

A TORRENT OF WORDS: A BIBLIOGRAPHY AND CHRONOLOGY ON THE FRANKLIN DAM CASE

BY JAMES A THOMSON*

Most High Court decisions which touch upon the Australian Constitution are posthumously examined in academic literature.¹ Some, though too few, have been subjected to more lengthy and detailed analysis.² The *Franklin Dam* case³ is not an exception. Within eighteen months, it has consumed a substantial number of pages of commentary. Prominent are discussions concerning specific constitutional powers — corporations, race, external affairs and nationhood — and prohibitions — ss 51(xxxi) and 100 and implied restrictions. General premises and themes which underlie the processes of constitutional adjudication have attracted rather less attention. There has been some enunciation of interpretative principles⁴ and discussion of the political dimensions of judicial review.⁵ Further elaboration would be invaluable. Perhaps, commentators are waiting for the dust to settle before advancing to these, and other, more nebulous aspects of constitutional decision-making. When they do so, the dimensions of Australian constitutional law scholarship could be irretrievably enhanced.

* BA LLB (Hons) (WA), LLM, SJD (Harv).

¹ Several bibliographies are listed in J A Thomson, "Constitutional Interpretation: History and the High Court: A Bibliographical Survey" (1982) 5 U.N.S.W.L.J. 309, 313 n 8. Other bibliographies are in C Howard, *Australian Federal Constitutional Law* (2nd ed 1972) xxxii-xxxvii; R Eggleston & E St John, *Constitutional Seminar* (1977) 63-68; M Coper, *Freedom of Interstate Trade Under the Australian Constitution* (1983) 371-380; G Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983) 329-346; *Federalism and Intergovernmental Relations in Australia, Canada, The United States and Other Countries: A Bibliography* (compiled by A A Liboiron) (1967) 9-25; L F Crisp, *Australian National Government* (5th ed 1983) 492-509.

² On the *Bank Nationalisation* case (1948) 76 CLR 1 (HC), (1949) 79 CLR 497 (PC) see eg A L May, *The Battle for the Banks* (1968); K Tennant, *Evatt: Politics and Justice* (rep 1972) 226-230, 241-243, 245-246; D Marr, *Barwick* (1980) 52-74; G Sawyer, "Bank of New South Wales and Others v Commonwealth. The Bank Nationalisation Case" (1948) 22 ALJ 213; Sawyer, "The Case of Bank Nationalization — a Study in Australian Government" (1950) 32 (3rd ser Pt III & IV) J Soc Comp Leg & Int L 17. On the *Communist Party* case (1951) 83 CLR 1 see eg K Tennant, *supra* 263-69; D Marr, *supra* 78-88; Beasley, "Australia's Communist Party Dissolution Act" (1951) 29 Canadian Bar Rev 490; Anderson, "Australian Communist Party v The Commonwealth" (1951) 1 U Qld LJ 34; G Sawyer, "Defence Power of the Commonwealth in Time of Peace" (1953) 6 Res Judicatae 214; Sheldon, "Public Opinion and High Courts: Communist Party Cases in Four Constitutional Systems" (1967) 20 West Pol Q 341, 353-357; Derham, "The Defence Power", in R Else-Mitchell (ed), *Essays on the Australian Constitution* (1961) 157, 177-183; L Zines, *The High Court and The Constitution* (1981) 177-201.

³ *Commonwealth v Tasmania* (1983) 46 ALR 625; 55 ALJR 450.

⁴ See eg C Saunders, "The National Implied Power and Implied Restrictions on Commonwealth Power" (1984) 14 FL Rev 265; L Zines, "The State of Constitutional Interpretation" (1984) 14 FL Rev 275.

⁵ See eg Galligan, "The Dams Case: A Political Analysis" in M Sornarajah (ed) *The South West Dam Dispute: The Legal and Political Issues* (1983) 102.

CHRONOLOGY**COMMONWEALTH V TASMANIA — HISTORICAL BACKGROUND**

- 1955 Lake Pedder National Park in South West Tasmania proclaimed a scenic reserve.
- 1967 Tasmanian Hydro-Electric Commission — [HEC] —, report on the Gordon River Power Development Stage One (1967), recommended that lake Pedder be flooded as part of a middle Gordon power development project. This report described the lake Pedder scheme as the first stage of a comprehensive hydro-electricity power development for the Gordon river and its tributaries.
Tasmanian legislation to enable work on project.
- 16 Nov 1972 General Conference of the United Nations Educational, Scientific and Cultural Organization [UNESCO] adopted the Convention for the Protection of the World Cultural and Natural Heritage.
- 1973 Whitlam Government “Committee of Inquiry into the Future of Lake Pedder in Tasmania”.
- 1974 Flooding of lake Pedder completed.
- 22 Aug 1974 Convention ratified by Australia.
- 1975 National Parks and Wildlife Conservation Act 1975 (Cth).
- 17 Dec 1975 Convention came into force.
- Oct 1979 Hydro-Electric Commission recommended the building of a dam on the Gordon river, downstream of the junction of the Gordon and Franklin rivers. [Hydro-Electric Commission of Tasmania, Report on the Gordon River Power Development Stage Two (1979)].
- July 1980 By the time HEC proposal was debated the Tasmanian State Labor Party was divided. The anti-dam lobby had sympathy for the environmental issue and was disillusioned with the strategy of cheap hydro-electricity for industry. Tasmanian ALP decided not to adopt HEC proposal but to build a dam on the Gordon river above Olga.
- Nov 1980 A Gordon above Olga Bill passed the House of Assembly (19-16) but not Legislative Council. Houses deadlocked through most of 1980.

- Dec 1980 Legislative Council Select Committee Progress Report recommended against the Olga Compromise in favour of Gordon below Franklin Scheme.
Legislative Council so amended and passed (13-4) the Assembly Bill.
Premier Doug Lowe announced that a Royal Commission would be appointed to inquire into powers of the Legislative Council.
- May 1981 Premier Lowe survived (13-8) a motion of no confidence.
- July 1981 State ALP Council decided to reject the Gordon above Olga scheme and called for a referendum.
- Sept 1981 Legislative Council Select Committee's final report recommended that the Gordon below Franklin scheme start.
Government announced it would introduce legislation for a referendum.
Senate Select Committee to inquire into the Tasmanian power project.
- 22 Sept 1981 Premier Lowe wrote to Prime Minister Fraser (Lib) requesting that a nomination of the Western Tasmanian Wilderness National Parks — [the Parks] — for listing in the World Heritage List of the Convention be forwarded by the Commonwealth to the World Heritage Committee.
- 13 Nov 1981 Commonwealth submitted nomination to World Heritage Committee.
- Nov 1981 Robin Gray won leadership of Tasmanian Liberal Party.
Premier Lowe defeated in a no confidence motion, resigned from ALP.
Harry Holgate ALP Premier (pro-dam supporter).
- Dec 1981 Referendum
— ballot papers did not include a no dam option
— 53% for Gordon below Franklin scheme
— 38% declined to choose either scheme — many write 'no dams' across ballot
— 9% for Olga scheme.
Tasmanian Parliament prorogued.
- Mar 1982 Tasmanian Parliament reconvened.
Holgate ALP government defeated in no confidence motion.
- 15 Apr 1982 International Union for Conservation of Nature and Natural Resources reported to the World Heritage Committee recommending that the Parks be listed on the World Heritage List.
- May 1982 Tasmanian elections
— ALP lost
— Libs won by 3 seat majority — Robin Gray Premier.
- June 1982 41% of voters wrote 'no dams' across ballot paper in ACT House of Assembly election.

Bureau of the World Heritage Committee met to consider nominations and resolved to request from Australia a statement of intent regarding construction of dams in the Parks.

- 18 June 1982 *Tasmanian Wilderness Society Inc v Fraser* (1982) 56 ALJR 762; 42 ALR 51.
- 28 June 1982 Assent to Gordon River Hydro-Electric Power Development Act 1982 (Tas) authorizing HEC to construct dam.
- 28 June 1982 Mr Gray requested Mr Fraser to withdraw the nomination of the Parks for inclusion on World Heritage List.
- July 1982 ALP National Conference adopted a no dams policy [54 (including Hawke) to 45 (including Hayden)] for 1983 election.
- 12 July 1982 Gordon River Hydro-Electric Power Development Act 1982 (Tas) came into operation.
- Aug 1982 Fraser refused Gray's request to withdraw nomination.
- 17 Aug 1982 Proclamation under National Parks and Wildlife Act 1920 (Tas) excised 14,125 hectares from Franklin-Lower Gordon Wild Rivers National Park.
- Oct 1982 World Heritage Bill introduced in Senate by Australian Democrat Party.
- Nov 1982 Senate Select Committee on South West Tasmania, Future Demand and Supply of Electricity for Tasmania and Related Matters (1982) — recommended a three year delay in hydro schemes in South West Tasmania.
- 4 Dec 1982 Flinders by-election in Victoria
— all candidates ran on an "anti-dams" ticket
— 40% of voters wrote "no dams" on ballot
— "no dam" liberal candidate narrowly won.
- 8 Dec 1982 World Heritage Committee received response from Commonwealth that Tasmania constructing a dam and that Commonwealth was discussing the scheme with Tasmania.
- 9 Dec 1982 Fraser announced that the Commonwealth would not stop the dam.
- 13-17 Dec 1982 World Heritage Committee met and decided to enter the Parks in the World Heritage List.
- Jan 1983 Fraser offered Gray \$500 million if he cancelled the dam. Gray refused this offer.
- 3 Feb 1983 Fraser announced a double dissolution and elections for March 5.
Hawke replaced Hayden as Leader of ALP.
- 5 Mar 1983 ALP won House of Representatives election
Liberals won all 5 Tasmanian House of Representatives seats.
- 31 Mar 1983 World Heritage (Western Tasmanian Wilderness) Regulations — [pursuant to National Parks and Wildlife Conservation Act 1975] — notified in Commonwealth Gazette.

- 6 Apr 1983 Writs filed in High Court by Tasmania and Commonwealth under 1975 Act:
C6 of 1983 — *Commonwealth v Tasmania*.
C8 of 1983 — *Tasmania v Commonwealth*.
- 22 May 1983 Assent to World Heritage Properties Conservation Act (Cth) 1983.
- 25 May 1983 World Heritage Properties Conservation Regulations notified in Gazette.
- 26 May 1983 10 Proclamations made under 1983 Act published in Gazette.
- 27 May 1983 Amendments to Regulations under 1975 and 1983 Acts notified in Gazette.
- 27 May 1983 Writ issued by Commonwealth — 1983 Act — C12 of 1983 — *Commonwealth v Tasmania*.
- 31 May 1983 Argument commenced before High Court
— New South Wales and Victoria intervened in support of Commonwealth.
— Queensland intervened in support of Tasmania.
- 1 July 1983 Decision — *Commonwealth v Tasmania*.
- Post July 1983 Commonwealth/Tasmanian negotiations as to compensation.

BIBLIOGRAPHY

- 1 M Sornarajah (ed) *The South West Dam Dispute: The Legal and Political Issues* 1983.
- 2 S Walker, "A Legal Wilderness Preserved" (1983) 57 Law Institute J 756-758.
- 3 J Goldring, "Initial Reactions to the Dam Case: Dams or Floodgates?" (1983) 8 Legal Service Bull 156-160.
- 4 Current Topics, "The Twilight of State Sovereignty?" (1983) 57 ALJ 487-489.
- 5 M Coper, "Commentary" in *The Franklin Dam Case* (1983) 1-26.
- 6 M Coper, "Franklin, M'Dear, I Don't Give a Dam! (or, The Franklin Dam Case: Is it a Watershed and Will it Open the Floodgates?)" Annual 83 [Uni NSW Law School] (1983) 7-9.
- 7 G Winterton, "States Cannot Rely on Courts to Fight for them" (4 July 1983) *The Australian* 7.
- 8 C Howard, "The Constitutional Riddle involved in *Hawke v Gray*" (12-13 March 1983) *The Weekend Australian* 14.
- 9 E Ward, *The Dams Case* (Basic Paper no 18 of 1983) (Dept of Cth Parl Library — Legislative Res Service).
- 10 M Wilcox, "The 'Dam Case' — Implications for the Future" (Oct 1983) 11 no 5 Habitat 32, 34.
- 11 G Evans, "The Tasmanian Dam Case: Background and Implications" (1984) 65 *Parliamentarian* 10-21.

- 12 B Burke, "Federalism after the Franklin" (1984) 56 No 1 Aust Q 4-10.
- 13 G Samuels, "The End of Federalism?" (1984) 56 No 1 Aust Q 11-19.
- 14 Note, "Constitutional Waters" [1983] Reform 162-164.
- 15 Commentaries in (2-3 July 1984) *The Weekend Australian* 1, 8, 9.
- 16 "A Forum — States Rights — This Real Issue?" (1983) 1 *The Political Animal* 67-82 (U Tas Students Pol Ass).
- 17 J Terry, "Damned Wilderness & Special Laws" (Aug 1983) 8 *Aboriginal L Bull* 2-3.
- 18 G Sawyer, "Some Little-noticed aspects of the Tasmanian Dams case" (13 July 1983) *The Canberra Times* 2.
- 19 M Crommelin, "The Significance of the Franklin Dam Case" (7 Nov 1983) in External Affairs Sub-Committee of Aust Constitutional Convention, *Report to Standing Committee* (Sept 1984) Appendix B.
- 20 M Crommelin, "Responses to the Franklin Dam Case" (9 May 1984) in External Affairs Sub-Committee of Aust Constitutional Convention, *Report to Standing Committee* (Sept 1984) Appendix L.
- 21 J Finnis, "Reforming the Expanded External Affairs Power" (Nov 1983) in External Affairs Sub-Committee of Aust Constitutional Convention, *Report to Standing Committee* (Sept 1984) Appendix C.
- 22 C Howard, "External Affairs Power of the Commonwealth" (Sept 1983) 60 No 4 *Current Affairs Bull* 16-24.
- 23 T Connolly, "The Tasmanian Dam Case: Treaties and the Australian Constitution" (1983) 54 *Aust Foreign Affairs Rec* 307-309.
- 24 H Connell, "External Affairs Power and the domestic implementation of treaties" (1983) 54 *Aust Foreign Affairs Rec* 492-499.
- 25 P Lane, "The Federal Parliament's External Affairs Power" (1983) 57 *ALJ* 554-559.
- 26 M Crock, "Federalism and the External Affairs Power" (1983) 14 *Melb UL Rev* 238-264.
- 27 D Derham, "Mere Surface Reflections: The Commonwealth of Australia Against the State of Tasmania" (1984) 58 *Law Institute J* 771-775.
- 28 K Ryan, "Australia and International Legal Issues" (1983) 37 *Australian Outlook* 167, 168-169.
- 29 M Foley, "Beyond the Franklin Decision" (1984) 9 *Legal Service Bull* 118-120.
- 30 L Zines, "Implications of the Tasmanian Dam Case" in *Papers Presented at the 22nd Australian Legal Convention Brisbane, 1983* (Law Council of Australia) (1984) 215-218.
- 31 L Zines, "The Environment and the Constitution" (24 May 1984 — Seminar on Federalism and the Environment — Centre for Research on Federal Financial Relations — A N U).
- 32 A Tonking, "Restrictive Trade Practice" in R Baxt & G Kewley (eds), *An Annual Survey of Australian Law 1983* (1984) 42, 44-46.
- 33 P McNamara, "Natural Resources Law" in *ibid*, 58, 78-79, 89-90.
- 34 H Lee, "Constitutional Law" *ibid* 236, 238-253.
- 35 L Southwell, *The Mountains of Paradise: The Wilderness of South-West Tasmania* (1983).
- 36 R Green, *Battle for the Franklin* (1983).

- 37 R Herr & B Davis, "The Tasmanian parliament, accountability and the Hydro-Electric Commission: the Franklin River controversy" in J Nethercote (ed), *Parliament & Bureaucracy: Parliamentary scrutiny of administration: prospects and problems in the 1980s* (1982) 268-279, 352-353.
- 38 A Kellow, "Public project evaluation in an Australian State: Tasmania's law controversy" (1983) 55 No 3 Aust Q 263-277.
- 39 R Herr, "Politics in Tasmania: Parties, States' Rights and Presidentialism" (1984) 60 No 11 Current Affairs Bull 3-13.
- 40 R W Baker, *Tasmania Now and Again* (1983) 97, 99-100.
- 41 J Shaw, "The Tasmanian dam issue and a royal commission into Parliament" (1983) 64 Parliamentarian 146-151.
- 42 S Diamond, "The Constitution and the Dam: Constitutional Aspects of Federal Intervention in the South-West Wilderness of Tasmania" [1983] Oracle [Monash U Law Students Magazine] 12-18.
- 43 Note, "Dams case opens up compulsory acquisition powers" (Oct 1983) Rydge's 86-88.
- 44 T Faunce, "Australia and the 'One World': the High Court decision in the Franklin River Case" (Sept/Oct 1983) 4 no 3 Bogong [Canberra & S E Region Environment Centre] 4-6.
- 45 National Library of Australia, "Franklin River (Tas)" in *APAIS: Australian Public Affairs Information Service: A Subject Index to Current Literature 1983* (1984) 429-431.
- 46 D Jackson, "Federalism in the future: The Impact of Recent Developments" (1984) 58 ALJ 438-447.
- 47 P Durack, "Second Reading Speech on Constitutional Alteration (External Affairs) 1984" (12 September 1984) Senate Hansard 858-860.
- 48 D Dawson, "The Constitution's — Major Overhaul or Simple Tune-Up?" (1984) 14 Melb UL Rev 353, 358-360.
- 49 G Bates, "The Tasmanian Dam Case and its Significance in Environmental Law" (1984) 1 Environmental and Planning L J 325-346.
- 50 G Sawyer, "External Affairs Power" (1984) 14 FL Rev 199.
- 51 G J Lindell, "The Corporations and Races Powers" (1984) 14 F L Rev 219.
- 52 G Winterton, "Comment on Lindell Paper" (1984) 14 F L Rev 258.
- 53 C Saunders, "The National Implied Power and Implied Restrictions on Commonwealth Power" (1984) 14 F L Rev 265.
- 54 L Zines, "The State of Constitutional Interpretation" (1984) 14 F L Rev 275.