

CASE NOTE***CONSTITUTIONAL VALIDITY OF DIVESTITURE ORDERS**

The divestiture provision in s 81 of the *Trade Practices Act 1974* (Cth) (“the Act”) empowers the court to direct that a company divest itself of shares or assets that have been acquired in contravention of the merger provision, s 50 of the Act. If there has been a contravention of s 50 and the shares or assets unlawfully acquired have vested in the acquirer, the court may in those proceedings or in other proceedings declare the acquisition void under s 81(1A). Under the current wording of s 50 a corporation is prohibited from acquiring shares or assets if the acquisition would have the effect or be likely to have the effect of substantially lessening competition in a market.¹

Since the passage of s 81, doubts have emerged as to its constitutional validity.² In the course of proceedings commenced by the Trade Practices Commission (“the TPC”) against the Gillette company, the Federal Court specifically considered the constitutional validity of s 81.³ Justice Burchett declared that s 81(1) and (1A) of the Act were each valid enactments.⁴ WSGAL appealed to the Full Federal Court.

* Ray Steinwall, Senior Associate, Michell Sillar, Sydney, Lecturer in Trade Practices Law, University of New South Wales.

1 The current wording of s 50 came into effect in January 1993. Prior to January 1993 the section prohibited acquisitions which resulted in a company being in a position to dominate a market.

2 See *Trade Practices Commission v Tooth & Co Ltd* (1979) 26 ALR 185.

3 *Trade Practices Commission v The Gillette Company (No 2)* (1993) 118 ALR 280.

4 *Ibid.*

At first instance and on appeal, the validity of the section was challenged by WSGAL on essentially two grounds. First, it was said that s 81 authorised an acquisition of property other than on just terms in contravention of s 51 (xxxi) of the Constitution. Secondly, that s 81 purported to give the Federal Court powers of a non-judicial nature.

I. ACQUISITION OF PROPERTY OTHER THAN ON JUST TERMS

Section 51(xxvi) of the Constitution provides:

The Parliament, shall subject to this constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

A number of principles have emerged in the interpretation of this section, some of which were conveniently summarised by Lockhart J on appeal:⁵

1. Apart from s 122, s 51(xxvi) is the only power available to the Commonwealth to legislate with respect to the compulsory acquisition of property.
2. The words “for any purpose in respect of which the Parliament has power to make laws” although words of limitation are not to be read as an exclusive and exhaustive statement of the Parliament’s powers.
3. Section 51 (xxvi) is intended to protect citizens from being deprived of their property and to ensure that under no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms. Importantly, it has been accepted as a constitutional guarantee of just terms for the acquisition of property and has been given a broad application.
4. In determining whether an enactment is a law with respect to the acquisition of property, its direct legal operation and effect must be examined.
5. The courts will not permit the use of circuitous devices for acquiring property without providing just terms.
6. The expression “property” is a comprehensive provision and extends to every type of valuable right and interest.
7. The mere extinguishment or diminution of a proprietary right vested in a person does not necessarily amount to an acquisition. What is required is the addition of a proprietary nature that has been acquired.
8. The guarantee in s 51(xxvi) is not confined to acquisitions of property by the Commonwealth and its agents but extends to acquisitions “by any other person”.

WSGAL believed that a divestiture order would result in the acquisition of property by the Commonwealth other than on just terms in contravention of s

5 *WSGAL Pty Ltd v Trade Practices Commission* (1994) ATPR ¶41-314 at 42,175-42,177.

51(xxxi). However, the TPC argued that not every compulsory divestiture of property is to be regarded as an acquisition within s 51(xxxi). For instance, in *Trade Practices Commission v Tooth & Co Ltd*,⁶ Gibbs J said:

It appears to me that there are cases in which s 51 authorises the compulsory divesting of property in circumstances in which no question of just terms could sensibly arise - for example, it would be absurd to say that the legislature could make provision for the exaction of a fine, or for the imposition of a forfeiture of property used in the commission for crime on just terms.

Justice Lockhart also pointed to decisions of the High Court citing examples of the laws of the Commonwealth that lie outside s 51(xxxi) for instance, laws concerning taxation, pecuniary penalties payable to the Commonwealth, fines or penalties imposed upon offenders, the vesting of property of a bankrupt in an official trustee, the vesting of enemy property in a controller and the confiscation of illegal goods.⁷

Justice Lockhart stated that the question of whether the legislative imposition of an obligation to pay money involves an acquisition of property depends on the context in which the obligation is imposed.⁸ The Court recognised that the remedy of divesting the acquirer of shares or assets and re-vesting title to them in the vendor is a sanction against a contravention of s 50. It is in furtherance of the statutory policy of prohibiting certain acquisitions and depriving the contravenor of the benefit of those unlawful acquisitions.⁹ Justice Lockhart described s 81 in the following terms:

Section 81 is just as much a law outside the scope of paragraph (xxxi) as is a law with respect to taxation, fines or pecuniary penalties payable for criminal offences, forfeiture to the crown of prohibitive imports and the vesting of property of a bankrupt in the official trustee in bankruptcy ... s 81 is in the nature of a mandatory injunction aimed at unravelling the conduct which gave rise to a contravention of s 50. It is a provision like a fine or penalty, the object of which is to ensure that the law is complied with and enforced.¹⁰

Section 81 provided for the genuine adjustment of competing rights, claims and obligations in the public interest and therefore did not infringe s 51(xxxi) of the Constitution. In what was clearly *obiter*, Beaumont J suggested that if s 81(1) stood alone, that is, unrelated to a contravention of a substantive provision such as s 50, then arguably it may be regarded as a law with respect to an acquisition within s 51(xxxi).¹¹

6 (1979) 142 CLR 397 at 408.

7 Note 5 *supra* at 42,178.

8 *Ibid* at 42,179.

9 *Ibid* at 42,181.

10 *Ibid* at 42,182-42,183.

11 *Ibid* at 42,194.

II. NON-JUDICIAL FUNCTIONS

WSGAL's second argument was that s 81(1A) was invalid as purporting to confer on the Federal Court powers which are not of a judicial character. The argument was developed on the basis of a number of related submissions:¹²

- (a) that the powers conferred under s 81(1A) are not those traditionally exercised by a court and are not ancillary to an exercise of judicial power.
- (b) that the power enables the court to declare an otherwise valid acquisition as *void ab initio* which is akin to a legislative power but not to the exercise of judicial power.
- (c) that s 81(1A) does not permit determination of rights and liabilities as they currently exist. At first instance, Burchett J explained WSGAL's concern:

If made, a declaration would not be one as to existing rights but as to whether an acquisition found by the Court to have contravened s 50 was to be treated as void. The vice of this was said to be that the Court was not authorised to determine judicially whether an acquisition was antecedently void, but to exercise an independent discretion to render the acquisition void from its inception.¹³

- (d) that s 81(1A) provides no standard by which the discretion is to be exercised.

For the purpose of exercising the powers under s 81(1A), the court must first find that there has been an acquisition of shares or assets contrary to s 50 of the Act. This is clearly a task of a judicial nature. Similarly, the exercise of the power under s 81(1A) must be in accordance with established legal principles and therefore constitutes an exercise of judicial power. Certainly as Beaumont J suggested, even if it was not the exercise of judicial power itself, it is at least ancillary or incidental to the exercise of judicial power and is therefore valid.¹⁴

The Court rejected both of the substantive arguments raised by WSGAL and dismissed the appeal.

III. CONCLUSION

The divestiture remedy has been rarely used in Australia. Although there are significant practical impediments to its use,¹⁵ it does have a deterrent component. The decision is significant in that it removes any doubts that may have existed as to the validity of s 81 and its likely use in merger litigation.

¹² Ibid at 42,195-42,196.

¹³ Note 3 *supra* at 285.

¹⁴ Note 5 *supra* at 42,196.

¹⁵ See the comments in *Trade Practices Commission v Australian Meat Holdings Pty Ltd* (1988) ATPR ¶40-893.