COMMENT ON THE EXTERNAL AFFAIRS POWER

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My comment on Professor Sawer's paper is confined to three matters: the executive power of the Commonwealth to conclude treaties on behalf of Australia; the relevance of the subject matter of a treaty to the scope of Commonwealth legislative power to implement the provisions of the treaty; and the concept of federalism inherent in the High Court's decision in the *Franklin Dam* case.[1]

1 COMMONWEALTH EXECUTIVE POWER

Insofar as s 51(xxix) of the Commonwealth Constitution empowers the Commonwealth Parliament to make laws implementing the provisions of international treaties, the executive power of the Commonwealth to conclude treaties on behalf of Australia is a vital issue in determining the scope of that Commonwealth legislative power. Nevertheless, the High Court has not scrutinised closely the issue of Commonwealth executive power to conclude treaties. It seems to have been accepted without serious analysis that Commonwealth executive power to conclude treaties on behalf of Australia is unlimited.

Professor Sawer points to *R* v *Burgess; ex parte Henry*[2] as authority for this proposition, but in this respect *Burgess* is a somewhat curious case. The relevant treaty there, the Paris Convention for the Regulation of Aerial Navigation (1919), was concluded by the King on behalf of Australia as part of the British Empire, in an era before the independence of the self-governing dominions was fully recognized.[3] It is difficult to see how any question of Commonwealth executive power to conclude treaties on behalf of Australia could have arisen in this case. Nevertheless, Evatt and McTiernan JJ proffered the opinion that "the King's Executive Government of the Commonwealth had power to enter into the Aerial Navigation Convention".[4] They did not, however, suggest that the Commonwealth had executive power to conclude any treaty regardless of its subject matter. Latham CJ merely indicated that the Commonwealth government was bound by the convention without deciding whether it lay within the Commonwealth executive power to conclude such a convention on behalf of Australia. His Honour stated:

> The important question is whether or not His Majesty the King could bind the Commonwealth of Australia as part of the British Empire by a treaty made between His Majesty and heads of other Powers, the Commonwealth being separately represented in the negotiations for the treaty and signing and ratifying the treaty by its own representative.[5]

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[1] *Commonwealth* v *Tasmania* (1983) 46 ALR 625.

[2] (1936) 55 CLR 608 (hereafter cited as *Burgess*)

[3] L R Zines, "The Growth of Australian Nationhood and its Effects on the Powers of the Commonwealth" in L R Zines (ed), *Commentaries on the Australian Constitution* (1977) 1, 22-25.

[4] (1936) 55 CLR 608, 682.

[5] *Ibid* 636.

Starke and Dixon JJ did not address the issue.

Koowarta v *Bjelke-Petersen*[6] contained passing reference to Commonwealth executive power to conclude treaties, but again no close analysis. Gibbs CJ stated that the Governor-General, exercising the prerogative power of the Crown, can make treaties on subjects which are not within the legislative power of the Commonwealth.[7] Stephen and Murphy JJ suggested that executive power in relation to external affairs was part of the executive power of the Commonwealth vested in the Queen and exercisable by the Governor-General pursuant to s 61 of the Commonwealth Constitution.[8] It followed for Murphy J that such executive power was subject to constitutional limitations, express and implied, and may also be limited by the Commonwealth Parliament; however, it was not otherwise restricted concerning subject matter.[9] Wilson J drew a distinction between Australia as a fully autonomous sovereign nation within the international community with all the rights and responsibilities that attach to that status, and the Commonwealth as a constituent unit of the Australian federation. That distinction served to explain how the Commonwealth may possess executive power to enter into international relationships broader in scope that its legislative power to implement treaty obligations,[10] presumably in a representative capacity on behalf of the sovereign nation.

In the *Franklin Dam* case the issue of Commonwealth executive power to conclude treaties went by default. Only Dawson J gave it serious consideration. His Honour queried the position adopted by Stephen and Murphy JJ in *Koowarta* that the source of this power was s 61 of the Commonwealth Constitution. If this view were correct, he said, the source of Commonwealth legislative power to implement treaties would be s 51(xxxix) of the Constitution (the incidental power) rather than s 51(xxix) (the external affairs power). Instead, His Honour regarded the conclusion of treaties by the Commonwealth on behalf of Australia as an exercise of the Crown prerogative, originally vested in the Crown in right of the United Kingdom but now exercisable by the Crown in right of the Commonwealth, even though the opportunity afforded by s 2 of the Constitution for assignment of functions of the Crown to the Governor-General had not been taken with respect to the conclusion of treaties.[11] It is interesting to speculate whether, if this opportunity had been taken, the advice to the Crown of her Commonwealth Ministers would have been sufficient to allow a complete assignment of the treaty-making function, or whether the advice of State Ministers may also have been required. In any event, Dawson J disagreed with the further suggestion of Murphy J in *Koowarta* that the executive power to conclude treaties was limited by express and implied prohibitions in the Commonwealth Constitution;

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[6] (1982) 39 ALR 417 (hereafter cited as *Koowarta*).
[7] (1982) 39 ALR 417, 434.
[8] *Ibid* 449 *per* Stephen J; 469 *per* Murphy J.
[9] *Ibid* 470.
[10] *Ibid* 479.
[11] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 838-839.

in the opinion of Dawson J, the capacity of the Commonwealth to conclude treaties with other countries was subject to no constitutional limitations.[12]

Thus the basis of Commonwealth executive power to conclude treaties remains in doubt, although the existence of that power is scarcely doubted. Moreover, although there is some disagreement regarding the scope of the power it is generally accepted that the power extends to matters which (apart from s 51(xxix) of the Commonwealth Constitution) lie beyond the reach of Commonwealth legislative power. It is from this starting point that the High Court has addressed the question of the scope of Commonwealth legislative power conferred by s 51(xxix) to implement treaty provisions.

Within the framework of the Commonwealth Constitution, this approach is curious. The federal nature of that Constitution requires an allocation of legislative and executive power to two levels of government, Commonwealth and State. The allocation of legislative power is detailed and specific; the allocation of executive power is implicit. In these circumstances one might expect the High Court to adopt as a starting point those provisions of the Constitution describing the allocation of legislative power, and then mould executive power accordingly. On other occasions the court has advocated such an approach. However, with regard to external affairs the reverse has occurred.

2 COMMONWEALTH LEGISLATIVE POWER

The issue here is whether the legislative power of the Commonwealth conferred by s 51(xxix) of the Constitution to implement treaty provisions is limited by reference to the subject matter of the treaty.

Professor Sawer regards this issue as resolved by *Burgess*, with the result that the decision of the High Court in the *Franklin Dam* case is, at least in this respect, unremarkable. I regard *Burgess* as equivocal at best.

Certainly Evatt and McTiernan JJ in *Burgess* took the view that Commonwealth legislative power to implement treaty provisions was not limited by reference to the subject matter of the treaty.[13] On the other hand, Dixon J plainly disagreed, stating that it seemed to him to be

> an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.[14]

However, His Honour conceded legislative power to the Commonwealth with respect to matters "indisputably international in character".[15] Starke J does not appear to have reached a concluded view on this issue, although he referred to the possibility that Commonwealth legislative power may be limited to implementation of treaty provisions whose subject

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[12] *Ibid* 842.
[13] (1936) 55 CLR 608, 680-682.
[14] *Ibid* 669.
[15] *Ibid*.

matter was "of sufficient international significance for international co-operation and agreement".[16] It is Latham CJ who causes difficulty in this respect. Undoubtedly His Honour inclined towards the view expressed by Evatt and McTiernan JJ, acknowledging that "the possible subjects of international agreement are infinitely various"[17] and declaring that in his opinion it was

> impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement.[18]

These statements, however, seem more relevant to the issue of Commonwealth executive power to conclude treaties than to the issue of Commonwealth legislative power to implement their provisions. Alternatively, as Professor Sawer suggests, they may relate to the requirement that a treaty be *bona fide* before the Commonwealth gains the legislative power to implement its provisions. In any event, Latham CJ underlined the extraneous nature of these comments by noting that

> . . . [i]f it should be thought that before a subject can legitimately be dealt with under this heading it should possess some characteristics which make it specially proper to be dealt with on an international basis, there can be little room for doubt that aviation is such a subject.[19]

Whatever *Burgess* may be thought to decide on this matter, it is apparent that members of the High Court in subsequent cases felt uninhibited by that decision. In *Airlines of NSW Pty Ltd* v *NSW (No 2)*[20] Barwick CJ entered a clear reservation concerning the scope of Commonwealth legislative power to implement treaty provisions, in the following terms:

> . . . I would wish to be understood as indicating that in my opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament. What treaties, conventions, or other international documents can attract the power given by s 51(xxix) can best be worked out as occasion arises.[21]

In the same case Menzies J suggested that Commonwealth legislative power may well be limited by reference to the subject matter of treaty provisions:

> Under the Constitution, s.51 (xxix.) "External affairs", the Commonwealth has power to make laws to carry out its international obligations under a convention with other nations concerning external affairs.[22]

Windeyer J recognised the significance of the issue but felt that its determination should remain for another day:

> . . . I wish to avoid entering upon the controversial question of whether the mere making of a treaty between the Commonwealth and some foreign country upon any subject can enlarge the constitutional powers of the Commonwealth Parliament. . . . Neither the importance of the question nor the desirability

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[16] *Ibid* 658.
[17] *Ibid* 641.
[18] *Ibid*.
[19] *Ibid*.
[20] (1965) 113 CLR 54 (the *Second Airlines* case).
[21] *Ibid* 85.
[22] *Ibid* 136.

> of avoiding unnecessary generalization has been diminished by the developments of modern times in the forms and methods of international relationships and the nature and extent of international commitments.[23]

Similar caution was exercised by members of the Court in *NSW* v *Commonwealth*.[24] Gibbs J (as he then was) said:

> The external affairs power authorizes the Parliament to make a law for the purpose of carrying out or giving effect to a treaty, at least if the treaty is in reference to some matter indisputably international in character.[25]

In the words of Mason J:

> There is abundant authority for the proposition that the subject matter [of s 51(xxix)] extends to Australia's relationships with other countries and in particular to carrying into effect treaties and conventions entered into with other countries, provided at any rate that they are truly international in character.[26]

However, in *Koowarta*, decided only a year before the *Franklin Dam* case, the High Court was forced to take a stand on this issue. The question of whether Commonwealth legislative power to implement treaty provisions was limited by reference to the subject matter of those provisions was raised directly in argument. In response thereto, three (or perhaps four), distinct views emerged from the Court. Gibbs CJ (with whom Aickin and Wilson JJ agreed) held that the power extended only to such treaty provisions as possessed the character of "external affairs", in the sense of involving relationships with other countries or with persons or things outside Australia.[27] They rejected the argument that the mere existence of a treaty obligation imposed upon Australia was sufficient to meet this requirement. Further, in that case, the obligations imposed by the International Convention on the Elimination of All Forms of Racial Discrimination lacked the character of external affairs.[28] Stephen J agreed that it was not enough that a Commonwealth law gave effect to a treaty obligation. The subject matter of the obligation had to be a matter of "international concern".[29] However, this quality of subject matter was apparently different to that of an external affair, because Stephen J held that the subject matter of the Convention was clearly one of international concern.[30] Brennan J also accepted that s 51(xxix) of the Commonwealth Constitution authorised Commonwealth legislation to implement the provisions of a treaty only where the subject matter of the treaty was of "international quality", but held that the mere existence of a treaty obligation was sufficient to meet this requirement.[31] Mason and Murphy JJ rejected the proposition that the power conferred by s 51(xxix) was limited by reference to the subject matter of treaty provisions, however that

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[23] *Ibid* 153.
[24] (1975) 135 CLR 337 (the *Seas and Submerged Lands* case).
[25] *Ibid* 390.
[26] *Ibid* 470.
[27] (1982) 39 ALR 417, 440-441.
[28] *Ibid.*
[29] *Ibid* 453.
[30] *Ibid* 454.
[31] *Ibid* 488.

limitation may be expressed.[32] They alone endorsed the views of Evatt and McTiernan JJ expressed in *Burgess*.

Accordingly, a majority of the Court in *Koowarta* decided that Commonwealth legislative power to implement the provisions of a treaty was limited by reference to the subject matter of the treaty provisions, even though that limitation was expressed in terms of "external affairs", "international concern" and "international quality". It is the rejection of this aspect of *Koowarta* which places the *Franklin Dam* case outside the unremarkable category of cases defining the legislative power of the Commonwealth with respect to external affairs.

It should be noted, though, that the *Franklin Dam* case displays no less diversity of expression than *Koowarta* concerning the relevance of subject matter of treaty provisions to Commonwealth legislative power to implement those provisions. Gibbs CJ, Wilson and Dawson JJ regarded *Koowarta* as authority for the view that the subject matter of treaty provisions must at least be one of international concern before s 51(xxix) of the Constitution gave the Commonwealth Parliament the power to carry the provisions of the treaty into effect.[33] Deane J joined Mason and Murphy JJ in holding that the external affairs power gave the Commonwealth Parliament the capacity to carry out within Australia any treaty provision binding the Commonwealth in relation to other countries,whatever its subject matter may be.[34] Incidentally, His Honour relied on *Burgess* as authority for this proposition, finding nothing in *Koowarta* to cause modification of the views expressed in *Burgess* as to the scope of the legislative power conferred by s 51(xxix) of the Constitution.[35] Brennan J maintained the somewhat narrower view that he expressed in *Koowarta*: the external affairs power allowed the Commonwealth Parliament to implement any treaty obligation, regardless of subject matter, but otherwise the Commonwealth Parliament could give effect only to those provisions of a treaty which were of international concern.[36]

In the result the narrower formulation adopted by Brennan J held no significance, as he decided that the relevant provisions of the Convention for Protection of the World Cultural and Natural Heritage imposed international obligations on Australia. Moreover, in the face of his rather liberal view of what constitutes an international obligation, it may be expected that the occasions upon which the approach of Brennan J leads him to differ in the result from the rest of the *Franklin Dam* majority may be few. Nevertheless, it is at least of passing interest to note that Brennan J was apparently of the opinion that the subject matter of the Heritage Convention would not have met his criterion of international concern in the absence of the international obligations imposed by it upon Australia.[37]

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[32] *Ibid* 463 *per* Mason J; 472-473 *per* Murphy J.

[33] (1983) 46 ALR 625; 667-668 *per* Gibbs CJ; 743-744 *per* Wilson J; 844 *per* Dawson J. All clearly preferred the more stringent requirement that the subject matter constitute an "external affair", but felt constrained by *Koowarta* to adopt the criterion of "international concern": 670 *per* Gibbs CJ; 752 *per* Wilson J; 837-838 *per* Dawson J.

[34] *Ibid* 804 *per* Deane J; see also 689-692 *per* Mason J; 728-830 *per* Murphy J.

[35] *Ibid* 804.

[36] *Ibid* 772.

[37] *Ibid* 774.

3 CONCEPT OF FEDERALISM

Closely related to the issue of Commonwealth legislative power conferred by s 51(xxix) of the Commonwealth Constitution is the concept of federalism inherent in that Constitution. The reason lies in the fact that in *Koowarta* no dissent was expressed from the proposition that the language of s 51(xxix) of the Constitution must yield not only to express but also to implied prohibitions contained in the Constitution.[38] Both in *Koowarta* and in *Franklin Dam* it was argued that it was an implied prohibition of the Constitution that Commonwealth legislative power could not be so extensive as to destroy the federal nature of the Constitution. To deal with that argument it was necessary for the High Court to spell out what was inherent in Australian federalism.

In *Koowarta*, Gibbs CJ, Stephen, Aickin, and Wilson JJ, decided that federalism required some measure of legislative power beyond the reach of the Commonwealth Parliament, and thus within the exclusive province of the States.[39] In other words, the federal nature of the Commonwealth Constitution demanded a division of legislative power between Commonwealth and States rather than merely an allocation of legislative power to those levels of government. To meet this requirement s 51(xxix) had to be confined to implementation of a defined category of treaty provisions whose subject matter was of a particular (and thus limited) description. Mason and Murphy JJ in contrast, decided that federalism required no more than the continued existence of the States and maintenance of their capacity to function, plus prohibition of any discrimination against States in the exercise of Commonwealth legislative power.[40] Brennan J appears to have reserved his position on this issue.

The decision in the *Franklin Dam* case suggests a shift in the majority position on this issue. Mason J elaborated upon his views expressed in *Koowarta*, in the following terms:

> The only relevant implication that can be gleaned from the Constitution, and this is called in aid independently by Tasmania, is that the Commonwealth cannot in the exercise of its legislative powers enact a law which discriminates against or "singles out" a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function. This implied prohibition — for it is in truth an implied prohibition despite the endeavour of Barwick CJ in *Victoria v Commonwealth* (the *Pay-roll Tax* case) (1971) 122 CLR 353 at 372-3, to deal with it as a matter of characterization — has been recognised and discussed in many cases. . . . The precise limits of the prohibition have not been formulated . . . and there is no need here to essay a more precise formulation, for the discussion of the principle as it applies in this case can be left until later. What is important for present purposes is that the implied prohibition reflects in point of expressed principle as much as can legitimately be extracted from the miscellany of considerations on which Tasmania relies. So much and no more can be distilled from the federal nature of the Constitution and ritual invocations of the "federal balance".[41]

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[38] (1982) 39 ALR 417, 443 *per* Gibbs CJ; 452 *per* Stephen J; 460 *per* Mason J; 472 *per* Murphy J; and 481-482 *per* Wilson J. Brennan J did not address this issue.

[39] *Ibid* 438 *per* Gibbs CJ; 452-453 *per* Stephen J; 481 *per* Wilson J.

[40] *Ibid* 460 *per* Mason J; 472 *per* Murphy J.

[41] (1983) 46 ALR 625, 694-695.

Murphy J was no less direct.[42] Brennan and Deane JJ were rather more circumspect in dealing with this issue, merely holding that the Commonwealth legislation did not invalidly impair the legislative or executive functions of the State.[43] Deane J even found it unnecessary to decide whether the relevant principle (that the legislative powers of the Commonwealth are subject to a general limitation that they cannot be exercised in a matter which would be inconsistent with the continued existence in a matter which would be inconsistent with the continued existence of the States and their capacity to function, or which would involve a discriminatory attack upon a State in the exercise of its legislative authority) "should be treated as if it were embodied in the Constitution as an express overriding guarantee".[44] However, it necessarily follows from the conclusion reached by Brennan and Deane JJ that s 51(xxix) of the Constitution allows the Commonwealth Parliament to implement (at least) any treaty obligation, without regard to subject matter, that there is no subject matter beyond the potential reach of Commonwealth legislative power. Whatever protection may be accorded by the Constitution to State executive power, none is given to State legislative power.

Despite strong dissents from the minority justices[45] it would seem that the *Franklin Dam* case rejects the idea that federalism requires a division of legislative power between the two levels of government established by the Commonwealth Constitution, that is to say, a division guaranteed by the Constitution and thus beyond the capacity of either level of government to alter by unilateral action. In its stead the decision appears to embrace a concept of federalism which guarantees the States no more than their continued existence as States and the capacity to function as such, together with freedom from discriminatory Commonwealth legislation. The full measure of that guarantee remains to be spelt out but clearly not included in any quota of exclusive legislative power.

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[42] *Ibid* 726-728.
[43] *Ibid* 762-768 *per* Brennan J; 823-824 *per* Deane J.
[44] *Ibid* 823.
[45] *Ibid* 668-669 *per* Gibbs CJ; 752 *per* Wilson J; 841 *per* Dawson J.