Chapter One

A View of the External Affairs Power

Rt Hon Sir Garfield Barwick, AK, GCMG

The Commonwealth is a federation of States, formerly self-governing colonies within the Imperial system, and was itself a colony within the British Empire, a circumstance which should be remembered when the Constitution is under construction. The State constitutions, though statutory and as modified by the federal Constitution, were confirmed by it. The federal Constitution is in writing and is explicit as to the powers it creates. It provides for a separation of powers and for a parliamentary democratic system of government.

On the separation of its territories from those of the Imperial regime, our Australian monarchy emerged, separate and distinct from the British Crown, as it is from the monarchies of New Zealand and Canada. The powers exercisable by the monarch are explicitly described, as are those given to the Governor-General personally. The monarch was given the power to appoint and instruct the Governor-General; to withhold assent to Commonwealth legislation if the Governor-General had reserved that question for the monarch; and the power to set aside a Commonwealth statute within two years of its passage through the Parliament ÄÄ but all these powers are exercisable only on the advice of the Australian ministry communicated to the monarch via the Prime Minister.

Thus the monarch has no power which can be exercised without or not in conformity with the advice of the Australian ministry. The powers given to the Governor-General personally are clearly defined. He has the power to appoint and therefore to dismiss the ministry which is appointed not for a term, but to hold office during his pleasure. This does not mean his personal pleasure, but means in substance so long as that ministry retains the confidence of the Parliament. He is given the power and authority to summon the Parliament, to prorogue it and to dissolve it. These powers of the Governor-General are explicit and are the result of the direct enactment of the Westminster Parliament, and not in any sense derivative from the fact that the Governor-General is representative of the Queen in Australia. The powers which are given to him are given to him personally and directly by the Constitution.

There has been talk lately about reserve powers of the Crown. It seems to have been thought that Sir John Kerr's dismissal of the ministry in 1975 may have been an exercise of these reserve powers, but in fact he exercised an express power given him by the Constitution to appoint and to dismiss the ministry. The notion of reserve powers being available to the Crown was developed in Imperial days when it was thought that in the long process of converting an absolute monarchy into a constitutional monarchy there remained some powers of the Crown which were exercisable without the concurrence of the ministry. Whether or not this was a correct view, the Commonwealth Constitution leaves no room for any such notion.

The Constitution lists the matters on which the Commonwealth Parliament can legislate. The matters are very succinctly described. The power to levy duties of customs and excise was given exclusively to the Commonwealth, but otherwise the powers nominated by section 51 of the Constitution are the same legislative powers as are retained by the States. Consequently virtually

all the powers given to the Commonwealth, other than the authority to levy customs and excise, are concurrent powers. Any possible conflict of legislation on these subjects is dealt with by section 109, which makes the law of the Commonwealth paramount in case of any conflict of legislative activity; that is to say, paramount to the extent of any inconsistency between the federal and State law on that subject.

It is for the Court to construe the descriptive phrases contained in section 51 to determine their meaning. That determination will be made as of 1900 and the descriptions will retain that meaning throughout, though the field that meaning will cover will depend upon current circumstances and will be found in the course of time to authorise ever widening actions. Illustrations will be found in the decisions of the Court.

We have so far not adopted the view of the majority of the Supreme Court of the United States about the incorporation of the grant of legislative power in the Constitution of that country. That majority has taken the view, strongly opposed by a vigorous minority, that the meaning of the grant will change with the circumstances.

The legislative power to make laws on external affairs is granted by those two words, "external affairs", in section 51 of the Constitution. The powers granted in this respect will be governed by the meaning of the words "external affairs" as they were understood in 1900. This cannot properly be read as a grant of power with respect to international relationships but rather, as the words indicate, with respect to external affairs, which must mean the external affairs of the federation, of the Commonwealth of Australia. An affair of the Commonwealth will be a matter of concern to the federation and if, because of its nature, that matter would need external action to accomplish it, to bring it to fruition, it is an external affair of the federation.

An illustration of such an affair would be the national need to make an arrangement with a foreign power or powers, the affair being of intrinsic national quality of what was sought to be done and the external aspect of it provided by the external treaty.

The Commonwealth had become a signatory to the Convention for the Protection of the World Cultural and Natural Heritage, under which the Commonwealth undertook obligations expressed in very general and wide ranging terms to protect the environment, and to submit an inventory of territorial features suitable for inclusion in a list which the World Heritage Committee was required to keep of properties considered to be of world heritage value. The Commonwealth nominated an area in Tasmania known as the Gordon below Franklin Dam area as suitable for inclusion in the World Heritage List. Thereafter that area was accepted as a suitable piece of international heritage by the Committee. The nomination by the Commonwealth was not pursuant to any obligation to make a nomination but entirely voluntary, gratuitous. Thereafter a section of the World Heritage Properties Conservation Act 1983, section 6, empowered the minister to forbid any development of the item nominated to the international committee as suitable for world heritage.

Of course in 1900 there was no concept of the United Nations nor any activities of that body. The United Nations decided to establish a list of physical manifestations which were to be regarded as the international heritage and to be voluntarily protected by the nations. The process of identifying the physical object to be included in the international heritage list included the voluntary surrender of power on the part of the national state. It is as well to remember that the United Nations has no legislative power but its activities depend upon the voluntary concurrence of nations in what is proposed.

The Convention for the Protection of the World Cultural and Natural Heritage to which Australia was a party did not impose any obligation on the Commonwealth to nominate a piece of territory

as suitable for inclusion in the World Heritage List. So that the Commonwealth's act in nominating the Tasmanian river as suitable for inclusion in the World Heritage List was a purely gratuitous act.

The High Court in its several recent decisions has taken a much wider view of the grant of legislative power. It seems to me it has not considered the validity of a statute giving the ministry authority to prevent development on a slice of Australian land because it has with the approval of an appointed committee of the United Nations been placed on a list of heritage properties. The Court does not address the question of whether what is authorised is an affair of the federation and test its validity accordingly.

The proposal before the Australian Government in 1982 was that it should nominate a slice of Australian territory as suitable for inclusion in a list of international heritage items to be kept by a committee nominated by the United Nations. The statute provided, as a consequence of the acceptance by that committee of the nominated item as suitable for inclusion in the list of international heritage items, that the local government lost control of the territory in the interests of its maintenance and preservation. By no stretch of the imagination could that proposal excite the interest and concern of the Australian community so as to become an affair of the Commonwealth and authorised so as to become an affair of the Commonwealth carrying the necessary authority for its implementation, thus making up the external affair. In terms the proposal is of international interest and evidently of academic interest lacking practical reality. It would be stretching matters beyond breaking point to call the proposal a Commonwealth affair, a matter of interest and concern to the country.

Yet a statute providing the consequences of the submission of a slice of Australian territory for inclusion in the list of international heritage items was held by the Court to be a valid exercise of the legislative power with respect to external affairs. It seems to me that if the very terms of the proposal were taken to represent the circumstances which would justify a statute to carry them into existence, such an act could not be held to be a valid exercise of the power with respect to external affairs, for the reason that the proposal did not constitute an affair of the Commonwealth at all, but was little more than an academic exercise of the United Nations. On that footing the Act would be invalid as a piece of Commonwealth legislation. The idea of placing an item of Australian territory at the disposal of a committee of the United Nations is little better than fanciful, yet the Court justified the statute and authorised the submission of a piece of Australian territory for inclusion in the list of international heritage items. It seems to me it did so not by testing the validity of the statute in the light of the circumstances in which it was being passed, but in the light of the circumstances which would have been created if it had been valid and placed in effect.

On the footing that the grant of legislative power is a power to accomplish an affair of the Commonwealth by external activity, it seems to me that if the question be asked, what affair of the federation called for the listing by an appointed committee of the United Nations of a physical item of Australian territory, the answer must be "none". It was of no concern to the federation, to the Commonwealth of Australia, to have listed by the United Nations committee this area, however much it was of consequence for the international community as of heritage value. I therefore conclude that the nomination of Australian territory as of international heritage value was not an affair of the federation and consequently, for that reason, the statute was void.