whether as a matter of "substance" sub-s (5) could be said to be reasonably incidental to sub-s 45D(1).

The decision upholds the basic prohibition of the conduct described in sub-s (1) but that protection may be significantly reduced by the invalidity of sub-s (5). It is unlikely that the Federal Court would attribute the conduct of members of a union to the union itself unless there was evidence that the union had organised or assisted in the conduct.[63] In practical terms there may be difficulties with enforcing the prohibition in s 45D(1) against individuals or with obtaining proof of involvement against union leadership, so that realistic protection may be much more difficult for a corporation to obtain.

MICHAEL T CORRIGAN*

KOOWARTA v BJELKE-PETERSON AND OTHERS STATE OF QUEENSLAND v COMMONWEALTH OF AUSTRALIA[1]

Constitutional law — Constitution (Cth) s 51(xxix) —external affairs power — whether racial discrimination a matter of international concern — Constitution (Cth) s 51(xxvi) — laws for the people of any race — Racial Discrimination Act 1975 (Cth) ss 9, 12 — locus standi — "person aggrieved".

Racial Discrimination — Racial Discrimination Act 1975 (Cth) ss 9, 12 — constitutional validity — Constitution (Cth) s 51(xxvi), s 51(xxix).

1 THE FACTS

The plaintiff, Koowarta, was a member of a group of Aboriginal people situated in Queensland. On behalf of himself and others in the group, the plaintiff approached the Aboriginal Land Fund Commission and requested it to acquire the lease of certain land in Northern Queensland for use by the plaintiff and the other members of the group for grazing purposes. In February 1976, the Commission entered into a contract with the lessees of the land for the purchase of the lease. However, the transfer was subject to the approval of the Minister of Lands of the State of Queensland as required by the contract itself and the provisions of the Land Act 1962 (Qld). The Minister refused approval and gave the following statement of the reasons—

> The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.[2]

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[63] See the careful analysis of Fullagar J in *Williams* v *Hursey* (1959) 103 CLR 30, 81.

* BA; LLB (Hons) (ANU).

[1] (1982) 56 ALJR 625; (1982) 39 ALR 417. High Court of Australia; Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson, Brennan JJ.

[2] (1982) 56 ALJR 625, 627.

The plaintiff alleged that the refusal to grant approval was contrary to the Racial Discrimination Act 1975 (Cth) which sought to enforce within Australia the International Convention on the Elimination of All Forms of Racial Discrimination.

The relevant sections of the Act were s 9 and s 12. Section 9 provided—

> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race . . . 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.

Subsection 9(2) defined a "human right or fundamental freedom" as including rights referred to in Article 5 of the Convention. Article 5 referred to various rights including "(v) The right to own property alone as well as in association with others."

Section 12 of the Act is more specific—

> 12(1) It is unlawful for a person, whether as a principal or agent—
> (a) to refuse or fail to dispose of any estate or interest in land or any residential or business accommodation to a second person: . . .
> (d) to refuse to permit a second person to occupy any land or any residential or business accommodation,
> . . . by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

Section 24(1) allowed a "person aggrieved" by an unlawful act to bring a civil action for one or more of the remedies set out in s 25. The remedies in s 25 include an injunction, an order directing the defendant to do a specified act and—

> (d) damages . . . in respect of—
> (i) loss suffered by a person aggrieved by the relevant act, including loss of any benefit that that person might reasonably have been expected to obtain if the relevant act had not been done; and
> (ii) loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act. . . .

The plaintiff claimed that the Minister's refusal to grant approval for the reason that the plaintiff and other members of the group were Aboriginals, constituted an "unlawful act" under s 9 and s 12 of the Act and he sought declarations, an injunction and damages under s 24(1) and s 25.

The defendants delivered a defence and demurrer. Some of their claims were based on the application of the facts to the legislation, however, their main submission was that the Racial Discrimination Act 1975 was outside the power of the Commonwealth Parliament and invalid.

2 THE EXTERNAL AFFAIRS POWER—S 51(xxix)

The main issue in the case was whether the Racial Discrimination Act 1975 was valid as an exercise of the external affairs power. The decision on this point has far reaching consequences for the determination of the balance between federal and State powers in the Australian legislative system. The

significant point is that the Act was to allow for the domestic enforcement of an international convention on a subject over which the Commonwealth had no specific legislative power. The successful use of the general "external affairs" power could potentially place within Commonwealth power a number of subject-matters hitherto thought to be the domain of the State legislatures.

In defining the content of the "external affairs" power, the judges were able to find reasonably common ground. Latham CJ in *R* v *Burgess; Ex parte Henry*[3] gave the generally accepted meaning of "external affairs" when he said:

> The regulation of relations between Australia and other countries, including other countries within the Empire, is the substantial matter of external affairs.[4]

It was to this definition that each of the judges in *Koowarta* returned when justifying their particular point of view.

As each judge applied the definition of the power to the facts of the case they made significant findings on the basic nature of the power. In the case before them the power was being used ostensibly for the enforcement within Australia of an international convention and, as was clearly pointed out by their Honours, it was the use of the power in this way that gave rise to the most important authorities.[5] However, it was acknowledged that this was not the sole role of s 51(xxix) and that the power may well operate for the enactment of laws totally independent of any specific international obligation. Gibbs CJ pointed out[6] that laws relating to the rights of diplomats within Australia, or laws suppressing publication within Australia of matters that may excite disaffection within Australia against the government of a friendly country,[7] were clearly laws that fell within the external affairs power, notwithstanding that they operated solely within Australia and in the absence of any international treaty or convention. The reason such laws clearly fell within s 51(xxix) was that the very nature of the subject matter of the law was such as to affect Australia's relations with other countries and so, without more, legitimately fell within the definition of the power.

The divergence between the minority and majority in the case can be explained by the differing views on the inter-relationship of the two uses of the power; first to enact laws on subject matters which by their own nature are external affairs, and secondly, to implement treaty obligations. The minority, constituted by Gibbs CJ, Aickin J (who merely concurred with Gibbs CJ) and Wilson J (who agreed with Gibbs CJ but added some comments of his own), felt that the use of the power to implement a treaty or convention was no different from any other use of the power. To them the central question was whether the particular subject matter could be regarded as an external affair—the mere fact a treaty was in existence was

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[3] (1936) 55 CLR 608.
[4] *Ibid* 643; quoted by Gibbs CJ (1982) 56 ALJR 625, 633.
[5] *Roche* v *Kronheimer* (1921) 29 CLR 608; *R* v *Burgess; ex parte Henry* (1936) 55 CLR 608; *R* v *Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634; *Airlines of NSW Pty Ltd* v *NSW (No 2)* (1965) 113 CLR 54.
[6] (1982) 56 ALJR 625, 633-634.
[7] *R* v *Sharkey* (1949) 79 CLR 121.

irrelevant. In contrast, the majority, constituted by Stephen, Mason, Murphy and Brennan JJ considered that the existence of a treaty in relation to a subject matter was in itself a significant factor in determining whether a law with respect to that subject matter could affect Australia's relations with other countries. They felt that a subject matter in isolation may well be outside s 51(xxix); however, a treaty in relation to that subject matter could well transform what was otherwise an "internal affair" into an "external affair".

It is convenient to look first at the judgments of Gibbs CJ and Wilson J. For the most part, they ignored the existence of the Convention. Consequently what was significant in their decisions was their classification of the subject matter of the legislation before them. Both their Honours concluded that the elimination of racial discrimination did not affect Australia's relations with other countries but was a matter of purely domestic concern. Wilson J expressed his views in this way:

> It is clear from the terms of ss. 9 and 12 of the Act, which the Chief Justice has set out, that they lack this external aspect to which I have referred. Each section makes it unlawful for any person to engage in the conduct which is described therein. Generally speaking that conduct is of a type which if it were to occur at all, would take place in the ordinary day-to-day intercourse of persons in Australia.[8]

This conclusion was reached notwithstanding the acknowledgment by their Honours of the growing international concern over racial discrimination.

It is trite, but significant, to point out that international conventions or treaties entered into by the Commonwealth Executive are not self-enforcing as domestic law within Australia but require legislation. However, it was accepted by all the judges in the case that the executive had power to enter into a treaty or convention on any subject it saw fit. What frightened Gibbs CJ and Wilson J was that if the Parliament's power to implement a treaty was co-extensive with the executive's power to enter a treaty, the Commonwealth legislative power would be unlimited in scope. They felt that such an extension of Commonwealth power would have dire consequences for the federal system in Australia. Gibbs CJ expressed his fears this way:

> it is impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became a party to an appropriate international agreement. . . . The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.[9]

Whenever the division of State and federal power is in issue the *Engineers'* case[10] quickly springs to mind. Gibbs CJ felt that the *Engineers'* case did not provide any barrier to his conclusions as he felt that although that case rejected the view that certain powers were reserved to the States ". . . in determining the meaning and scope of a power conferred by s 51 it is

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[8] (1982) 56 ALJR 625, 658-659.
[9] *Ibid* 637.
[10] (1920) 28 CLR 129.

necessary to have regard to the federal nature of the Constitution".[11] He also referred to *Bank of NSW* v *Commonwealth*[12] where Latham CJ commented that no power in the Constitution should be construed so as to give the Commonwealth Parliament universal power and so render the other powers superfluous. Nonetheless it is difficult to identify any significant distinction between the reserved powers doctrine and the principle of maintaining the federal balance, especially in light of Gibbs CJ's statement that:

> It is apparent that a narrower interpretation of par. (xxix) would at once be more consistent with the federal principles upon which the Constitution is based. . . .[13]

In his desire to maintain the external affairs power within clearly identifiable bounds Gibbs CJ was drawn to the conclusion that the existence of a treaty or convention in relation to a certain subject matter was for the most part irrelevant in determining whether that subject matter was an external affair. He stated:

> the test must be whether the provisions given effect have themselves the character of an external affair, for some reason other than that the executive has entered into an undertaking with some other country with regard to them.[14]

Wilson J expressed the same view in this way:

> It follows that Australia's obligation to eliminate racial discrimination within Australia will only assume the character of an external affair for the purposes of s. 51(xxix) if the manner of its implementation necessarily exhibits an international character.[15]

As has already been mentioned, both Gibbs CJ and Wilson J concluded that the subject matter of the Racial Discrimination Act did not contain the necessary external aspect and consequently was not valid as an exercise of the external affairs power.

It is convenient at this point to consider the reaction of Gibbs CJ and Wilson J to the view of Murphy J, that if the Commonwealth Parliament could not enforce within Australia all treaties entered into by the executive "Australia would be an international cripple unable to participate fully in the emerging world order."[16] Gibbs CJ dealt briefly with this argument by returning to his common theme that Australia was a federal system:

> whether or not the external affairs power has the wide scope that is claimed for it by the Commonwealth in the present case, Australia is fully equipped in the totality of legislative powers . . . the Commonwealth and the States together have plenary power.[17]

The suggestion is that although the Commonwealth may not have power to enforce a particular international obligation within Australia, co-operative

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[11] (1982) 56 ALJR 625, 637.
[12] (1948) 76 CLR 1.
[13] (1982) 56 ALJR 625, 638.
[14] *Ibid.*
[15] *Ibid* 660.
[16] *Ibid* 656, Murphy J quoting himself in the *Seas and Submerged Lands* case (1975) 135 CLR 337, 503.
[17] (1982) 56 ALJR 625, 635.

legislative action by the States and the Commonwealth may enforce within Australia any international obligation that the Commonwealth may attract. Wilson J suggested that this may simply be one of the prices that is paid for the adoption of a federal system. He said "If a situation of this kind occurs, it obviously renders the conduct of foreign affairs more complex than in the case of a unitary state."[18] However, he may have understated the potential divisiveness of the whole issue when he commented "The task of ensuring the co-operation of the States may present a political challenge . . .".[19]

These views of Gibbs CJ and Wilson J were given some support by the preliminary comments of Brennan J. He made the point that irrespective of any views on Australia's ability to participate in the community of nations the capacity of the Commonwealth Parliament to enforce any international obligation was subject entirely to the powers available in the Constitution. He felt that "If inhibition results from a constitutional limitation upon Commonwealth legislative powers, the political consequence must be accepted".[20] It was accepted by all the members of the Court that the external affairs power was, at the very least, subject to the express limitations that the Constitution imposed. This would tend to lessen the force of the "international cripple" argument as the view that the Commonwealth's power to enforce a treaty or convention obligation may also be limited to the extent it required State co-operation is merely to acknowledge another constitutional limitation on the power. Nonetheless, it is clear that the minority decision is influenced more by their Honours' perception of the need to prevent undue encroachment by the Commonwealth on State powers than on strict legal reasoning.

The judgments of Mason, Brennan and Murphy JJ which account for three of the four decisions of the majority were based on much simpler premises than those in the minority decisions. Having stated the common view that the external affairs power extended to matters affecting Australia's relationships with other nations, Mason J proceeded to indicate why he felt that ss 9 and 12 of the Racial Discrimination Act fell squarely within the power:

> The power applies to a treaty to which Australia is a party for it is not in question that such a treaty is an external affair . . . [although this is exactly what was questioned by the minority]. It would seem to follow inevitably from the plenary nature of the power that it would enable the Parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty. It is very difficult to see why such a law would not be a law with respect to an external affair, once it is accepted that the treaty is an external affair.[21]

Brennan and Murphy JJ were also of the view that a treaty in relation to a subject matter stamped that subject matter with the character of an external

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[18] *Ibid* 660.
[19] *Ibid.*
[20] *Ibid* 661.
[21] *Ibid* 648.

affair and therefore as a proper matter for the exercise of s 51(xxix). Brennan J showed the contradiction in the minority view when he said:

> It follows that to search for some further quality in the subject, an "indisputably international" quality, is a work of supererogation. The international quality of its subject is established by its effect or likely effect upon Australia's external relations and that effect or likely effect is sufficiently established by the acceptance of a treaty obligation with respect to that subject.[22]

It is arguable that it is here that the reasoning of the majority is more legally convincing than that of the minority. While each of the majority judges felt that the mere existence of a treaty in relation to a subject matter was relevant in deciding if the subject matter was likely to affect Australia's relations with other countries, the minority was inclined to the view that the existence of a treaty was irrelevant. This latter view shows a disregard for the accepted definition of external affairs.

Mason J was not impressed by the solution of Gibbs CJ and Wilson J to the problem of the co-operation of the State legislatures to "fill in the gaps" in Commonwealth power. He felt that:

> The ramifications of such fragmentation of the decision making process . . . are altogether too disturbing to contemplate. . . . Such a division would have been a certain recipe for indecision and confusion seriously weakening Australia's stance and standing in international affairs.[23]

To emphasise the impracticality of the minority solution Mason J referred to Australia's own experience with Commonwealth/State co-operation and concluded that in light of this knowledge "It is unrealistic to suggest . . . that the discharge of Australia's international obligations by legislation can be safely and sensibly left to the States acting uniformly in co-operation."[24] The nature of party politics in Australia and the unabashed self-interest with which State governments approach national issues can only substantiate the view of Mason J. But Mason J need not have relied on generalities as the facts of the present case itself are enough to show the difficulty Commonwealth/State co-operation poses. Here the Queensland Government not only acted contrary to an international obligation by refusing to allow the transfer of the lease of land to the Commission because the land was to be used by Aboriginals, but it also acted contrary to Commonwealth policy by disputing the validity of the legislation enforcing the obligation.

Murphy J stated expressly what everyone else was thinking when he said that the minority view was simply the reserved powers doctrine by another name and emphasised that this principle of interpretation had been clearly abolished by the *Engineer's* case.[25]

Despite the fact that the majority's view greatly increased the potential power of the Commonwealth they did recognise that the power was not unlimited. In indicating that some treaties may not attract the operation of the external affairs power Mason J emphasised that he was referring to a

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[22] *Ibid* 664.
[23] *Ibid* 648.
[24] *Ibid* 650.
[25] *Ibid* 656.

> treaty which is genuine and not . . . a colourable treaty . . . into which Australia has entered solely for the purpose of attracting to the Commonwealth Parliament the exercise of a legislative power over a subject-matter not specifically committed to it by the Constitution.[26]

Mason J earlier gave some indication of the factors he considered were relevant in identifying a bona fide treaty:

> Agreement by nations to take common action in pursuit of a common objective evidences the existence of international concern and gives the subject matter of a treaty a character which is international.[27]

What Mason J seemed to be focusing on was the concept of the countries who were parties to a treaty pursuing some common objective through common action that would benefit each of the parties to the treaty. He considered two types of subject matter. First, direct physical risks to other countries, for example the trade in noxious substances, and the spread of contagious diseases. He felt that the existence of either of these things in one country posed a direct threat to other countries so consequently a treaty to prohibit the trade or eliminate the disease was one which would directly benefit all countries and therefore had the necessary international character. Secondly, he looked at racial discrimination, a more subjective threat, and acknowledged that its presence in one country did not directly affect other countries. However, he felt the presence of racial discrimination in one country could lead to reprisals in another constituting a disturbance of the international order. Consequently eliminating racial discrimination in one country would be of benefit to the international order and so the proper subject of an international treaty.

What is unclear is whether Mason J was laying down a test to apply to all treaties or merely looking at the type of treaty before him and identifying aspects of that particular treaty that were sufficient to give it its international character. If every treaty requires a common action, a common objective and the achievement of a common benefit to be bona fide then any treaty where obligations placed on each country are different, may, even if those differences are only to take account of local circumstances, not be genuine according to Mason J. Mason J did contemplate that there may be some subject matters that have no international component and so a treaty in relation to that subject could only be said to be an artificial attempt by the executive to attract power over that subject matter to the Commonwealth Parliament. He may have considered that a treaty obliging a country to enact laws relating to matters purely local in character and without parallel in other member countries may well be such an attempt and therefore not a proper subject for s 51(xxix). Brennan J may well have been contemplating a similar circumstance when he said:

> Such a colourable attempt to convert a matter of internal concern into an external affair would fail because the subject of the treaty obligation would not in truth affect or be likely to affect Australia's relations with other nations.[28]

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[26] *Ibid* 651.
[27] *Ibid.*
[28] *Ibid* 664.

Consequently the majority did recognise, consistent with the minority, that the subject matter must inherently contain some international aspect. Without that quality any treaty in relation to it could not be regarded as "genuine". Arguably the critical point of divergence between the minority and majority was that while Mason and Brennan JJ were prepared to accept that the mere fact a treaty was in existence went a long way to showing that the subject matter had the necessary international aspect, Gibbs CJ and Wilson J tended to ignore the treaty. Brennan J relied on the statements of Barwick CJ in *Airlines of NSW (No 2)*[29] to show the factors in a treaty which gave its subject matter the character of an external affair. Barwick CJ was considering the Chicago Convention in relation to air navigation:

> Suffice it now to say that in my opinion the Chicago Convention, having regard to its subject matter, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes upon the parties to it unquestionably is, or, at any rate, brings into existence, an external affair of Australia.[30]

Brennan J then referred to the detailed analysis by Stephen J of the growth of racial discrimination as a matter of international concern and concluded that in order for Australia to maintain its credibility as a nation it must ensure the implementation of the treaty.

It is convenient at this point to note the concern of Gibbs CJ that the "bona fides" limitation suggested by Brennan and Mason JJ would not be a sufficient safeguard against the destruction of the federal balance. He felt that the Commonwealth Executive would rarely enter a treaty in bad faith. He gave the example of a treaty relating to working hours:

> Suppose, for example, that the executive genuinely believed that working hours should be reduced (or increased), that Australia ought to join in an international agreement to that effect, and that it would be beneficial if, by entering into an agreement, the Parliament acquired a legislative competence it otherwise lacked.[31]

Gibbs CJ felt that such an extension of Commonwealth power would not be consistent with the federal nature of the Constitution and the only "safe" way to ensure that Commonwealth power was kept within reasonable bounds was to limit s 51(xxix) to matters that were inherently external affairs.

A bridge between the judgments of the minority and majority was provided by the decision of Stephen J. His remarks mirrored many of the views of Gibbs CJ and Wilson J but his conclusions on a critical point meant that his decision created the statutory majority with Mason, Murphy and Brennan JJ in favour of the validity of ss 9 and 12.

Stephen J acknowledged, as did all the other justices, that the Commonwealth executive had power to conclude a treaty on any subject it thought fit. However, Stephen J expressed a similar concern to that of Gibbs CJ and Wilson J that if the Commonwealth legislative power to enforce treaties was co-extensive with the executive's power to enter treaties it:

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[29] (1965) 113 CLR 54.
[30] *Ibid* 85 quoted by Brennan J (1982) 56 ALJR 625, 664.
[31] (1982) 56 ALJR 625, 638.

> may place in jeopardy the federal character of our polity, the residuary legislative competence of the States being under threat of erosion and final extinction as a result of federal exercise of the power which par. (29) confers.[32]

Stephen J noted that the Constitution itself imposed certain express limitations on the power by the initial words of s 51 "Subject to the Constitution . . .". These words meant that the Commonwealth could not, simply by legislating to give effect to a treaty, avoid the prohibitions contained in ss 92, 113 and 116. In addition he noted the implied limitation established in *Melbourne Corporation* v *Commonwealth*[33] that prevented the Commonwealth exercising its powers in such a way as to threaten the actual existence of the States. However, the problem for Stephen J was identifying how far these implied restrictions went.

Where Stephen J accorded with the minority judges was in his view that the mere existence of a treaty was not sufficient to convert a subject into an external affair. He considered that:

> where the grant of power is with respect to external affairs an examination of subject matter, circumstance and parties will be relevant whenever an exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations.[34]

The point at which Stephen J detached himself from the minority and became part of the majority was in his classification of the subject matter. He chartered the history of the growth in interest in human rights which had their origins in the Charter of the United Nations, and were developed in the International Court of Justice to the extent that Stephen J concluded that human rights had become ". . . a proper subject for international action".[35] He concluded the International Convention on the Elimination of All Forms of Racial Discrimination which had been ratified by over 80 nations, and the international post-war developments in the area of racial discrimination ". . . is enough to show that the topic has become for Australia, in common with other nations, very much a part of its external affairs and hence a matter within the scope of s. 51(29)".[36]

It is this detailed analysis by Stephen J showing the development of racial discrimination as a matter of international concern that makes the conclusion of Gibbs CJ and Wilson J remarkable. To conclude, as Gibbs CJ did, that facts in the present case were different from the previous authorities because racial discrimination is "a matter that is entirely domestic" is to ignore the very relevant analysis of Stephen J. This real inconsistency in the reasoning of Gibbs CJ is clearly apparent in one of the most critical passages in his judgment:

> The crucial question in the case is whether under the power given by s. 51(xxix) the Parliament can enact laws for the excution of any treaty to which it is a party, whatever its subject matter, and in particular for the execution of a treaty which deals with matters that are purely

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[32] *Ibid* 644.
[33] (1947) 74 CLR 31.
[34] (1982) 56 ALJR 625, 645.
[35] *Ibid* 646.
[36] *Ibid* 647.

> domestic and in themselves involve no relationship with other countries or their inhabitants. In the most important of the cases (*R* v *Burgess; Ex Parte Henry; R* v *Poole: Ex Parte Henry (No. 2); Airlines of N.S.W. Pty Ltd* v *New South Wales (No. 2)* and *New South Wales* v *The Commonwealth*) in which it has been held that laws to give effect to treaties can validly be made under the external affairs power, the treaties in question had, in themselves, an international element; they affected the relations between Australia and other countries in some direct way.[37]

It is difficult to identify a convincing rationale for distinguishing the elimination of racial discrimination, the subject matter of the present treaty, from the regulation of air navigation (the subject matter of the treaty in *R* v *Burgess; Ex parte Henry*),[38] or the sovereignty of the territorial sea (the subject matter of the treaty in the *Seas and Submerged Lands* case).[39] The only superficial difference is that the latter cases relate to something physically identifiable, while the former is concerned primarily with a value judgment. However, by returning to the accepted definition of external affairs—"matters affecting Australia's relations with other countries"—such a difference cannot be significant as value judgments are as much a subject of conflict between nations as are differences between nations over tangibles. That racial discrimination in one country has the potential to affect relations with other countries needs no more evidence than the South Africa situation.

That the minority judges should seek to ignore these factors suggests that their decisions were based not on an application of the accepted law to the facts but on a pre-determined assessment of what the distribution of power in a federal system should be. That they attributed large parts of their judgments to statements about the dangers of extending Commonwealth power merely confirms this.

The same divisions can also be identified in the decisions by Gibbs CJ and Stephen J on the alternative submission by the Commonwealth that, quite apart from the Convention, the elimination of racial discrimination was part of customary international law and therefore a proper subject for the external affairs power. Gibbs CJ, having already concluded that racial discrimination was not inherently an external affair, went on to conclude that nor was it a part of customary international law. His Honour acknowledged that international law imposed certain obligations on nations in relation to human rights, however, he considered that these only extended to matters such as genocide, torture, imprisonment without trial and wholesale deprivations of the right to vote, to work, or to be educated. Racial discrimination, he said, "stands on an entirely different plane."[40]

Stephen J, took a contrary view, although not committing himself to a decision which he saw as unnecessary in light of his previous conclusions. His Honour said:

> There is, in my view, much to be said . . . for the conclusion that, the

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[37] *Ibid* 634.
[38] Above n 3.
[39] Above n 16.
[40] (1982) 56 ALJR 625, 640.

> Convention apart, the subject or racial discrimination should be regarded as an important aspect of Australia's external affairs . . . In the present case it is not necessary to rely upon this aspect of the external affairs power since there exists a quite precise treaty obligation. . . .[41]

As a result of Stephen J siding with Mason, Murphy and Brennan JJ, ss 9 and 12 of the Racial Discrimination Act were held valid as an exercise of the power given to the Commonwealth by s 51(xxix) of the Constitution.

3 THE RACES POWER—S 51(xxvi)

The second submisssion by the Commonwealth was that ss 9 and 12 were valid as exercises of s 51(xxvi) of the Constitution. Five of the judges, Gibbs CJ (with Aickin J concurring), Stephen, Wilson and Brennan JJ dealt with this issue and each was of the opinion that the power could not uphold ss 9 and 12 of the Act. Section 51(xxvi) gives the Commonwealth power to make laws with respect to "The people of any race for whom it is deemed necessary to make special laws."

Each of the judges emphasised that the essence of the grant of power in s 51(xxvi) was that it only allowed for the making of "special laws". Stephen J said:

> It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises; without this particular necessity as the occasion for the law, it will not be a special law such as s. 51(26) speaks of.[42]

It seems that not only must the law be directed to a particular race, the subject matter of the law must be such that it relates to a need relevant only to that race.

The present law was not directed at a particular need of a particular race as it applied to all people in Australia regardless of race. The fact that it sought to eliminate racial discrimination in general meant that it did not have the necessary focus on a particular race of people that might give it the character of a special law. Stephen J suggested that if only the aboriginal race was subject to racial discrimination then a general law eliminating racial discrimination would only be relevant to that particular race and so could possibly be regarded as a "special law". However, the diversity of races in Australia subject to some discrimination meant this argument could not be supported in the present case.

Gibbs CJ and Wilson J took a slightly wider view of the power than did Stephen J. They did not consider that it was necessary for the court to identify that the subject race had a special need for the law as this was for the Parliament to decide. It was sufficient that the law was directed to a particular race. They felt that the present law did not have this characteristic as it had a general application. Both their Honours contrasted the present legislation with a law specifically prohibiting discrimination against Aboriginals which they suggested would have sufficient reference to the people of a particular race to be regarded as a "special law".[43]

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[41] *Ibid* 647.
[42] *Ibid* 642.
[43] *Ibid* 631-632 *per* Gibbs CJ, 537-538 *per* Wilson J.

Murphy J and Gibbs CJ made some additional comments on the paragraph which are of interest. Murphy J was of the opinion that "for" in s 51(xxvi) meant "for the benefit of." It does not mean "with respect to", "so as to enable laws intended to affect adversely the people of any race."[44] In contrast Gibbs CJ considered that a law under s 51(xxvi) "might validly discriminate against, as well as in favour of, the people of a particular race."[45] Arguably, an attempt to restrict the paragraph to beneficial laws is not supported by the wording of the paragraph itself.

4 LOCUS STANDI

On the assumption that ss 9 and 12 were constitutionally valid the court proceeded to consider first, whether Mr Koowarta had standing to bring the action in the first place and relative to that whether the refusal by the Minister to approve the transfer of the lease to the Commission constituted an unlawful act by virtue of s 9 or s 12 of the Act.

Gibbs CJ, although deciding that ss 9 and 12 were invalid proceeded to consider whether either section was applicable to the facts alleged. In relation to s 12 he considered the issue to be whether a refusal to dispose of an interest in land to a body corporate could constitute a breach of s 12(1)(a) the problem being that a corporation cannot possess race, colour or ethnic origin. And as it was the Commission who was refused consent and not Mr Koowarta himself it was submitted by the defendants that there was no breach. Section 12 refers to a refusal to dispose of an interest in land to a "second person" by reason of the race of that second person or "associate" of that second person. Gibbs CJ felt that "Provisions such as those of s 12, which are intended to preserve and maintain freedom from discrimination, should be construed beneficially".[46] For this reason he concluded that the section applied to the Commission and that the plaintiff could be regarded as an "associate" of the Commission. Since the reason for the refusal of the Minister was that the land was to be used by Aboriginals Gibbs CJ felt that if s 12 was valid it may have been breached.

Stephen J took a slightly different view and relied on s 12(1)(d). He considered that it was not particularly relevant that technically it was the Commission who was refused approval. His Honour felt that it was sufficient that the Minister was aware that the land was to be used by Mr Koowarta and other Aborigines and that this was the reason for refusal of approval. His Honour concluded that this amounted to a refusal "to permit a second person to occupy any land . . . by reason of the race . . . of that second person . . .", contrary to s 12(1)(d).

Mason J felt that the refusal may well have constituted a breach of s 12(1)(a), (c) or (d) and adopted a similar view to Gibbs CJ in suggesting that there was no reason why the section should not apply to a corporation.

Brennan J considered that as s 12(1)(d) referred to the occupation of land it could only refer to the "occupation by a natural person".[47] He did

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[44] *Ibid* 656.
[45] *Ibid* 631.
[46] *Ibid* 630.
[47] *Ibid* 668.

not think that it was material in the present case that the persons who were ultimately deprived of the occupation of the land, that is, the Aboriginal group, would only have obtained their right of occupation indirectly through the Commission.

More disagreement arose over the possible application of s 9 of the Act. Gibbs CJ was doubtful whether it applied. Section 9 imposed a general prohibition on discriminatory acts and incorporated certain specific acts of discrimination referred to in Article 5 of the Convention. The most important allegation by Mr Koowarta was that the Minister's refusal to consent to the transfer of the lease impaired the exercise of Mr Koowarta's right to "own" property, referred to in Article 5(d)(v). Gibbs CJ pointed out that Mr Koowarta's statement of claim did not allege that Mr Koowarta would ever own the property. At most he could only expect a right to possession under a license to occupy and the word "own" could not be expanded sufficiently to cover that. He also added that the rights referred to in Article 5 could only apply to natural persons so he concluded that "The context provided by s. 9 and Art. 5 leads me to conclude that s. 9 is not intended to apply to the rights of artificial persons such as corporations."[48]

In contrast Brennan J was much more influenced by the spirit of Article 5 and s 9. He felt that s 9

> . . . comprehends the denial of an opportunity to acquire a legal right to use land. It follows that a denial of an opportunity for the plaintiff to obtain a license to use land satisfies that element of s. 9(1) upon which argument was presented in the present case.[49]

Consequently s 9 was breached.

5 "PERSON AGGRIEVED"

Having concluded that the refusal by the Minister to approve the transfer of the lease was an unlawful act under s 9 and/or s 12, the final, and related issue was whether Mr Koowarta was a "person aggrieved" under s 24 of the Act and so entitled to the remedies allowed for in that section. Brennan J felt that his conclusion on the application of s 9 determined his conclusion on Mr Koowarta's right to a remedy:

> The scope of s. 9 is recognised by the provision in s. 25(d)(i) for the recovery of damages for the "loss of any benefit that that person might reasonably have been expected to obtain." The loss of a benefit which was expected to be obtained would not be linked causally to an act contravening s. 9 unless that section . . . prohibited conduct which might occasion the loss of an expectation of benefit as well as conduct which might occasion the loss of a benefit to which the person aggrieved was entitled.[50]

Gibbs CJ, adopting a similar approach, suggested that Mr Koowarta had a genuine grievance as a result of the unlawful act as it "deprived him of

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[48] *Ibid* 631.
[49] *Ibid* 667.
[50] *Ibid.*

the possibility of obtaining a legal right to go on the land."[51] He did therefore have sufficient standing to bring the action.

6 CONCLUSION

The main importance of *Koowarta* is the High Court's exposition on the meaning and content of the external affairs power. The significant issue was the effect of the existence of an international obligation on the scope of the power.

Two basic lines of argument emerged from the case. The first approach was that adopted by Mason, Murphy and Brennan JJ. They took the view that the significant factor was that the Racial Discrimination Act was implementing an international obligation. They considered that it was reasonably self evident that a treaty was a matter affecting Australia's relations with other countries and, as long as the treaty was "bona fide" or "genuine" then it was a proper matter for the exercise of the power in s 51(xxix). This meant that the main enquiry for those three judges was whether the treaty exhibited the characteristics of a "genuine" or "bona fide" treaty and this was not determined by their own subjective assessment of the subject matter but by an analysis of the treaty itself. Although this approach would seem to give s 51(xxix) a potentially wide scope it is clear that differing opinions on what factors indicate a genuine or bona fide treaty could mean that future judges place such stringent conditions on what a genuine or bona fide treaty is that few "treaties" could operate to convert their subject matter into an external affair. For example the "common action for common objective" criteria adopted by Mason J could potentially exclude a number of treaties from being "genuine".

The second approach was that of Gibbs CJ, Wilson and Stephen JJ. Their approach was to look primarily at the subject matter of the legislation. Gibbs CJ and Wilson J concluded that the elimination of racial discrimination was a matter of purely domestic concern and therefore not a proper matter for the external affairs power. In contrast the assessment by Stephen J of the subject matter based on an analysis of the history of international concern over racial discrimination was that it was clearly a matter affecting Australia's relations with other countries and therefore within s 51(xxix). It seems reasonably obvious that the conclusions of Stephen J are clearly in accord with the status of this issue of racial discrimination in international affairs. Even had there not been a treaty obligation in existence it is probable that Stephen J would conclude that racial discrimination was inherently an external affair and therefore within the power granted by s 51(xxix).

The differing conclusions reached by Gibbs CJ and Wilson J and Stephen J on the inherent nature of the subject matter of the Racial Discrimination Act highlights the other significant part of the judgment of Gibbs CJ and Wilson J. Their Honours felt that if such a matter fell within s 51(xxix) merely because it was the subject of a treaty then no subject would be beyond Commonwealth power and in time the federal structure of Australia's legislative system would cease to exist. What is unfortunate

[51] *Ibid* 631.

about this approach is that it uses a consequence of one conclusion to justify reaching a contrary conclusion. It may be that one of the reasons that the *Engineers* case rejected the reserved powers doctrine as a principle of interpretation was that its application meant that legal argument was commenced with a predetermined assessment of what the distribution of powers between State and Commonwealth should be, rather than working through the definition of the powers in s 51 to decide what the Constitution says the distribution of powers is. Although both Gibbs CJ and Wilson J in stating their "federal balance" argument denied it was the reserved powers doctrine, it is arguable that both concepts are based on an erroneous approach to basic legal reasoning. To say racial discrimination is not an external affair because if it was the federal balance would be destroyed is to state a conclusion as a reason for a conclusion which is clearly circular.

In the final analysis it is difficult to anticipate the significance *Koowarta* will have in a subsequent case concerning the operation of s 51(xxix) given the contrasting lines of reasoning adopted by the court and the qualifications placed on the exercise of the power.

The subjectiveness of the "inherent nature of the subject matter" approach and the inbuilt "safety valve" in the "genuine or bona fide treaty" approach makes it even more apparent that as far as constitutional issues are concerned, in many cases legal reasoning may well be used as a facade manufactured in order to legitimise a predetermined political decision.

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