

THE MEANING OF "TRADING CORPORATION" IN THE  
COMMONWEALTH CONSTITUTION

*R. v. TRADE PRACTICES TRIBUNAL; EX PARTE*

*ST. GEORGE COUNTY COUNCIL*

*R. v. Trade Practices Tribunal; Ex parte St. George County Council*<sup>1</sup> was concerned with the method to be used in characterising a corporation as a trading corporation within s. 51(xx)<sup>2</sup> of the Commonwealth Constitution. The only detailed judicial discussion of the matter was by Isaacs, J. in *Huddart, Parker and Co. Pty. Ltd. v. Moorehead*,<sup>3</sup> who said:

Next, it is clear that the power is to operate only on corporations of a certain kind, namely, foreign, trading, and financial corporations. For instance, a purely manufacturing company is not a trading corporation; and it is always a preliminary question whether a given company is a trading or financial corporation or a foreign corporation. This leaves entirely outside the range of federal power, as being in themselves objects of the power, all those domestic corporations . . . which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific and literary purposes. . . .

The common denominator, or basis for this construction of s. 51(xx), was clearly the purpose of incorporation. However, Isaacs, J. gave no guidance (beyond an argument *sui generis*) on the method to be used to determine such a purpose. In the *St. George Case* the members of the High Court failed to agree on the correct method to be used. Moreover, some members adopted a basis of construction diametrically opposed to that of Isaacs, J.

*The Facts*

Pursuant to a proclamation by the Governor in 1920 the St. George County Council was constituted a corporation under Part XXIX of the Local Government Act 1919 (N.S.W.). By s. 564 the County Council was given full power to undertake any functions delegated to it in accordance with the Act, for the joint benefit of the areas within the County district. The primary functions so delegated were those contained in ss. 416-419 of the Act. Sections 417-419 were the most significant. Section 417 allowed the Council, to "establish, acquire and conduct trading undertakings"; which were defined by s. 418(1). Section 418(2) included within the power to trade in any article or commodity, a power to "purchase, generate, manufacture, or obtain the article or commodity for the purpose of sale or hire". Section 419 imposed restrictions on the Council. Section 419(1) required that the trading undertaking be conducted "without any loss being incurred" but also "as cheaply as possible". Section 419(2) required the approval of the Minister to any discrimination in the supply of electricity to persons within the Council's district. These sections were contained in Division 2 of Part XVII of the Local Government Act, headed "Trading By Councils".<sup>4</sup> The County Council had a monopoly over the supply of electricity in its area; however, it was the Council's trade in electrical fittings and appliances that brought it to the notice of the Trade Practices Tribunal.

<sup>1</sup> Reported (1974) 48 A.L.J.R. 26.

<sup>2</sup> "The Parliament shall . . . have 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."

<sup>3</sup> (1909) 8 C.L.R. 330 at 393.

<sup>4</sup> The Council was also given the power (under s. 181) to borrow money and levy a loan rate. The Treasurer could guarantee Council borrowing, see s. 564D. A comprehensive summary of the relevant provisions was given by Gibbs, J. (1974) 48 A.L.J.R. 26 at 34-36.

When "off peak" or "extended off peak" hot water systems were purchased from the Council a subsidy was paid in respect of their installation. No such subsidy was paid on the installation of heaters bought from other suppliers. The Commissioner of Trade Practices considered that the subsidisation scheme was an abuse of the Council's monopoly position in that it reduced the capacity of other suppliers to compete with the Council and constituted the examinable practice of monopolisation under s. 37(2) (a) of the Restrictive Trade Practices Act 1971 (Cwlth.).<sup>5</sup> Consultations under s. 48 of the Act took place and failed. In March 1973 Tribunal proceedings were instituted against the Council and a hearing was fixed for 24 September 1973.<sup>6</sup> For the Commissioner to rely on s. 37 it had to be shown that the Council was a corporation as defined by s. 5 of the Act: "'Corporation' means a corporation that is a foreign corporation, a trading corporation formed within the limits of the Commonwealth or a financial corporation so formed." One week before the hearing was due to commence in the Tribunal the St. George County Council sought a writ of prohibition in the High Court of Australia. The ground was that the Commissioner had no jurisdiction over the Council because it was not a corporation within s. 5.

#### *The Arguments*

The argument of the Commissioner was straightforward. It was not contended that the Council was a foreign or financial corporation; the contention was that the applicant was a trading corporation. The Commissioner argued that the Council had been established for trading purposes and that its current activities (trading) also showed the trading character of the corporation.<sup>7</sup>

For the County Council it was argued that the corporation was municipal in character and that this term was in contradistinction to the term "trading corporation". This argument was primarily based on the Local Government Act which disclosed the public nature of the corporation, as evidenced by four main factors.<sup>8</sup>

(1) The source of incorporation itself; which also meant that the corporation could be the recipient of further local government powers and functions.<sup>9</sup>

(2) The County Council had the power to levy a loan rate; and loans attracted a power of Treasury guarantee.

(3) The limitation on the profitability of the Council, contained in s. 419 of the Act.

(4) Performance by the County Council of a public service; it provided a service which was beneficial to the public. A factor linked with the restriction on profit in s. 419.

It also appears to have been argued by the applicant that the words "formed within the limits of the Commonwealth" were only satisfied by incorporation under the usual legislation with regard to companies, and not under a local government Act. This does not appear to have been seriously contended.<sup>10</sup> Instead the argument centred on the internal features and purposes of the applicant. This involved a neglect of current activities.

#### *The Decision*

The High Court<sup>11</sup> held that the applicant was not a corporation within s. 5. The rule nisi for prohibition, made by Mason, J., was therefore made absolute.

<sup>5</sup> Now superseded by the Trade Practices Act 1974 (Cwlth.).

<sup>6</sup> Commissioner of Trade Practices, *Sixth Annual Report* (1973) 6-7.

<sup>7</sup> See (1974) 48 A.L.J.R. 26 at 32 *per* Menzies, J., and at 37 *per* Gibbs, J.

<sup>8</sup> *Id.* at 27-28 *per* Barwick, C.J.

<sup>9</sup> *Id.* at 32 *per* Menzies, J.

<sup>10</sup> *Id.* at 28 *per* Barwick, C.J., and at 36-37 *per* Gibbs, J.

<sup>11</sup> McTiernan, Menzies and Gibbs, JJ.; Barwick, C.J. and Stephen, J. dissenting.

McTiernan, J. did not think that Parliament intended a corporation such as the Council to come within the jurisdiction of the Trade Practices Tribunal. The object of the Restrictive Trade Practices Act was "to preserve Competition in Trade and Commerce to the extent required by the Public Interest".<sup>12</sup> For McTiernan, J. this was an object "pertaining to"<sup>13</sup> private enterprise *vis à vis* public enterprise. However, the applicant was a corporation with a public enterprise character; it did not supply electricity and electrical goods purposely to make a profit. Merely undertaking revenue producing operations did not make the corporation a private trading corporation.<sup>14</sup> It was "too remote a deduction to draw from the general words 'trading corporation' that the legislature intended to make such a body amenable to the jurisdiction of the Trade Practices Tribunal. . . ." <sup>15</sup>

McTiernan, J. did not therefore find it necessary to deal with the wider question of whether it was within the competency of the Commonwealth Parliament to control such a body. However, it is difficult not to agree with Barwick, C.J., that "the effect of the trading activities of such a corporation upon and in the community will not be lessened or necessarily affected by the fact that it is a State or municipal instrumentality".<sup>16</sup>

The other judgments dealt with the wider question involving the proper construction of s. 5 and the width of the power conferred by s. 51(xx). Although no question arose as to the "constitutional powers of the Commonwealth"<sup>17</sup> it was necessary to decide on what basis corporations came within s. 5. It was necessary to go further than McTiernan, J. had gone and consider and construe s. 51(xx). The similarity between s. 5 and s. 51(xx) led Gibbs, J. to say that the two had the "same meaning".<sup>18</sup> Barwick, C.J. also thought the two similar enough to result in the construction of s. 5 being applicable to s. 51(xx).<sup>19</sup> Therefore, with the exception of McTiernan, J., the judgments have a direct bearing on the construction of s. 51(xx) of the Constitution.

In order to decide whether the applicant was a trading corporation as defined by s. 5 Menzies, J. thought it "of primary importance to examine the law under which the St. George County Council was established".<sup>20</sup> From this he concluded that the County Council was formed for local government purposes.<sup>21</sup> Menzies, J. then deduced four features of the Council. First, the subordination of trading purposes to public or community purposes; shown, for example, by s. 419 of the Local Government Act. Secondly, a "governmental" character by virtue of the power to rate land. Thirdly, that further local government power could be given to the applicant. Fourthly, that loans raised by the Council could be guaranteed by the Treasury and had the nature of trustee investments.<sup>22</sup>

It will be noticed that all these features concentrated on the intrinsic character of the corporation and were independent of the "particular powers and functions . . . at the time of its establishment or later".<sup>23</sup> The similarity with the arguments for the Council is apparent. The features therefore estab-

<sup>12</sup> Preamble to the Act, quoted (1974) 48 A.L.J.R. 26 at 30 *per* McTiernan, J.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Id.* at 31.

<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.* at 29; *cf.* at 42 *per* Stephen, J.

<sup>17</sup> *Id.* at 31 *per* Menzies, J.

<sup>18</sup> *Id.* at 36.

<sup>19</sup> *Id.* at 26, 27, 29. Menzies, J. stated that the draftsman of s. 5 "had regard to the terms of s. 51(xx)", *id.* at 31. Leave to intervene in the case was given to the States of New South Wales, Victoria and Queensland, on the basis that the decision would bear on the meaning of s. 51(xx).

<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.* at 32.

<sup>22</sup> *Ibid.* Less importance was attached to the fourth feature.

<sup>23</sup> *Ibid.*

lished the local government nature of the corporation: its *municipal* character. The trading activities of the Council were, for Menzies, J., subordinate to the Council's municipal purpose. The first feature of the applicant therefore revealed its "very nature"<sup>24</sup> as non-trading. The distinction between trading and municipal corporations was that recognized by Isaacs, J. in *Huddart Parker*; the types of corporation were, in 1900,<sup>25</sup> mutually exclusive.

Gibbs, J. based his decision on the premise that the words "trading corporation" in s. 51(xx) (and s. 5) formed a composite expression. "Trading" indicated "the essential attribute of the kind of corporation to which it"<sup>26</sup> referred.

A trading corporation is one formed for the purpose of trading. . . . It is necessary to determine the true character of the corporation, upon a consideration of all the circumstances that throw light on the purpose for which it was formed. Thus there is no difficulty in holding that the fact that a corporation carries on some trade which is merely incidental or ancillary to the fulfilment of its main purpose does not give it the character of a trading corporation.<sup>27</sup>

The St. George County Council was not a corporation formed for the purpose of trading. Although it was true that then "Council was set up to conduct, as its sole or at least its dominant activity, what may, for some purposes at least, be described as a trading undertaking",<sup>28</sup> other circumstances showed that the essential attribute of the corporation was non-trading. According to Gibbs, J. the true character of the applicant was municipal. The circumstances that showed this were the powers of the Council: particularly the power to levy rates (and borrow under Treasury guarantee); and the restrictions imposed by s. 419 of the Local Government Act.<sup>29</sup> The Commissioner had no jurisdiction over the applicant because the Council was a municipal corporation, a category of corporation which could not include a trading corporation as defined by s. 5.

Gibbs, J. did not think it irrelevant that the Council traded but rather that the trading activities did not reveal the true character of the corporation. It was a "half-truth" to say that the Council was "formed for the purpose of trade".<sup>30</sup> Unlike Menzies, J., he was prepared to look beyond the incorporating statute. If a corporation was formed to engage in trade it would not matter that formation was under a local government statute: it would be a trading corporation.

Like Menzies, J. before him, Gibbs, J. cited the statement of Isaacs, J. in *Huddart Parker*. The approval of Gibbs, J. however, was qualified.<sup>31</sup> Although it was unnecessary to decide the matter, Gibbs, J. must be taken to have cast doubts on the correctness of the statement, particularly in relation to the exclusion of purely manufacturing companies and mining companies from laws relying on s. 51(xx) as a source of power.

The focal point of the dissenting judgment of Barwick, C.J. was that the description "trading corporation" referred, not to the purpose of incorporation, but instead to the activities that the corporation was actually engaged in.

[The] activities of a corporation at the time a law of the Parliament is said to operate upon it will determine whether or not it satisfies the statutory and therefore the constitutional description. Thus . . . the

<sup>24</sup> *Ibid.*

<sup>25</sup> *Id.* at 33.

<sup>26</sup> *Id.* at 37.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* at 38.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* See n. 45, below.

<sup>31</sup> *Id.* at 37.

identification of the corporation which falls within the statutory definition will be made principally upon a consideration of its current activities.<sup>32</sup>

The principal activities of the County Council were trading activities. In dealing with the arguments of the applicant, Barwick, C.J. did not deny that they established the corporation as a municipal corporation. However, the arguments, being based on purpose and not activities did nothing to establish a non-trading character in the activities. What the arguments based on the Local Government Act did establish was that the County Council was a "creature and servant of 'local government'".<sup>33</sup> In short the County Council was a "municipal trading corporation".<sup>34</sup> Even so, the Chief Justice thought that the purpose of incorporation of the applicant was for trading.

Implicit in the judgment of Barwick, C.J. is a rejection of the approach of Isaacs, J. in *Huddart Parker*. Unlike Isaacs, J. (and all other justices in the *St. George Case*), the Chief Justice took the view that s. 51(xx) gave the Commonwealth power over certain municipal corporations, i.e., municipal trading corporations.

In his dissenting judgment Stephen, J. read "trading" in s. 5 as referring to the functions of a corporation. The St. George County Council had, for Stephen, J., only "one delegated function",<sup>35</sup> and this was to trade. Although s. 5 had a temporal connotation, referring "either to the activities which a corporation is intended to undertake, or to those which in fact it does undertake",<sup>36</sup> there was no need to choose between the two in this case. The County Council's intended functions were identical to its actual functions and were trading functions. A consideration of its activities showed that the Council, albeit a local government body, had "none of the regulatory or governmental functions associated with ordinary government bodies".<sup>37</sup> The basis of his test (activities or function) was the same as that of Barwick, C.J.

The arguments of the applicant were based on the internal, or domestic, functions of the Council and were mostly irrelevant to its external functions and activities. Only the restrictions imposed by s. 419 related to external matters. Although the section may have resulted in lower prices to the consumer it did not detract from what Stephen, J. called the "commercial enterprise" character of the corporation:

It might be otherwise, if it distributed electricity free of charge but so long as its activity is that of buying and reselling rather than distributing by way of gift it is . . . engaged in trading and since this is its only activity it is properly described as a trading corporation.<sup>38</sup>

Stephen, J. agreed with Menzies and Gibbs, JJ. in regarding the terms "municipal corporation" and "trading corporation" as mutually exclusive.<sup>39</sup> The applicant, however, belonged in the latter category. In no other judgment was the corporation described as non-municipal in character. Stephen, J. (like Barwick, C.J.) also believed that the purpose of formation was to trade.<sup>40</sup> The test did not, therefore, involve a rejection of the sentiment of Isaacs, J.'s statement in *Huddart Parker*. However, Stephen, J. rejected the basis on which Isaacs, J.'s statement was formed.

In the *St. George Case* Stephen, J. did not find it necessary to choose between the two connotations of ss. 5 and 51(xx). However, it would seem that he favoured the present functions as the relevant criterion. There are two

<sup>32</sup> *Id.* at 29.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Id.* at 30.

<sup>35</sup> *Id.* at 39.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Id.* at 40.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> *Ibid.*

reasons: first, the discussion of s. 419 (an important section) was based on the Council's current activities; secondly, the statement that actual (present) functions would not be altered in character if "some other motive [actuated] a corporation . . . to engage in trade".<sup>41</sup> Although the reasons are not conclusive of one interpretation to the exclusion of the other, the second reason points (at least in some cases) to actual functions being dominant over intended functions as the relevant criterion.

Although the judgments showed a great difference of opinion as to the weight to be given to current activities or functions, there was unanimity on one point. Not every corporation which traded would be a trading corporation; s. 51(xx) is a power with respect to the enumerated corporations, and it is not therefore a power with respect to trading.<sup>42</sup>

#### *Which Test?*

In the *St. George Case* two different bases were used for determining which corporations were trading corporations within s. 51(xx). The basis of the tests proffered by Menzies and Gibbs, JJ. was the purpose of formation while the tests of Barwick, C.J. and Stephen, J. were based on the functions of a corporation. According to *Strickland v. Rocla Concrete Pipes Ltd.*<sup>43</sup> the corporations power of the Commonwealth is to be construed widely and not narrowly or pedantically. Which test in the *St. George Case* offered the greatest degree of certainty while not being narrow or pedantic? Barwick, C.J. was concerned to show the difficulties associated with a test which tried (perhaps pedantically) to assign purpose to incorporation. Particularly he thought problems would be encountered with a corporation formed under a State Companies Act by a memorandum of association.<sup>44</sup> It was probably true that the presence of the Local Government Act as an incorporating statute made it easier to assign purpose to the incorporation of the St. George County Council. Difficulties could, perhaps, be encountered with a memorandum of association which evinced powers not synonymous with purpose; for example, in a diversified company. Something more than an inspection of the document would be required if such a case arose.

It is here that the distinction between the tests of Menzies and Gibbs, JJ. would apparently become important. The basis in each of the tests was identical but the method of evaluation was different in degree. Menzies, J. looked (more narrowly) only at the statute and presumably would look only at a memorandum. Gibbs, J., however, would look beyond this and his test could involve a consideration of current activities as a circumstance that would throw light on the purpose of incorporation and reveal the true nature of the corporation.<sup>45</sup> In the *St. George Case* this did not occur. The consideration of current activities ignored other circumstances that did show the true purpose of incorporation. Obviously current activities would be of prime importance when they were in themselves fulfilling the purpose of incorporation.

If the test of Gibbs, J. gave the appearance of a qualitative approach then it would seem that the test presented by Barwick, C.J. was more quanti-

<sup>41</sup> *Id.* at 40.

<sup>42</sup> *Id.* at 29 *per* Barwick, C.J.; at 30 *per* McTiernan, J.; at 33 *per* Menzies, J.; at 37 *per* Gibbs, J.; at 41 *per* Stephen, J.

<sup>43</sup> (1971) 124 C.L.R. 468 at 490-491 *per* Barwick, C.J.; at 499 *per* Menzies, J.

<sup>44</sup> (1974) 48 A.L.J.R. 26 at 28-29.

<sup>45</sup> Professor Lane seems to take the contrary view that it would only be the charter, the memorandum of association, which would be looked at: P. H. Lane, "Federal Control of Trading Corporations" in (1974) 48 A.L.J. 233, 239. It is submitted that (although this was the approach of Menzies, J.) this takes a narrow view of the test of Gibbs, J. and that his discussion of current activities shows them to be a relevant circumstance. No doubt some of Gibbs, J.'s discussion of current activities was in deference to the Commissioner: (1974) 48 A.L.J.R. 26 and 37. However, it would seem that it was only the fact that the current activities revealed a "half-truth", were "incomplete and misleading" (*id.* at 38) that they were not thought important in the instant case.

tative; a corporation would be a trading corporation when its principal or main activities were trading activities. No doubt this gave the test of the Chief Justice a look of certainty not so obvious in the narrower test, of Menzies, J., based on the purpose of formation. However, the mathematical certainty so presented is more apparent than real. It would be difficult to find an adequate criterion by which to gauge when a particular activity became predominant. In the *St. George Case* mention was made of total revenue and profit.<sup>46</sup> However, what percentage of total revenue or profit would be required for an activity to become predominant? Presumably, if only two activities were undertaken, one trading and one non-trading, a corporation would be a trading corporation within s. 51(xx) if more than fifty per cent of profit or revenue were made in trading activities. Such a test would be difficult to apply to well integrated companies with many activities; and in the *St. George Case* (according to the majority decision) gave a distorted view of the corporation. Moreover, the test does not appear a particularly appropriate way in which to interpret the Constitution.

The basis of the test of Stephen, J. was the same as that of Barwick, C.J. but the method of characterisation need not be. If the relevant criterion were current activities to the exclusion of intended activities the method would be identical to that of the Chief Justice and attract the same problems: when does an "ancillary" activity become a "principal"<sup>47</sup> activity? The proper approach to Stephen, J.'s test could be to treat the two alternatives as not mutually exclusive. Both intended functions and actual functions could be considered. To the extent that intended functions would be similar to purpose this method would approach more closely that of Gibbs, J. than that of Barwick, C.J. Even so, the basis of the test of Stephen, J. would remain distinct from that of Gibbs, J.

Given the diversity of opinion offered in the case, it must be conceded that, overall, the test of Gibbs, J., possessing the twin virtues of broadness and a degree of certainty, which are lacking in the other judgments, is to be preferred.

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## IMPLIED WARRANTIES IN THE SALE OF GOODS

*ASHINGTON PIGGERIES LTD. v. CHRISTOPHER HILL LTD.*

*CHRISTOPHER HILL LTD. v. NORSILDMEL<sup>1</sup>*

### *The Facts*

The appellants, Ashington Piggeries, were mink breeders who contracted with the respondents, Christopher Hill, to supply a mink food called "King Size". It was the respondents' business to make and supply animal feeding compounds, but they had never previously compounded food for mink. The formula for the "King Size" was supplied by the appellants. One of the ingredients included in the formula was herring meal, which was supplied to the respondents by the third party Norsildmel, a Norwegian firm. A consignment of this herring meal was later discovered to be contaminated by a substance

<sup>46</sup> *Id.* at 27, 29 *per* Barwick, C.J.

<sup>47</sup> *Id.* at 40, 41.

<sup>1</sup> (1972) A.C. 441.