times Ltd* v. *The Commonwealth* (1966) 115 C.L.R. 418.

(except perhaps foreign corporations)[35] employ persons;[36] no power to make laws with respect to the incorporation or liquidation of companies,[37] or with respect to their powers and capacity as a matter of contract law; no power over municipal corporations, or over the mining, manufacturing, religious, scholastic, charitable, scientific or literary activities of any corporations,[38] or over investment companies; no power to regulate the internal management and administration of companies;[39] no power to control the profit policy of a company, although there may now be a power to regulate the price of goods bought and sold by trading corporations; no power to regulate the issue by a trading corporation of an invitation to the public to lend money to it or to take up shares in its capital, although such a power may exist in the cases of foreign and of financial corporations carrying on business within the Commonwealth; no power to promulgate an exhaustive civil or criminal code of behaviour for corporations; and no power over banking and insurance companies.[40] The view of Isaacs J. in *Moorehead's* case[41] that the purpose of section 51(xx.) was to enable Commonwealth control of the conduct of corporations as against outsiders, may be found to be too wide. Still, the power seems to be directed to the control of the activities of corporations rather than of corporations as such. Where Commonwealth power exists over an activity, it includes a power to prohibit that activity. Thus, the Commonwealth could suppress some activities of corporations, subject to section 92,[42] either altogether or on conditions. But while the Commonwealth could suppress some activities of corporations, it could not suppress corporations as such.

It remains to be seen whether the Commonwealth will take advantage of the powers arguably now available to it through section 51(xx.). The decision in the instant appeals has perhaps removed the oft-relied on excuse of lack of power over the matter. Arguably, for example, it now lies open to the Commonwealth to control on a uniform basis throughout the Commonwealth the price and standards of goods sold by companies, and the terms and conditions of sales by corporations, objectionable trading practices of all descriptions (such as pyramid selling), the sale of dangerous or objectionable matter (for example, firearms and explosives), and the local equity in foreign corporations carrying on business anywhere in Australia. Equally importantly, if it

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[35] 45 A.L.J.R. 485, 490 *per* Barwick C.J.; *Moorehead's* case (1909) 8 C.L.R. 330, 412-413 *per* Higgins J.

[36] (1909) C.L.R. 330, 348, *per* Griffith C.J.

[36] (1908) C.L.R. 330, 348 *per* Griffith C.J.

[37] *Id.*, 348-349 *per* Griffith C.J., 362 *per* Barton J., 371 *per* O'Connor J., 394 *per* Isaacs J., 412 *per* Higgins J.; *Bank Nationalization* case (1948) 76 C.L.R. 1. 202 *per* Latham C.J., 304 *per* Starke J.

[38] *Moorehead's* case (1909) 8 C.L.R. 330, 393 *per* Isaacs J.

[39] *Id.*. 394 *per* Isaacs J.

[40] *Bank Nationalization* case (1948) 76 C.L.R. 1, 204, 256.

[41] (1909) 8 C.L.R. 330, 393.

[42] *Cf., Bank Nationalization* case (1948) 76 C.L.R. 1, 304 *per* Starke J.

be accepted that even a manufacturing or mining corporation can in one of its aspects be a trading company (that is, when it sells or attempts to sell its manufactures or ores) then the Commonwealth could indirectly control, for environmental purposes, manufacturing or mining activities of companies by laws acting on the sale or attempted sale of manufactures and ores. And in all probability, the Commonwealth now has power to regulate interest rates on loans and borrowings by companies, and power to regulate every contract of sale, of supply or of services entered into in Australia except between two natural persons. In short, the decision in the instant appeals seems to have left the Commonwealth with power to regulate uniformly throughout the Commonwealth, many matters which before the decision had assumedly been outside its power and which for many years had called for thorough and systematic regulation on a national scale.

P. A. McNAMARA*

SALMAR HOLDINGS PTY LTD v. HORNSBY SHIRE COUNCIL[1]

Declaratory judgment — Equity Act, 1901-1965 (N.S.W.) section 10 — Statutory appeal procedures under Local Government Act, 1919-1971 (N.S.W.) — Jurisdiction to award declaration in lieu thereof.

Freed by section 15 of the Law Reform (Miscellaneous Provisions) Act, 1965 (N.S.W.)[2] from the former circumscription of its availability, the declaratory judgment has of recent years come into vogue in New South Wales as a means whereby to ascertain the rights of subjects; and as the field in which rights of property, in particular, are most often at issue, the local government area has provided the context for a large proportion of the attempts thus to invoke the equitable jurisdiction of the Supreme Court. It was inevitable, therefore, that the province of the declaratory judgment should be found to overlap those of the statutory appeal procedures set up under the Local Government Act, 1919-1971 (N.S.W.). The result has been a territorial dispute which has, however, now received its apparent quietus at the hands of the New South Wales Court of Appeal in *Salmar Holdings Pty Ltd* v. *Hornsby Shire Council.*

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* LL.B. (A.N.U.); Editor, 1971.

[1] [1971] 1 N.S.W.R. 192. New South Wales Court of Appeal; Mason, Jacobs and Moffitt JJ.A. Hornsby Shire Council unsuccessfully appealed to the High Court. The appeal (not yet reported) dealt only with the meaning of "trade" in s. 309 of the Local Government Act, 1919-1971 (N.S.W.); there was no discussion of the jurisdictional issue discussed in this note.

[2] Amending the Equity Act, 1901-1965 by the insertion of a new s. 10. Of particular relevance in the present case are sub-ss 10(1) and 10(2)(b)(vii).