THE EXTERNAL AFFAIRS POWER

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It is a tenable view of *Commonwealth* v *Tasmania*[1] that as a matter of *ratio decidendi* it added nothing to the judicial construction of the Commonwealth's external affairs powers (Constitution ss 51(xxix) and 61) which was not already adumbrated in *R* v *Burgess; ex parte Henry*[2] (in 1936) and clearly established in *Koowarta* v *Bjelke-Petersen*[3] (in 1982). In this range of cases, attention is concentrated on circumstances in which the Commmonwealth claims power to enact and implement laws having a domestic application within Australia which would not be valid unless they were made in pursuance of an international agreement to which the Commonwealth is a party. There are other circumstances in which the external affairs power will support Commonwealth laws, and these are mentioned in all the *Franklin Dam* and *Koowarta* opinions, but hitherto the case illustration of such valid laws has been minimal. It has been hitherto assumed, though not explicitly stated, that international agreements and their implementation in Australia constitute a distinct subdivision or aspect of the legal rules in question. There are dicta suggesting an approach to the power which would eliminate the need for any special doctrines with respect to international agreements, but this paper is written on the assumption that for some time to come cases will be argued and decided on the assumption mentioned. In this category of cases, then, the matters settled as a matter of *ratio decidendi* by *Koowarta* were as follows. First, the executive power of the Commonwealth, exercised by or on the authority of the Governor-General in Council, includes power to enter into agreements with other countries on any topic whatsoever, without regard to the distribution of governmental powers in the Australian federal system. Secondly, such agreements will not be a basis of validity for Commonwealth laws depending for their validity solely on s 51(xxix) of the Constitution in association with the international agreement unless four further conditions are satisfied: the agreement must be made *bona fide*, and must be with respect to a matter of substantial international concern, and the legislation must be in substantial accord with the terms of the international agreement, and not inconsistent with the Constitution. Has the *Franklin Dam* case made any difference to this?

1 COMMONWEALTH POWER TO MAKE INTERNATIONAL AGREEMENTS

In the *Franklin Dam* case, only Dawson J discussed this question. He concluded: "It has not been questioned in recent years that the treaty making power of this country is unlimited",[4] and he might have quoted the similar statement of Gibbs CJ in *Koowarta*,[5] where the Chief Justice,

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[1] (1983) 57 ALJR 450, hereafter the *Franklin Dam* case.

[2] (1936) 55 CLR 608, hereafter *Burgess*.

[3] (1982) 56 ALJR 625, hereafter *Koowarta*.

[4] (1983) 57 ALJR 450, 564.

[5] (1982) 56 ALJR 625, 635.

while dissenting on other matters, could be taken as speaking for the Court. But Dawson J was also correct when indicating that the precise source of the agreement-making power of the Governor-General in Council has not received much judicial examination. He contended that it could not be based on the Crown prerogative (as Gibbs CJ had assumed in *Koowarta*), because it has not been delegated by the Monarch, and because, boldly using the legislative history, he argued that it was not covered by s 61 of the Constitution.[6] Hence he concluded that the power has come into existence by virtue of international law, mediated through the practice of nations; their acceptance of Australia as a sovereign nation was sufficient. There are three fallacies in this argument. First, the practice of nations and international law may be necessary to accepting a previously colonial country as independent, but neither can determine the location within that country of consequential domestic powers; the allocation of power to the Commonwealth, and to the Governor-General in Council, can only be carried out by domestic constitutional provision. Secondly, the understandings of 1900 as to the scope of s 61 were understandings as to denotation, which can change with time; the connotation of s 61 was "executive power", and its scope, like other denotations, can change with such authoritative domestic developments as those beginning with the Versailles Treaty, and the foundation of the League of Nations, in 1919, and expressed in the Balfour Memorandum of 1926.[7] Third, although the High Court has hitherto assumed rather than clearly stated the location of the agreement-making power, it is surely indicated with sufficient clarity, as a matter of authority, in the *Burgess* and *Koowarta* judgments, and in *Barton* v *Commonwealth*,[8] to be now beyond argument. The power is vested in the Governor-General of the Commonwealth in Council by a combination of s 61 and so much of the prerogative relevant to this matter as is required. Moreover, this fallacious argument as to the location of the treaty-making power leads him into a concession to his opponents on more substantial questions which is unnecessary. He says[9] that since the treaty-making power is created *aliunde* the Constitution, it is not subject to the limitations of the Constitution. If, however, the treaty-making power is derived from s 61 together with or as explained by the prerogative, then it ought to be just as much subject to the limitations of the Constitution as any other power.

Nevertheless, we are indebted to Dawson J for initiating a discussion of the treaty-making power. In this writer's opinion, the fatal step, from the point of view of states'-right doctrines, was taken in *Burgess* when the majority held and the doubters did not deny that the agreement-making power of the Executive is without subject-matter limitations. For the reasons briefly but convincingly outlined by Latham CJ, it has always been absurd that the Commonwealth should have unlimited and of neces-

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[6] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 562.

[7] In the *Franklin Dam* case Dawson J used "connotation" and "denotation" in a sense which is the reverse of that used above (p.842). The meaning attributed to the terms in the text is, however, consistent with usual High Court terminology, eg *Professional Engineers'* case (1959) 107 CLR 208, 267; *Lansell* v *Lansell* (1964) 110 CLR 353, 366, 370; *King* v *Jones* (1972) 128 CLR 221, 229.

[8] (1974) 131 CLR 477.

[9] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 564.

sity exclusive power to agree for Australia as a whole but should then have to rely for performance of an agreement on securing the cooperation of seven or eight autonomous governments working under different constitutions and reflecting different and constantly varying political majorities. Latham CJ spoke from his bitter experience as an Attorney-General of the Commonwealth when trying the cooperative path on the topic in dispute — control of air navigation — which obviously cried out for national control.

But we are also indebted to Dawson J for a suggestion which if accepted would greatly simplify this topic and remove the need for much of the intricate pleading and evidence-gathering which such cases at present require. He says[10] that if s 61 is indeed the basis of the treaty-making power, then there should be no need for the Commonwealth to rely on s 51(xxix) at all for the validation of treaty-based legislation. The power of carrying a treaty into effect would be amply supplied by a combination of s 61-cum-prerogative and the incidental power, s 51(xxxix). This would not leave s 51(xxix) without a function; it was historically necessary, because, as all agree, in 1900 and until at least 1919 s 61 was taken not to connote treaty-making powers, and because of the as yet undetermined but probably large range of powers which s 51(xxix) carries in the absence of any international agreement. As a matter of authority, Dawson J's suggestion is at present untenable.

2 BONA FIDES

In no case has it been pleaded that the international agreement in question was entered into *mala fide*, and the notion that this might be an objection originated as a throw-away *obiter* in *Burgess*.[11] However it has often been repeated since, and is specifically endorsed in the *Franklin Dam* case by Mason,[12] Brennan[13] and Deane[14] JJ. In all cases the only kind of "mala fides" mentioned is a purpose of using an international agreement to support a Commonwealth law having no other basis, when no genuine "international" purpose was involved. Hence this rubric tends to merge with "international concern", and it is not surprising that in *Koowarta*, Stephen J conflated the two considerations and proposed for the decision of both an objective approach — the examination of the history and contents of the international agreement in question.[15] The references in the *Franklin Dam* case take the matter no further. Hence an important question remains: is *bona fides* an element in determining the validity of a related law which the Commonwealth must establish, or is its absence a ground of invalidity to be established by the party contesting validity? While the *Franklin Dam* case contains no explict discussion of such questions, the majority emphasis on the existence of an international agreement as providing the "externality" required by s 51(xxix) does point in the

[10] *Ibid* 562. The ALJR misprints "xxix"; it should clearly be xxxix.
[11] (1936) 55 CLR 608, 687.
[12] (1983) 57 ALJR 450, 484–485.
[13] *Ibid* 525–527.
[14] *Ibid* 545.
[15] (1982) 56 ALJR 625, 645. The *bona fides* requirement was unanimously endorsed in *Koowarta*, but Gibbs CJ suggested that it might prove a frail safeguard against abuse.

direction of an ultimate onus on the Commonwealth. But it is likely that at least in the case of multilateral agreements — and only such agreements have hitherto been considered — there will be an initial presumption of "genuineness"; Mason J indicated in both *Koowarta*[16] and the *Franklin Dam* case[17] his dislike (natural in a former Commonwealth Solicitor-General) for a doctrine which might require the Court to investigate the politics of treaty-making, but he did not suggest that the making of a treaty should be *conclusive* evidence of *bona fides*, and any such suggestion would in practice — like all dogmatic fictions — obliterate the requirement which it purports to "evidence". Moreover, the trend of decision seems to favour rather than discourage judicial investigation of the Ministerial purposes which provide the substance of "Crown" decisions.[18]

3 INTERNATIONAL CONCERN

Perhaps the main importance of the *Franklin Dam* case, from the point of view of legal logic, is to attribute to *Koowarta* a weight of authority *against* a separate requirement of "international concern" as a basis for treaty-executing s 51(xxix) laws which separately considered it did not possess. It is even arguable that if *Koowarta* involved as part of its *ratio decidendi* a requirement of "international concern", then as to that matter the case is overruled by a majority in the *Franklin Dam* case. My own view of *Koowarta* was that only two Justices — Murphy[19] and Brennan[20] JJ — indicated that the *bona fide* making of an international agreement sufficiently creates an "external affair" to which legislation under s 51 (xxix) can then be attached. It seemed to me that Mason J was not so dogmatic on that point, though certainly expressing a preference for such a rule; he seemed to me to be prepared to accept and apply the clear view of Stephen J in that case which treats "international concern" as a separate requirement. Hence as a matter of strict *ratio decidendi*, "international concern" was required both because the Stephen view had to be included in order to explain the judgment for the Commonwealth in that case, and because specific *exclusion* of the requirement was favoured at most by two Justices. But in the *Franklin Dam* case Mason J[21] tells us that he agreed with Murphy and Brennan JJ in *Koowarta* on this point, and indeed Wilson J also accepts this view of the dicta of Mason J in *Koowarta*.[22] Has, then, a separate requirement of "international concern" disappeared? It is entirely possible that the trend of decision will have that effect and will be founded on the joint effect of the *Franklin Dam* case, and of *Koowarta* as treated in the *Franklin Dam* case. This depends very much on the "federal structure" outlook of future appointments to the

[16] *Ibid* 651.
[17] (1983) 57 ALJR 450, 486.
[18] *Re Toohey; ex parte Northern Land Council* (1981) 56 ALJR 164; *FAI Insurances Ltd. v. Winneke* (1982) 56 ALJR 388.
[19] I include him with some doubt, since his opinion is not clear on the point and he is at pains to emphasize the existence of international concern. His opinion in the *Franklin Dam* case on the point is clear.
[20] (1982) 56 ALJR 625, 655–656.
[21] (1983) 57 ALJR 450, 484.
[22] *Ibid* 512.

High Court bench. But a contrary development is also possible, for two reasons. First, on the view that decisions, even constitutional ones, are authoritative only in relation to the "facts" — including constitutional facts — on which they are decided, it will always be possible to assert that the critical decisions on these matters so far considered have concerned multi-lateral conventions entered into under the auspices of international organizations with a very wide membership, after a history of debate and investigation on an international scale, and in circumstances clearly showing the existence of "international concern"; in both the *Franklin Dam* case and *Koowarta*, this history is referred to in all the controlling opinions. Secondly, there is not in the *Franklin Dam* case a clear majority in favour of the Mason-Murphy-Brennan view on "international concern", because Deane J — not a member of the *Koowarta* bench — does not explictly refer to it. Indeed, he refers dismissively to the more recent High Court discussions of the external affairs powers,[23] and founds himself on the majority opinions in *Burgess*, in particular the joint opinion of Evatt and McTiernan JJ written by Evatt J. Those opinions in turn give no explicit attention to the sort of issues raised by Stephen J in *Koowarta*, since the main concern of Evatt and McTiernan JJ (and indeed of Latham CJ) was to establish that Australia had (*per* the Commonwealth) power to make treaties without limit as to subject matter, and that the Commonwealth had power under s 51(xxix) to carry them into Australian law even when the subject matter did not otherwise come within Commonwealth competence. The language of the *Burgess* opinions is capable of interpretation as including any *bona fide* treaty which the Commonwealth makes, but even as a matter of language, without aid from a theory of the *ratio decidendi*, the more natural reading is informed by the nature of the convention there considered — multilateral and associated with an international organization. The word "international" itself is quite capable of being used to describe an agreement between two nations, but it is more usually used to describe a multi-national agreement. Deane J quotes with approval, as summarising the Evatt-McTiernan judgment, the following: "the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement";[24] the reference is evidently to multilateral activity. Of course this does not exclude the possibility that Evatt and McTiernan JJ would have been prepared, as Mason, Murphy and Brennan JJ now are, to regard the making of a bona fide agreement, irrespective of the number or nature of the parties and the history of the matter, or its contents, as sufficient, but their opinion provides no authority on that point and hence neither does that of Deane J in the *Franklin Dam* case. In the *Franklin Dam* case, Brennan J observes that if the Stephen requirement of "international concern" is applicable, it is easily satisfied.[25] This is so in the case of the multilateral conventions so far brought before the Court, but a bilateral agreement on a "State" subject may raise different considerations. Per-

[23] *Ibid* 544, when mentioning *Koowarta* and criticising the search for an "external affair" in the singular.

[24] *Ibid*

[25] *Ibid* 527.

haps the more important feature of the Stephen opinion is his suggestion that a consideration of the history and contents of an international agreement (and he is clearly considering bilateral as well as multilateral agreements) may be decisive both as to "bona fides" and "international concern".

4 CONFORMITY WITH CONVENTION REQUIREMENTS

This question has become entwined with the question of the sorts of legal authority which an international agreement must provide in order to validate consequential Commonwealth legislation. There are two stages in this enquiry, not always clearly distinguished; first, whether the international agreement must oblige Australia to take specified action, or whether some and what degree of encouragement, advice, recommendation, expression of approval, expression of a technological, moral, political standard of conduct as preferred in a particular context, authorisation to take steps for reaching an indicated purpose etcetera is sufficient. Once obligation to act is departed from as a criterion, the range of possibilities is great, extending far beyond the "recomendations" of the International Labor Office which Evatt and McTiernan JJ were anxious to bring within the range of Commonwealth legislative action by their *obiter dicta* in *Burgess*.[26] In the *Franklin Dam* case, the Court accepted without question the view that what the relevant convention required was to be determined in accordance with international customary and treaty law concerning the interpretation of international agreements, and four Justices[27] held clearly that in accordance with such rules of interpretation, the World Heritage Convention which came into effect in 1975 imposed an obligation on the Commonwealth to take steps to preserve the Franklin River area of Tasmania as part of a listed World Heritage area. It was likewise assumed, without any specific discussion of the question, that the degree of relationship between challenged legislation and convention obligation required by s 51(xxix) of the Constitution was to be determined by Australian domestic constitutional law, and that the main thrust of regulations under the National Parks and Wild Life Conservation Act 1975 (Cth)[28] and of the World Heritage Properties Conservation Act 1983 (Cth) was to perform that obligation. Hence as a matter of strict *ratio decidendi*, the *Franklin Dam* case carries these questions no further than validating the performance of an international obligation. Dicta go further and will be mentioned later. The discussion of the international law question indicated that by its standards, the imposition of an obligation is consistent with leaving to the parties a considerable discretion as to modes and timing of performance, but it was also suggested that Australian domestic contract law is moving in the same direction.[29] The limit case may be an agreement which leaves the parties at liberty to disregard its requirements, or a relevant

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[26] (1936) 55 CLR 608, 687.

[27] Mason, Murphy, Brennan and Deane JJ.

[28] But Deane J considered that these regulations infringed the constitutional guarantee of just terms for Commonwealth acquisitions. Otherwise the finding as to the domestic requirement was by the same four Justices.

[29] *Commonwealth* v *Tasmania* (1983) 57 ALJR 480, 492 per Mason J, 509 per Murphy J, 530 per Brennan J, 546 per Deane J.

requirement, altogether. However, if this limit is reached, or in the view of a future High Court bench sufficiently approached, so as to negative obligation, the question would remain whether something less than obligation is sufficient. It is hardly likely that an international agreement would fail to indicate some preference for a specified course of action. On the question of compliance with the international *obligation*, the *Franklin Dam* case carries the matter no further than did *Burgess*, *Poole*[30] and *Koowarta*. The obligation was to preserve the area in its natural state rather than drowning it, and this the challenged legislation achieved.

5 CONSISTENCY WITH THE CONSTITUTION

This has never been doubted by any Justice as a requirement of s 51(xxix) laws, the litmus test being its acceptance by Murphy J.[31] It includes the implied as well as the express limitations. In the *Franklin Dam* case, only one suggested limitation was of particular interest in relation to s 51(xxix), namely the rule developed from s 51(xxxi) which erects the requirement of just terms for Commonwealth property acquisitions into a general constitutional guarantee. Gibbs CJ, Wilson and Dawson JJ did not consider the question, but Mason, Murphy, Brennan and Deane JJ did; all assumed that s 51(xxix) laws came within the guarantee — the first specific decision on the point — but only Deane J was prepared to apply it so as to invalidate some of the challenged regulations;[32] his majority colleagues considered that the challenged laws fell on the regulatory (valid) rather than acquisitive (invalid) side of this difficult dividing line.

6 DICTA

It is believed that the above covers the *ratio decidendi* of the *Franklin Dam* case, from a strict or old-fashioned point of view. However, as the treatment of *Koowarta* in the *Franklin Dam* case illustrates, doctrine grows from dicta as well as from authoritative precedent, and the *Franklin Dam* case is rich in dicta. The most striking are those of Murphy J, who endeavours to provide an extensive if not exhaustive summary of the scope of the power as he sees it, going far beyond established precedent.[33] Unlike Gibbs CJ and Mason J, he has no difficulty in recognising "international interest" in a topic when it exists, and treats its existence as sufficient to ground s 51(xxix) laws if the concern relates to "circumstances or things inside Australia". He regards the power as extending to "any recommendation or *request*" of the U.N. and related organizations. It covers Australia's relations not only with other nations, but also with at least some external non-governmental groups, examples being transnational business corporations and trade unions, and includes laws which "foster or inhibit relations between Australia or political entities, bodies or persons" in Australia with similar groups or persons external to Australia. (*Quaere*, does "political" qualify all this, and if so why?).

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[30] *R* v. *Poole; ex parte Henry (No 2)* (1939) 61 CLR 634.
[31] *Koowarta* v *Bjelke-Petersen* (1982) 56 ALJR 625, 655.
[32] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 555–559.
[33] *Ibid* 505–506.

He repeats the test of "physical externality" which on one view is in any event established by ratio in *Seas and Submerged Lands*.[34] Indeed, it can be said that all these suggestions are but logical extensions of the general notion of "physical externality". He states all these as sufficient conditions for s 51(xxix) laws, not necessary conditions, with the implication that there may be further examples. But he agrees with Mason J that the result is not to give the Commonwealth power to make laws about the subject of the external relationship — for example, about wilderness areas, *tout court*, — but about the subject so far as involved in the relationship. Mason J[35] expressly accepts the Barwick view that the power extends to effectuation of benefits, and gives the dangerous example of a joint-venture agreement between the Commonwealth and another country which the Commonwealth may legislate to "facilitate"; does this at last provide a conclusive answer to the frequent claims of the Australian Labor Party "right" leaders who resist a federal socialist objective because the Commonwealth lacks power to achieve it? The Mason opinion in general goes, more cautiously, in the Murphy direction, with greater emphasis on the difficulties of judicial control of executive and parliamentary judgment than on the achieving of harmony with world order;[36] note Mason J's suggestion that the "real benefit" of the World Heritage Convention for Australia is the preservation of precious relics and environmental features in the world as a whole.[37] Deane J also said that the power extends beyond obligations to "observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies *and pursuit of international objectives which cannot be measured in terms of binding obligation*".[38] On implementation, Murphy[39] and Deane[40] JJ uphold partial performance of treaty requirements where this does not involve breach. Mason,[41] Brennan[42] and Deane[43]JJ agree that since the power is purposive in a sense similar to that of the defence power, the Court is entitled to require that a challenged measure can be reasonably regarded as conducive to the purpose, and Deane J introduces into this familiar topic some fresh language and perhaps a more subtle perception by emphasising the need for *proportionality* between law and purpose. The World Heritage Convention has a federal clause — Article 34 — whose interpretation was handled by the majority as if it were a simple matter of statutory interpretation, Anglo-Australian style; on that basis, the clause clearly had no application once it was decided that the Commonwealth had power to legislate under s 51(xxix).[44] On that basis, the decision was plainly correct, and as such was accepted by Wilson J.[45]

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[34] *New South Wales* v *Commonwealth* (1975) 135 CLR 337.
[35] *Commonwealth* v *Tasmania* (1983) 57 ALJR 450, 488.
[36] *Ibid* 505 per Murphy J.
[37] *Ibid* 490.
[38] *Ibid* 544; (italics added).
[39] *Ibid* 506.
[40] *Ibid* 549.
[41] *Ibid* 488.
[42] *Ibid* 533.
[43] *Ibid* 546.
[44] *Ibid* 491 per Mason J, 509 per Murphy J, 531 per Brennan J, 547 per Deane J.
[45] *Ibid* 516.

However, the observations of Wilson J and Dawson J[46] based on a different assumption may as to this issue be more in accordance with an international law approach to the problem.

[46] *Ibid* 569.