GENTLEMEN AND PLAYERS: APPLICATION OF THE TRADE PRACTICES ACT TO GOVERNMENT BODIES, INCLUDING THOSE CORPORATISED OR PRIVATISED

by

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> The Crown does not take technical points in civil proceedings – *a fortiori* in criminal ones.*
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> 'Contrariwise', continued Tweedledee, 'if it was so, it might be; and if it were so, it would be: but as it isn't, it ain't. That's logic'.[1]

The rush to develop the Australian continent last century, combined with political dogma at a slightly later stage of the nation's history, has left us with a legacy of government-run utilities and businesses, from ports, railways and gas companies to banks, hospitals and insurance companies. In addition, statutory marketing schemes for primary produce have proliferated.

Following developments overseas, Australian governments have recently embraced, in varying degrees, the policy of deregulation and divestment of these activities, and even those on the left of the political spectrum have begun to accept, after the spectacular failure of socialism in Eastern Europe, that governments rarely succeed in running enterprises efficiently. Government-run utilities have generally operated without competition, as *de facto* or *de jure* monopolies, and have had no incentive to minimise costs or offer acceptable levels of service. In some cases, a decision has now been made to transfer those activities to private ownership, usually by floating them on the stock exchange, while in other cases the decision has been to corporatise the entity, by placing it on a similar footing, in terms of revenue and budgeting, to a commercial enterprise. At the same time, new proposals have also been made for government sponsored infrastructure developments which are likely to produce a new generation of quasi-governmental entities.

Despite the moves towards devolution, governments seemingly have been less ready to accept the proposition that these entities should be required to play according to the same rules of the marketplace that govern the private sector. For most of their existence, these organisations have been able to enjoy the shield of the Crown and operate above the law in respect of their business conduct. This has led to a situation where there are "gentlemen and players": those who play the game according to the rules they choose to obey, and those who are expected to obey all the rules. Despite rhetoric about "level playing fields", the pace of change at the State level has been glacial.

The purpose of this paper is to examine the way in which the shield of the Crown operates in the context of the *Trade Practices Act* 1974 (Cth) (the "Act"), especially Part IV. Part IV deals with competition matters, and the extent to which the corporatisation or privatisation of these entities will deprive them of the shield.

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* Griffith CJ in *Melbourne Steamship Co Limited v. Moorehead* (1912) 15 CLR 333 at 342.

1 Lewis Carroll, *Through the Looking Glass*, ch.4.

2 *Trade Practices Act* Review Committee – Report to the Minister for Business and Consumer Affairs August 1976 paras: 10.25, 10.26.

3 (1979) 145 CLR 107.

Historical Development

At the outset, the Act contained no reference to its possible application to the Crown. In light of this, established principle applied to exclude its operation in respect of the Crown in its various guises.

In its Report of August 1976, the Swanson Committee recommended that the Commonwealth Government and its instrumentalities, when engaged in commercial activities of their own, should be bound by the Act to the same extent as a corporation. It believed that the same principle should apply to the States and that this should be achieved by consultation.[2]

The Commonwealth Parliament duly amended the Act in 1977, by introducing s.2a:

(1) Subject to this section, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

(2) Subject to the succeeding provisions of this section, this Act applies as if:
   (a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and
   (b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business,
   were a corporation.

(3) Nothing in this Act renders the Crown in right of the Commonwealth liable to be prosecuted for an offence.

(4) Part IV does not apply in relation to the business carried on by the Commonwealth in developing, and disposing of interests in, land in the Australian Capital Territory.

Since then, a number of decisions have tested the application of the Act to particular Crown activities, but no agreement has been reached to extend the Act to State Governments.

The issue came before the High Court in 1979, when injunctions were sought concerning certain contracts entered into between the Queensland Commissioner for Railways and BHP which were alleged to contravene ss.45 and 47. It was alleged, *inter alia*, that the agreements required BHP to provide financial assistance to the Commissioner on the condition that the Commissioner would not acquire equipment from a competitor of BHP. When the Commissioner raised the defence of the shield of the Crown, the matter was removed to the High Court under s.40 of the *Judiciary Act* 1903 (Cth): *Bradken Consolidated Limited & Anor v. Broken Hill Proprietary Co Limited & Ors.*[3]

The Court held that the Commissioner was an instrumentality, agent or authority of the Crown and there was no legislative intention that the Act should bind the Crown in right of Queensland. The *Railways Act* 1914-1976 (Qld) provided that the Commissioner "representing the Crown ... shall have and may exercise all the powers, privileges, rights and remedies of the Crown."

Referring to *Province of Bombay v. Municipal Corporation of Bombay*,[4] Gibbs ACJ noted that it was an established rule of construction that no statute binds the Crown unless the Crown is expressly named therein or unless there is a necessary implication that it was intended to be bound. In the Australian context, there was the question whether the rule applied when the Crown was the State Crown and the legislation was Commonwealth. Although it is established that, within certain limits, the Commonwealth Parliament can bind the States,[5] the presumption is against it so doing in the absence of clear words or necessary implication, for the reasons stated in an early US Supreme Court decision *US v. Hoar*:[6]

> In general, Acts of the legislature are meant to regulate and direct the acts of citizens, and in most cases the meaning applicable to them applies with very different and contrary force to the Government itself.

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4 [1947] AC 58.
5 *State Chamber of Commerce and Industry v. The Commonwealth* (1987) 163 CLR329.
6 2 Mason 311.

Justice Murphy dissented, on the basis that the rule of construction applied only to the Commonwealth Crown, or if that were incorrect, the Act could still apply to the conduct of others in relation to the Crown. Unfortunately, the only authority cited by his Honour[7] is on a different point.

However, that was not the end of the matter. The applicants sought relief against BHP, as well as the Commissioner. The Court found clear authority that to so apply the Act would prejudice the Crown and this was not permitted. In an English trade practices case, it was held that an agreement to which the Crown was not a party, was exempt from registration under the *Restrictive Trade Practices Act* 1956 (UK) because registration of the agreement would be prejudicial to the interests of the Crown.[8]

Justices Mason, Jacobs and Stephen concurred in separate reasons in *Bradken*. The effect of the judgment, which has not been disturbed subsequently, is that anyone dealing with the Crown in right of the States or Territories is, in respect of those dealings, immune from the operation of the Act where to hold otherwise would prejudice the interests of the Crown. This penumbra of immunity may, on the basis of the English case, extend even to dealings with third parties.

Bradken has a number of consequences raising issues for competition law:

(1) instrumentalities of the States may disregard the Act in their dealings and may insist that others do likewise where their interests would otherwise be prejudiced. One might have thought that State instrumentalities would not seek to rely on such immunity and would impose a degree of self-discipline on themselves when participating in commercial activities. Decided cases reviewed here and anecdotal evidence suggests otherwise;

(2) one might have thought, after the Swanson Committee Report, that State Governments, if not actively seeking formal agreement to remove the immunity, would discontinue conferring statutory immunity on new business entities created by statute. This has again not generally been the case;

(3) the person dealing with the State instrumentality cannot, without taking expert legal advice, be certain whether in a particular case the instrumentality enjoys the shield of the Crown and whether the person's own dealings with the instrumentality will be either subject to a different standard of conduct from that applying to the Crown or, if it is in the Crown's interest, protected from the Act's operation;

(4) the operation of the immunity in markets where Crown instrumentalities are major players, and quite often enjoy statutory monopolies, will be such as to distort the competitive process and give the instrumentality a considerable actual and tactical advantage;

(5) the High Court of Australia has put in issue the justification of the preservation of the general presumption that legislation does not bind the Crown in the absence of express words or necessary implication.[9]

Difficulties of Application

There appears to be no particular uniformity in the drafting of statutes establishing instrumentalities. One cannot assume, without further inquiry, that an entity established by statute, is an agent or authority of the Crown. There will be clear cases and borderline cases. Once it is established that a particular instrumentality is not entitled to the shield of the Crown, it must nevertheless be established that it is a trading or financial corporation in order for it to be within the primary application of Part IV of the Act. If the impugned conduct is something to which Part IV of the Act may apply, there may be a question as to whether it is engaged in "in trade or

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7 *McGraw-Hinds (Aust) Pty Limited v. Smith* (1979) 144 CLR 633.
8 *In re Telephone Apparatus Manufacturers Application* [1963] 1 WLR 463.
9 *Bropho v. State of Western Australia* (1990) 171 CLR 1.

commerce". These questions will not always be without difficulty.[10]

The expression "State instrumentality" will be used here as the generic term for an entity created by a State or Territory statute irrespective of whether, on examination, it is found to be entitled to the shield of the Crown. The expression "Crown instrumentality" will be used to refer to a State instrumentality which has that immunity. The expression "Commonwealth instrumentality" will be used to refer to an entity created by a statute of the Commonwealth Parliament. These will be discussed later in this paper.

In the first case[11] to follow *Bradken*, it was alleged that the New South Wales Minister for Public Works, and the Metropolitan Water Sewerage and Drainage Board (the "Board"), had acted in concert with members of the relevant trade union to implement a policy of denying work to private contractors in breach of s.45d of the Act. The matter of substance was whether the Board was an emanation of the Crown. Justice Sheppard considered the terms of the Act establishing the Board. For two principal reasons, his Honour held that it was: the Board was subject to the direction and control of the Minister and all its lands and property were held on trust for the Minister. An ancillary reason related to the fact that "until the passing of the present Act, the functions of providing water supply and sewerage services had always been in New South Wales functions of government".[12] The Board's predecessor, established in 1880, had been held to be the Crown by the High Court in 1911.[13] Moreover, Sheppard J held that the relief sought could not be granted against the other respondents because to do so would prejudice the Crown. His Honour rejected an argument that it would not have this effect because, in fact, the Board was being hindered by the conduct of the union. That was not the kind of prejudice *Bradken* was talking about; the Crown had entered into the arrangement with the union and it was free to do so.

While the High Court in *Bradken* had declared that the proper sequence in which to resolve the relevant issues of the application of the Act to a State instrumentality was to consider first the defence of shield of the Crown and, only if that were resolved in the negative, to then consider whether the instrumentality was a trading or financial corporation, these questions were considered in the reverse order in the next case, *State Superannuation Board of Victoria v. Trade Practices Commission*.[14] There, the Commission had served notices under s.155 of the Act on the Board seeking information and documents relating to alleged exclusive dealing in lending money secured on land. The Board argued that it was not a "corporation" within s.4(1) of the Act and that s.47 did not apply to it. Justice Brennan in the Federal Court concluded that the Board was a financial corporation. Shield of the Crown was not argued until the appeal, where the Full Court held that the Board was independent of the Victorian executive government and could not rely on the *Bradken* defence. The Court rejected the argument that a corporation formed for "governmental purposes" could not be a trading or financial corporation.

The High Court was divided on the financial corporation argument. Chief Justice Gibbs and Wilson J found that the Board was not a financial corporation and it was therefore unnecessary to consider the application of the shield of the Crown. The majority (Mason, Murphy and Deane JJ) referred to an earlier decision on Crown immunity in order to determine the test for its application to a particular instrumentality: *Superannuation Investment Trust v. Commissioner of Stamps (SA)*.[15] There the High Court had divided as to the character of the Trust, although applying the same principles. There was no question of the Victorian Parliament having conferred

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10 For example, *Sun Earth Homes Pty Limited & Ors v. Australian Broadcasting Corporation* (1991) 13 ATPR 41-067.
11 *F Sharkey & Co Pty Limited v. Fisher & Ors* (1980) 3 ATPR 40-185.
12 *Ibid* at 42,531.
13 *Federated Engine Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398.
14 (1982) 150 CLR 282.
15 (1979) 145 CLR 330.

Crown immunity (as in *Bradken*) on the Board. The question was whether the Board was an emanation of the Crown. The majority held that the Board was distinguishable from the Trust in the earlier case: it had greater autonomy, its funds and property were not dealt with by the relevant Act "consistently with having the character of the Crown in right of the State of Victoria." The appeal was therefore dismissed.

It should be noted at this point that the Superannuation Fund Investment Trust was a Commonwealth instrumentality and the question in the 1979 case was whether it was liable for South Australian stamp duty. It should therefore be treated with some caution when applying the case to situations where the Commonwealth is legislating and the instrumentality is established by a State. However, the matters which will be looked at in the constituting statute are similar: whether the instrumentality performs functions traditionally regarded as governmental, the degree of executive government control over the entity, its funding from consolidated revenue or otherwise.[16]

(a) *Bradken* and Other Immunities in Practice

The next case calling for consideration is *New South Wales Bar Association & Ors v. Forbes Macfie Hansen Pty Limited & Ors.*[17] The applicants had sought injunctions to prevent advertisements of the New South Wales Government, aimed at explaining and promoting new legislation dealing with limitations on workers compensation and personal injury claims. The respondents were the Government's advertising agents and relevant Ministers. No State instrumentality was involved. The case is relevant however to the penumbra identified in the *Bradken* case. Justice Einfeld held that the publication of the advertisements was a legitimate function of government and the immunity of the Crown extended to protect the advertising agents as commercial contractors of the Government against being joined as aiders and abettors. Then in *The Paul Dainty Corporation Pty Limited & Anor v. The National Tennis Centre Trust & Ors*,[18] the Full Court of the Federal Court held that legislation establishing the Victorian Arts Centre Trust, the National Tennis Centre Trust and the Olympic Park Management did not involve a sufficient degree of executive control of those bodies to confer on them the shield of the Crown in respect of alleged exclusive dealing under the Act. The *Victorian Arts Centre Act*, 1979 (Vic) provided that "subject to the general direction and control of the minister the Trust shall be responsible for the management of the Centre". This was "somewhat ambiguous" and presented a question which was "not easy to decide" but Woodward, Northrop and Sheppard JJ came to the view that "having regard to Gibbs CJ's reminder as to how easily the shield of the Crown can be provided for if that is the intention of the legislature", the better view was that the Trust was not operating under the shield.[19]

However, the respondents had a stronger argument under s.51 of the Act because s.5 of the *Victorian Arts Centre (Amendment) Act* 1988 (Vic) "specifically authorised and approved" agreements specified in the schedule to the Act and "any subsequent agreements to like effect". As the relevant agreements met that description, they were therefore expressly excepted from the operation of s.47 by virtue of s.51(1)(b).

Yet another field of immunity was opened up by *Bourke & Ors v. State Bank of New South Wales*.[20] Section 51(xiii) of the Constitution gives the Commonwealth Parliament power to make laws with respect to "Banking, other than State banking; also State banking extending beyond the limits of the State concerned ...". There is thus a limitation on the legislative power of the Commonwealth in this area. The question to be determined was whether the limitation applied

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16 *Ibid* at 347*ff* per Stephen J.
17 (1988) 10 ATPR 40-875.
18 (1990) 22 FCR 495.
19 *Ibid* at 522.
20 (1990) 170 CLR 276.

only to the banking power or to the Commonwealth's legislative power generally. The appellants had alleged that the State Bank had contravened ss.52 and 52a of the Act. Justice Wilcox held that the Bank was a financial corporation but that insofar as the Act purported to regulate a transaction of a State bank taking place wholly within the limits of the State concerned, it was invalid. The question was removed to the High Court which dealt with the appeal from Wilcox J's decision.

In a joint judgment, the High Court held that, insofar as they purported to apply to banks as financial corporations, ss.52 and 52a were laws with respect to banking and, as such, operated so as to have a substantial connection with State banking. Although the definition of "financial corporation" in s.4(1) excluded "a body corporate that carries on as its sole or principal business the business of banking (other than State banking not extending beyond the limits of the State concerned)", this was not sufficient to save its operation from the constitutional limitation. A corporation could not be regarded as a "financial corporation" with respect to part only of its business. The second limb of the definition of "financial corporation", being a law with respect to banking, was therefore wholly invalid, while the first limb, referring to financial corporations within the meaning of s.51(xx) of the Constitution generally, was not such a law and was not affected by s.51(xiii) in the same way: it could be read down so as to have no application to the conduct of State banks to the extent that they are engaged in State banking not extending beyond the limits of the State concerned.

The result is not satisfactory but can only be remedied by Constitutional amendment. The same limitation is found in the insurance power, s.51(xiv). The Act will therefore not apply to purely intra-State conduct of banks and insurance companies (in the area of banking or insurance respectively) owned by a State.

One Government insurance company which was not constrained by State boundaries was the New South Wales Government Insurance Office ("GIO") which became engaged in an acrimonious altercation over an acronym with its Western Australian counterpart, SGIC. The excursion prompted French J to observe that it was "a sad spectacle to see public bodies, established for public purposes, engaged in unproductive and expensive litigation at a time when community resources are under considerable pressure to meet far more pressing needs...".[21]

The GIO was established by the *Government Insurance Act* 1927 (NSW). Section 3(3a) provided, "the office shall, for the purposes of any Act, be deemed to be a statutory body representing the Crown."

The GIO raised a number of defences: that it was not a trading or financial corporation, that it was an emanation or agent of the Crown, and that the Act did not apply to it or to the other respondents (the GIO's subsidiaries), and that the Act did not apply to a trading or financial corporation carrying on State insurance beyond the limits of the State concerned. Justice French rejected an argument by the applicants, based on *Bourke*, that a State bank carrying on banking outside the limits of its home state was a financial corporation bound by the Act whether or not it was an emanation of the Crown.

The respondents' reliance on *Bradken* was then challenged on the basis that that decision had been called into question by the High Court's decision in *Bropho v. State of Western Australia*. His Honour found that *Bropho* had modified but not removed the presumption on which *Bradken* was based and that, in light of s.2A of the Act, it was likely that the *Bradken* view would continue to prevail in relation to the States. Turning to the question of whether the GIO was an emanation of the Crown, French J observed:

> The question whether a body set up by a statute is an emanation or agent of the Crown is frequently linked to the related question whether it is bound by some other statute. The first limb of that inquiry may be expressed by asking whether the body enjoys Crown

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21 *State Government Insurance Corporation & Anor v. Government Insurance Office of New South Wales & Ors* [1991] 13 ATPR 41-110.

> immunity, but it is really one part of a two-part constructional issue which begins with an examination of the statute which it is sought to apply. The first question in that examination is whether the statute whose application is sought does apply on its proper construction to all or any of the activities of the Crown or its agencies or instrumentalities. And if it does not apply to such activities in whole or in part, the question which follows is whether the activities of the public body claiming Crown immunity are properly classed as activities of the Crown and fall outside the operation of the relevant statute. The answer to that second question will depend upon the proper construction of the legislation by which the public body is constituted.[22]

His Honour held that the GIO was an emanation of the Crown in right of New South Wales and it did not lose that character by crossing State boundaries. Moreover, its subsidiaries were entitled to protection from the Act in line with *Bradken*.

In an interlocutory decision in *Od Transport Pty Limited v. The West Australian Government Railways Commission*,[23] the Court held that the question as to whether the Commission was an emanation of the Crown was complex, involving questions both of law and fact; it was not as clear cut as the facts in *Bradken*. The Commission might be the agent of the Crown in respect of some of its powers and functions but not others.

In *"E" v. Australian Red Cross Society & Ors*,[24] Wilcox J had to decide whether The Royal Prince Alfred Hospital was an emanation of the Crown. His Honour said that the three most important considerations were: "the function of the corporation, the extent to which it is subject to ministerial control and whether or not its property and funds are held independently of government".[25] Although the *Public Hospitals Act* 1929 (NSW) imposed significant fetters on the board of the Hospital it did not, in his Honour's opinion, affect the legal structure of the Hospital. He concluded that it was not excluded from the operation of the Act.

The position of instrumentalities established by Territory legislation has been considered only once. In *Burgundy Royale Investments Pty Limited & Ors v. Westpac Banking Corporation & Ors*[26] claims under ss.47, 52 and 53 of the Act led to consideration of whether the Northern Territory and the NT Development Corporation were bound by the Act. The Full Federal Court held that the Crown in right of the Territory was distinct from the Crown in right of the Commonwealth and, as it was not expressly referred to in s.2a, there was no basis for the implication of an intention to bind it. The NT Development Corporation was, it was held, intended to perform governmental functions and should be treated as an agent or emanation of the Crown: it had no significant degree of autonomy.

The position of the Australian Capital Territory since self-government is the same as the Northern Territory. However, s.2a(4) contains an express exception in respect of Part IV in relation to "the business carried on by the Commonwealth in developing, and disposing of interests in land in the Australian Capital Territory." Prior to self-government, the Territory was administered by the Commonwealth and, by virtue of s.2a, exposed to the operation of the Act in relation to business dealings.[27]

(b) Commonwealth Instrumentalities

The position of the Commonwealth is now adequately covered by s.2a. The Commonwealth

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22 *Ibid* at p.52,705 and 52,706. The same position has been adopted by O'Loughlin J who held that the State Bank of South Australia was an instrumentality of the Crown and not subject to an action under s.52 of the Act: *Hawthorn Pty Limited & Ors v. State Bank of South Australia & Anor*, Federal Court, 23 January 1993 (unreported).

23 (1987) 13 FCR 500.

24 (1991) 27 FCR 310.

25 *Ibid* at 345 and 346.

26 (1987) 18 FCR 212.

27 Thus, in *Phillip & Anton Homes Pty Limited v. The Commonwealth* (1988) 10 ATPR 40-388, a claim under s.53a(1) of the Act in relation to the advertising of land in the Act was upheld by the Full Federal Court.

itself, and each of its instrumentalities, insofar as it carries on a business, is subject to the Act (with the exception, as noted above, of the sale of land in the ACT). For the purposes of s.2a, "authority of the Commonwealth" is defined in s.4(1) as:

(a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or

(b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest.

The reference to Territory law does not mean that any Territory instrumentality is caught, because it must have been established for a purpose of the Commonwealth. It is difficult to think of an example of such a body.

Note that the definition of "authority" was introduced in 1990 and has application to s.46b(1) which declares that s.36a of the *Commerce Act* 1986 (NZ) relates to taking advantage of a substantial degree of power in a trans-Tasman market:

> It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, and their authorities, are not immune, and may not claim immunity, from the jurisdiction of the courts of Australia and New Zealand in relation to matters arising under ss.36a, 98h and 99a of the *Commerce Act* 1986 of New Zealand.

The Act treats an authority of the Commonwealth as being in the same position as a corporation. Accordingly, no question arises as to whether the Commonwealth instrumentality is a trading or financial corporation. Thus in *Tytel Pty Limited & Ors v. Telecom*,[28] where certain s.46 conduct was alleged against Telecom, Jackson J noted that the first element of s.46(1) was that there must be a corporation. Telecom was a body corporate established for a purpose of the Commonwealth under a law of the Commonwealth and was therefore an authority of the Commonwealth. Moreover, it carried on a business and therefore was within the purview of s.46 by virtue of s.2a.[29]

(c) Trading or Financial Corporation

However, if a State instrumentality is found not to be a Crown instrumentality, the question as to whether it is a trading or financial corporation must still be addressed. If it is incorporated in a Territory, this step will not be necessary because of para.(c) of the definition of "corporation" in s.4(1) which relies on s.122 of *the Constitution*.

What is required to be a trading or financial corporation has been considered in a number of cases, not limited to State instrumentalities. The High Court has provided conflicting tests in regard to what is a "trading corporation": *R v. Federal Court of Australia; Ex Parte Western Australian National Football League*.[30] In *Bradken*, Gibbs ACJ took the view, in obiter, that the Commissioner was not a trading corporation. On the other hand, Prince Alfred Hospital and the GIO were held to be trading corporations. The State Superannuation Board was held to be a financial corporation.[31] There is some theoretical scope at least for the application of the Act to a State instrumentality which is not a trading or financial corporation by way of the extended operation of the Act set out in s.6 and based on the commerce power and the telecommunications power.

While no State legislation exists which replicates Part IV of the Act, the States have enacted

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28 (1986) 67 ALR 433. More recently the Australian Overseas Telecommunications Corporation, a company wholly-owned by the Commonwealth and the successor by statute to all of the property and rights of Telecom, was found by Wilcox J to have breached s.46 in its dealings with printers of telephone directors – *General Newspapers Pty Limited & Ors v. Australian & Overseas Telecommunications Corporation Ltd* (1993) ATPR 41-.

29 In *Suatu Holdings Pty Limited v. Australian Postal Commission* (1989) 11 ATPR 50-178 Australia Post was held to be carrying on a business. However in *Thomson Publications (Australia) Pty Limited v. TPC* (1979) 2 ATPR 40-133 the Trade Practices Commission was held not to be.

30 (1979) 143 CLR 190.

Fair Trading Acts which replicate Division 1 of Part V of the Act. Section 7 of the *Fair Trading Act* 1989 (Qld) provides that the Crown in right of Queensland "and also, so far as the legislative power of the State extends, in all of its other capacities", is bound by that Act. Section 3 of the *Fair Trading Act* 1987 (NSW), provides for that Act to bind the Crown in right of the State in so far as it carries on a business, whether directly or by an authority of the State. The provision in Victoria corresponds with that in Queensland.

(d) Express Exemption

As mentioned earlier, in relation to the *Paul Dainty* case,[32] a State or Territory may expressly exempt conduct from the operation of Part IV by legislation or regulation: ss.51(1)(b) and (c). Section 172(2) enables the Commonwealth to exempt "prescribed conduct engaged in the course of a business carried on by the Commonwealth or by a prescribed authority of the Commonwealth". An example in point is the former *Trade Practices (Telecommunications Exemptions) Regulations* which exempted certain conduct of Telecom, OTC and Aussat.

The power to exempt, by regulation of a State, was used once in relation to tied insurance by building societies. The Commonwealth responded by adopting the *Trade Practices (Removal of Exceptions) Regulations*.[33]

(e) Lack of Progress

The cases reviewed above illustrate the uncertainty surrounding the application of Part IV to State instrumentalities. Despite the recommendations of the Swanson Committee 15 years ago, the States have not taken any action. In May 1989, the Senate Standing Committee on Legal and Constitutional Affairs invited submissions on the shield of the Crown generally. The Committee is yet to report on this reference.

Corporatisation and Privatisation

It is interesting to look to the future as represented by State instrumentalities formed, or reformed to shed light on the following question. In the era of corporatisation and privatisation will the shield of the Crown continue to be relied upon by State Governments?

(a) Privatisation in New South Wales

In 1991 the New South Wales Government moved to privatise the GIO which had only recently successfully invoked the shield of the Crown as a defence to a claim of misleading conduct by its Western Australian counterpart.[34] The *Government Insurance Office (Privatisation) Act* 1991 states as its objects, *inter alia*:

> to provide for the conversion of the Government Insurance Office into a public company and for its sale by public float ... to convert GIO from a statutory authority into a public company ... and apply the Corporations Law after its conversion ... (s.3)

The Act provides for the GIO to have a share capital of $1,000,000,000 and to pay up certain of those shares and issue them to the State. The amount to be issued is to be determined by the Minister, as is the amount of reserves to be retained and the amount of the proceeds of the float to be paid to the State. The GIO is to be taken to be registered as a public company under the name "GIO Australia Holdings Limited".

Section 13 provides that the State is "in relation to membership of GIO, entitled to the same rights, privileges and benefits, and is subject to the same duties, liabilities and obligations, as if it had become a member of GIO under its memorandum and articles of association." The Government's guarantee of payment of moneys under classes of policies approved by the Minister continues, and any liability is appropriated from the Consolidated Fund: s.16. Section

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31 *Supra* n.14.
32 *Supra* n.18.
33 *Supra* n.30. See *In re Ku-ring-gai Co-operative Building Society (No.12) Ltd & Anor* (1978) 36 FLR 134 and *Suatu*.
34 *Supra*, n.22.

35 provides that the board of directors of the GIO, is subject to the control and direction of the Minister, and s.36 declares that the GIO and any subsidiary, "are agencies through which the State of New South Wales engages in State insurance, and for that purpose, are public authorities of the State". There is a reference to s.51(xiv) of *the Constitution*. However s.34 provides that ss.35 and 36 apply only during any period after the conversion when the majority of the GIO's issued shares are held by the State.

It is clear that the GIO remains a Crown instrumentality until after a successful float, which has now occurred. Interestingly, the legislation adopts the form of words found in the Queensland and Victorian (but not the New South Wales) *Fair Trading Acts*: "This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities": s.42.[35]

Thus, the GIO remained protected from the provisions of the Act, as does anyone dealing with it in respect of conduct affecting its interests, in accordance with the *Bradken* principle, until the GIO is floated. Thereafter, s.36 ceased to apply and the GIO ceased to carry on the business of State insurance and thus, its activities will clearly fall within the ambit of the Act.

Some instrumentalities which are merely corporatised, and not privatised, will continue to enjoy the protection of the shield of the Crown. However, an alternative regime exists in New South Wales by way of the *State Owned Corporations Act* 1989 (NSW) which provides for companies to be formed or acquired by the State and then, by further Act of Parliament, to come within the legislative scheme. The legislation states the principal objective of every state owned corporation as being to operate as a successful business. Section 9 of that Act provides that a state owned corporation "is not and does not represent the state except by express agreement with the voting shareholders of the corporation". There is provision, however, for the Minister to override the board of the corporation in certain circumstances. A corporation which has been brought within the purview of this Act is Hunter Water Corporation Limited in which have been vested the business and assets of the Hunter Water Board which supplies water to Newcastle.[36]

(b) Corporatisation in Queensland and Victoria

The policy of the Queensland Government, as articulated in a white paper released early in 1992[37] seems to be that corporatised entities will remain Government owned and will continue to enjoy the protection of the shield of the Crown. The Queensland Investment Corporation is an example. The *Investment Corporation Act* 1991 (Qld) provides for the establishment of the Corporation which "represents the Crown and, subject to [the] Act has and may exercise and claim all the powers, immunities, privileges, rights and remedies of the Crown": s.2.10. The Corporation is not brought under the provisions of the Corporations Law. Thus, the shield of the Crown will remain and the Corporation, in its commercial dealings, will retain the advantages of the *Bradken* doctrine as compared with its commercial counterparts.

The change of government in Victoria in late 1992, saw the adoption of a wide-ranging privatisation policy and the enactment of the *State Owned Enterprises Act* 1992 (Vic) which provides a number of models for corporatisation and privatisation of government businesses and statutory corporations. The legislation appears to have been drafted so as to afford the Government of Victoria maximum flexibility in relation to the timing and staging of the process.

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35 There appears to be a conflict between s.13 (the State as a member of GIO being subject to the same liabilities as an ordinary member) and the declaration in s.36 conferring the shield of the Crown, unless s.13 is read down to limit its operation to the purely contractual liabilities of company membership. Yet the *Corporations Law* is expressed to bind the Crown in right of each of the States. In light of this one wonders about the position of the State under s.186 of the *Corporations Law* which provides that where the number of members of a public company is reduced below 5 and the company carries on business for more than 6 months, a member of the company who is aware of the fact may be liable for any debt of the company contracted during that time.

36 *Hunter Water Board (Corporatisation) Act* 1991 (NSW).

37 *The Australian*, 5 March 1992.

Statutory corporations, which become "State business corporations", will continue as government instrumentalities, while "State owned companies" are intended not to represent the Crown and will apparently be subject to the *Trade Practices Act* (s.70 of the *State Owned Enterprises Act*). Section 86 of the latter statute however provides a power to make regulations by which the activities of a "State owned enterprise" (which includes a State owned company) may be "authorised for a particular period for the purposes of Part IV of the *Trade Practices Act* 1974 ...". In February 1993, the Victorian Minister for Energy and Minerals, announced the proposed sale of the "Gas & Fuel Corporation's profitable LPG division, Heatane Gas", by 30 June 1993.

(c) Drafting Techniques

There is something to be said for the practice of enacting an express statement of Crown immunity in legislation establishing an instrumentality or corporatised body, as has been done in the cases of the Queensland Investment Corporation, the Queensland Industry Development Corporation.[38] Earlier legislation tends not to include a clear statement and one is left the task of reviewing the legislation in its entirety to determine whether the instrumentality concerned is an emanation of the Crown. For example, the Queensland *Tourist and Travel Corporation Act* 1979-1984 (Qld), establishes a corporation which has wide powers and, given the importance of tourism in Queensland, might be thought likely to engage in significant commercial activities. The promotion of tourism and travel may perhaps be regarded as a governmental function, albeit not one with a particularly long tradition.

The remaining criteria articulated by Wilcox J in the *Red Cross*[39] case, were the extent to which the instrumentality is subject to ministerial control (not decisive in the *Paul Dainty*[40] case) and whether or not its funds and property are held independently of the government. All members of the Tourist and Travel Corporation are appointed by the Governor in Council. The Minister is empowered to issue directions on matters of policy and the exercise of the Corporation's powers and functions which the Corporation is required to observe and carry out: s.14(3). The Corporation's budget must be approved by the Minister. The Act prescribes funds to be established by the Corporation and the manner in which moneys received by it are to be applied and invested. Although open to argument, these elements would seem to be enough to qualify the Corporation as an emanation of the Crown.[41]

Suppose that the Tourist and Travel Corporation engages in conduct which appears to contravene s.47 of the *Trade Practices Act*, and further suppose that that conduct involves a private commercial entity in an agreement or conduct which might expose the entity to a claim that it is knowingly involved in a contravention. The entity is placed in a very difficult position. It will need to seek advice as to whether the Corporation is an emanation of the Crown. If the advice is that it is not, but the Corporation adheres to its position, the private party may have to litigate the issue or risk exposure to contravention proceedings, or walk away from a commercially attractive transaction.

Apart from the steps taken in New South Wales,[42] the position remains that State instrumentalities may be immune from Australian competition laws. However, they will be subject to a law in that area of a foreign state, namely s.36a of the New Zealand *Commerce Act*.

Meanwhile, the Chairman of the TPC has been quoted as saying that it was a "myth" that all

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38 Act 108 of 1985, s.9(4), and the Queensland Treasury Corporation (Act 54 of 1988, s.17).

39 *Supra* n.25.

40 *Supra* n.19.

41 Section 13 of the *Acts Interpretation Act* 1954 (Qld) may also be relevant. It provides that "**No Act** [ie, Queensland Act] hereafter passed shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included therein for that purpose", and was described by Stephen J in *Bradken* as a version of the rule "**even more favourable to the Crown than the rule itself**".

42 See also the *Government Pricing Tribunal Act* 1992 (NSW), establishing a tribunal to review pricing of government monopoly services.

government activities were protected from the *Trade Practices Act*. The Chairman said that the *Trade Practices Act* applies to all business undertakings. These include government business enterprises at the federal, state and local levels.[43] This summation of the law, if correctly attributed, may be altogether too sanguine.

Future Directions

(a) Whither the Crown?

As mentioned earlier, the authority of *Bradken* remains unscathed. However, it awaits possible reconsideration by the High Court following *Bropho*, although it was doubted by French J in the *GIO* case that State Crown immunity from the Act would be affected by such reconsideration.

Bropho involved the question of whether a subsequent Western Australian criminal statute applied to Crown land in that State. In a joint judgment, six members of the High Court noted that, in cases such as *Province of Bombay v. Municipal Corporation of Bombay*[44] the rule of construction that the Crown is not bound, in the absence of necessary implication, had become a very stringent test. Considerations deriving from the dignity of the Crown encompassing little more than the Sovereign and the basic organs of government "would seem to have little relevance, at least in this country", according to their Honours "to the question whether a legislative provision worded in general terms should be read down so that it is inapplicable to the activities of any of the employees of the myriad of governmental commercial and industrial instrumentalities covered by the shield of the Crown".[45] The only justification for the rule was the weight of authority in its favour, yet it relied on divining legislative intent, which might well be more concerned with other things and might not be expressed in specific terms. The particular statutory provision should therefore be read in the context in which it was made, although the fact that the rule itself was seen as a stringent one should be taken into account when construing a statute enacted before the publication of the Court's decision in this case. Where 93% of the land in the State was Crown land, Parliament could hardly have intended that the provisions of general implication in the legislation not to apply, for, in the words of Brennan J, in a concurring judgment, "to exclude Crown lands would eviscerate the Act".[46]

Ironically, by inserting s.2a (with its limiting words "insofar as it carries on a business") into the Act in 1977, Parliament has probably made it no longer possible to argue convincingly that the original legislative intent of Parliament was to give the Act general application, including State instrumentalities. Thus, the conclusion of French J must, with respect, be correct.[47]

On 4 October 1992, the Prime Minister established an independent inquiry into competition policy in Australia. The first topic which the Committee appointed to conduct the inquiry is required to consider is:

> whether the scope of the Trade Practices Act 1974 should be expanded to deal effectively with anti-competitive conduct of persons or enterprises in areas of business currently outside the scope of the Act.

The Committee is to report by May 1993.

(b) New Infrastructure Arrangements

The *National Rail Corporation Agreement Bill* 1991 may provide the model for new federal

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43 *Australian Financial Review*, 5 March 1992.

44 [1947] AC 58 (relied on in *Bradken*).

45 *Supra* n.10 at 19.

46 *Ibid* at 383.

47 On the **narrow view** of the presumption against binding the Crown, only the Crown in right of the legislating government received the benefit of the presumption. See PW Hogg, "The Crown and Statutes in the Australian Federation" [1969], 1 *Aust Current Law Rev* 22. For a contrary view on *Bropho* see James McLachlan, "The Application of the *Trade Practices Act* 1972 (Cth) to State Government Instrumentalities" (1990) 64 ALJ 710.

arrangements for infrastructure developments as part of the policy of microeconomic reform. The Bill, which at the time of writing had passed the Senate and was before the House of Representatives, is designed to approve and implement an agreement made in 1991 between the Government of the Commonwealth and New South Wales, Victoria, Queensland and Western Australia and which is set out in a schedule to the Bill. The recitals state in part:

A. To achieve micro-economic reform in the Australian rail industry, the Commonwealth, State and Territory Governments have agreed that a company should be established for the purpose of conducting, among other things, rail freight operations in Australia on a commercial basis in accordance with principles compatible with those set out in the Heads of Government Agreement on the National Rail Freight Corporation dated 31 October 1990.

B. These principles are:
   (a) that the Company will:
      (i) operate on a strictly commercial basis, with a financially viable corporate plan, and be subject to the Trade Practices Act 1974 (Commonwealth)

Sections of the Bill state that neither the Company (ie the National Rail Corporation Limited), nor any of its subsidiaries, is, or represents, the Crown; is an instrumentality or agency of the Crown; or is entitled to any immunity or privilege of the Crown.

Thus, while the Commonwealth Government appears to be committed to the universal application of the Act in areas over which it has direct legislative control, it appears that the States, in varying degrees, are not. Until this issue is seriously addressed at the political level, there will continue to be two classes of participants in an important range of commercial activities, namely gentlemen and players.