The Franklin Dam Decision and The External Affairs Power: A Comment

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My point of departure is the rejection of the majority of the High Court in the *Franklin Dam*[1] case of the doctrine of "federal balance". This rejection is posited on the basis that this doctrine, espoused by a majority in *Gazzo's case*[2] re-indorsed in form although not in substance by a majority (including Stephen J.) in *Koowarta,*[3] and defended by the minority in the Franklin Dam case, is in some way a reincarnation of the doctrine of state reserved powers — a doctrine whose opponents take great delight in affirming has been demolished and is in tatters after *Engineers.*[4]

The two doctrines are, in truth, not identical. The doctrine of state reserved powers looks to a defined content of State legislative powers preserved by s. 107. Such a bundle or corpus or group of powers would then be used by the Court to narrowly confine the specific heads of power conferred on the federal parliament by s. 51 of the Constitution.

However the doctrine of federal balance dictates that, in determining the ambit of a particular head of Commonwealth power, reference must be made to the powers conferred by other paragraphs of s. 51, and more importantly to the legislative power exercisable by State Parliaments pursuant to ss. 106 and 107 of the Constitution.

The conjunction of ss. 106 and 107 is important. While s. 107 is open to the interpretation that it refers to specific powers of a State which it had as a colony before federation for example, a power over education, a power over agriculture, etc., s. 106, in preserving a State's Constitution, preserves not only the skeletonal structure of that constitution, i.e., the Parliament, Executive and the (superior) Court, but also the general legislative power of that Parliament (expressed in the words — "power to make laws for the peace, order (welfare) and good government of the State") as an *undifferentiated* power. Thus, it appears that structure and power are inextricably related.

The antagonists of the federal balance doctrine do make allowance for certain federal implications drawn from the *State Banking*[5] and *Payroll Tax cases,*[6] i.e. the protection of the institutions of a State in the exercise of executive power from Commonwealth legis-

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1. *Commonwealth* v. *Tasmania* (1983) 46 A.L.R. 625.
2. *Gazzo* v. *Comptroller of Stamps (Vic.); Ex parte Attorney-General (Vic.)* (1980-1981) 38 A.L.R. 25.
3. *Koowarta* v. *Bjelke-Petersen* (1982) 39 A.L.R. 417.
4. *Amalgamated Society of Engineers* v. *Adelaide S.S. Co. Ltd.* (1920) 28 C.L.R. 129.
5. *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31.
6. *Victoria* v. *Commonwealth* (1971) 122 C.L.R. 353.

lation which would threaten their existence and functioning – but they assert there is no room in constitutional interpretation for the doctrine of federal balance.

In the *Franklin Dam case*[7] the majority therefore believes that they can interpret a power such as the external affairs power according to what might be described as "shuttered" or "enclosed" characterization or interpretative principles. By this, I mean that they believe that it can be interpreted complete with all its meaning in isolation from other power-recognizing or power-conferring sections such as s. 106 and 107.

However, I think that in this respect they have been misled by the self-generating appeal of what I would call the isolationist technique. Obviously one essential part, feature, element – call it what you will – of the Constitution is based on a division of power. A characterization procedure which is indifferent to this differentiation or breaking up of the corpus of what in a unitary State is sovereign legislative power is obviously an incomplete one.

In opposition to the isolationist technique, the protagonists of the doctrine of federal balance espouse what might be described as a "linkage" technique. All power-conferring sections and powers must be read in a total context and their interaction with each other recognized.

It is not to the point to say that the former approach is based on a doctrine of express interpretation while the latter embodies a doctrine of implications. Indeed the distinction is not a practical one. Any interpretation of a constitutional document involves what might be called a cross-matching of sections – a contextual interpretation if you like – which has reference to postulates or implications arising from the structure of the text itself. In my view a plausible, persuasive case may be made out in support of the doctrine of federal balance based on the linkage technique. The consequence would be that s. 51(xxix) must be read in conjunction with ss. 106 and 107.

Indeed, there is a connection between this doctrine and the doctrine of implied immunities adopted in the *Payroll Tax case*[8] – a doctrine which was indeed recognised by the majority in the *Franklin Dam case,*[9] although the connection was denied by them. The argument would go this way. The functioning of a State under its constitution is a functioning of its organs of government: legislative, executive and judicial as well as the exercise of the powers appropriate to other organs. If one particular head of power vested in the Commonwealth Parliament such as s. 51(29) was given an interpretation which would absorb, debilitate or destroy the functioning of State powers, a reconciliation of that paragraph with ss. 106 and 107 must be attempted. Otherwise the State Parliaments and their executives would remain empty shells deprived of an ability to carry out their general, indeed basic, legislative and executive functions.

It is true that members of the Court have not attempted any

7. *Commonwealth* v. *Tasmania, op. cit.*
8. *Victoria* v. *Commonwealth, op. cit.*
9. *Commonwealth* v. *Tasmania, op. cit.*

catalogue of what such basic functions are. They have merely been content to affirm that they exist. In other contexts such as the administrative law context they have tended to reject the utility of the distinction between basic governmental functions and other types of functions. I do not think that judicial uneasiness in that context with the distinction between the category of "governmental" and "non-governmental" can be applied to the distribution of federal powers under the federal constitution.

The administration of justice is one example that is often raised in the interpretation of sections of the constitution such as s. 51(35) to suggest that this function is an attribute of State governmental power which is not subject to direct intrusion, erosion or regulation by the Commonwealth acting under s. 51 heads of power. And under similar reasoning it would appear that the functioning of the State Public Service is immune from Commonwealth interference. It could well be argued that the construction of public works such as a dam on State or State-instrumentality land which would generate electricity for the needs of the State is basic to the functioning of the State.

However, I repeat that I am not asserting that the identification of such powers or functions *necessarily* cuts down the ambit of a S.51 head of power. The doctrine of federal balance requires that the existence and nature of those powers be identified, indeed are required to be identified by the Court when it is interpreting a s. 51 head of power, and a balance be struck. The isolationist technique cannot blind the court to the fact that these other sections and power conferring heads exist and that the constitutional document is a coherent one.

What then is the criterion by which s. 51(xxix) is to be given an interpretation which conforms to the doctrine which I have been expounding? We come to the specifics in the *Dam decision*.[10] The majority states that the existence of a treaty obligation is sufficient to give rise to an external affair. The minority requires the content of the treaty obligation to be scrutinized. In their view an open-ended obligation cannot provide a satisfactory touchstone or criterion of what is an external affair. The adoption by the executive of the obligation is not in their view therefore the essential criterion of external affair: the essential criterion is the subject matter or context of the legislation giving effect to that obligation. In this respect their mode of interpretation is founded on the federal balance doctrine. If *any* subject matter of a treaty could be given effect to by legislation passed pursuant to s. 51(29), the distribution of the powers between Commonwealth and States — indeed the identification of specific heads of power in other sections or other paragraphs of s. 51 — is rendered meaningless. Consequently in order to sustain a contextual interpretation which would preserve the integrity of State institutions as well as their functioning under s. 106, some touchstone of external affairs such as the "mutuality" test or the "international concern" test is necessary.

The *mutuality* test has the benefit of clearly identifying the

10. *Ibid.*

criterion by which an external affair is determined. The Chicago Air Convention and the Convention on the Continental Shelf, to take two examples, all deal with matters of mutual international relations, even though the legislation incorporating them or giving effect to them may regulate subject matter within Australia. The *international concern* test which was accepted by Stephen J. in *Koowarta's case*[11] and accepted at least for the purpose of argument by the minority in the *Franklin Dam case*[12] is more elusive. Treatment of Australian nationals in a manner which involves certain distinctions pertaining to race but which does not breach standards of international law outlawing genocide inhumane treatment etc. cannot be said to involve mutuality. It may generate international concern. The touchstone of international concern must therefore be fluid, depending upon the developments in international relations, as indeed Stephen J. pointed out in *Koowarta.*[13] Certainly, if applied to the facts of the Dam case it would *not* appear to encompass the construction of a dam on land nominated for the World Heritage list. It might be argued on one test of international concern, that the construction of a dam is such a matter insofar as it is a subject of international discussion at an international forum pursuant to procedures embodied in a treaty. But the test must be an objective one. It is not enough that the matter is brought up in an international body such as the United Nations General Assembly or a subsidiary organization by representatives attending a gathering of members of that organization. Indeed, development work in an area of environmental significance would not appear to breach or come into conflict with those standards of international behaviour which are part of customary international law; nor in my view is it a breach of *precise* obligations which would lead to penal sanctions under an international treaty.

In this respect, it appears to me the distinction between "hard" and "soft" obligations in a treaty has not been sufficiently appreciated by the majority in the *Franklin Dam case.*[14] An obligation to preserve, such as that contained in Art. 5, supported by a type of federal clause such as is to be found in Art. 34, is preeminently an example of what I would call a "soft" obligation. In this I agree with the minority that a general standard or ideal enshrined in a treaty and a procedure for listing do not of themselves create an obligation on the part of a signatory to the convention to abstain from carrying out public works in an area which has been so listed.

Thus while the listing procedure may be regarded as a matter of international concern, the obligation to preserve, which is not backed by sanctions for any precise fact situation spelt out in the Convention, does not create the basis for the prohibitions contained in s. 9 of the Act. Indeed two judges of the majority, Brennan and Deane JJ., recognized this in their analysis of the validity of the precise prohibitions contained in s. 9. However, in the end

11. *Op cit.*, at 445.
12. *Commonwealth* v. *Tasmania, op cit.*, at 667, 742 and 841.
13. *Loc. cit.*
14. *Commonwealth* v. *Tasmania, op. cit.*

result they state that the prohibition in 9(1)(h) read with the regulations were an appropriate implementation of the Convention. However, it is difficult to see that a prohibition of the construction of the dam is an implementation of a precise obligation undertaken by Australia under the convention.

Thus I would assert that the majority in the *Franklin Dam case*[15] have not succeeded in matching what might be called the obligations under the treaty and the precise obligations imposed by the World Heritage legislation upon the State of Tasmania and the H.E.C. in relation to work undertaken on State land under a State Act and relating to a State Government's functioning.

15. *Ibid.*