Chapter Three

The Proper Scope of the External Affairs Power

Professor Michael Coper

Introduction

Two weeks ago, I attended the highlight of Canberra's autumn festival, an open-air, evening performance of Carl Orff's Carmina Burana. Sung by a cast of thousands and watched by even more, this "scenic cantata" was impressively staged on the foreshores of Lake Burley Griffin in front of the old Parliament House and just adjacent to the High Court. The climax was a simultaneous explosion of music and fireworks, with a huge wheel of fortune sent into a spin by exploding fireworks and left to burn as the centrepiece of a spectacular bonfire.

As the conflagration reached its peak, I looked across the heads of the crowd towards the High Court. From where I stood, the flames were reflected in the glass panelling on the west side of the Court so perfectly that it looked for all the world as if the High Court were on fire. This was an astonishing sight, made even more astonishing by the fact that, despite the duration and intensity of the fire, it left no scars whatsoever on the building – no crashing beams, no broken glass, no burning embers, nothing. The Court stood untouched and unmoved, despite the fire apparently raging inside it.

What an extraordinary metaphor! A contemporary vision, perhaps, of the burning bush, a modern symbol of the judicial commandments handed down from on high. More prosaically, a reminder that in recent times we really have had a High Court on fire – a Court reshaping the common law, a Court affirming resoundingly the existence of native title, a Court discovering constitutional rights and freedoms implicit in the concept of representative democracy, a Court breathing new life into the handful of express rights in the Constitution, and a Court taking what seems to many observers to be a somewhat robust, if not downright bullish, view of the ambit of Commonwealth power.

Many of you here will hold the view, I suspect, that the current operation of the Commonwealth's external affairs power is one of the best examples not only of the fire in the belly of the High Court, but also of a fire that needs urgently to be doused. I suspect also that you will have been unpersuaded by the High Court's reasoning in support of its current wide view of the power, a view originally established by narrow majorities but now generally accepted within the Court. If you are familiar with the music of Carmina Burana, you may think that that music has something in common with the Court's reasoning in the external affairs power cases: vigorous but simple rhythms, reiterated short motifs, and plainsong-like declamation. But that will only reinforce your view that the Court's current approach is inappropriate.

I want to put to you this morning that the High Court's current view is appropriate, in two senses. First, I hold the view that the Court's current interpretation of the external affairs power is the correct interpretation of that power under the present Constitution, or, to avoid the simplistic language of right and wrong in a subtle world of ideas with few absolutes, is an appropriate interpretation having regard to the accepted touchstones of constitutional interpretation. Secondly, when it comes to considering how the external affairs power might be amended – and there is clearly no right or wrong view in this area of policy choice – I believe that there are powerful arguments in favour of leaving the constitutional framework as it is, and of seeking ways within that framework of alleviating the concerns that you may have.

The current interpretation of the power

I recognise that it is a forbidding task to persuade this audience that the High Court should be applauded for its current interpretation of the external affairs power. John Stone in his paper to the Society last year on white ants and termites observed that the external affairs power is "the greatest flaw in our Constitution as it has evolved today". The Society itself is committed to redressing the federal balance in favour of the States. And Colin Howard has addressed you at each of your four previous conferences, in his unmistakably pungent style, consistently making the point that the record of the High Court in this and in other areas leaves (if I may rather understate the point) something to be desired.

Perhaps even more significantly, the critics from within the Court of what is now the orthodox view of the power have marshalled, powerfully and eloquently, a battery of respectable principles of interpretation which clearly sit very uncomfortably with the conclusions drawn by the majority. I remind you briefly that the now accepted view is that the Commonwealth can legislate to implement domestically any bona fide treaty obligation, whatever the subject-matter of that treaty. This means that, given the presence of an appropriate treaty to which Australia is a party, the Commonwealth can legislate on subjects outside those otherwise allocated to the Commonwealth under s.51 of the Constitution, and indeed on any subject at all.

An interpretation of one head of power which is at odds with the very scheme of allocating legislative power to the Commonwealth only in limited and defined subject-matter areas must, it is said, be suspect. And this is but a consequence, it is further said, of ignoring a fundamental canon of construction of any legal document, whether it be a will, a contract, a statute or a Constitution. That canon of construction is that words or phrases should not be isolated from their context and interpreted literally, but should take their meaning from the nature and purposes of the document taken as a whole. Words are empty shells, into which meaning must be poured from the surrounding circumstances.

These impeccable principles of interpretation were invoked prior to 1920 in aid of the conclusion that the heads of Commonwealth power in s.51 of the Constitution were to be read in the light of, and subject to, the general rule that certain areas of power were "reserved" to the States. On this reasoning, it might have been held, for example, that in view of the States' traditional and important responsibility for the law and administration of title to land, the power of the Commonwealth in s.51(xxvi) of the Constitution to make laws with respect to "the people of any race" (if in those days the power had encompassed the Aboriginal people) was insufficient to support an Act in the nature of the Native Title Act 1993. However, in the landmark Engineers Case, the seventy-fifth anniversary of which falls this year, the High Court relied on equally impeccable principles of interpretation – with particular emphasis on the ordinary and natural meaning of the text and the avoidance of vague, subjective and elusive limitations implied from the nature of the polity – to deal the "reserved State powers" doctrine a blow from which it would never recover. Thus, when the eloquent minority in the Tasmanian Dam Case sought to invoke the canon of contextual constraint, they had to struggle to recreate a doctrine of "federal balance" which, although it had common roots with the doctrine of reserved powers, had somehow to be distanced from it.

It is surprising in some ways that the Engineers Case has been so sacrosanct. No doubt it suited the times – galvanised by the First World War, a more national Australian identity had begun to emerge and was soon to find expression in the developments that led to a redefinition of the relationship with Great Britain in the Statute of Westminster 1931. But its streak of literalism has had a profound effect on constitutional interpretation. Strands of this literalist thinking can be seen in major decisions on, for example, the Commonwealth's interstate and overseas trade and commerce power in s.51(i) of the Constitution and the Commonwealth's tax power in s.51(ii). The former has been held to allow the Commonwealth to achieve major environmental protection objectives, simply by making compliance with environmental requirements a precondition to export, and indeed any kind of regulation could be hung off the export power in

this way. The latter can also be used to regulate any activity at all, simply by way of tax incentive or disincentive rather than by direct prohibition. In neither case is it an objection that the activity in question would otherwise fall outside the ambit of Commonwealth power.

The High Court has at times flirted with the idea of adopting a more purposive approach to those kinds of questions, in order to identify what the Commonwealth law in question is "really" about. But the abstract or literalist or textual emphasis has remained, for a variety of reasons. Not the least of these reasons is a disinclination on the part of the judges to decide questions of validity by reference to criteria that are so elusive and subjective that they are in truth more political than legal, or at least incapable of yielding any certainty or of avoiding capriciousness in their application.

This leads me to my first reason for thinking that the current interpretation of the external affairs power is appropriate. There is no alternative, narrower view, in my opinion, which offers a viable, practical and judicially workable touchstone of validity. By and large the critics of the current interpretation have not sufficiently addressed this question, although I was interested to see that Peter Durack conceded the point in his address to the Society in 1993.

All of the proposed narrower tests of validity under the external affairs power have turned on the idea that, for a treaty to be capable of domestic implementation by the Commonwealth, the subject- matter of the treaty must itself be inherently international in character. It must derive that character from something outside the treaty, from something other than the mere existence of the treaty. This approach is not merely subjective and elusive. It also puts the Court in the invidious position of second-guessing the political judgment that has been made that the subject-matter of the treaty is a matter of significance in Australia's international relations. This is particularly and obviously so when the test of validity is put in terms of whether the matter is a matter of international "concern", the test which the Tasmanian Dam Case minority felt bound to accept after the Court's decision upholding the Racial Discrimination Act in Koowarta's Case. It may be less so on the somewhat narrower view of the Koowarta minority, who appeared to require a "relationship with countries, persons or things outside Australia", evidently implying some sort of direct physical or transactional connection. However, even that test, unless confined strictly in its application to diplomatic relations and extradition, seems open to the same criticism.

I will not pursue this point any further, except to say that if there are any amongst you who are comfortable with an activist Court determining which international treaties are appropriate for the Commonwealth to implement and which are not, and as a corollary of course striking down legislation implementing those in the latter category, then I would be interested to hear whether you are also comfortable with the Court's recent activism in the area of implied constitutional rights. The issues are not quite the same, but the parallel serves to focus attention on the broad question of what is the proper role of an unelected court in second-guessing the judgments of our elected representatives.

Perhaps partly because of these considerations, although partly also a function of resignation to the general acceptance these days of the broad view of the external affairs power, attention has turned to solving the perceived problems of the broad view either by constitutional amendment or by political arrangements. I have already said that I favour the latter course. But first let me briefly add another reason in support of the view that the High Court's current interpretation of the external affairs power is appropriate.

This reason may strike you as over-simple, but it is based on a principle of interpretation as impeccable as any that I have mentioned thus far. The power was always intended to permit the domestic implementation of international treaty obligations, and its wider ambit today is a function simply of the steady growth this century of subjects judged by the international community to be appropriate for international agreement. It is the facts that have changed, not the legal meaning of the power. Some lawyers like to think of this in terms of the difference between the "connotation" of the power and its "denotation". It is not dissimilar to the quite

uncontroversial approaches to other Commonwealth powers expressed in generic terms which have resulted in, for example, the trade and commerce power extending to commercial air travel, and the "postal, telegraphic, telephonic and other like services" power extending to the electronic media, even though aircraft, radio and television were unknown to the framers of the Constitution.

It is true that Australia's involvement with international treaties before 1900 was very limited, and it is also true that Great Britain continued for some thirty years after 1900 to be mainly responsible for the conduct of Australia's international relations. But to limit the power by reference to those considerations is, I think, to confuse the particular examples for the general principle (not to mention the difficulty discussed earlier of anchoring those limits in judicially manageable criteria). The vast range of matters today the subject of international concern, discussion, negotiation and agreement was beyond the contemplation of the framers of the Constitution, but the insight that domestic legislation might be necessary to implement treaty obligations undertaken by or on behalf of the Commonwealth was not. This was recognised by a strong majority of the High Court nearly sixty years ago in the Goya Henry Case, and, to refer again to Peter Durack's 1993 paper, I was interested to read his observation that had those judges sat on the Tasmanian Dam Case they would have come to the same conclusion, that is, they would also have upheld the validity of the World Heritage Properties Conservation Act.

As the debate has really moved on from the judicial interpretation of the external affairs power to other ways of attacking the perceived problems, I shall make only two further observations on this aspect of the matter. First, the correctness or otherwise of the High Court's current view is not entirely irrelevant to the question of constitutional amendment. Obviously, if the High Court has got it wrong, that in itself is an argument for amendment. If the High Court has got it right, that does not of course preclude amendment to achieve an arrangement perceived to be superior. But to the extent that it is said that the Constitution should be amended to correct error on the part of the High Court, then for the reasons I have given I do not agree.

Secondly, although I lapsed just now into the convenient shorthand of "right" and "wrong", I remind you, as I said at the outset, that there are no absolutes here. It is a matter of which view you find more persuasive. It would be perverse to deny that there are respectable arguments on both sides. It is of intense interest to me to inquire into why we are persuaded to one view or another. Is it an abstract judgment about the intellectual rigour of a particular argument? Is it a function of our life experience, including whether we come from a large or a small State, or from a privileged or a deprived background, or from a conventional or an alternative family? Is it related to our early childhood experiences? But these are questions of psychology. They merit further investigation, but perhaps not today.

Political constraints

In any event, the upshot of the current interpretation of the external affairs power is that there are few limits of any significance on the ability of the Commonwealth to extend its reach into almost any field of human endeavour. Perhaps partly for this reason, some of the judges have applied a fairly strict test to determine whether legislation passed in pursuance of a treaty is indeed a faithful and appropriate implementation of that treaty, or, in other words, to ensure that the treaty is not merely a peg on which to hang a law dealing indiscriminately with whatever is the general topic of the treaty. Another suggested limit, that the treaty be entered into bona fide, is generally acknowledged to be a weak reed. But the fact that there may be few if any real legal limits on the external affairs power does not mean that there are not political limits. I mentioned earlier that the tax power can be used in a similar way to regulate any field of endeavour by way of tax incentive or disincentive. This is, however, largely theoretical and impractical. The political constraints are obvious. The same might be said of tied grants to the States under s.96 of the Constitution, although that power has historically been used in ways which may reasonably be thought to be inimical to the "federal balance".

I know that it will not satisfy you merely to say that the limits to the exercise of the Commonwealth's external affairs power should be left to be worked out in the political arena. In the political arena, the powerful are likely to prevail. In the absence of legal limits, it is the Commonwealth which will make the ultimate decisions about participation in treaties and about their implementation in Australia, and it is the Commonwealth whose legislation will override that of the States. Under these circumstances, you may think that to leave it all to politics is something of a cop-out.

I think that that would be a simplistic view. In our mature, democratic society we endeavour to work through our representative institutions and to put in place sensible, balanced and rational policies after widespread consultation. The unilateral use of the external affairs power by the Commonwealth, and the unfettered power of the Commonwealth executive to undertake treaty obligations, have been intensely controversial. But these issues have also – indeed, as a consequence of the controversy – been the regular subject of public discussion and enquiry, the latest of which is the wide-ranging reference on the external affairs power to the Senate Legal and Constitutional References Committee. The nature of the political constraints which might be imposed on the exercise of the power, at least in terms of formal mechanisms, is in a state of great fluidity, but the state of the debate is a healthy sign – if I am not being too optimistic – of our democratic institutions at work.

The political constraints that might be imposed – and I am talking here of the formal mechanisms for decision-making rather than the informal sensitivities to public opinion on particular proposals – fall broadly into two groups. The first relates to the relationship between the Commonwealth Parliament and the Commonwealth executive, and in particular to parliamentary participation in and oversight of the treaty-making process. The second relates to the relationship between the Commonwealth and States. The two are of course not entirely unrelated, particularly to the extent that the Senate – theoretically the voice of the States in the federal arena – might be given an enhanced role.

There is a strong case, in my opinion, for greater parliamentary scrutiny of treaty-making. The entering into of international agreements is, and should remain, an executive function. It is an integral part of the conduct of our foreign affairs. But given the role of Parliament in the domestic implementation of treaty obligations, and the more general arguments for enhancing Parliament's role in the interests of a healthy democracy, it would be unsatisfactory for Parliament to be first apprised of a treaty only when a Bill is introduced for its implementation. It would also be unsatisfactory for Parliament to be unaware of and uninvolved in international obligations undertaken by the executive that do not require domestic implementation. The greater the exclusion of the Parliament from the process, the greater the inconsistency with fundamental principles of accountability.

The practice in relation to the tabling of treaties in Parliament has varied over the years, as has the policy of whether that tabling is to enable Parliament to form a view on whether the treaty should be ratified or whether it is simply for information. The current practice of tabling treaties in bulk every six months is clearly not designed to allow Parliament any active role. Indeed, many of those treaties will already have been ratified. On the other hand, a list of all treaties currently under consideration is now being published regularly in the Department of Foreign Affairs and Trade's monthly magazine Insight. This is not a substitute for tabling in Parliament, but tabling can be seen as part of the wider process of community consultation.

It is, however, the purpose of the tabling which is critical. If it were a preliminary step towards enabling either or both Houses of the Parliament to approve or to disallow ratification, that would give the Parliament a more determinative role than if ratification were simply made conditional upon the treaty having lain on the table for a given period. One could of course combine these two ideas and make ratification both conditional on prior tabling and subject to subsequent approval or disallowance. But a point will eventually be reached where the retarding effect of enhanced scrutiny will seriously detract from the practical effectiveness of our

participation in international affairs. It is all a matter of getting the right balance, a consideration to which I will return in a moment.

One of the difficult questions is whether restrictions in the nature of tabling as a precondition to ratification should be statutory restrictions or simply agreed practices. We could of course even attempt to elevate them to constitutional restrictions, but this would surely inject too much rigidity into an area where exceptions will sometimes be necessary and where practices evolve in the light of experience. There are legal and practical difficulties also with a statutory regime, and in this respect I commend to you the characteristically thoughtful submission of Professor Enid Campbell to the Senate Legal and Constitutional References Committee. I must say that I lean towards parliamentary participation as a matter of agreed practice rather than of binding law, but that is a matter of judgment on which reasonable minds can differ. And when it comes to disallowance, it is difficult to see, as a practical matter, a government subjecting itself to a Senate veto.

To introduce another point, there is much to be said, I think, for having a standing committee of the Commonwealth Parliament for the scrutiny of treaties. But parliamentary involvement at the Commonwealth level, although it might help to democratise the treaty-making process, does not directly meet the concerns of those who would wish to see a more significant role for the States. In this respect, there have been various proposals for an Intergovernmental Treaties Council. Again it may be debated whether such a body should be purely advisory and only informally constituted, or whether it should have a statutory basis and functions that legally constrain the power of the Commonwealth executive. Although falling well short of a broadly representative Treaties Council, it was agreed at the Special Premiers' Conference in July, 1991 that there would be an Intergovernmental Standing Committee on Treaties, and also that the pre-existing Principles and Procedures for Commonwealth- State Consultation on Treaties would be reviewed. There is also a veritable horde of Ministerial Councils and committees of officials in particular areas. But, as in the case of appointments to the High Court, we are left in no doubt that the existing mechanisms are consultative and not determinative. As Enid Campbell points out in her submission to the Senate Committee, "It would be extremely difficult to run, in tandem, a legislative regime under which both the Houses of the federal Parliament and a Treaties Council have a secured stake in the treaty-making process". This goes to the matter of balance which I touched on earlier. The treaty-making process should be democratised, and the legitimate interests of the States should also be vindicated. But at the same time the freedom of executive action should not be so constrained that, to use the words of someone who is probably not your favourite High Court judge, Australia would become an "international cripple".

The question of constitutional amendment

It is precisely because it is a matter of balance that I believe it is preferable to seek that balance within the flexibility and fluidity of political arrangements, rather than to etch it in stone by way of constitutional amendment.

Returning now to this question of constitutional amendment, we are talking here primarily about the balance between Commonwealth and State legislative power, rather than about the appropriate degree of constraint upon Commonwealth executive power, the latter debate taking place against an assumed background of unlimited Commonwealth legislative power, and indeed as an indirect way of pegging back the unlimited potential of that power. However, the arguments are similar in kind: how to balance our ability to speak internationally with a single voice, and to act decisively as a nation in international affairs, against the important benefits and values of our domestic power-sharing arrangements, which are designed to allow the input of diverse interests and perspectives, including but not limited to those represented by our groupings into communities called States.

When it comes to the balance between Commonwealth and State legislative power in the implementation of treaties, experience demonstrates that the greater the necessity or occasion for

State legislation, the greater is the potential for delay, lack of uniformity, and even for action by one State to put Australia in breach of an international obligation.

You may well say that that is the price that must be paid to avoid the destruction of our federal system. It depends, I think, on whether you see the federal system primarily in terms of legally enforceable and perhaps fairly static lines of demarcation, or alternatively in terms of more fluid arrangements that can respond to changing political exigencies without necessarily denying a role to the component parts of the federation. I have made clear my own preference for preserving the current potential of the Commonwealth's legislative power in relation to external affairs, and for striving to vindicate our federal values through appropriate political arrangements: that is my preferred balance. I do not believe that this entails the destruction of our federal system. There is no single, right model for a federal system. There is just a range of widely differing systems which exist in fact.

For clarification, let me just add that I am giving here my own view of the desirable balance that the Constitution should strike in the area of foreign relations. My conclusion is that constitutional amendment is unnecessary. But this was not a factor in my earlier defence of the appropriateness of the High Court's current interpretation of the external affairs power, although some of the judges may have appeared to invoke such a consideration. My defence of the current interpretation was based on traditional principles of interpretation and on the elusiveness and invidiousness of any narrower view, invidiousness in the sense of casting the judges into an unacceptably political role. It would be consistent with that defence to say that the end result is undesirable and that the power should be narrowed by constitutional amendment. However, that is not my view. In my view the end result is desirable. But that is (at least in this case) a separate matter from (although equally consistent with) the correctness or appropriateness of the High Court's interpretation of the power.

I have not yet commented directly on Colin Howard's proposed amendment. Clearly, I am opposed to it, irrespective of its precise form. But I would add that it appears to narrow the external affairs power to a considerably greater extent than some like-minded critics of the current situation seem to think necessary or appropriate. I keep going back to Peter Durack's 1993 paper, for although I disagree with it on some fundamental points, I also think that it contains many thoughtful and sensible observations. Senator Durack, as he then was, put forward his own suggested amendment to the external affairs power, which was somewhat broader than Colin Howard's current proposal. In the course of doing so, he observed that whereas another proposal was "too restrictive of Australia's role as a member of the international community", his proposal left "room for flexibility in its application to new and unforeseen developments in the political world, at the same time preserving a significant role for the States". Peter Durack's preferred balance is, I think, closer to the mark than Colin Howard's.

Conclusion

However, these things are somewhat subjective, and, as I said earlier, our positions on these matters may be at least partly the result of rather dimly perceived psychological factors. The Samuel Griffith Society is – and is I think proud to proclaim that it is – a conservative Society. That is, it is dedicated to conserve and defend the existing Constitution, or at least the perceived virtues of the existing Constitution such as federalism and decentralisation of power. What makes one of us a conservative, committed to the preservation of existing values, and another a radical, committed to experimentation and change? What makes one of us a centralist and another a States' righter? What makes some of us passionate about these issues and others indifferent?

I don't know. No doubt we take our respective positions because we think they are right. But none of us can be right, surely, in any absolute sense. The truth is that we differ in our values and our judgments, and probably without really understanding why. These values and judgments are of course not necessarily constants. They may yield to life experience, or even respond to the direct attempts of others to persuade. The lawyer's craft, after all, is the art of persuasion. But if

we step over the line between certainty in our belief and certitude, between confidence and dogmatism, then we would not be according to each other the respect that is a precondition to dialogue. As Julius Stone used to say of the task of judges in making difficult choices, it is necessary to delicately steer a course between baseless dogmatism and paralysing doubt.

I began with Carmina Burana and my astonishing vision of the High Court on fire. Of course it was an illusion. You may think that that is also an appropriate metaphor for the High Court's interpretive techniques. But the Court's interpretation of the external affairs power has had and continues to have real consequences for the nature of the polity. I have argued that those consequences are not inappropriate, and that an acceptable balance between the need on the one hand to have the capacity to pursue a robust and incisive foreign policy, and, on the other, to involve in that process all of the relevant stakeholders, is capable of being hammered out in the political arena. I am sure that if I had only brought with me the orchestra, the choir and the fireworks from Carmina Burana, then I would certainly have persuaded you.

Reprise: Discussion by the three Contributors

1: Professor George Winterton

I want to say something about State constitutional reform, and also perhaps expand my previous comments about a few causes c,lŠbres. I do want to emphasise that, the way I see it, it is largely the potential of the power rather than its exercise that really concerns people.

If you think back on the cases that have been before the High Court on the external affairs power, we first had the Burgess Case, where a lot of what could have been done under the power effectively could have been done under the commerce power, and the same is true of the Airlines of NSW Case. Then we had the Koowarta Case, which admittedly rested on the decision there in relation to the Racial Discrimination Act s validity, which did rest on the power, and I ll highlight that point in a moment. The Franklin Dam legislation was upheld also under the corporations power – they effectively didn t need the external affairs power at all. So really, although that case of course was a critical one in determining the large ambit of the power – that the Commonwealth could implement a treaty on any topic – strictly speaking the ability of the Commonwealth to stop the building of the Franklin Dam did not rest solely on the external affairs power. It rested on it as well as the corporations power, but it could have been done under the corporations power, and the Aboriginal power also would have played a role in that.

The industrial relations legislation which is before the High Court – of course we don t know the outcome of that – rests also on other powers, and may well be upheld. It rests also on the corporations power and the arbitration power. Certainly the commerce power (the interstate and foreign commerce power), especially if it is interpreted in a more modern form as Chief Justice Mason has suggested – and I think rightly so, perhaps not necessarily going down the American path, although that itself is under review by the Supreme Court of the United States – will also support a lot of Commonwealth activity.

When I said earlier that a lot of people would oppose, even though illogically, the reform of the external affairs power on the grounds that they actually like the policy results that flow from it, I think that s an important point to be borne in mind.

It is the case, and I m sure all of you agree, as a matter of federalism, that if you think the States have the power to be right, then they have the power to be wrong. If you think the States have the power to regulate, for example, sexual relationships or criminal law, then they have the power to take action that one may not approve of, just as much as they have the power to take action one approves of. That s an obvious fact that s often omitted, lost sight of, but the fact of the matter is of course that people in voting on a constitutional amendment would take into account what policy results might flow.

Bearing in mind the ability of the Commonwealth to regulate a great deal of economic activity under the commerce power – particularly if it is interpreted in more modern form, which I think is extremely likely from the High Court at the moment – and from the corporations power and

other powers, I think one could say essentially that the main area where the Commonwealth would be using the external affairs power, where people might like it to be used, is in the area of individual rights. After all, of the High Court cases I mentioned, the only one that specifically rested solely on the external affairs power was Koowarta, upholding the Racial Discrimination Act.

The other recent outcry in some quarters about the use of the external affairs power concerned the sexual privacy law, and Colin Howard earlier mentioned the Sex Discrimination Acts, Equal Opportunity Acts and so on. It s really in the area of human rights: I think one could say essentially that if one was looking at where the Australian community might resist reform of the external affairs power because they value the results, it would be in the area of human rights. And this really picks up the point that was suggested by an earlier question about individual liberty. Surely the way to head this off, if we re really trying to protect the States and also, if you like, to make out the best political case for reforming the external affairs power, is for the States to get their own houses in order.

The State Constitutions are, by and large, an awful mess. The only State Constitution that post-dates the second World War is Victoria's, enacted in 1975. The Queensland Constitution in origin dates back to 1867, New South Wales to 1902, Western Australia has two Acts of 1889 and 1899, South Australia's to 1934, and Tasmania s to the same year. The only one that post-dates in any way, in any coherent form, the second World War is Victoria s.

The State Constitutions are rather unexplored territory. People focus solely on the Commonwealth Constitution. Perhaps I could urge this Society, one day, to devote one of its Conferences to focus on the State Constitutions. That would be a very good idea, I m sure most of you would agree with that. But practically, if the State Constitutions, for example, included substantial protection of rights, which I m sure most of you would agree with, the political case for the Commonwealth to interfere in that area, like proposing rights based on international instruments, would have a lot less political weight.

The argument that we re allowing Libya to run our human rights policy is not a popular one, and people I think are in two minds about this. On the one hand the public, if you ask them, would favour certain rights; on the other hand they certainly wouldn t particularly think that the implementation of international instruments is the ideal way to do it. As I mentioned before, it prevents the Commonwealth, for example, adopting the language for a Bill of Rights that it might think preferable. It couldn t, for example, adopt the Canadian Charter; it has to adopt the International Covenant on Civil and Political Rights, even though most people might think the Canadian Charter is preferable.

So my suggestion is really that the thing to do is to focus on rights, and to protect them in the States; and if that s done, the Commonwealth's political case for using the external affairs power to protect rights will be greatly diminished. And if in fact they insist upon interfering-as it might be seen – in imposing their own particular conception of rights, based upon some international instruments, I think public opinion will move in a much stronger way against the use of the external affairs power, and the case for reform along the lines suggested – perhaps not as narrowly as Colin Howard s amendment, but whatever the particular form – will be greatly strengthened. Thank you.

2: Professor Michael Coper

Mr Chairman, I m the most recent speaker, so there s very little that I need to add. Perhaps just very briefly I can make this point, that I think a lot of this depends on how we see ourselves. We of course group ourselves in all sorts of different ways. We might see ourselves as part of the world community; we might see ourselves as part of the Australian community, as Australians; we might see ourselves as part of a State, or as part of an even smaller local community, and all of those things are valid. Where we differ, I suppose, is at what level we think different decisions should be made, and as George mentioned earlier, it is something of a spectrum and different views are possible. But what is the Commonwealth, after all? It is only us, it s us as Australians

from a national perspective, rather than from a State or local perspective. Sometimes we speak as if the Commonwealth is something else, some external foreign alien, visiting from outer space, but it s us. We are part of the Commonwealth. The question of what decisions should be made at that level as against the local level is what the debate is all about.

What I have tried to argue is that we should exercise some caution against asking too much of the judges in setting the limits about where decisions should be made, and that we should endeavour to work it out through the political process.

Now in this respect there is a lot of room to improve our representative institutions. There is a lot of room for making both the Commonwealth Parliament and the State Parliaments more representative and responsive institutions, especially the Commonwealth Parliament, where the theory of the States having a voice through the Senate has of course not been all that significant in the way things have worked out, with party politics and other things. But I think that if we focus our attention too much on the law of the Constitution, and too much on the role the judges might play, we are not going to focus enough on working harder at the political level to vindicate our values such as federalism and sharing of power. We are not going to work hard enough at sorting those things out in the political arena. I believe it is possible, and you might think I m being too sanguine, too optimistic about this and that the Senate Committee will just be another committee report, and if you take the attitude of the present Government, for example Senator Evans statements, you don t get much comfort for those who want more parliamentary scrutiny of the executive government process, but I think these things are possible, and I think that is the arena in which I would be focusing my attention. Thank you.

3: Dr Colin Howard

While it is fresh in my mind I really would like to commend my two critics on their increasingly touching faith in politicians. It is really quite heartening. I also would like to thank Michael for the kind things he said about one of my books. I make two comments about that. By the mere process of writing a book I do not undertake to stop thinking, but rather reserve the right to change my mind. Secondly, if anything I wrote in that book has influenced what he has had to say today, I rather regret it.

I also refer to another striking observation, which I consider really splendid, namely, Michael s comment that as he and George rarely agree about anything, the fact that they agreed about this matter must increase the chances of their being right.Now without directly disagreeing with that, my own view is that equally it increases the chances of their both being wrong, which of course is exactly what has happened today.

I wonder if I might assist the further discussion by circulating copies of the proposed amendment to which I was speaking. One or two people have pointed out that there might be a difficulty in recalling exactly what it was I was proposing.

Let me draw your attention to two sentences in my proposed amendment, labelled (a) and (b). The (a) sentence reads unless the Parliament has power to make that law otherwise than under this sub- section . All that that says is that there is no intention in this amendment in any way to diminish the legislative powers of the Commonwealth under any of the other enumerated sub-sections. The significance of that is that some of the observations that my colleagues have made suggest that my amendment would greatly narrow the scope of Commonwealth legislative powers, which they also seem to feel would be a very bad thing.

The truth is that if you take the originally enumerated powers of the Commonwealth, and if you add in the very expansive principles of interpretation that the High Court has developed throughout the history of the federation, you will find that that covers an enormous amount of ground. The Commonwealth really does have enormous legislative power. And that legislative power covers a wide variety of topics, probably about half of which are very rarely used at all, or at least not challenged. In addition to that there is the back- up of s.109 over-riding State laws; now that gives an enormous amount of Commonwealth legislative power.

Now I go from there to the argument, which appears to be quite strongly pressed, that another effect of the amendment that I have proposed is that it would hamper the Commonwealth in its conduct of foreign policy. I recall, as being absolutely spot-on, the observations made by Sophie Panopoulos, in which she said she couldn t see how this in any way constrained the Commonwealth in that regard. There is no point in seeking to elaborate that point, which seems to me perfectly obvious. The Commonwealth, if it were operating under an external affairs power amended in the way I have suggested, would simply continue to conduct foreign policy in whatever mysterious way it wishes to, making plain from the outset that on certain subjects it will have to seek the consent of the States, or that other conditions will have to be met before the treaty can be ratified. Providing it makes that perfectly clear in its conduct of foreign policy, I cannot see how there can be any constraints.

The point we are trying to constrain, or that I at any rate would like to constrain, is having the Commonwealth using the fig leaf of the external affairs power, and the conduct of foreign policy, in order to acquire yet further extensions of its domestic program.

Now George in his most recent remarks gave a very good run down of the number of leading cases on the external affairs power in recent years where there was seemingly no need to invoke the external affairs power at all; and I thought that was very telling.

We are not a homogeneous country, within our own polity, either geographically or historically. We are homogeneous compared with some others, no doubt, but within ourselves we are not all that homogeneous. There is plenty of room for difference in all sorts of policies, criminal law, for example, being one. Someone has pointed out just recently, not for the first time, that we have in fact the potential in this country to conduct a continuing social laboratory, to find out how things work. We are never going to find out how things work, by contrast, if everything becomes unified and imposed from the last place in the country that seems to be likely to form a reasonably accurate view of what s going on out there.

Now the second sentence in my proposed amendment is (b), whereby the law is made at the request or with the consent of the State . Now that is directly relevant to what I have just said. There are plenty of so- called foreign policy issues which in my view should not be, in effect, determined at the whim or at the speed at which executive government today determines them. I cannot see how that can be any kind of a threat to anybody or anything.

I agree with the observations which were made by several speakers, including my two colleagues, about our tendency to disembody the Commonwealth. What the expression the Commonwealth means depends on the context. It can mean Australia as a member of the international community, it can mean the national population, it can mean some bureaucrats in Canberra, it just depends.

Similarly with the word States and the expression States rights . Just as with the word Commonwealth , they have no fixed meaning but take their meaning from the context. So, for example, the present context is not an arid and pointless effort to defend an abstraction called States rights. It is about over-authoritarian centralised government (the Commonwealth) riding roughshod over the regions which constitute most of the country (the States).

To repeat that point in another way, it is not States rights, but the whole concept of federalism, that is being undermined by misuse of the external affairs power.

One speaker this morning referred to personal liberty, personal freedom, as the ultimate conflict; the open centralisation of power in Canberra and the diminishing capacity of anyone to resist it.

The issue before us today has nothing to do with States rights. It has everything to do with decentralisation of power. Decentralisation of power is summed up in one word: federalism. And it exists precisely in order to make life difficult for central governments. That is exactly why it was put there. If that s under threat, then we are all under threat.

It is under threat from the external affairs power, not the least because that power has been interpreted by the High Court, in exactly the same way as any other power. Michael, for example, compared it to the tax power and the commerce power. It s not the same thing.

Certainly there can be borderline situations, but in themselves the concepts of taxation and trade and commerce are relatively precise, relatively straightforward. But nobody knows what an external affair is. The words external affairs in the Constitution from the very beginning just sat there, as empty vessels waiting to be filled with meaning. During the first half century of federation nobody (or almost nobody) took any notice of them. You did have Burgess Case in the 1930s but you didn t have to rely on the external affairs power in that case, which related to the sensible and proper regulation of airlines. Since then of course people have been pouring whole jugfulls of meaning into it.

So I reject the general line of argument, What s so remarkable about all this, it s all part of the process of growing up, the facts change, but it s all part of the development of the law . It is a very different process from that. It is the arbitrary attribution to the words external affairs of a meaning which subjects our domestic legislative processes to influences almost throughout the world without any noticeable constraints at all. I think that is producing a situation which it is well worth trying to do something to resist.

A lot of comments have been made by my two colleagues about how extremely narrow my own proposal would be. I don t see it as either wide or narrow. I see it as simply curbing the results which are being produced by this almost random progress of High Court interpretations, by a Court which in this area doesn t seem to have its feet on the ground at all, for the most part, plus what has now become quite open political piracy. The distance to which the present federal government has pushed this expansive interpretation is quite extraordinary. It is not so much an intention to subvert the Constitution as to increase its own power in the scheme of things. If anything gets in the way, oh well, call in external affairs .

One last thing that I wanted to comment on was that, perhaps because they didn t consider it to be serious, neither of the other speakers had regard to my point about the exposure to incompetent international bureaucrats. I happen to think that s quite a point. I had an experience recently involving a brief from New Zealand in which I had quite an extensive exposure to the sort of thing which the ILO can get up to, and it was pretty breath-taking stuff. George, you made a lot of reference to experts, in the course of explaining that you didn t know anything about external affairs. You may be interested to know that one of the most experienced, influential and incompetent bodies in the ILO calls itself the Committee of Experts.