Case Note:

PORT MACDONNELL PFA INC v SOUTH AUSTRALIA

INTRODUCTION

The High Court finally has had its say on the constitutionality of the 1979 Australian Offshore Settlement.[1] Much academic ink has been spilt debating the effectiveness of the mechanisms in that settlement;[2] it was quite a constitutional adventure. The 1979 scheme was based on the first ever usage of a mysterious section in the Constitution, section 51(xxxviii).[3] It was also based on a novel usage of the external affairs power in section 51(xxix).[4] Little wonder, then, that it generated so much discussion. The use of section 51(xxxviii), for a second time, to form the spinal column of the 1986 *Australia Act* package only served to intensify this debate.[5]

As we shall see, the court has not tendered an opinion on the entirety of the scheme. Indeed, the view which it proffered is obiter. Even with respect to that part of the scheme considered, many questions remain unanswered. Nevertheless, that component of the 1979 settlement considered has been approved and the momentum thus created likely would see the remainder of the scheme endorsed should it ever be studied by the court. The Canberra edition of the *Australia Act* 1986 also looks to be a more sturdy specimen than ever, given the court's expansive confirmation of the power of section 51(xxxviii) to vary the constitutional position of the States.

As is often the case, *Port MacDonnell PFA Inc v South Australia*[6] arose out of a set of prosaic facts. It involved a challenge to South Australian legislation regulating the rock lobster fishery adjacent to that State. South Australian fishermen produce approximately 50% of the total Australian rock lobster

[1] Or, at least, an important part thereof.

[2] See, for example: Richard Cullen, *Australian Federalism Offshore* (2nd ed Law School, University of Melbourne, 1988); John Waugh, *Australian Fisheries Law*, (Law School, University of Melbourne, 1988); M Crommelin, *Offshore Mining and Petroleum: Constitutional Issues* (1981) 3 AMPLJ 191. R D Lumb, *Section 51.pl. (xxxviii) of the Commonwealth Constitution* (1981) 55 ALJ 328. J Quick and R R Garran, *Annotated Constitution of the Australian Commonwealth* (Sydney, Angus and Robertson, 1901), 651. Garth Nettheim, *The Power to Abolish Appeals to the Privy Council from Australian Courts* (1965) 39 ALJ 39; Leslie Zines, *The High Court and the Constitution* (2nd ed, Canberra, Butterworths, 1987) 273–80; and Keven Booker, *Section 51(XXXVIII) of the Constitution* (1981) 4 (2) UNSW LJ 91.

[3] Cullen, op cit fn 2, 85–7.

[4] Id 102–3.

[5] In 1986, the States requested the Commonwealth, pursuant to section 51(xxxviii), to pass the *Australia Act* 1986. The Commonwealth, in turn, requested the British Parliament to pass the same Act. The two Australia Acts, mirror images of each other, have rescued the States from their constitutional, quasi-colonial time-warp, a legacy, principally, of their decision to have nothing to do with the Statute of Westminster constitutional reforms of the late 1920s. For a thorough discussion of these important constitutional reforms, see Zines, op cit fn 2, 268–80.

[6] (1989) 63 ALJR 671.

catch.[7] The 1979 arrangements arose for consideration because the interlocking State and federal legislation involved purported to rely on important parts of that settlement.

In a unanimous joint judgment, the court found that the management scheme for the rock lobster fishery was largely valid. This finding was based on South Australia's general competence to legislate extraterritorially with respect to matters connected to the State rather than on the relevant component of the 1979 settlement, however. Nevertheless, the court did offer an opinion on the effectiveness of the 1979 arrangements. The court concluded, after sparse discussion, that the *Coastal Waters (State Powers) Act* 1980 (Cth), the first major component of the 1979 settlement,[8] was valid. The brevity of the reasoning causes one to wonder if the court was, at least partly, impressed by the fact that this settlement was the outcome of an *agreement* between the Commonwealth and the States.[9] What I am suggesting is that the remarkably cooperative nature of the 1979 settlement likely fortified the court's disposition towards finding the scheme to be constitutionally valid. The irony is that the Hawke Labor federal government would probably have been quietly pleased had the scheme been found to be invalid for the official policy of the current federal government is to dismantle it.[10] All the other States and the Northern Territory intervened in the case. The Commonwealth did not.

THE 1979 AUSTRALIAN OFFSHORE SETTLEMENT

Since the decision in the *Seas and Submerged Lands* case in 1975,[11] it has been clear that the Commonwealth enjoys virtually complete hegemony beyond the low-water line.[12] After three years of negotiations between the Fraser federal government and the States (pursuant to the Fraser government's 'New Federalism' policy) the 1979 Australian Offshore Settlement was unveiled. What it essentially did was restore the States to the position which they (mistakenly) thought they had enjoyed all along. That is, the Commonwealth, upon the request of the States, gave them title and law making powers over approximately the first three nautical miles offshore. Almost certainly, the Commonwealth retains the power to repeal these concessions at any time, though it is possible some compensation may be payable to the States upon withdrawal of any title to these waters conferred on the States by the *Coastal Waters (State Title) Act* 1980 (Cth) (the second major component in the 1979 settlement).[13]

What the States apparently failed to push for in negotiations towards the settlement (and what the Commonwealth certainly did not concede) was

[7] Id, 676.
[8] Cullen, fn 2, Part 5.3.
[9] In constitutional theory, almost the entirety of the repositories of sovereign power in Australia, apart from the High Court itself.
[10] Cullen, op cit fn 2, 99.
[11] *NSW* v *Commonwealth* (1975) 135 CLR 337.
[12] Cullen, op cit fn 2, 65–9.
[13] Id 110–1.

improved fiscal or ultimate management rights in the far more economically important, continental shelf offshore zone. The Commonwealth retained virtually total control, in both respects, over this offshore zone.[14]

The waters of the sea 'returned' to the States by the 1979 settlement, and over which they were given virtually plenary powers to make laws, are called *coastal waters*. This term encompasses the three nautical mile territorial sea and the internal waters landward of the territorial sea. A distinction needs to be drawn between these *internal waters*, which are waters of the sea landward of the straight baselines and closing lines drawn, in certain circumstances, to establish the inner boundary of the territorial sea (and the boundaries of a number of other offshore zones) and *inland waters*.[15] The term internal waters derives primarily from international law whilst inland waters is a term of municipal law. Inland waters, by way of contrast with internal waters, attach not to the territorial sea, but rather to the land. Inland waters can be completely land-locked marine zones (such as lakes) *or* waters of the sea which, nevertheless, are regarded as being within the territory of a nation much like its dry land for a number or reasons, including being within the 'jaws of land' or due to their long usage.[16] Almost certainly, bodies of water such as Port Phillip Bay and Sydney Harbour are inland waters. In 1977, in *Raptis'* case, the High Court confirmed that the Gulf of St. Vincent and Spencer Gulf were inland waters of South Australia.[17] As it happened, the court in the *Port MacDonnell* case muddled the distinction in keeping with past judicial practice both in Australia and in Canada.[18] This was despite the fact that it was considering legislation which made the distinction quite clear.[19]

The 1979 settlement also made provision for the States to legislate *beyond* coastal waters in certain circumstances. In particular, where the Commonwealth and a State had made an agreement with respect to an offshore fishery there was provision for State law to apply to the entire fishery; that is, both within and beyond coastal waters.

BACKGROUND TO THE PORT MACDONNELL CASE

In November of 1988, the Commonwealth and the State of South Australia

[14] Richard Cullen, *Bass Strait Revenue Raising: A Case of One Government Too Many?* (1988) 6 Journal of Energy and Natural Resources Law, 213, 226–8.

[15] Id 221.

[16] Ibid

[17] *Raptis v South Australia* (1977) 138 CLR 346. See also Cullen, op cit fn 2, 58–60.

[18] See, especially, *Re Strait of Georgia, etc [BC]* (1977) 1 BCR 97 and *Re Attorney-General of Canada and Attorney-General of British Columbia et al* (1984) 8 DLR (4th) 161 and also, Richard Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes*, Federation Press, Parts 4.2, 5.1 and 5.3 (forthcoming).

[19] Section 5(6) of the *Fisheries Act* 1982 (SA) states where the Act is to apply. Section 5(6)(a) speaks of it applying 'to all waters that are within the limits of the State' (namely inland waters). Section 5(6)(b) speaks of it applying 'in relation to any waters of the sea not within the limits of the State that are on the landward side of waters adjacent to the State that are Commonwealth proclaimed waters' (namely internal waters). I confess, I have been 'campaigning' for some terminological exactitude in this area for several years so far with little success. I do not tire easily, however.

entered into an arrangement for the management of the rock lobster fishery adjacent to South Australia.[20] Section 12H(4) of the *Fisheries Act* 1952 (Cth) authorized the Commonwealth to enter into such an arrangement. Section 12L of the same Act provided that once the Commonwealth had entered into such an arrangement, the provisions of the federal Act were not to apply to that fishery. Section 14 of the *Fisheries Act* 1982 (SA) then provided that, where there was an arrangement in place between the Commonwealth and South Australia with respect to a given fishery, the State Act applied to that fishery. Section 12H(3) of the *Fisheries Act* 1952 (Cth) also said that, where a fishery was adjacent to more than one State *and* an arrangement was made between the Commonwealth and those *States*, Commonwealth fisheries law was to apply.

To the extent that these arrangements depended for their validity on the 1979 settlement, section 5(c) of the *Coastal Waters (State Powers) Act* 1980 (Cth) was the section which the court needed to consider. It said that each State had the power to make laws with respect to fisheries beyond coastal waters which were the subject of a management arrangement between the Commonwealth and the State.

THE JUDGMENT

One problem which the court had to address in this particular instance related to the eastern boundary of the fishery in question. The 1979 settlement deals quite thoroughly with the question of State to State, offshore boundaries. In essence, it relies on the precise boundaries expressed in the Schedule 2 of the *Petroleum (Submerged Lands) Act* 1967 (Cth). The areas there stipulated cover that part of the sea (adjacent to each State) from the low water mark, generally, to the outer limit of the continental shelf. They are called *adjacent areas* and each State has one. The *State to State* offshore boundaries between the adjacent areas are drawn using the principle of *equidistance*; that is, these dividing lines are drawn to maintain equidistance from the point of departure on the coastline (the land boundary between the States) over the total length of the offshore boundary lines.

Possibly due to oversight, the provisions designed to facilitate single jurisdiction regulation of fisheries, failed to address the problem which arose in this case. Those provisions were unproblematic when the fishery was clearly contained within one State's adjacent area or where it overlapped State adjacent areas when *both* States were to make an arrangement with the Commonwealth. Here we had a case where the fishery did so overlap (into Victoria's adjacent area) *but* only South Australia had made an arrangement with the Commonwealth. The arrangement did not purport to apply to the entire fishery, only to so much of it as related to South Australia. The problem was that the arrangement set down a *different* offshore boundary line between

[20] This arrangement replaced an earlier arrangement of April 1987, but nothing turned on this point.

South Australia and Victoria (when defining the eastern boundary of the area to be regulated) than that stipulated in the 1979 settlement. The fishery boundary was to follow the meridian of longitude passing through the southernmost point of the Victoria-South Australia land boundary. This demarcation was significantly more favourable to South Australian jurisdiction than the equidistance boundary.

The court found that the eastern fishery boundary was invalid, notwithstanding the open-ended wording of the offshore fishery components of the 1979 settlement which, it was argued, allowed for such a border. Any fishing arrangement, State to State offshore boundaries had to comply, the court said, with the equidistant boundary system embodied elsewhere in the 1979 settlement legislation. The court read the relevant elements in the federal Fishing Act down, however. That is, the fact that (pursuant to the South Australia-Commonwealth arrangement) the *Fishing Act* 1982 (SA) invalidly purported to regulate rock lobster fishing, not just within a segment of the Victorian adjacent area *but* also within a portion of Victorian coastal waters did not result in the invalidity of the entire regulatory scheme. It simply meant that the scheme did not extend as far as its terms asserted.[21]

The court then went on to endorse the validity of the South Australian regulation of the fishery. Their Honours said that the legislation comfortably passed the test of having a sufficient link with the peace, order and good government of South Australia. This extraterritorial nexus test, as it is sometimes known, was recently restated in relatively undemanding terms by the court in *Union Steamship Company of Australia Ltd v King*.[22] Thus the challenged South Australian legislative component of the fishery management scheme was a valid exercise of the extraterritorial legislative power of the State Parliament. Moreover, the court noted that there was no intrusive Commonwealth law here giving rise to inconsistency problems under section 109 of the Constitution:[23] the field was left clear for the State legislation. Indeed, the *Fisheries Act* 1952 (Cth) in section 12L expressly provided for the field to be left open for the State legislation.

The widening of the States' extraterritorial powers in the *Union Steamship* case and in this case has, thus far, been in the context of *offshore* regulation. Simple geographic reasons dictate that rarely will this give rise to conflicts between the laws of two *States*, although such a conflict would have arisen in this case had the court not redrawn the eastern boundary of the fishery.[24] The court seems to be signalling, however, that its recent generous reading of State extraterritorial law-making capacity has to be seen within the context in which it has occurred; the offshore. Attempts by the States to regulate activities within or connected to other States in conflict with the regulation of that same activity within that other State raises additional matters for consideration. My own view is that the court is likely to persist with more limited

[21] *Port Macdonnell* case, (1989) 63 ALJR 671, 679.
[22] (1988) 62 ALJR 645.
[23] On the doctrine surrounding the operation of section 109, see Colin Howard, *Australian Federal Constitutional Law* (3rd ed, Sydney Law Book Company, 1985), 37–60.
[24] *Port MacDonnell* case (1989) 63 ALJR 671, 682.

interpretations of competence in such cases as a prophylactic measure. The prospect of endless State to State conflict of laws litigation suggests itself as a most likely development if the High Court *should* decide to give the green light to land-bound State extraterritorial adventures. May we be spared that.

Strictly speaking, as the court found that the fishery regulation was within the *general* competence of the State, there was no need to go on and consider the validity of the conferral of power[25] on South Australia by the State Powers Act and more specifically, by section 5(c) of that Act. Nevertheless, as the court had heard full argument on the validity of section 5(c), it felt it appropriate to express its view.

In fact the court looked not just at section 5(c) but at the validity of the State Powers Act generally. It should be noted that the court did *not* consider the validity of the other major legislative component in the 1979 settlement, the State Title Act. In the event, the court found the State Powers Act to be constitutionally valid.

The Act was the first ever Act to rely on section 51(xxxviii) of the Constitution.[26] That section is worded as follows:

> 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 exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

In accordance with section 51(xxxviii), the State Powers Act was passed at the request of all the States. It conferred full powers over coastal waters and certain other powers (such as that with respect to fisheries) beyond coastal waters within the adjacent areas of the States. The preponderant view of the many commentators on this section was that, despite the obscure wording of section 51(xxxviii), the Act probably was valid.

The court endorsed this supposition, though pursuant to some sparse reasoning. The court began its consideration of the scope of section 51(xxxviii) with a couple of barely coherent passages concerning the baffling reference to the Federal Council of Australasia in the section which it opined was of little significance in any event.[27] Essentially the court divined the meaning of the section from remarks made by Sir Samuel Griffith, about a

[25] Or confirming of power (see below for the significance of this distinction).

[26] The section has since been used to enact the *Australia Act* 1986 (Cth) which, together with the *Australia Act* 1986 (UK), severed a number of (though by no means all) colonial links between the States, especially, and the United Kingdom. See further, Cullen, op cit fn 2, 108–10.

[27] *Port MacDonnell* case (1989) 63 ALJR 671, 683. I agree that the point is of no constitutional moment, though the peculiar words raise some intriguing theoretical difficulties. See further, Cullen, op cit fn 2, 86 and 89.

precursor of section 51(xxxviii), at the Sydney Constitutional Convention of 1891. These remarks, according to the court, supported the view that section 51(xxxviii) was inserted to enable State constitutions to be made or varied within Australia.[28] With respect, the literature would suggest that matters are not quite so clear as this.[29] Perhaps more tellingly, the Constitution itself throws some doubt on this line of reasoning about the purpose of the section. If such was its primary purpose it is hardly clear from the wording of the section itself. It is hard, also, to reconcile this reasoning with the presence of section 106 in the Constitution (more of which shortly) which provides that the constitutions of each State are to continue until altered in accordance with their *own* constitutional change mechanisms.

Frankly, the Convention debates reveal evidence of significant political schizophrenia on the part of the delegates. At times they talk as if Australia was about to become a fully paid up and completely independent member of the international fellowship of nations. There is equal evidence, however, to suggest that most delegates *concurrently* still saw a federated Australia maintaining its close relationship with the 'mother' country. More importantly, the 'mother' country rather favoured the latter, hierarchical association, witness the emasculation of section 74 of the Constitution which, in its original version, prohibited appeals to the Privy Council. It seems clear that the founding fathers never formulated a thorough and detailed political philosophy for the new nation. Rather, they were pragmatic problem solvers who saw significant economic and defense benefits in federating. Intercolonial jealousies and vested interests made any closer association out of the question at the time. Accordingly, I find the High Court's characterization of section 51(xxxviii) as a considered scheme for 'patriating' State constitutions improbable.[30]

Having identified the provenance of section 51(xxxviii) the court spent some time identifying the 'overall content' of the power. Their Honours noted that the passage of time and Australia's growth towards international independence had eroded any limitations on the power's use that may have prevailed at the time of federation.[31]

The court was then drawn into a tangled argument about whether section 51(xxxviii) permits the 'confirming' of existing power as well as the 'conferring' of new powers on the States. This problem is an old one, familiar to the court; in characterizing section 51(xxxviii) must any legislation based upon it predominantly exhibit the character of the section and no other? Thus, to the extent that the State Powers Act *confirms* power does it *fail* to fall within

[28] Id, *Port MacDonnell* case, 683–4.

[29] J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth* (Sydney, Angus and Robertson 1901), 651 and see the other monographs and articles at fn 2.

[30] My view, briefly, is that the section did not have a clear purpose, but it likely addressed, in very woolly fashion, a range of felt, but poorly articulated concerns, probably including the one identified by the court. It survived into the Constitution because its obscure wording did not look as if it threatened any vested interest. It had the qualities, in other words, of being peculiar but harmless and, who knows, possibly of use some day. As Australia gradually shed its colonial status, the section did assume a new importance, however. See further, Cullen, op cit fn 2, 88–93.

[31] In this regard, see Cullen, op cit fn 2, 90–3.

section 51(xxxviii) under this test of characterization because legislation so confirming was *not* an exclusive preserve of the United Kingdom Parliament at the time of federation? In the event, an old High Court stand-by, multiple characterization, rides to the rescue.[32] The court concluded that the dual character of the State Powers Act in both *conferring* and *confirming* power was not fatal to its validity. In any event, the court rightly suggested that a stricter characterization would only have rendered the *confirming* aspect of the State Powers Act ineffective under section 51(38). Of course, to the extent that section 51(xxxviii) may be lacking, the Act likely is supported by section 51(xxix), the external affairs power and, especially in this case, by section 51(x), the fisheries power.[33]

Finally, the court assessed the impact of section 106 of the Constitution on the State Powers Act. That section provides that, 'subject to this Constitution', State constitutions are to continue until altered in accordance with those State constitutions. The State Powers Act, as its title States, aims to alter State powers, so there would appear to be a prima facie problem with section 106. The court ponders, however, (in more oblique language) whether a law granting *greater* power to the States ought be thwarted by section 106. Their Honours then conclude that the dilemma arising from the fact that both section 51(xxxviii) and section 106 are expressed to be 'subject to this constitution' must be resolved in favour of section 51(xxxviii). This assertion is not supported by argument. It seems to be driven by the court's approbative impression of the scheme as a whole.[34]

CONCLUSION

The High Court ultimately curtailed the purported extent of South Australia's regulation of the adjacent rock lobster fishery but not the regulation itself. That regulation was valid as an exercise of the State's general powers to legislate extraterritorially as a sufficient nexus with the State could be demonstrated. In obiter dicta, the court also said that the State Powers Act was valid. This conclusion is altogether sound. The reasoning supporting it cannot be so readily catalogued. The court seemed preoccupied with issues at the margin of the debate over section 51(xxxviii), such as the conferred-confirmed dichot-

[32] By multiple characterization I mean finding legislation valid notwithstanding that it may be characterizable in a variety of ways, provided one of those characterizations falls within a head of Commonwealth power. The High Court has endorsed this practice continually in a number of cases, including: *Commonwealth v Tasmania* (1983) 158 CLR 1; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 61 ALJR 171, 174; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; and *Fairfax v Commissioner of Taxation* (1965) 114 CLR 1.

[33] The court briefly alluded to this possibility. The *Port MacDonnell* case (1989) 63 ALJR 671, 686.

[34] To the extent that the court was informed in its decision by a view that they ought not readily interfere in political construct such as this due to it having been devised and enacted by all the sovereign legislatures in Australia, I would endorse the approach. The court should, however, have been more explicit about this reason for endorsing the State Powers Act.

omy. The characterization dilemma thrown up by this dichotomy is real but at the end of the day, even if it did *partly* threaten the validity of the State Powers Act, no adverse consequences arose for the States. Moreover, the legislation in total very likely represents a valid exercise of the external affairs power in section 51(xxix)[35] and, in part, an exercise of the section 51(x) fisheries power. However, the explanation for the dearth of comprehensive argument seems to reflect, in part at least, the court's respect for the political pedigree of the scheme.

It should be noted that the court did not discuss any of the other components of the 1979 settlement and, in particular, did not consider the other major legislative element, the State Title Act. The likelihood, now, of the court endorsing most if not all of the other elements in the 1979 settlement, including the State Title Act, must be great, however.

The court also did not consider whether, constitutionally, the Commonwealth can unilaterally raze the entire scheme. The court did, of course, make it clear that *it* is not going to dismantle the 1979 settlement. As was observed earlier, the policy of the Federal Labor Party, since the scheme's inception, has been to rescind it. I believe that the Commonwealth does retain the power to repeal the scheme unilaterally[36] but the political price is too high and the economic benefits[37] too slight for it ever to use that power. In effect, the court has cemented the 1979 Australian Offshore Settlement, already a sturdy political construct, more firmly into place than ever.

Finally, the judgment plainly has strengthened the foundations of the *Australia Act* 1986 (Cth). This Australian version of that Act was rooted in section 51(xxxviii). Of course, the Australia Act initiative was buttressed by a British version of the same Act. Ultimately, however, the disquiet expressed by Professor Zines about the validity of section 15 in the two Australia Acts remains. To the extent that that section appears to limit the power of alteration in section 128 of the Constitution, then it surely is invalid in the Canberra edition of the Australia Act. Whether it also is invalid in the British version is a larger mystery.[38]

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[35] See Keven Booker, *Section 51(XXXVIII) of the Constitution* (1981) 4(2) UNSW LJ 91.

[36] Cullen, op cit fn 2, 110–1. Some compensation may well be payable pursuant to section 51(xxxi) of the Constitution, however.

[37] A major, revenue ripe, petroleum or other mineral find within State coastal waters might cause a revision of this conviction.

[38] Zines, op cit fn 2, 270–3.

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