

COMMENT

BY SIR MAURICE BYERS Q.C.*

Nationhood Power

That such a power now exists is indisputable.¹ Its ambit alone must yet be resolved. Its restrictions, that is, activities denied to an exercise of the power, must be those that apply generally to legislative powers. A non-coercive power is no power — an absurd proposition — and no reason exists to confine the power to one extending only to permit Commonwealth funds to be drawn from its Treasury. The true rule is stated by Mason J.²

Every implied power arises from constitutional language, history or political reality. Thus, in the United States, powers over aliens, the Indian tribes, foreign relations and the compulsory requisition of private property derive from implication based on history and political reality. This is explained in the *Curtiss-Wright* case.³ Australia differs from the United States in three relevant respects: it is not a union of states; Commonwealth powers were not granted to it by the States; and there is, and there never was, dual Commonwealth-State citizenship.

Next, every federation requires federal supremacy in its fields, otherwise its force is only contractual. Contractual federation is impossible for Australia — it is denied by an imposed constitution. Again, where specific powers are granted, inherent restrictions on them just contradict the constitutional text. Notions such as “federal balance” or “traditional State powers” are faint cries doomed to a death as inglorious as their birth. To say that a specific power must be read down or read out is a counsel doomed by the text. The law declared by the Commonwealth Parliament represents the will of the people of the whole of Australia. If such a law falls within a specific or an established inherent Commonwealth power, the will of the people of the States, each a part of the whole, must give way. The people of the States are protected by express constitutional provisions such as ss 92, 99, 100, 104, 105 and 106-108. The *Melbourne Corporation* case⁴ merely states the obvious fact that this federation needs States and Commonwealth.

If a geographical feature identified with the nation and so treated by its citizens were faced with destruction, Commonwealth power would extend, it is submitted, to measures essential to preserve it, whatever State law might say.

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¹ *Commonwealth v Tasmania* (1983) 57 ALJR 450, 478 per Gibbs CJ, 511 per Murphy J, 520 per Wilson J, 542 per Deane J, 572 per Dawson J.

² *Ibid* 487, 492-493.

³ *United States of America v Curtiss-Wright Export Corporation* (1936) 299 US 304, 315-318.

⁴ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.