Chapter Seven

When External Means Internal

Dr Colin Howard

It is no doubt a matter of some familiarity to this audience that s.51 of the Australian Constitution is a list of what are called the enumerated legislative powers of the Parliament.
They are an entertaining collection of major preoccupations of the day interspersed with mere afterthoughts. They vary considerably in length, depending no doubt on the degree of rhetorical self- expression that the particular subject matter inspired in the delegates to the conventions of the 1890s who drafted them.
So, for example, we find that the institution of matrimony qualifies as a proper subject of federal law but, being highly respectable, is acknowledged rather tersely by the single word "marriage". It reminds one of the journalistic axiom that good news is no news.
This impression is strengthened by the immediately following item, which deals with divorce and associated matters in no less than 17 words. No mystery about what intrigued the delegates on that front. They were all men.
Incidentally the only other single word item in the list is "Quarantine". It really does begin to look as if marriage was privately regarded as some kind of affliction that the Commonwealth, with any luck, would abolish at the first opportunity.
As far as I know, I have the distinction of being the first person to suggest that the abolition of marriage might have been a motivating factor in federation.
Another of my favourites is the forthright, if not exactly hospitable, pessimism of the three word power "Immigration and emigration". It implies that the most that anyone not already here could be expected to do for Australia was to arrive, take a quick look and go away again.
How much more enterprising it would have been to invert the word order with the object of implying that Australians were so enamoured of their native country that if they left it they very soon came back again, appalled at the rest of the world.
But it has just occurred to me that I have managed to digress from the subject of this paper without even mentioning the subject from which I have digressed, so let me move on to the topic I am supposed to be talking about.
This is item 51(29), the legislative power dismissively summarised in the two stark words "External affairs". Not only did the concept of affairs external to Australia, excepting perhaps the Club Med variety, fail to enthuse the convention delegates, but also, once again, they revealed to the discerning eye their unacknowledged associations of thought: by putting this item neatly between "The Influx of criminals" (which disclosed a distinct lack of ancestor worship) and relations with the islands of the Pacific, which probably meant girls in grass skirts and nothing much else.
It amazes me that there are people around who regard the study of Constitutions as a dull and purposeless pursuit. On the contrary, it is an occupation worthy of Woody Allen himself. And, to come back to the point for the second time, nothing could illustrate this better than the fate that has befallen those two apparently harmless words "external affairs" at the hands of the High Court of Australia, not an institution normally associated with an overflowing sense of humour.

It will no doubt also be known to this audience that in Sydney in 1901, immediately after federation, there was published Australia's classic commentary on the Constitution, an imposing volume entitled Annotated Constitution of the Australian Commonwealth. The authors were, as they later became, Sir John Quick and Sir Robert Garran. Each had been closely associated with the conventions of the 1890s, Sir John as a delegate to the later ones and Sir Robert as a junior civil servant.

Sir Robert Garran in particular was a remarkably talented and learned man. He entered the Commonwealth Public Service immediately on federation and actually wrote out the first Government Gazette in his own hand and took it to the printer himself. He was the Commonwealth's first civil servant and had a long and distinguished career in that capacity.

He was no mere bureaucrat but a highly competent lawyer who later became Secretary of the Attorney-General's Department and after that Solicitor-General of the Commonwealth. Incidentally to those accomplishments he was a classical scholar and also published a volume of excellent translations of the 19th century German lyric poet Heinrich Heine.

I confess that whenever I have occasion to look back at those distant days and reflect upon the quality of some of the people who played prominent roles in the great debates of the time, including bringing this country into existence, I reflect ruefully upon how much better off we should be if a few of them were still in public life today. There is no comparison, and we are the losers.

In their great commentary Quick and Garran devote six closely printed pages to the external affairs power. Nowadays only one sentence is remembered. Even that solitary survivor has been reduced to a routine quote out of context. All it says is that the power "may hereafter prove to be a great constitutional battle-ground." It still may, but we should be so lucky. It is quite possible that the opportunity has been and gone without anyone really noticing.

What produced the solitary surviving sentence was the emergence even before federation of sharply contrasting opinions about what the deadly duo, "external affairs", were intended to mean. Before turning to them it is worth remembering that we are at the moment living through yet another of those embarrassing episodes during which assorted politicians and worthy citizens give tongue to much clamour about Australian independence.

All the usual trappings are on display: new flags, yet more anthems, dubious conduct in the presence of the Queen (all the more regrettable when the poor lady already has to cope with her own frightful family), whether we should be a republic and all the rest of it. In the years 1899 to 1901 this was decidedly not the atmosphere in which the external affairs debate took place.

Although the essentials of the argument were much the same as they are now, the details have changed considerably. Nowadays Australian independence from the United Kingdom is simply not an issue and has not been an issue since at least the passing by the British Parliament of the Statute of Westminster in 1931. Even that event was no more than a formal recognition that quasi-colonial status for the Dominions went out the window with the first world war (optimistically named at the time the Great War: little did they know).

With the benefit of hindsight we can see clearly nowadays that in 1901 the British Empire, vast and varied though it might be, was already heading into terminal decline. That was not how it looked at the time. On the contrary, to all appearances it was at its zenith, and a pretty spectacular zenith it was. The idea that in that situation the British Government would wish to retain control of its far flung Imperial policies was not merely respectable: it was perfectly natural. No doubt this was one reason why the neutral word "external" affairs was chosen instead of the more usual expression "foreign" affairs.

This is reflected in the contemporary commentaries. One approach went no further than remarking that s.51(29) was a new departure but that what it meant was not clear. True enough.

Another suggested that the UK Parliament, unless it were later minded to repeal the Commonwealth after all, intended to hand over control of Australian external affairs to Australia. To us this may seem stunningly obvious but in those days it was a pretty radical proposition.
A third approach went into the matter with more precision. There are many rules of construction that apply to Acts of Parliament. For the most part they are common sense rendered into legal language. One of them is that, in the absence of express words or necessary implication from the context to the contrary, an Act is assumed to be intended to apply only inside Australia and not extraterritorially.
The third approach to s.51(29) suggested that its purpose was to make sure that in its application to Commonwealth statutes this rule of construction remained precisely that: a rule of construction only and not a rule limiting the scope of any of the legislative powers. This was a shrewd suggestion that fitted the intellectual climate of the time.
To us the idea that the Commonwealth should not have power to enact laws with extraterritorial operation is a strange one indeed. It was not at all strange at the turn of the century when the contrast was between a mighty imperial power and a clutch of remote colonies whose concerns were almost exclusively domestic in character.
Quick and Garran however were not at all impressed, even going so far as to describe the rule of construction argument as untenable. (Lawyers, especially judges, use the word "untenable" as a polite synonym for "rubbish".) As far as they were concerned the external affairs power was a distinct legislative power in its own right and did not qualify any of the other powers in s.51. They then wrote another memorable sentence which ought to have been far more influential than the battleground one.
They said: "The expression `External Affairs' is apparently a very comprehensive one, but it has obvious limitations." The intellectual climate of the 20th century has not been one in which the idea of limitations and restraints has flourished. Since the concept of restraint in public life and international relations is overdue for a return to favour, the Quick and Garran view of the external affairs power is worth recalling.
I quote again: "It must be restricted to matters in which political influence may be exercised, or negotiation and intercourse conducted, between the Government of the Commonwealth and the Governments of countries outside the limits of the Commonwealth. This power may therefore be fairly interpreted as applicable to (1) the external representation of the Commonwealth by accredited agents where required; (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries; and (3) the extradition of fugitive offenders from outside countries."
The reference in the first of these three items to "accredited agents where required" to represent the Commonwealth overseas conveys vividly the contemporary lack of any concept of a full blown foreign service, or even the possible need for one, but that is immaterial. What is material, in my view, is the absence of any suggestion that the power to legislate for external affairs was, by implication, also a power of potentially unlimited scope to legislate for internal affairs in pursuance of international obligations.
The furthest that the learned authors go in that direction is to include extradition, which is unexceptionable. Although no part of their commentary, it is worth noting also that the original version of the power included the words "and treaties". These were later deleted but on what ground is not clear. What does seem clear is that their deletion is not consistent with an intention that the Commonwealth should acquire legislative power by merely entering into an international agreement.
The Quick and Garran analysis of the external affairs power is in my view clearly correct. It recognises that in the scheme of s.51 of the Constitution it cannot be relegated to a subordinate or

supplementary category but that equally it should not be elevated to a status that effectively predominates over the other legislative powers. Still less should it assume a character that invites any government to extend the scope of Commonwealth legislative power almost at will.

Nevertheless these things have come to pass. They have come to pass because in the last 30 years the High Court of Australia, in a mere handful of decisions, has seen the two words "external affairs" as holding the key to Australia's assuming its proper place in the international community. This I believe to have been a profound mistake in at least two ways. One is as a matter of constitutional interpretation. The other is as a matter of wisdom.

So far as constitutional interpretation is concerned I make one elaboration of the Quick and Garran argument which is required by the passage of time. It is exemplified by Australia's scientific and other interests in Antarctica. Laws are needed for such undertakings. The High Court has held that such laws may be based on the external affairs power on the ground that the undertaking has an obvious connection with this country and is external to it. I see nothing wrong with that.

Where I part company with the High Court is over its reaction to other changes in the world about us during this century. Compared with a century ago, the advance of technology in the fields of communication and travel has transformed the world to a previously unimaginable extent. Particularly since the second world war everyone has become internationalised. It follows that the implementation of international agreements and obligations has become correspondingly more important.

My disagreement with the High Court, or at least the majority thereof, is over the conclusion to be drawn from those indisputable facts. According to the Court they require an expansive interpretation of the external affairs power in order that Australian governments should not be hamstrung in the international sphere by constitutional limitations on the Parliament's legislative powers.

I disagree with the premise of that argument. Internationalisation does not make it in the least necessary to expand the external affairs power one step beyond the limits assigned to it by Quick and Garran except in matters of transient detail. The acceptance of international obligations is no warrant for interpreting basic provisions of anyone's Constitution out of existence in order to comply with them. To argue otherwise is to put the true situation on its head.

Legally the Constitution of a country is that country. I am not talking about totalitarian window dressing, where the so-called Constitution of a country is pure fiction. I am talking about a country like Australia where the Constitution has been freely adopted, has the force of law and is ultimately guaranteed by an independent judiciary.

In such a country as ours, the federal government in the international arena is exactly the same government as in the domestic arena. In both contexts the government is only what the Constitution says it is. It can do only what the Constitution says it can do. If it assumes international obligations that go beyond the legislature's domestic powers, so be it. To implement them it will have to take whatever steps are lawfully open to it to remedy the absence of power. In Australia this means either the co-operation of the States or else a constitutional amendment.

In saying that, I am well aware that neither is easily forthcoming; but I am not advancing a far-fetched or impractical doctrine. The limitations on federal legislatures are well recognised in international law and diplomacy. They are dealt with as a matter of routine by what is known as a federal clause. This simply acknowledges that a federal government may face constitutional obstacles that impede or prevent complete implementation of an international obligation.

There is not and never has been the slightest reason why the High Court should distort our own Constitution in order to make an exception of Australia in this respect. The United States of America has a much older federal Constitution than we do, and also a much more adventurous

Supreme Court, but I am not aware that any Administration has needed to be judicially rescued in a similar way.

That, then, is why I disagree with the High Court simply as a matter of constitutional interpretation. Its enormous expansion of the external affairs power runs counter to basic principles of construction, was justified by no emergency and seriously distorts the domestic balance of legislative power. I am unmoved by the observation, if it be made, that that balance has been seriously distorted in other ways since federation. No other change can compare in magnitude or significance with the one under discussion.

I turn now to my second point of disagreement, what I have called the unwisdom of the exercise. This turns on the uses to which this accretion of centralised power to the Commonwealth may be put.

Recently I wrote an IPA backgrounder on the external affairs power and the then forthcoming United Nations Conference on Environment and Development. By some mischance its acronym, UNCED, is pronounced unsaid in English, which positively invites the inquiry whether, as is usual on these junkets at the taxpayers' expense, most of what was said would have been better left unsaid, but I pass over that happy possibility.

The reason why I refer to the backgrounder is that to develop the unwisdom point today I need to repeat certain passages from it. If any of you now suffer a touch of deja vu, I do apologise. I was not expecting to be saying any more on the subject, unless perhaps in the courts, so soon afterwards.

I have sufficiently stressed already that the doctrine currently espoused by the High Court gives s.51(29) of the Constitution a very wide scope of operation indeed. That doctrine in summary is that the power supports legislation with respect to anything external to Australia which has an acceptable connection with Australia. An acceptable connection is, among other things, any international obligation that requires domestic legislation for its implementation.

Wide though it is, that doctrine has to be understood in the context of certain expansionary influences that are inherent in the interplay between government, Parliament and the High Court. The starting point is the apparently simple proposition that if Parliament purports to pass a law which does not come within the scope of any of its legislative powers, it is not a valid law at all.

Logically, if a law is not valid it is a nullity and therefore has no effect on anything. The problem with this is that, until the proper authority declares the enactment to be either valid or invalid, or partly the one and partly the other, no-one knows what the position is. The proper authority is the High Court but the High Court will decide nothing that is not brought before it as a formal dispute between parties. In other words, the validity or otherwise of an Act of Parliament cannot be determined unless and until a dispute comes before the Court the resolution of which turns on that question.

Since government cannot function in a permanent state of uncertainty about the validity of vast numbers of statutes that nobody bothers to challenge, the working rule is that an Act is presumed to be valid until judicial decision to the contrary. It follows that at any given time all kinds of laws are in operation which have some sort of apparent connection with one or more of Parliament's legislative powers but no- one actually knows whether the connection is sufficient to make them valid or not.

That alone, as a practical matter, expands the scope of any legislative power, for in this situation federal governments and parliaments tend to be distinctly optimistic about the width of the legislative powers. They are often encouraged in this by the circumstance that some of the powers will have been before the High Court seldom or not at all and are therefore particularly vulnerable to expansive assumptions about their scope.

A further expansionary influence is the judicial principle, expressed also in statutory form in s.51(39) of the Constitution, that to the central idea embodied in a legislative power there has to be added what is called the incidental power. This means matters necessarily incidental to the power or its execution.

Now consider the material that all this works on. I have no idea to how many treaties Australia is currently a party, using the term "treaty" loosely to cover any kind of international agreement. There must be hundreds of them at least, on widely varying subject matters. Implementation of practically every one of them can be referred to the external affairs power if nothing else is available.

Certainly there may be some constitutional obstacles on particular points (like freedom of interstate trade) that are not so easily overcome, but those are few and far between. Also it will be understood that I have passed over various secondary uncertainties, such as what amounts to acceptance of an international obligation short of a formal treaty, to what extent action can be taken against State governments and their instrumentalities, and similar matters.

Minor reservations of that kind are of little consequence when measured against the steadily increasing tendency to look to international rather than national action on world issues. Particularly is this so when some unusually grandiose project comes along, UNCED being an excellent example. I concede at once that the programs lying behind UNCED were, and are, so unwieldy, and so subject to political pressures that in themselves have little to do with the environment, that for the time being little if any changes to Australian domestic law need be anticipated.

That situation however can hardly last. Rightly or wrongly, by which I mean cogently or not, the environment is now big news and has long since received the ultimate political accolade of being seen to have a lot of votes in it. It is therefore not going to go away. Its potential for becoming an almost inexhaustible source of Commonwealth legislative power becomes correspondingly important.

There seems already to be general acceptance among those who are close to the action that UNCED handicapped itself by the unwieldiness to which I referred. Disregarding political obstructionism, it was grossly over-ambitious anyway. Sweeping measures ought not to be the order of the day. We just do not know enough. What we need is the patient accumulation of facts in particular contexts. The framework for an exercise of that kind is not a grandiose conference but a relatively concrete project.

As soon as we reach that stage, Australian legislative action can be expected. Even at that point the word "relatively" is important. The price of international agreement invariably is vagueness of language. Anyone who doubts that need only inspect the Racial Discrimination Act 1975. Inspection of that Act reminds me of the so-called Bubble Act passed by the British Parliament in 1720 in a panic reaction to the first great stock market collapse known as the South Sea Bubble.

It was widely and erroneously supposed that joint stock companies were the cause of the crash, so Parliament legislated to abolish companies. The Act was couched in such comprehensively obscure language that no-one was ever able to work out whether companies had been abolished or not. To be on the safe side everyone assumed that they had been. It was the most successful statute ever enacted.

The draftsman is unknown but he should have been immortalized as the greatest of them all. Alone and unaided, without the need for a single prosecution, he delayed the development of the modern registered company by well over a century. A barren but nevertheless splendid achievement. My point is that the external affairs power will shortly require an abundance of

parliamentary draftsmen of his calibre. All the current ones are employed full time on the Income Tax Assessment Act.

In conclusion let me briefly sketch just two of the consequences which could follow from UNCED, even on the material in existence right now. Suppose that an Australian government became a party to a convention on climate change which was aimed at cleaning up the atmosphere and predicated on the supposition that the atmosphere needs cleaning up.

Such an undertaking could well bring with it power to nationalize anything industrial or commercial that could be suspected of affecting the climate. If outright nationalization proved to be impracticable for some incidental constitutional reason, comprehensive regulation should achieve the end in view just as effectively.

As another example take a convention on the conservation of biodiversity. It is quite possible that definitions of biodiversity abound and do not necessarily translate literally. I know that at least one says that the term "means the variety of and variability among living organisms and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

As I have observed on a previous occasion, this seems to cover pretty much anything except humans or human activities, for it is no more politically correct nowadays to point out that humans come in different colours and sexes than it used to be to say that people are not born equal.

The significance of the definition, taken in conjunction with the High Court's current interpretation of the external affairs power, is that its implementation could comfortably cover the nationalization of farming, or at least total central government control of land use for pastoral and agricultural purposes.

The heart of the matter is that the concept of the environment is so extensive that it can be persuasively argued to encompass in one way or another almost all human activity. If one takes into account pressure of population in marginally fertile areas, it might even include conceiving and giving birth.

In this way UNCED furnishes the most striking illustrations to date of the inappropriateness of the High Court's current approach to the external affairs power. That approach mortgages the domestic effect of much of our Constitution to the incidents and accidents of international diplomacy.

The conduct of diplomacy necessarily tends to be influenced by events outside the country rather than inside. In my view it follows that, exactly as Quick and Garran envisaged with remarkable prescience long ago, the emphasis should be not on expanding the external affairs power but on setting sensible limits to its proper area of operation.

It is easy of course to take extreme examples to make a point and lay oneself open to the rejoinder that it would never happen. My concern is not with suggesting that any of the more startling possibilities of abuse of the external affairs power actually will come to pass. My purpose is simply to say that the current state of the law is such that they could come to pass.

That should not be the case.

Addendum

Since writing the foregoing I have recalled another striking recent instance of the consequences that can flow from the current interpretation of the external affairs power. It involves the Mabo case and the Racial Discrimination Act 1975 of the Commonwealth.

No doubt you will all recall the 6:1 majority decision of the High Court on 3 June 1992, with only Dawson J dissenting, in Eddie Mabo v. Oueensland. It was the case in which the High Court fundamentally altered the law of property by inventing what it called native land title.

This concept enables groups of indigenous Torres Strait Islanders and Australian Aborigines to base a claim to ownership of land on their own laws and customs as an alternative to Australian law as previously understood. The social, economic and legal implications of the case are staggering in their depth and scope, but I have no time on this occasion to go into them. I make only the following point.

Under most circumstances there would not be too much difficulty in modifying the effect of a judicial decision by legislation. A matter of land law in particular is for State legislatures, not the Commonwealth, except of course in the federal territories. The States however, as you will know, have to live with the s.109 of the Constitution problem: that their laws are displaced by valid laws of the Commonwealth on the same subject.

The High Court held the Racial Discrimination Act valid years ago. If the States enact laws modifying the Mabo decision in the matter of native land title, their laws are almost certain to conflict with that Act; yet that Act is itself valid only as an exercise of the external affairs power because it depends upon an international treaty obligation entered into by an Australian government.

As I have had occasion recently to observe elsewhere, it is hard to get more internal than the law of title to land. Without the convenient help of the external affairs power, as at present interpreted, neither the High Court nor the Commonwealth would have been able to impose on the States this fundamental change in the law.

It is perhaps worth bearing in mind also that native land title can benefit at most 1.53% of the population, and probably in practice a far lesser percentage, upon whom we already spend upwards of a billion dollars in public money annually. I am sure that there is not a single Government or Opposition in the country that particularly relishes sorting out where we go from here.

Truly, those two innocent-looking words, "external affairs", have much to answer for.