THE ENIGMA OF JUSTICIABILITY

THE RAILWAY STANDARDIZATION CASE

The realm of the agreement between the Sovereign in Right of the Commonwealth and the Sovereign in Right of the State or States has been something of a judicial no man's land into which the High Court has always ventured with the utmost wariness. A learned authority[1] on our Constitution spoke in 1925 of how real and dangerous were the conflicts of interest which might arise from disputes between these distinct political entities and how fit a subject they were for judicial determination. Despite this exhortation, the activity of the court in this sphere, has been tempered by a preliminary consideration of whether the relationship subsisting between the governments was of a kind on which the court ought to deliberate.

To predict whether any particular set of circumstances will attract judicial attention is by no means an easy task and in the *Railway Standardization Case*[2] the State of South Australia invited the High Court[3] to consider the justiciability of one such inter-governmental agreement.

RESUMÉ OF THE AGREEMENT[4]

The subject of the instant dispute was the Agreement made between the governments of South Australia and the Commonwealth in 1949. This was embodied in statutory form[5] and in essence provided for the standardization by the State of its own irregular gauges whilst the Commonwealth was to construct a standard gauge linking Alice Springs and Birdum and convert to this gauge the Darwin-Birdum, Port Augusta-Alice Springs sectors.

Part 111 provided that the Commonwealth was to furnish all finance for the scheme, but that the State was to bear three-tenths of the ultimate costs of standardizing its own gauges. Especially critical for our purposes were the following clauses.

> *Any question* arising as to the *order in which the standardizing works shall be carried out shall be determined by agreement between the parties.* (cl. 9(1).)
>
> *Any question* arising as to *the time* at *which any standardization works shall be commenced* by any party *shall be determined by agreement between the parties.* (cl. 9(2).) (Italics supplied.)
>
> Where a matter is required by this Agreement to be determined by agreement between the parties and the parties fail to reach agreement, the matter shall be determined by the Minister (sc. Federal Minister for Transport in agreement) with the Minister of Railways of the State. (cl. 3.)

Pursuant to the purported Agreement, the State had begun converting its own irregular gauges and the Commonwealth had started work on the Port Augusta-Alice Springs sector.

THE PLEADINGS

The Commonwealth having been somewhat tardy in attending to certain of its alleged obligations by way of financial provision for State expenditure, the Plaintiffs sought declarations that the 1949 Agreement was of binding and

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[1] Sir Harrison Moore, "Suits between Commonwealth and State and State and State," 7 *Journal of Comparative Law* 3 ser. P. IX, 155.

[2] *The State of South Australia and the Attorney-General for the State of South Australia* v. *The Commonwealth* (1962) 108 C.L.R. 130. Hereafter this case will be referred to simply by the Report number, viz., 108 C.L.R.

[3] Dixon, C.J., McTiernan, Kitto, Taylor, Menzies. Windeyer and Owen, JJ.

[4] See the delineation of the facts by Sir Owen Dixon 108 C.L.R. at 142-5.

[5] The Schedule to the Railways Standardization (South Australia) Agreement Act, No. 83 of 1949 (Commonwealth). The Schedule to the Railways Standardization Agreement Act, No. 49 of 1949 (South Australia).

obligatory force on the Commonwealth. Incorporated in the Statement of Claim were references to letters from the South Australian Minister to his Commonwealth counterpart urging that agreement be arrived at as to the time of and order for commencing further work.

The plain fact was that no such agreement was ever reached but the Plaintiffs required that the Defendant be declared legally bound to agree.

To the Statement of Claim the defendant demurred on the grounds that the 1949 pact was nothing more than "an agreement to make an agreement".[6] Alternatively it was not justiciable, being more in the nature of a political arrangement between two governments than an enforceable legal contract.

In summary then, the Plaintiffs pleaded a contract and alleged that there had been a breach. The Defendant denied the existence of a contract either because of the want of *consensus ad idem*[7] or because the relation between the parties was not justiciable by a court of law.

It is the purpose of this article to consider briefly whether the judgments indicate any distinct features which earmark an agreement as not justiciable.

THE CONCEPT OF JUSTICIABILITY

(a) Jurisdiction: The leading judgment was delivered by Sir Owen Dixon (with Kitto, J. concurring). The Chief Justice was of the opinion that there was a strong presumption that agreements between governments gave rise solely to political obligations, but that there was a possibility, and no more, that legally enforceable obligations might be imported. This latter point depended, felt his Honour, essentially on the supremacy of the judicial power in our Federal System.[8] Now, that power being invoked under s.75(iii) and s.78 of the Constitution, there was an exercise of the original jurisdiction which itself is limited by reference to "matters".

Sir Harrison Moore has argued that "The judicial interpretation of matters ascertains the scope and limits of justiciability".[9] It would follow, *semble*, that to give rise to legal obligations, the intergovernmental agreement must involve a "matter". In an early case Isaacs, J., as he then was, held that ". . . 'matters' includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject and which therefore governs their relations and constitutes the measure of their rights and duties inter-se".[10]

In arguing that the 1949 Agreement constituted a contract (*supra*) the Plaintiffs, it is submitted, were contending that the Agreement was enforceable by an action under s.75(iii) and s.78 of the Constitution and s.57 and s.64 of the Judiciary Act.[11] If the instant Agreement was to be justiciable by the court

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[6] *Dicta* of Lord Buckmaster in *May and Butcher* v. *The King* (1934) 2 K.B. 17 at 28; cited with approval by Owen, J. 108 C.L.R. at 157.

[7] Their Honours, it is suggested, rested their decision essentially on the first ground. All pointed to the fact that no agreement had been arrived at between the parties as to the time for and the order of commencing the work. Windeyer J. (at 153) felt that the incorporation of the Ministerial correspondence in the Statement of Claim was tantamount to an admission that the parties were still in the mere negotiations stage.

[8] 108 C.L.R. at 139.

[9] Sir Harrison Moore, "The Federation and Suits between Governments", 17 *Journal of Comparative Legislation* 163.

[10] *The State of South Australia* v. *The State of Victoria* (1911) 12 C.L.R. at 715 (*The State Boundaries Case*).

[11] It would then follow from this submission that a substantive liability in contract ascertained as nearly as possible by the same rules of law as would apply between subject and subject is imposed upon the Commonwealth. See the joint judgment of Dixon, C.J., McTiernan and Williams JJ. in *Asiatic Steam Navigation Co. Ltd.* v. *The Commonwealth* (1955-1956) 96 C.L.R. 397 at 416-17.

The issue of whether s.75(iii) and s.64 give rise to a substantive liability or whether the sections respectively render the Commonwealth subject to the jurisdiction of the High Court or whether s.64 is limited to questions of procedure does not directly arise in the

the law of contract would have to be "the positive law" governing the rights and liabilities of the parties for ". . . you look to the substantive law as between subject and subject as the basis of the delictual liability of the Commonwealth".[12] In upholding the demurrers the Court must have found that the claim of the Plaintiffs did not involve a "matter". In *The Commonwealth* v. *State of New South Wales*[13] it was said that "matters" ". . . includes all claims for infringements of legal rights of every kind—all claims referable to a legal standard of right. The word would, without question, include a claim for breach of contract".

The Court must have determined then, that the 1949 Agreement was not a contract in law because, it is submitted, there was no "legal standard of right" to which it was referable.

(b) Private Law and Justiciability:

> In my opinion, a matter between States in order to be justiciable must be such that a controversy of like nature could arise between individual persons and must be such that it could be determined on principles of law.[14]

These words of Sir Samuel Griffith are echoed in the reasoning of the present Chief Justice, who cited with approval a passage from a posthumous article[15] by Sir Harrison Moore, in which, to summarize, the view was put that the rights and obligations subsisting between individuals were the guide to the ascertainment of the legal rights of which the High Court had cognizance; this principle would therefore exclude agreements, in which the subject of the mutual undertakings was the exercise of political power, because, as such, they were incapable of existing between individuals.

Windeyer, J. alone offered a definition of a political undertaking.

> . . . Undertakings that are political in character—using the word political as referring to promises and undertakings of governments, either to their own citizens or to other states or governments—are therefore often not enforceable by processes of law.[16]

Private law in the sense of the law regulating the rights and obligations of individuals is not applicable to the solution of any controversy arising out of any such agreement, for "the subject matters of private and public law are necessarily different".[17]

(c) Mode of Performance and Justiciability: An important discriminating feature, it is suggested, of the non-justiciable agreement is the method of performing the subject of the mutual undertakings. The Chief Justice noted that major financial and governmental matters were involved in the 1949 Agreement and that these were subject to considerations to which private law was not directed. He exemplified the financial provisions subject to the principle of parliamentary appropriation.

It is submitted with respect that this factor alone cannot render an agreement non-justiciable if the other criteria (see postea) of justiciability are present.[18] If they are not, then there will be no legally enforceable contract and

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instant case. The Chief Justice did mention Kitto, J.'s opinion in favour of s.64 giving rise to a substantive liability (see the *Asiatic Steam Case, supra* at 427-8) but after the decision in *The Commonwealth* v. *Anderson* 34 A.L.J.R. 323 it would seem that the procedural view of the section has prevailed.

[12] *Asiatic Steam Navigation Co. Ltd.*, v. *The Commonwealth op. cit.* at 417.

[13] (1923) 32 C.L.R. 200.

[14] *South Australia* v. *Victoria op. cit.* at 675.

[15] *Op. cit.* see n. 1.

[16] 108 C.L.R. at 154.

[17] McTiernan, J. *ibid* at 149.

[18] The argument that Parliamentary appropriation was a prerequisite to legal proceedings for the enforcement of an agreement by the Crown to pay money was unanimously

the question of whether this factor renders a contract non-justiciable is superfluous.

In the *Wool Clips Case*[19] it was held that the Agreement before the Court was not cognisable by the Court depending as it did for its performance upon the constitutional relationship between the Imperial and Commonwealth Governments and their good faith towards each other.

In the instant case the promises were of a political nature because "their performance necessarily requires executive and further parliamentary action".[20]

Therefore an agreement whose performance depends on extra judicial stimuli or is guaranteed by political sanctions (postea) will, *semble*, not be justiciable.

(d) Agreed Action or Co-ordination and Definiteness: In the *P. J. Magennis Case*,[21] Dixon, J. as he then was, made what is now accepted as the authoritative pronouncement in this area of the law. His Honour referred to the presence, in that Agreement, of ". . . not a few clauses which depend on or provide for *agreed action by State and Commonwealth*, and the general tenor of the document suggests rather *an arrangement between two governments*, settling the *broad outlines* of an *administrative and financial scheme* than a *definitive contract* enforceable at law".[22] (Italics supplied.)

The immediate contrast is between arrangement and contract, between agreed action on broad outlines and definiteness and enforceability. Arrangements are not contracts,[23] it is submitted, because they describe the situation where the broad outlines of a scheme have yet to be implemented by agreed action between the parties. The 1949 Agreement made provision for co-operation towards implementing the Agreement (clauses 3 and 9(1) and (2) *supra*) and, coming within the concept of an "arrangement", was not justiciable.[24]

This submission is fortified by the view of Menzies, J. who said of the 1949 Agreement:

> . . . a political arrangement contemplating further particular agreements, that, when made, will have legal consequences rather than being itself a contract enforceable at law.[25]

The incorporation of ministerial correspondence in the Statement of Claim, seeking definite agreement on the time for, and the order of, commencing further work is all too significant.

Legal obligations can only materialize after administrative and political considerations have played their part in formulating the ultimate contract. The defendant in fact refused to reach agreement, as sought by the State, and in so refusing was admittedly influenced by prevailing financial, economic and

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rejected by the High Court in *New South Wales* v. *Bardolph* (1933-1934) 52 C.L.R. 455. The subject is given a means, under the Judiciary Act, of establishing the existence of a valid claim against the Crown. See Dixon, J. as he then was at 509ff.

[19] *John Cooke and Co. Pty. Limited* v. *The Commonwealth* (1922) 31 C.L.R. 394 where it was held that the agreement for the sale of the whole of the 1916-1917 wool clip to the United Kingdom did not invest any of the growers, who had sold their wool through the Central Wool Committee (as prescribed by the agreement), with any legal rights against that body.

[20] McTiernan, J. 108 C.L.R. at 149.

[21] *P. J. Magennis and Co. Pty. Limited* v. *The Commonwealth* (1949) 80 C.L.R. 382.

[22] *Ibid.* at 409.

[23] See esp. *Newton* v. *Federal Commissioner of Taxation* (1958) 98 C.L.R. 1. where, delivering the judgment of the Privy Council, Lord Denning said:

> Their Lordships, are of the opinion that the word "arrangement" is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law.

[24] Thus McTiernan, J. described the 1949 Agreement as ". . . political arrangements for co-operation on matters of national importance". 108 C.L.R. at 149.

[25] *Ibid.* at 150. The stark contrast between arrangement and contract is again to the fore.

policy considerations.[26] The Chief Justice stated quite categorically that the question of agreement depended on matters of principle and policy. At this stage, then, there was no justiciable contract but a mere political arrangement.[27]

Nor will statutory ratification of an intergovernmental arrangement lend to the broad undertakings the character of legally enforceable obligations, as Sir Harrison Moore has so vehemently contended.[28]

The Court was none-the-less unanimous in its opinion, that legal obligations could arise in the effectuation of the work once agreement as to time and order had been reached.[29] On the fulfilment of the work undertaken by one party, the financial responsibilities accruing to the other side would be considered legal obligations. Before these obligations arise, however, there must be consensus between the parties and, *semble*, from certain remarks of Menzies, J., the work must have been performed strictly according to the tenor of the agreement.[30]

Even conceding that such agreement has been arrived at, the critical question for us to determine is at what point will the Court intervene to enforce the provisions of the agreement. It would seem that the broad outlines of the arrangement must have been so implemented as to be transformed into a definitive contract. Thus the Chief Justice said:

> . . . it could only be in respect of some definite obligation, the breach of which is unmistakably identified that a court can pronounce a judicial decree in a case such as this.[31]

The reason for the Court's insistence on this degree of precision was the fear of the extension of its true function into a domain that did not concern it, namely, the consideration of undertakings dependent entirely on political sanctions.[32] It would follow that such undertakings are beyond the jurisdictional competence of the High Court and do not give rise to "matters".

The regrettable feature of this judicial attitude is the obvious penchant in favour of political obligations, with the inevitable result that a grievous burden is cast on a plaintiff to establish the requisite degree of definiteness for enforceability. Windeyer, J. described the 1949 Agreement as an "imperfect obligation" wanting the "vinculum iuris".[33] This language was taken from an early authority; in *Werrin* v. *The Commonwealth*,[34] Dixon, J., as he then was, suggested that these imperfect obligations were made perfect by the creation of a jurisdiction under the Constitution in which the Commonwealth could be sued. It may be submitted, with respect, that this was not a significant appellation and the question must always be whether the obligation which exists *in abstracto* is perfected by coming within the jurisdictional competence of the Court. This refers us again to a consideration of definiteness within the

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[26] *Ibid.* at 146.

[27] *Ibid.* at 147. The word "political", it is submitted, is a mere label to distinguish the species of arrangement from the other arrangements. It is not to be taken as a criterion of non-justiciability but is applied *ex post facto* to an arrangement adjudged to be non-justiciable on the grounds under consideration.

[28] *Op. cit.* n. 9 where the learned jurist urged that statutory approval created statutory rights in respect of which proceedings could be instituted in the High Court. This view is, *semble*, now untenable by reason of the opinion of Menzies, J. who felt that execution and approval by the Legislature did not, *per se*, alter the non-justiciable character of the 1949 Agreement. (108 C.L.R. at 150.)

[29] See Dixon, C.J. at 141. Menzies, J. at 150. Windeyer, J. at 153.

[30] 108 C.L.R. at 150.

[31] *Ibid.* at 141.

[32] See also under head (a) *supra*.

[33] 108 C.L.R. at 154 citing Tindal, C.J. in *Gibson* v. *The East India Company* (1839) 5 Bing N.C. 262 at 274. The phrase was there used to describe a grant by the East India Company of a pension in its capacity as the Government of India. It was said that such an obligation was not enforceable by the Court but only by petition of the Crown. At this stage, of course, there was no direct recourse against the Crown.

[34] (1937-1938) 59 C.L.R. 150 at 168.

contractual norm.[35]

(e) The Policy Aspect: The rationale for the reluctance of the courts to find that these intergovernmental arrangements are not justiciable is rooted in the judicial desire to refrain from interfering with "political and administrative action and discretion".[36] A wide interpretation of "matter" would leave the courts without any limits of jurisdiction in disputes involving high policy issues. Thus controversies requiring the application of political considerations for their settlement are not justiciable.[37] The refusal to uphold the plaintiffs' contentions, in the present case, was tantamount to a tacit recognition that the Commonwealth's economic advisers were best qualified to decide whether it was prudent, in the then prevailing economic conditions, for the Commonwealth government to sanction further work and incur additional financial responsibilities. Again in the *Wool Clips Case* (*supra*) the High Court placed emphasis on the arrangement there being the offspring of the exigencies of war and of paramount importance to the success of the allied war effort.[38] Just how serious an effect judicial intervention can have is shown by the repercussions of the *Magennis* decision (*supra*). The holding by the High Court that the Soldier Settlement Scheme was constitutionally invalid resulted in the Federal Government abandoning the similar conjoint legislation with the other states in favour of a system of grants under s.96 of the Constitution.[39]

Conclusion

In any future claim arising out of an intergovernmental agreement the prospective litigant must first satisfy the High Court that it has jurisdiction to entertain the suit. Then it is for the plaintiff to persuade the Court that the agreement is sufficiently definite to come within the contractual norm.[40] In view of the cautious attitude adopted by the court for fear of interfering in the governmental sphere, the countervailing presumptions against these agreements giving rise to legal obligations may prove too strong to overcome. Particularly will this be the position where there is provision for further agreement which involves executive or administrative action or where the original scheme depends for its effectiveness on political sanctions. In the latter case there will probably be a contention that the court is without jurisdiction.

Unfortunately the court does not indicate what degree of this anomalous quality of definiteness the agreement must have in order to constitute a contract and whilst this crucial point is still a moot one even the most optimistic plaintiff must bear a heavy onus of proof.

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[35] Perhaps the best illustration of the judicial enforcement of a political undertaking is *New South Wales* v. *Bardolph* (1934) 52 C.L.R. 455, where the plaintiff was held entitled to recover the value of unused advertising space which the State had contracted to purchase. The agreement was in writing and set out the exact terms with respect to the price for the space in the plaintiff's newspapers and the option to renew the agreement. The breach was "unmistakably identified" consisting as it did in the refusal by the newly elected Government to take up further advertising space.

The Court found that the State had, under various Acts, set aside sums to satisfy these liabilities when they arose. Consequently no further parliamentary or executive action was required.

[36] Isaacs, J. in the *State Boundaries Case op. cit.* at 715.

[37] *Ibid.* at 675 *per* Griffith, C.J.

[38] Sir Harrison Moore argued that this was the substantial reason why the *Wool Clips* Agreement was held to have created no legal rights. He suggested that Governments always intend to establish legal relations to the fullest extent possible and that political arrangements were restricted to the war-time situation (*op. cit.* n. 1 at 182). Subsequent authority has, it is submitted, cast doubts on this view. In particular the post-war schemes for the repatriation of the armed forces have been held to create no private legal rights; notably *Gilbert* v. *Western Australia* 35 A.L.J.R. 449.

[39] See *Gilbert's Case* at 452-3.

[40] 108 C.L.R. at 141.