CASE NOTES

TASMANIAN WILDERNESS SOCIETY INC. v. FRASER[1]

Constitutional Law — Whether Australian Loan Council an 'authority of the Commonwealth' — Nature of the Financial Agreement.

In recent years a number of unsuccessful but ingenious attempts have been made to persuade the High Court to interfere with the financial machinery of the federation. A characteristic of this litigation has been that the financial issue is not an end in itself but only a means to a different end. The latest instance is *Tasmanian Wilderness Society Inc. v. Fraser*[1] in 1982.

The Tasmanian Wilderness Society and two other plaintiffs applied for injunctions to restrain the consideration by the Australian Loan Council, which was due to meet in the following week, of a submission by Tasmania seeking approval for the borrowing of money to implement the Gordon below Franklin Hydro-Electric Power Development Scheme. The society's standing to sue derived from the main object of its existence, which is to preserve and protect the Tasmanian wilderness. The second and third plaintiffs were companies with tourist operations in south west Tasmania. The defendants were the then Prime Minister, the Commonwealth Treasurer and the Commonwealth. The point of including the Treasurer was that he was technically the Commonwealth member of the Australian Loan Council, the Prime Minister attending only in an observer status. Although this at first might seem a strange reversal of the realities, it should be borne in mind that in practice it is very many years since the Loan Council did any more than formally adopt the agreement reached between Commonwealth and States at the annual Premiers' Conference, which is always held immediately before the Loan Council meeting.

An initial oddity of the proceedings was that although the plaintiffs had taken care to join as a party anyone who might be thought an appropriate defendant on the Commonwealth side, they had omitted to join corresponding parties on the Tasmanian side. These would have been the state of Tasmania and its Premier, the latter being Tasmania's member of the Loan Council. The Premier of Tasmania having, not surprisingly, declined to help cure the defect by accepting service informally, Mason J., who heard the application, was asked to make an order under O. 16, r. 2 of the High Court Rules that the Prime Minister and the Commonwealth Treasurer, or either of them, represent the other members of the Loan Council. This he declined to do on the reasonably obvious ground that the interests of the Commonwealth in particular and of the other members of the Loan Council among themselves were not the same as the Tasmanian interest in the action.

It is indeed difficult to see how the interest of any member of the Australian Loan Council can possibly be exactly the same as the interest of any other member when a borrowing submission comes forward from one State alone in relation to a project wholly within that State. Joint projects can be envisaged in which the interests of the parties are for practical purposes identical, and procedural questions can be imagined

[1] (1982) 42 A.L.R. 51.

in which the interest of all the States against the Commonwealth, or the other way round, are identical, but no such issue arose in the present instance.

One of the arguments advanced by the plaintiffs on the substance of the application was that section 30(1) of the Australian Heritage Commission Act 1975 (Cth) imposed on the Prime Minister and the Commonwealth Treasurer an obligation to ensure that *inter alia* any 'authority of the Commonwealth' in respect of which they had ministerial responsibilities did not take any action that adversely affected any place which had been entered in the Register of the National Estate kept pursuant to section 22 of the Act. The Australian Loan Council, it was contended, was an authority of the Commonwealth within the meaning of the section and the Prime Minister and Commonwealth Treasurer had ministerial responsibilities in relation to it. Approval of the Tasmanian borrowing submission would adversely affect a part of Tasmania which had been entered in the Register by enabling work to proceed in implementation of the Gordon below Franklin Scheme. The discretionary remedy of interlocutory injunction to prevent the Loan Council considering this submission was sought pending the resolution of constitutional issues affecting the validity of the Scheme in subsequent litigation.

It was indispensible to this argument that the Australian Loan Council be held to be an authority of the Commonwealth within the meaning of the Australian Heritage Act. Mason J. declined to do so. Even without the law to help him, as a matter of simple common sense he could surely have come to no other conclusion. The membership of the Loan Council is made up of the Prime Minister, or another Commonwealth Minister nominated by him, and the six State Premiers or their ministerial nominees. As Mason J. observed, he suspected that 'if there be a subject on which the members of the [Council] stand united, it would be in repelling the suggestion that it is described accurately as being an "authority of the Commonwealth" '.[2]

The Australian Loan Council is set up by clause 3 of the Financial Agreement between the Commonwealth and the States. The Financial Agreement is not in itself a law of the Commonwealth.[3] The only conceivably relevant law of the Commonwealth is the Financial Agreement Act 1928 (Cth), but that Act makes no reference to the Australian Loan Council and in no way, apart from ratification of the Agreement, affects the constitution or membership of the Council. Quite apart from its inherent character therefore, Mason J. was able to hold that as a matter of law the Loan Council had not even been set up by the Commonwealth but by a contract between the Commonwealth and the States which made it a creature of neither. Mason J.'s conclusion is supported further by Constitution section 105A(5), which gives agreements of the character of the Financial Agreement, made pursuant to that section, direct binding force without the need for legislative ratification. It was supported also by the definition of 'authority of the Commonwealth' in section 3(1) of the Australian Heritage Commission Act, but Mason J. did not attach particular importance to this.

Tasmanian Wilderness Society Inc. v. Fraser takes its place, although on a somewhat less exalted level, with the *AAP Case*[4] in 1975 and *Sankey v. Whitlam*[5] in 1978 as the latest of a series in which arguments directed in one way or another at various parts of the financial machinery of the federation have been advanced, unsuccessfully, in pursuit of a quite different goal. In the *AAP Case* the attack was ostensibly launched on the Commonwealth parliamentary power of appropriation and the executive spending power but the object was to prevent implementation of an ambitious social welfare scheme which the Commonwealth Parliament did not have full legislative

[2] *Ibid.* 55.
[3] *Sankey v. Whitlam* (1978) 142 C.L.R. 1.
[4] *Victoria v. Commonwealth* (1975) 134 C.L.R. 338.
[5] (1978) 142 C.L.R. 1.

power to enact. In *Sankey v. Whitlam* the object was to bring former Commonwealth Cabinet Ministers to trial for conspiracy to commit an offence against the law of the Commonwealth, the alleged law being the Financial Agreement.

Of the three, the argument advanced in *Tasmanian Wilderness Society Inc. v. Fraser* was by some margin the weakest. The judgment was correspondingly clearest. The monumental confusion of the *AAP Case* was not repeated. But then again, there was only one judge in *Tasmanian Wilderness Inc. v. Fraser.*

COLIN HOWARD*

HAZLETT v. PRESNELL[1]

Constitutional Law — Location of boundary between New South Wales and Victoria — Applicability of accretion and erosion — Implied executive powers of demarcation — Effect of prescription and acquiescence on territorial sovereignty of States.

In a sense, this case arose from events in 1866, when Messrs Wood and Kirk, the occupiers of Pental Island in the River Murray, isolated diseased stock on the Island and were summonsed to appear at Balranald on 15 June to answer charges under the New South Wales Scab Act. This brought to a head differences between New South Wales and Victoria over the interpretation of two Imperial Acts, 13 & 14 Vict. c. 59 (1850) and 18 & 19 Vict. c.54 (1855), which together established the separate colony of Victoria and determined its boundary with New South Wales. To clarify alleged ambiguities, section 5 of the 1855 Act declared that

> the whole watercourse of the said River Murray, from its Source . . . to the Eastern Boundary of the Colony of South Australia, is and shall be within the Territory of New South Wales.

The question of Pental Island was jointly referred to the Privy Council for resolution. It was awarded to Victoria in 1872, by an exercise of the royal prerogative, not of the judicial power, and in accordance with practice, no reasons were given for the award.

Shortly thereafter the occupiers of Beveridge Island wrote to the Victorian Government to ask whether they also laid claim to that island. This time, the colonies sought to resolve the question amicably by each appointing a surveyor who would jointly determine 'the main channel of the Murray River at Beveridge Island'. It seems implicitly to have been assumed that the main channel must also constitute 'the whole watercourse' within the meaning of the 1855 Act. When the survey revealed that the northern channel was both larger, and discharged more water, than the southern channel, the Colonial Secretary for New South Wales wrote to the Chief Secretary for Victoria on 20 June 1876.

> With reference to my letter of the 14th September last and previous correspondence respecting the arrangement for determining the main channel of the Murray River at Beveridge Island, I have now the honour at the instance of my Colleague the Secretary for Lands to inform you that, as under the reports of Mr. District Surveyor Betts and the Surveyor-General of this Colony there is no question whatever that Beveridge Island belongs to Victoria, the Government of New South Wales lays no claim to it.

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[1] (1982) 43 A.L.R. 1.