Chapter One

Amending the External Affairs Power

Colin Howard

The purpose of this paper is to argue that s.51(xxix) of the Constitution should be amended, and to propose an appropriate form of words. This audience hardly needs to be reminded that s.51(xxix) is the power of the Parliament to legislate for the peace, order and good government of the Commonwealth with respect to "external affairs".

To advocate an amendment to the Constitution implies a shortcoming in its operation which would be remedied by the proposed change. In the present instance the shortcoming is the extent to which High Court interpretation of the external affairs power has enabled the federal Parliament, at the behest of the executive government, to circumvent limitations on other legislative powers.

The result has been increasing intrusion by the Commonwealth into areas of the national life which the framers of the Constitution clearly intended should remain under the control of the States. Or, to put the matter another way, although s.51(xxix) of the Constitution is expressed to be a power to legislate with respect to external affairs, in practice it has now become a source of power to legislate upon an ever-widening variety of topics the significance of which is overwhelmingly domestic, not external.

Let me first dispose of the cynic's view of the matter. As he, or she, sees it, throughout the life of the federation the flow of power has been almost uninterruptedly from the States to the Commonwealth, particularly through the exercise of the latter's control of the national finances. That being so, the cynic asks, why worry about a bit more power going the same way via external affairs? My response is that the fact that the constitutional intention has been defeated in one important respect is no argument for sitting idly by watching the same thing happen in another.

Cynics however have a second string to their bows. They can point to the notorious difficulty of getting any proposed amendment past the constitutional obstacles that lie in its path. They can claim with some plausibility that nowadays even to try is a waste of public money and time. I do not accept this objection as sufficient either, but I shall not pause at this point to examine it further. I shall return to it later.

There was a time, not so many years ago, when to mention the external affairs power was to invite in return a blank stare. Offhand the topic meant very little, even among constitutional lawyers. I suppose that current equivalents might be the powers to legislate for lighthouses, lightships, beacons, buoys and astronomical and meteorological observations. Times have changed. Even if the exact number of the relevant subsection continues to escape the memories of all but specialists, the expression "external affairs" is becoming widely known. So is unease about its significance.

A striking instance occurred early last year. In a joint statement released on 20 January, 1994 eight major industry associations urged the federal government to change its approach to treaty-making. The parties to this statement were the Australian Chamber of Commerce and Industry, the Australian Mining Industry Council, the Business Council of Australia, the Council for International Business Affairs, the Environmental Management Industry Association of Australia, the Metal Trades Industry Association, the National Association of Forest Industries and the National Farmers Federation.

That is a formidable concentration of opinion. As far as I know, it represents the first formal expression of disquiet from commerce and industry at the use which has been made by successive federal governments of the concept of an external affair. The signatories to the

statement were concerned primarily with identifying deficiencies in current procedures, but they did not rest content with that. They suggested also many improvements, mostly by way of wider consultation before entering into treaty obligations and closer parliamentary supervision both before and after the event.

This document was followed, towards the end of 1994, by the entry of the external affairs power into politics. The Senate referred the operation of s.51(xxix) to its Legal and Constitutional References Committee. Submissions were requested by 24 February, 1995. At the time of writing the Committee has not yet reported. There can be little doubt that Senate interest was aroused by the extraordinary use made of the external affairs power in the Industrial Relations Reform Act 1993, otherwise known as the Brereton Act, and the sterling work of Senator Rod Kemp of Victoria in keeping the implications of the power before the Senate.

A further sign of mounting interest was the publication in October, 1994 by the Institute of Public Affairs of a paper on the subject by the Honourable Peter Durack QC, a former Senator for Western Australia and, among other ministerial posts, Attorney-General. I shall have occasion later to refer to this paper again. Also in October 1994, in that month's issue of The Adelaide Review, Mr Tony Abbott recommended a constitutional amendment which, by coincidence, accords with my own line of thought, although in some respects differently worded. I shall have occasion later to refer to this again too.

If one is familiar with a topic and has spoken on it on a number of occasions, which is the case with me and the external affairs power, one is apt to find oneself after a while in a situation resembling the sea route in the Straits of Messina, which separates Italy from Sicily and runs between the rock Scylla and the whirlpool Charybdis.

On the one hand I am in danger of hitting the rock of boredom by repeating information already familiar to my listeners; but on the other I risk falling into the whirlpool of confusion by assuming that my listeners are as conversant with the subject as I am. On the whole I am more apprehensive about Charybdis than about Scylla, so please forgive me for outlining yet again the precise nature of the problem with which we are confronted.

I have referred already to the Brereton Act. Because it surpasses by far in selectivity any previous legislative reliance on the external affairs power, a useful way of summarising the present situation is to outline the position as it was immediately before the Brereton Act and then briefly consider how that Act has extended it. Shortly stated, successive High Court decisions had developed a doctrine that s.51(xxix) empowers the Parliament to legislate for the implementation within this country of any international obligation to which Australia is a party.

That is not the whole scope of the power. It extends also, naturally enough, to matters which in themselves are entirely external but have a reasonable connection with Australia. Examples of such matters are the adjacent sea bed, Antarctica, overseas aid and diplomatic representation abroad. There is also, and not at all naturally, a vaguer category of external affairs which seems to comprise anything of international concern in which Australia takes an interest. In the context of the external affairs power, Australia means the federal government of the day.

The power is subject to outright prohibitions in the Constitution, whether express or implied, but there are not many of these. The general effect therefore is that the external affairs power holds out the temptation to any federal government to resort to it to circumvent limitations on any of the Commonwealth's numerous other legislative powers. All the government needs to do is find an international obligation or, failing that, a matter of international concern in which it can claim to have an interest, and base an Act of Parliament upon it.

It is far from clear how a sufficient degree of genuine interest in a matter of international concern is to be proved. The method employed thus far, sometimes with considerable ingenuity, has been to rely on international instruments like treaties, or on covenants and conventions of the United Nations and its associated bodies, such as the International Labour Organisation (ILO).

The High Court has held that in this situation the domestic legislation, to be valid, must amount to a reasonable attempt in both letter and spirit to implement the international instrument relied

on. The Court has said also that it is not open to a government to manufacture spurious obligations or interests for the sole purpose of empowering the Parliament to legislate on a particular topic. This limitation is distinctly theoretical. No-one so far has been able to work out how the absence of a genuine obligation or interest could be evidenced to the satisfaction of a court.

This then is in broad outline the position as it was before the Brereton Act. Before the passing of that Act the application of these principles had bestowed upon the federation such blessings as the complex legislative scheme to nullify the effect of the Seas and Submerged Lands Case, New South Wales v. Commonwealth (1975) 135 CLR 337; the Racial Discrimination Act 1975, which was upheld by a 4:3 majority in Koowarta v. Bjelke-Petersen (1982) 153 CLR 168; the World Heritage Properties Conservation Act 1983, upheld in the Tasmanian Dam Case, Commonwealth v. Tasmania (1983) 158 CLR 1; the Sex Discrimination Act 1984, and also the Human Rights and Equal Opportunity Commission Act 1986, the validity of neither of which has been challenged.

It is no doubt only a matter of time before the beneficiaries of most of this legislation, almost none of which is on the face of things within Commonwealth legislative power, will be joined by children, regardless of their parents' wishes, every known form of animal life, and every existing aspect of the environment. Meanwhile we shall just have to make do with the Brereton Act.

The Act is no lightweight. It inserts about 300 sections into the Industrial Relations Act 1988 (the IR Act). It consists of 8 Parts and 4 Schedules, one of which also adds 12 additional schedules to the IR Act. These are a collection of texts of international instruments, or extracts from them, to most of which Australia is a party, plus in one case a code of law on the topic of parental leave.

The instruments relied on to invoke the external affairs power nearly all emanate from the ILO. They comprise eight ILO Conventions and four so-called ILO Recommendations. Australia is a party to the Conventions and has ratified all of them. In one case the ratification occurred shortly before the passage of the Act and long after the Convention came into existence. Australia is not a party to the Recommendations because nobody is.

The difference between ILO Conventions and ILO Recommendations is that the former purport to impose obligations upon member nations to implement them but the latter do not: they are only what they say they are, recommendations. Reliance upon them, if it is upheld by the High Court, represents yet a further extension of the external affairs power. Presumably they will fall into the "matters of international concern in which Australia takes an interest" category of external affairs, for they certainly do not even purport to impose obligations in the manner of a treaty or a Convention.

In the Brereton Act, not even the invocation of ILO Recommendations is the high water mark of innovative optimism. One of the many rights which the Act purports to confer is a limited right to strike. Implementation of such a right is said in the Act to be an international obligation. It seems however that parliamentary counsel had some difficulty in providing a basis for this particular bastion of democracy.

It is said to derive from no less than five sources: a United Nations Covenant, two ILO Conventions, the Constitution of the ILO and customary international law. Perhaps the hope is that the proposition can be sustained by weight of numbers, not to mention variety. It certainly does not seem to be sustainable as an implementation of any of the grounds relied on. Only one of them even refers to a right to strike, and that one says that such a right can be exercised only in accordance with the laws of the relevant country, which is manifestly self-contradictory.

That particular exercise illustrates well the intellectual level of some of the international material that Labor governments in particular are addicted to introducing into Australian domestic law. It illustrates also what I have referred to as the selectivity of the Brereton Act. In many places it falls far short of adopting a complete set of principles enshrined in some Covenant or comparable document. It picks and chooses bits and pieces of text according to the government's

domestic shopping list. Words begin to lose meaning if we have to accept this sort of thing as genuine implementation of an international obligation.

The Brereton Act does not rely by any means wholly on the external affairs power but it does rely on it to an extent, and in ways, which surpass anything seen thus far in any context. Little wonder that the validity of substantial parts of it are under High Court challenge by Victoria, South Australia and Western Australia.

Lastly in setting the scene I refer to a different aspect of the matter which, if I may say so, has been brought out particularly well by Senator Rod Kemp in his various parliamentary speeches and submissions to committees. He draws attention to the increasing influence over our domestic affairs of policies fashioned by UN instrumentalities which are composed to a significant extent of people from countries with no claim to be even remotely democratic and whose personal competence is usually invisible.

In Senator Kemp's view this trend is in a subtle but effective way undermining the very sovereignty and independence which we had thought to be safely enshrined in the Australia Acts of 1986. The only answers I have seen to his contentions seem to me to be nitpicking and legalistic, and therefore merely evasive, characteristics which they have in common with the republican movement.

It is against that background that I turn now to the question of amendment. Much of the problem of s.51(xxix) derives from its undue economy of self-expression. I have described on a previous occasion with what admirable foresight Sir John Quick and Sir Robert Garran, in their Annotated Constitution of the Australian Commonwealth, perceived that the uninformative words "external affairs" would one day cause trouble. That day has now come and it falls to us to see if we can do something about it.

It is inherent in the character of a specific power to legislate upon a given topic that it should be framed in positive terms. It is similarly inherent that its scope of operation is coterminous with the scope of the topic to which it refers, but quite where the line is to be drawn between what the power does, and what it does not, authorise can never be wholly foreseen. Life is too various. Hence, if there is a possible area of operation which you definitely do not want that power to have, it is advisable to fall back on the negative and prohibit that particular application of the power.

It is well to bear these simple principles in mind in the present case. Starting from the position that s.51(xxix), by interpretation, now authorises too wide a range of laws, the problem can be tackled either positively or negatively. The grammatically positive approach seeks to identify in more detail than at present what sort of laws the subsection should authorise. This method is likely to have only partial success at best, for no more than any other legislative power can it cover every possible future situation.

The negative approach is much less vulnerable, which is why constitutional guarantees tend to be prohibitions. A notable exception in this country, which helps to prove the point, is the freedom of interstate trade guarantee of s.92 of the Constitution. It is expressed in the positive and has caused immense trouble to everyone except the legal profession all this century.

Hence my first proposition is that we should forget about tinkering with the words "external affairs" to make them express more clearly what we want them to mean, and devise a prohibition to prevent them being given a meaning and effect that we do not want. In principle the prohibition should be as simple and straightforward as possible. Language of such vivid and dedicated obscurity as the Income Tax Assessment Act, the Native Title Act and the Corporations Law should be avoided.

Fortunately, the enterprise is assisted by the fact that we know exactly what we do not want s.51(xxix) to authorise. We do not want it to authorise laws which operate in the States, at all events not without State consent. It seems to me that to devise a form of words which achieves this is one of life's less demanding intellectual challenges.

What I would propose is adding after the words "external affairs" in s.51(xxix) the following:

"provided that no such law shall apply within the territory of a State unless
(a) the Parliament has power to make that law otherwise than under this sub-section; or
(b) the law is made at the request or with the consent of the State; or
(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia."

There are some consequential matters. The question may be asked whether such an amendment can or should be retrospective. Although no doubt an interesting point when expressed in that way, it does not in fact arise. The effect of the amendment would be that existing laws enacted in reliance on s.51(xxix) in its original form would no longer be operative in any State in the absence of a request or consent, unless they related to diplomatic representation.

If in any case a State had indeed been previously consulted, and had consented informally, the question might arise whether such a consent could operate, perhaps with the help of retrospective State legislation, to avoid a hiatus in the application of the Commonwealth law. I think the answer probably is yes, but, fascinating though such hypotheticals are, I would not recommend complicating the amendment by trying to foresee and provide for them in the Constitution itself. Consequential questions are matters of interpretation for the High Court.

There may be a view that rather than amend subsection 51(xxix) itself, a guarantee to the same effect be put in an altogether separate section numbered, say, 51A. If it were to cover the same ground as my proviso it would have to be rephrased along the following lines: "No law made by the Parliament pursuant to sub- section (xxix) of section 51 can apply within ... etc, etc." I do not feel moved to go to the barricades over what may be a mere matter of style, but what I can only call professional instinct leads me to believe that the closer the connection between the legislative power itself and any limitations upon it, the better. I am sticking with my proviso.

Lastly there remains the second argument of the cynic that I put to one side at the outset. This was that there is no hope of an amendment getting through, so we might as well forget it. Although the paper by Peter Durack that I mentioned earlier is not at all the work of a cynic, but a constructive consideration of the issues based on his long and varied experience, he does come to the same conclusion about the prospects of an amendment.

At p.8 he writes:

"It certainly can't be said that the question has been ignored these last eleven years, or that no genuine effort in fact has been made to find a solution to the problem. On the contrary, a great deal of thought and action has been given to it, and a number of proposals have been debated and some partial modifications of Federal policy have been agreed. Nevertheless, no substantial agreement has been reached on any amendment to the Constitution itself. This means that no change to the Constitution is in sight."

This is the view that a minimum condition for constitutional amendment is bipartisan political support. Perhaps nowadays, plentifully supplied as we are with Greens, Independents, Independent Greens, Democrats of assorted hues and so on, I should say multipartisan political support. It would be idle to deny that there is much evidence to support this view, although perhaps not as much as seems at first glance.

However that may be, I do not take the view that a proposed amendment is not worth proceeding with unless it enjoys virtually unanimous political support. At the very least, a proposal that fails by only a narrow margin (and remembering that an amendment that has around 66% support in the national electorate can fail under the requirement that it must pass in four of the States as well) can send a powerful political message.

Furthermore, the lessons of 1967 should not be forgotten. Two amendments relating to Aborigines were put up and passed with overwhelming support. An accompanying amendment which would have broken the nexus of s.24 of the Constitution, and enjoyed almost complete parliamentary support, failed decisively. It was widely believed, whether rightly or wrongly is immaterial, that the Aboriginal amendments were included only because, being popular, they might bring s.24 in on their coat-tails. In the result the electorate gave a clear demonstration that

it was perfectly capable of distinguishing between proposals on the basis of their perceived merits.

Moreover the perceived purpose of the Aboriginal amendments was to benefit Aborigines, a simple and readily grasped concept. Here too it is immaterial that that perception was naive. Then, as now, dramatic Aboriginal welfare initiatives are intended, at all events primarily, to benefit the politicians who make them. 1967 is an excellent example. Having accepted the electoral kudos of supporting the amendments, all political parties ignored the matter for the next 15 years or so.

But the point is that the Aboriginal amendments conveyed a simple and attractive message to the electorate. By contrast, the proposed s.24 amendment to break the nexus had considerable merit but unfortunately was confusingly technical in character and easily capable of being attacked as political trickery.

We can learn from all this. The amendment that I propose takes a form which seems to me readily comprehensible. It says clearly enough that henceforth the Commonwealth cannot do something without the consent of the States. Moreover it is capable of being explained, perfectly correctly, along the lines developed by Senator Kemp. My guess is that there is already a substantial body of opinion in the electorate which would readily rally behind the message that we are increasingly being delivered into the hands of incompetent foreigners for short-term political advantage.

The reservation for laws relating to diplomatic representation is entirely in keeping with the original constitutional intention. The Commonwealth must certainly have overriding power to legislate for the establishment and protection of embassies and diplomatic staff of other countries in Australia, including the customary exemptions from criminal process, customs searches and so on.

I hardly need labour the point also that on a number of fronts current political correctness is facing a mounting backlash. I have in mind, for example, the shrill vociferousness of all manner of minority groups incessantly carrying on about their rights. Then there is that legislative caricature the Brereton Act, a grotesque and unworkable pay-off to the trade unions on the basis, very largely, of waffle borrowed from the ILO.

In the realm of grotesque legislative caricatures one must not overlook the Native Title Act, which is increasingly emerging as not only similarly unworkable but equally out of touch with public opinion. To these concerns there may be added mounting apprehension about sweeping UN involvement in almost everything on environmental grounds. And of course the republican push is making its contribution to the general annoyance with the Commonwealth by encouraging us to project to the rest of the world the impression that we are ashamed of our Head of State. Even the High Court only got stuck into our achievements.

For such reasons as these I believe that the time is fast approaching when an external affairs amendment will be a reasonable and practicable proposition to put to the electorate. No doubt it will be contentious at the Commonwealth level because it unambiguously proposes a curtailment of Commonwealth power. This affects every federal government, whatever its political character. Nevertheless, it is hard to believe that there would be serious objections at State level. On the Coalition side, it seems to me also to be difficult to oppose such a measure at the federal level without a serious loss of credibility.

In conclusion I suggest also that there may still be something to be said for acting on principle and conviction. The perversion of the external affairs power has a fair claim to be the most blatant and cynical departure from the original constitutional intention that we have yet seen. If ever there was a de facto amendment of the Constitution in manifest defiance of its own prescribed procedures, surely this is it.