CASE NOTES

MURPHYORES INCORPORATED PTY LTD v. THE COMMONWEALTH OF AUSTRALIA[1]

Constitutional law — Trade & Commerce — Environmental protection — Export — Minerals — Constitution s. 51(i) — Customs Act 1901 (Cth) s. 112 — Customs (Prohibited Exports) Regulations reg. 9 — Environmental Protection (Impact of Proposals) Act 1974 (Cth).

The case under review concerns the question of whether the Federal Parliament can, through use of its power under section 51(i) of the Constitution, prohibit altogether the export of particular goods and, more particularly, whether a relaxation of such an absolute ban on certain conditions is an exercise of the trade and commerce power or an exercise of a power related to the conditions of the relaxation (in this case environmental considerations).

That the case needs explanation was evidenced in 1975 by the then Prime Minister, Mr Whitlam, stating that the question was one of whether "environment factors come within trade and commerce with other countries".[2]

The case has interest wider than itself, particularly when one considers the mineral wealth of Australia, the necessity to export the minerals so as to reach a sufficient market and the alteration to the environment brought about by the extraction of minerals.

The plaintiffs were the holders of mining leases issued under the provisions of the Mining Act 1968 (Qld) which entitled them to extract zircon and rutile from the sand comprising Fraser Island (off the coast of Queensland). Because of the relative absence of demand in Australia for commercial quantities of these minerals, it was and is of great importance to the plaintiffs to be able to export them. This they cannot do without the written permission of "the Minister" issued pursuant to regulation 9 of the Customs (Prohibited Exports) Regulations.

This regulation is made pursuant to section 112 of the Customs Act 1901 (Cth) which in turn relies for its validity upon section 51(i) of the Constitution (the trade and commerce power). Prior to assent being given to the Environment Protection (Impact of Proposals) Act 1974 (Cth), (hereafter called "the Act"), the then Minister indicated that approval under the regulation would be forthcoming to the plaintiffs in due course. The Act provided, *inter alia*, for inquiry into the environmental aspects of projects such as that contemplated on Fraser Island. Subsequently to the Act coming into force the Minister directed that an inquiry be made into:

---

[1] (1976) 50 A.L.J.R. 570; (1976) 9 A.L.R. 199; High Court of Australia; Barwick C.J., McTiernan, Gibbs, Stephen, Mason, Jacobs and Murphy JJ.

[2] Australian Financial Review, 22 May 1975.

> All of the environmental aspects of the making of decisions by or on behalf of the Australian Government in relation to the exportation from Australia of minerals (including minerals that have been subjected to processing or treatment) extracted or which may hereafter be extracted from Fraser Island in the State of Queensland.[3]

The plaintiffs in this case sought declarations of invalidity of the Act and orders restraining the Commissioners from holding the inquiry and restraining the Minister from having regard to any report of the inquiry or to any environmental aspects in deciding an application to export pursuant to regulation 9.

A subordinate question of interest was the plaintiffs' *locus standi* to bring this action. In the event this question was not tested as the Solicitor-General waived any objections to competency. The suggested right of the plaintiffs to relief was said to arise as a result of the implied threat of criminal prosecution for failing to answer a summons to attend the environmental inquiry, which if the plaintiffs were correct, was constituted pursuant to an Act which was beyond the power of the Parliament.

The case was heard by a full Bench of seven Justices who were unanimous in allowing the defendants' demurrer to the plaintiffs' statement of claim.

Apart from agreeing with Stephen J. in his conclusions and reasoning, the Chief Justice found that the Act was within the competence of Parliament. Further he could find no reasons to restrain a decision made *bona fide* pursuant to the provisions of the Act upon the matters contemplated by the Act.

McTiernan J. relied upon *R.* v. *Anderson*; *ex parte Ipec-Air Pty Ltd*[4] to hold that regulation 9 and section 112 of the Customs Act were *intra vires* the Constitution. He further relied upon *Herald and Weekly Times Ltd* v. *The Commonwealth*[5] to find that in exercising the power the Minister need not have regard only to trade and commercial consideration.

Murphy J. found that the Act and regulation 9 were valid but that there was a duty on the Minister to consider an application for approval under regulation 9 and that in considering the application the Minister might have regard to national policies not only in trade and commerce. He also found that section 11 of the Act was validly brought into operation and that the Minister might have regard to the results of the inquiry.

The comprehensive judgments are those of Stephen and Mason JJ.

After relating the principal issues Stephen J. described the critical questions as:

---

[3] (1976) 50 A.L.J.R. 570, 572.
[4] (1965) 113 C.L.R. 117.
[5] (1966) 115 C.L.R. 418.

> whether any and, if so, precisely what duties are imposed upon the Minister for Minerals and Energy in the manner of exercise of his power to approve of exports under reg. 9(3).[6]

His Honour went on to explain why he assumed the validity of regulation 9; it was because it was within the regulation-making power of the Customs Act and section 51(i) of the Constitution. More specifically, on the constitutional question, he was concerned to emphasize that section 51(i) is not a purposive power:

> "The Federal Parliament, having power to legislate with respect to overseas trade and commerce, is legislating concerning a matter at the very heart of that subject matter when it prohibits the exportation of specified classes of goods, and none the less so when its legislation takes the form of a power to make regulations prohibiting all export of particular classes of goods coupled with a dispensing power. Such a regulation remains one within the four corners of the trade and commerce power since its subject matter is the exportation of goods.
>
> In those instances in which the legislative power of the Commonwealth is granted in purposive terms, as in s. 51(vi), it is necessary, in determining constitutional validity, to have regard to purpose and this applies no less to administrative acts than to legislation; hence reference, in such cases as *Shrimpton* v. *The Commonwealth*[7] to the need to ensure that the stream does not rise above its source. But where the source of power is found in non-purposive subject matter, as in s. 51(i), the same problem does not present itself. Thus once legislation addresses itself to the subject matter of the prohibition of exports, central to the trade and commerce power, a regulation implementing that prohibition will inherently be within subject matter; so also will be an administrative decision relaxing, or failing to relax, that prohibition in a particular case; so long as that is the nature of the decision it will be within power and there is no question of the stream rising above its source. The source is trade and commerce with other countries and the stream of legislation, regulation and administrative decision flows from it and concerns one and the same subject matter, all within constitutional power.[8]

His Honour then posed the question of whether the maker of the decision had duly exercised his decision making power and said, "This question must depend for its answer primarily upon the legislation which confers the power".[9]

After review of various of the Customs regulations His Honour concluded that: "only something amounting to lack of bona fides could justify curial intervention in decisions made in the exercise of the power to relax export prohibitions".[10]

---

[6] (1976) 50 A.L.J.R. 570, 573.
[7] (1945) 69 C.L.R. 613, 630.
[8] (1976) 50 A.L.J.R. 570, 574.
[9] *Ibid.*
[10] *Id.* 575.

His Honour then found that the Minister was free to have regard to the environmental aspects of the sand mining and free to have regard to the report of the inquiry.

This case contains a concise statement on the correct method of characterising Commonwealth laws and includes a confirmation of the incorrectness of the doctrine of reserved powers.

Mason J.'s judgment in particular further weakened the authority of *R.* v. *Barger*[11] and helped to dispose of an isolated, anomalous statement of the approach to characterisation by Dixon J., as he was then, in *Crowe* v. *The Commonwealth*[12] Mason J. noted that:

> A law which absolutely or conditionally prohibits exportation of goods is a law that operates on that topic. It is not a law which ceases to deal with that topic because it confers a discretion, unlimited in scope, to permit exportation of particular goods. In this respect it differs from a law whose connection with the subject matter of power is more remote, when the limits of a statutory discretion may become important in characterizing the law . . .
>
> The point here is that by imposing a conditional prohibition on exportation, a prohibition which may be relaxed according to the exercise of a discretion, the law is dealing with exportation of goods, a matter at the heart of trade and commerce with other countries. It is not to the point that the selection may be made by reference to criteria having little or no apparent relevance to trade and commerce; it is enough that the law deals with the permitted topic and it does not cease to deal with that topic because factors extraneous to the topic may be taken into account in the relaxation of the prohibition imposed by the law. It is now far too late in the day to say that a law should be characterized by reference to the motives which inspire it or the consequences which flow from it.[13]

This approach to characterisation is in the tradition of the *Engineers Case*[14] and has helped the Commonwealth to extend its influence indirectly over topics not expressly within its powers. Again, Mason J. recognised this point:

> It is one thing to say that the trade and commerce power does not enable the Commonwealth to regulate and control directly matters standing outside the subject matter of power, such as the environmental aspects of mining in Queensland. It is quite another thing to say that the Commonwealth cannot in the exercise of that power make laws which have a consequential and indirect effect on matters standing outside the power, even by means of prohibiting conditionally engagement in trade and commerce with other countries. It is no objection to the validity of a law otherwise within power that it touches or affects a topic on which the Commonwealth has no power to legislate.[15]

---

[11] (1908) 6 C.L.R. 41: see also *Fairfax* v. *Federal Commissioner of Taxation* (1965) 114 C.L.R. 1.
[12] (1935) 54 C.L.R. 69, 70.
[13] (1976) 50 A.L.J.R. 570, 577.
[14] (1920) 28 C.L.R. 129.
[15] (1976) 50 A.L.J.R. 570, 578.

His Honour dealt also with the submission that the reasons given for exercising a statutory discretion might be extraneous to any objects the legislature had in mind, by saying that:

> the point at which the argument breaks down is when it asserts that the environmental aspects of mining operations proposed to be carried on for the extraction of ore for the concentrates intended to be exported are extraneous to the scope and purpose of the *Customs Act* and the *Customs (Prohibited Exports) Regulations*[16]

Generally the unanimity of the Justices and the brevity of the judgments seem to entrench the principles under review in no uncertain fashion.

A postscript to this case is that following the plaintiffs' declining to participate in the inquiry held pursuant to the Act (and concluded before the hearing of the case) and as a result of the findings of the inquiry, permission to export the minerals was refused by the Minister as from 1 January 1977.

S. B. AUSTIN*

STATE OF VICTORIA v. THE COMMONWEALTH OF AUSTRALIA[1]

Constitutional law — Appropriations power — Constitution ss. 51, 52, 61, 81, 83, 94, 96 — Expenditure pursuant to an appropriation Act — Executive power — National implied power — Standing — Justiciability — Appropriation Act (No. 1) 1974 — 1975 s. 3, sched. 2, div. 530, item 4.

Since the *Uniform Tax Cases*[2] the Commonwealth's pre-eminence in financial matters has never been questioned. The power of the purse has given to the Commonwealth control in many areas of governmental activity over which it has no direct constitutional power. This has been achieved largely through the medium of section 96 grants, though it has not been solely limited to such means. The general appropriations power of section 81 has also been relied on to fund Commonwealth involvement in a wide range of activities. Despite the importance of this method of funding the extent and scope of section 81

[16] *Id.* 579.

* Barrister-at-Law (N.S.W.).

[1] (1975) 50 A.L.J.R. 157; (1975) 7 A.L.R. 277. High Court of Australia; Barwick C.J., McTiernan, Gibbs, Stephen, Mason, Jacobs and Murphy JJ.

[2] *First Uniform Tax Case* (1942) 65 C.L.R. 373, *Second Uniform Tax Case* (1957) 99 C.L.R. 575.