THE STATE OF CONSTITUTIONAL INTERPRETATION

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The Principles of Construction

The emphasis given in the *Engineers'* case[1] to the express terms of the Constitution, the application of the "golden rule" of construction and the exclusion of broad implications (stigmatised as political) had the effect of enhancing national power. This effect was reinforced by the application of the principle referred to by O'Connor J in a now much quoted passage in *Jumbunna Coal Mine NL* v *Victorian Coal Miners' Association*:[2]

> . . . it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
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> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.

This statement was approved in 1983 by a unanimous Court in *R* v *Coldham; ex parte Australian Social Welfare Union.*[3]

Heavy reliance on the principle that Commonwealth powers were to be construed broadly and generously, and without regard to the existence of any State exclusive legislative power, appeared in all the majority judgments in the *Franklin Dam* case[4] and, in recent years, in other judgments of those judges.

Further ancillary principles that have received emphasis are:

(a) that Commonwealth powers are, generally speaking, not to be construed as if they were mutually exclusive;[5]

(b) that a law directly operating on a subject matter of power is within that power whatever purpose or policy appears from the Act, or whatever the consequences of the enactment;[6]

(c) that where a law can be characterised as upon a subject matter within Commonwealth power it is irrelevant that it may also be described as a law with respect to another subject matter.[7]

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[1] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[2] (1908) 6 CLR 309, 367-368.

[3] (1983) 47 ALR 225.

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

[5] *Russell* v *Russell* (1976) 134 CLR 495; *ibid* 813 *per* Deane J.

[6] This principle received clear affirmation in *The Herald & Weekly Times Ltd* v *Commonwealth* (1966) 115 CLR 418; *Murphyores Incorporated Pty Ltd* v *Commonwealth* (1976) 136 CLR 1; and *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 40 ALR 609 (hereafter referred to as *Actors Equity* v *Fontana Films*).

[7] *Ibid.* Statements by Barwick CJ in *Victoria* v *Commonwealth* (1971) 122 CLR 353, 372-373 (the *Payroll Tax* case) that seem contrary to this principle have been expressly rejected by Stephen, Mason and Brennan JJ, and impliedly rejected by other judges. In any case, as Stephen J points out in *Actors Equity* v *Fontana Films* (1982) 40 ALR 609, 625, the approach of Barwick CJ in that case was probably intended to be confined to issues of intergovernmental immunity.

Deane J in the *Franklin Dam* case summed up this issue as follows:

> . . . it is settled law that there is no general dichotomy between the grants of legislative power contained in the various paragraphs of s 51. It is also settled that a single law can possess more than one character. It suffices for constitutional validity if any one or more of those characters is within a head of Commonwealth power. In determining validity, the task is not to single out the paramount character. It suffices that the law "fairly answers the description of a law 'with respect to' one given subject matter appearing in s 51" regardless of whether it is, at the same time, more obviously or equally a law with respect to other subject matter . . .[8]

All this of course leads to enhancement of Commonwealth power. Each of the principles mentioned is a reply to any argument that a Commonwealth law should be held invalid for a reason rejected by the formulation of the principle.

I doubt whether any judge on the High Court would deny any of the rules or principles of construction that have been stated above. The difference of result in the various aspects of the *Franklin Dam* case came about partly because of the degree of emphasis or reliance placed on the principles and the weight given to other factors.

Rationale for the Principles

In propounding the views of constitutional construction that they did, the majority in the *Engineers'* case were prepared simply to assert that their application was the proper role and duty of a judge. It was, however, suggested that the earlier judges, in allegedly departing from the ordinary canons of construction, produced increasing "entanglement and uncertainty".[9]

More recently other policy justifications have been given by those judges who are concerned to ensure that Commonwealth powers are given a broad and liberal construction and who place great emphasis on the principles referred to above. "Flexibility", "adaptability to changing circumstances" and "national interest" have been called into aid as a reason and justification for those principles. Prominence has been given to a statement by Dixon J (as he then was) in *Australian National Airways* v *Commonwealth*, that

> . . . it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.[10]

Brennan J referred to the principle of construction put forward by O'Connor J[11] as giving the Constitution "a dynamic force which is incompatible with a static constitutional balance".[12]

Connected with this idea is that of "national need", "national interest" or "national concern". In the *Payroll Tax* case Windeyer J declared that the *Engineers'* case was a result of a realisation "that national laws might

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[8] (1983) 46 ALR 625, 814.

[9] (1920) 28 CLR 129, 142.

[10] (1945) 71 CLR 29, 81 — cited, for example, in *Koowarta* v *Bjelke-Petersen* (1982) 39 ALR 417, 462 *per* Mason J.

[11] Supra n 2.

[12] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 773.

meet national needs".[13] Similarly in *Actors Equity* v *Fontana*, Mason J declared that the accepted approach to the construction of a legislative power ensured "that all conceivable matters of national concern would be comprehended".[14]

In the *Franklin Dam* case, national need and national concern loomed large in the reasoning of the majority in relation to the external affairs power, as it did in *Koowarta* v *Bjelke-Petersen*.[15] It was necessary, the majority judges thought, to take a broad view of Commonwealth power because it was "essential to Australia's participation in world affairs".[16] Mason J continued:

> It is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken.[17]

Both Murphy and Deane JJ have declared that Australia would be "an international cripple" if a broad view of the external affairs power were not taken. Indeed Deane J suggested that a broad interpretation of the external affairs power was necessary to satisfy one of the objects Sir Henry Parkes put forward as the basis for a federal union in 1891.[18] His Honour said that the external affairs power must contain what is necessary for "responsible conduct of external affairs in today's world".[19]

In *Koowarta* Brennan J remarked that:

> The validity of a law enacted in reliance on para (xxix) does not turn upon broad considerations of the desirability or otherwise of conferring power upon the Commonwealth Parliament to perform treaty obligations; inevitably it turns upon the words of the Constitution.[20]

But in the *Franklin Dam* case his Honour quoted with approval the passage of Windeyer J in the *Payroll Tax* case referred to above,[21] which His Honour described as referring to

> the concordance throughout the history of the Federation between the growth of Commonwealth power and the growth of national sentiment and the need for national laws.[22]

According to this view, it seems that flexibility and adaptability to changing circumstances must result in a steady increase in Commonwealth power.

Federalism

How does the concept of the federal state fit into this picture? To an extent it does, in the view of all current members of the High Court, as the judgments in the *Franklin Dam* case show; but there is clearly a

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[13] (1971) 122 CLR 353, 396.
[14] (1982) 40 ALR 609, 637.
[15] (1982) 39 ALR 417.
[16] *Ibid* 463 *per* Mason J.
[17] *Ibid.*
[18] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 802.
[19] *Ibid* 805.
[20] (1982) 39 ALR 417, 484.
[21] Supra n 13.
[22] (1983) 46 ALR 625, 773.

polarisation between the majority and minority judges as to the degree of relevance.

The *Engineers'* case overturned two distinct but connected doctrines: the reserved powers of the States and the immunity of instrumentalities. The first of these required that, in construing the specific powers granted to the Commonwealth, regard should be had to the powers that were supposedly reserved to the States under s 107 of the Constitution. The second doctrine rested on the idea that it was in the nature of federalism that the central government could not fetter, control or interfere with the free exercise by the State governments of their functions and vice versa. The implied immunities doctrine was based on a concept of federalism which, it was said, required coordinate independent governments in the Commonwealth and State spheres. The doctrine of reserved powers, however, involved mainly the division of legislative power between the governments and was generally aimed at ensuring that the States retained exclusive power to deal with their domestic affairs. The doctrine was, therefore, not based on the general concept of federalism, but, rather, on a type of federal system which it was thought the Constitution embodied. That doctrine made it necessary for the Court to reconcile the specific Commonwealth powers with the implied grant of power to the States. In fact, however, the "reserved power" was generally treated as the major power with the result that Commonwealth powers that might have impinged upon it were regarded as exceptions to be interpreted strictly.

There was a long-standing adherence, at least verbally, by the High Court to the acceptance of the overthrow of the reserved powers doctrine. But after the *Engineers'* case the concept of federalism was used to develop a new theory of intergovernmental immunities. So far as Commonwealth power is concerned, it is accepted by all members of the present Court that the existence of the federal system implies a restriction of Commonwealth power. All the judges regard that restriction as one which prevents the Commonwealth from discriminating against a State (unless the nature of the power indicates otherwise) or preventing it from existing or functioning as such.[23]

The use of "federalism" as an aid to determining the *content* of Commonwealth powers emerged in respect of some judges in *Actors Equity* v *Fontana Films*;[24] *Koowarta* v *Bjelke-Petersen*;[25] the *Franklin Dam* case;[26] and *Gazzo* v *Comptroller of Stamps (Vic); ex parte Attorney-General for Victoria*.[27] *Gazzo* involved the validity of a provision of the Family Law Act 1975 (Cth), which purported to exempt from State stamp duty certain instruments, amongst which were those made pursuant to an order of the Family Court. The provision was held invalid by Gibbs CJ, Stephen and Aickin JJ; with Mason and Murphy JJ dissenting. It is clear that the conclusions of the individual judges resulted (as Murphy J sug-

[23] These views are expressed in such cases as *Koowarta* v *Bjelke-Petersen* (1982) 39 ALR 417, 433 *per* Gibbs CJ; 460 *per* Mason J; 472 *per* Murphy J; in *R* v *Coldham; ex parte Australian Social Welfare Union* (1983) 47 ALR 225, 236 in the judgment of the majority; and in the *Franklin Dam* case (1983) 46 ALR 625.

[24] (1982) 40 ALR 609.

[25] (1982) 39 ALR 417.

[26] (1983) 46 ALR 625.

[27] (1981) 38 ALR 25 (hereafter referred to as *Gazzo*).

gested) from whether their initial focus was on the matter of Commonwealth concern — compliance with the court order — or on the subject matter of the State law — the levying of stamp duty on documents.

The majority began with the State legislation and noted that the criterion of liability to duty did not relate to marriage or matrimonial causes as would be the case where there was a tax on marriage certificates. In the words of Stephen J, the State Act just happened

> to encounter, quite randomly, a particular document which is in some way related to marriage or to divorce and matrimonial causes. . . .[28]

This, it was said, made the Commonwealth provision remote from the subject matter of Commonwealth power. This conclusion went a long way in helping to reach the decision that the purported exemption was not incidental to the marriage or matrimonial causes powers. According to Gibbs CJ, the State tax did not prevent or impede the person bound by the order from complying with it; it merely made it more burdensome for him financially and therefore the exemption made it easier for him to comply with the order. In the same way, His Honour said, an order for payment of maintenance might be more easily complied with if a party was relieved of liability of paying his solicitors' fees, medical expenses or grocery bills.[29]

The operation of State law upon the transfer by Mr Gazzo differed in one vital respect from one which relieved a party in a matrimonial causes suit of his liability to pay his solicitor, doctor or grocer. It operated to burden the very transaction that the party was required by court order, and therefore Commonwealth law, to carry out. To free a person from other liabilities because he might then be in a better position to provide property to his spouse would no doubt strike many people as a ludicrous basis for upholding the validity of law under s 51(xxi) or (xxii). What such a person might do with the money saved is a matter of uncertain speculation. Here, however, the tax was imposed on the instrument which it was the duty of the party to execute.

That such a levy was different from relieving the party of other liabilities was, I think, recognised by the Chief Justice when he said that the situation would be different if the State laws had imposed a practical barrier to the registration of the transfer, and he gave as an example the case where the amount of the impost equalled or exceeded the value of the property.[30] It would appear therefore that the amount of the duty — even though imposed under a general law — was seen as of some relevance to the effectuation of the purpose of the power and the Family Law Act. It could not be suggested, on the basis of similar reasoning, that the Commonwealth would have power under s 51(xxi) and (xxii) to relieve the party of his liability in respect of his medical and grocery bills even if they rose to astronomical heights.

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[28] *Ibid* 35.
[29] *Ibid* 33.
[30] *Ibid.*

If the fact that the duty imposed upon the transaction, which it is the object of the order to see completed, is relevant in the example given by Gibbs CJ, it is difficult to understand why a tax operating upon it is not a burden or a hindrance, or why the amount of the tax is relevant. In *D'Emden* v *Pedder*[31] a duty of only two pence was imposed upon a receipt. Yet in the *Engineers'* case the decision in *D'Emden* v *Pedder* was regarded as correct because the imposition of the tax was inconsistent with an obligation under Commonwealth law to give the receipt.[32]

It seems clear that the following passage of Gibbs CJ is at the basis of His Honour's reasoning in *Gazzo*:

> . . . in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power; that of course would not be relevant if the law were clearly within the substantive power expressly granted.[33]

His Honour would therefore seem to be of the view that what might otherwise be a plenary construction of the power in its incidental area is to be limited by having regard to areas of State exclusive power. Clearly if one concentrates simply on purposes of the Commonwealth powers and their implementation, the tax burdens fulfilment of the order and certainly hinders the Family Court in determining how the property of the spouses should be distributed. A tax has consistently been regarded as a burden in many other areas of the law such as the situation in *D'Emden* v *Pedder* and the many cases on s 92. If one concentrates on the impact of the State duty on the matter of Commonwealth concern, it matters not whether the State has singled out those matters of concern. It is the *effect* on the Commonwealth purposes that is of importance, not the policy or nature of the *State law*. It is suggested that the reasoning in *Gazzo* constitutes a qualification to the doctrine expounded in the *Engineers'* case rejecting the use of s 107 of the Consttution as a basis for reading down any of the provisions in s 51. In relation to the incidental area of a power, it seems, if *Gazzo* is followed, that the Commonwealth might not be able to remove practical burdens on, and hindrances to, Commonwealth purposes if they are imposed under a State law that does not discriminate with respect to the matter of Commonwealth concern, unless the burden is a particularly heavy one.[34]

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[31] (1904) 1 CLR 91.

[32] These and other criticisms of *Gazzo* appear in an unpublished paper delivered by Mr Dennis Rose at a departmental seminar.

[33] (1981) 38 ALR 25, 34.

[34] It may be that the scope of the decision is more limited if one has regard to another aspect of the reasoning, namely, an emphasis on the fact that the Family Law Act 1975 (Cth), and the order made under it, proceeded on the basis that the transfer of property should proceed under State law. It was said by Aickin J that the Commonwealth had to take the States' systems of land registration as they stood: (1981) 38 ALR 25, 66. And payment of the duty under that system was a precondition of registration: see also (1981) 35 ALR 25, 33 *per* Gibbs CJ. If that is a major reason for the judgments, then, while it still involves a notion of reserved State power, the Commonwealth could possibly provide that the Court order should itself operate as a transfer of either legal or equitable interests. In that case there would be no question of using State facilities. However this would, of course, create practical problems.

The concept of the federal system also appeared in *Actors Equity* v *Fontana Films*[35] where, *inter alia*, it was held unanimously that the corporations power authorised a law prohibiting certain secondary boycotts where the purpose and likely effect of the conduct was to cause substantial damage to the business of a trading corporation. All the judges regarded the control of conduct calculated to damage the trading activities of the trading corporation as within the power. However there was considerable difference of approach between Gibbs CJ (with whom Wilson J agreed) on the one hand, and Mason J (with whom Aickin J agreed) and Murphy J on the other.

The Chief Justice began by rejecting the view that s 51(xx) would support any law directed to a corporation referred to in that paragraph. One well known ground for rejecting such a view is that of Higgins J who in *Huddart, Parker & Co Pty Ltd* v *Moorehead* regarded its consequences as "big with confusion".[36] His Honour considered that a division of power under which the Commonwealth could enact a complete code of laws for s 51(xx) corporations and the States could enact such a code in respect of all other corporations and natural persons was absurd and unlikely. Gibbs CJ in *Actors Equity* v *Fontana Films* referred to this argument, but suggested that the reason for rejecting the broad view was to preserve the federal balance of the Constitution. His Honour referred to the

> proper reconciliation between the apparent width of s 51(xx) and the maintenance of the federal balance which the Constitution requires.[37]

In the *Franklin Dam* case Dawson J, while relying in part on the view expressed by Higgins J as to the undesirable consequences of the broader interpretation declared, that "such a conception is hardly consistent with the federal nature of the Constitution".[38] In *Actors Equity* v *Fontana Films* (as in the *Franklin Dam* case) Mason J considered that there was no good reason for limiting laws in respect of trading corporations to those concerned with the trading activities of the trading corporation. His Honour referred to "a competing hypothesis" mentioned above, which was that s 51(xx)

> was intended to confer comprehensive power with respect to the subject matter so as to ensure that all conceivable matters of national concern would be comprehended. The power should, therefore, in accordance with that approach, be construed as a plenary power with respect to the subjects mentioned free from the unexpressed qualifications which have been suggested.[39]

Here we get quite starkly two conflicting assumptions: federal balance versus national need. Professor Lumb has argued that the former consideration relies on the terms of the Constitution and is not inconsistent with the *Engineers'* case, while the latter is pure implication or assumption.[40]

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[35] (1982) 40 ALR 609.
[36] (1909) 8 CLR 330, 409-410.
[37] (1982) 40 ALR 609, 616. Wilson J agreed.
[38] (1983) 46 ALR 625, 852.
[39] (1982) 40 ALR 609, 637.
[40] R D Lumb, "Problems of Characterization of Federal Powers in the High Court" (1982) AT 45.

It is clear to me that both involve implications and assumptions to a degree.

It should be noted that the reasoning of the Chief Justice in *Actors Equity* v *Fontana Films* goes beyond that in *Gazzo* in that the resort to the federal system is not, in the former case, confined to the incidental area of a power. The existence of the federal system is used to determine its core.

What does the concept of federation involve? And what is its relevance to constitutional interpretation? Any description of a federal state would probably include the idea of regional governments with a guaranteed existence and some degree of governmental power not defeasible at the will of the central government. To uphold a law aimed at, or likely to threaten, the existence and governmental structure of the State might be seen as inconsistent with the survival of a federal system, although there might, of course, be much argument as to whether that is the effect or operation of the law. Those who support such a principle can point to the description of the union as a federal Commonwealth and the preservation, subject to the Commonwealth Constitution, of the constitutions and powers of the States under ss 106 and 107 of the Constitution. Generally, the context in which this principle operates is where a Commonwealth law purports to operate on a State government in its executive or proprietorial capacity.

Leaving aside the special problems related to the external affairs and defence powers, the concept of federalism cannot be used as a general restriction on the scope of Commonwealth legislative powers to regulate and control the activities of citizens. Even granted that a federal state is one where the States have a degree of exclusive legislative and executive power, the broad notion of federalism has nothing to say — and can have nothing to say — as to what powers and how much power must remain in the States. The judge is left to his own intuitions or predelictions or to a familiar or historical state of affairs.

As mentioned earlier the old doctrine of reserved powers related not so much to the general concept of federalism, but concerned rather the particular sort of federal system which it was thought the Constitution provided, namely, one where the States had substantial control over, *inter alia*, local trade and industry. At other times, however, it was stated that the doctrine extended to State power to control its "domestic affairs".[41] The highly subjective nature of the task of imputing a central or core content to State residual powers is, of course, evident.

In a more restricted field Kitto J in *Airlines of New South Wales Pty Ltd* v *New South Wales (No 2)*[42] appears to have taken the view that the notion of the federal state required a particular power to be vested in the States. His Honour considered that the United States' attitude to the commerce power was inconsistent with "dual federalism". He seems to have been of the view that if the Commonwealth had power to regulate intra-State trade the Constitution would cease to be federal. It is not clear why that should be so.

It is true as Professor Sawer has pointed out that

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[41] *Peterswald* v *Bartley* (1904) 1 CLR 497; *R* v *Barger* (1908) 6 CLR 41, 69 *per* Griffith CJ.

[42] (1965) 113 CLR 54, 115 (the *Air Lines Case (No 2)*).

> the question of federalism or no federalism becomes in practice whether the area of autonomy is sufficient to be worth considering.[43]

Clearly, from this aspect, federalism is a matter of degree. It is impossible to say precisely where along a spectrum or continuum ranging from a complete unitary state to a loose confederation, a society is no longer entitled to be called a federal state.[44] It is suggested, however, that no amount of contemplation of the word "federal" or of ss 106 and 107 of the Constitution can assist in the construction of such powers as the corporations power, the marriage power or the commerce power.

The external affairs power has been thought to raise peculiar problems in this regard. The minority in the *Franklin Dam* case, in resorting the concept of a federal system, denied that they were resurrecting the old doctrine of reserved power. Gibbs CJ declared that

> [t]he external affairs power differs from the other powers conferred by s 51 in its capacity for almost unlimited expansion.[45]

As it is for the executive to decide the treaties to which Australia should become a party, this meant to Gibbs CJ and the other minority judges that the Government could decide to enlarge Commonwealth legislative power at will and so determine to destroy the federal balance of the Constitution.

The other judges accepted in the *Franklin Dam* case, as they did in earlier cases such as *Koowarta* and in a later case, *R* v *Coldham* that the federal system was a factor in constitutional interpretation. As I have stated earlier they declared that the Commonwealth could not by laws otherwise within the power discriminate against a State (unless the power indicated otherwise) or prevent a State from continuing to exist and function as an independent entity of the federation. This, according to Mason J, was all that could be derived from the concept:

> So much and no more can be distilled from the federal nature of the Constitution and ritual invocations of "the federal balance".[46]

It is clear that for the majority this principle did not include preserving to the States any particular degree of legislative power. Brennan J limited the principle to the processes by which the powers of the organs of the State were exercised,[47] and referred to the statement of Dixon J (as he then was) where His Honour said that, in *Melbourne Corporation* v *Commonwealth*:

> [t]he framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them.[48]

Mason J seems to have had a similar view when he quoted with approval Stephen J in *Koowarta*, to the effect that the implied restrictions were designed "to protect the structural integrity of the State components of

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[43] G Sawer, *Modern Federalism* (1976) 106.
[44] W S Livingstone, *Federalism and Constitutional Change* (1956) Ch 1.
[45] (1983) 46 ALR 625, 669; also 752 *per* Wilson J; 842-843 *per* Dawson J.
[46] *Ibid* 694-695.
[47] *Ibid* 767.
[48] (1947) 74 CLR 31, 82 (the *State Banking* case).

the federal framework, State legislatures and State executives".[49] The reply of Wilson J is:

> Of what significance is the continued formal existence of the States if a great many of their traditional functions are liable to become the responsibility of the Commonwealth?[50]

The reference by Wilson J to "traditional functions" represents the very ground of complaint by the majority against the use of the concept of federalism. They regarded the plea to preserve the federal balance as meaning little more than the creation of subjects of power that the judge thought appropriate for the States, or alternatively, as an endeavour to entrench what was familiar, or what was familiar in 1900, as a constitutional criterion. They saw the issue as in fact the same as that involved in the doctrine of reserved powers. In *Koowarta*, Mason J suggested that in recent cases the doctrine of reserved powers "seems to have re-emerged in different guises".[51] Murphy J in the same case declared that:

> The States' contentions are a hardly disguised representation of the State reserved powers doctrine rejected in [the *Engineers'* case] but now having a new lease.[52]

To say that the broad view accepted in the *Franklin Dam* case has legally resulted in Commonwealth capacity to deal with any subject (subject to constitutional restrictions) is not literally true. The limitations on the Commonwealth are: (a) that there must be an international convention or situation; (b) that any treaty must be "bona fide"; and (c) that a Commonwealth law must be seen as reasonably appropriate to give effect to the treaty or matter of international concern. Assuming that the subject does not otherwise come within Commonwealth power and that these conditions are not satisfied the matter remains within the exclusive power of the States.

The question of whether this has resulted, or will by erosion result, in Australia being a federal state in nothing but name relates to the ease with which the Commonwealth may, if it wishes to legislate on a particular topic, do so by entering into an international agreement. In *Koowarta* Mason J displayed considerable scepticism as to this.[53] It is clear however that that consideration was not at the root of the majority's attitude. They did not really reply to the argument that it was inconsistent with the Constitution to have the States denuded of all exclusive legislative power. Nevertheless they seemed to have regarded it as an irrelevant consideration.

Nationhood

What of the concept of "national concern"? It is true, as Professor Lumb indicates,[54] that the Constitution makes no reference to nation, national or nationhood in connection with the Commonwealth or its powers. Yet the concept — whatever it means — has been referred to or relied on by

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[49] (1983) 46 ALR 625, 703, citing with approval *Koowarta* v *Bjelke-Petersen* (1982) 39 ALR 417, 452 *per* Stephen J.

[50] *Ibid* 752.

[51] (1982) 39 ALR 417, 461.

[52] *Ibid* 472.

[53] *Ibid* 463.

[54] Supra n 40.

a great many judges over the last three quarters of a century. These judges have not been like-minded on matters of constitutional law, and they include Griffith, Barton, Dixon, Latham, Barwick and Gibbs CJJ; and O'Connor, Isaacs, Starke, Windeyer, Mason, Jacobs and Murphy JJ. All have at some time, in admittedly different contexts, relied on the notion in the process of constitutional interpretation. Such notion has been used by the judges to explain the ability of the Commonwealth, first, to bind States under exclusive powers[55] and also under concurrent powers;[56] to show why the States cannot exercise the prerogatives relating to external affairs;[57] to decide that the territorial sea belongs to the Commonwealth;[58] to conclude that the Commonwealth may make laws under s 122 that operate throughout the Commonwealth;[59] and that the Commonwealth may engage in activities and enterprises not included in its express powers.[60] It has also been used, as indicated above, to justify the principle that Commonwealth powers should be interpreted broadly and generously.

Like "federalism" and "sovereignty", "nationhood" is a slippery concept. Like the other two expressions, it is often used in a political or social context in a purely emotive sense, indicating nothing more than that the speaker is in favour of enhanced central power or is against the retention by the States of substantial exclusive power.

Any issue may be seen as creating "a national need" or as being one of "national concern" because it arises in all States. The need for housing, education, town planning, recreation, roads and sewerage is universal. The need "to do something about" crime, traffic accidents, industrial safety, and industrial disturbances is proclaimed throughout the country. On this ground it is possible to regard almost any social issue as a matter of "national concern". From the fact that a need arises everywhere or a social problem exists everywhere it does not, of course, follow that the legislative solution is best attempted by the central government.

Some problems may be seen as national in another sense — namely the impossibility of one State alone dealing with the problem because of its ramifications. Some questions of economic management may be seen as being of this nature because of the "integration" of the national economy. On other occasions the problem might be that of a State attempting to control or regulate bodies such as nationwide organisations, corporations or trade unions. Then again, national concern may arise as a result of the social values of the Australian community — concern, for example, that there should be a minimum standard of public service and social security for all persons in whatever State or Territory they live.

To an extent, intrusion of national concern or national interest into constitutional construction may resemble the doctrine of reserved powers in the sense that the judge is determining, without any guidance from the express terms of the Constitution, that a particular subject matter is best

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[55] *R* v *Sutton* (1980) 5 CLR 789, 797, 803.

[56] *Engineers'* case (1920) 28 CLR 1, 155.

[57] *R* v *Burgess; ex parte Henry* (1936) 55 CLR 608, 645; *New South Wales* v *Commonwealth* (1975) 135 CLR 337, 373 *per* Barwick CJ (the *Seas and Submerged Lands* case).

[58] *Seas and Submerged Lands* case *ibid.*

[59] *Lamshed* v *Lake* (1958) 99 CLR 132, 142-143 *per* Dixon J.

[60] *Victoria* v *Commonwealth* (1975) 134 CLR 338 (the *Australian Assistance Plan* case).

dealt with at a particular level. The difference is that those who emphasise "federal balance" are concerned with traditional roles, while those who emphasise national need are not.

There may be some who still argue that neither of these notions is the concern of the judge, and the general tone of the *Engineers'* case is to urge that the words of the Constitution be given their "ordinary" or "natural" meaning. But it is obvious to constitutional lawyers that resort to ordinary meaning cannot produce a conclusive answer to the issue whether, for example, the corporations power extends to the control of only the trading activities of a trading corporation, of all the activities of such a corporation, to all laws addressed to such corporations; or only to (or in addition) laws in which corporate nature of the juristic persons referred to is a significant element.

The various concepts of national government, interest or concern as used in construing the Constitution seem to refer to some, or an accumulation of, the following factors:

(a) the acquisition by Australia of full juristic personality at international law, with the Commonwealth representing all Australian interests in relation to the outside world;[61]

(b) the supremacy of Commonwealth laws;

(c) the fact that the people of all the States are represented in the Commonwealth Parliament and that Commonwealth law operates throughout Australia;[62]

(d) that as a result of social and economic forces the Commonwealth in the exercise of its express powers, such as taxation, borrowing, grants to States, defence, external affairs, commerce, corporations, industrial disputes, banking etc., is forced to consider, balance and adjust more and more interests and concerns throughout the Commonwealth. That is, a great number of matters are seen as relevant to matters of indisputably Commonwealth concern which were once regarded as purely local or domestic.

It is, I think, this last factor that has been an important element to some judges in decision making and that has resulted in the strong references to adaptability and flexibility. It was emphasised expressly by Brennan J in the *Franklin Dam* case:

> That canon of construction [propounded by O'Connor J in *Jumbunna* v *Victorian Coal Miners' Association*[63]] ensures that the Parliament is enabled to fulfil the object for which the power was designed. The application of that canon of construction to the affirmative grants of paramount legislative powers gives the Constitution a dynamic force which is incompatible with a static constitutional balance. The complexity of modern commercial, economic, social and political activities increases the connections between particular aspects of those activties and the heads of Commonwealth power and carries

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[61] *R* v *Burgess; ex parte Henry* (1936) 55 CLR 608, 645; *Seas and Submerged Lands* case (1975) 135 CLR 337, 373 *per* Barwick CJ; *cf* the *Franklin Dam* case (1983) 46 ALR 625, 858 *per* Dawson J.

[62] *Payroll Tax* case (1971) 122 CLR 353, 398 *per* Windeyer J; *Lamshed* v *Lake* (1958) 99 CLR 132, 142-143 *per* Dixon CJ; *Engineers'* case (1920) 28 CLR 1, 155.

[63] Supra n 2.

> an expanding range of those activities into the sphere of Commonwealth legislative competence.[64]

The view seems to be that a resort to a notion of "reserved" or "traditional" powers of the States in the process of interpretation will freeze the system at any particular time or period of our history. Looked at in that light the rhetoric about national interest and concern, the emphasis on literalism and plenary construction of Commonwealth powers and the plea to regard the Constitution as an organic instrument fit for a dynamic society all come down to the same thing. A refusal to have regard to the residue of State power is seen as a way of avoiding the result that what has been usual or habitual at any particular time will be treated as necessarily implied or enshrined in the Constitution.

A "balancing" of powers

Professor Lumb has argued that, having regard to the references in the Constitution to the Commonwealth as "federal" and to the existence of ss 106 and 107, the concept of "federalism" should be used as an "overarching principle" in construction. He postulates that we should infer from the Constitution that certain matters are within residual State power:

> General legislative power with respect to private law (eg property, contracts, torts and succession) would appear to be a core part of the State Constitutions and therefore protected expressly by s 106 subject of course to the interpretation given to the s 51 heads of power under the "balancing" process.[65]

This seems to be similar to the old doctrine, but Professor Lumb says that there is a difference. He maintains that, prior to the *Engineers'* case, the Court gave primacy to the State residual powers as they saw them, while he is advocating a balance or adjustment of the powers. While this approach is in some respects similar to that adopted by Gibbs CJ in *Gazzo*,[66] it may go beyond those views. Certainly in *Strickland* v *Rocla Concrete Pipes Ltd*,[67] for example, neither Gibbs J (as he then was) nor any other member of the Court "balanced" Commonwealth power to deal with the trade practices of corporations with the State power to control contracts. Nor is it clear why the areas Professor Lumb has chosen are to be seen as the "core" of the residual powers. In the heyday of a similar doctrine in the United States, the "core" was seen as including such matters as manufacture, mining, agriculture, health, safety, and the relationship of master and servant. It seems that in both choosing the State's core subjects and the process of balance there would be a considerable widening of the scope of judicial subjectivism which had been thought to have been narrowed by the overthrow of the doctrine of reserved powers. For some the result may, of course, be worth the price; but for the reasons I have given regarding the notion of federalism, I do not believe, as

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[64] (1983) 46 ALR 625, 773.

[65] R D Lumb, "Problems of Characterization of Federal Powers in the High Court" (1982) AT 45, 48.

[66] *Gazzo* v *Comptroller of Stamps (Vic)* (1981) 38 ALR 25; see also His Honour's remarks in *Actors Equity* v *Fontana Films* (1982) 40 ALR 609, esp 615-621.

[67] (1971) 124 CLR 468.

Professor Lumb does, that the principle he advocates is a reasonable inference to be drawn from the overall structure of the Constitution.

It is not suggested that the application of rules of construction relating to "ordinary and natural meaning" or the exhortation to "remember that it is a Constitution that we are interpreting" will readily produce clear and definitive answers. A judge minded to enhance national power will no doubt more often find a particular law to be within Commonwealth authority than one who is not, even though neither is consciously or deliberately taking into account any residuary State power or national need. To reject a broad construction is not necessarily to engage in balancing State and Commonwealth authority, or to be concerned with the "federal balance". There may be other reasons. I have indicated elsewhere[68] that I find it difficult, for example, to regard the judgment of Dixon J in *R* v *Brislan; ex parte Williams*[69] as a manifestation of a judge consciously or unconsciously concerned with State residual power, or deciding what he thought was a proper division of power within the federation. Similarly the *Communist Party* case,[70] while concerned only with a question of federal power, involved issues of construction that are not readily seen as primarily about the division of State and federal power.

In determining what is incidental to (or the degree of nexus with) a subject of Commonwealth power, the Court will of necessity, at times, be concerned with the impact of the purported law on other areas of life. If the impact of an activity on, say, banking or overseas commerce is regarded as "remote", "tenuous", or "indirect" it is often because its effect on other areas of concern seems much greater, and more important, and contrasts with the slightness of the connexion with the subject of Commonwealth power. This may, in turn, show that the law has some purpose which is not the fulfilment of the object of the Commonwealh power concerned or that it is not a reasonable means to a legitimate end.

For example, in *Victoria* v *Commonwealth*,[71] Dixon CJ asked rhetorically whether it would "strike the mind as absurd" if a law forbidding a subscriber to the telephone services to pay debts until he had paid his telephone account was incidental to the power in s 51(v).[72] It is clear that he regarded the nexus with the telephone service as tenuous. Its only relationship would be the *possibility* that the taxpayer *might* in some circumstances then have enough money to pay his telephone bill, which he might not otherwise have been able to do. This is however a far cry from regarding the process of characterisation, whether in a central or incidental area of the power, as involving a balancing of Commonwealth powers with subject matters which are supposedly conferred exclusively on State Parliaments.

That these issues are not — or are not always — influenced by a judge's views of the federal balance or the national need is illustrated by one of the holdings in *Actors Equity* v *Fontana Films*[73] where Gibbs CJ and

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[68] L Zines, *The High Court and the Constitution* (1981) 17.
[69] (1935) 54 CLR 262.
[70] *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1.
[71] (1957) 99 CLR 575 (the *Second Uniform Tax* case).
[72] *Ibid* 615.
[73] (1982) 40 ALR 609.

Dawson J dissented from the decision of Stephen, Mason, Murphy, Aickin and Brennan JJ that s 45D(5) of the Trade Practices Act 1974 (Cth) was invalid. The effect of that sub-section was that if two or more trade union members engaged in a secondary boycott with the purpose or likely effect of injuring the business of a trading corporation, the trade union was deemed to have engaged in that conduct unless it established that it took all reasonable steps to prevent the members concerned from engaging in the conduct.

The Chief Justice considered the provision reasonably incidental to s 51(xx). It was, in His Honour's view, within the power of Parliament to require the union to take all reasonable steps to prevent its members from engaging in the conduct. His Honour saw a reasonable nexus with the object of the power — namely, the protection of the trading activities of trading corporations.

Although His Honour's reasoning can possibly be countered, the majority judges never really replied to the reasoning of the Chief Justice in that case. Mason J merely declared that s 45D(5) was a law about trade unions, saying that:

> to me it has a very remote connexion with corporations, a connexion so remote that the provision cannot be characterized as a law with respect to corporations of the relevant class.[74]

On this issue Stephen and Aickin JJ simply agreed with Mason J, and Brennan J said in effect little more than that the provision was not within s 51(xx). Murphy J held it invalid on other grounds.

The majority judgments on this issue can be, and have been, criticised[75] for not coming to grips with the reasoning put forward by the Chief Justice and the authorities to which he referred — they are merely dogmatic statements. The decision, nevertheless, illustrates the point being made.

Conclusion

The principles propounded by the majority judges in the *Franklin Dam* case seem based on a number of policy and other considerations:

(a) the Constitution is intended to be an enduring document to be applied to changing circumstances over long periods of time;
(b) it gives no inkling of the extent of exclusive power in the States, other than by extraction of what is within Commonwealth power (apart from express restrictions);
(c) the concept of the federal state does not provide any guidance as to what subjects of power must be exclusive to the States;
(d) factual events and circumstances will in the course of time indicate a nexus with Commonwealth power that was not obvious in earlier times. For example the safety of inter-state or overseas aircraft may require today control over all aircraft even though that did not seem to be the case in 1935. The nature of modern war produced a highly centralised state during World War II. Similarly, international relations today are affected by more and different events than was the case in earlier times;

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[74] *Ibid* 639.
[75] The paper by Mr Dennis Rose (supra n 32) represents one such trenchant criticism.

(e) it is not for a court to infer that the States have subjects of power which must act as a restriction on the construction of Commonwealth powers (either directly or for the purpose of "balancing" those powers with Commonwealth powers in doubtful cases), when no guidance can be obtained from either the Constitution nor the declaration that Australia is a "Federal Commonwealth". Such an approach amounts to a judge imposing his personal views, or else emphasises history at the expense of adaptability and flexibility, which are the hallmarks of the Constitution.

Basically the complaint of the minority is that this approach disregards to a large degree a canon of construction which provides that you must have regard to the context in which particular provisions appear. They say the overriding context is the federal system and to Dawson J, for example, the approach of the majority was "unprecedented as a legitimate method of construction".[76]

To a degree the reasoning of the majority endeavours to reply to this criticism. It does accept an inference related to the continued existence of the States, but does not accept that that involves any degree of exclusive State power.

The argument, however, regarding the external affairs power is of a different order from the sort of reasoning or argument based on federal considerations that has been applied by some judges to the corporations power, the marriage or the commerce powers. It is that the recognition in the Constitution of the existence of States as independent governmental organisations requires *some* area of exclusive power. On this view the reasoning that led all members of the Court to accept restrictions based on federal implications should have resulted in their not accepting the interpretation of the external affairs power that they did.

The majority does not seem to me to have expressly replied to this argument. Either they rejected it or considered that their approach did not lead to the result stated by the minority.

Some type of argument is suggested by Mason J. After pointing out that the expectations or assumptions of the founding fathers did not constitute a proper criterion His Honour added:

> . . . the difference between those expectations and subsequent events as they have fallen out seems to have been a difference in the frequency and volume of external affairs rather than a difference in kind. Only if there was a difference in kind could we begin to construct an argument that the expression "external affairs" should receive a construction which differs from the meaning it would receive according to the ordinary principles and interpretation.[77]

The argument suggested by this comment is along the following lines; the Constitution declared the Commonwealth to be a "Federal Commonwealth"; the method chosen was to confer on the central government express affirmative and enumerated powers, subject to which the States would make laws for the peace, order and good government of their States (apart from other restrictions and Commonwealth exclusive powers).

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[76] *Commonwealth* v *Tasmania* (1983) 46 ALR 625, 841.
[77] *Ibid* 692-693.

Leaving aside all other considerations the legislative implementation of treaties in compliance with international obligations or goals has a direct connection with "external affairs" in the sense of Australia's relations with other countries. No one in 1900 regarded this power as inconsistent with the notion of a federal state — but this was because of the factual context. Areas of international agreement and co-operation were far more limited in 1900 than they are today. It was not that in 1900 there was a general notion that treaties in relation to any subject-matter were improper. It was simply that the nations saw no need to enter into relations in respect of a large range of matters, and people then could not envisage they would ever do so. As the position was seen in 1900, therefore, the vesting of power in the Commonwealth to implement any international agreement did not raise any question of whether the States were deprived of all, or nearly all, exclusive legislative power.[78] If the result of increased international activity results in a vast reduction of State exclusive power, that is merely an inevitable consequence of a great increase in the degree of international activity. The description of the union as "federal" cannot, according to this view, result in a narrowing of Commonwealth power as a consequence of this increase in international activity.

But of course this sort of reasoning does not convince everyone — least of all the minority judges. In the ultimate analysis no amount of talk about the principles, rules or canons of construction will produce a compelling result.

Whether, and for how long, the approach of the present High Court will continue is difficult to predict. Certainly, the majority in the *Franklin Dam* case have provided clear rationes relating to the scope of the external affairs power, the corporations power and the races power. There have been signs recently that the minority judges may not always be willing to follow precedent in this regard. In *Stack* v *Coast Securities (No 9) Pty Ltd*[79] Wilson and Dawson JJ, referring to the earlier case of *Fencott* v *Muller*,[80] said:

> Notwithstanding that we remain convinced of the correctness of these propositions, it must now be accepted that neither of them finds support in the decisions to which we have referred. The result in our view is that *until there is an opportunity for reconsideration*, the Court may find itself committed to a course of reasoning which involves *artificiality* and *error*.[81]

[78] Comparison may be made here with s 132 of the British North America Act 1867 (UK).
[79] (1983) 57 ALJR 731.
[80] (1983) 57 ALJR 317.
[81] (1983) 57 ALJR 731, 746 (italics added).