THE NATIONAL IMPLIED POWER AND IMPLIED RESTRICTIONS ON COMMONWEALTH POWER

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The purpose of this paper is to examine the significance of the *Franklin Dam* case[1] for the use of implications in the interpretation of the Commonwealth Constitution.

Implications of various kinds, derived from various sources, are regularly made in the interpretation of the Constitution. The necessity for them has been frequently acknowledged. In *West*'s case,[2] for example, Dixon J said:

> Since the *Engineers' Case* a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the *Engineers' Case* meant to propound such a doctrine.[3]

Implications are freely made by particular judges on particular issues. Those relied on in the judgments of Murphy J, for example, are often attributed to the existence of a free and democratic society.

Thus in the *Henry* case[4] he suggested that laws which authorised slavery or serfdom, or, as in the instant case, provided for the guardianship of persons over the age of eighteen without further justification, would be invalid:

> The reason lies in the nature of our Constitution. It is a Constitution for a free society. . . . A law which . . . kept migrants or anyone else in a subordinate role inconsistent with the status of a free person, would be incompatible with a fundamental basis of our Constitution.[5]

Implications derived from the fact that the Constitution is based on a system of responsible government also are regularly made. Generally these are less explicit and therefore harder to identify. Nevertheless, the need for the interpretation of the Constitution to be guided by consideration of the principles of responsible government was recognised even in the *Engineers'* case:[6]

> For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture. . . . Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government.[7]

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[1] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450.

[2] *West* v *Commissioner of Taxation (NSW)* (1937) 56 CLR 657.

[3] *Ibid* 681-682.

[4] *R* v *Director-General of Social Welfare (Vic); ex parte Henry* (1975) 133 CLR 369.

[5] *Ibid* 388.

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

[7] *Ibid* 146 *per* Knox CJ, Isaacs, Rich and Starke JJ.

On the other hand, there is a curious reluctance to accept the use of implications derived from federalism, even though that is at least as obvious a fundamental feature of the Constitution as responsible government. The existence of certain implications based on federalism is accepted, although they are rarely applied with any effect. Their content appears to be frozen, with the result that if they cater to any needs at all, it is to the perceived needs of the federal system between about 1920-1950 when the principles were evolving. They certainly do not reflect any fundamental theory of what federalism is about. Any suggestion that they might be expanded or adapted to meet the circumstances of a current case seems to be considered rather unsavoury. Yet clearly this was not always the case. In *West's* case[8] for example, Evatt J warned against accepting:

> all the *obiter dicta* in the *Engineers' Case* as having achieved the impossible task of anticipating every future difficulty in the working of our Federal constitutional scheme.[9]

The implications which were the subject of discussion in the *Franklin Dam* case rely on two distinct considerations. The first is the fact of Australia's nationhood. The second is federalism. They are dealt with separately in this paper. The case did not make a significant positive contribution to either of them.

1 NATIONHOOD

The existence and scope of an implied Commonwealth legislative power derived from nationhood arose for consideration in the *Franklin Dam* case because part of the World Heritage Properties Conservation Act 1983 (Cth) purported to rely on such a power. Section 6(2) listed five circumstances in which the Governor-General would be authorised to declare identified property in a State to be property to which s 9 applied if he was satisfied that the property was likely to be damaged or destroyed. The first four circumstances clearly were designed to attract the external affairs power. The fifth was as follows:

> s 6(2)(e) the property is part of the heritage distinctive of the Australian nation —
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> (i) by reason of its aesthetic, historic, scientific or social significance; or
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> (ii) by reason of its international or national renown, and, by reason of the lack or inadequacy of any other available means for its protection or conservation, it is peculiarly appropriate that measures for the protection or conservation of the property be taken by the Parliament and Government of the Commowealth as the national parliament and government of Australia.

Proclamations were made pursuant to s 6 in relation to five areas on 26 May 1983. None were necessarily attributable to s 6(2)(e).

The concept of an implied nationhood power exercisable by the Commonwealth is not new. It has usually arisen in the context of the spending

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[8] (1937) 56 CLR 657.
[9] *Ibid* 698-699.

power (s 81) or the executive power (s 61) in combination, if need be, with the incidental power (s 51(xxxix)). Thus in both the *Pharmaceutical Benefits* case[10] and the *Australian Assistance Plan* case[11] there was general acceptance that the Commonwealth could appropriate and spend for purposes other than its enumerated legislative powers whether under s 81 alone, or s 81 in combination with s 61. Considerable differences on the ambit of this power appeared in the judgments but at the very least it was accepted that it included "whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government".[12] Similarly it has been accepted that s 61 confers on the executive powers consistent with the "character and status of the Commonwealth as a national government".[13] Legislation on matters incidental to the execution of the power may be enacted by the Parliament, pursuant to s 51(xxxix). Thus, in the view of Mason J in the *Australian Assistance Plan* case:

> there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix.) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.[14]

The above observations were made in the context of the Commonwealth's power to spend. Similar comments have also been made about the use of s 51(xxxix) in combination with s 61 to support legislation protecting the Commonwealth against internal subversion.[15]

It is a considerable leap from an implied nationhood power of the kind described above to acceptance of the existence of an independent, substantive legislative power derived from the fact of nationhood. In cases like the *Australian Assistance Plan* case and *Burns* v *Ransley*[16] the legislative power is only an incidental power, attached to and following on the executive power. Nor is it necessarily an implied power without any express constitutional authority for its existence. Both the references to the "purposes of the Commonwealth" in s 81 and to the "maintenance of this Constitution" in s 61 can be and have been construed as justifying the extension of the appropriation and spending powers respectively beyond the substantive heads of Commonwealth legislative power.

Nevertheless there is some authority in the cases for the existence of an independent, implied legislative power which might have been hoped to provide support for s 6(2)(e) of the World Heritage Properties Conservation Act 1983 (Cth). The most explicit statement is in the judgment of Dixon J in the *Communist Party* case,[17] where he expressly prefers to imply power for the Commonwealth to legislate to protect its own existence rather than to rely on "combining the appropriate part of the text

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[10] *Attorney-General for Victoria (ex rel Dale)* v *Commonwealth* (1945) 71 CLR 237.
[11] *Victoria* v *Commonwealth and Hayden* (1975) 134 CLR 338.
[12] *Pharmaceutical Benefits* case (1945) 71 CLR 237, 269 *per* Dixon J.
[13] *Australian Assistance Plan* case (1975) 134 CLR 338, 396 *per* Mason J.
[14] (1975) 134 CLR 338, 397.
[15] *Burns* v *Ransley* (1949) 79 CLR 101, 109-110.
[16] *Ibid.*
[17] *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1.

of s 51(xxxix.) with the text of some other power".[18] The general utility of this observation is lessened by the fact that his reasoning is very closely tied to the particular needs of a power to protect against subversive conduct. Statements which can be construed to support the existence of a separate implied legislative power deriving from nationhood can also be found in other cases, however. A passage in the judgment of Mason J in the *Australian Assistance Plan* case[19] falls into this category and appears to have provided a model for part of the wording of s 6(2)(e).

In the *Franklin Dam* case, only five of the seven members of the Court, Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ, pronounced on the validity of this paragraph. All held that there was no implied nationhood power which could support the action taken in this case. Only four of the five justices discussed the issue at any length: Brennan J simply concluded that there was "no judicial warrant"[20] for paragraph (e). Nor does the use of the nationhood power to support the Commonwealth's action appear to have been pressed hard in argument. According to Dawson J: "this submission was but faintly put".[21]

The judgments are inconclusive on the existence and content of an implied Commonwealth legislative power derived from nationhood which is separate from and additional to the incidental power. None of the four justices denied the existence of the power. Dawson J came closest to it when he discussed references to the concept in the context of the spending and executive powers and observed that if there is some further, independent, legislative power "it has not really been explored at all".[22] Gibbs CJ, Wilson and Deane JJ, on the other hand, appeared to assume the existence of such a power, although the authorities and examples cited were connected directly with the spending and executive powers.

Little additional guidance was provided on the content of the power, if it exists, apart from the fact that its purported exercise in this case was ineffective. Gibbs CJ directed himself solely to the circumstances of the present case, denying the application of s 6(2)(e) on the grounds that the question of the use of land within a State was not a matter "peculiarly appropriate to a national government"[23] as required by the terms of that paragraph. He also observed that the protection of the national park was not such a large and complex undertaking that it "requires national co-ordination to achieve".[24] He appears here to have been drawing upon the views of Jacobs J in the *Australian Assistance Plan* case[25] on matters which constitute the "purposes of the Commonwealth" in the context of the spending power. He left open the question whether the need for national co-ordination in fact is a relevant test.

Wilson, Deane and Dawson JJ attempted to distinguish between matters which might fall within an implied nationhood power and those which

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[18] *Ibid* 187.
[19] (1975) 134 CLR 338, 397.
[20] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 534.
[21] *Ibid* 572.
[22] *Ibid.*
[23] *Ibid* 479.
[24] *Ibid.*
[25] (1975) 134 CLR 338, 412-413.

cannot. The distinction drawn by Dawson J[26] was based on two different usages of the term "nationhood". In one sense it is used to mean the Commonwealth as the central unit of goverment in Australia; the only unit able to act in a way which affects the country as a whole. In the other sense it is used to refer to Australia as a nation in international law, with an independent international personality of its own. Dawson J accepted the possibility of implied executive power derived from nationhood in the latter sense. He refused to accept, however, that the Commonwealth had implied legislative power which derived from its nationhood in the former sense. The express division of legislative powers in the Constitution was designed to confer the necessary powers on the Commonwealth for that purpose.

There is a common thread on this issue in the judgments of Wilson and Deane JJ. Both denied the application of an implied nationhood power in the present case because of the substantive effects produced by the law. The principal distinction drawn by Wilson J was between coercive and non-coercive laws:[27] Deane J, on the other hand, emphasised the need to confine an implied power to "areas in which there is no real competition with the States".[28] Deane J also gave some positive guidance on the possible ambit of an implied nationhood power. He speculated, for example, on the existence of areas "which, while not included in any express grant of legislative power are of real interest to the Commonwealth or national government alone".[29] Further, he accepted that "Commonwealth action to assist or complement actions of a State"[30] would also fall within the scope of the power. This was a significant observation in light of the views he subsequently expressed in the *Coal Industry Tribunal* case.[31]

The *Franklin Dam* case is of limited assistance on the question of the implied nationhood power. Most members of the Court were careful neither to expressly affirm or deny the existence of the power. Very few suggestions were offered as to its possible content, to act as guidance for the future. With the exception of Dawson J, no member of the Court directly addressed the distinction between an implied legislative power of the kind claimed in this case and the operation of the incidental power in combination with s 61.

2 FEDERALISM

The possibility of giving effect to implications drawn from federalism arose in the *Franklin Dam* case in two ways. First, it could be argued that the meaning of the term "external affairs" should be interpreted in the light of the need to maintain a constitutionally guaranteed federal distribution of legislative power. Secondly the purported use of the power in this case could be attacked on the ground that it infringed certain implied restrictions on Commonwealth power attributable to the relationships that should exist between governments in a federal system. These two issues

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[26] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 572-573.
[27] *Ibid* 520.
[28] *Ibid* 542.
[29] *Ibid.*
[30] *Ibid.*
[31] *Re Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 57 ALJR 649.

tended to become intertwined in argument and in some of the judgments, for obvious reasons. If the external affairs power were interpreted so as to destroy or significantly erode the constitutional division of powers it was possible to argue that this threatened the continued existence of the States or their capacity to function and thus fell foul of an implied restriction on Commonwealth power. As far as possible, however, the two issues will be kept separate in the discussion that follows.

A *The ambit of the external affairs power*

The major choice for the Court in determining the ambit of the power to legislate for "external affairs" in the *Franklin Dam* case lay between accepting that any international arrangement to which Australia was a party automatically constituted an "external affair" and therefore provided a basis for Commonwealth legislation under s 51(xxix), and requiring, as an additional feature, that the subject-matter of the arrangement must also be of international concern. If the former were adopted there would be no area of governmental activity which was not potentially subject to Commonwealth legislative power because, as Mason J observed, "there are virtually no limits to the topics which may hereafter become the subject of international cooperation . . .".[32] If the latter were adopted it would place an absolute limit on the reach of the external affairs power, albeit a limit the application of which was uncertain, shifting and subjective.

The majority of the Court, Mason, Murphy, Brennan and Deane JJ succumbed to the temptation of treating the issue as merely another attempt to revive the doctrine of reserved powers. Brennan and Deane JJ gave separate consideration to the Tasmanian argument on the "federal balance" but in a way that suggests they regarded it as an extension of the reserved powers doctrine. All four concluded that the general ambit of the external affairs power should not be determined by reference to implications arising from federalism.

Two streams of authority were relied on to support this result. The first was the principle enunciated in *Jumbunna*,[33] and followed most recently in the *Social Welfare Union* case,[34] that:

> where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should . . . 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.[35]

These cases were also cited for the proposition that terms used in s 51 must be accorded their "natural meaning". It may be doubted whether either of these accepted principles of interpretation was necessarily conclusive in the present case. The natural meaning of the words "external

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[32] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 486.

[33] *Jumbunna Coal Mine, No Liability* v *Victorian Coal Miners' Association* (1908) 6 CLR 309.

[34] *Re Coldham; ex parte Australian Social Welfare Union* (1983) 57 ALJR 574.

[35] *Jumbunna Coal Mine, No Liability* v *Victorian Coal Miners' Association* (1908) 6 CLR 309, 368.

affairs'' was one of the principal issues for the Court to decide. Further, this was one case in which context, namely, the detailed federal distribution of legislative powers, might have been considered to provide an indication that the object and purpose of the power would be better achieved by construing it in less than the widest possible way. The rationale of the *Jumbunna*[36] principle is that the Court is:

> interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.[37]

The assumption in the majority judgments, made most explicitly in the judgment of Brennan J,[38] is that the needs created by the development of the community always, and certainly in this case, are better satisfied by an expanded interpretation of Commonwealth power.

The second major stream of authority relied on by the majority was the rejection of the doctrine of reserved State powers in the *Engineers'* case.[39] This aspect of the judgments of the majority is unsatisfying. They do not deal adequately with the difference between interpreting the Constitution by reference to particular powers that are notionally reserved to the States and interpreting it by reference to a residue of powers exercisable by the States without Commonwealth intervention. This point is sufficiently important, in the context of a federal Constitution, to have been taken seriously and met, although it may not have altered the conclusions of the majority or the outcome of the case. Nor is there a dearth of precedent to support a more cautious approach to the external affairs power on this basis. Wilson J[40] quotes Latham CJ in the *Bank Nationalisation* case[41] to this effect:

> no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament.[42]

Those comments were made in the context of a discussion of the technique of characterisation generally. Similar comments can be found, however, in relation to the defence power which, like the external affairs power, is capable of overriding the division of powers completely in particular circumstances.[43]

B *Implied restrictions on Commonwealth power*

Tasmania had argued that the exercise of Commonwealth legislative power is subject to an implied restriction, derived from the federal nature of the Constitution, which rendered the legislation in this case invalid.

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[36] *Ibid.*
[37] *Ibid*, 367-368.
[38] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 528.
[39] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129
[40] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 520.
[41] *Bank of New South Wales* v *Commonwealth* (1948) 76 CLR 1.
[42] *Ibid* 184-185.
[43] *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Victoria* (1942) 66 CLR 488, 507.

The argument put was quoted in the judgment of Deane J to the effect that the Act and Regulations:

> are invalid because they interfere with, inhibit, curtail or impair the legislative and executive functions of the State of Tasmania and the prerogative of the Crown in right of Tasmania in relation to the lands.[44]

The argument was a restatement and partial extension of earlier case law in which it had been accepted that there was an implied limit on Commonwealth power to discriminate against or interfere with the States in certain ways. Only three members of the Court, Mason, Brennan and Deane JJ dealt with it at any length. The three minority judges found it unnecessary to do so. Murphy J dismissed it as "frivolous".[45] Those justices who did deal with it found that it had no application to the present case.

All three were roughly in agreement on what the relevant principle was. It is convenient to quote the formulation of Mason J:

> The only relevant implication that can be gleaned from the Constitution . . . is that the Commonwealth cannot in the exercise of its legislative powers enact a law which discriminates against or "singles out" a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function.[46]

Brennan J[47] expressed agreement with Mason J's earlier formulation of the implication in *Koowarta*'s case,[48] which was similar except for the potentially important fact that it referred to the States in the plural: there is a difference between a law which discriminates against a State and one which discriminates against the States. Deane J referred to the:

> general overriding constitutional principle that Commonwealth legislative powers cannot be exercised in a way which would involve an indirect amendment to the Constitution or which would be inconsistent with the continued existence of the States and their capacity to function or involve a discriminatory attack upon a State "in the exercise of its executive authority. . . ."[49]

One obvious difference between the formulations of Mason and Deane JJ is that the latter restricts the principle to discrimination against a State in the exercise of its executive authority whereas the former refers more generally to discrimination against "a State", presumably considered as a polity. This uncertainty about whether the principle applies only to action against the executive arm of a State can be traced through the earlier cases. It was matched, on occasion, by particular reservations in relation to Commonwealth action affecting a State in the exercise of its prerogative powers. None of the justices who dealt with the matter in the *Franklin Dam* case considered that any special significance should be attached to the fact that a Commonwealth law affected a State in the

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[44] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 554.
[45] *Ibid* 505.
[46] *Ibid* 487.
[47] *Ibid* 524.
[48] *Koowarta* v *Bjelke-Peterson* (1982) 56 ALJR 625, 649.
[49] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 543 citing *Melbourne Corporation* v *Commonwealth* (1947) 74 CLR 31, 83.

exercise of its prerogative powers, if it were otherwise valid.[50] The wider issue of whether the principle should be confined to protect State executive action was not finally resolved. It is suggested here, however, that Mason J's formulation is preferable.

The only aspect of the implied restriction in the form accepted by the three justices that was even potentially relevant in the *Franklin Dam* case was the part that prohibited Commonwealth action that "inhibits or impairs the continued existence of a State or its capacity to function". Even that argument was difficult to sustain convincingly, if the terms of the prohibition were taken literally, and its application confined to the particular circumstances of the *Franklin Dam* case. The State of Tasmania would not cease to exist in consequence of the Commonwealth legislation. The question of its capacity to function was more problematical, but not much more. As Mason J[51] observed, the prohibition is directed against impairment of the capacity of a State to function as a government, rather than restriction of any particular function which a State undertakes. There was no such restriction imposed on Tasmania in this case. Both Mason and Deane JJ considered the possibility that the prohibition might be infringed if the area involved were large enough, which it was not. Brennan J considered its application in other circumstances; if control of wastelands were essential to the maintenance of responsible government in a State, for example, or if "the Commonwealth measures . . . applied to the buildings that house the principal organs of a State".[52] Neither of these circumstances, of course, existed in the present case.

The course of the argument on this issue illustrates the impracticality of the currently accepted views of the implied restrictions on Commonwealth power derived from federalism. What is the utility of a principle which protects the formal existence of States in a federation, or that nebulous concept of their capacity to function, while enabling them to be deprived of an unlimited and unpredictable range of functions or of the revenue resources to meet those functions? Does a principle which operates in this way really serve "to protect the structural integrity of the State components of the federal framework, State legislatures and State executives" which Mason J,[53] quoting Stephen J in *Koowarta*,[54] identified as its purpose? Is it possible ultimately to accept the description of "the States as bodies politic whose existence and nature are independent of the powers allocated to them"?[55] It is at this point that the question of the ambit of Commonwealth power coincides with the effective operation of implied restrictions on Commonwealth power derived from federalism. The failure of the judgments in the *Franklin Dam* case to deal with these issues adequately, or at all, provides clear evidence that our jurisprudence is defective in this area.

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[50] *Ibid* 492 *per* Mason J, 525 *per* Brennan J, 554 *per* Deane J.
[51] *Ibid* 492.
[52] *Ibid* 525.
[53] *Ibid* 492.
[54] *Koowarta* v *Bjelke-Peterson* (1982) 56 ALJR 625, 645.
[55] *Melbourne Corporation* v *Commonwealth* (1947) 74 CLR 31, 82 *per* Dixon J.