LEGAL LANDMARKS 1961
CONSTITUTIONAL AND ADMINISTRATIVE LAW

Commonwealth Legislative Power: Defence and Acquisition of Property

In *Re Dohnert Muller Schmidt & Co.*,[1] the constitutional validity of certain provisions of the *Trading with the Enemy Act* 1939-1957 (Cth) was challenged. At the outbreak of the Second World War, legislation of this nature had been passed by various countries engaged in the war: its purpose *inter alia* was to "freeze" the locally situated property of enemy aliens during the continuance of hostilities. The Australian Act established a system whereby the Controller of Enemy Property, an official appointed pursuant to regulations made under the Act, was given control of property which came into his hands pursuant to these regulations.[2] The Act also laid down a procedure whereby the businesses of persons, firms or companies to which enemy character attached could be removed from the control of enemy aliens. Under this procedure the High Court was given power to appoint controllers and to vest in these persons full powers of management including the power of sale of the person's, firm's or company's assets.[3] Moneys accruing from the carrying on of a business by the controller were placed in a fund under the supervision of the High Court.[4]

At the termination of hostilities, the moneys and investments pertaining to the property which had been acquired by the Controller and also the moneys which had been paid into the High Court fund by controllers of businesses were not freed from control or returned to the owners. The reason was that in 1948 a general agreement on war reparations from Germany had been entered into by a number of nations, including Australia, which had participated in the war. Under this agreement assets of German nationals held by each individual nation were to be disposed of in such a way as to preclude their return to German ownership and the moneys received were to be taken into account as part of the reparation which Germany was required to make under the agreement. Each country was allotted a certain percentage of the total moneys received were to be taken into account as part of the reparation German activities during the war.[5] Germany, which had not been a party to this agreement, later accepted this obligation in the Treaty of Bonn and agreed to compensate its own nationals

1. (1961) 35 A.L.J.R. 54.
2. Sec. 16; regs. 6 & 7 of the National Security (Enemy Property) Regulations.
3. Sec. 13.
4. The High Court Suitors' Fund.
5. See Paris Agreement on Reparations, Articles 2 and 6: 40 A.J.I.L. (1946) p. 117 at pp. 120, 122 (Supplement).

for their loss of property which was to be liquidated in this way.[6] As far as Japanese assets were concerned the Japanese Peace Treaty of 1952 provided that each signatory nation was entitled to hold assets of Japanese nationals within its jurisdiction at the end of hostilities as reparation for damage suffered by it through Japanese activities during the war.[7] However, no obligation was imposed on the Japanese Government to compensate its own nationals who might be deprived of their property in this way.

Pursuant to these international arrangements Australia modified its Trading with the Enemy Act and sections 13C and 13D were inserted in the Act. These sections vested in the Controller of Enemy Property by order of the High Court, on an application by the Attorney-General, moneys standing in the High Court fund as a result of payments made by controllers of businesses which had been brought under control pursuant to the Act. Such moneys were to be paid into the Enemy Subjects Trust Account.[8] Moneys paid into this Account in respect of Japanese property were to be used for the benefit of certain classes of Australians who had suffered injury or imprisonment at Japanese hands.[9] However, no distribution was prescribed in the case of moneys representing German assets as no Treaty of Peace had been signed with that country.

In the present case, the Attorney-General of the Commonwealth had made an application under section 13D of the Act for the transfer of moneys accruing as the result of the carrying on of the business of the Dohnert Schmidt company by a controller. At the outbreak of the war, this company was a trading concern established in Leipzig. The application was contested by the defendants who had interests in the company on the ground that sections 13C and 13D were invalid in that they constituted an acquisition of property without just terms and so infringed sec. 51 (xxxi) of the Constitution.

The High Court upheld the validity of the sections. Dixon, C. J. (with whom the other members of the Court agreed) pointed out that in *Roche v. Kronheimer*[10], decided after the First World War, legislation providing for the disposal of German assets pursuant to the Treaty of Versailles had been upheld as a valid exercise of the defence power. Such arrangements were necessarily incidental to that power in that they pertained to the settlement of questions

6. Chapter 6, Article 5 of the Treaty: 49 A.J.I.L. (1955) p. 97 at p. 98. (Supplement).
7. Article 14 of the Treaty.
8. Sec. 13E. The Account was established by reg. 9 of the National Security (Enemy Property) Regulations.
9. Sec. 13F.
10. (1921) 29. C.L.R. 329.

arising from state of war.[11] On the question of the possible application of sec. 51 (xxxi) the Court had decided in earlier cases that expropriation of property for defence purposes as for other Commonwealth purposes set out in sec. 51 was subject to the requirement that just terms must be provided.[12] As Dixon C. J. put it: "It is hardly necessary to say that when you have, as you do in par. (xxxi) an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of statutory interpretation to treat that as inconsistent with any other construction of other powers conferred in the context that would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation, but without the safeguard, restriction or qualification".[13]

However, the Chief Justice pointed out that two qualifications must be placed on this general statement of principle. In the first place, the nature of certain powers set out in s. 51 might be such that the conditions imposed by par. xxxi would have no application. A typical example would be the sequestration of the property of a bankrupt under the bankruptcy power. In the second place the scope of par. xxxi was limited. "Prima facie it is pointed at the acquisition of property by the Commonwealth for use by it in the execution of the functions, administrative and the like, arising under its laws."[14]

In the present case the effect of sections 13C and 13D of the Trading with the Enemy Act was merely to vest in the Controller the moneys in question which were to be paid into an Enemy Subjects Trust Account, the beneficial ownership of the property being suspended. The Controller would have custody of the moneys until steps were taken to apply it in satisfaction of reparation claims. This did not amount to an acquisition of property for the purposes of the Commonwealth and therefore just terms did not have to be provided.[15]

The reasoning of the Court in *Schmidt's* case supports the proposition that there are certain acquisitions of property allowed by par. vi—the defence power—which are not subject to the limitation of par. xxxi. Direct legislative acquisitions of the property of Australian citizens whether real or personal are of course subject to this limitation, and there is authority for the proposition that where compulsory sales of property are prescribed by legislation—

11. 35 A.L.J.R. at p. 56.
12. See, for example, *Andrews v. Howell* (1941) 65 C.L.R. 255.
13. 35 A.L.J.R. at pp. 56-7.
14. *Ibid.*, at p. 57.
15. *Ibid.*, at p. 57. See also the judgment of Taylor J. at p. 59.

even though the Commonwealth itself is not the "buyer" but some other person or body—the condition of just terms must be fulfilled.[16] Where, however, as in the present case, property rights of enemy aliens are "freezed" in wartime and are brought within the operation of an international reparations settlement after the end of hostilities, the position is different. In such a case judicial authority supports the proposition that par. xxxi will not apply for two reasons. In the first place, the termination of the property rights in question is so closely tied up with the defence and external affairs powers that the legislation authorizing it will be characterized purely and simply as laws with respect to those powers; in the second place the deprivation is not for the purposes of the Commonwealth conceived of as a juristic entity entitled to hold and use property, but so as to enable the Commonwealth to fulfil its international treaty obligations. In the present case there was an additional factor which was not adverted to by the Court: the beneficial ownership of German aliens in their property had not been entirely brought to an end in order to satisfy reparation claims, for reg. 5B of the National Security (Enemy Property) Regulations[17] seems to envisage the possibility of an eventual agreement being made under which moneys representing such property are returned to the Government of a country which has lost its enemy status (as Germany has) or to persons authorized by that Government to receive them, for example, to the owners. It could therefore be said that, as the Commonwealth Parliament has not arranged for the disposition of moneys representing the property of German nationals (while it has done so in respect of the property of Japanese nationals), there has only been a temporary suspension of the owners' rights in that property which may or may not lead to permanent deprivation.[18]

Local Government—Powers of Council—Remedy of Injunction

In *Lynch v. Brisbane City Council*[1] the High Court in an appeal from the Supreme Court of Queensland examined the nature and scope of those sections of the Local Government Acts (1936-1959) and City of Brisbane Acts (1924-1959) which confer the power of

16. *McClintock v. The Commonwealth* (1947) 75 C.L.R. 1 at pp. 23-4 (per Starke J.).
17. Inserted in 1946. Such an agreement might be inconsistent with Article 6 of the Paris Agreement, although Article 2 of that Agreement envisages future agreements with respect to reparations.
18. It is true that *Minister of the Army v. Dalziel* 68 C.L.R. 261 decided that the taking of property for an indefinite term was an acquisition of property. In *Schmidt's* Case, however, it could be said that the detention of the property was not in order to benefit the Commonwealth directly and was justifiable on the basis that the ultimate disposition of the property might be subject to international agreement.
1. (1961) 35 A.L.J.R. 25.

making ordinances on the Brisbane City Council and entitle that body to sue for an injunction to support the exercise of its powers.

In the Supreme Court Mansfield C. J. had granted an injunction to the Council restraining the defendants (Lynch and others) from obstructing officers of the Council in exercising their power under a city ordinance to remove a stall for which there was no subsisting council licence. These officers had been physically obstructed by the defendants when they took steps to remove the unlicensed stall which had been set up in a city arcade. The ordinance in question —33a of the City of Brisbane Ordinances—provided that a person should not use a stall on any land for the display or sale of goods unless there was a subsisting licence for that purpose. It also empowered the Building Surveyor or his agents to take down and remove an unlicensed stall. At the outset it was necessary to decide the question to what extent the City Council would be entitled to the remedy of injunction.

Section 52 (8) of the Local Government Acts (Queensland) provides: "In any case in which the Attorney-General might take proceedings on the relation of or on behalf of or for the benefit of a Local Authority for or with respect to enforcing or securing the observance of any provisions made by or under this Act or any other Act conferring powers or imposing duties upon a Local Authority, the Local Authority shall be deemed to represent sufficiently the interests of the public and may take proceedings in its name". For this purpose the term "Local Authority" covers the Brisbane City Council exercising its powers under the City of Brisbane Acts and other Acts. The effect of this provision is to allow a local authority to commence injunction proceedings in its own name without securing the co-operation of the Attorney-General, that is to say without bringing a relator action—but only in those cases in which the Attorney-General himself would be recognized as having a sufficient interest to commence proceedings.

There is a considerable degree of uncertainty on the question as to what type of interest will suffice for injunction or declaration proceedings by the Attorney-General. It seems that on this matter in the past English courts have been more ready to grant injunctions than have been the Australian Courts.[2] In the leading Australian case *Ramsay v. Aberfoyle Manufacturing Company*,[3] the High Court refused an injunction to restrain actions which were contrary to a municipal by-law. The major reason given by Latham C. J. was that it was not the task of a Court of Equity to remedy the deficiencies of statute law: it was for Parliament to see to it that adequate

2. *Attorney-General v. Sharp* [1931] 1 Ch. 121. *Attorney-General v. Harris* [1961] 1 Q.B. 74.
3. (1935-6) 54 C.L.R. 230.

remedies were available for breaches of the laws made by it or by subordinate bodies.[4] The other judges gave different reasons.[5]

In *Lynch's case*, the High Court did not offer any enlightenment on whether it still adheres to the *Ramsay* doctrine in view of recent English authority in favour of the grant of the injunction remedy in cases of breaches of municipal by-laws[6]. It was of the opinion that in any case S.52 (8) of the Local Government Acts did not enable the Council to sue under that section as the proceedings were not with respect to "enforcing or securing the observance of any provision made by or under this Act or any other Act . . ."[7] In actual fact the action was to prevent individuals from obstructing the Council and its officers in the performance of their duties. However, such circumstances were sufficient grounds for the granting of an injunction quite apart from S.52 (8). In the opinion of the High Court "the case is not covered by precise authority but threatened and repeated unlawful and forcible interferences with the exercise of rights of course always have been proper occasions for the invocation of the equitable jurisdiction to intervene by injunction and there seems no reason why a municipal authority, exercising a lawful power of removing objects from a site where they unlawfully exist, should not obtain an injunction for the protection of its servants and agents from unlawful physical obstruction in the fulfilment of its functions".[8] The High Court did not elaborate this opinion. It does seem to have the effect of making available to local government bodies a new method of having their by-laws enforced which will escape the fetters of *Ramsay's case*. By this method the local government body must itself take steps to enforce the by-law (for example, by removing the offending object or thing) when such by-law gives it authority to take direct action of this nature. If it is prevented from doing so or obstructed in the performance of its duties then an injunction will be available, not to have the by-law enforced by the prohibition of action contrary to it, but to enforce rights analogous to private rights, namely the right to the protection of the law from physical violence in the carrying out of acts authorised by the law. For this reason, of course, the action will be brought by the local government body in its own name and not as any *ex relatione* action with the Attorney-General of the State.

4. *Ibid.*, at pp. 236-43.
5. Rich J. considered that it was not a case for the exercise of the discretion of the Court in favour of the applicant (at pp. 243-5) while McTiernan J. following *Attorney-General v. Gill* [1927] V.L.R. 22 considered that the by-law did not confer on the public the enjoyment of any positive interest which would be the basis of the Attorney-General's intervention (at pp. 254-61). Starke J. dissented (at pp. 245-54). His judgment seems to be more in line with the English authorities.
6. See *Attorney-General v. Harris* [1961] 1 Q.B. 74.
7. (1961) 35 A.L.J.R. at p. 26.
8. *Ibid.*, at p. 27.

The second question which fell to be determined in *Lynch's case* was the extent of the ordinance-making authority of the Brisbane City Council. The appellant had argued that the empowering sections of the City of Brisbane Acts did not authorize the ordinance in question. S.36 (2) of these Acts authorized the Council to make ordinances for a variety of purposes including ordinances for the peace, comfort, welfare and convenience of the City and its inhabitants, and ending with the following clause: "And generally all such ordinances may be made and carried into effect by the Council as may be determined by it to be necessary for the proper performance of the powers and duties of the Council, whether such matter is within the express powers conferred by this Act upon the Council or not". S.36 (3) enumerated a list of specific heads of power beginning with the phrase "without limiting the generality of its powers" and ending with the phrase "and generally all works, matters and things which in its opinion are necessary or conducive to the good Government of the City and the wellbeing of its inhabitants". Within this list of specific powers there was one pertaining to the "subdivision of land and the use and occupation of land". In the opinion of the High Court, Ordinance 33a which related to the use of stalls on land, was not referable to this specific head of power. The ordinance was directed to the control of structures on land rather than to the use of the land itself while the specific head of power in question was directed to the purposes for which land might be used rather than to the control of the activities of Brisbane inhabitants on the land. However, ample support for the ordinance was to be found in the general words "peace, comfort, welfare and convenience of the City and its inhabitants", and the concluding words of S.36 (3) "matters and things which in the Council's opinion are necessary or conducive to the good government of the City and the well-being of its inhabitants".[9] It was true that in earlier cases[10] where specific powers were accompanied by general clauses of a similar nature, the Courts had applied the *eiusdem generis* principle so as to impose a restriction on the general words conferring powers on local government authorities, but in the present case the words of S.36 of the City of Brisbane Acts made it clear that no such restriction was to be implied. Indeed there was no genus to be discovered apart from that of local government.[11] The words in question "gave a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of local government because they affect the welfare and good government of the city and its inhabitants". However, the

9. *Ibid.*, at p. 27.
10. See, for example, *Leslie v. City of Essendon* [1952] V.L.R. 222
11. (1961) 35 A.L.J.R. at p. 28.

provision was not to be understood as conferring authority on the Council to make ordinances on matters outside this province.[12]

In imposing this latter restriction, it seems that the High Court had in mind that it was necessary to construe the powers conferred on local government authorities in such a way as to be in accord with the general criteria of municipal government activity and so as not to conflict with statute law. If, for example, the Council enacted an ordinance which fell outside what would be regarded as a matter of municipal concern and pertained to matters which were within the province of the State of Queensland, it is clear that the generality of the words used in S. 36 would not be construed in such a way as to authorize an ordinance of this nature.[13]

Finally, reference was made to the effect of S.38 (4) of the City of Brisbane Acts. This Sub-section prescribes that every ordinance be laid before the Legislative Assembly within a certain period (one month) and makes such ordinances subject to disallowance. If this requirement of laying is fulfilled "every such ordinance purporting to be made in pursuance of this Act shall, after the period aforesaid, be deemed to have been duly made and to have been within the powers of the Council". The High Court considered that this section would ensure the validation of an ordinance, in respect of form and authority, which had been laid before the Legislative Assembly for the requisite period, subject to the reservation that if the ordinance was "altogether outside the province of the Council as a subordinate legislative body" it might not gain the benefit of conclusiveness conferred by the sub-section. The reason given for this reservation was that an ordinance of such a nature could not be considered as purporting to be made under the Act.[14]

The effect of S. 38 (4) had been briefly considered in the earlier Queensland Full Court decision of *Brisbane City Council v. Barnett*[15] where Macrossan A. C. J., Philp J. and Mansfield J. (as he then was) were of the opinion that S. 38 (4) conclusively determined the question of the validity of a Council ordinance.[16] In a recent case *The Queen v. Brisbane City Council ex parte Mackay*[17] a majority of the Full Court (Mansfield C. J. and Hanger J.) held that an ordinance which had fulfilled the requirements of S. 38 (4) was not

12. *Ibid.*, at p. 28.
13. It must be kept in mind that S. 2 of the Queensland Constitution Act empowers the Legislative Assembly to make laws "for the peace, welfare and good government of the colony in all cases whatsoever". It is clear therefore that in all matters the authority of the legislature is paramount (subject of course to certain imperial legislation and to the Commonwealth Constitution).
14. (1961) 35 A.L.J.R. at p. 29.
15. [1945] 39 Q.J.P.R. 22.
16. *Ibid.*, at pp. 24-5.
17. [1961] Qd. R. 241.

open to attack on the ground of invalidity[18]. Wanstall J. however, held that S. 38 (4) was not conclusive and that an ordinance could be held to be in excess of power if (a) it could be seen to be not a real exercise of the power conferred; or (b) if it were inconsistent with or repugnant to some provision of the enabling Act.[19] At the present time it seems that in view of the dicta on this matter in *Lynch's case* the opinion of Wanstall J. rather than that of the majority would be more likely to be followed by the High Court if it were called upon to decide the validity of an ordinance which was found "to be altogether outside the province of the Council as a subordinate legislative authority".

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CRIMINAL LAW

Diminished Responsibility

The Criminal Code and Other Acts Amendment Act of 1961 has introduced into the criminal law of Queensland the doctrine of diminished responsibility. The Amendment Act inserted S. 304A into the *Queensland Criminal Code*. Subsection (i) of this Section provides:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.

S. 304A therefore substantially adopts S. 2 of the *English Homicide Act* 1957 which in its turn introduced into English law the Scottish doctrine of diminished responsibility.

The wording of the English provision has been slightly altered to suit the context of the Queensland Criminal Code. Thus S. 304A refers to both wilful murder and murder; it speaks of acts and

18. *Ibid.*, at pp. 248, 252.
19. *Ibid.*, at p. 262. It is interesting to note certain comments of Wanstall J. on the question whether the Full Court of Queensland is bound by its own decisions. He is of the opinion that exceptions analogous to those relating to the binding effect of previous Court of Appeal decisions on the Court of Appeal which were laid down in *Young v. Bristol Aeroplane Company* should be applied to Full Court decisions. Therefore the Full Court may choose between two conflicting decisions of its own and should refuse to follow a decision of its own which is inconsistent with a decision of the High Court.

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