AUSTRALIAN ASPECTS OF GOVERNMENT CORPORATIONS[1]

R. ELSE MITCHELL
Sydney, Australia

Political and Constitutional Background

The conclusion of Mr. Watson Sellar[2] that Australian experience of government corporations may assist in providing a solution to Canada's problems of management by "crown companies" is more than justified by a detailed consideration of Australian political and constitutional history over the last thirty years. One reason for this is that the question of the extent to which the government should engage in trade has long been a political issue of some importance in Australia and in few democratic countries are as many major functions and activities entrusted to government instrumentalities as in the Commonwealth of Australia and the several States.[3] Among the avenues of government activity in Australia, some of which are government monopolies, are postal, telegraph and telephone services, radio

[1] The technique of creating so-called "government corporations" as well as their constitution and administration deserve much closer study by lawyers than has so far been given. Political scientists have in recent years awakened to the importance of such corporations as instruments of government and economic and social organization, though it is only within the last ten years that W. A. Robson wrote in his preface to PUBLIC ENTERPRISE, published in 1937, of such corporations: "These bodies have been entrusted with the operation of vital public utilities and the regulation or organization of great national industries and it is impossible to over-estimate their importance in the social life of the community. They form the most significant development in the field of political institutions which has taken place in Great Britain during the present century; *yet curiously enough they have so far received hardly any systematic attention by social scientists or publicists.*" The essays collected by Robson provide an excellent review of the operation of some ten leading English corporations while John Thurston in his book GOVERNMENT PROPRIETARY CORPORATIONS IN THE ENGLISH-SPEAKING COUNTRIES, published in the same year, gives an account of the workings of government corporations in the United States of America, Great Britain and other countries, including Australia. Thurston's work, in addition to covering a wider field than Robson's collection, devotes considerable attention to legal problems which have arisen in relation to such corporations. His bibliography (at p. 283) contains a useful list of reference works and articles, many of which have a particular appeal to the lawyer. Mention must also be made, among the literature on this subject, of STATE SOCIALISM IN VICTORIA (1932) by F. W. Eggleston, who was a Minister of the Crown in Victoria and more recently Australian Minister in Washington. Though there is room for disagreement with Eggleston's conclusion that state enterprises in Victoria have failed dismally, his book is of great value as one of the pioneer works in the field and, in relation to the present subject, shows the extent to which government corporations had become a recognized and fundamental element in the political and economic life of one of the Australian States more than ten years ago.

[2] (1946), 24 Can. Bar Rev. pp. 393-404; 489-507.

[3] W. K. HANCOCK, AUSTRALIA (1930), Ch. VII, pp. 128-145.

broadcasting, railways, electricity generation and distribution, tramway and omnibus services, ship-building and shipping services, banking, insurance, meat production, home building, brick and pipe making, coal mining, quarrying and the acquisition, realization and export of primary products (not only wool).[4] This is a peace-time list and if the war period were embraced the list would include a vast number of other functions, many of which were entrusted to corporations constituted by the Commonwealth under the emergency powers conferred by the National Security Act 1939-1943.

This trend towards government enterprise, or socialization as some political protagonists prefer to call it, is now an established feature of the Australian economic and political system due chiefly, though not entirely, to the aims and influence of the Labour Party.[5] It can be appreciated therefore that the impact of this trend on private enterprise and *laissez-faire* methods has given rise to economic and social conflicts, many of which have been the subject of vital legal and constitutional battles in the courts: the most important of these, in recent years at least, is the decision of the High Court of Australia in the *Airlines* case.[6] So too, the aim of the Labour Party to secure a measure of social justice and security for the wage earner has also had important consequences in political and constitutional spheres, chiefly because of the necessity for imposing additional taxation burdens on industry to meet the cost of social services. To date provision has been made by legislation of the Parliament of the Commonwealth for the raising of revenue and its appropriation for the provision of a wide range of social services, including old age and invalid pensions, widows pensions, unemployment and sickness benefits, child endowment, maternity benefits and bonuses,

[4] Some of these activities are conducted by State governments and instrumentalities; the Commonwealth has conducted or legislated for the conduct of postal, telegraph and telephone services (Post and Telegraph Act 1901-1923), radio broadcasting (Australian Broadcasting Act 1942-1946), some trunk line railways (Commonwealth Railways Act 1917-1946), shipping services (Commonwealth Shipping Act 1923), banking (Commonwealth Bank Act 1945), wool realization (Wool Realization Act 1945), wheat acquisition and sale (Wheat Industry Stabilization Act 1946), meat acquisition, sale and export (Meat Export Control Act 1935-1946), overseas telecommunications services (Overseas Telecommunications Act 1946), air lines (Australian National Airlines Act 1945); the majority of these measures provide for the constitution of a board, commission or other similar body as a body corporate with perpetual succession and a common seal.

[5] In the State of Victoria, which has had non-labour governments during very lengthy periods, there has been a marked trend towards state socialism (*cf.* EGGLESTON, STATE SOCIALISM IN VICTORIA, Ch. II; HANCOCK, AUSTRALIA, Ch. VII).

[6] *Australian National Airways Pty. Limited* v. *The Commonwealth*, [1946] Argus L. R. 1; 71 Comm. L.R. 29.

educational subsidies, hospital benefits and, finally, pharmaceutical benefits.[7] The validity of the pharmaceutical-benefits scheme was recently challenged in the High Court of Australia and the decision of the court in the *Pharmaceutical Benefits* case,[8] which declared them unconstitutional, bears directly on leading aspects of Mr. Sellar's article and, from a political and constitutional viewpoint, is one of the most important decisions of the High Court since the *Engineers* case.[9] This assessment is made out only because the decision affects the prospect of the Labour Government being able fully to implement its social-services programme and to retain social services at present in force, but also because of its implications with respect to the Commonwealth's power to appropriate revenue for other public purposes not precisely related to the aims of any political party, such as exploration, medical, agricultural, scientific and industrial research and development, drought relief, literary and educational grants, etc.[10]

By way of further explanation of the Australian constitutional position it should be remembered that in 1942 the High Court in the *Uniform Tax* case[11] upheld the validity of income-tax legislation which excluded the State governments from the income-tax field by imposing heavy rates of tax (chiefly for war purposes) and making grants to each State of an amount equal to its normal revenue from income tax if it vacated the income-tax field. This decision sounded the death knell of the States' independent financial powers, firstly, because income tax was always regarded as the most lucrative method of raising revenue and, secondly, because the principle of the legislation upheld in the *Uniform Tax* case can be applied to other fields of taxation from which the States obtain funds. If this financial control were coupled with a virtually unlimited power of appropriation and a power in the Commonwealth to create corporations, the result might be

[7] The following Commonwealth statutes provide for the payment of these pensions and benefits: Invalid and Old-age Pensions Act 1908-1946, Widows Pensions Act 1942-1946, Unemployment and Sickness Benefits Act 1944, Child Endowment Act 1941-1942, Maternity Allowances Act 1912-1944, Education Act 1945, Hospital Benefits Act 1945, Pharmaceutical Benefits Act 1944. All these measures (other than the Invalid and Old Age Pensions Act, which is authorized by s. 51 (xxiii) of the Constitution) depend for their validity on the Commonwealth's appropriation power (s. 81—*vide infra*).

[8] *Attorney General* (*Victoria*) v. *The Commonwealth*, [1945] Argus L.R. 435.

[9] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1920), 28 Comm. L. R. 129.

[10] A list of acts making such appropriations passed before 1929 will be found in the Report of the Royal Commission on the Constitution, p. 199.

[11] *South Australia* v. *The Commonwealth* (1942), 65 Comm. L.R. 373.

disastrous to the State governments, because Commonwealth legislation prevails over inconsistent State laws[12] and, under the constitution of the Commonwealth, the States have no defined field of legislative activity but are mere "residuary legatees of legislative power".[13]

The Airlines Case

The *Airlines* case challenged the validity of the Australian National Airlines Act 1945 and of certain regulations under the Air Navigation Act 1920-1936 which were designed to achieve a nationalization of all interstate air line services by conferring a monopoly on the Australian National Airlines Commission, a corporation created by the act for the purpose of conducting interstate and extra-Australian air services. The act did not attempt to create a monopoly in the Commission with respect to intra-state air services because it was framed as an exercise of the legislative power to make laws with respect to "trade and commerce with other countries and among the States".[14] The attack on this legislation had three main branches: first, that the Commonwealth's legislative power was a power to regulate only and did not comprehend a power to trade; second that the Commonwealth could not create a corporation even with respect to matters within power and, third, that by prohibiting the conduct of competitive airlines the act offended the constitutional guarantee of freedom of interstate trade.[15] The High Court rejected the first and second arguments but upheld the third, thus confirming the validity of the legislation except so far as it purported to create a government monopoly.

Latham C.J., in discussing the first two objections, said of the Commonwealth's legislative power:

[12] S. 109 of the Constitution provides that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid". It has been held under this provision that an award made by the Commonwealth Arbitration Court fixing the terms of employment in an industry is a "law of the Commonwealth", which prevails over a State statute (*Clyde Engineering Company* v. *Cowburn* (1926), 37 Comm. L.R. 466). It can be appreciated, in view of this decision, that a statutory corporation created by the Commonwealth with power to make by-laws or regulations could override the provisions of State legislation.

[13] Ss. 106-108 of the Constitution; *cf. Engineers'* case and *Pharmaceutical Benefits* case, *supra.*

[14] The Commonwealth's legislative power is by s. 51(i) restricted in these terms to interstate trade and commerce.

[15] S. 92 of the Constitution provides that ". . . . trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". It has been held that this provision prevents Commonwealth and State governments alike from infringing the freedom at the border which it guarantees: *James* v. *The Commonwealth*, [1936] A.C. 578; 55 Comm. L.R. 1.

In the case of some of the subjects with respect to which the Commonwealth Parliament is given power to legislate under sec. 51, it is plain that the power is a power to make laws with respect to the conduct of persons other than the Commonwealth or any agency of the Commonwealth. Placita (xvii) bankruptcy and insolvency, (xxi) marriage, (xxii) divorce and matrimonial causes, (xxiii) invalid and old age pensions, (xxvii) immigration and emigration, (xxviii) the influx of criminals, and others are matters in which the Commonwealth does not take part, but in respect of which the Commonwealth Parliament may legislate. In the case of other subjects, however, it appears to me to be quite plain that the nature of the subject is such as to entitle the Commonwealth to make laws with respect to the Commonwealth (by itself or by a Commonwealth agency) taking part in the very subject-matter itself. For example, placitum (ii) 'taxation' is plainly taxation by the Commonwealth; (iii) 'bounties' are bounties to be granted by the Commonwealth; (iv) 'borrowing money' relates to borrowing money by the Commonwealth; (v) 'postal &c. services' include such services provided by the Commonwealth; (vi) 'the naval and military defence of the Commonwealth' includes defence by the Commonwealth. Under the power to legislate with respect to (vii) 'lighthouses, lightships, beacons and buoys', Parliament may authorise the Commonwealth to establish lighthouses &c. So also under (viii) 'astronomical and meteorological observations' the Commonwealth Parliament may legislate, as in fact it has done, for the actual making and control of such observations. Similarly, under (xi) 'census and statistics' the Commonwealth itself can take a census. Under (xiii), 'banking other than State banking' the Commonwealth Parliament can create a bank, as in fact it has done in the case of the Commonwealth Bank. It is unnecessary to extend the illustrations beyond those already given. There can be no reason in law why the power to make laws with respect to trade and commerce with other countries and among the States should not include a power to make laws enabling the Commonwealth itself, or a body established by the Commonwealth, to make such laws.

There is no specific power to create corporations in the constitution and in relation to this question his Honour continued:

It is true that the Commonwealth has no general power to create corporations, but when the Commonwealth Parliament exercises a legislative power it is for the Parliament, subject to any constitutional prohibition, to determine the means of securing an object which it is legitimate under the power for the Parliament to pursue. Thus, the establishment of the Commonwealth Bank was a means of giving effect to an approved policy with respect to banking. In the well-known case of *McCulloch* v. *Maryland* (1819) (4 Wheat. 316) it was held that if Congress can exercise a power it can create a corporation to carry that power into effect—see *Jumbunna Coal Mine* v. *The Victorian Coal Miner's Association* (1908) (6 Comm. L.R. 309), relating to the creation of corporations for the purpose of giving effect to the industrial arbitration power.

In the United States of America it has been held that Congress can, under the commerce power, provide for the incorporation of a bridge company to build a bridge between two States—*Luxton* v. *North River*

Bridge Company, (1894) (153 U.S. 525); or to construct railways across States—*California* v. *Central Pacific Railroad Company*, (1888) (127 U.S. 1). Such decisions were doubtless responsible for the grant of power to the Commonwealth Parliament to make laws with respect to the acquisition and construction of railways by the Commonwealth, subject to an express limitation requiring the consent of the State concerned—see Constitution, sec. 51 (xxxiii), (xxxiv). If this limitation had not been introduced, the Commonwealth Parliament would have been able to create corporations, to construct and operate interstate railways in Australia as it thought proper.

For these reasons, in my opinion, the fact that the Act authorises the establishment by the Commonwealth of a corporation to carry on interstate trade and commerce does not constitute any objection to the validity of the Act.

Rich J. prefaced his answer to the questions under review with a dictum of the Privy Council in *James* v. *The Commonwealth*[16] that "the constitution must not be construed in any narrow and pedantic sense" and then discussed the scope of the trade and commerce power:

I have no doubt that, as here found, the phrase 'trade and commerce' is wide enough to include not only the sale and disposition of goods but the transport of goods and persons, and not only the transport of goods and persons incidentally to the disposition of goods, but such transport as an end in itself.

I am of opinion also that the Commonwealth Parliament's trade and commerce power is not restricted to the regulation of trade and commerce carried on by private persons, but is wide enough to authorise provision for the carrying on of trade and commerce by the Commonwealth itself. It was pointed out in *The Queen* v. *Burah*, (1878) (3 App. Cas. 889 at 904-5) that when a question arises in regard to a Constitution, whether the prescribed limits have been exceeded the only way in which a Court of Justice can properly determine the question is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and it violates no express condition or restriction by which the power is limited, it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions. The Constitution contains no express provision against trading by the Commonwealth, and no necessary implication of a prohibition of such trading is involved in any of the express provisions.

Starke J. mentioned the comparable provisions of the United States Constitution and of the British North America Act 1867, both of which confer powers of regulation of commerce and of trade and commerce respectively, and said:

[16] [1936] A.C. 578, at p. 614; 55 Comm. L.R. 1, at p. 43.

> But there is little, if any, difference, I think, between the power to make laws with respect to trade and commerce and the power to make laws to regulate or for the regulation of trade and commerce. And since the decision, *Huddart, Parker Ltd.* v. *The Commonwealth*, (1931) (44 Comm. L.R. 492), in this Court, the view can no longer be maintained that the constitutional power in the Australian constitution to make laws with respect to trade and commerce with other countries and among the States is limited to general rules of conduct to be observed by those engaged in the operation of commerce with respect to those operations—*Australian Steamships Ltd.* v. *Malcolm*, (1914) (19 Comm. L.R. 298 at pp. 305-6) and does not enable the Commonwealth itself or its instrumentalities to engage in or carry on commerce.

Dixon J. did not discuss these questions at length but rested his conclusions that the Commonwealth could trade and establish a corporation for that purpose on the necessity for a broad and flexible interpretation of the constitution. The argument of the plaintiff, he thought, ignored the fact that the constitution is an instrument of government meant to endure and conferring powers expressed in general terms wide enough to be capable of flexible application to changing circumstances:

> A law authorizing the Government to conduct a transport service for interstate trade, whether as a monopoly or not, appears to me to answer the description of a law with respect to trade and commerce among the States. It is only by importing a limitation into the descriptive words of the power that such a law can be excluded.

The final judgment, that of Williams J., expressed the same conclusion, but in quoting American decisions as authorities he took the view that the content of the Australian power over trade and commerce was wider than Congress's power to regulate the same subject matter; he said:

> The power of legislation conferred by the placitum is plenary in its fullest sense, and must be given a wide and liberal interpretation. It is not, like the commerce power in the Constitution of the United States, a power to regulate trade and commerce. It is a power to make laws with respect to trade and commerce. Even under the more limited power, the Supreme Court of the United States has held that Congress can incorporate authorities to carry on businesses ancillary to facilities which it has provided to promote the flow of commerce, such as the business of generating and selling electricity as ancillary to the construction of reservoirs to control the flow of navigable rivers—*Oklahoma* v. *Atkinson Company*, (1941) (313 U.S. 508). A law incorporating an authority to carry on trade and commerce on behalf of the Commonwealth is, I think, a law with respect to trade and commerce.

As will be seen from the extracts quoted above all the judgments except that of the Chief Justice treat the power to incorporate as implicit in the power to trade. Latham C.J., however, puts it on a slightly different basis, namely that if there

is power in the Parliament to do something it is for the Parliament to decide what means shall be adopted to exercise that power. The general acceptance of this view will prove of vital consequence in relation to the appropriation power to be discussed shortly, since the Chief Justice's view would justify the Commonwealth in constituting a corporation as a medium of appropriating moneys and regulating the use of the moneys, despite the absence of a specific legislative power in respect of the subject matter for which the moneys are appropriated.

The Pharmaceutical Benefits Case

Let us now turn attention to the appropriation power and the decision in the *Pharmaceutical Benefits* case, which declared invalid the Pharmaceutical Benefits Act 1944. The act provided that any person ordinarily resident in Australia should be entitled to receive certain prescribed pharmaceutical benefits without any obligation to pay for them, and the scheme of the act was that pharmaceutical chemists on approval by the Director General of Health should supply those benefits on the presentation by the customer of a written order in a prescribed form by a medical practitioner; payment for the benefits was to be made by the Commonwealth Government out of a trust fund established by the National Welfare Act 1943 to meet general social services.

The plaintiffs' attack on the act was based, firstly, on the absence from the heads of legislative power committed to the Commonwealth by the Constitution of any subject such as public health, medical services, pharmaceutical benefits or anything which on a reasonable construction would include the act under review, and, secondly, upon a restrictive interpretation of the appropriation power set out in s. 81 of the Constitution. The Commonwealth did not seek to justify the act under any head of legislative power, but contended that the power to appropriate public moneys was sufficiently wide to give the act validity. It is as well to note again the specific terms of s. 81, which deals with the appropriation of moneys; the section is as follows:

> All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

The substantial issue then was whether this section conferred an absolute power of appropriation for general purposes or whether it conferred a more limited power and, if so, limited to what

extent. This is one of the issues stated and discussed by Mr. Sellar in his article.[17] The High Court held (McTiernan J. dissenting) that the Pharmaceutical Benefits Act was invalid because it was an act relating to doctors, chemists and public health—subjects outside the scope of the Commonwealth Parliament—and could not be treated solely as an appropriation measure.

Latham C. J. rejected the argument of the plaintiffs that the power of appropriation was limited to the appropriation of moneys for purposes in respect of which the Commonwealth could make laws under s. 51. If such a restrictive interpretation were adopted the appropriation power would be superfluous because the mere power to make laws with respect to a subject in itself includes a power to provide for the expenditure of moneys in relation to that subject. Moreover, the Constitution itself contemplates the provision of moneys towards other purposes such as the payment of salaries of the Governor General,[18] members of Parliament,[19] Ministers,[20] judges of the High Court,[21] the payment of compensation for State property taken over by the Commonwealth,[22] the granting of financial assistance to States[23] and the provision of interest and principal in respect of State debts.[24] The Chief Justice continued:

> It was argued for the plaintiff that the phrase 'the purposes of the Commonwealth' in s. 81 refers to legislative purposes of the Commonwealth, that is, purposes for which the Commonwealth Parliament has power to make laws. It is plain that the Commonwealth has executive and judicial purposes as well as legislative purposes. The very existence of the Commonwealth, apart from any legislation creates some purposes of the Commonwealth; see *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (1922) 31 Comm. L.R. 421 at 441.

What then are "purposes of the Commonwealth" within the meaning of the section? The phrase quoted plainly includes but is not co-extensive with those purposes in respect of which the Commonwealth has power to make laws. His Honour proceeded to say:

> A meaning is given to the words 'to be appropriated for the purposes of the Commonwealth' if they are read as intended to show positively that there may be other Commonwealth purposes than those

[17] (1946), 24 Can. Bar Rev. at pp. 501-504.
[18] S. 3.
[19] S. 48.
[20] S. 66.
[21] S. 72.
[22] S. 85.
[23] S. 96.
[24] Ss. 105, 105A.

in respect of which power to make laws is given elsewhere in the Constitution. Otherwise the words have no legal effect whatever.

What then is the authority which can determine what purposes are purposes of the Commonwealth? As the appropriation is to be made by law (s. 83), the natural answer is—the authority which makes Commonwealth laws, that is, the Commonwealth Parliament not the executive authority which administers laws when made, nor the judicial authority which interprets and applies the laws. Thus, in my opinion, the Commonwealth Parliament has a general, and not a limited, power of appropriation of public moneys. It is general in the sense that it is for the Parliament to determine whether or not a particular purpose shall be adopted as a purpose of the Commonwealth.

The judgment of the Chief Justice then discusses the constitutional position in the United States of America, the conflicting views of American jurists, and the conclusions reached by the United States Supreme Court in *United States* v. *Butler*[25] and *Charles C. Steward Machine Co.* v. *Davis*.[26] The United States Constitution, however, contains a different collocation of words and, in Section VIII, combines a power "to lay and collect taxes, duties, imposts and excises" with a power "to pay the debts and provide for the common defence and general welfare of the United States". Though there is no direct association of powers comparable to this in the Commonwealth Constitution some analogy can be drawn between the two constitutions, for the latter includes in s.51(ii) a completely general power to legislate with respect to taxation. The question whether a law with respect to taxation is a law for the "peace, order and good government" of the Commonwealth is a political question to be determined by Parliament and is not justiciable in the courts; so too, the determination whether a particular purpose should be regarded and adopted as a Commonwealth purpose, in the view of the Chief Justice, is a political matter. Accordingly, his Honour said:

The words 'purposes of the Commonwealth' should not, in my opinion, be construed as meaning for the governmental purposes of the political organism called the Commonwealth. In the introductory provision of s. 51 (that laws are to be made for the peace, order and good government of the Commonwealth) the word 'Commonwealth' is used to describe the people of the Commonwealth in the area which is the Commonwealth in the geographical sense. The laws of the Commonwealth operate directly upon the people of Australia, and it is the good government of those people with which the Constitution is concerned, not the government of the Government itself. In s. 81 in the phrase 'the purposes of the Commonwealth' the word 'Commonwealth' should, in my opinion, be interpreted in the same sense. The word "Common-

[25] (1936), 297 U.S. 1.
[26] (1937), 301 U.S. 619.

> wealth' there plainly does not mean the geographical area known as the Commonwealth. Neither, in my opinion, does it mean the Commonwealth as a political organism. I see no reason for limiting the words 'the purposes of the Commonwealth' to governmental purposes in the sense of the discharge of legislative, judicial or executive functions. The word 'Commonwealth' in this section refers to the people who, by covering clause 3 of the Constitution, are 'united in a Federal Commonwealth under the name of the Commonwealth of Australia'.
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> For these reasons, in my opinion, the provisions of s. 81 can fairly be read as intended to mean that it is the Commonwealth Parliament, and not any Court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes.

These conclusions, however, are subject to the important qualifications that the law which seeks to establish a "purpose of the Commonwealth" must be a law providing for expenditure of money. It may devote moneys to purposes over which it has no legislative power, for example, to the maintenance of hospitals, but it cannot by legislation attempt to control all hospitals or require persons to submit to compulsory vaccination or immunization; that is, the appropriation power, though an independent head of power "does not enable the Commonwealth to extend its legislative powers beyond those marked out and defined by the Constitution". It was for this reason that the Pharmaceutical Benefits Act was held invalid; that act was not merely an act authorizing the expenditure of money but was an act relating to chemists, doctors, drugs and medicines and allied matters which did not fall within the specific powers committed to the Commonwealth by the Constitution.

The judgments of the other majority members of the High Court are not as illuminating or comprehensive as that of the Chief Justice. However, they support the view that the appropriation power is not restricted to heads of legislative subject matter, but they do not agree that the American decisions have any application. Starke J. in discussing s. 81 said:

> This power must be construed liberally; it is a great constitutional power but it does not authorize the Commonwealth appropriating its revenues and moneys for any purpose whatever 'without regard to whether the object of expenditure is for the purpose of and incident to some matter which belongs to the Federal Government', *Harrison Moore, Constitution of the Commonwealth of Australia*, 2nd ed. (1910) pp. 523-527. Indeed the provisions in s. 96 of the Constitution for financial assistance to the States appear superfluous if the power of the Parliament were as extensive as is now claimed. The purposes of the Commonwealth are those of an organized political body, with legislative,

> executive and judicial functions, whatever is incidental thereto, and the status of the Commonwealth as a Federal Government.

Dixon J., with whom Rich J. agreed, refrained from expressing a very definite view on the scope of the appropriation power and, although he rejected the analogy with the United States Constitution which the Chief Justice accepted, the following extracts from his judgment indicate a wider view than that contended for by the plaintiffs:

> Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government. These are things which, whether in reference to the external or internal concerns of government should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world to-day.
>
> In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and, as I have already said, to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States. I have not yet seen any reason to desert this opinion. But, I repeat, this case requires us to go no further than to distinguish the carefully chosen words of our Constitution from the very different words of that of the United States.

Williams J. likewise rejected the applicability of decisions on the United States Constitution for the reason that—

> the relevant provisions in the constitution of the United States of America are different in structure and wording from those in the Constitution of the Commonwealth. . . . The important words [in s. 81] are therefore those contained in the phrase 'for the purposes of the Commonwealth'. They are more specific than the words 'the general welfare of the United States'.

His Honour concluded by saying that the Commonwealth "has no general power to legislate for social services" and that this general power is left to the States.[27]

The effect of this decision cannot yet be fully appreciated and it may be years before its full implications become evident. But one matter that became immediately evident was the doubtful validity of many acts which had been founded on the appropriation power, particularly those dealing with social services. Williams and McTiernan JJ. were the only High Court judges who made no secret of their views of the validity of the Commonwealth's social-services legislation. Williams J. positively said that this

[27] Invalid and old-age pensions are the only social benefits expressly committed to the Commonwealth by the Constitution (s. 51 (xxiii)).

field was one for the States into which the Commonwealth could not intrude, while it is clear that McTiernan J. would uphold all measures passed by the Commonwealth for these or allied purposes. The prospect that these social-services measures might be challenged in the High Court was reinforced by widespread opposition to the Labour government's high rates of taxation which, it was conceded, were necessary to finance the social-services programme, and a declaration of their invalidity might result in the cessation of all social services (other than invalid and old-age pensions) notwithstanding that some of them had been in force for many years[28] while others had been introduced by a non-labour government.[29]

The gravity of the situation and the possibility of the Labour government's plans for social security being frustrated induced that government to seek additional legislative power by altering the Constitution and on 28th September last a referendum of the electors was held to approve *inter alia* the addition to the Commonwealth's legislative powers set out in s. 51 of the following subjects:

> (xxiii. a.) The provision of maternity allowances, widow's pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription) benefits to students and family allowances.

The result of the referendum was in favour of the amendment[30] and accordingly the validity of the Commonwealth's social-services legislation is now beyond doubt. That, however, is only incidental to the main substance of the appropriation power.

Conclusions

In view of the undoubted trend in political and economic organization towards the centralization of power and the necessity for governments to assume responsibility for the conduct of vital industries and essential services, it is inevitable that the technique of the government corporation will be availed of more and more in the attempt to reconcile the varying and conflicting economic and social interests operating in the modern democratic state. The experience of the last ten years, and the war period in parti-

[28] The Maternity Allowance Act passed in 1912 provided for a "baby bonus"; its scope has since been extended to confer other benefits on mothers.

[29] The Child Endowment Act 1941, which is the measure mentioned by Mr. Sellar (24 Can. Bar Rev. pp. 503-4), was passed by an anti-Labour Government, though with the approval of the opposition Labour forces.

[30] At the time of writing figures are incomplete, but the alteration was approved in all States and the total number of electors for and against the alteration at the time of writing is —*For:* 2,182,686; *Against;* 1,798,705. Under s. 128 of the Constitution a majority of all electors and of electors in a majority of States must approve of an alteration before it can become effective.

cular, has borne out to the full Robson's statement that government corporations are "the most significant development in the field of political institutions which has taken place in Great Britain during the present century".[31] American experience of bodies like the Tennessee Valley Authority and Australian trends give this expression of opinion an even wider application.

In countries like Great Britain and Australia, where the basic political issue is *laissez-faire* versus state enterprise, the government corporation is being more frequently used as a means of resolving controversial policies, but whereas in Great Britain the government has untrammelled power to implement its plans the government of the Commonwealth of Australia is bound by the limitations and restrictions contained in its Constitution. The decisions in the *Airline* case and the *Pharmaceutical Benefits* case, however, pave the way for a greater and freer resort to the government-coproration technique. The abilities of the Commonwealth to create corporations in respect of matters over which it has legislative power and to appropriate moneys for even wider purposes may result in startling developments, but the combination of these abilities with other constitutional provisions can have even more far-reaching effects. Not only may government corporations created by the Commonwealth share the Commonwealth's financial supremacy over the States but they will be immune from interference by State governments and their regulations and by-laws will nullify State laws. It can also be envisaged that such corporations will play a part in allocating to the States moneys granted by the Commonwealth under s.96 of the Constitution as well as administering and expending moneys appropriated for objects that fall within what the High Court holds to be "purposes of the Commonwealth" under s.81 of the Constitution.

Where there is no vision, the people perish; but he that keepeth the law, happy is he.—Proverbs 29:18.

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[31] ROBSON, PUBLIC ENTERPRISE, p. 9.