Chapter One

The Proposed External Affairs Referendum

Colin Howard

At our Melbourne conference last year I prefaced my paper with a disclaimer to the effect that the views I expressed were mine alone and were not to be taken in any sense as those of my Minister or the Victorian Government. I still hold the position of Crown Counsel. Accordingly the same disclaimer applies.

My subject today originated at our Sydney conference last year. I observed on that occasion that section 51(xxix) of the Constitution, the power to legislate with respect to "external affairs", had become "a source of power to legislate upon an ever-widening variety of topics the significance of which is overwhelmingly domestic, not external". I went on to argue for a constitutional amendment to correct a situation so manifestly out of keeping with the intended federal character of the Constitution.

I did not, you may recall, confine myself to argument in the abstract but advanced for consideration the precise amendment which I thought, and still think, should be made. Before revealing it I briefly debated whether I could safely assume that everyone present was conversant with the nature and extent of the external affairs problem. I concluded that I should not make that assumption, even if for some of my listeners an introductory review of the situation might seem superfluous. Passing boredom for some seemed to me to be a lesser risk than lasting confusion for others. The case is different today. Everyone has now had the opportunity to read the Proceedings of that conference and, no doubt, will have duly read them. My assumption today therefore is that you are all well aware of the nature of the problem. You may recall also that my presentation was followed by addresses from Professors Winterton and Coper on the same subject. There was then a brief free for all in which the speakers took questions from the floor and commented on each other.

In November we had the further benefit of a paper from SEK Hulme, QC entitled *The Foreign Affairs Power: the State of the Debate.* There have to be taken into account also two contributions from former Senator and federal Minister Peter Durack, QC, one in 1993 as an address to this Society and the other as a paper published in 1994 by the Institute of Public Affairs.

A major event since those commentaries were published has been the federal election. This brought with it the virtual certainty of a constitutional Convention of some description in 1997. The idea of such a Convention originated in the diffuse and superficial exchange of ill-informed opinion which has come to be known as the republic debate, but I share John Stone's view that there is no reason why it should be limited to that topic. Apart from anything else, it will be an expensive exercise and we might as well get our money's worth.

In the hope of influencing opinion in that direction my paper today seeks to take account of the commentaries that I have mentioned and otherwise take up from where I left off last time. I start by setting out the text of the amendment that I previously presented. You will note that it has not

changed. You may safely conclude from that that I have not been noticeably influenced by my various colleagues' observations.

Leaving aside the opening general words of section 51 of the Constitution, the external affairs power in sub-section (xxix) consists only of the two words "external affairs". What I propose is not to change them but simply to add a proviso as follows:

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

In the latest volume in the series recording the Proceedings of this Society under the general title *Upholding the Australian Constitution*,(1) SEK Hulme is good enough to say that he would like to hear my views on another suggested amendment which is philosophically similar to mine but differently worded. Unfortunately the warm glow of satisfaction induced by such an observation emanating from so distinguished a quarter is somewhat chilled by the further revelation that he prefers the competitor.(2)

For the moment, if he will forgive me, I do not pause to take issue with him on that point. I will first take up some of the opinions expressed in Sydney. The two other speakers assigned to this topic were Professors Winterton and Coper of the University of New South Wales and the Australian National University respectively. SEK Hulme has summarised the general trend of these two papers in the commentary that I mentioned earlier and I have no wish to paraphrase his observations. I do wish however to make some of my own.

The first is that I sincerely regret having previously overlooked the singular and entirely persuasive manner in which Professor Coper illustrated the capacity of the external affairs power to stimulate people's imagination. Until he proved me wrong I should have thought it scarcely possible not merely to start a paper on the subject with an arresting vision of the High Court building going up in flames, to the sound of Carl Orff's *Carmina Burana*, but also to end it on the same apocalyptic theme. I entirely agree with his tactful omission to call *Carmina Burana* music. If I saw the High Court building going up in flames whilst I was ruminating on the external affairs power, I should probably think first of Wagner's *Ride of the Valkyries* and cheer them on.

In between these two entertaining episodes Professor Coper sets forth 18 pages of comment of which about three sentences are devoted to my suggested amendment. He is right in his conclusion that we disagree. The basic reason for that, as it seems to me, is that he is happy with the High Court's interpretation of the external affairs power and I am not. If I read him aright, all that he would like to see by way of improvement is a greater degree of political consultation. He seems to be untroubled by the unscrupulous manner in which successive federal governments have resorted to the power in order to implement entirely domestic programs.

Perhaps Professor Coper's position is best illustrated by the following sentence:

> "When it comes to the balance between Commonwealth and State legislative power in the implementation of treaties, experience demonstrates that the greater the necessity or occasion for State legislation, the greater is the potential for delay, lack of uniformity, and even for action by one State to put Australia in breach of an international obligation."(3)

That sentence is worthy of scrutiny. For a start, it is hardly necessary to invoke experience to support the proposition that the more legislatures that are involved in the implementation of a treaty, the greater the potential for diversity of response. Moreover it is not necessarily the case that delay is a bad thing, still less, in a land area as vast as Australia, lack of uniformity or even a refusal to comply with a course of action which happens to suit the Commonwealth. To call that last possibility putting Australia in breach of an international obligation begs the question at issue, which is the proper distribution of legislative power to enact international agreements into domestic law.

Apart from a spot of philosophical relativism, and his second invocation of the *Carmina Burana* bonfire, Professor Coper concludes by opining that my proposed amendment is too narrow in scope. He too prefers the alternative which appeals to SEK Hulme, even though he disagrees with its author (and I quote) "on some fundamental points". I may have made this position appear self-contradictory. It is not. Professor Coper does not favour any constitutional amendment. He simply regards my amendment as the greater of two evils.

I turn now to Professor Winterton. He approaches the subject by seeking to identify what is wrong with the present situation and concluding, I think it is fair to say, nothing much. The following key statement appears:

> "Constitutional reform should be based upon constitutional and political realities, not exaggerated apprehension of potential, but as yet unrealized, exploitation of power. The reality is that a few *causes célèbres* have raised the external affairs power to unwarranted prominence in Commonwealth-State relations."(4)

Those observations follow a quotation from former Liberal Senator Peter Durack, QC to the effect that the Hawke and Keating governments had "not made much use of the external affairs power", and that the Senator could not envisage a federal Labor government deliberately using the power to destroy the federal system.

With respect, I find this reasoning by Professor Winterton thoroughly unconvincing. I too doubt that even an ALP government would adopt a policy of deliberately destroying the federal system by manipulating the external affairs power. What I do not doubt is that if, pursuant to its domestic policies, such a government is advised that it has a legislative power problem which can be solved, or at least ameliorated, by an entirely artificial resort to external affairs, it will not be dissuaded by any adverse effects such a course of action may have on the federal system. No-one can doubt that proposition who has suffered the misfortune of having to study the *Industrial Relations Reform Act* 1993, otherwise known as the Brereton Act, which came into operation on 30 March, l994 and with a bit of luck will go largely out of operation again any time now.

The argument that ALP governments (for Gough Whitlam can be bracketed with Hawke and Keating) have made little use of section 51(xxix) subordinates quality to quantity. My view is that statutes reliant on the external affairs power which have been enacted on the initiative of ALP governments in recent times have had an impact on Australian society out of all proportion to their numbers. Conspicuous examples are the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984 and the *Human Rights and Equal Opportunity Act* 1986.

Major statutes like these, the blatant opportunism of the Brereton Act and the legislative world heritage mishmash on which the *Tasmanian Dam* decision(5) largely relied, cannot be simply dismissed, which Professor Winterton seeks to do, as relatively isolated events the significance of which has been exaggerated. Such an approach to the problem is in my view not only wrong in itself, but also quite overlooks the interaction between such statutes as these and other Acts. The result of the interaction is to extend Commonwealth power even further.

As only one instance, but a spectacular one, perhaps I may recall to your memory my discussion, at the third Conference of this Society,(6) of the relation between the High Court decision in *Mabo v Queensland* [No.2],(7) the *Native Title Act* 1993 and the *Racial Discrimination Act*. The upshot, greatly aided as usual by the High Court in the latest native title case, about which I spoke at our last conference, was the complex and far-reaching provisions of the *Native Title Act* which override State land law and administration.

If the extent of that intrusion into State functions had been advanced only a few years ago as an example of Commonwealth legislative power, it would have been rightly ridiculed. No longer. It now exists as an impressive example of an excess of intellectual ingenuity applied to the legislative process.

Professor Winterton goes yet further. He seeks to invalidate the entire line of thought which I and others have brought to bear on the interpretation and legislative use made of the external affairs power. He does so on the basis that our concerns relate only to future potential, not to anything that has actually happened or is at all likely to happen. As to what has actually happened, he is able to take this position by downplaying the significance of events which, as I have just illustrated, are in my view far from insignificant. On that therefore we simply disagree.

Future potential is another matter, and one not to be set aside as mere exaggeration unrelated to constitutional or political realities. SEK Hulme has commented adversely on this argument.(8) I wish to add only the following. Professor Winterton seems to be arguing here that if on rational grounds one foresees future harm, one is departing from constitutional or political facts because the perceived harm has, by definition, not yet happened. But surely, if nothing becomes a relevant fact until it has already happened, the consequence is that no foreseeable harm can ever be prevented by constitutional amendment.

I need not labour the point that an argument capable of supporting such a conclusion does no harm to my proposed amendment. I think that Professor Winterton gets himself into that position by adopting the tactic, which he regards as the "most logical" one, of first seeking to identify deficiencies in the current position, deciding next on criteria for improvement in light of the deficiencies and only then evaluating my reform proposal against those criteria.

Without arguing about the logical status of such an approach, it does seem to me to be an excellent method of constructing a heads-I-win, tails-you-lose framework of debate. All you do is scrutinise the situation, decide there is nothing much wrong with it, develop criteria consistent with that conclusion and discover that the reform proposal does not fit the criteria. If the evidence advanced by supporters of the proposal causes any concern you characterise it as unrealistic and exaggerated.

It seems to me that an approach more likely to produce a constructive result would move in exactly the opposite direction, starting by looking at what is proposed, and the arguments in support, and only then turning to the question whether the result would be an improvement. The advantage of going this way about is that one's attention may well be drawn by the proposers to relevant circumstances which might not otherwise have come to mind. If that does not happen, no harm is done, but at least nothing is excluded because it does not fit comfortably into a framework constructed *a priori*.

Professor Winterton concludes, in agreement with Professor Coper, that my proposed amendment is too narrow. This is a theme common not only to these two commentators but also to SEK Hulme. I shall take it up when I return to his observations, which I shortly shall. In the meantime I turn next to Senator Durack's contributions. The first appears in the second volume of the Proceedings of this Society under the title *The External Affairs Power - What is to be*

Done? (9) The second is his paper *The External Affairs Power* published by the Institute of Public Affairs in October, 1994.

I take this opportunity to say how much I have enjoyed re-reading Senator Durack's discussions of the problem, notwithstanding their largely pessimistic conclusions. Fortunately all I have to do today is take into account his alternative suggestion for an appropriate amendment to section 51(xxix) should an amendment be attempted.(10) This is the one preferred by SEK Hulme.

Senator Durack's amendment would exclude from the scope of the power 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".

I note also that Senator Durack recalls a contribution made by Sir Rupert Hamer back in 1988.(11) Sir Rupert, and I quote, "proposed a simple amendment to section 51(xxix) to prevent the Commonwealth's legislative power under it [from going] beyond the enumerated powers". I am much encouraged to be reminded that I can count Sir Rupert among my supporters. I would readily attribute my own proposal to him were that the case. Unfortunately all I can do is confess that the idea came to me a good four years or so after it came to him.

In the same passage Senator Durack recalls another aspect of Sir Rupert's 1988 contribution. I quote again:

> "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."

I quote that passage because the same groundless assertion surfaced again in Sydney and had to be corrected from the floor. (12) I sometimes wonder if the remarkable staying power of a declaration so manifestly wrong derives from the dogmatic confidence with which it is invariably trotted out.

It reminds me of something the late Bertrand Russell wrote in the course of a discussion of human reluctance to accept scientific knowledge, or something of the kind. He remarked that one of the Greek sages, Aristotle I believe, asserted that humans had only 28 teeth. He could have discovered his mistake by simply looking in someone's mouth.

Sir Rupert Hamer's reference to Canada, Germany and the United States however has greater relevance to today's debate than simply underlining the absurdity of the international cripple argument. It seems to me to go to the heart of the difference between Senator Durack's approach and my own. We are I think all agreed that that difference is conceptual and not merely a matter of phraseology. The commentators are agreed also that the difference can be described as the Senator's formulation being wider than mine in the sense that it would accord to the Commonwealth more legislative power than mine would.

One of the ways in which it achieves this result is by being a good deal less precise than mine. The Senator and I evidently agree that the mode of drafting most likely to yield a useful result is what I have called the negative approach. This means not trying to reformulate the central description of the power, but instead attaching to it provisos or exceptions which describe the

kinds of laws to which it nevertheless does *not* extend. I note that this technique also had the support of the former Commonwealth Parliamentary Counsel, Charles Comans, whom I remember with affection.

Beyond agreement on technique, however, I part company with Senator Durack. There may be those, in fact there evidently are, who believe that whatever weaknesses the Durack amendment may exhibit, it would be a great improvement on the present situation. I do not think so. Or to put the matter differently, I think that if that is the case, my own amendment would be a great improvement on the great improvement. My reasons are as follows.

I think we can safely assume that for the foreseeable future a majority of the High Court will be out of sympathy with the kind of amendment that members of this Society would support. Bearing this in mind, it seems to me that the Durack amendment relies on concepts which would not prove much of an obstacle to a hostile High Court.

I see no great difficulty, for example, in circumventing the initial prohibition by confining the concept of a law which "regulates" to a very narrow compass. As an instance, it can be readily argued that a law which empowers does not regulate.

Again, the word "matters" already has an abstruse technical meaning under the judicial power to which it could be easily confined so as to narrow the prohibition even further.

Exception (a) seems to me to be even more vulnerable, although of course in the direction of expansion, not contraction. It requires that for a law to be valid under the external affairs power its subject matter must have a substantial relationship to the same subject matter outside the Commonwealth. Let us test this against the Brereton Act. Leaving aside the awkward word "matter", does the Brereton Act "regulate" persons or things and, if so, do those persons or things have a substantial relationship to persons or things outside the Commonwealth?

Notice first that the meaning of the word "regulate" in exception (a) need not be the same as in the initial prohibition. This follows from the well established principle that the legislative powers of the Commonwealth are to be interpreted in the widest sense consistent with their language. The corollary of that principle is that limitations on Commonwealth legislative power should be interpreted in the narrowest sense consistent with their language.

Applying those principles to the Durack amendment we find that the word "regulate" appears first in a limitation on power, the initial prohibition, and therefore requires a restrictive interpretation. It then appears again in a grant of power, exception (a), and therefore requires an expansive interpretation. On this basis an unfriendly High Court would surely have no difficulty in concluding that the Brereton Act is not a regulatory statute within the meaning of the initial prohibition but is a regulatory statute for the purposes of exception (a).

Having surmounted that possible difficulty by far less adventurous reasoning than it applied to native title and freedom of political speech, the Court can take up the remaining question. This is whether the persons or things regulated by the Brereton Act have a substantial relationship to persons or things outside the Commonwealth. Or, in more familiar language, which I am sure the High Court would not be reluctant to adopt if it saw fit, whether the subject matter of the Act has a substantial relationship to the same subject matter outside the Commonwealth.

I have to say that answering that question in the affirmative seems to me to be a very simple exercise. All you have to do is assert that since the Act is based to a significant extent on international treaties and covenants and suchlike, it is part of a worldwide attempt to achieve fair and reasonable laws for the protection of workers everywhere. By reason of this worldwide community of interest the requirement of substantial relationship is readily satisfied.

That example seems to me to drive a coach and horses through the Durack amendment. I believe that it would make no significant difference to the present situation. I think we should bear in mind that at best we can only hope for one chance at amendment, so we had better get it right. I do not think that the Durack amendment does get it right. This is not a matter merely of language, readily remedied by redrafting. The basic approach is flawed.

I say that for three reasons. The first is that it ignores the implication of Sir Rupert Hamer's reference to Canada, Germany and the United States. Those countries seem to me to be not merely evidence but proof that power to conduct a vigorous national foreign policy is not in the least incompatible with federal limitations on implementing that policy by way of domestic legislation. There is therefore no reason to even attempt to modify the federal limitations on that ground, which is what the Durack amendment does.

Secondly, such an attempt is in this context fundamentally inconsistent with the adoption of what I have called the negative style of drafting. Where that approach is adopted in aid of restoring a federal balance, which is the present aim, any exceptions to an initial prohibition should be strictly limited to matters which do not affect the federal balance.

Thirdly, where a significant component of the situation which one seeks to remedy is the attitude of the judiciary, particularly the High Court, nothing is gained by entrusting to the courts vaguely expressed language which will necessarily need interpretation by those same courts. This is my answer to SEK Hulme's defence of the Durack amendment's obvious reliance on sympathetic interpretation. A corollary is that I think the greater precision of my own amendment makes it far more difficult to circumvent by interpretation.

I turn lastly to SEK Hulme's concerns about treaties of a genuinely international character, a topic which conveniently enables me to deal with the Durack exception (b), and his comment that my amendment would not have supported the regulations at issue in *R. v. Burgess, ex parte Henry*.(13)

I have no faith in the concept of a treaty of a genuinely international character. By definition all treaties and comparable arrangements are of a genuinely international character. To adopt a concept which requires the courts to detect a category of treaties which are not genuinely international is not merely a contradiction in terms. It is also a pointless exercise because it puts the emphasis in the wrong place. It is not the character of the treaty that matters but how it can be implemented.

Compare the Brereton Act with the 1936 air navigation regulations. I cannot see that either is more or less international than the other. Both are in fact domestic legislation. The most obvious difference in character or attributes between them is that regulation of both national and international air navigation is universally accepted as an inevitable safety measure, whereas Brereton type industrial legislation is not.

This leads us nowhere except to reinforce my belief that there is no future in trying to solve implementation problems by dividing treaties on a case by case basis into the genuinely international and the rest.

SEK Hulme advances the further contention that under my amendment the Commonwealth could not have implemented the 1936 air navigation regulations without State assistance, which he finds unsatisfactory.

I am not sure what is the source of his dissatisfaction but I do not share it. By 1936 air navigation was already a worldwide phenomenon. The growing irrelevance of State borders to that development was manifest. By 1936 four States had passed legislation under section 51(xxxvii) of the Constitution to refer legislative power over air navigation to the Commonwealth. In the

event only the Tasmanian Act ever became operative, the others being only precautionary. It is true also that New South Wales and Western Australia took no action and that the referring Acts were limited in scope and not identical.

My point is twofold. First, if the *Burgess* challenge to the Commonwealth regulations had succeeded, it seems likely that State minds would have concentrated wonderfully on how to remedy the situation. Secondly, even if section 51(xxxvii) had not existed, I find it inconceivable that another constitutional solution would not have been swiftly found.

Australia is not constitutionally at the mercy of phenomena which were not foreseen or foreseeable in 1900 unless rescued by the external affairs power. Other countries are not, so why should we be? In my view the Commonwealth has a more than ample collection of legislative powers which collectively, and with the considerable aid of both the implied and express incidental powers, would support a comprehensive code of air navigation. The linchpin of the structure would be the inseparability for practical purposes of intra- and inter-state air navigation.

No doubt I shall be reminded that the High Court has rejected any doctrine of commingling in the trade and commerce context. I contend that, had there been no alternative route to take in order to deal with a situation of obvious and growing national danger, commingling would have been readily accepted, as would any other viable solution.

I apply the same argument to Senator Durack's exception (b). There is no difficulty in finding power (indeed, if necessary it could be readily implied) to regulate people and things moving across the national border without going anywhere near the external affairs power. Think what might be done with a combination of the following powers as expanded by the incidental powers: international trade and commerce; taxation, including customs controls; defence; statistics; international banking and insurance; bankruptcy; intellectual property; family law; immigration and emigration; and the influx of criminals.

SEK Hulme contends further that my amendment removes from the Commonwealth power to deal with such matters as war criminals and international paedophilia. That is not right. As it happens, the defence power is available for war criminals if the High Court cares to use it, but I do not rely on that. What examples like these suggest to me is that my amendment is being misunderstood.

I am not proposing to abolish the external affairs power. It stays in place for anything external to Australia, including matters incidental to it or to its execution. There is no impediment at all to creating federal offences committed overseas which are enforceable in federal jurisdiction within Australia. Whether my words "no such law shall apply within the territory of a State" prevent trial of such offences in a court of federal jurisdiction in a State without the consent of the relevant State seems to me to be immaterial.

It is hard to believe that any State would object, especially if the Commonwealth had consulted properly before it enacted legislation. Even at worst, trials could be held in federal territories. Another alternative is to test out the influx of criminals power. It must surely be incidental to that power to legislate for the trial of persons charged with an overseas federal offence.

I conclude therefore that none of the reservations which have been expressed thus far about my proposed amendment can itself withstand critical analysis.

Endnotes

1 Upholding the Australian Constitution, Proceedings of The Samuel Griffith Society, Volume 6, p.25.

2 *Ibid.*, p.32.

3 *Op.cit.*, Volume 5, p.62.

4 *Ibid*., p.21.
5. *Commonwealth v. Tasmania* (1983) 158 CLR 1.
6. *Upholding the Australian Constitution*, *Proceedings of The Samuel Griffith Society*, Volume 3, p.1.
7 (1992) 175 CLR 1.
8 *Upholding the Australian Constitution*, *Proceedings of The Samuel Griffith Society*, Volume 6, pp.29Ä31.
9 *Op.cit*., Volume 1, pp.211Ä223.
10. *Ibid*., p.219.
11 *Ibid*., p.221.
12. *Op.cit*., Volume 5, pp.78Ä79.
13 (1936) 55 CLR 608.