[HIGH COURT OF AUSTRALIA.]

STATE SUPERANNUATION BOARD . . APPELLANT; APPLICANT,

AND

TRADE PRACTICES COMMISSION . . RESPONDENT. RESPONDENT,

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA.

H. C. OF A. 1982. Aug. 5, 6; Dec. 14. Gibbs C.J., Mason, Murphy, Wilson and Deane JJ.

Constitutional Law (Cth) — Powers of the Commonwealth Parliament — Financial or trading corporations formed within the Commonwealth — State Superannuation Board established by statute to administer fund to provide pensions for public servants — Whether financial corporation — Purpose of formation — Activities — Principal and characteristic activity — The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xx*) — *Trade Practices Act* 1974 (*Cth*), *s.* 4(1) — *Superannuation Act* 1958 (*Vict.*), *ss.* 6, 7, 49, 53.

Crown — Statutes — Presumption that Crown in right of State not bound by Commonwealth statute — Superannuation Board established by statute to administer fund to provide pensions for State public servants — Whether Crown in right of State — Trade Practices Act 1974 (*Cth*), *ss.* 4(1), 47 — *Superannuation Act* 1958 (*Vict.*), *ss.* 6, 7, 49, 53.

Trade Practices — Corporation — Financial corporation — Notice served on State Superannuation Board requiring provision of information and documents — Whether Board a financial corporation — Presumption that Crown in right of State not bound by Trade Practices Act 1974 *(Cth) — Whether Board represents Crown — Superannuation Act* 1958 (*Vict.*), *ss.* 6, 7, 49, 53 — *Trade Practices Act* 1974 *(Cth), ss.* 47, 155.

By the *Superannuation Act* 1958 (Vict.) the State Superannuation Board is charged with the administration of a fund established for the purpose of providing pensions for public servants. It collects contributions from eligible contributors and from the State Treasurer, ascertains entitlements and pays benefits. The Treasurer contributes an amount equal to five sevenths of the amount paid out of the fund in benefits. Three of the Board's six members are appointed by the Governor in Council, and three are elected by contributors. Of the appointed members one must be an actuary and another the Government Statist. A member may be removed by resolution of both Houses after suspension by the Governor in Council for misbehaviour or incompetence. The Board's eighty-six administrative and clerical staff are employed under the provisions of the *Public Service*

Act 1974 (Vict.) and their salaries paid by the Victorian Government. The Board itself employs eight persons in property management whose salaries are met by the fund. The Board is authorised to invest the fund in a variety of governmental and semi-governmental debentures, unsecured stock and loans, in loans secured by mortgages of real estate and in loans to authorised dealers in the short term money market. It may purchase or sell land with the consent of the Treasurer, who is also given power to determine that the aggregate amount which may be invested in mortgage loans shall not exceed such percentage of the fund as he determines. At 30 June 1980 the fund investments amounted to about $487 million. Of about $90 million longer term investments, $60 million comprised housing and commercial loans. The Board's funds are not part of the consolidated revenue, but its surplus funds held in any bank are "moneys of the Crown".

Section 4(1) of the *Trade Practices Act* 1974 (Cth) states that in the Act, "corporation" means inter alia a body corporate that is a financial corporation formed within the limits of Australia and that "financial corporation" means a financial corporation within the meaning of s. 51(xx) of the Constitution and includes a body corporate that carries on as its sole or principal business the business of banking (other than State banking not extending beyond the limits of the State concerned) or insurance (other than State insurance not extending beyond the limits of the State concerned).

Held (1) by Mason, Murphy and Deane JJ., Gibbs C.J. and Wilson J. dissenting, that the Board was a "financial corporation" within the meaning of par. (b) of the definition of "corporation" in s. 4(1) of the *Trade Practices Act* 1974.

Reg. v. Trade Practices Tribunal; Ex parte St. George County Council (1974), 130 C.L.R. 533; *Reg. v. Federal Court of Australia; Ex parte W.A. National Football League* (1979), 143 C.L.R. 190 and *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd.* (1978), 36 F.L.R. 134; 22 A.L.R. 621, considered.

(2) By Mason, Murphy and Deane JJ., Gibbs C.J. and Wilson J. not deciding, that in relation to its mortgage investment activities the Board was not an instrumentality of the Crown in right of the State of Victoria and was bound by the *Trade Practices Act* 1974.

Superannuation Fund Investment Trust v. Commissioner of Stamps (S.A.) (1979), 145 C.L.R. 330, considered.

Decision of the Federal Court (Full Court) (1981), 60 F.L.R. 165; 41 A.L.R. 279 affirmed.

APPEAL from the Federal Court of Australia.

In November 1979, by notice expressed to be under s. 155 of the *Trade Practices Act* 1974 (Cth) ("the Act"), the Chairman of the Trade Practices Commission required the State Superannuation Board, a body constituted by the *Superannuation Act* 1925 (Vict.) and continued in existence under the *Superannuation Act* 1958 (Vict.), to furnish certain information and produce certain documents relating to loans made by the Board on the security of mortgages of land which, the Commission alleged, may have constituted the practice of exclusive dealing in contravention of s. 47(1) of the Act. The Board commenced proceedings against the

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Commission in the Federal Court for, declarations that it was not a "corporation" as defined by s. 4(1) of the Act; that s. 47 did not apply to it; that the notice was not validly given, and that any failure or refusal by the Board to comply with the notice would not constitute a contravention of s. 155. Brennan J. held that the Board was a "corporation" as defined by s. 4(1), being a financial corporation within the meaning of par. (b) of the definition, and dismissed the application (1). The Board appealed to the Full Court of the Federal Court, where it was permitted to advance a further argument, not made before Brennan J., that it was not bound by the Act for the reason that it was an instrumentality of the Crown in right of the State of Victoria. The Full Court (Franki, Northrop and Ellicott JJ.) held that it was not an instrumentality, and dismissed the appeal of the Board (2). By special leave, the Board then appealed to the High Court.

D. Graham Q.C. (with him *R. A. Sundberg*), for the appellant. The body of judicial opinion about the meaning of "trading corporation" is not necessarily applicable in determining the meaning of "financial corporation". "Trading" points to the activities of a corporation. "Financial" does not. It describes a type of corporation in the same way as "foreign" does. Neither "financial" nor "foreign" directs attention to the activities of a corporation. A financial corporation is one set up for the purpose of providing finance. A corporation set up for another purpose, which happens to engage in the activity of providing finance or lending money, is not a financial corporation. The Board was set up to administer a superannuation scheme. In carrying out that overall function, it receives, collects and administers contributions, pays pension, classifies members, resolves disputes, and manages the fund created by the Act by investing the money of which it consists. It was not set up to provide finance. That provision is an incident of its investment activities, and they are but part of the totality of its functions. If it is proper to look at the activities of a corporation in order to determine its nature, the proper test is stated in *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd. ("Ku-ring-gai")* (3). The Board does not meet the principal or characteristic activity test. It does not borrow money. It does not deal in finance apart from investing and lending. Its transactions are not concerned with the repayment of borrowed money to those from

(1) (1980) 49 F.L.R. 216; 33 A.L.R. 105.
(2) (1981) 60 F.L.R. 165; 41 A.L.R. 279.
(3) (1978) 36 F.L.R. 134, at pp. 138, 150, 158; 22 A.L.R. 621, at pp. 624, 634-635, 641-642.

which it came. The contributors' money is never returned to them in the form of repayments of loan funds. The investment of trust moneys on loan as part of a total investment programme is not "commercially dealing in finance". Compare the Society in *Ku-ring-gai*. The absence of borrowing is not conclusive against a body being a "financial corporation". But the fact that a body does borrow has been regarded as one of the characteristic activities of a financial corporation. The Board is in the same position as the Superannuation Fund Board considered in *Fouche v. Superannuation Fund Board* (4). It holds contributions upon a trust for statutory purposes and invests the money pursuant to the obligations arising from that trust and the requirements of the Act. The Board is of a very special character set up for special purposes which deny it the character of a financial corporation.

The views of a majority of the Court in *Reg. v. Trade Practices Tribunal; Ex parte St. George County Council ("St. George")* (5) show that corporation set up for municipal purposes is outside the concept of a trading corporation, and the same is true of a corporation set up for State government purposes. That is equally applicable to what is a financial corporation. There is nothing in *Reg. v. Federal Court of Australia; Ex parte W.A. National Football League ("Adamson")* (6) which requires a body set up for government purposes to be characterised as a trading or financial corporation.

The *Trade Practices Act* 1974 (Cth) does not bind the Crown in right of a State: *Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd.* (7). The Board is entitled to the privileges and immunities of the Crown. The object of the *Superannuation Act* is to provide a pension scheme for government servants. The Board is appointed by the Governor in Council: s. 49. Its members are removable by the Governor in Council following suspension and addresses by Parliament: s. 53. Their remuneration is determined by the Governor in Council: s. 55. The Board's staff are members of the public service: s. 61. It reports annually to the Minister, and its reports are laid before Parliament: s. 63. Substantial payments are made from the Treasury into the fund to meet the government's obligations under the scheme: ss. 8, 18 and 20. The Treasurer's approval is required for the purchase of land and the construction or improvement of buildings: s. 6A. The present case is stronger than *Superannuation Fund Investment Trust v. Commissioner of Stamps*

(4) (1952) 88 C.L.R. 609.
(5) (1974) 130 C.L.R. 533.
(6) (1979) 143 C.L.R 190.
(7) (1979) 145 C.L.R. 107.

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(S.A.) (8), because the Board performs the functions of both the Commonwealth Commissioner and the Trust. [He referred to *Goodfellow v. Commissioner of Taxation* (9).]

[GIBBS C.J. Sometimes it is necessary to consider the particular activity in which a body is engaged in determining whether it is entitled to the immunity of the Crown. It may not have a blanket immunity. It may be immune in some respects and not in others. We will need to know under what section of its Act the Board was relevantly acting, so that we can see whether in so acting it was exercising an independent discretion or acting under the control of the Crown.]

The question is whether, when the Board is investing money in loans secured by mortgages pursuant to the obligations imposed on it by s. 6 of its Act, it is acting as part of the Crown. That must be answered affirmatively, because the Board is directed to undertake that activity for the purpose of administering a fund established to provide part of the emoluments of Crown servants. [He referred to *Grain Elevators Board (Vict.) v. Dunmunkle Corporation* (10); *Victorian Railways Commissioner v. Herbert* (11) and *Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)* (12).]

M. G. Gaudron Q.C., Solicitor-General for the State of New South Wales, (with her *R. S. McColl*), for the Attorney-General for the State of New South Wales, intervening in support of the appellant. The expression "trading or financial corporation" does not embrace certain statutory corporations. Those which are not included are those which undertake public and/or administrative functions for or on behalf of government, notwithstanding that in the course of performing those functions they may engage in trading activities or financial dealing, and also that those activities or dealings may be substantial. Statutory corporations and unincorporated statutory authorities were known to the law in 1900, and were known to perform administrative, public and governmental functions. [She referred to Spann, *Government Administration in Australia* (1979), pp. 122-123; *Arapiles Shire Council v. Board of Land and Works* (13); *Sydney Harbour Trust Commissioners v. Ryan* (14); *Federated Municipal & Shire Council Employees Union v. Melbourne Corporation* (15).] Those corporations are identifi-

(8) (1979) 145 C.L.R. 330.
(9) (1977) 51 A.L.J.R. 437; 13 A.L.R. 203; 7 A.T.R. 265; 77 A.T.C. 4,086.
(10) (1946) 73 C.L.R. 70.
(11) [1949] V.L.R. 211.
(12) (1955) 93 C.L.R. 376.
(13) (1904) 1 C.L.R. 679, at p. 683.
(14) (1911) 13 C.L.R. 358, at pp. 368-369.
(15) (1919) 26 C.L.R. 508, at p. 518.

able as a particular type of corporation distinct from trading or financial corporations. *Adamson* is confined to corporations operating wholly outside the sphere of government. *St. George* (16) was not overruled by *Adamson*.

G. C. Prior Q.C. (with him *B. Selway*), for the Attorney-Generals for the States of South Australia and Western Australia, intervening in support of the appellants. Whether a body is a financial corporation depends on whether dealing in finance is its principal or characteristic activity. The Full Court was wrong in asking whether the Board engaged in substantial financial activity. [He referred to *Trade Practices Commission v. Tooth & Co. Ltd.* (17) and *Bank of New South Wales v. The Commonwealth* (18).]

A. R. Castan Q.C. (with him *P. J. Jopling*), for the respondent.

[GIBBS C.J. You do not propose to ask us to re-open *Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd. ("Bradken")* (19)?]

No. That case dealt with a State instrumentality which was neither a financial nor a trading corporation. It held no more than that the Act did not apply to such instrumentalities. It was not concerned with what were financial or trading corporations. It was conceded that the Queensland Railways was neither. *Bradken* does not extend to trading or financial corporations which have the shield of the Crown.

[GIBBS C.J. But *Bradken* proceeded on that footing. It held that the Act did not bind the Crown. You are asking us to overrule *Bradken*. By a majority, the Court has decided that it will not permit the correctness of that case to be assailed directly or indirectly.]

The purpose test of *St. George* was disposed of by *Adamson* (20). Trading corporation cases are applicable to determine what is a financial corporation: *Ku-ring-gai* (21). *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (22) makes it impossible to exclude State governmental corporations from heads of Commonwealth power: *West v. Commissioner of Taxation*

(16) (1974) 130 C.L.R. 533.
(17) (1979) 142 C.L.R. 397, at p. 433.
(18) (1947) 76 C.L.R. 1, at pp. 256-257.
(19) (1979) 145 C.L.R. 107.
(20) (1979) 143 C.L.R. 190, at pp. 208-209, 233, 239.
(21) (1978) 36 F.L.R. 134, at pp. 138, 150, 158-159.
(22) (1920) 28 C.L.R. 129.

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(N.S.W.) (23). But for s. 51(xiii) of the Constitution, State banks would be financial corporations. It would not signify that the bank was run by a State. If *St. George* stands for any principle of all, it is restricted to municipal corporations. "Financial" can only be connected with activities, whereas "foreign" does not refer to activities, but to place of origin. [He referred to *Actors and Announcers Equity Association of Australia v. Fontana Films Pty. Ltd.* (24).] The fact that the Board does not borrow in order to lend does not prevent its being a financial corporation. A finance house funded by share capital instead of loans would be a financial corporation. The fact that the Board carried out a statutory function does not alter its nature or the nature of its activities.

The Board is not within the shield of the Crown. Half its members are elected independently of the executive: s. 49. The Minister cannot remove a member for misbehaviour or incompetence; only Parliament can. There is no power in the Treasurer to require information to be supplied. Only surplus money in banks is money of the Crown: s. 7. The whole fund does not form part of the public account. Those matters show how different the Board is from the Trust considered in *Superannuation Fund Investment Trust v. Commissioner of Stamps (S.A.)* (25). Running a superannuation fund is not a traditional function of government. [He referred to *Coomber v. Justices of Berkshire* (26); *Victoria v. The Commonwealth* (27).] Section 51(1)(b) of the *Trade Practices Act* provides for the States to exempt themselves from the operation of Pt IV.

[GIBBS C.J. This is *Bradken* revisited through the back door.]

No. That the States can exempt themselves adds force to the fact that the State Act does not expressly make the Board the Crown.

[GIBBS C.J. If the Act does not bind the Crown, nothing in it binds the Crown. The question is whether the Board represents the Crown. If the Act does not bind the Crown, you cannot make it harder for a State body to pick up the shield of the Crown by reason of some provision in the Act that it does not bind the Crown.]

The question whether a body is within the shield of the Crown is not determined in a vacuum or as an absolute proposition. It is

(23) (1937) 56 C.L.R. 657, at p. 682.
(24) (1982) 150 C.L.R. 169.
(25) (1979) 145 C.L.R. 330.
(26) (1883) 9 App.Cas. 61, at pp. 67, 74.
(27) (1971) 122 C.L.R. 353, at p. 398.

decided in the context of the particular activity in question. On the assumption that for some purposes the Board may be the Crown, it cannot be for the purposes of its investment and commercial financial dealings. When the Board goes out with its millions of dollars and wheels and deals on the short term money market, and otherwise does all the things that a financial institution does, it cannot have the shield of the Crown in respect of the operation of trade practices provisions inhibiting exclusive dealing.

D. Graham Q.C., in reply.

Cur. adv. vult.

Dec. 14.

The following written judgments were delivered:—

GIBBS C.J. AND WILSON J. The history of this case and the facts that are relevant to its determination are set out in the judgment of the majority of the Court. We can therefore address the issues immediately.

The primary question is whether the appellant ("the Board") is a financial corporation within the meaning of s. 51(xx) of the Constitution and thus subject to the *Trade Practices Act* 1974 (Cth), as amended; see the definitions of "corporation" and "financial corporation" in s. 4(1) of that Act.

The words "trading" and "financial" in s. 51(xx) are not terms of art, carrying some specialized legal meaning. They are ordinary words intended to identify particular types of corporation. The concept of "trading corporation" has been the subject of discussion in two earlier decisions of this Court: *Reg. v. Trade Practices Tribunal; Ex parte St. George County Council* (28) *("St. George"); Reg. v. Federal Court of Australia; Ex parte W.A. National Football League* (29) (*"Adamson"*). The judgments in those cases reflect a difference of judicial opinion as to the relative importance attaching to the criteria for determining whether or not a corporation is a trading corporation for constitutional purposes. The concept of "financial corporation" has not hitherto required the consideration of the Court. Nevertheless, in our opinion, the considerations which are material to the elucidation of the meaning and application of the term "trading corporation" are likewise material to the identification of a financial corporation, after making due allowance, of course, for the difference in function between them. The decisions to which we have referred therefore afford valuable guidance in the present case.

(28) (1974) 130 C.L.R. 533. (29) (1979) 143 C.L.R. 190.

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In *St. George*, a county council was established under the *Local Government Act* 1919 (N.S.W.) for "local government purposes". Its only activities were the supply of electricity and the supply and installation of electrical fittings and appliances. It was held by a majority (McTiernan, Menzies and Gibbs JJ., Barwick C.J. and Stephen J. dissenting) that the council was not a "trading corporation" within s. 5 of the *Restrictive Trade Practices Act* 1971-1972 (Cth). A dichotomy was drawn between the nature of a corporation as seen from the purpose of its incorporation and its characterization by reference to its current activities. Barwick C.J. said (30):

> "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.
>
> To say that a corporation's description for relevant purposes will be determined by its activities does not mean, of course, that a corporation which to any extent engages in trade is a trading corporation. It is evident that the legislative power given by s. 51(xx) is not a power to legislate with respect to trading. It is a legislative power with respect to some corporations. But a corporation whose *predominant and characteristic activity* is trading whether in goods or services will, in my opinion, satisfy the description . . ." (Our emphasis).

McTiernan J., after referring to the words "a trading corporation" in the definition of "corporation" in the Act, said that "It can hardly be contended that the legislature intended any corporation which trades" (31) and concluded by reference to the preamble that the Act was applicable to private enterprise and not to a public undertaking supplying goods or services.

Menzies J. (32) summed up his opinion:

> "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."

(30) (1974) 130 C.L.R., at pp. 542-543.
(31) (1974) 130 C.L.R., at p. 546.
(32) (1974) 130 C.L.R., at p. 554.

Gibbs J. (33) said:

> "... the power given by s. 51(xx) is not in respect of trading, and it does not extend to corporations generally; a corporation, even if trading, is not within the power unless it is a foreign, trading or financial corporation.
>
> A trading corporation is one formed for the purpose of trading. ... It is necessary to determine the true character of the corporation, upon a consideration of all the circumstances that throw light on the purpose for which it was formed. Thus there is no difficulty in holding that the fact that a corporation carries on some trade which is merely incidental or ancillary to the fulfilment of its main purpose does not give it the character of a trading corporation."

Stephen J. (34) said:

> "... 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."

It will be noted from this analysis of the judgments that every member of the Court in *St. George* looked for something more than mere trading activity. The majority placed it outside the constitutional category because they had regard to the purpose for which it was formed and its municipal or "non-private enterprise" character. The judgments of the minority reflect varying emphasis in relation to the significance of the trading activity carried on by the Council. Barwick C.J. was content to rely on its predominant and characteristic activity notwithstanding its governmental or municipal character, whilst Stephen J. relied on both the purpose of its formation and its activities.

Adamson was a professional football player (Australian Rules) and the question was whether the West Perth Football Club and the Western Australian and South Australian Football Leagues were trading corporations within s. 51(xx) of the Constitution and s. 6 of the *Trade Practices Act* 1974 (Cth). That question was answered, by majority, in the affirmative (Barwick C.J., Mason, Jacobs and Murphy JJ., Gibbs, Stephen and Aickin JJ., dissenting). In the present case, Brennan J. at first instance (35) summed up his view of the effect of *Adamson* in these words (36)):

(33) (1974) 130 C.L.R., at p. 562.
(34) (1974) 130 C.L.R., at p. 572.
(35) (1980) 49 F.L.R. 216; 33 A.L.R. 105.
(36) (1980) 49 F.L.R., at p. 227; 33 A.L.R., at p. 115.

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> "In the light of the judgments in *Adamson*, it appears to me that the balance of judicial opinion would categorize as a trading corporation a corporation whose trading activity is its substantial activity or is among its substantial activities. Trading need not be the corporation's predominant or principal activity, but the substantiality of its trading activity cannot be determined without reference to the other activities of the corporation, if any. Trading activity which is merely incidental to a predominant or principal activity is prima facie insufficient to confer the character of a trading corporation."

With great respect to his Honour, we must confess to some difficulty with the statement that "Trading need not be the corporation's predominant or principal activity" because we are unable to discern a balance of judicial opinion in support of it, even if one pays attention to obiter dicta as well as to the ratio decidendi of the majority decision. Barwick C.J. reiterated his conviction, expressed in dissent in *St. George*, that the "only sure guide to the nature of the company is a purview of its current activities, a judgment as to its nature being made after an overview of all those activities" (37). He then continued:

> "I remain of the firm conviction that for constitutional purposes a corporation formed within the limits of Australia will satisfy the description 'trading corporation' if trading is a substantial corporate activity."

There is no suggestion in these words that his Honour intended to enunciate a new criterion in place of that which in *St. George* (38) he had expressed as "predominant and characteristic activity". The decision to which his Honour came followed naturally and inevitably from his view of the facts which placed trading at the very heart of everything that the Club and the Leagues stood for. The conclusion that trading was clearly the predominant and characteristic activity finds clear expression in his Honour's judgment (39):

> "The central activity of the Club and of the League is the promotion of Australian Rules Football. . . .
>
> It was objected by the prosecutors' counsel that the Club was merely conducting a sport and therefore could not be regarded as being in trade. Of course, football of any code may be a sport, as distinct from a trade, when played solely for its own sake as a pastime upon an amateur footing. But what the Club and the League conduct is far removed from any such concept of sport. The players are professionals employed for wages in the playing of the code. . . .
>
> Charges are made for admission to the grounds under the control of the Club to view the matches promoted by it: . . .

(37) (1979) 143 C.L.R., at p. 208.
(38) (1974) 130 C.L.R. 533, at p. 543.
(39) (1979) 143 C.L.R., at pp. 210-211.

> In my opinion, the presentation of a football match as a commercial venture for profit to the promoting body is an activity of trade."

His Honour then referred to the sale of advertising and television rights in connexion with the presentation of matches and to the clearance fees at times demanded by the Club for the release of its players to other clubs, and continued:

> "These activities, essentially commercial in nature, emphasize the *trading quality* of the manner in which the Club and the league promote Australian Rules Football." (Our emphasis).

Mason J., with whom Jacobs J. agreed, defined the term "trading corporation" in this way (40):

> "Essentially it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation."

His Honour recognized that whether the trading activities of a particular corporation are sufficient to warrant its being characterized as a trading corporation is "very much a question of fact and degree" (41). However, the facts in *Adamson* left no doubt in his Honour's mind as to the result. He said (42):

> "The prosecutors' case is that the trading activities of the two Leagues are incidental to their main objects which are the promotion and encouragement of the sport as a recreation. This to my mind is an inversion of the true position. To me it seems that the sport is promoted and encouraged as a means of ensuring the receipt of the large financial returns which are associated with it. The financial revenue of the Leagues is so great and the commercial means by which it is achieved so varied that I have no hesitation in concluding that trading constitutes their principal activity."

His Honour came to a similar conclusion with respect to the West Perth Club, saying in effect that it carried on its principal activity, that of playing football, as a trade.

Murphy J. said (43):

> "... the description, 'trading corporation' does not mean a corporation which trades and does nothing else or in which trading is the dominant activity. A trading corporation may also be a sporting, religious, or governmental body. As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation."

Gibbs J. adhered to what he had said of the meaning of "trading

(40) (1979) 143 C.L.R., at p. 233.
(41) (1979) 143 C.L.R., at p. 234.
(42) (1979) 143 C.L.R., at p. 235.
(43) (1979) 143 C.L.R., at p. 239.

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corporation" in *St. George*. He said that the words were used in s. 51(xx) as an epithet describing a particular kind of corporation and did not simply refer to what a corporation does, or to what its main activities happen to be. However, his Honour then added (44):

> "If, contrary to my opinion, the activities of a corporation at the relevant time determine whether it satisfies the constitutional test, it is the 'predominant and characteristic activity' that has to be considered:"

referring to the passage from the judgment of Barwick C.J. in *St. George* which we have already cited.

Stephen J., with whom Aickin J. agreed, appears to have applied both the purposes test and the activities test. He took the view that the primary object of the prosecutors was to foster the game of football and to provide facilities for playing it and that in their activities there was no departure from that object. He added (45):

> "Such trading as it "[the League]" undertakes is incidental to and a by-product of its principal activities and is undertaken the better to perform those activities. Accordingly I do not regard it as a trading corporation.
>
> . . .
>
> I have laid considerable stress upon the incidental character of the trading activities of these corporations and have done so because I think that there may well be a distinction between trading which is incidental to, and is undertaken in the course of carrying out, some other principal non-trading activity and trading which is engaged in as a distinct and unconnected activity."

We have dwelt on *Adamson* at such length in order to avoid any misunderstanding as to the authoritative guidance it provides. In our opinion, the case is authority for the proposition that a corporation whose principal activity is trading is a "trading corporation" within s. 51(xx). Barwick C.J., Mason J. and Jacobs J. clearly grounded their decision on that view of the activity of the prosecutors. Murphy J. was content to say that their trading activities were substantial. So far as obiter dicta is concerned, while it is true that Mason J., with Jacobs J. concurring, adopted a relative test in terms of a "sufficiently significant proportion of overall activities" (46) and Murphy J. in terms of "not insubstantial" (47), the remaining four members of the Court (Barwick C.J., Gibbs, Stephen and Aickin JJ.) all either expressly or in our opinion implicitly indorsed the predominant and characteristic activity test.

We should now state the view which we take of the proper

(44) (1979) 143 C.L.R., at p. 213.
(45) (1979) 143 C.L.R., at pp. 220-221.
(46) (1979) 143 C.L.R., at p. 233.
(47) (1979) 143 C.L.R., at p. 239.

approach to the question of characterizing a trading or financial corporation for the purposes of s. 51(xx) and the *Trade Practices Act*. If the matter were free of authority, we would favour in substance the view expressed by Gibbs J. in *St. George*. As a matter of language, s. 51(xx) seems to us to identify distinct types of corporations, thereby alluding more to their nature and purpose than to the activities in which they engage. Of course a consideration of what corporations do may well be relevant to a determination of their nature and purpose; but to concentrate exclusively or primarily on the current activities of a corporation in the process of classification is to construe the legislative power as a power with respect to trading or financial activities rather than as a power with respect to certain types of corporation.

However, the matter is not free of authority. We regard ourselves as bound by *Adamson* to give greater weight to the current activities test than we would otherwise have thought appropriate. On the other hand, the process of characterization is not to be narrowly pursued. It calls for a consideration of all the circumstances touching the corporation in question before one can determine whether it satisfies the constitutional description. Such an approach is in our view necessarily implicit in a process of characterization and we do not understand *Adamson* to deny it.

Although this Court has not had occasion to consider a case involving a financial corporation, such a case came before the Full Court of the Federal Court in *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd.* (48). The Court held co-operative terminating building societies providing finance for their members to be financial corporations. Bowen C.J. (49) defined a financial corporation in terms of a corporation "which borrows and lends or otherwise deals in finance as its principal or characteristic activity"; cf. also Deane J. (50). For present purposes, we think that is a sufficient definition and one which we accept.

The Full Court, in coming to the decision from which the present appeal is brought, recognized that the purpose of establishing the Board was the administration of a superannuation scheme for government servants in Victoria. Nevertheless, their Honours proceeded on the basis that the critical question in the case was whether commercial dealing in finance, such as the borrowing and lending of money, was a substantial and not a mere ancillary part of its activities. They answered that question in the affirmative and

(48) (1978) 36 F.L.R. 134; 22 A.L.R. 621.
(49) (1978) 36 F.L.R., at p. 138; 22 A.L.R., at p. 624.
(50) (1978) 36 F.L.R., at pp. 159-160; 22 A.L.R., at p. 642.

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thus concluded, subject to the issue as to whether in the relevant respect it enjoyed the immunity of the Crown, that it was a financial corporation in the constitutional sense.

As we have endeavoured to show, we think with respect that the Federal Court, both at first instance and on appeal, misunderstood the authoritative guidance to be gleaned from *Adamson*. Although the current activities of a corporation are of central significance, mere quantity is not determinative. Brennan J. recognized this when as the primary Judge he said in the passage which we have already cited that the substantiality of the trading activity of a corporation cannot be determined without reference to its other activities. Taken in isolation from all the other circumstances of a case, the financial activities of a corporation may be substantial in a quantitative sense and yet be no more than incidental and therefore insignificant in relation to the other activities of the corporation. In such a case the financial activities may be both substantial and yet ancillary and therefore insufficient to fix their character to the corporation. Although in this respect we think that the distinction drawn by Brennan J. was correct, we have ventured earlier in these reasons with respect to join issue with the core of his Honour's analysis of *Adamson*. It is not a question solely of substantiality in either a quantitative or a relative sense but whether the activity is the predominant or characteristic activity.

Counsel for the appellant advanced a further ground for distinguishing the decision in *Adamson* from immediate relevance to the present case. He relied on the governmental character of the Board as a significant factor in the process of characterization. This is a factor which was absent in *Adamson*. If the submission is merely an attempt to reintroduce the notion of reserved State rights, then of course it invites summary rejection. As Barwick C.J. said in *St. George* (51), speaking of the construction of s. 51(xx):

> "The words should therefore be construed according to the principles of construction appropriate to the construction of the Constitution. Thus, the words must be given their full import without any constraint derived from the circumstance that so construed the constitutional power they express will affect State power, legislative or executive, or that the exercise of the constitutional power so construed will or may effect the exercise of State power. The reserved powers doctrine of the past has been fully exploded: but care needs to be taken that it does not still in some form or another infiltrate one's reasoning when construing Commonwealth powers or Acts of the Parliament.
>
> . . .

(51) (1974) 130 C.L.R., at pp. 540-541.

> Further, if the terms of an Act expressed in the language of the constitutional power properly construed embrace a government or local government instrumentality or agency, the connexion of the corporation with the government of a State will not of itself place the corporation outside the scope of the power or the statute".

Cf., also, *West v. Commissioner of Taxation (N.S.W.)* (52) per Dixon J. However, as we understand Mr. Graham's submission, he does not challenge these ramparts of Commonwealth supremacy. He was asserting the governmental character of a corporation as relevant to the question whether, having regard to all the circumstances including its current activities the corporation came within the constitutional description. If it does, then its government character cannot save it from the operation of the *Trade Practices Act*, unless of course that Act in its intended operation does not apply to it: *Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd.* (53).

The learned Solicitor-General for the State of New South Wales, Miss Gaudron, takes the governmental character argument a step further. She submits that there is a discrete category of governmental corporation established to perform administrative services in the nature of public services which was never intended to be included within s. 51(xx), whatever its activities might be. Such corporations are not to be confused with statutory trading instrumentalities, as to which different considerations apply. It follows, in her submission, not only that the decision in *St. George* relating to a municipal corporation may be supported on this ground but that its ratio decidendi is unaffected by the decision in *Adamson*. Having regard to the conclusion to which we have come, we do not find it necessary to examine this submission at any length and we reserve our opinion on its correctness. We would say, however, that the proper construction of the legislative power conferred on the Commonwealth by s. 51(xx) may well be elucidated by an examination of the connotation which in 1900 attached to the expressions "trading corporation" and "financial corporation" while recognizing that their denotation or content may have changed significantly in the course of the century.

In our opinion, the governmental character of the Board's activities is not irrelevant to the determination whether it falls within the constitutional description. It seems to us to be appropriate and indeed necessary to start with the proposition that here is a statutory body which is formed to carry out a governmental function, namely,

(52) (1937) 56 C.L.R. 657, at p. 682.

(53) (1979) 145 C.L.R. 107.

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the provision of emoluments to the servants of the government and their dependants. Everything that the Board does — the receipt of contributions, the classification of contributors, the determination of benefits and the management of the Fund — derives its significance from that fundamental premise. There is no doubt that, in the course of managing the Fund, the Board may be said to carry on a business of dealing in finance but in our opinion its activities in that regard must be described as ancillary or incidental to the Board's primary activity of administering the scheme. No doubt those activities are substantial in a quantitative sense but they are not such as to determine the character of the corporation. The predominant and characteristic activity of the Board is not to be described in terms of its financial dealings but by reference to the service it provides to government in Victoria by way of a superannuation scheme.

This conclusion makes it unnecessary for us to consider the alternative argument advanced for the appellant, namely, that the Board is entitled in the relevant respect to the shield of the Crown with the consequence that consistently with the decision of this Court in *Bradken* the *Trade Practices Act* does not apply to it.

We would allow the appeal.

MASON, MURPHY AND DEANE JJ. The appellant is a body corporate constituted by the *Superannuation Act* 1925 (Vict.) and continued in existence by the *Superannuation Act* 1958 (Vict.). It is charged with the administration of the Superannuation Fund established by the first Act and continued by the second Act for the purpose of providing pensions for public servants and other officers and with the investment of the Fund in the manner set out in s. 6 of the 1958 Act. In the course of discharging its statutory responsibilities the appellant from time to time invests moneys forming part of the Superannuation Fund in mortgages of land.

On 19 November 1979 the respondent Commission wrote to the appellant stating that inquiries made by the Commission suggested that the appellant, in the course of lending moneys on the security of mortgages of land, may have engaged in the practice of exclusive dealing in contravention of s. 47(1) of the *Trade Practices Act* 1974 (Cth). By notice expressed to be under s. 155 of that Act the Chairman of the Commission required the appellant to furnish certain information and produce certain documents.

The appellant then commenced an action against the Commission in the Federal Court of Australia, seeking declarations that it was not a "corporation" as defined by s. 4(1) of the *Trade Practices Act*, that s. 47 of that Act did not apply to it, that the notice given under s. 155 was not validly given and that any failure or refusal by the

appellant to comply with the requirements of the notice would not constitute contravention of s. 155. Injunctive relief was also sought. Brennan J., sitting as a judge of the Federal Court, held that the appellant was a "corporation" as defined by s. 4(1), being a financial corporation within the meaning of par. (b) of that definition. His Honour accordingly dismissed the application with costs. (54).

The appellant unsuccessfully appealed to the Full Court of the Federal Court (Franki, Northrop and Ellicott JJ.) (55). The Full Court affirmed Brennan J.'s conclusion that the appellant was a financial corporation within the meaning of par. (b) of the statutory definition. In the Full Court, the appellant advanced, for the first time, an argument that it was not bound by the provisions of the *Trade Practices Act* for the reason that it was an instrumentality of the Crown in right of the State of Victoria. In support of that argument, the appellant relied on *Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd.* (56), where this Court held that the *Trade Practices Act* did not bind the Queensland Commissioner of Railways for the reason that he was an instrumentality of the Crown in right of the State of Queensland. The Full Federal Court held that the appellant was not an instrumentality of the Crown and accordingly rejected the argument.

In its appeal to this Court the appellant challenges the correctness of each of the findings that it was a financial corporation and that it was not an instrumentality of the Crown in right of the State of Victoria. For its part, the Commission not only supported those findings in the Federal Court but argued that the decision in *Bradken* was confined to the case in which the instrumentality of the Crown was a trading corporation, as was the Commissioner of Railways (Q.), and that the decision says nothing about a case where an instrumentality of the Crown is a financial corporation. The short answer to this suggestion is that *Bradken* enunciated a broad proposition that the *Trade Practices Act* did not regulate the activities of an instrumentality of the Crown in right of a State and that the Commissioner's character as a trading, as distinct from a financial, corporation was immaterial to the decision. An application by the Commission for leave to present an argument challenging the correctness of *Bradken* was refused.

The consequence is that the two issues for our decision are those which engaged the attention of the Full Court of the Federal

(54) (1980) 49 F.L.R. 216; 33 A.L.R. 105.

(55) (1981) 60 F.L.R. 165; 41 A.L.R. 279.

(56) (1979) 145 C.L.R. 107.

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Court. In determining these issues we have the advantage of the comprehensive review made by Brennan J. at first instance and by Northrop and Ellicott JJ. on appeal of the nature of the appellant's financial and administrative activities. The correctness of their Honours' description of these activities is not in question, the point of departure in the argument being as to their legal significance.

It will be sufficient for present purposes if we summarize the appellant's activities. The summary which follows is based largely on the judgment of Brennan J. at first instance.

According to its preamble the *Superannuation Act* 1958 was enacted "... to consolidate the Law making Provision on a Contributory Basis for Superannuation Benefits for certain Public Officers and Employés and Benefits for Certain of their Dependants".

The appellant administers the superannuation scheme for which the statutes provide, collecting contributions from contributors and payments from the State Treasurer, ascertaining entitlements and paying benefits. The appellant manages and invests the assests of the Fund. The six members of the appellant are each appointed by the Governor-in-Council for a term of five years, three being contributors elected by contributors (s. 49). The other three members must include an actuary and the Government Statist. A member may be removed during his term of office only by resolution of both Houses after suspension by the Governor-in-Council for misbehaviour or incompetence (s. 53).

Contributors to the Fund are officers employed by the Victorian Government, governmental authorities and institutions. The estimated numbers of contributors range from 80,000 on 30 June 1977 to 90,228 on 30 June 1980. Contributions collected in the year ended 30 June 1980 exceeded $67,000,000. The total amount paid out in pensions that year was $79,729,252 and the number of pensions being paid on 30 June 1980 was 27,004. Contributors are required to make certain minimum contributions in accordance with statutory scales. A ceiling is placed upon the amount of contributions for which a revised scheme contributor is liable, the effect being that the contributor is not liable to contribute more than nine per cent of his relevant salary.

In practice the contributions of contributors are deducted from their salaries fortnightly. A contributor is classsified after medical examination as a contributor for full benefits, a limited contributor or a service benefit contributor (s. 12), and the classification affects the benefit available on retirement on account of ill health or physical or mental incapacity to perform his duties unless the ill health or incapacity is caused by traumatic bodily injury. The

function of classification is entrusted to the appellant which engages the part time services of a panel of fifteen private medical practitioners to advise it.

The appellant is charged with the responsibility of determining whether a contributor is unable by reason of ill health or physical or mental incapacity to perform his duties. The appellant reaches its decision after receiving a report from its medical officer and on occasion after receiving a further report by a medical practitioner agreed upon by the contributor and the appellant (s. 68).

The Treasurer of Victoria pays into the Fund amounts calculated in accordance with various provisions of the 1958 Act. In general, the Government's subvention is fixed at five-sevenths of the amount paid out of the Fund by way of pension or five-sevenths of certain lump sum payments to which contributors may become entitled otherwise than by conversion of part of a pension entitlement. The remaining two-sevenths is paid by the Fund. The Treasurer makes the Government's contribution, not when the particular contributor starts to make his contribution to the Fund, but when that contributor's pension commences to be paid. The Treasurer then partially recoups the Fund for the amount to be paid out.

The Fund bears not only the net liability to pay the statutory pensions and lump sum payments in excess of the Government subvention, it bears also a proportion of payments of settlements to pensions whose finances were affected by inflation. The *Pensions Supplementation Act* 1973 (Vict.) provides for automatic updating of pension based upon the Consumer Price Index. The Fund's contributions towards the supplementation of pensions have been substantial, amounting to $16,956,393 in 1980. The appellant also administers two smaller funds — the Parliamentary Superannuation Fund and the Married Women's Superannuation Fund.

The appellant has an administrative and clerical staff of eighty-six who are employed under the provisions of the *Public Service Act* 1974 (Vict.) and whose salaries are paid by the Victorian Government. The appellant itself employs eight persons in property management whose salaries are paid by the Fund. It retains the services of a consultant actuary and a panel of medical practitioners. It hires some computer services and shares some computer services with the Motor Accidents Board. Apart from special staff engaged in property management the appellant is dependent on the Victorian Government for administrative and clerical staff whose numbers are fixed by the Public Service Board. In 1980 the number of staff solely employed in housing loans was brought up to nine and this resulted in acceleration of the processing of applications for such loans.

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The 1958 Act (s. 6) authorizes the appellant to invest the Fund in a variety of governmental and semi-governmental debentures, unsecured stock and loans, in loans secured by mortgage of real estate and in loans to authorized dealers in the short term money market. The appellant is also authorized (s. 6A) to invest moneys standing to the credit of the Fund in the purchase of land in Victoria and in constructing, altering, maintaining and repairing buildings and carrying out other improvements on such land. Where any interest in land is obtained by the appellant, it may grant leases (or sub-leases) or sell the land for such consideration and on such terms and conditions as it thinks fit. The purchase or sale of land by the appellant must be with the consent of the Treasurer who is also given power to determine that the aggregate amount which may be invested in loans on mortgage security shall not exceed such percentage or proportion of the Fund as he determines. Otherwise the management and the investment in authorized investments of the Fund is under the control of the appellant.

As at 30 June 1980, the investments of the Fund stood in the books at $487,173,000. Longer term investments fell into four main groups: semi-government and local government loans, commercial loans, housing loans to contributors and real estate. Available surplus funds are invested, on a day-to-day basis, by way of loan on the short term money market. The investment of the Fund is, within the statutory limits, in the discretion of the appellant which is, however, on occasion, susceptible to influence from the Victorian Government and which has an understanding with that Government that it will lend support to semi-government loans. The following table shows the figures of the longer term investments made in the years ending 30 June 1977, 1978, 1979 and 1980 in each of the four broad classes.

	1977	1978	1979	1980
	(To nearest $000)			
Investment in—				
Semi-Government and Local Government loans	5,500	37,082	38,420	29,370
Commercial loans	17,556	16,879	28,651	46,024
Housing loans	8,041	10,431	10,869	13,760
Property purchases	3,470	4,091	6,048	324
Total:	34,567	68,483	83,988	89,478

Brennan J. had this to say about the appellant's management and investment of the assets of the Fund (57):

> "In the management of the Fund, the Board draws upon its indigenous expertise in forming its financial judgments, and it receives advice from a budget investment officer, property consultant, accountant and other staff who are skilled in matters of finance. Taking account of the enhancement in the value of the Fund's assets, the Fund is yielding annually a fraction over 10% on the total investment.
>
> The management of the Fund is a complex function, for the Fund itself is large and there is a large number of individual transactions involved in its management. Its management accordingly requires considerable clerical work, a great deal of administration at the executive level, and the sound exercise of financial and actuarial judgment and managerial skills."

Is the Appellant a Financial Corporation?

Although this Court has had to consider the meaning of the expression "trading corporation" in s. 51(xx) of the Constitution in its suggested application to a county council formed under the *Local Government Act* 1919 (N.S.W.) (*Reg. v. Trade Practices Tribunal; Ex parte St. George County Council* (58)) and in its application to a football league and a football club (*Reg. v. Federal Court of Australia; Ex parte W.A. National Football League* (59) ("*Adamson*")), this is the first occasion on which it has been called upon to consider the associated expression "financial corporation". It is our view that the Court's approach to the ascertainment of what constitutes a "financial corporation" should be the same as its approach to what constitutes a "trading corporation", subject to making due allowance for the difference between "trading" and "financial". After all, the two adjectives form part of the general category "and trading or financial corporations formed within the limits of the Commonwealth". The two classes are not mutually exclusive — a corporation may be a financial as well as a trading corporation.

In this respect the decision in *Adamson* is of importance for two reasons. First, the majority of the Court (Barwick C.J., Mason, Jacobs and Murphy JJ.), rejecting the argument that the purpose for which a corporation is formed is the sole or principal criterion of its character as a trading corporation, concluded that the relevant character of the football leagues and the football club was to be ascertained by reference to their established activities (60). In adopting this view their Honours disapproved the approach taken by

(57) (1980) 49 F.L.R., at p. 225; 33 A.L.R., at p. 114.
(58) (1974) 130 C.L.R. 533.
(59) (1979) 143 C.L.R. 190.
(60) (1979) 143 C.L.R., at pp. 208-211, 233-237, 239-240.

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the majority in *St. George* which placed emphasis on the purpose for which the County Council was formed (see, for example, p. 562).

Secondly, the judgments of the majority in *Adamson* make it clear that, in having regard to the activities of a corporation for the purpose of ascertaining its trading character, the Court looks beyond its "predominant and characteristic activity" (cf. p. 213 per Gibbs J.). Barwick C.J. (61) spoke of making a judgment "after an overview" of all the corporation's current activities, the conclusion being open that it is a trading corporation once it is found that "trading is a substantial and not a merely peripheral activity". Mason J. (62) said that it "is very much a question of fact and degree" having earlier stated (63) that the expression is essentially "a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation."

Murphy J. (64) said "As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation". Indeed, it was essential to the majority's approach and to its rejection of *St. George* that a corporation whose trading activities take place so that it may carry on its primary or dominant undertaking, e.g., as a sporting club, may nevertheless be a trading corporation. The point is that the corporation engages in trading activities and these activities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade. As the carrying on of that undertaking requires or involves engagement in trading activities, there is no difficulty in categorizing the corporation as a trading corporation when it engages in the activities.

Indeed, we would go on to say that there is nothing in *Adamson* which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its being properly categorized as a trading corporation if other more extensive non-trading activities properly warrant its being also categorized as a corporation of some other type.

If there be any difference in the comments made by the majority in *Adamson* it is one of emphasis only. And it is important to note that they were all directed to the issue as it arose for decision, an issue relating to a sporting club and the league with which it was affiliated; they were not aimed at the corporation which has not begun, or has barely begun, to carry on business. It might well be

(61) (1979) 143 C.L.R., at p. 208.
(62) (1979) 143 C.L.R., at p. 234.
(63) (1979) 143 C.L.R., at p. 233.
(64) (1979) 143 C.L.R., at p. 239.

necessary to look to the purpose for which such a corporation was formed in order to ascertain whether it is a corporation of the kind described.

Like the expression "trading corporation", the words "financial corporation" are not a term of art; nor do they have a special or settled legal meaning. They do no more than describe a corporation which engages in financial activities or perhaps is intended so to do. The nature and the extent or volume of a corporation's financial activities needed to justify its description as a financial corporation do not call for much discussion in the present case. A finance company is an obvious example of a financial corporation because it deals in finance for commercial purposes, whether by way of making loans, entering into hire purchase agreements or providing credit in other forms, and this activity is not undertaken for the purpose of carrying on some other business. However, just as a corporation may be a trading corporation, notwithstanding that its trading activities are entered into in the course of carrying on some primary or dominant undertaking, so also with a corporation which engages in financial activities in the course of carrying on its primary or dominant undertaking. Thus a corporation which is formed by an employer to provide superannuation benefits for its employees and those of associated employers may nevertheless be a financial corporation if it engages in financial activities in order to provide or augment the superannuation benefits.

All that we have said so far accords with what this Court decided in *Adamson* and with what the Federal Court decided in *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd.* (65) where co-operative terminating building societies providing finance for their members were held to be financial corporations. There, Deane J. (66), with whom Bowen C.J. and Brennan J. agreed, concluded that a corporation engaged in the activity of commercial dealing in finance was a financial corporation. By the expression "dealing in finance" his Honour referred "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". Notwithstanding certain distinctive features of the business activities of the societies in that case, viz., the object of providing benefits for members by making loans at moderate rates of interest, their inability to turn

(65) (1978) 36 F.L.R. 134; 22 A.L.R. 621.

(66) (1978) 36 F.L.R., at p. 159; 22 A.L.R., at p. 642.

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over their circulating capital in a repetitive way, their confinement in practice to making not more than one loan to each member and their performance of an important social function, the Federal Court held that the societies were financial corporations.

In order to dispose of the present case, it is unnecessary to decide whether the expression "trading or financial corporations" in s. 51(xx) might justify a broader interpretation of the constitutional power than that indicated by the majority judgments in *Adamson* or by the judgments in *Ku-ring-gai*.

The facts as we have recited them demonstrate beyond any question that the appellant engages in financial activities on a very substantial scale. Even if we confine our attention to such aspects of the appellant's investment activities as involve the making of commercial and housing loans, its business in this respect is very substantial and forms a significant part of its overall activities. No doubt these activities are all entered into for the end purpose of providing superannuation benefits to contributors, but, as we have seen, this circumstance constitutes no obstacle to the conclusion that the appellant is a financial corporation.

Is the Appellant the Crown in Right of the State of Victoria?

The ordinary canon of construction is that a statute does not bind the Crown unless it is mentioned expressly or by necessary implication (*Province of Bombay v. Municipal Corporation of Bombay* (67)). This is the rule as it applies to the Crown in right of the enacting legislature. However, it has long been recognized that in a federal setting special problems arise for consideration, the important question being whether there is a general presumption that a statute enacted by the Commonwealth Parliament is not intended to apply to the Crown in right of the States as well as in right of the Commonwealth. These problems were discussed to some extent in *Bradken* (68). It goes almost without saying that in a case such as the present the first step is to construe the *Trade Practices Act* because, subject to considerations of constitutional validity, the Commonwealth Parliament may exercise its legislative powers so as to affect either a State or an authority formed by a State which, according to State legislation, is to have the benefit of the privileges and immunities of the Crown in right of the State. In case of an inconsistency, the Commonwealth Act will prevail by virtue of s. 109 of the Constitution. These problems may be put to one side in the present case. In *Bradken* the Court held that the

(67) [1947] A.C. 58, at p. 61.

(68) (1979) 145 C.L.R., at pp. 116-123, 127-129, 134-136, 140-141.

Trade Practices Act did not evince any intention to bind the Crown in right of a State. If the appellant is not the Crown in right of the State of Victoria it will not be to the point that the State legislation purports to confer some of the privileges and immunities of the Crown on it. The reason is that one finds in the *Trade Practices Act* neither an intention that the Act should not bind a financial corporation which is not an emanation of the Crown but which, under State legislation, enjoys some of the privileges or immunities of the Crown in right of a State nor a grant of authority to a State Parliament impliedly to confer general immunity upon such a financial corporation from the provisions of the Act.

The question whether the appellant can be described as the Crown in right of the State of Victoria falls to be answered by reference to the judgments in *Superannuation Fund Investment Trust v. Commissioner of Stamps (S.A.)* (69). That it was a borderline case was shown by the even division of opinion on the question whether that Trust was a manifestation of the Crown in right of the Commonwealth — Barwick C.J. and Mason J. thought it was, Stephen and Aickin JJ. thought it was not, Murphy J. expressing no opinion on the point. There is on our reading of the judgments no inconsistency in principle between them. However, they differed in their application to the facts. Mason J. (70) was influenced by the circumstance that the Trust was brought into existence by the Crown in order to discharge its obligation to its employees to provide superannuation benefits for them. Stephen and Aickin JJ. (71) did not regard this factor as having weight in the circumstances of the case, regarding the absence in the executive government of any power to control the activities of the Trust as decisive.

Stephen J. attached importance to the existence of a provision in the statute which, on his view, tended to suggest that the Trust was liable to pay stamp duty and was not to be equated to the Crown in right of the Commonwealth. His Honour went on to speak of the possibility that some only of a corporation's functions should attract the privileges and immunities of the Crown and that this was very much a matter of statutory interpretation (72). Here, as we have pointed out, the question is whether the appellant is the Crown in right of the State of Victoria, not whether the State statute confers on an authority the privileges or immunities of the Crown in one or some of its functions.

There is no dispute that the appellant was established for an

(69) (1979) 145 C.L.R. 330.
(70) (1979) 145 C.L.R., at p. 355.
(71) (1979) 145 C.L.R., at pp. 348-350, 365-366.
(72) (1979) 145 C.L.R., at p. 350.

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essentially identical purpose to that of the Superannuation Fund Investment Trust, that of providing superannuation benefits for public servants. However, it is argued, and in our opinion correctly, that there are significant differences between the appellant and the Trust. First, the appellant has greater autonomy and independence than the Trust. Three of the appellant's six members are elected by contributors; other members are to include an actuary and the Government Statist. The composition and mode of election of the membership of the appellant emphasize its autonomy and equip it to make independent decisions respecting the provision of benefits and investment of funds.

Secondly, the whole of the Fund administered by the Trust formed part of the Trust Fund for the purposes of the *Audit Act* 1901 (Cth), as amended, and therefore constituted part of the Commonwealth Public Account as defined by that Act. Indeed, the *Superannuation Act* 1976 (Cth) provided that, on an employee ceasing to be an eligible employee, his accumulated contributions should be paid out of the Superannuation Fund into the Consolidated Revenue Fund and that any payment of a benefit under the Act should be payable out of the latter fund (s. 112). On the other hand, the moneys of the appellant, unlike those of the Trust, do not become part of the Consolidated Revenue. Section 7(1) of the Superannuation Act 1958 provides that moneys held uninvested by the appellant may be lodged either at call or on fixed deposit with the Treasurer or with any bank into which moneys are paid into "The Public Account" and all money so lodged with any such bank shall while in such bank be held to be moneys of the Crown. This section makes moneys lodged by the appellant with a bank Crown property but only whilst they are lodged with a bank. This special provision, which is designed to give the appellant the privileges of the Crown as a creditor against a bank with whom money is lodged, tends strongly against the view that the appellant is the Crown in right of the State of Victoria. Indeed, the absence of any corresponding provision governing the making of loans and investments generally serves to indicate that the statute does not even attempt to confer on the appellant privileges and immunities which it would have if it were the Crown.

For our part the position of the appellant is clearly distinguishable from that of the Trust in the earlier decision. The appellant has a greater degree of independent autonomy, and its funds and property are not dealt with by the *Superannuation Act* 1958 consistently with its having the character of the Crown in right of the State of Victoria.

For these reasons we would dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellant, *D. Yeaman*, Crown Solicitor for the State of Victoria.

Solicitor for the respondent, *B. J. O'Donovan*, Crown Solicitor for the Commonwealth.

Solicitors for the intervening Attorneys-General, *H. K. Roberts*, Crown Solicitor for the State of New South Wales, *G. C. Prior*, Crown Solicitor for the State of South Australia, and *C. Le B. Langoulant*, Crown Solicitor for the State of Western Australia.

R.A.S.