CASE NOTES

KOOWARTA v. BJELKE PETERSEN and OTHERS QUEENSLAND v. COMMONWEALTH OF AUSTRALIA[1] — EXTERNAL AFFAIRS POWER

Constitutional Law — Validity of Racial Discrimination Act 1975 (Cth) — s. 51(26) — s. 51(29) — locus standi of plaintiff.

Koowarta v. Bjelke Petersen and others started as an action in the Supreme Court of Queensland. The second defendant was the Queensland Minister for Lands. Parts of the cause were removed into the High Court. *Queensland v. Commonwealth* was an action brought in the High Court seeking a declaration. The plaintiff in the first matter was an Aborigine and belonged to a recognised group of Aboriginal people. On behalf of himself and the group he had approached a body corporate set up under Commonwealth legislation[2] called the Aboriginal Land Fund Commission requesting it to purchase a lease of certain land in north Queensland. It was Crown land and the current lessees held their lease from the State. A contract was entered into for the purchase of the lease subject to the permission of the Queensland Minister for Lands.

The Minister, pursuant to a decision of the Queensland Cabinet, refused his permission. The reason for the refusal was a standing policy of the Queensland Government that it did 'not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation'.[3] To this was added in the instant case, 'it is considered that sufficient land in Queensland is already reserved and available for use and benefit of Aborigines'.[4] On this basis the plaintiff claimed declarations, an injunction and damages for breach by the defendants of sections 9 and 12 of the Racial Discrimination Act 1975 (Cth). The defendants delivered a demurrer and also a defence which raised certain questions of law. The demurrer and the questions of law raised by the defence were the parts of the cause removed to the High Court.

Queensland v. Commonwealth claimed a declaration that the Racial Discrimination Act was beyond the legislative power of the Commonwealth. No allegation was made however that the Act was inconsistent with any Queensland legislation or, apart from enforcement of the government policy relied on in the *Koowarta* case, with any actual or contemplated Queensland administrative action. So far as the High Court was concerned therefore, the substance of the two cases was the same. Since the remedy by way of declaration is discretionary, the court used its discretion to limit argument to the validity of sections 9 and 12 of the Racial Discrimination Act, these being the only parts of the Act which might have practical consequences in the present litigation.

The care which the High Court took to delimit with precision the issues that it was deciding is an important feature of the case and will be returned to. Three major questions arose: whether the plaintiff had standing to bring his action; whether

[1] (1982) 39 A.L.R. 417.
[2] Aboriginal Land Fund Act 1974 (Cth). Repealed, but that was immaterial.
[3] (1982) 39 A.L.R. 417, 420.
[4] *Ibid.*

sections 9 and 12 of the Racial Discrimination Act could be supported under section 51(26) of the Constitution; and whether they could be supported under section 51(29) of the Constitution. The whole court decided that the plaintiff had standing; with only Murphy J. dissenting it was held that sections 9 and 12 of the Racial Discrimination Act were not an exercise of legislative power under section 51(26) of the Constitution; and by a majority of four to three it was held that sections 9 and 12 were a valid exercise of legislative power under section 51(29) of the Constitution.

The Racial Discrimination Act was passed explicitly to give effect to an international convention called the International Convention on the Elimination of All Forms of Racial Discrimination. Article 2(1) of the Convention obliged the parties to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation'.[5] Following on from this, Article 5 recited an obligation 'to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights'.[6] So far as relevant the rights referred to were to own property, to freedom of peaceful assembly and association, to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration and to housing.

Section 9 of the Act made it unlawful 'for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'. These words were expressly related to Article 5 of the Convention. Section 12 made it unlawful for a person to deal or refuse to deal with estates or interests in land in a variety of ways by reason of the race, colour or national or ethnic origin of the other person involved in a transaction. Section 18 of the Act defined 'reason' as being the dominant reason if there was more than one reason for the action in question.

The leading judgment for the minority of the Court on the main issue, whether the Racial Discrimination Act was a valid exercise of the power to legislate with respect to external affairs, was delivered by Gibbs C.J. Aickin J. agreed with Gibbs C.J. and added nothing further. Wilson J. agreed with Gibbs C.J. also but made some additional observations. These three judges were particularly concerned to set a rational limit to Commonwealth legislative power under section 51(29) having regard to the federal nature of the Constitution. As it happened, the limiting principle that they adopted would have had the result of invalidating sections 9 and 12 of the Racial Discrimination Act. Since this was not a consequence which the majority were prepared to accept, it becomes an interesting exercise to identify that principle first and then see how much further the majority were prepared to go in order to bring the Racial Discrimination Act within a wider principle.

Little need be said by way of preliminary about either the standing of the plaintiff or the application of section 51(26) of the Constitution. The point about standing was that section 24(1) of the Act gave remedies to a 'person aggrieved' by a breach of the Act. The apparent difficulty, such as it was, was that the Queensland Minister for Lands had refused permission not to the plaintiff but to the Aboriginal Land Fund Commission. So far as section 12 of the Act was concerned, there were at least two ways of meeting the argument that under the circumstances only the Commission

[5] *Ibid.* 422.
[6] *Ibid.* 423.

could be a person aggrieved. The simplest was that one of the ways of dealing with land specifically prohibited by section 12 was to refuse to permit its occupation. The Minister's action had clearly had the consequence of preventing the plaintiff from occupying the land covered by the lease on the ground that he was an Aborigine. Hence he fell directly within the terms of section 12 and had standing to sue accordingly. This was the ground taken by Stephen, Murphy and Brennan JJ.

Gibbs C.J., Mason, Aickin and Wilson JJ. held that 'person' in section 12 included a corporation. By its express terms section 12 encompassed a refusal to permit the occupation of land by reason not only of the race of the other party to the transaction but also of any 'associate' of that person. The objection was based on the plaintiff's race and the plaintiff was clearly an associate of the Commission. Gibbs C.J., Aickin and Wilson JJ. took into account also that the remedies under section 25 of the Act included damages for loss of dignity, humiliation or injury to the feelings caused by a breach of the Act. It was clearly possible that the Minister's refusal of permission, if held to be unlawful, would entitle the plaintiff to damages under this head. Hence he had standing to challenge the lawfulness of the refusal. Brennan J. was the only member of the Court to consider also whether the plaintiff had standing under section 9 of the Act. He held that he did on the basis that denial of the opportunity for the plaintiff to obtain a licence to use land was an infringement of a human right or fundamental freedom within section 9.

The argument seeking to validate sections 9 and 12 of the Act as an exercise of legislative power under Constitution section 51(26), the power to legislate with respect to the 'people of any race for whom it is deemed necessary to make special laws', was dismissed by six judges on the simple ground that the sections were not special laws for any race but general in their application. Whilst conceding that in some contexts the word 'any' is a synonym for 'all', the majority were not prepared to understand section 51(26) in this sense. They took the opportunity to point out that although modern attitudes lead naturally to the assumption that the purpose of section 51(56) is to protect minorities, its wording can equally well be read in the opposite sense; and that its original purpose was to permit legislation against the wide variety of non-white races who used to come to Australia for one reason or another.[7] Murphy J. accepted the Commonwealth's circular argument that the Racial Discrimination Act was supported by Constitution section 51(26) because it was legislation with respect to the people of any race against whom discrimination on racial grounds was or might be practised.[8] With scarcely any supporting argument he also asserted that section 51(26) contemplates only legislation which is for the benefit of any race.[9]

On the main point Gibbs C.J. for the minority identified the issue as being whether Commonwealth legislation which on the present facts operated entirely within Australia, and indeed within one State, was supportable as an exercise of the power to legislate with respect to external affairs on the basis only that Parliament was acting in accordance with a formal international obligation. No question arose of Australia's power to enter into the obligation but only of the extent of the power to implement it domestically. The legislation in question did not offend against any express prohibition in the Constitution. No previous authority decided the question one way or the other. It fell to be decided now entirely by reference to the proper principle of interaction between the scope of the external affairs power and the federal implications of the Constitution.

The difficulty about the federal implications was that if section 51(29) were permitted to become a source of power for domestic legislation on the basis only that

[7] *Ibid.* 428.
[8] *Ibid.* 473.
[9] *Ibid.*

Australia had entered into an international agreement related to the subject-matter of the legislation, the scope of the power could expand almost indefinitely. The danger lay not at all in the possibility that the Commonwealth might enter into international agreements as a mere device to acquire legislative power, but in the modern fact that it was almost impossible to think of an area of the national life which might not be affected by an appropriate international agreement. Such a development would ultimately obliterate the constitutional division of powers between Commonwealth and States. Furthermore it would have the undesirable consequence that the executive government of the Commonwealth could confer additional legislative power upon the Parliament.

Gibbs C.J. expressly guarded himself against being thought to argue that the external affairs power could have operation only in relation to matters geographically external to Australia or, alternatively, that a class of matters could be identified which were inherently external affairs within the meaning of the power.[10] It was common ground that section 51(29) must have a significant internal operation. Obvious examples would be the definition of diplomatic privileges within Australia and powers over fugitive offenders.[11] Examples from the case law included most prominently aerial navigation.[12] The question was what common denominator could be found in all the accepted instances of domestic operation of external affairs legislation which would at the same time provide the limiting principle for the scope of the power. The minority found it in the proposition that in each case 'the law, although operating within Australia, was one with respect to a subject matter which involved a relationship with other countries'.[13]

There was a distinction between a law of this character and a law the only connection of which with an external affair was that Australia had entered into an agreement about it with other countries. The distinction was that a subject of international concern or interest was not necessarily a subject involving a relationship between Australia and another country, or between Australia and persons or things outside Australia. For Gibbs C.J., Aickin and Wilson JJ., a law could not qualify as a law with respect to an external affair unless it clearly regulated or operated upon transactions or activities between this country and events which occurred outside this country.[14]

This test being applied to sections 9 and 12 of the Racial Discrimination Act, those sections clearly failed to qualify. Although they pertained to a subject of great international concern, they did not operate upon any external affair in the foregoing sense. In coming to this conclusion the minority were only too well aware of the nature of the subject-matter of the case before them. Wilson J. in particular stressed his personal acceptance of the importance and desirability of Australia's playing its part in furthering moves towards the achievement of racial equality.[15] The dissenting judges were nevertheless united in a determination not to further this end at the expense of giving Constitution section 51(29) a scope of operation which would seriously undermine the federal division of powers.

Since the line drawn by the minority between legislation which operates upon an external affair and legislation which does not is perfectly rational in principle, and would suffer from no unfamiliar difficulty of application to particular cases, it is instructive to turn now to the majority judgments to see how far beyond the position

[10] *Ibid.* 432, 441.
[11] *Ibid.* 432.
[12] *Ibid.*
[13] *Ibid.* 432.
[14] *Ibid.* 445.
[15] *Ibid.* 478.

taken by the minority they had to move in order to accommodate sections 9 and 12 of the Act.

The difference between the minority's formulation of the external affairs power and Stephen J.'s can be identified precisely. Stephen J. regarded the expression 'external affairs' as restricted to 'such of the public business of the national government as relates to other nations or other things or circumstances outside Australia'.[16] As it stands, this is of course not inconsistent with anything in the minority judgments. The question is where it takes us in terms of a power to legislate with effect within Australia. Stephen J. regarded the minimum scope of the power as defined in earlier cases to be 'a power to implement by legislation within Australia such treaties, on matters international in character and hence legitimately the subject of agreement between nations, as Australia may become party to'.[17] This still does not necessarily part company with the minority, even though Stephen J. regarded the power as extending somewhat further than the cases had yet taken it. Everything depends on what is meant by international in character. The minority's requirement was that for an international agreement to which Australia is a party to be a sufficient basis for legislation to operate domestically the agreement has to operate upon some relationship between Australia and another country or countries; but a subject-matter can be properly described as international in character without necessarily fulfilling that requirement.

As his judgment unfolds Stephen J. approaches even closer to the minority, for he readily concedes that a law enacted under section 51(29) is not necessarily valid merely because it gives effect to treaty obligations: a treaty 'on a topic neither of especial concern to the relationship between Australia' and another country 'nor of general international concern will not be likely to survive . . . scrutiny'.[17] But it is at this point that one sees the difference between Stephen J. and the minority emerging clearly. For Stephen J. it is evidently enough that a treaty, or presumably any other international agreement, is either of particular concern to the relationship between Australia and another country or of 'general international concern'.[18] The former would pass the minority's test but not the latter. Stephen J. is led to this view by the enormous increase which has taken place since the Second World War in the number of subjects regarded as matters legitimately of international concern, as opposed to being of purely domestic significance. As the former has expanded the latter has contracted. A consequential expansion of the domestic scope of the external affairs power follows naturally.

The heart of Stephen J.'s position is that a 'subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of nation's "external affairs" '.[19] He concludes this part of his judgment by making clear that he does not regard matters of international concern as necessarily being restricted to formal treaty obligations. 'There is, in my view, much to be said for . . . the conclusion that, the Convention apart, the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs, so that legislation much in the present form of the Racial Discrimination Act would be supported by power conferred by section 51(29). As with slavery and genocide, the failure of a nation to take steps to suppress racial discrimination has become of immediate relevance to its relations within the international community.'[20]

[16] *Ibid.* 449.
[17] *Ibid.* 453.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.* 456.

Mason J. similarly rejects explicitly the limitation imposed by the minority on section 51(29): 'It is not to be thought that the content of the power is limited to matters affecting our relationships with other nations and communities.'[21] He denies that a subject-matter must be either internal or external, pointing out rightly enough that many matters can have both aspects.[22] As with Stephen J., the question for Mason J. is whether the subject-matter is one of international concern. His examples of matters of international concern which necessarily have a domestic consequence include the suppression of an objectionable traffic or trade, the elimination of disease and limitations on production in order to stabilise markets.[23] The distinguishing characteristic is 'agreement by the parties to take common action in pursuit of a common international objective, each party standing to gain a benefit from its attainment'.[24] So far as the abolition of racial discrimination is concerned, Mason J. finds the benefit in 'the elimination of activity which may contribute to the disturbance of international peace and security'.[25] This suggests that his benefit requirement is not particularly significant and that in substance his position is the same as Stephen J.'s, the real emphasis being upon international concern and agreement to act.

Murphy J. similarly points to the great expansion in international preoccupation with matters which until recent times have been regarded primarily as of domestic concern. He concludes that the Racial Discrimination Act 'falls easily within the external affairs power'[26] because it not only implements a treaty but conforms very closely to the Convention in doing so. Nevertheless he makes clear that it would be immaterial even if the Act did not precisely conform to the terms of the Convention, for it would still relate to a matter of international concern, 'the observance in Australia of international standards of human rights, which is part of Australia's external affairs'[27] Murphy J. appears to go further than the other three members of the majority in accepting the mere existence of an international agreement as being a sufficient foundation for legislation under section 51(29) which conforms to its terms.

Every other member of the majority, including Brennan J.,[28] expressed himself somewhat more cautiously, but the difference in modes of self-expression on this point may not be significant. Indeed the doubt is not confined to this particular point. It is not altogether easy to know whether, like Murphy J., Brennan J. was intending to take a significantly wider view of the external affairs power than Stephen and Mason JJ. Probably not, but the following passage from Brennan J.'s judgment certainly reads rather more widely: 'When a particular subject affects or is likely to affect Australia's relations with other international persons, a law with respect to that subject is a law with respect to external affairs. The effect of the law upon the subject which affects or is likely to affect Australia's relationships provides the connection which the words "with respect to" require'.[29] And a few lines further on: 'No doubt there are questions of degree which require evaluation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them, but contemporary experience manifests the capacity of the internal affairs of a nation to affect its external relationships.'[30] All of which is quite true in general terms, and no doubt comfortably accommodates sections 9 and 12

[21] *Ibid.* 458.
[22] *Ibid.* 461.
[23] *Ibid.* 464.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.* 473.
[27] *Ibid.*
[28] *Ibid.* 487-9.
[29] *Ibid.* 486.
[30] *Ibid.* 486-7.

of the Racial Discrimination Act, but sets very ill-defined limits to section 51(29) of the Constitution for the future.

Koowarta has been greeted as a great advance in the interpretation of the external affairs power. In one sense it certainly is, for it is the first time that the High Court has concentrated its attention directly on the validity of a major piece of legislation for the regulation of conduct inside Australia which could be supported on no other ground than that it implemented an international obligation. Nevertheless, in assessing the implications of the decision for the future scope of the external affairs power a note of caution would be in order.

The circumstances of the case could scarcely have been more propitious from the Commonwealth's point of view. Queensland's treatment of its Aboriginal population is not widely regarded with admiration. On the broader scene, racial discrimination has in common with the even worse phenomena of genocide and slavery the characteristic that it goes to the very heart of the human condition. Brennan J. put this aspect of the matter best when he referred to the implementation of the Convention as perhaps going even to 'Australia's credibility as a member of the community of nations'.[31] It is a pity that it took Australia from 1966 to 1975 to get around to worrying about its credibility in the matter. But it is the very fact that the circumstances of the litigation greatly assisted the conclusion arrived at by the majority that should cause one to scrutinise their reasoning with care. We do well to remember that the question of constitutional interpretation involved was sufficiently debatable, even on these facts, for the High Court to divide almost equally on the outcome.

The contest between the regulation of Australia's relationships with specific other countries criterion and the affairs of international concern criterion has been clearly won, at all events for the time being, by the latter. This is no doubt a good thing in terms of such international problems as drug trafficking, the control of disease and, to cite some examples not mentioned by the High Court, the destruction of the environment, the reckless slaughter of endangered species and the preservation of international safety standards generally. In such areas as these, and no doubt others, the international concern criterion certainly enables the external affairs power to usefully supplement the Commonwealth's rather random collection of legislative powers in coping with a constantly changing world. And it may well be, as Stephen J. so explicitly pointed out,[32] that we are all of us becoming more internationalised whether we like it or not, so that the very concept of a country's internal affairs, so beloved of countries which come rather badly out of international scrutiny, is withering away.

Nevertheless it is exceedingly difficult to believe that some of the wider statements of principle made by the majority in *Koowarta* can be divorced from their context. It has been asserted for example that the way is now open to the enactment, presumably under a Labor Government, of a statutory national bill of rights. Presumably this would go somewhat further than a few rules about arrests, confessions and legal representation that most people seem to think a bill of rights is all about. At the very least a document purporting to be a worthwhile bill of rights ought to have something to say about freedom of speech and peaceable assembly, not to mention the value of one's vote and the undesirability of gerrymanders. Safeguards about freedom of movement into and out of the country and the right to a passport would not come amiss. Desirable though many, including the present writer, would think such a development to be, it strains credulity to believe that the external affairs power is now in a shape which would permit the wholesale internal readjustments that most of these changes would require on the basis only of international concern about such matters.

[31] *Ibid.* 488.
[32] *Ibid.* 453.

A pleasing, if minor, stylistic note on which to end: the High Court seems at last to have wholly discarded the inexplicable and totally erroneous tradition of referring to the subsections of section 51 of the Constitution as placita. Stephen J., at all events as reported in the ALRs, as one of his last acts on the Court has led the way in adopting another small modernisation which this writer finds particularly pleasing because he believes that he invented it. Throughout Stephen J.'s judgment those same subsections are signified in Arabic instead of Roman numerals. Thus 51(26) and 51(29) and not 51(xxvi) and 51(xxix). A small aid to communication but a most helpful one.

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FAI INSURANCES LTD v. WINNEKE AND OTHERS[1]

Administrative Law — Natural Justice — Decision of the Governor in Council affecting rights — Duty to Provide a hearing — Whether subject to judicial review — Administrative Law Act 1978 (Vic.).

INTRODUCTION

In an analysis of the decision of the High Court in *Sankey v. Whitlam*[2] Dr Pearce opined that '[t]he decision can be seen as the final step in the establishment of the fundamental concept that administrative action is subject to judicial review'.[3] Even if this statement is correct in the context of crown privilege the High Court has shown no consciousness of the final step having been taken in other areas. Indeed, as this case shows, the Court has moved to strengthen and extend this 'fundamental concept'.

During this century the traditional immunity of certain administrative bodies from judicial review has been steadily eroded to the extent that since *Padfield v. Minister of Agriculture Fisheries and Food*,[4] which settled the matter as far as Ministers were concerned, only two institutions could claim significant immunities: the legislature and the representative of the Crown. In *Re Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council*[5] the High Court reviewed an exercise of a regulation-making power by the Administrator of the Northern Territory (acting with the advice of his Executive Council) on the ground that the power had been exercised for a purpose other than that for which it was granted by the statute. A majority of the court treated the Administrator as the representative of the Crown in the Territory. In the instant case the Court held that the Governor in Council for the State of Victoria, when deciding whether to renew an approval of the appellants as workers' compensation insurers, was subject to the requirements of natural justice and was subject to the review of the Court on that basis.

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[1] Unreported judgment of the High Court of Australia — 11 May 1982. A concurrent appeal by Fire and All Risks Insurance Co. Ltd based on similar facts was treated identically by the Court.

[2] (1978) 142 C.L.R. 1.

[3] Pearce D., 'Of Ministers, Referees and Informers — Evidence Inadmissible in the Public Interest' (1980) 54 *Australian Law Journal* 127, 133.

[4] [1968] A.C. 997.

[5] (1982) 56 A.L.J.R. 164.