

## COMMENTS

### SECTION 51(xxxix) OF THE CONSTITUTION AND THE FEDERAL DISTRIBUTION OF POWER

BY GARY A RUMBLE\*

A well-known and central feature of the Commonwealth Constitution is the fact that most of the Commonwealth's express legislative powers are enumerated in s 51 of the Constitution. Section 51 commences with the phrase "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to" and then sets out forty clauses describing subject matters. These legislative powers are concurrent in the sense that the mere fact that these specific grants have been made to the Commonwealth does not subtract anything from the States' general powers to make laws for the peace, order and good government of their respective geographical territories.<sup>1</sup> Section 109 provides that in the case of inconsistency between a Commonwealth law and a State law, the Commonwealth law shall prevail.

It is obvious, given these basic features of the Commonwealth Constitution, that the federal balance, the line between Commonwealth and non-Commonwealth, will be affected by

- (a) the issue of *definition*—that is, by what the High Court decides each specific subject matter of Commonwealth power means; and
- (b) the issue of *characterisation*—that is, by what the High Court considers constitutes a sufficient connection between a Commonwealth law and a Commonwealth subject matter to justify the conclusion that the Commonwealth law is a law with respect to the Commonwealth subject matter.<sup>2</sup>

Those issues clearly appear on the face of the Constitution. There is, however, another issue not so readily apparent on the face of the document which could swamp those fine issues of definition and characterisation. The issue with that potential is the issue of the content of the Commonwealth's incidental powers.

It is an established principle that every express Commonwealth legislative power contained in the Constitution, impliedly

carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main

---

\* BA, LLB (ANU); Barrister and Solicitor of the Supreme Court of the Australian Capital Territory, Solicitor of the Supreme Court of New South Wales; Lecturer, Faculty of Law, Australian National University. My thanks to G J Lindell for constructive suggestions. The credit for any inadequacies or errors is, of course, all mine.

<sup>1</sup> Some of the topics in s 51 are exclusive to the Commonwealth in whole or in part but they take on this exclusive character because their subject matter is inherently beyond the competence of the States (*eg* placita (iv) and (xxxiii)) or because other parts of the Constitution exclude the States from the area (*eg* s 90 interacting with s 51(ii) and s 114 interacting with s 51(vi)).

<sup>2</sup> I am aware that some writers would use the tag "characterisation" to cover *both* issues (a) and (b). I find it more appropriate, however, to confine the term "characterisation" to the "with respect to" issue.

purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter.<sup>3</sup>

As well as the implied incidental power, there is also an express incidental power which appears as the final placitum of s 51 itself. The placitum, pl (xxxix), is in these terms:

Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

In so far as this express incidental power relates to matters incidental to the execution of powers vested in the Parliament it is difficult at first to see how it differs from the implied incidental power. The accepted distinction is that the *implied* incidental power goes to matters incidental to the subject matter of each specific legislative power while the *express* incidental power goes to matters incidental to particular exercises of legislative power.<sup>4</sup> In the recent case of *Gazzo v Comptroller of Stamps (Vic); ex parte Attorney-General for Victoria*,<sup>5</sup> Gibbs CJ set out the orthodox distinction between the implied and the express incidental powers and then commented that it was "not at all clear" what s 51 (xxxix) added, (in its application to matters incidental to the execution of legislative power) to the *implied* incidental content of each power.<sup>6</sup> His Honour then went on, as others have before,<sup>7</sup> to treat the express and the implied incidental powers as being co-extensive, at least for the problem in hand.

Gibbs CJ may have simply intended to make the uncontroversial point that it is difficult to see why the implied incidental power would not itself include matters incidental to the execution of powers as well as matters incidental to subject matters of powers. His Honour may have intended, however, to make a point similar to that made by Aickin J who said that s 51 (xxxix) "cannot be used to expand the subject-matter of any of the enumerated legislative powers."<sup>8</sup> One could reduce that proposition to a semantic point—whatever might be found to be within the reach of the incidental area of a power, the central area remains the same. It is clear from the context, however, that Aickin J was seeking to emphasise the limited scope of s 51 (xxxix). His Honour commented immediately afterwards that "Illustrations of the operation of para (xxxix) are not numerous . . ."<sup>9</sup> It is the purpose of this comment to take issue with that statement of Aickin J and to suggest one line of reasoning, based on the distinction between s 51 (xxxix) and the implied incidental power, which would find in s 51 (xxxix) a large potential for Commonwealth action.

The distinction between matters incidental to subject matter and matters incidental to execution might be illustrated by these examples. As an example

<sup>3</sup> *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 per Dixon CJ, McTiernan, Webb and Kitto JJ.

<sup>4</sup> *Le Mesurier v Connor* (1929) 42 CLR 481, 497-498.

<sup>5</sup> (1981) 38 ALR 25. See case note (1982) 13 FL Rev 191.

<sup>6</sup> *Ibid* 31.

<sup>7</sup> *Eg Burton v Honan* (1952) 86 CLR 169, 178 per Dixon CJ.

<sup>8</sup> (1981) 38 ALR 25, 56.

<sup>9</sup> *Ibid*.

of a law valid because it is incidental to a subject matter of Commonwealth power one could take the legislation<sup>10</sup> upheld in *Airlines of New South Wales Pty Ltd v New South Wales* [No 2].<sup>11</sup> That legislation prohibited the carrying on of an intrastate trading activity (intrastate air navigation) unless certain safety standards were met. The Commonwealth has no power with respect to intrastate trade. Unsafe intrastate air navigation was, however, seen to constitute a threat to interstate and overseas air navigation, activities within the centre of the Commonwealth subject matter of power under s 51(i). The suppression of the threat was valid, therefore, as being reasonably incidental to the subject matter of interstate and overseas trade.<sup>12</sup>

It is not so easy to find an uncontroversial example of a law which would be upheld as being relevant to a particular *execution* of a legislative power which would not also be upheld as being relevant to the *subject matter* of the legislative power. It might be, however, that Part IA of the Crimes Act 1914 (Cth) provides examples of such laws. Section 5, for example, making it an offence, *inter alia*, to aid or abet the commission of any offence against a law of the Commonwealth, has no connection on its face with any particular subject matter of Commonwealth power. Surely s 5 and similar provisions draw their undoubted validity from the fact that they depend for their operation on the fact that Commonwealth legislative power has been exercised to create offences? All valid laws creating offences can, *ex hypothesi*, be traced to some head of power. It would seem, however, somewhat artificial to argue that provisions like s 5 are relevant to each *subject matter* of power which is used from time to time to create offences. Such provisions seem to this writer to be valid because, and only because, of their relevance to *exercises* of Commonwealth legislative power.

Against the background of the distinction between "subject matter" incidental and "execution" incidental, I turn now to the potential which I see in s 51(xxxix).<sup>13</sup> That potential lies in the possible interaction of

<sup>10</sup> Regulations 198 and 199 made under the Air Navigation Act 1920-1963 (Cth).

<sup>11</sup> (1965) 113 CLR 54.

<sup>12</sup> *Ibid* 92-94 *per* Barwick CJ, 142 *per* Menzies J, 151 *per* Windeyer J and 166-167 *per* Owen J. McTiernan J (*ibid* 105-106) held that the law was supported by s 51(xxix) (the external affairs power) and did not refer to s 51(i). Kitto J (*ibid* 115-117) held that the legislation could be upheld because it was relevant to the safety of all air navigation within Commonwealth power. Taylor J considered the law invalid (*ibid* 131).

<sup>13</sup> In *Victoria v Commonwealth and Hayden* (the *AAP* case) (1975) 134 CLR 338, 406 Jacobs J set out a radical theory of s 51(xxxix) which has not received any direct comment from other members of the Court. The essence of the theory of Jacobs J is contained in this extract: (*ibid* 414)

"... the *Oxford Dictionary* defines the adjective 'incident' first as 'liable or apt to befall or occur to; likely to happen; hence, naturally appertaining or attaching'. On the other hand, it defines 'incidental' first as 'occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part'. This, it seems to me, is the distinction between the implied incidental power and the express power in s 51(xxxix).

"Whatever is incident (in the above sense) to the subject matter of power comes within the ambit of the main power. It is incident to that power in that it naturally appertains and attaches to that power. However, what is incidental to the execution of a main power includes every matter which occurs or is liable to occur in subordinate conjunction with the execution of that power, even though it forms no essential part of the main power itself. It is subordinate but just as importantly it is in conjunction. Thus a subject matter incidental to the execution of a power may have a wider ambit than the power implied in respect of the incidents of a subject matter of power".

s 51(xxxix) with the principle established by *Herald & Weekly Times Ltd v Commonwealth*<sup>14</sup> and *Murphyores Incorporated Pty Ltd v Commonwealth* (the *Fraser Island* case).<sup>15</sup>

In the *Herald & Weekly Times* case the High Court held that the Commonwealth could, under the broadcasting power (s 51(v)), prohibit broadcasting activities absolutely and relax (and, implicitly, reimpose) the prohibition by reference to *any* condition. In reaching the conclusion of validity most members of the Court followed a route with the following stages. The prohibition of an activity at the centre of the power was necessarily a law with respect to the subject matter of the power and any relaxation of the prohibition was similarly a law with respect to the subject matter of the prohibition. Neither the prohibition of the central area activity nor the relaxation of the prohibitions had to be further connected with Commonwealth power by being conditioned on criteria within Commonwealth power.<sup>16</sup> Similarly, in the *Fraser Island* case the Court held that it was within the Commonwealth power under s 51(i) to prohibit (and allow) export by reference to “non-Commonwealth” considerations.<sup>17</sup>

These principles would seem to apply equally to other s 51 placita—s 51(xiii) (banking) and s 51(xiv) (insurance)—where the Commonwealth has power with respect to activities. Thus it seems the Commonwealth can prohibit export or broadcasting or banking or insurance by reference to considerations, not otherwise within Commonwealth power, such as, for example, the employment conditions or intrastate trade or environmental impact or attitude to women, of the exporter or broadcaster or banker or insurer.

The hypothetical laws set out include conditions relating to non-Commonwealth subject matters. The non-Commonwealth conditions would nevertheless be part of valid Commonwealth laws. The terms of s 51(xxxix) seem eminently suitable to support action to enforce valid Commonwealth laws. Thus should the Commonwealth, in reliance on its powers under s 51(i) or s 51(v) or s 51(xiii) or s 51(xiv), prohibit export or broadcasting or banking or insurance by reference to employment conditions or intrastate trade or environmental impact or attitude to women, then it may generate, through s 51(xxxix) a power to legislate directly to control the exporter's or broadcaster's or banker's or insurer's behaviour in relation to those non-Commonwealth subject matters. According to the established distinction between the implied and the express incidental power, a measure based on

---

I do not intend to discuss this theory other than to say that it is compatible with the propositions which I set out about the *potential* for Commonwealth expansion. The theory of Jacobs J might, however, have taken under the implied incidental power the matters which I suggest are within the reach of s 51(xxxix).

<sup>14</sup> (1966) 115 CLR 418.

<sup>15</sup> (1976) 136 CLR 1.

<sup>16</sup> (1966) 115 CLR 418, 433-434 *per* Kitto J, 439-440 *per* Menzies J with Taylor, Windeyer and Owen JJ concurring with Kitto J. McTiernan J rested his decision on a narrower basis.

<sup>17</sup> *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1, 8 *per* McTiernan J, 11-12 *per* Stephen J, 22-23 *per* Mason J with Barwick CJ (*ibid* 5) endorsing the judgment of Stephen J, and Gibbs J (*ibid* 9) and Jacobs J (*ibid* 26) endorsing the judgments of both Stephen J and Mason J. Murphy J did not comment on the general proposition and relied on his proposition that the Commonwealth could control export by reference to national considerations (*ibid* 26-27).

s 51(xxxix) need only have a reference to the execution of a Commonwealth power and need not have any relevance to the subject matter of a Commonwealth power.

This does not mean that whenever the Commonwealth imposes a central area prohibition by reference to a non-Commonwealth condition, it can then legislate directly to require attainment of the standard required by the condition. If there were no practical difficulty in ascertaining whether a particular pre-condition had or had not been fulfilled it would be difficult for the Commonwealth to maintain the proposition that legislative control of the subject matter of the *condition* was a matter reasonably incidental to ensuring that prohibitions were only relaxed on satisfaction of the condition.

There is one category of condition, however, when Commonwealth legislation directly requiring performance of a condition would always be justifiable. Whenever the Commonwealth provided that a prohibition on engaging in an activity should be relaxed on a condition relating to the behaviour of the person admitted to the Commonwealth controlled activity *after* he had completed his participation in the activity, then Commonwealth enforcement of the condition would necessarily involve control of the subject matter of the condition. If, for example, the Commonwealth prohibited the import of petrol and then relaxed that prohibition on conditions relating to resale of the petrol after import, enforcement of the valid condition would involve direct control of resale, even resale in intrastate trade.

I am not aware of any decision of the High Court which bars this development of the power incidental to the execution of specific powers. It is true that in *Wagner v Gall*<sup>18</sup> a Commonwealth attempt to restrict and ration the intrastate marketing of an imported commodity was held not to be supported by s 51(i).<sup>19</sup> There was in that case, however, no argument relating to the enforcement of a condition on importation. There are statements in the cases to the effect that the constitutional distinction between interstate and overseas trade (power to legislate with respect to which is granted to the Commonwealth by s 51(i)) and intrastate trade (omitted from the grant to the Commonwealth) must be maintained, but they only go to justifying the exclusion of the *economic effects* of intrastate trade on interstate and overseas trade from consideration under s 51(i)'s incidental power(s).<sup>20</sup> The statements do not deny that activities which are intrastate trading activities may be within the reach of s 51(i)'s incidental power(s).

The potential which I have suggested for s 51(xxxix) is large but it is nowhere near as large as is the potential in the implied incidental power to expand the totality of Commonwealth power. So long, however, as the majority of the High Court continues to approach these issues in the manner that the majority did in the *Gazzo* decision, then the potential of both incidental powers will be held in check by an openly acknowledged principle of reserving certain areas of legislative action to the States.<sup>21</sup>

---

<sup>18</sup> (1949) 79 CLR 43.

<sup>19</sup> *Ibid* 91-92.

<sup>20</sup> *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54; *Attorney-General (Western Australia) ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (the *Port Hedland* case) (1976) 138 CLR 492.

<sup>21</sup> (1981) 38 ALR 25, 34 *per* Gibbs CJ, 38 *per* Stephen J.