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J. B. Sweeney J.

probably makes the order ineffective. The position will not be altered, if I am right, by making an order for rescission. I think it clear that if the facts as to the debtor's absence had been before the court no order as to payment in any way of the petitioning creditor's costs would have been made. In those circumstances I will also rescind the order for costs made on the making of the sequestration order. There will be no order as to the costs of this present application.

The exhibits may be handed out to the parties tendering them.

Orders accordingly.

Solicitors for the petitioning creditor: *F. A. & J. F. Newnham.*

R. L. CRISP

[FEDERAL COURT OF AUSTRALIA]

Re KU-RING-GAI CO-OPERATIVE BUILDING SOCIETY (NO. 12) LTD.

Re DEE WHY CO-OPERATIVE BUILDING SOCIETY (NO. 29) LTD.

Re DECLARATIONS AND ORDERS UNDER s. 163A, TRADE PRACTICES ACT 1974.

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1978, SYDNEY, *March* 7, 8; *Dec.* 15, 18.

Bowen C.J., Brennan and Deane JJ.

Trade Practices—Exclusive dealing—Terminating building societies—Whether trading or financial corporations—Exemption by State regulation—Whether State legislative authorization specific—Whether activity "in trade or commerce"—Nature of condition of supply—Whether acts done in concert against suppliers—Trade Practices Act 1974 (*Cth.*), ss. 4, 47 (1), (6), 51 (1) (*b*), 163A (1)—*The Constitution* (63 & 64 *Vict.*, *c.* 12), *s.* 51 (xx)—*Co-operation Act*, 1973 (*N.S.W.*), *s.* 82—*Co-operatives Regulations*, 1961, *reg.* 35A—*Trade Practices (Removal of Exceptions) Regulations* 1975, *reg.* 3.

The applicants sought declaratory relief, pursuant to the *Trade Practices Act* 1974 ("the Act") as to the operation and effect of the Act in relation to a practice of imposing, in respect of loans which each applicant made to its members, a requirement that the property mortgaged to secure repayment of the loan be insured with a nominated insurer. The commission took the view that the practice contravened the exclusive dealing provisions in s. 47 of the Act and proposed to institute proceedings under the Act against the applicants in the event of it obtaining evidence of such a practice in the future.

The applicants were co-operative terminating building societies incorporated under the *Co-operation Act*, 1923 (N.S.W.). The object of each was the raising of a fund so as to make loans to its members.

The special case in respect of each applicant raised eight different questions. The questions raised for the consideration of the court were: (1) Whether upon the facts stated in this case this Court should in the exercise of its jurisdiction under s. 163A of the *Trade Practices Act* 1974 make any of the declarations hereinafter referred to; (2) Whether such society is a trading corporation formed within the limits of Australia as defined in s. 4 (1) of the *Trade Practices Act* 1974; (3) Whether such society is a financial corporation formed within the limits of Australia as defined in s. 4 (1) of the *Trade Practices Act* 1974; (4) Whether such society is otherwise a "corporation" as defined in s. 4 (1) of the *Trade Practices Act* 1974; (5) Whether, in so far as the provisions of s. 47 purport to apply to such society, the same are outside the powers of the Parliament of the Commonwealth of Australia; (6) Whether, in so far as the provisions of the Act apply to such society, a requirement by such society that its members who borrow money from such society on the security of real property insure the same in the names of the society as mortgagee and the member as mortgagor for their respective rights and interests with a company nominated or approved by such society, is in contravention of the provisions of s. 47 of the Act; (7) Whether, if s. 47 of the Act applies to the society, the provisions of s. 51 of the Act require that regard shall not be had to any requirement by the society that its members who borrow money from the society on the security of real property insure the same in the joint names of the member as mortgagor and the society as mortgagee for their respective rights and interests with a company nominated or approved by the society in determining whether a contravention of the said s. 47 has been committed; (8) Whether it is within the jurisdiction of this Court conferred by s. 163A of the said Act or any other statutory provision to make the declaration set forth in par. (5).

Held, as to the questions so stated: (1) Per curiam. Yes. Section 163A of the Act enables a person to institute proceedings in the Federal Court seeking, in relation to a matter arising under the Act, a declaration as to the operation or effect of s. 47 of the Act. The question of the lawfulness of the conduct is a matter arising under the Act in relation to the operation or effect of s. 47. The resolution of the question is important to the applicants in determining their method of conducting their future activities and to the commission in the performance of its duty to seek to ensure observance of the provisions of the Act.

(2) Per curiam. It is unnecessary to answer this question as question (3) is answered in the affirmative.

(3) Per curiam. Yes. Each applicant was formed to carry on a business of dealing in finance and in fact carried on such a business, and accordingly, was a financial corporation within the meaning of the phrase as used in s. 51 (xx) of the Constitution and in the definition of corporation in s. 4 (1) of the Act.

The Queen v. *Trade Practices Tribunal; Ex parte St. George County Council* (1974), 130 C.L.R. 533, considered.

(4) Per curiam. It is unnecessary to answer this question.

(5) Per curiam. No. Each applicant was a financial corporation within the meaning of s. 51 (xx) of the Constitution.

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(6) Per Deane J., Brennan J. concurring, Bowen C.J. dissenting. Yes. Three separate arguments were advanced on behalf of the applicants in respect of this question: (i) the lending by the applicants to their members was not in trade or commerce; (ii) the condition or requirement that the member insure with a particular nominated insurer was not within the scope of s. 47 of the Act as first, the condition was not a condition imposed by the applicant and, secondly, in any event, was not a condition that the member "acquire services" within the meaning of s. 47 (6); (iii) the provisions of s. 51 (2A) of the Act were applicable to avoid any contravention of s. 47 which might otherwise be involved. Section 51 (2A) provides, for present purposes, that in determining whether a contravention of s. 47 has been committed, regard shall not be had to any acts done, other than in the course of trade or commerce, in concert by ultimate users or consumers of services against the suppliers of those services.

Re (i)—The phrase "trade or commerce" cannot be restricted to ordinary trading and commercial activities in "open" markets. The applicants were involved in business dealings in finance with their respective members. This lending was, for the purposes of s. 47 of the Act, in trade or commerce. Re (ii)—The practice of exclusive dealing involves supply upon condition. It does not matter whether the supply of services upon condition arises from the rules of the applicants or from the actions of the applicants. As to the second argument, the rights of the co-insured under a joint insurance policy constitute services for the purposes of s. 47 (6) and accordingly the condition amounted to a condition as to the acquisition of services. Re (iii)—It is impossible to regard the provision in the rules as being, or constituting the result of, an act done in concert by members of an applicant against that applicant or by an applicant and its members against a particular insurer or insurers generally. Accordingly, s. 51 (2A) had no application to the present circumstances.

Per Bowen C.J., dissenting. In order to answer question (6) it must be determined whether the practice of supplying loans upon the condition that members insure with a specified insurer was "in trade or commerce" for the purposes of s. 47 of the Act. The activities of the applicants must be looked at in their full context. A variety of considerations showed that the lending of money to members, which was the principal activity of the applicants, was not a trading activity. The degree of mutuality excluded the commercial element which was a necessary part of trade or commerce. There was no contravention of s. 47 of the Act and question (6) should be answered "No".

(7) Per Deane J. (Brennan J. concurring). No. Section 82 of the *Co-operation Act* provides, inter alia, that the rules of a building society shall contain "such other matters as may be prescribed by regulation". Regulation 35A, made pursuant to the *Co-operation Act*, prescribes that the rules of a building society shall include: "The manner in which the insurance of any building or premises the subject of a mortgage to a society is to be effected and whether the insurance of that building or those premises is required to be effected with an insurance company or insurance society specified, nominated or approved by the society or the board." The provisions of reg. 35A do not specifically authorize or approve any particular provision in the rules of a registered society requiring insurance with a nominated insurer. Nor do such provisions specifically approve either the act of lending to members on the condition that insurance must be effected with a particular nominated insurer or the terms or content of such a condition.

(8) Per curiam. Yes. A dispute between the commission and a person as to whether an actual or proposed course of conduct of that person will constitute

a contravention of the provisions of a section of the Act was a "matter" arising under the Act within the meaning of s. 163A. Accordingly, the court was able, pursuant to s. 163A, to grant declaratory relief embodying the answer to the question in par. (5).

SPECIAL CASE.

The applicants, two co-operative building societies, sought declarations as to the operation and effect of the *Trade Practices Act* 1974 in relation to the practice of imposing, in respect of loans which each applicant makes to its members, a requirement that the property mortgaged to secure repaymentof the loan be insured with a particular nominated insurer. The special case in respect of each applicant raised eight different questions.

J. C. S. Burchett Q.C. and *D. G. Hill*, for the applicants.

L. J. Priestley Q.C. and *P. S. Hastings*, for the respondent.

D. M. J. Bennett, *A. R. Emmett* and *L. Cashion*, for the Commonwealth Attorney-General.

Cur. adv. vult.

The following written judgments were delivered. DEC. 18.

BOWEN C.J. I agree with the summary of the facts and the answers given by Deane J. to questions (a), (b), (c), (d), (e) and (h) raised in the stated case. I agree with the reasons for judgment in relation to those answers prepared by Deane J. but wish to add something in relation to question (c). I would answer questions (f) and (g) "No". I give my reasons for doing so and refer to the facts in so far as it is necessary to do so in stating those reasons.

Question (c) asks whether the applicant societies are financial corporations formed within the limits of Australia. The authorities on the phrase "financial corporation" in s. 51 (xx) of the Constitution are meagre. We have the authority of Isaacs J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead*(1) for the view that the power in s. 51 (xx) was granted to the Commonwealth Parliament in order to ensure there was a strong national authority able to control the transactions of bodies of considerable size, wealth and influence, which might be harmful to the public. Isaacs J. also said (2) that s. 51(xx) empowers the Commonwealth Parliament to regulate the conduct of the corporations therein described in their dealings with the public. This, however, assumes that the object to which the power of the Commonwealth Parliament under s. 51 (xx) extends has already been ascertained. It does not assist in determining what

(1) (1909) 8 C.L.R. 330, at pp. 405-407. (2) (1909) 8 C.L.R., at p. 395.

corporations are included in the phrase "financial corporations" (cf. *The Queen* v. *Trade Practices Tribunal*; *Ex parte St. George County Council*(3)).

Counsel for the applicant societies submitted that, for the purposes of s. 51 (xx) of the Constitution and s. 4 (1) of the *Trade Practices Act* 1974, a financial corporation is a corporation that has a purpose of trading in money, evinced either in its constituent documents, or in its activities, or in a combination of both. If that argument is sound, it would seem that no corporation is included within s. 51 (xx) as a financial corporation, which would not also be properly characterized as a trading corporation. Trading includes trading in intangibles such as money, as well as in goods. Counsel for the applicants argued that in 1900 it may have been thought that a trading corporation would only comprehend a corporation buying or selling goods, that being then a current conception of trade. In order to include within the scope of legislative power those corporations which commercially borrowed, lent or otherwise dealt in money, the words "or financial" were included in s. 51 (xx). But, it was said, the commercial nature of a trading corporation should also attach to a financial corporation.

I do not consider that there is any reason for interpreting s. 51 (xx) so as to subordinate the meaning of "financial" to that of "trading". In my opinion a financial corporation is one which borrows and lends or otherwise deals in finance as its principal or characteristic activity or, depending on which approach one takes, it is a corporation formed for the purpose of borrowing and lending or otherwise dealing in finance. If it does so in the way of trade it may also be a trading corporation, but that is not a necessary feature of a financial corporation. The phrase "trading or financial corporations" has a distributive operation, and neither adjective qualifies the other. Furthermore, although the connotation of the words used in s. 51 (xx) remains constant, their denotation may change (*The King* v. *Brislan*; *Ex parte Williams*(4)).

Do the applicant societies fall within the words "financial corporations"? The purpose and activities of the applicants are directed to satisfying social needs for housing for low income earners with dependants. Section 6 (1) of the *Co-operation Act*, 1923 (N.S.W.) provides that the objects of co-operative societies are the promotion of the economic or social interests of their members. In this sense the applicants are naturally described as "co-operative societies", or (being incorporated) "co-operative corporations". On the other hand the means used to attain these objects is the borrowing and lending of money at relatively low rates of interest. It was to do this that the societies were

(3) (1974) 130 C.L.R. 533, at p. 574.
(4) (1935) 54 C.L.R. 262.

incorporated. In this sense the societies are "financial corporations".

Two tests relating to categorization are suggested by the *St. George County Council* case (5) and the applicants satisfy both. The purposes, and also the activities of each applicant are financial ones. Accordingly, I consider that the applicants do fall within the definition of "corporation" in s. 4 (1) of the Act, being financial corporations formed within the limits of Australia. I agree that question (c) should be answered "Yes".

In order to answer (f), it must be determined whether the practice of supplying loans upon the condition that the members insure with a specified insurer is "in trade or commerce" for the purposes of s. 47 of the Act.

The terms "trade" and "commerce" are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements (*W. & A. McArthur Ltd.* v. *State of Queensland* (6)). The word "trade" is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing (*Commissioners of Taxation* v. *Kirk* (7) per Lord Davey; *W. & A. McArthur Ltd.* v. *State of Queensland* (8)). The commercial character of trade was mentioned more recently by Lord Reid in *Ransom* v. *Higgs* (9). His Lordship there said: "As an ordinary word in the English language 'trade' has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services (10)". Moreover, the word covers intangibles, such as banking transactions, as well as the movement of goods and persons, for historically its use has been founded upon the elements of use, regularity and course of conduct (*Bank of New South Wales* v. *Commonwealth* (11)).

Paragraphs 10 and 26 of the special case describe the activities of the applicants. If some of these activities are isolated from their context they could be described as common incidents of trade. Thus the obtaining of capital from a bank on the security of an equitable mortgage over the borrower's undertaking and assets, is a common part of trade. The lending of money at interest might also be described in that way. The obtaining of a concessions agreement, the arranging of insurance in respect of properties mortgaged to the society by a member, and particularly the receipt of commission from the insurer in respect

(5) (1974) 130 C.L.R. 533.
(6) (1920) 28 C.L.R. 530, at p. 547.
(7) [1900] A.C. 588, at p. 592.
(8) (1920) 28 C.L.R. 530.
(9) [1974] 1 W.L.R. 1594.
(10) [1974] 1 W.L.R., at p. 1600.
(11) (1948) 76 C.L.R. 1, at p. 381.

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of premiums paid under those policies, could all be described as common trading activities.

Indeed, it was argued on behalf of the commission that these activities were engaged in by the applicants as part of trade or commerce. It was said that if a corporation borrowed and lent money, albeit to a restricted class of borrowers, for the purpose of making a profit it would clearly be trading. Profit, however, although a common incident of trade is not a necessary attribute of it. If those same activities are conducted as a business with an element of mutuality rather than profit, still it was said, the business is involved in trade. It was argued that it was not a correct description of the applicants that they merely channelled funds to members for the purpose of providing welfare housing. Instead the applicants stood in legal relations to the banks as borrowers, and in legal relations with their members as lenders of money at interest.

However, the activities of the applicants must be looked at in their full context. The source of the Ku-ring-gai Society's funds is the Home Builders Account of the State of New South Wales, established pursuant to the Commonwealth-State Housing Agreement. That agreement provides that the funds are to be lent by the State to, inter alia, terminating building societies, and are to be lent by them to borrowers to assist them to build or purchase homes for themselves and their families. To qualify for a loan the borrower must fall within a class limited by cl. 24 of the agreement.

There is here evident a policy to provide welfare housing and it can be inferred that terminating building societies are contemplated as being intermediate recipients of the funds, as they are appropriate vehicles through which to implement that policy. The benefit of those funds is intended to be enjoyed by the members who are the ultimate borrowers, the home owners. It can at least be said that it is contemplated that the terminating building societies will not use the funds to their own advantage, as might be expected of a normal trader. It is significant that commercial lending institutions may not receive the funds from the State for the purpose of being lent to borrowers.

Although the Dee Why Society does not receive its funds from this source, the agreement has significance for it, for the agreement tends to give a non-commercial character to terminating building societies as a class.

The direct source from which both applicants receive their funds are banks. Their loans are subject to conditions and are secured. Both loans are repayable over thirty-one years. In the case of the Ku-ring-gai Society the rate of interest is five per cent and in the case of the Dee Why Society, it is nine and a half per cent. The loans to both societies are given for the purpose of being re-lent to members. In the case of the Ku-ring-gai Society

there is a special condition that the loans must be used for the purpose of building new homes or the purchase of new homes not previously occupied.

I do not consider that much light is thrown on the nature of the applicants' activities by the circumstances touching their loans from the banks. The loans provide the means by which the applicants are enabled to lend money to their members. If that business of the applicants is part of trade, then no doubt their obtaining of finance from the banks is also a trading activity. Equally if their business is not trading, their obtaining of loans will not be a trading activity either. The major relevance of the applicants' method of obtaining funds, is that moneys are sought from only one source and not from the public.

The next question is whether the applicants' principal activity, the lending of money to members at interest on the security of mortgage over real estate, is a trading activity. Put as baldly as that it could be. The lending of money, receipt of repayments, attending to payment of insurance premiums and the like certainly have a regularity that enables one to say that the applicants have a business of lending money to members. Further, a regular dealing in commodities is a hallmark of trade.

However, this activity of the applicants is a limited one. The applicants do not receive money on deposit from the public, nor do they lend to the public. They do not advertise for members. Although they are entrusted with approving or rejecting applications for membership, the criteria by which they are guided in making that selection are laid down by the Commonwealth-State Housing Agreement or by the registrar. Not only do the applicant societies lend to a limited class of persons, but the nature of that class is determined by the government. Further the applicants do not make a profit. They lend to their members at the same rate of interest as that payable on the moneys borrowed from the bank. The maximum amount which they can lend is fixed by the registrar. Although they make charges to cover administrative expenses, those charges are limited by the registrar. The applicants, having lent the money to their members, are not concerned merely with receiving due instalments of principal and interest in repayment of the loan. They insist (in the absence of special circumstances) that the members reside in the homes purchased with the funds from the societies. The applicants are prepared to suspend repayment of loans in the event that a member is in financial difficulties due to sickness or unemployment or the like. Figuratively they have a somewhat paternal relationship with their members. The applicants are forbidden to develop a trade connexion with builders, real estate agents or the like, by directing a disproportionate amount of their business to them.

The applicants are terminating societies. They are not permitted to make further advances to new members out of discharge moneys and early repayments of principal. They do not administer a "revolving" fund. There are even restrictions upon the making of further advances to existing members. These limitations are laid down by Registry Circular C45 referred to in par. 8 of the case. When the societies have run their course they are to be wound up in accordance with the provisions of Pt V of the *Co-operation Act*, 1923 (N.S.W.). Rule 97 of the Ku-ring-gai Society's rules provides for the particular manner in which any surplus will be distributed to members.

These considerations clarify the context in which the applicants carry on their business of providing loans to members, and the restrictions on the way in which that can be done. In my view they show that the lending of money to members, which is the principal activity of the applicants, is not a trading activity. There is involved a degree of "mutuality" on the part of the applicants in relation to the members (*Fletcher* v. *Income Tax Commissioner* (12)). The presence of that mutuality may be derived from a whole complex of factors, not solely the absence of profit. It excludes the commercial element which is a necessary part of "trade or commerce".

Some guidance in discovering the presence of "mutuality" is gained from a consideration of the application of the mutuality principle in taxation law. That principle is based upon the simple notion that a person cannot make a profit out of himself (*Bohemians Club* v. *Acting Federal Commissioner of Taxation* (13)). The principle has been held to apply to limited companies where there is complete identity between the contributors to the common fund and the persons entitled to participate in any redundant portion of that fund, those persons participating in the capacity of contributors (*Municipal Mutual Insurance Ltd.* v. *Hills* (14); *New York Life Insurance Co.* v. *Styles* (15); cf. *Sydney Water Board Employees' Credit Union Ltd.* v. *Commissioner of Taxation (Cth.)* (16)). With regard to contributions arising from membership fees, management fees contributed by members, fines for late instalments and discharge fees there is identity between members contributing and members entitled to participate in a surplus. Had contributions been obtained from other members or associated member societies then a disparity would have arisen, but this was not the case. It is true that the receipt by the applicant societies of commissions in respect of insurance were not from members but these were relatively small in amount. Furthermore, we are not here considering whether some receipt is or is not of an income

(12) [1972] A.C. 414, at p. 421.
(13) (1918) 24 C.L.R. 334.
(14) (1930) 16 Tax Cas. 430, at p. 448.
(15) (1889) 14 App. Cas. 381.
(16) (1973) 129 C.L.R. 446.

character. We are considering whether certain loan transactions between the applicant societies and their members were "in trade or commerce". It is, in my view, relevant to that question to have regard to the substantial degree of mutuality involved. Even the insurance commissions received were really in relief of the members, enabling their contributions to management expenses to be lower than they otherwise would have been.

The respective contributions of the lending banks to the applicants are loans provided by non-members and go to the relationship between the applicants and the banks, not to the relationship governing the dealings between the applicants and their members. Even if, contrary to my view, they were regarded as being transactions of the applicants in trade or commerce, this would not necessarily mean that the loan transactions to members were in trade or commerce. The same might be said of contributions received by way of insurance commission.

In s. 47 (1) the phrase "in trade or commerce" appears to me to qualify the verb "engage", not the noun "corporation". It is, therefore, possible that a corporation might be regarded as supplying in "trade or commerce" in relation to some loans, yet not in relation to some other loans which contained the element of mutuality. However, in the present case this disparity does not appear. It appears to me that a substantial degree of mutuality was involved in the loans to members. In my opinion, upon the facts in the stated case, neither applicant in supplying services, that is, loans to members upon the condition as to insurance, was engaging in that practice in trade or commerce within the meaning of s. 47 (1) or (6).

Paragraph (g) of the application raises the question whether s. 51 (1) (*b*) requires that regard shall not be had to the practice of the imposition of a requirement in relation to insurance. Section 51 (1) (*b*) directs attention to acts that are, or are of a kind which are specifically authorized or approved by a State Act or regulations under a State Act, and exempts those acts from the operation of Pt IV of the *Trade Practices Act*.

Regulation 35A prescribed pursuant to s. 82 (3) (*e*) of the *Co-operation Act*, 1923 (N.S.W.), requires that a building society set forth in its rules the manner in which insurance of any premises the subject of a mortgage to the society is to be effected, and whether it is required to be effected with an insurance body specified by the society. This regulation was added to the existing regulations being promulgated in the New South Wales *Government Gazette* No. 17 of 17th January, 1975. At that time s. 47 prohibiting exclusive dealing appeared in the *Trade Practices Act* 1974 in a form which, in all material respects, was similar to the present form of s. 47 inserted by amendment in 1977. Section 52 (1) (*b*) remains unchanged since the *Trade Practices Act* 1974 commenced. Accordingly, when reg. 35A was

introduced requiring societies to set forth in their rules whether the insurance of premises was required to be effected with an insurance body specified by the society, they were doing so in that context. They were not authorizing or approving of a procedure to be set forth in the rules of the societies, which could not in practice be engaged in by the society because it was contrary to law. That would have been futile. They were, by regulation, authorizing and approving, indeed requiring, the inclusion in the rules of the societies of a procedure, which in practice the societies could engage in, if it was specifically authorized or approved by State regulations. Inherent, therefore, in the regulation was an authorization or approval of the practice.

Certainly, it was not an express or a direct authorization or approval of the practice. In my view, it would have been much clearer and more satisfactory if it had been. But s. 51 (1) (*b*) does not require the authorization to be express or direct. It requires simply that it should be specific. It does not appear to me that reg. 35A lacks the quality of being specific. It refers precisely to the class of acts in question, namely, the act of requiring insurance of premises to be effected with an insurance body specified by the society. It could hardly be more specific in this relevant respect, without descending to the specification of particular cases.

It is true that the regulation requires to be set forth in the rules whether such insurance is a requirement. A society would have a choice whether or not it included such a requirement in its rules. But this only means that the regulation involves authorization or approval to the rules either requiring or not requiring it.

It is further true that, even if the requirement be included in the rules, the authorization or approval inherent in the regulation will not be availed of unless the society in fact engages in the practice. We are asked in these proceedings to proceed upon the basis it has been included in the rules. Certainly, the applicant societies proceeded to engage in the practice. In the circumstances, it is my view, the societies in doing so engaged in a practice which was specifically authorized or approved by the reg. 35A.

Regulation 3 of the *Trade Practices (Removal of Exceptions) Regulations* 1975 provides that s. 51 (1) (*b*) is not to operate in relation to a requirement by a society that a borrower effect insurance with a specified insurer. The very exception created by s. 51 (1) (*b*) in conjunction with reg. 35A appears to be removed by reg. 3, a regulation made under s. 51 (1) (*b*) itself. On that basis the applicants would be exposed to possible contravention of s. 47 (6) of the Act. However, the conclusion I have come to in relation to question (f) precludes that result.

An argument was advanced to the effect that the practice of supplying on the condition did not enjoy the protection of s. 51 (1) (*b*) for the reason that reg. 35A was not limited to "acts or things done" in New South Wales. The operation of s. 51 (1) (*b*) is clearly restricted to cases where the act or thing which would otherwise have been in contravention of Pt IV is an act or thing "done in a State". The act is the supply of the loan service upon the condition that the borrower cause insurance to be effected with an insurer specified by the lender. In the case of both applicants the members are resident in New South Wales and all loans are secured on land in New South Wales. Thus the performance of the agreement and the agreement itself are located in New South Wales. Were it not for reg. 3 then, s. 51 (1) (*b*) together with reg. 35A would create an exemption from contravention of s. 47 (6).

Some difficulty was also occasioned by the placing of the words "in a State" in reg. 3 so as to suggest that the place where the insurance was to be effected constituted the State nexus. If the contract of insurance were located outside New South Wales, which is the State in which the performance of the loan agreement is to occur, then reg. 3 would not remove the exception under s. 51 (1) (*b*). However, under the loan agreements, insurance was required to be effected with a company within New South Wales. Because reg. 3 removes the exception and exposes the applicants to contravention of s. 47 (6), I would answer question (g) "No".

Although the applicants are not protected by s. 51 (1) (*b*), the answer I have given to question (f) leads me to the conclusion that they have not acted in contravention of s. 47 (6) of the Act.

I would answer the questions raised by the special case, in respect of each of the Ku-ring-gai Society and the Dee Why Society, as follows: (a) Whether upon the facts stated in this case this Court should in the exercise of its jurisdiction under s. 163A of the *Trade Practices Act* 1974 make any of the declarations hereinafter referred to: "Yes". (b) Whether such society is a trading corporation formed within the limits of Australia as defined in s. 4 (1) of the *Trade Practices Act* 1974: "It is unnecessary to answer this question". (c) Whether such society is a financial corporation formed within the limits of Australia as defined in s. 4 (1) of the *Trade Practices Act* 1974: "Yes". (d) Whether such society is otherwise a "corporation" as defined in s. 4 (1) of the *Trade Practices Act* 1974: "It is unnecessary to answer this question". (e) Whether in so far as the provisions of s. 47 purport to apply to such society the same are outside the powers of the Parliament of the Commonwealth of Australia: "No". (f) Whether in so far as the provisions of the Act apply to such society a requirement by such society that its members who borrow money from such society on the security of real property

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Re KU-RING-GAI CO-OPERATIVE BUILDING SOCIETY (No. 12) LTD.

Bowen C.J.

insure the same in the names of the society as mortgagee and the member as mortgagor for their respective rights and interests with a company nominated or approved by such society is in contravention of the provisions of s. 47 (1) of the Act by virtue of s. 47 (1) of the *Trade Practices Act* 1974: "No". (g) Whether if s. 47 of the Act applies to the society, the provisions of s. 51 of the Act require that regard shall not be had to any requirement by the society that its members who borrow money from the society on the security of real property insure the same in the joint names of the member as mortgagor and the society as mortgagee for their respective rights and interests with a company nominated or approved by the society in determining whether a contravention of the said s. 47 has been committed: "No". (h) Whether it is within the jurisdiction of this Court conferred by s. 163A of the said Act or any other statutory provision to make the declaration set forth in par. (e): "Yes".

I would order that the commission pay the applicants' costs of the special case.

BRENNAN J. The stated case and its annexures are analyzed in the judgment of Deane J. which I have had the advantage of reading. I agree in the answers proposed by his Honour to the several questions raised by the case; and except to the extent that these reasons depart from the reasons expressed by his Honour, I concur in his judgment.

The applicants seek declaratory relief under s. 163A of the *Trade Practices Act* 1974. They will incur the risk of prosecution if they pursue the practice referred to in the case: that is, if the Dee Why Society requires its borrowers to insure with an insurer nominated by it, and if the Ku-ring-gai Society requires performance by its borrowers of their undertaking to insure with an insurer nominated by it. The reality of the risk of prosecution, and the certainty that the applicants are engaging and wish to continue to engage in a practice the lawfulness of which is challenged by an authority competent to prosecute, show the present case to be one where a declaration might properly be made, and where the declaration sought should be made if the challenged practice be lawful (*Re Tooth & Co. Ltd.* (17)). In determining whether the challenged practice is lawful, questions of the validity of s. 47 of the *Trade Practices Act* or of its construction in conformity with the Constitution may arise. There is ample jurisdiction conferred upon this Court by s. 163A to determine those questions: see *Re Tooth & Co. Ltd. (No.* 2) (18).

Section 47 relevantly applies to trading and financial corporations as they are defined by s. 4 (1) of the Act. That definition—"a trading corporation formed within the limits of

(17) (1978) 31 F.L.R. 314.

(18) (1978) 34 F.L.R. 112.

Australia or . . . a financial corporation so formed"—echoes the language of s. 51 (xx) of the Constitution which, being drawn upon as a source of power to support the Act, limits the denotation of the terms used in the definition. It is clear that the Constitutional phrase "trading or financial corporations formed within the limits of the Commonwealth" denotes two classes of corporations locally formed, and that criteria of classification are necessarily to be applied to distinguish between those corporations which fall into one or other of the stated classes, and those which do not. The subjects are not amenable to classification within the natural order, for corporations are artificial entities having no existence save to the extent prescribed by a system of law; yet the description of a corporation as a "trading" or "financial" corporation refers to a factual activity or function and imports a nexus of some kind between the activity or function and the corporation.

These matters were considered by the High Court in *The Queen* v. *Trade Practices Tribunal; Ex parte St. George County Council* (19). The High Court was there concerned to determine the classification of the St. George County Council, a corporation created under the *Local Government Act*, 1919 (N.S.W.), and which engaged in trading activity as it was empowered to do. Their Honours' reasons for judgment show varying approaches to the criteria of classification, and no single ratio decidendi appears.

Barwick C.J. regarded the activity of the corporation as definitive of its character. He said: "It seems to me that 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, in my opinion, the identification of the corporation which falls within the statutory definition will be made principally upon a consideration of its current activities" (20).

McTiernan J. construed the Act as exhibiting a legislative intention to apply to trading corporations which were engaged in a private enterprise and to exclude corporations which conduct a municipal trading undertaking. He said: "It can hardly be contended that the legislature intended any corporation which trades. The preamble of the *Restrictive Trade Practices Act* 1971 (Cth.) expresses an object with which the Act was made. The object is: 'To preserve Competition in Trade and Commerce to the extent required by the Public Interest'. This is naturally an object directed to—that is, pertaining to—private enterprise" (21).

And, later in his judgment, his Honour said: "The Council conducts a municipal trading undertaking. This is not sufficient to

(19) (1974) 130 C.L.R. 533.
(20) (1974) 130 C.L.R., at pp. 542-543.
(21) (1974) 130 C.L.R., at p. 546.

put into the category of a 'trading corporation'—a trading company which is incorporated. The Council does not supply electricity or electrical goods purposely to win sums of money as profits. If the Council's operation of the undertaking is revenue-producing that does not change the character of the enterprise from public to private" (22).

Menzies J. rejected the activities test as sufficient by itself, pointing to the several kinds of corporations which are not trading corporations though they engage in some trading activities. He added: "It is not my purpose to attempt to define all that falls within the limits of the classification of 'trading corporation'. Rather, I am concerned to indicate that the classification has limits and those limits are not to be ascertained simply by asking the question 'Does the corporation trade?' As I have indicated, many corporations which do trade are clearly outside the limits of the classification and one group of corporations that is not comprehended is, in my view, corporations of an essentially different character, namely corporations for local government purposes" (23).

Gibbs J., rejecting the activities of the Council as sufficient by themselves to determine its categorization as a trading corporation, said: "A trading corporation is one formed for the purpose of trading. However, as I have indicated, the mere fact that a corporation is trading does not mean that it is a trading corporation. 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 trading corporation" (24). The test of purpose of formation is to be answered by reference not merely to the activity which the corporation was set up to conduct but also by reference to the constitution of the corporation and the manner in which it is required to fulfil its functions. Further to this Gibbs J. said:

"The crucial question then is whether, because the County 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, it is therefore a trading corporation. To say that the County Council was formed for the purpose of trade seems to me to state a half-truth and to ignore a number of significant circumstances that reveal its true nature. It is clear that the County Council was formed to fulfil a function which was given by the Act primarily to municipal and shire councils but which it was apparently considered might more beneficially be exercised by an authority operating within a wider area than

(22) (1974) 130 C.L.R., at p. 548.
(23) (1974) 130 C.L.R., at p. 554.
(24) (1974) 130 C.L.R., at p. 562.

that of one municipality or shire. That function is cast upon the County Council by action taken by the Governor under the authority of the Act. The principal aspect of the function is the supply of electricity—a commodity regarded as essential for modern life—and in fulfilling its function the County Council must exercise its powers and perform its duties for the benefit of the areas included in the County District. The County Council is a body whose members are delegates elected by, and are themselves members of, the constituent councils. It must supply the electricity and appliances as cheaply as possible and therefore must not aim to make a profit. Any profit that may happen to be made can only be applied in providing for the matters mentioned in s. 419 (1) of the Act, and will not enure for the benefit of the members of the County Council or any other private individuals. The County Council has power to levy rates, and its expenses may be met by the constituent councils. It may borrow moneys under Treasury guarantee. When all these facts are considered, the proper conclusion in my opinion is that the County Council is a corporation constituted for the purposes of local government to provide an essential service to the inhabitants of an aggregation of local authority areas, under conditions thought most likely to prove beneficial to them. It is properly described as a municipal corporation" (25).

Stephen J. joined the Chief Justice in dissent. In his judgment he said: "Again I would of course accept that every corporation which happens to trade is not a trading corporation, the engaging in trading activities ancillary to some other principal activity cannot make the corporation one properly described as a trading corporation. But that proposition has no relevance in the present case since the County Council's activities, both as contemplated by the terms of its creation and as they are in fact undertaken, are concerned with trading and with nothing else" (26).

In each of these judgments the predominant activity in which the corporation engages or which it was formed to engage in was regarded as either indicative or definitive of the corporation's character. But in the view of the majority, other features showed the subject corporation to be in a category which is exclusive of "trading corporations", and therefore to lie outside the ambit of Commonwealth legislative power. The relevant category was identified as local government or municipal corporations, and the circumstance that the St. George County Council was formed for the purpose of conducting what the *Local Government Act* described as a "trading undertaking", and traded accordingly did not take the Council out of that category. The minority were not so concerned to deny the Council the character of a muni-

(25) (1974) 130 C.L.R., at p. 564.

(26) (1974) 130 C.L.R., at p. 572.

cipal corporation, but they regarded dual characterization as placing the Council within the category of "trading corporation" whether or not it was also within the category of municipal corporation (27).

In choosing between the categories, a number of features was referred to in the majority judgments: the public character of the enterprise (28), the purpose of the Council's function (29), the powers of the Council (30) and the nature of its borrowings (31). These features were regarded as the relevant criteria for placing the Council within a category of corporations which excluded trading corporations: see per Gibbs J. (32).

In the present case the relevant inquiry is whether either of the applicant corporations is a financial corporation. Unless some feature of its constitution, or purpose of incorporation, or management, would place it in a category which is exclusive of the category of financial corporation, its predominant activity must be regarded in order to ascertain whether it answers the relevant description. Its predominant activity is the activity which it was formed to undertake—the borrowing of moneys to lend to its members, the lending of those moneys, the receipt of repayments and the ultimate repayment of the moneys to the source from which they came. These are money dealings. The activities of borrowing in order to lend and lending at interest are financial activities which give to each corporation the character, and place it within the category of a financial corporation. It is no doubt right to describe the applicant societies as co-operative societies or, more fully, as co-operative terminating building societies, but that description neither places them in, nor removes them from, the category of financial corporations. Nor do the features of each society—its constitution, organization and management, the source and nature of its borrowings, its subjection to governmental controls—identify it as falling within some category of corporation which excludes financial corporations. It is not now necessary to determine whether either society is a trading corporation, or the extent to which the categories of trading corporations and financial corporations coincide. The relevant practices of each applicant society are thus amenable to regulation under s. 47 of the *Trade Practices Act*.

Unless an exemption is to be found elsewhere, s. 47 (1) and (6) would prohibit each of the applicant societies from engaging in the practice of making loans on condition that the borrower takes out an insurance policy with a nominated company. Section 51 (1) (*b*) of the *Trade Practices Act* was relied on to furnish such an exemption. It provides:

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(27) (1974) 130 C.L.R., at pp. 543, 573.
(28) (1974) 130 C.L.R., at pp. 548, 564.
(29) (1974) 130 C.L.R., at pp. 551, 565.
(30) (1974) 130 C.L.R., at pp. 551-552, 564.
(31) (1974) 130 C.L.R., at pp. 552, 564.
(32) (1974) 130 C.L.R., at p. 565.

"(1) In determining whether a contravention of a provision of this Part has been committed, regard shall not be had—

(*b*) in the case of acts or things done in a State—except as provided by the regulations, to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act passed by the Parliament of that State."

Where an act or thing has received the specific authorization or approval mentioned in s. 51 (1) (*b*), it is incapable of forming a part of that body of facts which must be proved to establish a contravention of s. 47. Section 51 (1) (*b*) operates distributively over each of the ultimate facts (being acts or things) which together might otherwise constitute a contravention. That is not to say that the ultimate facts are to be so analyzed into their conceptual constituents that the relevant nature of the act or thing disappears. The making of a loan on condition that the borrower takes out an insurance policy with a nominated company is not the making of loan simpliciter, with the imposition of the condition being separately superadded: it is the making of a loan upon the stated condition. The question is whether the making of such loans has been specifically authorized or approved.

The relevant provisions are s. 82 of the *Co-operation Act*, 1923 (N.S.W.), and reg. 35A of the regulations made under that Act. Regulation 35A provides:

"The following matter is prescribed pursuant to section 82 (3) (*e*) of the Act to be set forth in the rules of a building society:

The manner in which the insurance of any building or premises the subject of a mortgage to the society is to be effected and whether the insurance of that building or those premises is required to be effected with an insurance company or insurance society specified, nominated or approved by the society or the board."

It is lending upon the condition that insurance "be effected with an insurance company . . . nominated by the society" which attracts the operation of s. 47 of the *Trade Practices Act*. Does reg. 35A "specifically authorize or approve" the act of lending upon that condition? The regulation purports to limit the freedom of a building society to require insurance to be effected with a nominated insurer by prescribing the insertion of the requirement in the rules of the society. The provision no doubt assumes that the requirement is lawful, for it is not to be thought that the regulation prescribes the creation of unlawful obligations under the rules of the society.

It is one thing to assume that it is lawful for a society to impose the requirement, and to prescribe the contents of the society's rules accordingly, and another thing to give specific authorization or approval to the act of lending upon the relevant condition. It is no doubt a commonplace that State laws assume

the lawfulness of an act which might be an ingredient of conduct contravening the *Trade Practices Act*, for Pt IV of that Act is concerned for the most part with trading practices which would be perfectly lawful if it were not for the provisions of that Part.

It is a consequence of the enactment of the *Trade Practices Act* that practices hitherto lawful are proscribed by Commonwealth law. Section 51 (1) (*b*) limits the operation of s. 47 so that the laws of a State may define the acts or things which do not fall within the prohibitions of s. 47. The boundaries of this Alsatia are to be chosen, in the first instance, by the laws of the relevant State. But the appropriate State legislation which exercises the exempting power must specifically authorize or approve the act or thing; that is, it must manifest a legislative intention that the act or thing, if done or existing, shall not be a link in the chain of proof of a liability, whether civil or criminal. To be sure, the laws of a State do not usually trouble to give legislative affirmation of the lawfulness of acts or things which are not otherwise proscribed, but a legislative assumption of the lawfulness of an act or thing is not tantamount to a specific authorization or approval of that act or thing. What is necessary is that the State law should exhibit a specific legislative intention to authorize or approve the act or thing, even though that act or thing would not—but for the provisions of the *Trade Practices Act*—be unlawful.

Regulation 35A is not so drawn as to give that specific authorization or approval to the act of lending on condition that the borrower effect insurance with an insurer nominated by a building society.

I would answer the questions posed in the stated case in the manner proposed in the judgment of Deane J.

DEANE J. This is a special case stated in proceedings by the applicants, the Ku-ring-gai Co-operative Building Society (No. 12) Ltd. ("the Ku-ring-gai Society") and the Dee Why Co-operative Building Society (No. 29) Ltd. ("the Dee Why Society"), against the Trade Practices Commission ("the commission"), for declaratory relief, pursuant to s. 163A of the *Trade Practices Act* 1974 ("the Act"), as to the operation and effect of the Act in relation to a practice of imposing, in respect of loans which an applicant makes to its members, a requirement that the property mortgaged to secure repayment of the loan be insured with a particular nominated insurer. The commission maintains that the practice, in respect of which the applicants enjoy no authorization, constitutes exclusive dealing in contravention of the provisions of s. 47 of the Act and proposes to institute proceedings under the Act against the applicants for penalties in the event that it obtains evidence of their engaging in the practice in the future.

The applicants are co-operative terminating building societies. They are registered under, and derive corporate status from, the provisions of the *Co-operation Act*, 1923 (N.S.W.), ("the *Co-operation Act*"). The object of each is stated in its rules as being the raising, by the subscriptions of members and as otherwise authorized by the *Co-operation Act*, of a fund to make loans to members. In fact, the subscription fees paid by members are insignificant and the fund has, in the case of each applicant, been raised by borrowing, at favourable rates of interest, from a bank pursuant to the provisions of an equitable mortgage over the assets and undertaking of the relevant applicant. In the case of the Ku-ring-gai Society, the moneys have been borrowed from the Rural Bank of New South Wales and represent part of an allocation to the New South Wales Government under the Commonwealth-State Housing Agreement. In the case of the Dee Why Society, the lender is the Bank of New South Wales Savings Bank Ltd. and the repayment of principal and the payment of interests have been guaranteed by the New South Wales Treasurer pursuant to the provisions of the *Government Guarantees Act*, 1934 (N.S.W.). The moneys made available to the Ku-ring-gai Society were offered and accepted on the condition that the loans by the society be to enable the erection of new dwellings or the purchase of new dwellings erected and not previously occupied. The moneys made available to the Dee Why Society were offered and accepted on the condition that loans by the society be, in effect, restricted to enable the erection or acquisition of dwellings within the Sydney suburbs of Manly and Dee Why. The Ku-ring-gai Society has completed its programme of loans to members and, being a terminating society, its future activities can be expected to be directed towards receipt of the moneys due under the mortgages granted by members, payment of principal and interest in respect of the loan from the Rural Bank of New South Wales and, ultimately, voluntary liquidation. It would, however, seem at least theoretically possible that it could make some future loans to members. The Dee Why Society had not, at the time of the special case, actually commenced the making of loans to its members. That activity has, no doubt, now commenced and I shall refer to the Dee Why Society on the basis that it has commenced to make loans to its members.

The income of the applicants is derived from interest paid by members upon loans made to them, management fees, fines and discharge fees paid by members and allowances and commissions received from insurance companies. The revenue outgoings of the applicants consist of interest on the principal of the bank loan, management fees and administrative expenses. The applicants neither receive money or deposits from the public nor lend to the public. Each confines its borrowing to the one overall loan from a bank to which reference has been made. Their

lending is, under their rules, restricted to lending to their members. They do not conduct their activities for the purpose of making financial profits but, subject to a loading of less than one per cent per annum charged as a contribution to managerial and administrative expenses and a difference between rests for calculation of interest, lend to their members at the same rate as that at which they borrow from the relevant bank. In the event that an overall financial profit is found to have resulted from their activities when the occasion for their voluntary liquidation arrives, any surplus is, under the rules of each applicant, to be distributed among the members proportionately to the amount of the principal of their respective loans. Any accumulated losses not written off at the commencement of voluntary winding up are, under the rules, to be borne by members in the same proportions.

The applicants perform an important social function of assisting in the provision of finance to enable the acquisition and erection of dwellings. They perform their functions under strict governmental supervision and, in the performance of them, participate in the implementation of governmental policies of encouraging both the availability of housing to family units in what was referred to in argument as "the lower income groups" and the erection of new housing by the building industry. Governmental requirements and restrictions (imposed by regulations made under the *Co-operation Act* or, less formally, by direction and advice communicated through the New South Wales Registry of Co-operative Societies) extend, in the case of societies which, like the Ku-ring-gai Society, receive funds made available under the Commonwealth-State Housing Agreement or which, like the Dee Why Society, operate with the aid of a New South Wales Government Guarantee, to matters such as permissible sources of funds, the content of mortgages given by members to secure repayment of loans, the maximum amount which can be lent to the individual member, the maximum income of a prospective borrower and the maximum value of improvements of the house for the purchase or erection of which the member seeks to borrow.

There is a degree of confusion in the special case and annexed material as to the terms of the requirement as to insurance of the mortgaged property which the applicants impose and, in the case of the Dee Why Society, the special case (par. 28) incorrectly states the effect of r. 47 of the society's rules. The rules of each applicant (r. 47 in each case) provide that the society itself shall effect the relevant insurance in the joint names of the society and the member with an insurer specified by the society and provide that the member shall reimburse the society for the premium within fourteen days of its payment by the society. The standard form of mortgage used to secure the repayment of moneys lent to

members provides that the mortgagor (i.e. the borrowing member) will repay to the society in accordance with the rules for the time being of the society all premiums for insurance effected by the society against loss or damage by fire, lightning, storm and tempest on all buildings and premises the subject of the mortgage provided that the mortgagor if required by the society in accordance with the rules for the time being of the society will insure against such loss or damage such buildings and premises. Since there is nothing in the rules which authorizes the society to require that the member effects the relevant insurance, the reference in the form of mortgage to the society's imposing such a requirement "in accordance with the rules" would appear to be without content with the result that the only operative provision of the mortgage in that regard is that the insurance be effected by the society on behalf of itself and the member.

On the other hand, the special case (par. 13) defines the requirement imposed by the Ku-ring-gai Society as being a requirement that the member himself effect insurance on the property to be mortgaged in the joint names of the member and the society "as owner and mortgagee respectively and for their respective rights and interests" with a nominated insurance company (in the case of the Ku-ring-gai Society the Australian General Insurance Company Ltd.). The special case (par. 28) states that it will be the Dee Why Society's practice to require borrowers from it to insure with a nominated insurer. The statement of the relevant requirement in this form (i.e. that the insurance be effected by the member) finds some support in the annexed material (see cl. 5 of the Ku-ring-gai Society's Standard Conditions of Loan). When the discrepancy between the practice as stated in the special case and the provision of the rules was raised in the course of argument, the commission insisted that the relevant practice was as stated in agreed terms in the special case and no application was made or foreshadowed by the applicants for a variation of that statement of the practice in the special case. In all the circumstances, I consider that the questions raised by the special case should, at least in the first instance, be approached on the basis that, notwithstanding the provisions of the rules, the relevant practice is as stated, by agreement between the parties, in the special case and that the requirement is that the borrowing member effect insurance of the subject property with a particular nominated insurer.

Commission is paid by the nominated insurer to the relevant society in respect of premiums paid under the policies of insurance effected or maintained in compliance with the requirement relating to insurance. In monetary terms, the amount of such commission is not great. For the year ended 31st March, 1977, the total of such commission received by the Ku-ring-gai Society was less than $400. Such commission does

however, in relative terms, make a significant contribution to payment of the applicants' management expenses.

The special case raises, in respect of each applicant, eight different questions. Those questions involve consideration of certain preliminary matters going to jurisdiction and discretion and of four substantive issues between the parties. It is convenient, before going to the actual questions, to examine those preliminary matters and, if it is appropriate that the substantive issues be dealt with, those four substantive issues.

The four substantive issues between the parties are: (i) Whether each (or either) of the applicants is a "corporation" for the purposes of s. 47 of the Act; (ii) If so, whether the provisions of s. 47 of the Act in so far as they purport to apply to that applicant are within the legislative competence of the Commonwealth Parliament; (iii) If yes to (i) and (ii), whether the condition or requirement as to insurance or the practice of lending upon that condition or requirement is to be disregarded in determining whether there is any contravention of the provisions of s. 47 of the Act; (iv) If yes to (i) and (ii) and no to (iii), whether lending upon the condition or requirement as to insurance constitutes, in the absence of authorization under the Act, a contravention of the provisions of s. 47 of the Act.

The preliminary matters going to jurisdiction and discretion are whether the court has jurisdiction to grant declaratory relief embodying the answer to (ii) supra and whether the court should, as a matter of discretion, grant declaratory relief embodying the answers to all or any of (i), (ii) and (iii). These matters going to jurisdiction and discretion arise at the threshold. It is desirable that a conclusion in relation to them be reached before consideration is given to the substantive matters in issue between the parties.

Section 163A (1) of the Act provides, for present purposes, that a person may institute a proceeding in the Federal Court seeking, in relation to a matter arising under the Act, a declaration as to the operation or effect of any provision (other than provisions not presently relevant) of the Act and that the court has jurisdiction to hear and determine such a proceeding. A dispute between the Trade Practices Commission and a person as to whether an actual or proposed course of conduct of that person will constitute a contravention of the provisions of a section of the Act is, in my view, a matter arising under the Act in relation to the operation or effect of the relevant provisions of the Act. The fact that the questions in issue include the question whether the relevant provisions of the Act are within the legislative competence of the Parliament of the Commonwealth does not prevent either the dispute being a matter arising under the Act or a declaration as to the validity or invalidity of the relevant provisions of the Act being a declaration, in relation to that matter, as to the operation

or effect of those provisions. It follows that this Court possesses jurisdiction, pursuant to s. 163A (1) of the Act, to grant declaratory relief embodying the answer to (ii) supra (see, generally, *Re Tooth & Co. Ltd. (No. 2)* (33).

The dispute between the applicants and the Trade Practices Commission in the present matter is an actual one. It involves the question whether the ordinary manner in which the applicants conduct their affairs involves a contravention of the provisions of the Act. The commission proposes to institute proceedings under the Act against the applicants for penalties in the event that it obtains evidence of their lending upon the relevant condition in the future. The resolution of that dispute is important to the applicants in determining their method of conducting their future activities and to the commission in the performance of its duty to seek to ensure observance of the provisions of the Act. The circumstances, in my view, warrant the grant of declaratory relief embodying the court's conclusion on the substantive issues between the parties. I proceed to the consideration of those issues.

(1) IS EACH (OR EITHER) OF THE APPLICANTS A "CORPORATION" FOR THE PURPOSES OF S. 47 OF THE ACT?

Section 47 (1) of the Act provides that, subject to the section, "a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing". The next nine subsections of s. 47 (s. 47 (2)—(10) inclusive) describe a number of different courses of conduct which, if pursued by a corporation in trade or commerce, will involve the corporation engaging in exclusive dealing. Among them (s. 47 (6)), is supplying or offering to supply, services (defined, in s. 4 of the Act, to include any rights under a contract in relation to the lending of money) on the condition that the person to whom the corporation supplies services will acquire services (defined, in s. 4, to include any right under a contract of insurance) from another person not being a corporation related to the supplying corporation. The act of supplying services on such a condition will constitute a contravention of s. 47 of the Act if two further ingredients are present. The first such ingredient is that supply of the services be in trade or commerce. The second is that the supplier be a corporation.

Section 4 of the Act defines a corporation as meaning, inter alia, a body corporate that "is a trading corporation formed within the limits of Australia or is a financial corporation so formed". Each of the applicants, being incorporated in New South Wales pursuant to the provisions of the *Co-operation Act* of that State, is a corporation formed within the limits of Australia. The question whether either applicant is a corporation for the purposes of s. 47 of the Act will therefore be answered

(33) (1978) 34 F.L.R. 112.

conformably with whether it is "a trading corporation" or "a financial corporation". Those phrases are defined, by s. 4 of the Act, as meaning, respectively, a "trading corporation" and a "financial corporation" within the meaning of s. 51 (xx) of the Constitution, subject only to the qualification that the phrase "financial corporation" in the definition section extends to include banking and insurance companies which may not, in the light of the express provisions conferring legislative power in relation to banking and insurance which other placita of s. 51 of the Constitution contain, be encompassed in the reference to financial corporation in placitum (xx). (See the definition of "financial corporation" and "trading corporation" in s. 4 of the Act; *The Queen* v. *Trade Practices Tribunal*; *Ex parte St. George County Council* (34) and *Bank of New South Wales* v. *The Commonwealth* (35)).

The words used in s. 51 (xx) of the Constitution are "trading or financial corporation". There is no authoritative judicial statement of their ambit and it is inappropriate to attempt to frame a comprehensive definition of them in their context as the subject matter of a constitutional grant of legislative power. In the *St. George County Council* case, there was an unresolved divergence of judicial opinion as to whether the question whether a corporation comes within the words should be answered primarily by reference to its actual activities or by reference to the purpose for which it was formed. The distinction between possible primary reference points may, in some cases, be of crucial importance. The present is not, in my view, such a case for the reason that each of the applicants in the present matter was formed for the purpose of carrying on the very activities which it in fact carries on.

The phrases "trading corporation" and "financial corporation" in the context of both s. 51 (xx) of the Constitution and the definition of "corporation" in the Act are composite ones. Each phrase refers to a corporation which can appropriately be categorized by reference to activity whether actual or intended. The fact that a corporation was formed for purposes or with objectives that might legitimately be advanced through trading, or that it in fact trades, will not necessarily mean that it can be appropriately categorized as a trading corporation. Nor will the fact that a corporation was formed for purposes or with objectives that might legitimately be advanced by involvement in financial transactions or that it occasionally has dealings in finance necessarily mean that it can appropriately be categorized as a financial corporation. Trading activity or dealing in finance (whether actual or intended) will be decisive of categorization only where the overall circumstances are such that the

(34) (1974) 130 C.L.R., at pp. 538, 555. (35) (1948) 76 C.L.R., at p. 204.

corporation can appropriately be categorized by reference to such activity.

It was but faintly submitted on behalf of the commission that the present applicants are trading corporations. Even accepting, as I do, that a much more extended scope should be given to the concept of "trade" and "trading" than the buying and selling of goods (see *Bank of New South Wales* v. *The Commonwealth* (36) and *Strickland* v. *Rocla Concrete Pipes Ltd.* (37)), I incline to the view that neither applicant can properly be categorized as a trading corporation. It is, however, unnecessary that I express any concluded view on that question. The primary issue is whether the applicants (or either of them) can, for present purposes, appropriately be categorized as financial corporations. In my view, each applicant should, for the purposes of s. 51 (xx) of the Constitution and the definition of "corporation" in s. 4 of the Act, be so categorized.

As has been said above, the phrase "financial corporation" is a composite one. It does not refer to solvency. An obvious reference point is to the activity of commercial dealing in finance. Another possible reference point is the provision of management or advisory services in relation to financial matters. I use the words "dealing in finance", for want of a better expression, to refer to transactions in which the subject of the transaction is finance (such as borrowing or lending money) as distinct from transactions (such as the purchase or sale of particular goods for a monetary consideration) in which finance, although involved in the payment of the price, cannot properly be seen as constituting the subject of the transaction. A common but not invariable characteristic of the relevant type of transaction is that the obligation on each side is to pay money. The borrowing and lending which the applicants were formed to engage in and in which they in fact engage are dealings in finance in this sense. The essential question is whether, in all the circumstances, the applicants should properly be categorized as financial corporations by reference to those activities.

There is a number of important respects in which the activities of the applicants can be distinguished from the activities commonly associated with companies whose business is that of dealing in finance. The objective of the applicants is to provide benefits to members by making loans at a moderate rate of interest rather than to carry on their commercial activities at a profit from which dividends to the members may be declared. The fact that the applicants are terminating societies precludes the repeated turn-over of circulating capital. The fact that each of the applicants has confined its borrowing to one loan from a bank and confines its lending to, in ordinary circumstances, not more

(36) (1948) 76 C.L.R., at p. 381.

(37) (1971) 124 C.L.R. 468, at p. 489.

than one loan to each of its members means that the commercial activities of each applicant are severely curtailed. The fact that the applicants perform an important social function and that the funds which they borrow can be traced to government funds or are obtained with the help of government guarantees may mean that they carry on their activities with a degree of altruism beyond that ordinarily evinced by commercial enterprises. All these distinctions and considerations are relevant to the categorization of the applicants and their activities. They are not, however, conclusive of it.

Whatever may have been the motivation of borrower or lender or of those involved in making or assisting in making the relevant funds available, the borrowing from the bank by each applicant was a secured borrowing at interest and was a commercial dealing in finance. Praiseworthy and altruistic though the motives of those associated with the promotion and management of the applicants may, to no small extent, be, the lending by the applicants to members upon security and at interest are, likewise, commercial dealings in finance. Neither the borrowing nor the lending can be seen in isolation from one another. Neither can they be seen as merely incidental or ancillary to some other and predominant activity. The lending to members is the raison d'être of the applicants and both the purpose and the culmination of their operations. Their borrowing is so that they may lend.

Notwithstanding the restricted scope and limited duration of their activities, each applicant, in my view, carries on a business. At the heart of that business are the commercial dealings in finance constituted by the relevant applicant's borrowing and lending of money and the subsequent payments and receipt of money pursuant to obligations and rights resulting from those dealings. Each applicant was formed to carry on that business. The activities of each applicant are confined to carrying it on. The business which each applicant carries on and which it was formed to carry on is a financial business. Each applicant, being formed to carry on a business of dealing in finance and in fact carrying on such a business, is, in my view, properly to be categorized as a financial corporation within the meaning of the phrase as used in s. 51 (xx) of the Constitution and in the definition of "corporation" contained in s. 4 of the Act. It follows that each of the applicants is a corporation for the purposes of s. 47 of the Act.

(2) ARE THE PROVISIONS OF S. 47 OF THE ACT, IN SO FAR AS THEY PURPORT TO APPLY TO THE APPLICANTS, WITHIN THE LEGISLATIVE COMPETENCE OF THE COMMONWEALTH PARLIAMENT?

Section 51 (xx) of the Constitution confers upon the Parliament of the Commonwealth legislative power with respect to, inter alia,

financial corporations formed within the limits of the Commonwealth. Plainly, the provisions of s. 47 of the Act to the extent that they prohibit such a corporation from, in trade or commerce, engaging in the practice of exclusive dealing are within the legislative powers conferred upon the Commonwealth Parliament by s. 51 (xx). Indeed, the contrary was not argued on behalf of the applicants.

The argument advanced on behalf of the applicants was that neither of the applicants is within any of the categories of corporation specified in s. 51 (xx) of the Constitution and that the provisions of s. 47 of the Act, to the extent that they purport to apply to the applicants, were not, for that reason, within the legislative power conferred by s. 51 (xx) of the Constitution and were not within any other head of Commonwealth legislative power. My conclusion, that each of the applicants is, for the purposes of s. 51 (xx), a financial corporation formed within the limits of the Commonwealth, effectively determines this issue against the applicants. Section 47 (1) of the Act is applicable to the applicants and, subject to the section, prohibits the applicants from engaging, in trade or commerce, in the practice of exclusive dealing as defined by the section. The provisions of s. 47 of the Act are, in their application to the applicants, within the legislative competence of the Commonwealth Parliament.

(3) IS THE PRACTICE OF IMPOSING THE REQUIREMENT AS TO INSURANCE, OR THE REQUIREMENT ITSELF, TO BE DISREGARDED IN DETERMINING WHETHER ANY CONTRAVENTION OF THE PROVISIONS OF S. 47 OF THE ACT HAS BEEN COMMITTED?

Section 51 (1) (*b*) of the Act provides that, in determining whether a contravention of (inter alia) the provisions of s. 47 of the Act has been committed, "regard shall not be had . . . in the case of the acts or things done in a State—except as provided by the regulations, [made under the Act] to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act passed by the Parliament of that State". It was argued, on behalf of the applicants, that the practice of imposing the relevant requirement in relation to insurance was restricted to acts or things done in New South Wales and was specifically authorized or approved by regulation under the New South Wales *Co-operation Act*. The commission disputed that that practice was specifically authorized or approved by the relevant regulation and argued that, in any event, the regulation was ineffective for the purposes of s. 51 (1) (*b*) by reason of a failure to limit its ambit to acts or things done in New South Wales. It was also submitted on behalf of the commission that the practice did not enjoy the protection of s. 51 (1) (*b*) by reason of express provision in the *Trade Practices (Removal of Exceptions) Regulations* that a requirement by a

building society that a borrower cause insurance to be effected with a nominated insurer shall not be disregarded in determining whether a contravention of s. 47 of the Act has been committed. Assessment of the merits of these arguments involves examination of the provisions of the relevant regulation under the *Co-operation Act* in its legislative context.

Section 82 (1) of the *Co-operation Act* provides that the rules of a registered society shall be divided into paragraphs numbered consecutively and shall set forth the matters specified in twenty-nine separate sub-clauses. Section 82 (2) provides that the rules of a society with limited liability (such as the applicants) shall, in addition to the matters mentioned in s. 82 (1), set forth the matters specified in a further eleven separate sub-clauses. Section 82 (3) provides that the rules of a building society shall also set forth the matters specified in a further four separate sub-clauses. Each of the three subsections provides that, in addition to the matters specified, the rules shall set forth "such other matters as may be prescribed by regulation" (s. 82 (1) (dd), s. 82 (2) (1), s. 82 (3) (e)). Section 124 provides that the Governor "may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed . . .".

Regulation 35A under the *Co-operation Act* was notified in the New South Wales *Government Gazette* on 17th January, 1975. It provides as follows:

"35A. The following matter is prescribed pursuant to section 82 (3) (e) of the Act to be set forth in the rules of a building society:—

The manner in which the insurance of any building or premises the subject of a mortgage to the society is to be effected and whether the insurance of that building or those premises is required to be effected with an insurance company or insurance society specified, nominated or approved by the society or the board."

As has been mentioned, there is some confusion in the special case and the annexed material as to the manner in which the insurance on premises mortgaged by members to the applicants is to be effected. The special case describes the relevant requirement as being that the member must effect the insurance. The rules of each applicant provide that the insurance will be effected by the relevant applicant. It would, however, be a comparatively minor matter for either the rules or the actual practice of the applicants to be amended to remove the discrepancy and I approach the consideration of the question on the basis suggested on behalf of the applicants, namely, that the primary question is whether either the provision actually appearing in the rules or the practice of lending upon the condition set out in that provision is, for the purposes of s. 51 (1)

(*b*), specifically authorized or approved by reg. 35A.

The effect of reg. 35A is to add a further matter to the many which must, by reason of the specific provisions of s. 82 of the *Co-operation Act*, be set forth in the rules of a registered limited building society. The regulation does not indicate any required or approved content of the relevant provision in the rules. It indicates no preference as to whether the requirement that insurance be effected with a specified, nominated or approved insurer should be imposed or as to the manner in which insurance is to be effected. It simply requires that the rules specify that manner and indicate whether insurance with a specified, nominated or approved insurer is or is not required. The question which arises is whether such a requirement that the rules of a society contain provision on a particular subject matter can properly be seen, for the purposes of s. 51 (1) (*b*), as a specific authorization or approval of any particular provision in the rules which comes within the ambit of the requirement.

Regulation 35A adopts, in its failure to indicate any preferred content of the required provision, the approach found in the sub-clauses of s. 82 (1), (2) and (3) which prescribe specific material which the rules are required to set forth. The prescribed material is designated, in the case of some of those sub-clauses, by a general reference to subject matter. Thus, for example, s. 82 (1) requires that the rules of a registered society set forth, inter alia, the name and the objects of the society, the manner in which the funds of the society are to be raised and invested and the purposes to which the funds of the society are to be applied (s. 82 (1) (a), (d), (f), (g) and (h)). In the case of other sub-clauses, the material to be set forth in the rules is, by reason of its nature, described with greater particularity. Thus, for example, s. 82 (3) requires that the rules of a registered building society shall set forth whether or not shares may be withdrawn and whether the society is a non-terminating society (s. 82 (3) (c) and (a)). The requirement introduced by reg. 35A that the rules set forth the manner in which insurance is to be effected falls within the former category. The requirement that the rules set forth whether insurance is required to be effected with an insurer specified, nominated or approved by the society falls within the latter category.

When a statement has no purpose or effect other than to convey information as to independently existing facts or circumstances, a requirement that the information be stated may, if appropriately worded, constitute both general prior authorization or approval of some undetermined statement conveying the information and specific authorization or approval of the precise accurate statement of the information. It is, for example, possible to see a requirement or instruction that a person state his name as constituting specific authorization or approval of a precise

accurate statement satisfying the requirement or instruction. The position is, however, different in a case such as the present where the purpose and effect of the required statement is not so limited and the statement is not a statement of independently existing facts or circumstances.

The rules of a registered society themselves constitute the compact between the members. They will ordinarily be adopted at the inaugural meeting of the society. They define the rights and duties of the members of the society. They are registered under the *Co-operation Act* and have operative effect both as regards the matters which they authorize and the matters which they require. The material which they set forth cannot properly be seen as material set forth solely or primarily for the purposes of information. The statement in the registered rules of a requirement as to insurance with which a member must comply is not only a statement of the requirement, it is also the source of the obligation to observe it. The prescribed statement is not one of independently existing fact or circumstance. The setting forth of the relevant statement in the rules itself constitutes both the adoption and implementation of the particular society's actual policy on the specified subject which the rules are required to set forth.

The requirement in reg. 35A, that the rules set forth whether insurance is required to be effected with a nominated insurer, may properly be seen as constituting legislative approval or authorization of the inclusion in the rules of an unspecified statement on that subject. In my view, however, it no more constitutes *specific* authorization or approval of any particular statement on that subject matter which the rules of a particular society might contain than does, for example, the common legislative requirement specifying that particular matters be set out in the prescribed written memorandum of a money-lending contract constitute specific legislative authorization or authority for the particular provisions which appear in a particular contract (see, for example, *Money-lenders and Infants Loans Act*, 1941-1948 (N.S.W.), s. 22 (2)). It follows that that requirement does not, in my view, constitute specific authorization or approval of an express provision in the rules of either applicant that insurance with a particular nominated insurer is required. If I had been of the view that the requirement could constitute specific approval or authorization of a particular statement which was actually set forth in the rules, a further question would arise as to whether the ambit of the authorization or approval extended beyond a statement that insurance with a nominated insurer was required and covered the actual naming of the particular insurer either in, or in pursuance of, the relevant rule.

It follows that, in my view, the provisions of reg. 35A do not specifically authorize or approve any particular provision in the

rules of a registered society requiring insurance with a nominated insurer. Nor do such provisions specifically approve either the act of lending to members on the condition that insurance must be effected with a particular nominated insurer or the terms or content of such a condition. In the result, it is unnecessary to express any view on the argument advanced on behalf of the commission to the effect that the practice of supplying on the condition did not enjoy the protection of s. 51 (1) (*b*) for the reason that reg. 35A was not limited to "acts or things done" in New South Wales or the argument that the effect of the *Trade Practices (Removal of Exceptions) Regulations* is that the protection of s. 51 (*b*) is not available in respect of the requirement that insurance be effected with a nominated insurer.

(4) DOES LENDING UPON THE CONDITION OR REQUIREMENT AS TO INSURANCE IN ALL THE CIRCUMSTANCES, CONTRAVENE THE PROVISIONS OF S. 47 OF THE ACT?

Section 47 (1) and (6) of the Act provides, for present purposes, as follows:

"(1) Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.

(6) A corporation ... engages in the practice of exclusive dealing if the corporation—

(a) supplies ... services; ...

on the condition that the person to whom the corporation supplies ... the ... services ... will acquire ... services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation."

Section 4 of the Act defines "services" as including: "any rights (including rights in relation to ... personal property) benefits, privileges or facilities that are ... provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are ... provided, granted or conferred under — ... (d) any contract for or in relation to the lending of moneys". The section defines "supply", when used as a verb, as including "in relation to services—provide grant or confer" and defines "trade or commerce" as meaning "trade or commerce within Australia or between Australia and places outside Australia".

A corporation which lends money under a mortgage contract will, prima facie, provide or grant rights, benefits or facilities under a contract for or in relation to the lending of money. Such lending will, provided it is "in trade or commerce", prima facie, constitute supplying services for the purposes of s. 47 (6) of the Act. In such a case, a condition or requirement that the borrower or mortgagee will insure the mortgaged property with a particular nominated insurer will, prima facie, constitute a condition that the borrower or mortgagee, being the person to

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whom the corporation supplies the services, will acquire services from another person. If that other person is not a body corporate related to the lender, the result will be that, in lending money in trade or commerce on that condition or requirement, the corporation will be engaging in exclusive dealing within s. 47 of the Act.

It was submitted on behalf of the applicants that, even if it be assumed (as I have found to be the fact) that the applicants are corporations for the purposes of s. 47 of the Act, their lending on condition that the member will insure the mortgaged property with a particular nominated insurer did not constitute exclusive dealing within that section. Three separate grounds of argument were advanced for this submission. They were: (a) That the lending by the applicants to their members is not in trade or commerce; (b) That the condition or requirement that the member insure with a particular nominated insurer was not within the scope of s. 47 (6); and (c) That the provisions of s. 51 (2A) of the Act were applicable to avoid any contravention of s. 47 which might otherwise be involved. I shall consider these three grounds of argument in the order in which they are set out above.

(a) *Is the lending by the applicants to their members "in trade or commerce" for the purposes of s. 47 of the Act?* The applicants do not lend in the market place. Their lending is restricted to their members. The rates of interest which they charge are, no doubt, below, and in the case of the Ku-ring-gai Society well below, the rates of interest which the member would be required to pay if he borrowed the same amount for the same term and upon the same security in the market place.

As has been mentioned, the applicants perform an important social function and, to some extent, play a part in the implementation of government policies. The funds which they borrow can be traced to government funds or are obtained with the help of government guarantee. The scope of their activities is circumscribed by the fact that they have limited their borrowing activities to one borrowing from a bank and their lending activities to loans to their members and, ordinarily, to not more than one loan to each member. The common dominant objective of trading and commercial dealings in the market place, namely profit, is lacking from their activities. The making of loans at low rates of interest to their members constitutes both the culmination and the objective of their activities. Their motive for making such loans is to benefit the members to whom they lend. If the scope of the phrase "trade or commerce" in s. 47 of the Act were restricted to ordinary trading and commercial activities in open markets, there would plainly be a great deal to be said for the applicants' submission that their lending to their members is not in such trade or commerce. The phrase cannot, however, in my view properly be regarded as so restricted.

The terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phrases of development of trade, commerce and commercial communication, the terms are clearly of the widest import (see, generally, *W. & A. McArthur Ltd.* v. *State of Queensland* (38) and *Bank of New South Wales* v. *The Commonwealth* (39)). They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making. I have already expressed the conclusion that, notwithstanding the particular nature of the applicants and the particular character of their activities, their lending to their members are commercial or business dealings in finance. In my view, that lending is, for the purposes of s. 47 of the Act, in trade or commerce.

(*b*) *Is the condition or requirement that the member insure with a particular nominated insurer within the scope of* s. 47 (6)? The applicants argued that the condition or requirement that the member insure with a particular nominated insurer was not within the scope of s. 47 (6) for the reason that the condition was not a condition imposed by the applicant and was not, in any event, a condition that the member "acquire services" within the meaning of the subsection.

The basis of the argument that the relevant condition was not imposed by the applicants was that the condition was to be found in the rules of the relevant applicant. The obligation of a member to effect insurance came, it was said, from the rules which represented the compact between the members and was not something imposed by the applicant which was a creature of that compact. This argument ignores the discrepancy between the practice as specified, by agreement between the parties, in the special case and the condition contained in r. 47 of the rules of each applicant. Quite apart from that discrepancy however, the argument is, in my view, mistaken.

The practice of exclusive dealing does not necessarily involve the *imposition* of any condition. It involves supply *upon* a condition. The condition may well have been suggested by the recipient of supply. It may have been imposed by some third

(38) (1920) 28 C.L.R., at pp. 546 et seq.

(39) (1948) 76 C.L.R., at pp. 284 et seq., 381 et seq.

party. It may arise, by implication, from all the circumstances in which the goods or services were supplied. Even if the relevant condition upon which a loan was made was that contained in the rules of the applicants, a loan by an applicant to one of its members would, if that condition were applicable to it, be, for the purposes of s. 47 of the Act, a supply of services upon that condition. The section does not look to the origin of the condition upon which there is a supply of services. The section looks to the supply of services upon that condition.

The argument that the relevant condition is not a condition that the member "acquire services" within the scope of s. 47 is a more persuasive one. The insurance which the borrowing member is, according to the practice as described in the special case, required to effect is insurance of the subject property in the joint names of the member and the society "as owner and mortgagee respectively and for their respective rights and interests". Both member and society have a legitimate interest in ensuring that the interest of both in the mortgaged premises is covered by a mutually acceptable policy of insurance. From the point of view of the member, it is plainly desirable that the society's indemnity under the insurance of its interest as mortgagee does not involve consequential rights of subrogation in the insurer against himself. From the point of view of the society, adequate insurance of the member's equity in the mortgaged property enhances the value of the member's personal convenant and permits, in the event of destruction or damage, a degree of flexibility which might otherwise be unavailable. Indeed, insurance which is confined to the mortgagee's interests only will, in the event of damage, plainly be likely to raise difficult problems in quantifying the loss actually suffered by the mortgagee. From the point of view of both mortgagor and mortgagee, a joint policy with one insurer prevents, in the event of destruction or damage, disputes between insurers as to quantum of respective liability and eliminates the possibility of a short fall resulting from a gap in the cover provided by separate policies.

It was not contended on behalf of the commission that any contravention of s. 47 would be involved if the condition as to insurance was restricted to coverage of the interest of the relevant applicant, as mortgagee, in the mortgaged property. It would seem a condition which was so limited would not be within s. 47 (6) for the reason that it would relate to acquisition of the relevant services by the applicant itself through the member as its agent. The issue between the parties is whether the consideration or requirement is within s. 47 (6) to the extent that it requires insurance in respect of the interest of the member.

The condition of supply to which s. 47 (6) of the Act refers is, for present purposes, a condition that the recipient of the primary services "will acquire services of a particular kind or description"

from a third person not being a body corporate related to the supplier of the primary services. The supply to which s. 47 (6) refers is supply upon such a condition. Can it properly be said that supply upon a condition that supplier and recipient will, in association and in their joint names and in respect of their respective rights and interests insure a mortgaged property comes within a proscription of supply upon condition that the recipient will acquire services? The resolution of this question is to be found within the definition of "services" contained in s. 4 of the Act.

Section 4 of the Act defines services, for present purposes, as including, "*any* rights . . . benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes *the* rights, benefits, privileges or facilities that are, or are to be provided, granted or conferred under—. . . (*b*) a contract of insurance . . ." (italics added). As a matter of language, the phrase "any rights" is apt to include a right which is held jointly as well as a right which is held independently. The rights of a co-insured under a joint policy of insurance come within its purview. The substitution of the phrase "the rights" in that part of the definition which expressly refers to rights under a policy of insurance is in the context of a provision that that part of the definition shall not limit the generality of what has gone before. In that context, the reference to "the rights . . . under a contract of insurance" should be interpreted as referring not only to the undivided totality of rights of the independent insured but also to any right which a co-insured or any other person might severally or jointly acquire under a contract of insurance. Once the conclusion is reached that the rights of a co-insured under a joint insurance policy constitute "services" for the purposes of s. 47 (6), a condition that the borrowing member effect insurance on the mortgaged property "in the joint names of the member and Society as owner and mortgagee respectively and for their respective rights and interests" can be seen as a condition as to an acquisition of services for the purposes of the section.

It follows that the fact that the condition relates to joint insurance by the lending applicant and the borrowing member prevents neither the condition being, for the purposes of s. 47 (6), a condition that the borrowing member will acquire services nor the supply upon that condition being a proscribed supply for the purposes of that subsection.

(*c*) *Are the provisions of s.* 51 (2A) *of the Act applicable to avoid any contravention of s.* 47 *which might otherwise be involved*? Section 51 (2A) provides, for present purposes, that in determining whether a contravention of the provisions of s. 47 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by

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ultimate users or consumers of services against the suppliers of those services. The applicants argued that the condition contained in relation to insurance which was contained in the rules of each applicant came within the protection of that subsection. In my view, there is no substance in this argument.

Even if the discrepancy between the practice as specified in the special case and the condition contained in the rules of each applicant is ignored, it is, in my view, impossible to see the provision in the rules as being, or constituting the result of, an act done in concert by the members of an applicant *against* that applicant or by an applicant and its members *against* a particular insurer or insurers generally. There is considerable difficulty in identifying any relevant act as being done in concert by the members of an applicant or by an applicant and its members. It was suggested in argument that the relevant act done in concert by the members was the formulation and adoption of the provision as to insurance in the rules of the applicant of which they are a member. The documents annexed to the special case indicate, however, that most of those who ultimately became members would have had nothing to do with the formulation or adoption of those rules. Even if the difficulty of defining with precision any relevant act done in concert by members or by an applicant and its members be surmounted, it is plain that any such act could not properly be seen as an act done in concert by members *against* the relevant applicant or by an applicant and its members in concert *against* an insurer or insurers generally.

CONCLUSION.

In the result, I have reached the conclusion that the lending of money by the applicants to their members upon the condition that the borrowing member insure the mortgaged property "in the joint name of the member and the Society as owner and mortgagee respectively and for their respective rights and interests" with a particular nominated insurer constitutes, for the purposes of s. 47 of the Act, the supply of services by a corporation, in trade or commerce, on the condition that the person to whom the corporation supplies the services will acquire services of a particular kind or description directly or indirectly from a third person not being a body corporate related to the supplying corporation. It follows that such supply constitutes exclusive dealing for the purposes of that section.

I have given consideration to the question whether the position would be any different if the practice in which the applicants engaged were the supply upon the condition as to insurance contained in their respective rules, namely, that the relevant applicant would itself effect the insurance in the joint names of the applicant and the borrowing member on the basis that the

member would reimburse the society for the premium within fourteen days of its payment by the society. In my view, supply upon that condition would likewise constitute exclusive dealing for the purposes of s. 47 of the Act. The fact that the policy of insurance was to be effected by the relevant applicant in the joint names of itself and the borrowing member would, in my view, not alter the fact that the member was himself acquiring services, through the applicant as his agent, for the purposes of s. 47 (6) of the Act. The position may well be different if the obligation as to insurance was restricted to insurance of the society's interest and provision were made to enable, as distinct from compel, the member to join in that insurance.

It should be noted that the questions raised by the special case do not require consideration to be given to whether, in the case of the Ku-ring-gai Society, insistence upon the condition as to insurance in respect of loans made prior to the commencement of the provisions of the present s. 47 of the Act will involve any contravention of the provisions of the Act.

I would answer the questions raised by the special case, in respect of each of Ku-ring-gai Society and the Dee Why Society, as follows: (a) Whether upon the facts stated in this case this Court should in the exercise of its jurisdiction under s. 163A of the *Trade Practices Act* 1974 make any of the declarations hereinafter referred to: "Yes". (b) Whether such society is a trading corporation formed within the limits of Australia as defined in s. 4 (1) of the *Trade Practices Act* 1974: "It is unnecessary to answer this question". (c) Whether such society is a financial corporation formed within the limits of Australia as defined in s. 4 (1) of the *Trade Practices Act* 1974: "Yes". (d) Whether such society is otherwise a "corporation" as defined in s. 4 (1) of the *Trade Practices Act* 1974: "It is unnecessary to answer this question". (e) Whether in so far as the provisions of s. 47 purport to apply to such society the same are outside the powers of the Parliament of the Commonwealth of Australia: "No". (f) Whether in so far as the provisions of the Act apply to such society a requirement by such society that its members who borrow money from such society on the security of real property insure the same in the names of the society as mortgagee and the member as mortgagor for their respective rights and interests with a company nominated or approved by such society is in contravention of the provisions of s. 47 (1) of the Act by virtue of s. 47 (6) of the *Trade Practices Act* 1974: "Yes". (g) Whether if s. 47 of the Act applies to the society, the provisions of s. 51 of the Act require that regard shall not be had to any requirement by the society that its members who borrow money from the society on the security of real property insure the same in the joint names of the member as mortgagor and the society as mortgagee for their respective rights and interests with a company nominated

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or approved by the society in determining whether a contravention of the said s. 47 has been committed: "No". (h) Whether it is within the jurisdiction of this Court conferred by s. 163A of the said Act or any other statutory provision to make the declaration set forth in par. (e): "Yes".

I would order that the applicants pay the commission's costs of the special case.

Declarations and Orders accordingly.

Solicitors for the applicants: *Church & Grace.*

Solicitor for the respondent: *Alan R. Neaves* (Commonwealth Crown Solicitor).

Solicitor for the Attorney-General: *Alan R. Neaves* (Commonwealth Crown Solicitor).

B. D. LAWRENCE

[SUPREME COURT OF NEW SOUTH WALES]

NIXON *v.* COMMISSIONER OF TAXATION*

N.S.W. SUP. CT

1979, *July* 9, 26.

Hunt J.

Income Tax—Assessable income—Whether profit from sale of property acquired for purpose of profit-making by sale—Appeal—Question of law—Onus of proof—Income Tax Assessment Act 1936 *(Cth.)*, *ss.* 26 *(a)*, 190 *(b)*, 196 (1).

Held: Appeal allowed with costs. (1) The board of review's decision involved questions of law, the court therefore had jurisdiction to hear the appeal and the whole decision of the board was open to review.

Ruhamah Property Co. Ltd. v. *Federal Commissioner of Taxation* (1928), 41 C.L.R. 148, followed.

The questions: (a) whether the proper construction to be placed on s. 26 (*a*) of the Act in relation to the facts of the particular case was a question of law; and, (b) whether such a submission itself was a point of law sufficient to grant leave to appeal, were not determined.

Federal Commissioner of Taxation v. *Miller* (1946), 73 C.L.R. 93; *Hayes* v. *Federal Commissioner of Taxation* (1956), 96 C.L.R. 47; *Lombardo* v. *Federal Commissioner of Taxation* (1978), 9 A.T.R. 241 and (1979), 9 A.T.R. 550, cited.

(2) The taxpayer bears the onus of proving that the assessment is excessive.

McCormack v. *Federal Commissioner of Taxation* (1977) 7 A.T.R. 368, followed.

The degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the facts to be proved.

Rejfek v. *McElroy* (1955), 112 C.L.R. 517, referred to.

*[EDITOR'S NOTE: On 6th September, 1979, Lockhart J. granted the commissioner's application for leave to appeal to the Federal Court of Australia: see *Federal Commissioner of Taxation* v. *Nixon* (1979), 10 A.T.R. 245; 37 F.L.R. 135.]