Chapter Ten

The External Affairs Power: What is to be Done?

The Hon. Peter Durack, QC

Dealing with the "external affairs" power, section 51(xxix), has been the High Court's greatest failure in its role as interpreter of the Constitution. Admittedly, it is an extremely wide and vague head of power. However it is instructive to compare the High Court's treatment of section 92. Had the High Court applied that section in the same literal way it has in relation to the "external affairs" power, government in Australia would have been well nigh unworkable. Although its treatment of section 92 has been subject to heavy criticism and has not been easy to follow, the High Court at least realised that it could not be literally interpreted. Unfortunately the same approach has not been adopted in relation to external affairs.

I have not been asked, nor do I propose, to deliver a paper on the history of the High Court's treatment of this head of power. I have been asked to attempt a much more difficult task, namely to answer the question, What is to be done about the situation which has resulted from the High Court's current interpretation of it?

Nevertheless I am compelled to make one point about the history of the High Court's approach. On re-reading Burgess's Case which was decided in 1936 I was, rather to my surprise, struck with the conclusion that if the same Justices had sat on the Franklin Dam Case in 1983 (nearly fifty years later), they would have come to the same decision. Furthermore, instead of being divided four/three as they were in the latter case, they could well have been unanimous, or at least four/one in favour.

The biggest surprise was that only one judge (Dixon J.) in Burgess's Case was in any way troubled about the fundamental problem with the section : how is it possible that the power can be utilised by the Executive of the Federal polity to gain both executive and legislative powers on any subject under a Constitution, the main purpose of which was to limit the Federal power to specified areas of Government?

Although Dixon saw this fundamental problem, it did not stop him from agreeing with his brothers that the international civil aviation Convention which they were dealing with did in fact give power to the Federal Parliament to apply the Convention's rules wholly within a State. His reason was that they were "indisputably international" in character, and therefore a matter of external affairs. The other four Justices (Latham, Starke, Evatt and McTiernan) were not concerned about this argument at all.

Although subsequent judges and commentators have fallen back on Dixon's obiter as providing some limit on the power, the only case in which this view played a vital role in the decision was Koowarta. It must now be clear that it is simply far too vague and unworkable to provide a limit on the power, and that the weight of judicial (and legal profession) views are that the power encompasses, at least, the obligations of any bona fide treaty entered into by the Commonwealth, subject only to the express and (severely restricted) implied limits on Federal power under the Constitution (e.g. sections 80, 116, etc. and the essential functioning of a State).

It must, of course, not be overlooked that the power is not simply a treaty–making one. It clearly applies to anything which is truly external to Australia (extraterritorial laws, recognition of other countries, extradition of offenders, etc). It also gives Australia the power to protect our off-shore resources, and to regulate shipping in the territorial sea.

It is however the ambit of the treaty–making power which causes the problem for those who have a firm commitment to a Federal system of Government. That is not to say that the Justices of the High Court who have supported this wide power lacked such a commitment, although it may well have been so in some cases. The criticism of the Court is that it has failed to develop any workable and acceptable doctrine to engraft a federal meaning onto this head of power.

That is really so disappointing that I must acknowledge a nagging fear that the task is beyond legal solution.

Certainly I see no likelihood that the current Court or its foreseeable successors will accomplish the task. It may well be that in the long run a legal solution will be found, but I don't imagine that any of us here today are content to leave it at that. For what it is worth my own view is that the Court could have developed the implied limits on Commonwealth discrimination against the States, or interfering with their essential function, to achieve, on a case by case basis, some reasonably satisfactory doctrine.

I believe there is a real difference between a Convention on aviation, or pollution of the atmosphere or the sea, and one which is said to prevent the construction of a small dam on a minor river in a remote part of the country. But the Court has not attempted that, and it would be just academic to propose that it do so now.

The only other contribution which some Justices have made towards solving the Federal dilemma inherent in the power is the requirement of some mutuality between the activities in Australia, and those outside Australia, which are covered by the Convention. This view has been most clearly propounded by Sir Harry Gibbs in the Koowarta Case. Unfortunately, only a minority of the Court agreed with him and, here again, it seems unlikely that it would gain any support in the current Court.

I turn now to the question of a political solution.

Since the Franklin Dam decision, there has been no lack of attention at the political level to the ambit of the external affairs power and its problem for our Federal system. However, it must be stressed that the likelihood of a decision of that kind had been foreseen for many years before the Franklin Dam was proposed. State Governments had been concerned about the rapidly growing list of treaties which were being entered into by the Federal Government without any consultation with them, even though, at the least, it was clear that they were going to be pressured to give effect to many of these new obligations. At the same time the Federal bureaucracy (with the encouragement of constitutional lawyers in the Attorney General's Department and the academic world) saw the potential for the great enlargement of Federal power.

The Whitlam years greatly intensified this conflict, and in 1975 the High Court added more fuel to the fire with its decision in the Seas and Submerged Lands Case, which limited State jurisdiction to the high water mark around the Australian coastline. The decision in this Case was partly based on a treaty, but that was not strictly necessary for the decision. Nevertheless it lit up all the smouldering concerns and discontent at State level.

Fortunately the Fraser Government had just been elected. It was sympathetic to these views, and set about the policy of solving such problems by co-operative arrangements between the Commonwealth and the States. The National Companies and Securities scheme and the Offshore Constitutional Settlement are the two best known examples of the success of this approach. However, a less well known contribution to cooperative federalism was the agreement to give the States a greater role in the negotiation and implementation of treaties. This was enshrined in a resolution at the Premiers' Conference in June, 1982 but the practices set down then had already been put in place. The two most important commitments made by the Commonwealth were (1) to seek Federal clauses in treaties; and (2) to give the States the first opportunity to

implement any of the obligations of a treaty which came within State jurisdiction. These were promptly repudiated by the Labor Government in November, 1983.

The great issue presented by the scheme for a dam on the Franklin River was well and truly on the political agenda by mid 1982. You may recall that there were a number of other great issues on the political agenda at that time. Nevertheless, the one that proved to be the greatest problem for the Fraser Government was undoubtedly its handling of this issue.

We were already committed to and well experienced in seeking co-operative solutions to problems of this kind, and as a result we ruled out the sort of legislation which led to the Franklin Dam Case. We did all we could to negotiate with the Tasmanian Government; first to stop the building of the Dam at all and, after this failed, to meet the demands for better protection of the South–West Tasmanian wilderness which had been placed on the World Heritage List.

At the 1983 election, all we had done gave us no political benefit. The city electorates, particularly in Sydney and Melbourne, were overwhelmed with outrage at what they saw on their television screens, and the perceived devastation of the wilderness which most of them would never even want to enjoy. Colleagues who lost their seats, as well as those who survived the ordeal, all attested to this searing experience, and believed that the Fraser Government had been quite wrong to allow itself to be crucified on the altar of State rights.

The Federal Liberal Party will never forget that experience, and will be reluctant to pay such a political price for that principle, even if it is prepared to go to great lengths to observe it. The other side of the coin is, of course, that State leaders should not push State rights to extremes.

By 1983, with co-operative federalism on the decline and the Federal power entrenched by the High Court, those of us left with a commitment to the federal cause started to look for other solutions. Ideally of course the external affairs power could be limited by a referendum, but that required both an effective form of words and sufficient support in the electorate to obtain the required majority for change.

The new movement kicked off to a good start at the Adelaide Constitutional Convention in April, 1983.

On the motion of the then Leader of the Opposition, Mr Peacock, a resolution was passed expressing concern about the expansionary interpretation of the external affairs power, and directing that a sub-committee of the Convention should be set up to consider mechanisms by which the "traditional balance" of legislative, executive and judicial powers in Australia should more effectively be preserved.

This sub–committee was duly set up, and reported to the next Constitutional Convention held in Brisbane in July, 1985. It found that there were sharp political differences of opinion about the views expressed in the motion, and great difficulties with the phrase "traditional balance" of power referred to in it. This difficulty seems rather strange considering the committee was not made up of lawyers but of practising State and Federal politicians. If they could not discern such a balance even in broad terms, you may well question whether voters at a referendum would have more success.

At all events, the only agreement was the recommendation for a Treaties Council, to be set up by the Premiers' Conference, which would perform virtually the same function as Federal/State officials had been performing during the years of the Fraser Government as set out in the Agreement of June, 1982. Not surprisingly, that was the only proposal which could gain support at the Brisbane Convention.

Over this time, however, three firm proposals for a referendum were developed and put before the Brisbane Convention. These were:

1. A root and branch constitutional change worked out by Professor Crommelin of Melbourne University. He suggested that the solution was to assign exclusive powers to both the Federal and

State polities, with all remaining areas of Government to be the subject of concurrent powers. This would clearly ensure that the States would retain a significant governmental role, and that despite treaty obligations being entered into which came within State powers, these could only be enforced at the State level. The argument against this proposal was that it would be difficult to reach agreement on the actual division of powers, and would be too difficult to explain to the electorate.

2. A very different approach to the Crommelin proposal was drafted by Dr Finnis, a constitutional lawyer at Oxford University, who had been advising the Bjelke-Petersen government of Queensland on these issues for some years. He proposed to limit the legislative ambit of the external affairs power to certain specific subjects, such as aviation and fugitive offenders, but otherwise only in respect of those powers already enumerated in section 51. This proposal did not have the same intellectual attraction as the Crommelin proposal, but the main criticism of it was that it would be too restrictive of Australia's role as a member of the international community.

3. The third proposal was one which I developed on behalf of the Opposition when I was Shadow Attorney–General in 1983-84. Unfortunately it was not prepared in time for consideration by the sub– committee, which for some reason finished its report in September, 1984.

Although I was not a member of the sub-committee I had learned of the conflict within it and decided to put forward a separate proposal for the Brisbane Constitutional Convention. With the help of a former Commonwealth Parliamentary Counsel, Charles Comans, we devised a bill for an amendment to section 51(xxix), to limit its ambit along the lines suggested by the dissenting Justices in the Koowarta Case, particularly as formulated by Gibbs CJ.

The bill as introduced by me in the Senate sought to ensure that the power does not authorise the Federal Parliament to make laws regulating "persons, matters or things in the Commonwealth", except to the extent that:

(a) those persons, matters or things have "a substantial relationship to other countries or to persons, matters or things outside the Commonwealth; or

(b) the laws relate to the movement of persons, matters or things into or out of the Commonwealth".

How well we achieved our purpose may be debated, but at any rate I believed, and still believe, that the solution would be a significant brake on the power and could be reasonably applied. Its virtue over both the Crommelin and Finnis proposals is that it leaves room for flexibility in its application to new and unforseen developments in the political world, while at the same time preserving a significant role for the States. As I have said, it was not considered by the sub–committee but, if it had been, I am sure that it would not have gained support. However, a motion to refer it to the External Affairs sub-committee at the Brisbane Convention was only narrowly defeated. Had the Queensland Government delegation supported the motion it would have been passed. Instead it actually opposed it, even though it had failed to gain support for its own (Finnis) solution.

To complete the frustrating attempts to seek a Federal solution to the external affairs power, I refer to the proceedings of the Hawke Government's Constitutional Commission, presided over by Sir Maurice Byers with the aid of Gough Whitlam, Professors Campbell and Zines and Sir Rupert Hamer. In its 1988 report the Commission duly recorded the work of the External Affairs sub- committee of the Constitutional Convention which had recommended a Treaties Council. It concluded that Australia's role in the international community would be greatly weakened by any further limits on the external affairs power than those already laid down by the High Court. It endorsed the proposal for a Treaties Council. Both the Distribution of Powers Committee and the

Commission itself discussed the proposals for a referendum which I have mentioned and found fault with all of them. Difficulties with my bill were found in the drafting, but no suggestions were made as to how it could be improved.

All these proposals were however rejected because the majority of that Commission was wholly satisfied with the extent of the Commonwealth power as it stood, and was not concerned about its effect on the Federal compact. Courageously, Sir Rupert Hamer made a vigorous dissent on this question and proposed a simple amendment to section 51(xxix) to prevent the Commonwealth's legislative power under it to go beyond the enumerated powers. He dealt a powerful refutation to the claim all through this debate that Australia would be an international cripple if it could not implement the obligations it assumed under a treaty. He pointed out that this has not occurred in Canada, Germany or the United States. None of these countries can guarantee the implementation of treaties entered into by their national governments.

One further proposal did however emerge from the report of the Constitutional Convention. Mr Lindell in the Distribution of Powers Committee, and Professor Zines in the final report, both criticised the fact that treaties are ratified as well as negotiated by the Executive under our Constitution. Parliament plays no role in the process. This is not the case in the US, where a two– thirds majority in the Senate is required for ratification. They proposed that the Federal Parliament should assume a role in the ratification process, either by requiring an Act of Parliament to do so, or by Parliamentary disallowance of ratification by the Executive. The attraction of this proposal, as with the Treaties Council, is that it could be implemented without a referendum and would place some brake on the executive power. The majority of the Constitutional Commission did not support this proposal.

After a decade of lively and unresolved debate about the external affairs power, I still have to answer the question put to me : What is to be done?

In my view no solution can be found in the High Court or by a referendum in the present climate. The latter is ruled out by the continuing failure to reach any political common ground about even the desirability of an amendment to section 51(xxix), much less the form of it. Accordingly, it seems that the only possible change could be made by Parliament itself which would, of course, require support from the Government of the day. The proposals for a Treaties Council and a Parliamentary role in the ratification of treaties are useful and workable, and would undoubtedly place some restraint on the vast Executive power which now exists.

In my view the Treaties Council should be set up by uniform legislation by the Parliaments of Australia rather than by the Premiers' Conference. This would clearly give it greater authority, and it should represent wider interests than just the Federal and State Governments.

In the end, however, no solution will work unless the Federal Executive power is committed to it. There are now so many treaties in place (?1600) that it would not detract much from existing Executive powers if a hostile Senate refused to ratify any more. That attitude in the Senate is, however, not a likely one. It is more likely to support ratification.

The Fraser Government's experience showed that co-operative federalism does work, or can be made to work in most cases. Labor Governments since 1983, although committed to much greater central power, have not relied much on the external affairs power to achieve their policies. Despite the furore over the Franklin Dam Case, little use has been made of it. One notable exception is the Sex Discrimination Act, but the administration of that Act relies heavily on State bodies. Currently the Government is threatening to use the ILO Convention to achieve its industrial relations policy, but so is the ACCI. There is more bluster about this power than substantial usage. The truth is that there are many other powers in the Federal treasure house of section 51.

I would like to think that my judgment about the feasibility of changing section 51(xxix) by referendum is wrong. It may be that the people would be more perceptive about the need to rein in the external affairs power in Australia than many of their own Federal and State representatives appeared to be at the Constitutional Conventions. The Labor Party however would undoubtedly oppose such a proposal.

If nevertheless the Federal Parliament could be persuaded to attempt the task, you will not be surprised if I answer the question, What is to be done? by choosing my own bill as the most promising means of achieving success. So long as it remains unchanged, the power is there for a Federal Government to subvert the Federal system, with the States being left as mere administrators.