CASE NOTES

ACTORS AND ANNOUNCERS EQUITY ASSOCIATION OF AUSTRALIA AND OTHERS v FONTANA FILMS PTY LTD[1]

Constitutional Law (Cth) — Constitution (Cth) s 51(xx) Corporations power — constitutional validity of legislation prohibiting secondary boycotts — Trade Practices Act 1974 (Cth) s 45D

Trade Practices — prohibition of secondary boycotts — organisation of employees deemed to be engaged in conduct of members — constitutional validity of s 45D(1)(b)(i), s 45D(5) and s 45D(6) Trade Practices Act 1974 (Cth) — Constitution (Cth) s 51(xx)

On 11 May 1982 the Full High Court handed down its decision in *Actors and Announcers Equity* v *Fontana Films*. All members of the Court agreed on the constitutional validity of s 45D(1)(b)(i) of the Trade Practices Act 1974 (Cth) as amended[2] which prohibits the imposition of "secondary boycotts"[3] against corporations for the purpose and with the likely effect of causing substantial loss or damage to the business of the corporations. However a five-two majority of the Court held invalid s 45D(5) of the Act with so much of sub-s (6) as was consequential to the operation of sub-s (5). Section 45D(5) deems an organisation of employees to have engaged in conduct prohibited by sub-s (1) in concert with its employees and with the purpose held by those employees where the organisation fails to show that it took "all reasonable steps" to prevent two or more of its employees from engaging in the prohibited conduct. Sub-section (6) renders the organisation liable in damages to persons suffering loss by reason of the conduct.

The decision is significant both in terms of industrial relations in Australia[4] and for the reasoning of the Justices concerning one of the Commonwealth Parliament's most important yet largely untested powers—s 51(xx) of the Constitution. The second aspect of the decision raises questions about the validity of Commonwealth legislation which deems the existence of the very facts upon which Commonwealth legislative power may be seen to rest.

The background to the case arose in October 1980 when Fontana Films

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[1] (1982) 56 ALJR 366; (1982) 40 ALR 609; (1982) ATPR 40-285. High Court of Australia; Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ.

[2] Hereinafter referred to as "the Act".

[3] Apart from the margin note, s 45D does not use this expression and spells out explicitly the prohibited conduct in para (1)(b) as that taken by two persons in concert in order to induce a third person not to deal with a fourth person, the last person being the real target of the conduct.

[4] On the introduction of s 45D on 1 July 1977 see M Sexton, "Trade Unions and Trade Practices" (1977) 5 Aust Bus L Rev 204; R C McCallum, "Industrial Law 1977" in R Baxt (ed), *Annual Survey of Law 1977* (1978) 226, 264; B Creighton, "Secondary Boycotts under Attack—The Australian Experience" (1981) 44 Mod L Rev 489. The amendment followed a brief report of a Trade Practices Review Committee headed by Mr T B Swanson, delivered on 20 August 1976.

Pty Ltd, a company which carried on business as a film producer, was preparing for the production of a film entitled "The Brothers Zak" and several documentaries. The appellant, Actors and Announcers Equity Association of Australia[5] (the union) with some other persons, demanded that Fontana Films employ only actors belonging to the union and that the company pay residual fees to actors it employed. When the company refused, the union declared the film productions "black" and by pressure on theatrical agents prevented Fontana from obtaining the services of actors. Fontana was forced to cease production of all of its films although by this stage it had incurred expenses of over $10,000.

Relying upon s 45D the company applied to the Federal Court for an injunction[6] restraining the union, its officers and other persons from engaging in conduct in concert with each other or with any other person that hindered the supply of actors to the company. McGregor J held that the evidence *prima facie* established a breach of s 45D(1)(b)(i)[7] and granted the injunction under s 80 of the Act. An appeal was taken to the Full Court of the Federal Court by the union but so much of the appeal as concerned the validity of s 45D was removed to the High Court under s 40(1) of the Judiciary Act 1903 (Cth). The High Court found it unnecessary to examine the correctness of the findings of fact made by McGregor J.

The provisions of s 45D(1) are as follows:

> S 45D(1) Subject to this section, a person shall not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person (not being an employer of the first-mentioned person) or the acquisition of goods or services by a third person from a fourth person (not being an employer of the first-mentioned person), where—
>
> (a) the third person is, and the fourth person is not, a corporation and—
>
> (i) the conduct would have or be likely to have the effect of causing—
>
> (A) substantial loss or damage to the business of the third person or of a body corporate that is related to that person; or
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> (B) a substantial lessening of competition in any market in which the third person or a body corporate that is related to that person supplies or acquires goods or services; and
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> (ii) the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—

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[5] A trade union registered under the Trade Union Act 1881 (NSW).

[6] Remedies for breach of s 45D include proceedings by the Attorney-General to have the union fined up to $250,000 under ss 76 and 77. A person who suffers loss as a result of the conduct may seek damages under s 82; however s 45D has usually been invoked in order to restrain boycotts by injunction under s 80. The Conciliation and Arbitration Commission also has jurisdiction to conciliate a s 45D dispute under s 80AA of the Act and Division 5A of the Conciliation and Arbitration Act 1904.

[7] McGregor J in fact referred to s 45D(1)(b)(ii) in his judgment (reported (1980) 6 TPC 573) but this was treated by the High Court as a typographical error, there being no evidence to suggest a breach of sub-para (ii) rather than (i).

(A) substantial loss or damage to the business of the fourth person; or

(B) a substantial lessening of competition in any market in which the fourth person acquires goods or services; or

(b) the fourth person is a corporation and the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—

(i) substantial loss or damage to the business of the fourth person or of a body corporate that is related to that person; or

(ii) a substantial lessening of competition in any market in which the fourth person or a body corporate that is related to that person supplies or acquires goods or services.

Sub-sections 45D(1A) to (1C) deal with boycotts in the course of trade between Australia and overseas, among the States or within a Territory or between a State and a Territory. Sub-section 45D(2) provides *inter alia* that a person shall be deemed to engage in conduct for a purpose mentioned in sub-s (1) if he engages in that conduct for purposes that include that purpose. Sub-sections (3) and (4) exclude the operation of sub-s (1) when the dominant purpose for which the conduct is engaged in is substantially related to the conditions of employment of the person engaging in the conduct or his fellow employees.

"Corporation" is defined in s 4(1) of the Act to mean a body corporate mentioned in s 51(xx) of the Constitution, a body corporate incorporated in a Territory or a holding company of any company so defined. A "related" body corporate is defined in sub-s 4A(5) to mean a holding company, a subsidiary company or a company associated as another subsidiary of the first company's holding company. The Court put aside doubts as to validity created by these extended definitions because they were not raised by the facts on this occasion.[8] Primarily these doubts are whether corporations sought to be brought within the ambit of s 45D can be described as trading or financial corporations within s 51(xx), and if not whether "related" corporations could be reached through the incidental power.

On appeal the Bench rejected the union's submission that the facts fell within s 45D(1)(a), the validity of which was argued to be more doubtful than s 45D(1)(b). Although the Chief Justice may have shared this doubt,[9] the Court considered that the case raised only the validity of sub-para (b)(i) and that it was unnecessary to go further. Gibbs CJ, Stephen, Mason and Brennan JJ held[10] that each part of s 45D(1) (in the opinion of the Chief Justice this provision created 24 offences when read with the extended definitions in s 4 and sub-ss 4A(1) to 4A(5)) was capable, with the aid of s 15A of the Acts Interpretation Act 1901 (Cth), of a separate and self-

[8] (1982) 56 ALJR 366, 368 *per* Gibbs CJ, 377 *per* Mason J. However Stephen J stated that the legislation was in excess of power where it extended to holding companies at 375.

[9] (1982) 56 ALJR 366, 368; 40 ALR 609, 614.

[10] (1982) 56 ALJR 366, 369, 375, 377, 386; 40 ALR 609, 615, 627, 630, 646.

contained operation. Hence doubts about the validity of s 45D(1)(a) or (b)(ii) were irrelevant to the validity of sub-para (b)(i).[11]

Section 45D(1)(b)(i)

All members of the Court agreed in the conclusion that s 45D(1)(b)(i) was valid. The only source of power upon which the Commonwealth (intervening) had sought to justify this provision was s 51(xx) of the Constitution:[12]

> The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to:
> . . . (xx) Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.

In these proceedings s 45D came to rest upon the words "trading corporations . . . formed within the limits of the Commonwealth" alone. However the Court did not deal with the threshold question of whether Fontana Films Pty Ltd was a trading corporation; this was assumed to be so for the purposes of this application and left to be decided as a question of fact at the trial.[13] As Fontana's main business was the production of films, the point might have been raised that its activities could not be characterised as "trading" in light of the distinction previously maintained in constitutional interpretation between the concepts of production and trade.[14]

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[11] The distinction between paras (1)(a) and (1)(b) seems to be that (b) requires that the *target* of a boycott ("the fourth person") be a corporation whereas (a) requires that the "third person" or *instrument* of the boycott be a corporation. In both cases the conduct hinders the business of the corporation but para (b) requires further that that be the purpose of the conduct; under (a) it is an incidental effect of conduct aimed at the fourth (non-corporate) person. The significance of purpose to Parliament's protective power emerges quite strongly in the judgments of Gibbs CJ and Wilson J, and to a lesser extent in that of Stephen J.

[12] S 45D had earlier been held valid in relation to conduct occurring in the course of interstate trade (to which it extends by s 6(2)(b) of the Act) in *Seamen's Union of Australia* v *Utah Development Co* (1978) 22 ALR 291; (1978) 53 ALJR 83. There is now a wider prohibition of secondary boycotts in the course of interstate and overseas trade by sub-ss 45D(1A), (1B), (1C). The Federal Court has also held that s 45D does not bind the Crown in right of a State authority, in *Sharkey (F) and Co Pty Ltd* v *Fisher* (1980) 33 ALR 173.

[13] (1982) 56 ALJR 366, 369, 386; 40 ALR 609, 615, 646. When *Fontana* was decided the definition adopted was whether it was a corporation whose trading activities, at the time a Commonwealth law operates upon it, form a sufficiently significant proportion of its overall activities to merit its description as a trading corporation (Brennan J at 387; 648; *R* v *Federal Court of Australia; ex parte Western Australian National Football League* (1979) 143 CLR 190, 233; *State Superannuation Board* v *Trade Practices Commission* (1983) 57 ALJR 89 (as to financial corporations). Since *Fencott* v *Muller* (1983) 57 ALJR 317; 46 ALR 41, the activities test would not seem to be the sole criterion of character in the opinion of Mason, Murphy, Brennan and Deane JJ—if those activities are not present because the corporation is yet to begin to trade, its character may be found in its objects and constitution, for example.

[14] For example Sir Isaac Isaacs stated in *Huddart Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330, 393 ". . . a purely manufacturing company is not a trading corporation". A mining corporation may not be within the description—*Federal Commissioner of Taxation* v *Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 314 *per* Dixon J. See also the distinction between the concepts of trade and production maintained in regard to ss 51(i) and 92—*Grannall* v *Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77-8. Perhaps a production corporation which sell its finished products on a substantial commercial basis is not a pure producer and is, in part, a trader.

The Chief Justice (with whom Wilson J agreed) noted that s 45D(1)(b)(i) imposes no obligation on a corporation but rather is aimed at the conduct of other persons designed and likely to cause substantial loss to the business of a corporation. The High Court's decision in *Strickland* v *Rocla Concrete Pipes Ltd*[15] had established that Parliament has at least power to regulate and control the trading activities of trading corporations in the context of restrictive trade practices legislation; beyond that point Barwick CJ (and the other members of the Bench) had refused to discuss the wider limits of the power in *Strickland's* case.[16]

Gibbs CJ also noted the *CLM Holdings*[17] decision that the corporations power may authorise the imposition of obligations upon non-corporate persons in its incidental aspect.[18] In his Honour's opinion this supported the validity of s 45D(1)(b)(i) because the conduct prohibited here was so relevant to the subject of power that the provision could be described as a law with respect to corporations. However Gibbs CJ added a proviso that Parliament could not prohibit any conduct which might injure or damage a trading corporation—the test was one of relevance and degree. Parliament could however prohibit conduct calculated and likely to damage the trading activities of a trading corporation.

Gibbs CJ also held that the fact that the provision required that the "business" of the corporation be the target, rather than its trading activity, did not take the section outside power. The concept of business was treated as wider than trading activity and Gibbs CJ suggested the purchase of stationery as an example of a part of business which is not trading. Nevertheless the "business" of a trading corporation is to trade and one could not damage that, in his Honour's opinion, without damaging its trading activity. The provision was substantially one for the protection of the trading activities of trading corporations and valid.

Stephen J characterised s 45D(1)(b)(i) as a law prohibiting concerted action directed against a corporation's dealings in goods and services. Only one aspect of this character related to trading corporations but it was enough to give the law the required character of one with respect to trading corporations. This character was confirmed by the fact that the prohibition was directed to those who intended harm to the corporation.[19]

On the "business" point Stephen J found that the context of that term required that its meaning be confined to a corporation's trading activities.[20] Nevertheless his Honour hinted that the power is not confined to the trading activities of trading corporations.

Mason J (with whom Aickin J agreed) also characterised the provision as a prohibition of secondary boycotts which adversely affect the trading

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[15] (1971) 124 CLR 468.

[16] *Ibid* 490; see Case Note (1972) 5 FL Rev 133.

[17] *R* v *Judges of the Australian Industrial Court; ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235.

[18] In *Fencott* v *Muller* (1983) 57 ALJR 317; 46 ALR 41 the *CLM Holdings* decision was extended to uphold the use of the corporations power to impose *civil* liability upon natural persons where incidental to regulation of the activities of corporations. In the joint opinion of Mason, Murphy, Brennan and Deane JJ this is so because corporations act through natural persons and because effective regulation calls for the imposition of duties upon those persons who participate in corporate activities.

[19] (1982) 56 ALJR 366, 375; 40 ALR 609, 626.

[20] *Ibid* 376; 627.

activities of corporations.[21] Because the provision protected rather than regulated those activities, Mason J stated that its character was not automatically clear. In his Honour's opinion a valid protective law should operate directly upon the subject and not merely confer some incidental protection to the subject by, for example, casting a wider flung net which protected all trading activities regardless of who carried them on. Mason J also indicated quite strongly that the subject of s 51(xx) is corporations of the kind described and is not confined to particular activities of the corporations. In any event here the provision operated directly upon trading activities and so fell within the existing *Strickland* test. Mason J noted that "business" may be a far wider concept but like Stephen J read the prohibition in its context to be directed to conduct hindering trading activity.[22]

Murphy J reaffirmed his dictum in *Re Adamson; ex parte Western Australian National Football League (Inc)*[23] that s 51(xx) may be used to protect trading corporations in regard to those who deal with them. Parliament could protect the subject corporations from each other and

> enact a comprehensive criminal and civil code dealing with the protection of foreign trading and financial corporations, their property and affairs and also the protection of others in relation to such corporations.[24]

Apart from sub-ss (5) and (6) Murphy J held that s 45D was easily within this aspect of the power.

Wilson J added one observation to his agreement with the Chief Justice that, while some parts of s 45D(1) may be too remotely connected to corporations to be within power, sub-para (1)(b)(i) was valid because its central characteristic was a prohibition of conduct intended and likely to injure substantially the corporation.

In the opinion of Brennan J, these proceedings presented the "obverse" of the problem in *Strickland*. Here the law imposed a duty (and not a right) upon non-corporate persons generally not to engage in the proscribed conduct and hence created a corresponding right (rather than a duty) in the protected corporations. Brennan J stated that there is no difference in constitutional principle between laws which, discriminating between the corporations in s 51(xx) and the public at large, impose either rights or duties upon corporations in their trading activities.

On the "business" point his Honour held that the protection given to a corporation's non-trading business was immaterial in this case and in any event severable. Both concepts run into each other and Brennan J held that the provision did not lose its character as a law with respect to trading corporations by the use of the term "business". That concept was part of a corporation's existence and activity and like Mason J, Brennan J stated the relevant subject as corporate persons, not corporate activities. While trading activities may be central to the power, the power extends to more peripheral matters.

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[21] *Ibid* 378; 631-632.
[22] *Ibid* 379; 633-634.
[23] (1979) 143 CLR 190, 239.
[24] (1982) 56 ALJR 366, 383; 40 ALR 609, 640.

Generally Gibbs CJ, Stephen, Mason and Brennan JJ expressly reaffirmed the principle that the validity of the provision rested upon its legal operation, that is, the rights, duties, powers or privileges it created, and not the guiding motive which led to the enactment,[25] and they rejected the argument that first and foremost s 45D was a law dealing with trade unions and secondary boycotts.

Stephen J engaged in a discussion of the principles of characterisation under the Constitution and reaffirmed the rejection of the Canadian "sole or dominant character" approach. In Australia, the Court is free to recognise the reality that a law may bear a number of characters and that only one need relate to the subject of power for the law to be valid.

On the "business" point, the facts did not raise in any concrete fashion a distinction in relation to the trading activities test. It would seem that Mason, Murphy and Brennan JJ would allow the Commonwealth to protect non-trading aspects of a corporation's business and Stephen J probably also leaned in this direction. The Chief Justice however made little of the business/trade distinction. Previously the Court has maintained that a distinction exists[26] as did Sir George Jessel MR in *Smith* v *Anderson*[27] (cited by Gibbs CJ and Mason J).

In *Fontana* Mason J indicated that a corporation's trading activities include the supply or acquisition of services by a corporation; for example the hiring of actors by the company in this case. It is not clear whether the actors engaged by Fontana Films Pty Ltd were employees or independent contractors[28] but if the former the decision may raise important implications for the Commonwealth's power to deal with industrial relations of corporate employees by means of s 51(xx) rather than s 51(xxxv). The proposition implicit in the statement by Mason J is that the hiring of employees or at least contractors may be characterised as a trading activity. Independently of the trading activities test Murphy J would allow Parliament to legislate directly about the wages and conditions of corporate employees free of the limitations contained in s 51(xxxv); the whole thrust of all the judgments in *Fontana* is that the Commonwealth may protect the hiring of labour by a trading corporation and this implies that it may regulate that hiring. Whether it could do so in the employees' interest rather than the corporation's must be more doubtful however, because of the protective character of s 45D.

In regard to the protective power of Parliament, Gibbs CJ and Wilson J, and to a lesser extent Stephen J, laid stress on the importance in s 45D(1)(b)(i) of the purpose of those who cause harm to a corporation and this must raise some doubts about s 45D(1)(a) which gives protection against unintended damage. On the other hand Mason, Murphy and Brennan JJ did not place any particular importance on the intentions of those instigating a boycott.

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[25] Citing *Melbourne Corporation* v *Commonwealth* (1947) 74 CLR 31, 79; *Fairfax* v *Federal Commissioner of Taxation* (1965) 114 CLR 1, 7, 13.

[26] *Hornsby Shire Council* v *Salmar Holdings Pty Ltd* (1972) 126 CLR 52, 54, 56.

[27] (1880) 15 Ch D 247, 258-259.

[28] For this distinction see *Halsbury's Laws of England* (4th ed, Vol 16) para 501; P Atiyah, *Vicarious Liability in the Law of Torts* (1967) Chs 3-8.

The State of the Corporations Power

In *Fontana* some of the judgments contain some *obiter* discussion about the nature of the corporations power. A lack of unanimity in the Court about the width of this power emerged quite clearly.

Gibbs CJ referred to considerable difficulties of interpretation in considering the power because it is defined in terms of legal persons rather than activities or a class of transactions. His Honour stated

> having regard to the federal nature of the Constitution it is difficult to suppose that the powers conferred by pars (xix) and (xx) were intended to extend to the enactment of a complete code of laws on all subjects applicable to the persons named in those paragraphs[29]

and the Court's role is

> to achieve the proper reconciliation between the apparent width of s. 51(xx) and the maintenance of the federal balance which the Constitution requires.[30]

For instance it is insufficient in the Chief Justice's opinion that a Commonwealth law merely applies to or touches a trading corporation;[31] some further nexus must be shown, grounded upon the adjectives in paragraph (xx)—"foreign", "trading" and "financial".[32] Significantly however Gibbs CJ also cites with approval *Melbourne Corporation* v *Commonwealth*[33] and *Fairfax* v *Federal Commissioner of Taxation*[34] for the general principle that if a Commonwealth law has an actual and immediate operation within a field of Commonwealth power it will be valid notwithstanding that it has another purpose which could not be achieved directly by exercise of Commonwealth power. This raises the question of what is required for a valid law dealing with trading corporations, that is, to have an actual and immediate operation with regard to those corporations. In the opinion of the Chief Justice, it is not enough that *any* right or duty is granted to or imposed upon the subject corporations. Must such a right or duty be directly related to the corporations activities? Gibbs CJ stated:

> The words of par (xx) suggest that the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws if they are to be valid.[35]

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[29] (1982) 56 ALJR 366, 369; 40 ALR 609, 616.

[30] *Ibid* 370; 616.

[31] As Barwick CJ had stated in *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 490. Menzies J in *Strickland* expressly left this point open at 507-508.

[32] This theory is consistent with that of Barwick CJ's in *Strickland* that the central area of the power is the external activities of corporations whether trading, financial or foreign, and that mere corporate personality is not in itself the core of the power. In *Huddart Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330, 393 Isaacs J had also given considerable weight to the adjectives in para (xx) on the basis that those corporations had been selected for the Commonwealth because of their activities. In that decision however Isaacs J attempted to confine the power so as to persuade his reserved powers-minded brethren that its ambit was not as destructive of the States' rights as they feared: that fear is no longer relevant to the interpretation of the power on modern principles, it may be submitted.

[33] (1947) 74 CLR 31, 79.

[34] (1965) 114 CLR 1, 13.

[35] (1982) 56 ALJR 366, 370; 40 ALR 609, 616.

It is not clear however in what way this "nature" must reveal itself. His Honour recognises that the motives with which a law is enacted are excluded from the process of characterisation.[36] If Gibbs CJ is stating that the law must impose a trading right or trading duty upon a trading corporation to be valid, and one ignores the motives of enactment, then his Honour would not seem to be advocating a significantly narrower conception of s 51(xx) than say Mason J (whose view is set out below). On the *Melbourne Corporation* principle (endorsed by Gibbs CJ) Parliament could prescribe that a trading corporation could not carry on any trade or business unless it complied with any standards that might be set by Parliament, including for example, such diverse criteria as environmental safeguards, a price and wage freeze or anti-discrimination requirements towards its staff and customers. One might also add that, fundamentally, acceptance of the *Melbourne Corporation* principle as applied in *Murphyores* v *Commonwealth*[37] (to the commerce power) in regard to the corporation's power must alter the present federal balance of responsibility because such an aspect of the corporations power has not previously even been considered. The present federal balance is therefore largely irrelevant to the consideration of an unexercised power: the balance is merely a consequence of the Court's interpretation of the Constitution in response to the Commonwealth's attempts to exercise its powers and in part rests upon the boldness of the Commonwealth in resorting to untested powers.

In *Fontana* Gibbs CJ approved the dictum of Higgins J in *Huddart, Parker & Co Pty Ltd* v *Moorehead*[38] that absurd consequences would flow from recognition of a plenary power with respect to corporations. If this is a permissible criterion of interpretation,[39] it may not necessarily be accurate. We already have one set of restrictive trade practice and consumer protection laws throughout the States for s 51(xx) corporations and another set for other persons. One could add that so sweeping is the adoption of corporate trading structures (often by shelf companies)[40] it may fairly be said that a power to deal with trading corporations is substantially a power to deal with trade.[41] Hence there would not be an unrealistic and artificial division of federal and State responsibilities—and one not nearly as absurd as, for example, that presently existing under the Family Court's powers to deal with the custody of children from previous marriages under s 51(xxi) and (xxii).

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[36] Except, one might add when one considers whether a law is incidental to the exercise of a Commonwealth power; see L Zines, *The High Court and the Constitution* (1981) 30-36.

[37] (1976) 136 CLR 1.

[38] (1909) 8 CLR 330, 409-410.

[39] One of the dicta of the Court in the *Engineers* case was that feared abuse of power is no reason to qualify an express grant of power (1920) 28 CLR 129, 151.

[40] *Fencott* v *Muller* (1983) 57 ALJR 317; 46 ALR 41.

[41] This development would not ignore the interstate and intrastate distinction of the power with respect to trade but would flow from a recognition that each s 51 head of power is independent to at least the extent that the express words of one paragraph are not to be limited by a mere implication drawn from another paragraph (*Russell* v *Russell* (1976) 134 CLR 495, 539; *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468). It is no more than an implication that intrastate trade is a matter left to the States under s 51(i). Arguably traders bring themselves within Commonwealth jurisdiction by adoption of a corporate structure.

Stephen J did not consider the wider scope of the corporations power in *Fontana* although his Honour did discuss general principles of characterisation of Parliament's legislative powers.

Mason J stated that when the Court considers a legislative power defined in terms of persons rather than activities, "different" consequences may flow but that none of those arose in this case. Mason J cited *R* v *Public Vehicle Licensing Appeal Tribunal (Tas); ex parte Australian National Airways Pty Ltd*[42] for the proposition that the Court should simply read s 51(xx) and apply the words without making implications or imposing limitations not found in the text. This obviously harks back to the *Engineers*[43] principle of interpretation but that fundamental decision did not rule out all implications in constitutional interpretation.[44] The question remains whether the Constitution requires that the power be limited so that the Commonwealth may not enact a code of laws which simply apply in a range of ways, to the corporations named. In *Fontana* Mason J reiterated that it is a Constitution the court is construing and that it should be interpreted with all possible generality. His Honour rejected undue emphasis on the adjectives in s 51(xx) and on the activities of the corporations as raising "mere speculation":

> the subject of the power is corporations—of the kind described . . . not . . . the activities of corporations let alone activities of a particular kind or kinds.[45]

Mason J also supported the application of the *Melbourne Corporation* principle as applied in *Murphyores* so that Parliament could if it thought fit prohibit the trade of a trading corporation on any criteria. His Honour suggested a hypothesis of interpretation that s 51(xx) was intended to confer upon the Parliament comprehensive power to deal with the subject so as to ensure that all conceivable matters of national concern could be nationally regulated.[46]

In *Fontana* Murphy J indicated that the Commonwealth has such a comprehensive power over the described corporations, covering all their internal and external relations, including the matters contained in a Companies Act. His Honour rejected the notion that the power is confined to corporations already formed as inconsistent with the Commonwealth's power to make retrospective laws. This notion, grounded upon the words "formed within the limits of the Commonwealth" is that Parliament may only deal with corporations already formed—essentially their external relations—and not the incorporation and related internal matters of trading and financial corporations.[47] However this notion is primarily one of definition of the subject of power rather than a limitation upon the manner of exercise of the power: Parliament can enact retrospective laws but only

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[42] (1964) 113 CLR 207, 225-226.

[43] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[44] See the authorities collected by Professor Zines *supra* n 36, 10-11.

[45] (1982) 56 ALJR 366, 381; 40 ALR 609, 636.

[46] *Ibid* 381; 637. For some "States' rights" criticism of Mason J's judgment, see R D Lumb, "Problems of Characterization of Federal Powers in The High Court" [1982] ACLD at 45.

[47] See Zines *supra* n 36, 72-73.

in respect of things within its subject matter. The power to incorporate under s 51(xx) is an unresolved[48] issue of the width of subject of power.

Brennan J was perhaps the most cautious member of the Bench refusing to embark upon an examination of the general nature of the power where it had not been raised by the issues of the case nor subjected to argument by counsel. In his Honour's opinion such a practice was of particular importance here because this head of power had not "hitherto been the subject of extensive judicial exegesis".[49] It was unnecessary to consider whether any law which merely singled out the corporations in s 51(xx) and affected them in some way fell within power.

In conclusion this aspect of the decision does not markedly advance the development of any special principles when the Court is faced with a legislative power defined in terms of persons. What does emerge as a key issue however is the significance to be attached to the adjectives in s 51(xx) —are they merely descriptive of the type of corporations which fall within the subject of power, as Mason and Murphy JJ seem to be implying, or do they have a larger role as a limitation upon the power itself, in some way controlling the way the Commonwealth may affect the corporations, as the Chief Justice indicates? The latter view is directed to the control of the activities of the corporations rather than control of the corporations as such, it would seem.

The Invalidity of Sub-sections 45D(5) and (6)

Sub-sections (5) and (6) raised an entirely different problem. They are as follows—

> (5) If two or more persons (in this sub-section referred to as the "participants") each of whom is a member or officer of the same organization of employees (being an organization that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members in relation to their employment) engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with other persons, the organization shall be deemed for the purposes of this Act to engage in that conduct in concert with the participants, and so to engage in that conduct for the purpose or purposes for which that conduct is engaged in by the participants, unless the organization establishes that it took all reasonable steps to prevent the participants from engaging in that conduct.
>
> (6) Where an organization of employees engages, or is deemed by sub-section (5) to engage, in conduct in concert with members or officers of the organization in contravention of sub-section (1) or (1A)—
>
> (a) any loss or damage suffered by a person as a result of the conduct shall be deemed to have been caused by the conduct of the organization;
>
> (b) if the organization is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organization; and
>
> (c) if the organization is not a body corporate—

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[48] *Ibid* 72-75.
[49] (1982) 56 ALJR 366, 386; 40 ALR 609, 645.

(i) a proceeding in respect of the conduct may be instituted under section 77, 80 or 82 against an officer or officers of the organization as a representative or representatives of the members of the organization and a proceeding so instituted shall be deemed to be a proceeding against all the persons who were members of the organization at the time when the conduct was engaged in;
(ii) sub-section 76(2) does not prevent an order being made in a proceeding mentioned in sub-paragraph (i) that was instituted under section 77;
(iii) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in sub-paragraph (ii) is the penalty applicable under section 76 in relation to a body corporate;
(iv) except as provided by sub-paragraph (i), a proceeding in respect of the conduct shall not be instituted under section 77 or 82 against any of the members or officers of the organization; and
(v) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in sub-paragraph (i) that is instituted under section 77 or 82, process may be issued and executed against any property of the organization or of any branch or part of the organization, or any property in which the organization or any banch or part of the organization has, or any members of the organization or of a branch or part of the organization have in their capacity as such members, a beneficial interest, whether vested in trustees or however otherwise held, as if the organization were a body corporate and the absolute owner of the property or interest but no process shall be issued or executed against any other property or members, or against any property of officers, of the organization or of a branch or part of the organization.

In a quite short treatment of these provisions Mason J, with Stephen and Aickin JJ concurring,[50] concluded that they were laws about trade unions and that they had a very remote connection with corporations in s 51(xx). In the opinion of Mason J s 51(xx) did not authorise the holding of an organisation responsible for breaches of s 45D(1) committed by its members if the organisation neglected to prevent its members from instituting the boycott.

Murphy J agreed in the invalidity of these provisions for quite different reasons. Parliament has incidental powers, implied or in s 51(xxxix), to presume or deem one fact from the existence of another, provided that the prescription or deeming was rational. If irrational, it would undermine the judicial power for Parliament to require a court to act upon it in order to find a person liable, upon facts which could not rationally support that liability. Murphy J held that the effect deemed by sub-section 45D(5) was irrational in "light of experience of Australian industrial relations".[51]

The fifth justice to hold sub-sections (5) and (6) invalid was Brennan J, who did so because the provisions

preclude inquiry into whether the organisation has in fact engaged in

[50] *Ibid* 374, 384; 627, 643.
[51] *Ibid* 384; 642.

> the conduct to which liability is attached. They purport to bring within the operation of a valid law an organisation which, not having engaged in the conduct proscribed is beyond the reach of that law.[52]

In his Honour's opinion if an organisation has taken no steps to contravene section 45D(1) then it is beyond the scope of Commonwealth power exercised through that section; it cannot be deemed to be vicariously liable for the acts of its officers by this exercise of the corporations power.

Gibbs CJ with Wilson J concurring[53] would have upheld sub-ss (5) and (6). The Chief Justice noted that the burden of proof under sub-s (5) to evade liability could only be discharged in a certain way. If the facts otherwise deemed to exist were jurisdictional facts (defined by his Honour as facts necessary to be shown if Commonwealth power could be attracted) then the case raised the difficult problem encountered in *Williamson* v *Ah On*[54] and *Milicevic* v *Campbell*.[55] The principle from those authorities is that Parliament cannot by a statutory fiction recite or deem itself into a field in which it has no power.[56] Sir Isaac Isaacs stated in *Williamson's* case:

> if the legislation were so arbitrary and fanciful, so flagrantly destructive of any real and reasonable chance to place the real facts before the Court for the determination of the issue—in short a mere disguise for extending the legislative power—the Court would not hesitate to say the statutory provisions attacked were beyond the uttermost border of incidental aid to effectuate the main power.[57]

Nevertheless if clearly within power, there is no authority to support Murphy J that Parliament could not enact an arbitrary and fanciful deeming provision—the wisdom of Commonwealth legislation is not an issue for the Court.[58]

In *Fontana* Gibbs CJ put aside the *Williamson* issue because his Honour held the facts deemed to exist by sub-s (5) were not jurisdictional facts. This point is considered below.

Mason J had distinguished *Williamson* v *Ah On* and *Milicevic* v *Campbell* because, unlike the provisions upheld in those cases, s 45D(5) went further than merely reversing the normal onus of proof resting upon the informant or plaintiff. Sub-section (5) was "very different" to those provisions because it provided that an organisation could defend itself only by proof of a fact that was quite separate to and independent of the organisation's non-involvement in the boycott, *viz* that the organisation had taken all reasonable steps to prevent the participants from engaging in the boycott. It would appear from his Honour's judgment that the invalidity of s 45D(5) rested upon the lack of a substantial connection to the subject of corporations

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[52] *Ibid* 388; 650.
[53] *Ibid* 384; 643.
[54] (1926) 39 CLR 95.
[55] (1975) 132 CLR 307.
[56] *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1, 189, 222, 263; see W A Wynes, *Legislative Executive and Judicial Powers in Australia* (5th ed 1976) 132-133; Zines, *supra* n 36, 190-193.
[57] (1926) 39 CLR 95, 117.
[58] *South Australia* v *Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373, 409; *Orient Steam Navigation Co Ltd* v *Gleeson* (1931) 44 CLR 254, 261; *Burton* v *Honan* (1952) 86 CLR 169, 179.

rather than upon any issue rising out of *Williamson* or *Milicevic* as to the deeming of the existence of a jurisdictional fact; however it is difficult to draw a conclusion on this due to the brevity of the judgment on this point.

Gibbs CJ went on to conclude that sub-s (5) could be supported as reasonably incidental to the corporations power. Because sub-s 45D(1) operated to protect corporations from certain industrial pressure, to require that an industrial organisation take all reasonable steps to prevent its members from engaging in the prohibited conduct, sub-s (5) was incidental to the attainment of that protection.[59]

The ambit of implied incidental powers is one of the most difficult issues of constitutional interpretation. Every legislative power carries with it authority to deal with acts, matters and things outside the subject which must or should be regulated in order to effectuate the main power.[60] While it is for the Court to determine whether a measure is appropriately related to a subject of power, the Court's role is not to decide whether the method chosen by Parliament is the best or appropriate to actually achieve the desired end.[61] In *Fontana* Mason J and Gibbs CJ disagreed whether sub-s (5) was sufficiently supportive and connected to the effect of sub-s (1). If the test of validity is not the reasonableness of the provision but its reasonable connection to the power, it is submitted that Mason J took a peculiarly narrow approach to the incidental aspect of the protective power in this decision. Given that sub-s (5) has a number of characters, at least one of these is quite strongly supportive of the protection conferred by sub-s (1), and the dissent of the Chief Justice seems far more persuasive on this "incidental" point, and is consistent with decisions such as *Burton* v *Honan*.[62]

However the Chief Justice's narrower view of the validity of s 45D(1) did raise, it is argued, a jurisdictional fact problem in regard to sub-s (5). Gibbs CJ, Stephen and Wilson JJ laid emphasis upon the fact that s 45D (1)(b)(i) touched only those who *intended* to injure corporations and hinted that the Commonwealth might not be able to prohibit boycotts which as a matter of negligence injure a corporation. The implication from this may be that that intent is a (jurisdictional) fact necessary to support the validity of s 45D(1)(b)(i). If so then sub-s (5) deems an organisation to act with this intent and in effect deems the existence of the facts, contrary to the true position, which render the organisation amenable to Commonwealth power. In this way sub-s (5) raises what well may be a statutory fiction in order to bring an organisation within the scope of the Commonwealth's protective power. This seems ample reason to hold sub-s (5), and consequently sub-s (6), invalid because even on a wider view of the protective power, sub-s (5) deems the existence of the very facts on which that protective power is to operate. This reasoning appears most clearly in the decision of Brennan J and, with respect, it is submitted that it is to be preferred. It also avoids the difficult subjective question of degree

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[59] Clearly this is so but arguably the validity of s 45D(5) raised a question about the deeming of the existence of jurisdictional facts. That same question arose in *Williamson, supra* n 54 and *Milicevic, supra* n 55, from quite different provisions, of an evidentiary or onus of proof nature.

[60] *Grannall* v *Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77.

[61] *Stemp* v *Australian Glass Manufacturers Co Ltd* (1917) 23 CLR 226, 233.

[62] (1952) 86 CLR 169.

whether as a matter of "substance" sub-s (5) could be said to be reasonably incidental to sub-s 45D(1).

The decision upholds the basic prohibition of the conduct described in sub-s (1) but that protection may be significantly reduced by the invalidity of sub-s (5). It is unlikely that the Federal Court would attribute the conduct of members of a union to the union itself unless there was evidence that the union had organised or assisted in the conduct.[63] In practical terms there may be difficulties with enforcing the prohibition in s 45D(1) against individuals or with obtaining proof of involvement against union leadership, so that realistic protection may be much more difficult for a corporation to obtain.

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KOOWARTA v BJELKE-PETERSON AND OTHERS STATE OF QUEENSLAND v COMMONWEALTH OF AUSTRALIA[1]

Constitutional law — Constitution (Cth) s 51(xxix) —external affairs power — whether racial discrimination a matter of international concern — Constitution (Cth) s 51(xxvi) — laws for the people of any race — Racial Discrimination Act 1975 (Cth) ss 9, 12 — locus standi — "person aggrieved".

Racial Discrimination — Racial Discrimination Act 1975 (Cth) ss 9, 12 — constitutional validity — Constitution (Cth) s 51(xxvi), s 51(xxix).

1 THE FACTS

The plaintiff, Koowarta, was a member of a group of Aboriginal people situated in Queensland. On behalf of himself and others in the group, the plaintiff approached the Aboriginal Land Fund Commission and requested it to acquire the lease of certain land in Northern Queensland for use by the plaintiff and the other members of the group for grazing purposes. In February 1976, the Commission entered into a contract with the lessees of the land for the purchase of the lease. However, the transfer was subject to the approval of the Minister of Lands of the State of Queensland as required by the contract itself and the provisions of the Land Act 1962 (Qld). The Minister refused approval and gave the following statement of the reasons—

> The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.[2]

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[63] See the careful analysis of Fullagar J in *Williams* v *Hursey* (1959) 103 CLR 30, 81.

* BA; LLB (Hons) (ANU).

[1] (1982) 56 ALJR 625; (1982) 39 ALR 417. High Court of Australia; Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson, Brennan JJ.

[2] (1982) 56 ALJR 625, 627.