# 'FEDERAL' IMPLICATIONS IN THE CONSTRUCTION OF COMMONWEALTH LEGISLATIVE POWER: A LEGAL ANALYSIS OF THEIR USE

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## Introduction

One of the features of the *Franklin Dam* case[1] concerned the way in which it brought into sharp focus the varying approaches and attitudes of members of the High Court in the construction of Commonwealth legislative powers and, in particular, the extent to which implications based on the federal nature of the Constitution can be used in that process. This issue is of fundamental importance and concerns matters at the heart of our system of government including the proper role of the High Court as an organ of government, the relationship between the Commonwealth and the States and, ultimately, the nature and (some would say) continued existence of Australian federalism itself.

The normative question whether federal implications *should* be made, and if so to what extent, might be answered by reference to an analysis of what is best for Australia or for Australian federalism. A political scientist would be expected to take such an approach, freely acknowledging its inevitable subjective elements and relying primarily, if not exclusively, on policy reasons to support a particular and personal view. In contrast, the High Court, at least formally, has taken a different approach. The question of what conclusion should be reached is answered by a distinctive and apparently deductive process of reasoning that is generally expressed in terms that are seen to be constrained by a need to follow earlier judicial decisions or principles. Constitutional conclusions are almost never overtly based on, and only occasionally justified (in an *ex post facto* way) by reference to, policy considerations. There is no place at all for expressions of individual political or philosophical preferences. In this paper, I propose to focus attention on the latter

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1 Commonwealth v Tasmania (1983) 46 A L R 625

approach by evaluating the reasoning used by members of the High Court in relation to the use and content of federal implications in construing Commonwealth legislative powers.

To put this issue into its historical perspective, it is necessary to make some reference to the *Engineers* case.[2] The majority judgment in that case, decided in 1920, has been criticised by commentators as being badly organized with reasoning that is "unconvincing", even "self-contradictory".[3] Yet it is universally recognized as a landmark case; indeed probably the most important case in Australian constitutional law. Since it was decided, all judges of the High Court have purported to follow the principles enunciated by the majority. Three major propositions can be extracted from those principles.

First, in interpreting the Constitution, the ordinary rules of English statutory construction are to be applied "so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning".[4] The majority judgment emphasised the *express* provisions of the Constitution, the need to adhere to the "natural meaning" of the text and the inappropriateness of the use by the judiciary of "political" considerations as a means of constitutional interpretation.[5]

Secondly, the doctrine of immunity of governmental instrumentalities, which had earlier been regarded as a "necessary implication" in a federal system "upheld by the general law of self-preservation"[6] and read into the Constitution by earlier decisions of the Court, was rejected.[7]

Thirdly, although the point did not arise directly in the *Engineers* case, the reasoning of the majority resulted in the overthrow of the more general doctrine of reserved State powers. It had been argued that s.107 of the Constitution provided a limitation or restriction upon the legislative power of the Commonwealth in that it reserved certain powers to the States. Federal concurrent powers, which under s.51 were expressly made "subject to the Constitution", could not be exercised so as to limit State powers continued by s.107. The majority in the *Engineers* case answered that argument in the following way:

> it is a fundamental and fatal error to read sec.107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec.51, as that grant is reasonably construed, unless that reservation is as explicitly stated.[8]

2 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 C L R 129

3 J Fajgenbaum and P J Hanks *Australian Constitutional Law* 2nd ed (1980) 470, R T Latham, *The Law and the Commonwealth* (1949) 563-4 and L Zines *The High Court and the Constitution* (1981) 9

4 Engineers Case, at 155

5 Id at 142, 149 and 150-2

6 Federated Amalgamated Government Railway and Tramway Service Association v N S W Railway Traffic Employees Association ("Railway Servants Case") (1906) 4 C L R 488 at 538

7 Engineers Case, at 151-2

8 Id at 154

## The 'Natural Meaning' of the Constitution

The emphasis given in the *Engineers* case to the express terms of the Constitution is consistent with a judicial approach to the construction of Commonwealth legislative powers that has had widespread support since the earliest years of the High Court. Justice O'Connor, one of the three original members of the High Court bench, when faced with the construction of one of the paragraphs of s.51, stated his preference for the following principle:

> [I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
>
> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.[9]

This statement, in describing an approach which has long been accepted as "the true rule of constitutional interpretation",[10] has been quoted with approval in many recent judgments of the High Court.[11]

The rationale of this approach, evident from the opening words of the passage quoted, has itself been expressed as a a 'well-established' principle that the affirmative grants of paramount Commonwealth powers should be construed in a way that enables the content of such powers (i.e. their 'denotation' rather than their 'connotation') to expand to embrace new events and changed times. The classic statement of this principle is contained in the judgment of Dixon J. in *Australian National Airlines Pty. Ltd.* v *Commonwealth*:[12]

> it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.

9 Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 C L R 309 at 367-8 The power under consideration was s 51 (xxxv)

10 See, e g , the unanimous judgment of the Court in R v Public Vehicles Licensing Appeal Tribunal (Tas), Ex parte Australian National Airways Pty Ltd (1964) 113 C L R 207 at 225-226

11 It was recently approved by the High Court in its unanimous judgment in Ex parte Australian Social Welfare Union (1983) 47 A L R 225 See also the Franklin Dam Case (1983) 46 A L R 625 at 668-9 (Gibbs C J ), 693-4 (Mason J ), 772 (Brennan J ) and 841 (Dawson J )

12 (1945) 71 C L R 29 at 81

A number of subsidiary principles, consistent with the ones referred to above, have been developed and applied by the High Court. Many of these will be considered later in this paper.[13]

## Implied Immunity of Governmental Instrumentalities

The doctrines of immunity of governmental instrumentalities and reserved State powers were both based on 'federal postulates' — implications based on the federal nature of the Constitution and used as a premise of reasoning in interpreting the constitutional grants of legislative power.[14] The majority in the *Engineers* case rejected use of implications based on a concept of federalism:

> It is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution, and which, when started [sic], is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions.[15]

Nevertheless, the rejection by the *Engineers* case of the doctrines of immunity of governmental instrumentalities and reserved State powers and the reaffirmation by the Court of the correct approach to interpreting the Constitution did not mark the end of implications based on 'federalism' in the interpretation of Commonwealth powers under the Constitution. Indeed, the *Engineers* case itself expressly left open the question whether a State would be immune from two types of Commonwealth laws: viz. those imposing taxation and those that intrude upon State prerogative powers.[16]

13 See, e g , below at 121 infra

14 See G Sawer, *Cases on the Constitution of the Commonwealth of Australia* 3rd ed (1964) 14

15 Engineers Case (1920) 28 C L R 129 at 145 Cf Dixon C J in Ex parte Professional Engineers Association (1959) 107 C L R 208 at 309 "The general propositions expressed in the Engineers Case were expressed with a certain emphasis and perhaps copiousness of epithet which no doubt were to be accounted for by the conscious change in fundamental doctrine which the judgment made"

16 Id at 143 In addition, the joint judgment is itself seen as an illustration of the approach of going beyond the text where 'necessary' in the use made of the concept of 'responsible government' as a premise of reasoning see Sawer, supra n 14, at 14 and Zines, supra n 3, at 14 Since then, many judges of the High Court have considered that there is a need for making implications and that it is proper to do so see e g Dixon C J in A N A v Commonwealth (1945) 71 C L R 29, at 85, Windeyer J in Airlines of NSW Pty Ltd v NSW (No 2) (1965) 113 C L R 54 at 115 (Kitto J ) and 149 (Windeyer J ) and, more recently, Murphy J in R v Director-General of Social Welfare for Victoria, Ex parte Henry (1975) 133 C L R 369 and Koowarta (1982) 56 A L J R 625 at 655-6 and Deane J in the Franklin Dam Case (1983) 46 A L R 625 at 801 In this paper I am concerned only with implications based on the 'federal nature of the Constitution'

In subsequent cases, judges of the High Court including, if not led by, Sir Owen Dixon, took advantage of these 'provisos' in the *Engineers* case to develop modified versions of the governmental immunities doctrine — clearly based on implications arising from the federal nature of the Constitution. These versions went well beyond the 'taxation' and 'prerogative' laws put to one side by *Engineers*. In the *Melbourne Corporation* case it was held that the implied prohibition operated to prevent the use of federal legislative power to make

> not a general law . . . but a law that discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers.[17]

Furthermore, strong judicial support has been given to the proposition that even a *general* non-discriminatory Commonwealth law might be invalid if it interfered with the performance by the States of their "essential" or "constitutional" functions.[18]

Ironically, the earlier strands of the doctrine, used to justify the development of the content of this implied prohibition, must now be treated with a great deal of caution. Many Commonwealth taxation laws challenged in the High Court since the *Engineers* case have affected State action or State personnel yet none have been held invalid on that ground.[19] Similarly, Commonwealth laws that have adversely affected a State's prerogative powers have been upheld.[20]

More recent cases have confirmed a tendency to regard interference with the 'functioning' (cf. interference with 'legislative or executive powers') of a State as representing the core of this implied prohibition on the exercise of Commonwealth legislative powers.[21] To the extent that 'discrimination' *per se* is prohibited, (and, as will be argued later in this paper, on the current state of the authorities this is highly questionable) it must be regarded as an independent limb to the doctrine. Thus, in the *Franklin Dam* case, Mason J. put the matter as follows:

17 Melbourne Corporation v Commonwealth (1947) 74 C L R 31 at 79 Dixon J went on to say that the Engineers Case had 'nothing to say' about such a use of power by the Commonwealth

18 See, e g , Melbourne Corporation, at 62 per Latham C J , 66 (Rich J ), 75 (Starke J ) and 99-100 (Williams J ), also Victoria v Commonwealth ("Pay-roll Tax Case") (1971) 122 C L R 353, at 392-3 (Menzies J ), 411 (Walsh J ) and 424 (Gibbs J )

19 The best examples are the Uniform Tax cases (South Australia v Commonwealth (1942) 65 C L R 373 and Victorian v Commonwealth (1957) 99 C L R 575) and the Pay-roll Tax Case, supra n 18

20 See especially Commonwealth v N S W ("Royal Metals Case") (1923) 33 C L R 1 and the discussion of the issue by Mason J in the Franklin Dam Case at 704-5

21 See, e g , Gibbs C J in Pay-roll Tax Case (1971) 122 C L R 353 at 424 and Stephen J in Koowarta (1982) 56 A L J R 625 at 645

> The only relevant implication that can be gleaned from the Constitution . . . is that the Commonwealth cannot in the exercise of its legislative powers enact a law which discriminates against or 'singles out' a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function.[22]

Later in his judgment he explained the operation of the principle and its various threads:

> What it does is to prohibit impairment of the capacity of the State to function as a government, rather than to prohibit interference with or impairment of any function which a State government undertakes. As Stephen J. pointed out in *Koowarta* (ALJR at 645; ALR at 452), the implication is derived from the federal nature of the Constitution and it is designed 'to protect the structural integrity of the State components of the federal framework, State legistlatures [sic] and State executives'.
>
> To fall foul of the prohibition, insofar as it relates to the capacity of a State to govern, it is not enough that the Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.[23]

Although its limits have not been formulated precisely, the validity of the modern version of the implied immunities doctrine is unanimously acknowledged.[24] It has been judicially recognised and discussed on many occasions since the *Melbourne Corporation* case from which it takes its name. Nevertheless, that remains the only case where the principle has been invoked to strike down an otherwise valid Commonwealth law. The steady accumulation of precedents establishing that particular State powers or functions are *not* immune have demonstrated that if the principle is not largely theoretical,[25] its practical operation is extremely narrow.

22 (1983) 46 A L R 625 at 694

23 Id at 703 See also Brennan J at 765-768 Deane J (at 801) appeared to suggest that at least in relation to discrimination, the principle should be confined to a State in the exercise of its executive capacity

24 See, e g , Koowarta (1982) 56 A L J R 625 at 634 per Gibbs D J , 644-5 (Stephen J ), 649 (Mason J ), 655-6 (Murphy J ) and 660-1 (Wilson J ) Note, however, that in the Franklin Dam Case, supra n 22, Deane J (at 823) specifically left open the question "whether that principle should be treated, as it would sometimes appear to be, as if it were embodied in the Constitution as an express overriding guarantee"

25 See P H Lane, *The Australian Federal System* 2nd ed (198) 970 fn 63 and Fajgenbaum and Hanks, supra n 3, at 484 where it is argued that the reluctance or refusal of the Court to commit itself to the doctrine "when it was of more than speculative interest [in the Pay-roll Tax Case] must diminish its credibility"

Recently, however, members of the High Court have illustrated possible applications of the principle. For example, in its unanimous decision in the *Social Wefare Union* case, the Full Court expressly left open the question whether the doctrine would be infringed by "a Commonwealth law which permitted an instrumentality of the Commonwealth to control the pay, hours of work and conditions of employment of all State public servants".[26] This would be an interference not merely with the general law affecting the administrative functions of particular State departments, but with the structural organization of the whole of the State public service and its consequences might be so far reaching as to constitute sufficient interference with the central constitutional integrity of the State governments.

Further illustrations arose from Tasmania's argument in the *Franklin Dam* case that the effect of the legislation in question was to infringe against the *Melbourne Corporation* principle.[27] Gibbs C.J., Wilson and Dawson JJ. did not address the question. They held that the relevant legislation was not authorized under any head of Commonwealth legislative power and was therefore invalid, making it unnecessary to consider the impact of such legislation on State "immunity". Mason, Murphy, Brennan and Deane JJ. rejected Tasmania's argument, having no difficulty in holding that the implied prohibition was not infringed. Murphy J. dismissed the resort to it as "frivolous" and continued:

> The mere fact that the Acts impair, undermine, make ineffective or supersede various State functions or State laws is an ordinary consequence of the operation of federal Acts and does not affect their validity.[28]

On the facts of the case it was inevitable that unless the *Melbourne Corporation* principle was to be *extended* — an invitation rejected by the majority and ignored by the minority — it would have no application to the legislation under challenge. Adopting the words of the Chief Justice in *Koowarta*, there was no real doubt that the provisions of the legislation "do not prevent a State from continuing to exist and function".[29]

However, in the course of their judgments, Justices Mason, Brennan and Deane gave some indication of their views on the scope of certain aspects of the principle. Mason and Deane JJ. conceded that the size of

26. R v Coldham, Ex parte Australian Social Welfare Union (1983) 47 A L R 225 at 236

27 A similar argument was either summarily rejected or ignored by members of the Court in Koowarta (1982) 56 A L J R 625 at 634 per Gibbs C J , (with whom Aickin and Wilson JJ agreed), at 645 (Stephen J ), 649 (Mason J ) and 655 (Murphy J )

28 (1983) 46 A L R 625 at 728 See also at 703 per Mason J , 766 (Brennan J ) and 824 (Deane J )

29 Koowarta (1982) 56 A L J R 625 at 634

the area affected by Commonwealth legislation might activate the operation of the prohibition. Mason J. treated the matter very warily. It was, he stated

> perhaps possible that in some exceptional situations if the area of land affected by Commonwealth prohibitions similar to those imposed by reg.5 forms a very large proportion of the State, the impositions of the prohibitions would attract the *Melbourne Corporation* principle.[30]

But as to the regulations made under the National Parks and Wildlife Conservation Act 1975, he thought this was "certainly not the case" since only 14,125 hectares were affected.[31] Furthermore, even the prohibitions under the World Heritage Properties Conservation Act 1983 which were potentially applicable to the whole of the Wilderness National Parks — a total of 769,355 hectares or 11.3 per cent of the State — were said to be simply "not enough" to bring those provisions within the *Melbourne Corporation* principle.[32] Deane J. considered that although the area covered by the 1983 Act provided a "setting" in which the implied prohibitions argument was advanced with "effectiveness", it did not survive closer scrutiny.[33] It could not "properly be seen as in any way inconsistent with the continued existence of Tasmania or its capacity to function".[34]

Another aspect of the prohibition addressed in the *Franklin Dam* case concerned the State's prerogatives in relation to land affected by the Commonwealth legislation. Tasmania argued that the Wilderness National Parks were 'wastelands of the Crown' and thus that their control was within the prerogative and immune from Commonwealth interference. Consistently with decisions of the High Court since *Engineers* referred to earlier,[35] none of the justices who addressed the matter in the *Franklin Dam* case considered that any special significance should be attached to the fact that a Commonwealth law affected a State in the exercise of its prerogative powers.[36] Brennan J. dealt with this issue at some length. He examined the historical grounds for the claim, noting that "there was a time in the mid-nineteenth century when the legislative control of wastelands was essential to the working of responsible government

30 Franklin Dam Case (1983) 46 A.L.R. 625 at 705
31 Id.
32 Id. at 707
33 Id. at 823
34 Id. at 824
35 Supra n. 20 and accompanying text
36 Franklin Dam Case (1983) 46 A.L.R. 625 at 704-5 per Mason J.; 727 (Murphy J.); 762-6 (Brennan J.) and 823-4 (Deane J.)

in Tasmania".[37] There was a strong inference that if this were still the case (which it was not), the *Melbourne Corporation* principle would apply. Brennan J. hypothesised that there would be "some substance" in Tasmania's argument if the Commonwealth measures "were applied to the buildings that house the principal organs of a State" such as the central Departments of Government, the Parliament or the Supreme Court.[38]

These illustrations highlight the basis, and at the same time the severe operational limitations, of the implied prohibition. As Brennan J. concluded

> . . . it is impossible to suppose that the functioning — as distinct from the powers — of any organ of Tasmanian government is affected by a restriction on the use of land which is not devoted to the functioning of an organ of government.[39]

This distinction is central to a proper understanding of the practical operation of the principle. Despite some apparent misconceptions, the principle does not forbid, and never has forbidden, the expansion of Commonwealth legislative powers in areas 'traditionally' occupied by the States.[40] As Dixon J. explained in the *Melbourne Corporation* case:

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them.[41]

It is significant that none of the minority judges in the *Franklin Dam* case, even as an alternative basis for his conclusions, sought to extend the scope of this implied prohibition to enable it to apply to the legislation in question. None of them disputed the very limited application of

37 Id at 766
38 Id at 767
39 Id
40 e g Lane, supra n 25, appears to argue that this principle should ensure that the States continue as viable units 'and this, of course means with effective powers'
41 (1947) 74 C L R 31 at 82

that principle. Instead, each adverted to what he saw as a need for a different and more effective implied prohibition on Commonwealth legislative power. The approach is exemplified in the following passage by Wilson J.:

> It seems to me that if a whole range of legislative and executive authority which formerly resided in the States is capable of being subsumed under paramount Commonwealth laws then the very constitutional structure of the States is undermined. Of what significance is the continued formal existence of the States if a great many of their traditional functions are liable to become the responsibility of the Commonwealth?[42]

The next section of this paper includes a discussion of the development and use of another federal implication intended to extend the protection given by the implied immunities doctrine by guaranteeing some measure of State legislative power beyond the reach of the Commonwealth Parliament.

## The Reserved Powers Doctrine

It has already been noted that the reserved State powers doctrine (along with the immunity of governmental instrumentalities doctrine), was denounced by the majority in the *Engineers* case. Both doctrines were based on implications arising from 'federalism'. Both operated to restrict the reach of Commonwealth laws. But there is an important difference between them. Despite earlier analyses to the contrary,[43] it is now accepted that the 'immunities' doctrine — like its revamped version, the *Melbourne Corporation* principle — is an implied prohibition that excludes particular matters from the operation of Commonwealth laws that are otherwise within power. Thus, as both the *Melbourne Corporation* case itself and the *Franklin Dam* case demonstrate, the question of the applicability of the prohibition does not arise unless, and until, a law falls within the ambit of a grant of Commonwealth legislative power. As Windeyer J. pointed out in the *Pay-roll Tax* case, the existence of the prohibition "relates to the use of a power not to the inherent nature of the subject matter of the law".[44] It does not affect the interpretation of the scope and mean-

42 (1983) 46 A L R 625 aat 752

43 In the Melbourne Corporation Case (1947) 74 C L R 31, Latham C J and Williams J considered that the application of the principle depended upon a 'characterisation technique' which Barwick C J later adopted as "the real ground of, and, in any case, the only acceptable ground for, [that] decision", Pay-roll Tax Case (1971) 122 C L R 353 at 372-4 This view is no longer regarded as acceptable see, e g Mason J in the Franklin Dam Case (1983) 46 A L R 625 at 694

44 Pay-roll Tax Case (1971) 122 C L R 353 at 403

ing of the relevant Commonwealth power. In contrast, the reserved State powers doctrine was directly concerned with the interpretation of the content of particular grants of Commonwealth legislative power.

As a result of the rejection of the doctrine of reserved powers, the High Court endorsed the principle that the scope of a grant of Commonwealth legislative power is to be interpreted without regard to the powers traditionally exercised by the States. Since the *Engineers* case, there have been consistent reminders of the 'true' and 'correct' approach: the question under s.51 "is always whether a particular enactment is within Commonwealth power. It is never whether it invades a State's domain".[45] Or, as Menzies J. stated in *Airlines of N.S.W. Pty. Ltd.* v *N.S.W. (No.2)*:[46]

> Arguments based upon the extent of State legislative power, or, the extent to which that power has been exercised, to measure or confine the legislative power of the Commonwealth, must, since the *Engineers case* . . . fall upon deaf ears.[46]

There have also been frequent reminders and warnings of the various guises of the fallacy of reasoning from

> some general conception of the subjects which fall within [the undefined residuary of State powers] as if they were granted or reserved to the States as specific heads of power. But no fallacy in constitutional reasoning is so persistent or recurs in so many and such varied applications.[47]

Despite the continuous stream of uncompromising and unqualified judicial statements rejecting the use of State reserved powers reasoning in the process of construing Commonwealth legislative powers, there have been a number of attempts to give a new lease of life in one form or another to that "old and discredited fallacy".[48] Most of these attempts can conveniently be reviewed under three headings: first, the incidental area of power included within each grant of legislative power; secondly, the 'corporations' power and, thirdly, the 'external affairs' power.

*(a) Incidental Area of Commonwealth Legislative Power*

Apart from recent occasions, the most significant illustration of reserved

45 Id at 400

46 (1965) 113 C L R 54 at 143

47 Dixon J in Re Foremen & Sons Pty Ltd, Uther v FCT (1947) 74 C L R 508 t 530 These sentiments have been echoed strongly and persistently by Murphy J in recent cases see, e g , Koowarta, at 656 and Franklin Dam, at 727-8

48 Koowarta, at 662 per Brennan J

State powers reasoning is provided by the High Court's interpretation of the content of s.51(i) under which the Commonwealth has power to make laws with respect to "(t)rade and commerce with other countries and among the States". In the *Railway Servants* case,[49] decided in 1906, the High Court held that since the grant of power in s.51(i) referred only to interstate and overseas trade and commerce, it therefore impliedly withheld from the Commonwealth any power of regulating purely intrastate trade and commerce. Similarly, other cases held that s.51(i) must be read "as if it contained an express declaration" that power to regulate purely intrastate trade "is reserved to the States".[50] This reasoning was "hopelessly opposed" to the *Engineers* case and, accordingly, the *Railway Servants* case was overruled. Using the principles of construction approved in the *Engineers* case, it is clear that s.51(i), broadly construed as a grant of power, does not imply a prohibition on Commonwealth incursions into the domain of intrastate trade. It grants the Commonwealth power over interstate trade but, as Barwick C.J. observed in the course of construing the content of the corporations power, s.51(i) "contains no explicit or implicit prohibition and does not reserve the subject of intrastate trade to the States".[51]

However, insofar as the *incidental* area of s.51(i) is concerned, the High Court has relied heavily on the type of reserved State powers reasoning of the *Railway Servants* case. Briefly, it has been argued that the Constitution makes a distinction between the domestic trade of a State and those types of trade specified in s.51(i) and that the Constitution requires that distinction to be preserved, or at least given great weight, in determining what is within the incidental area of that power (and, indeed, the incidental area of other Commonwealth legislative powers). The classic statement of this approach is found in the following passage from the judgment of Kitto J. in *Airlines of N.S.W. Pty. Ltd.* v *N.S.W. (No.2)*:[52]

> The Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications.

49 (1906) 4 C.L.R. 488

50 Huddart Parker & Co. Pty. Ltd. v. Moorehead (1909) 8 C.L.R. 330 at 352

51 Strickland v. Rocla Concrete Pipes (1971) 124 C.L.R. 468 at 488

52 (1965) 113 C.L.R. 54 at 115

The "constitutional distinction" to which Kitto J. referred is the supposed implied distinction between intrastate and interstate or overseas trade and commerce. In the post-*Engineers* cases where this distinction has been adopted,[53] the relevant reasoning has never been expressed in reserved powers terms. Nevertheless, there is much force in Professor Zines' conclusion that the argument used to support a narrower construction of the incidental area of Commonwealth power "is lacking in logic unless one adopts a doctrine of reserved powers".[54] In more colourful language, Murphy J. has protested that the "maintenance of the supposed division and the further insistence that even the use of the incidental power in s.51(xxxix) cannot obliterate the division, keeps the pre-engineers ghosts walking".[55] It should be noted however, that, to a significant degree, the practical obstacles to Commonwealth legislative power created by this limited interpretation of s.51(i) have been overcome following the rejection by the High Court in the *Rocla Concrete Pipes* case of both the reasoning and conclusion in *Huddart Parker* in relation to the scope of s.51(xx) of the Constitution.[56]

Until recently it appeared that this approach to the construction of the incidental area of s.51(i) would be confined to that head of power. However, in *Gazzo* v *Comptroller of Stamps (Vic)*[57], Gibbs C.J., Stephen and Aicken JJ. (Mason and Murphy JJ. dissenting) held that the provisions of a Commonwealth statute that purported to exempt from State stamp duty (inter alia) instruments made pursuant to an order of the Family Court were not incidental to the marriage or matrimonial causes powers (s.51(xxi) and (xxii) respectively) and were invalid. As is evident from the following passage in his judgment, Gibbs C.J. unequivocally based his conclusion on a form of reserved powers reasoning:

> in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power; that of course would not be relevant if the law were clearly within the substantive power expressly granted.[58]

That statement is expressed rather cautiously: no attempt is made to lay down what *weight* should be given to the fact that the operation of a Commonwealth law invades a State power, nor is there any suggestion

53 See also the Western Australian Airlines Case (1976) 138 C.L.R. 492
54 Supra n.3 at 56
55 Western Australian Airlines Case, (1976) 138 C.L.R. 492 at 530
56 Infra at 14-15
57 (1981) 38 A.L.R. 25
58 Id. at 34

that this fact would *generally* be relevant (cf. "not always irrelevant") in construing the ambit of the incidental area of Commonwealth powers. Note also the Chief Justice's ready acknowledgment that a similar inquiry "of course would not be relevant if the law were clearly within the substantive power expressly granted". Nevertheless, the earlier part of that statement is an extremely rare example — since the *Engineers* case — of an express reliance on a reserved powers implication.

The reasoning of Gibbs C.J. in *Gazzo* has potentially far-reaching consequences in relation to the content of the incidental areas of all Commonwealth legislative powers. However, its impact remains largely speculative and it would be unwise, in the absence of further consideration of this matter by the High Court, to read too much into the Chief Justice's statement. The actual decision in *Gazzo* was reached by a bare majority of a five-member bench. Quite apart from the criticism it has received, the scope of the decision may well be limited to, and supportable as a matter of construction on, its own facts without resort to the wider principle relied upon by Gibbs C.J. In any event, that principle, clearly rejected by the dissenting judges, found direct support only in the judgment of Stephen J. who based his conclusion primarily on other grounds.[59]

*(b) The 'Corporations' Power*

Insofar as the 'core' areas of Commonwealth legislative powers are concerned, the High Court's written judgments have indicated general agreement with the proposition that the reserved powers doctrine was 'exploded' by the *Engineers* case and that any attempt to reintroduce it into the process of construing express grants of Commonwealth powers must be rejected.

Cases dealing with the construction of the Commonwealth's power to make laws with respect to "(f)oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" (s.51(xx)) provide an excellent insight into the tensions resulting from attempts to give effect to (or at least be seen to give effect to) that approach. Reference has earlier been made to the landmark decision in *Rocla Concrete Pipes* where the Court unanimously held that, in respect of the interpretation of s.51(xx) of the Constitution, no regard should be had to the distinction between intrastate and interstate or overseas trade.[60] Accordingly, that grant of power was not (as Griffith C.J. had argued in *Huddart Parker*) to be construed as if the Constitution "contained an express declaration

59 Id at 38 For a justification of the use of a concept of 'federalism' in this context see Zines, supra n 3, at 57-8

60 (1971) 124 C.L.R 468 at 488-9 per Barwick C.J , 499 (McTiernan J ), 508-11 (Menzies J ), 512 (Windeyer J ), 513 (Owen J.), 515 (Walsh J ) and 522 (Gibbs J.)

that power [over intrastate trade] . . . is reserved to the States". All members of the Court, including Gibbs J. (as he then was), agreed that s.51(xx) of the Constitution contained no express limitation to corporations engaged in interstate or overseas trade or commerce and that none should be implied. The present Chief Justice expressly acknowledged in that case that the doctrine of reserved powers "cannot be accepted as correct".[61]

Following *Rocla Concrete Pipes,* the High Court examined the content of the corporations power on at least seven occasions up to and including the *Franklin Dam* case.[62] On all but one (less important) occasion,[63] there were at least two dissentiates and in five cases there were the barest majorities on the interpretation of some major aspect of the power.[64] While some differences of judicial opinion might be expected in the early stages of the construction of an important constitutional power, the recent divisions on the High Court are consistent with a polarisation of fundamentally different views on the scope of s.51(xx).

Yet the semblance of unity apparent from both the reasoning and the decision in *Rocla Concrete Pipes* has been maintained consistently in later cases in the processes of constitutional construction said to be relied upon by all members of the Court. Earlier in this paper, reference was made to the recent unanimous approval by the Court of the true rule of constitutional interpretation set out in a statement of O'Connor J. in *Jumbunna.*[65] Similarly, in interpreting the content of s.51(xx), there has been no dissent from that method of construction. Further, the minority judges in each case have expressly endorsed the use of such principles and rejected unequivocally any reliance on reserved powers reasoning. Perhaps the most significant example is found in the joint judgment of the minority (Gibbs C.J. and Wilson J.) in the *Superannuation Board* case. In the course of their reasoning, Gibbs C.J. and Wilson J. cited and purported to rely on the following argument by Barwick C.J. in the *St George County Council* case in relation to the proper approach to the construction of s.51(xx):[66]

61 Id at 522

62 R v Trade Practices Tribunal, Ex parte St George County Council (1974) 130 C L R 533 ('St George County Council Case'), R v Australian Industrial Court, Ex parte C L M Holdings Pty Ltd (1977) 136 C L R 190 ("Adamson's Case"), Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1981) 40 A L R 609 ("Fontana Case"), Superannuation Board v Trade Practices Commission (1982) 44 A L R 1 ("Superannuation Board Case"), Fencott v Muller (1983) 46 A L R 41 and the Franklin Dam Case (1983) 46 A L R 625

63 In the C L M Holdings Case, supra n 62, the High Court held, with little elaboration, that s 51(xx) or the incidental power would authorize a provision having the same effect as s 5 of the Crimes Act on directors of trading corporations

64 St George County Council Case (where there was a 2-2 split on the constitutional question), Adamson's Case (4-3), Superannuation Board Case (3-2), Fencott v Muller (4-3) and the Franklin Dam Case (4-3)

65 Supra at 3, n 11

66 Superannuation Board Case (1982) 44 A L R 1 at 8-9

> The words should therefore be construed according to the principles of construction appropriate to the construction of the Constitution. Thus, the words must be given their full import without any constraint derived from the circumstance that so construed the constitutional power they express will affect State power, legislative or executive, or that the exercise of the constitutional power so construed will or may affect the exercise of State power. The reserved powers doctrine of the past has been fully exploded: but care needs to be taken that it does not still, in some form or another, infiltrate one's reasoning when construing Commonwealth powers or Acts of the Parliament.[67]

How is it, then, that there is such a gulf between the conclusions reached by members of the Court who generally form the 'majority' and those who form the 'minority' in these cases? The majority's conclusions in interpreting s.51(xx) widely follow from, or are at least consistent with, the principles of construction declared to be applicable; *prima facie* the result is achieved by a direct application of the approach endorsed in the *Engineers* case. As for the minority's conclusions, the judgments themselves contain little to indicate a logical progression from a premise identical to that adopted by the majority to a conclusion that is fundamentally opposed.

A rare reference to the guiding philosophy of the minority approach was given by Gibbs C.J. (with whose reasons Wilson J. agreed) in the *Fontana* case.[68] The Chief Justice stated:

> However, having regard to the federal nature of the Constitution, it is difficult to suppose that the powers conferred by paras (xix) and (xx) were intended to extend to the enactment of a complete code of laws, on all subjects, applicable to the persons named in the paragraphs.[69]

Nevertheless, no explanation was given (or, in the context of s.51(xx), has yet been given) as to how the 'federal nature of the Constitution' operates to negate, or drastically reduce, the application of the *Engineers*

67 In responding to a submission from counsel (in the same case) seeking to distinguish Adamson's Case on the basis of the 'governmental character' of the Superannuation Board, Gibbs C J and Wilson J stated (at 8) 'if the submission is merely an attempt to re-introduce the notion of reserved State rights then of course it invites summary rejection' That statement indicates some confusion between the immunity of governmental instrumentalities doctrine and the reserved powers doctrine

68 (1981) 40 A L.R 609

69 Id at 616 The reference to s 51(xix) is to 'Naturalization and aliens' Unlike the other heads of power in s 51, paras. (xix) and (xx) — together with para (xxvi). the 'race' power — describe a class of persons rather than a subject matter.

principles of construction. Is the concern merely that, in interpreting one paragraph of s.51, assistance may (or should) be sought in the words of another?[70] Or is the concern a wider one, to limit the content of a grant of Commonwealth power where a literal (and hence more expansive interpretation) would result in an encroachment in fields traditionally occupied by the States?

The terms (in contrast to the *conclusions*) of the minority judgments provide no answers and few clues. The approach of construing a particular power narrowly by reference to another or other grants of power is, on currently accepted principles, a limited one. Thus, the mere fact that a construction of a particular power would render otiose the major part, or even the whole, of another grant of power does not require a narrow construction of the first-mentioned power.[71] Different considerations may apply where a head of power contains an *express* exception or restriction.[72] However, the minority judgments do not specifically rely on the content of any one or more grants of Commonwealth power to justify giving s.51(xx) a restricted meaning. Nor do those judgments contain any suggestion (usually associated with the construction of the defence and external affairs powers) that a restricted interpretation is necessary to ensure that the other grants of power are not rendered 'absurd' or 'meaningless'.[73]

The possibility of a wider concern — that a literal interpretation of s.51(xx) would result in an encroachment on powers traditionally exercised by the States — finds some support in the reference by the Chief Justice (with whose judgment Wilson J. agreed) in the *Fontana* case to the need to ensure:

> the proper reconciliation between the apparent width of s.51(xx) and the maintenance of the federal balance which the Constitution requires.[74]

It is significant that this reference to the need for a "federal balance" notion in the context of s.51(xx) was not expressed to be part of the process of reasoning to determine the scope of the power. Instead, it was made

70 In Rocla Concrete Pipes (1971) 124 C.L.R. 468 at 523 Gibbs C.J. mentioned this as a qualification to the rejection of the implied intrastate/interstate trade distinction in s.51(xx).

71 Legislation is generally acknowledged that s.51(xxix) includes the entire subject matter contained in s.51(xxx): see N.S.W. v. Commonwealth ("Seas and Submerged Lands Act Case") (1975) 135 C.L.R. 337 at 471 and 497. See also Attorney-General (Victoria) v. Commonwealth ("Marriage Act Case") (1962) 107 C.L.R. 529 esp. at 560 in relation to the content of s.51 (xxi) and (xxii).

72 Thus, the requirement of 'just terms' in s.51(xxxi) has been interpreted to operate as a general constitutional guarantee. The question in relation to other express restrictions — e.g. those in s.51(x), (xiii) and (xiv) — seem unresolved. See the discussion of this issue in Zines, supra n.3, at 19-21.

73 This issue is discussed later in the context of the external affairs power.

74 (1981) 40 A.L.R. 609 at 616.

in the context of approving the High Court's practice of approaching the interpretation of s.51(xx) "gradually and with caution proceeding no further than the needs of the particular case require". Yet that practice has been approved and adopted by almost all judges of the High Court in the interpretation of s.51(xx) — regardless of their views as to the necessity of preserving the "federal balance".[75] In any event, if the Constitution 'requires the maintenance of the federal balance' it surely does so not only for the purpose of deciding only so much as necessary to resolve a matter before the Court but also for the purpose of interpreting the content of s.51(xx). Yet neither the Chief Justice nor any of the judges who have given s.51(xx) a narrow interpretation have expressly based their reasoning either on the premise that the "federal balance" is required to be maintained or on the premise that the federal nature of the Constitution requires that the words of s.51(xx) be limited in some way.

There is, of course, a striking similarity between the reserved State powers doctrine rejected in the *Engineers* case and the use of a 'federal balance' notion to restrict the literal meaning (i.e. the *"apparent width"* as Gibbs C.J. has conceded) of the corporations power. Having added their own strong condemnation of the reserved powers reasoning in construing Commonwealth legislative powers,[76] the minority judges faced acute problems in justifying their reliance on a federal balance argument. Not the least of these problems is the lack of supporting precedents, particularly on a matter that is widely seen as contrary to the approach endorsed by an authority so apparently revered as the *Engineers* case itself. Another problem is the need to reconcile their conclusions with their own reasoning in other contexts. For example, earlier in this paper it was observed that, in arguing for a reserved State powers limitation in the incidental area of (at least some) Commonwealth powers, Gibbs C.J. had unequivocally ruled out a similar limitation in relation to a "substantive power expressly granted".[77] One is left with the impression that the problems in reconciling these statements were so great that they were more conveniently left unaddressed.

Legal commentators have suggested that there is an important difference between interpreting the Constitution by reference to particular powers that are notionally reserved to the States and interpreting it by

75 See, e g , Rocla Concrete Pipes (1971) 124 C L R. 468 at 490-1 per Barwick C J., and Fontana (1981) 40 A L R 609 at 634 per Mason J and at 645 per Brennan J In Fencott v. Muller, Gibbs C.J. and Wilson J and Mason, Murphy, Brennan and Deane JJ , in their respective joint judgments, agreed that there was no need to determine the validity of a provision which is irrelevant to the issues raised by the parties. Cf Murphy J in Fontana, at 640 In any event, it may well be argued that a case by case approach might also be considered to be the best method of ensuring that s.51(xx) is accorded a *wide* meaning.

76. See, e g., the passages referred to at 118-20 supra

77 Supra at 117

reference to a residue of powers exercisable by the States without Commonwealth intervention. The merits of this distinction will be considered later in relation to the external affairs power.[78] In the present context, it is sufficient to note that both processes of interpretation are patently inconsistent, if not with the principles of the *Engineers* case, then at least with the concession by the Chief Justice and Wilson J. that in interpreting s.51(xx)

> the words used must be given their full import without any constraint derived from the circumstance that so construed the constitutional powers they express will affect State power, legislative or executive, or that the exercise of the constitutional power so construed will or may affect the exercise of State power.[79]

*(c) The External Affairs Power*

The issue of the use of an implication to be drawn from the federal nature of the Constitution which requires preservation of 'the federal balance of powers effected by the Constitution' was raised directly, and openly considered at some length, in relation to the construction of the 'external affairs' power (s.51(xxix) of the Constitution) in the two recent cases of *Koowarta* and *Franklin Dam*.

In *Koowarta* all but one member of the Court cited (or agreed with a judgment that cited) the *Engineers* case and acknowledged both the principles of construction that were endorsed by it as well as the rejection of the doctrine of reserved State powers.[80] However, a majority — Gibbs C.J., Stephen, Aitken and Wilson JJ. — held that, despite *Engineers*, an overriding implied limitation based on the federal nature of the Constitution, and extending beyond such limitations that 'serve to protect the structural integrity of the State components of the federal framework', qualified the ambit of the Commonwealth's external affairs power.[81] This view was rejected by Justices Mason, Murphy and Brennan. The position was reversed in the *Franklin Dam* case where Mason, Murphy and Brennan JJ. were joined by Deane J. in holding that s.51(xxix) is to be construed with all the generality that the words used admit, and that, in the process of that construction, no implication concerning the 'federal balance of power, could be drawn from the Constitution.[82] Gibbs C.J., Wilson and Dawson JJ. dissented.

78 Infra at 128-29

79 Supra n 66 and accompanying text

80 (1982) 56 A L J R 625 at 637 per Gibbs C J (with whom Aickin and Wilson JJ agreed), 650 (Mason J ), 656 (Murphy J ) and 663 (Brennan J )

81 See, e g , Id at 637 (Gibbs C J ) and 643-6 (Stephen J ).

82 (1983) 46 A L R 625 at 693-4 per Mason J , 727-9 (Murphy J.), 769-70 (Brennan J ) and 801-2 (Deane J.)

In stark contrast to the position in the 'corporations power' cases which were examined earlier in this paper, most of the judges who concluded that s.51(xxix) should be given a narrow construction did so expressly on the basis of the "federal balance" implication and each of them sought to justify its use. The one exception was in *Koowarta* where Wilson J. although expressing his 'entire agreement' with the reasons and conclusions of the Chief Justice, added, at some length, his own "supplementary remarks".[83] Those remarks warrant some consideration because they illustrate the extreme reluctance of members of the High Court to acknowledge the place of implications in judicial reasoning of the type adopted by the Court.[83a]

Wilson J. reviewed the earlier decisions of the Court dealing with the scope of s.51(xxix) "in order to show the very limited authority that they provide".[84] He then examined the provisions of the Act under challenge, the consequences of a broad view of the external affairs power and the considerations relating to the implementation in a federation of international obligations. He concluded that s.51(xxix) is not wide enough to enable the Parliament to implement every obligation which Australia assumes in its international affairs. Further, he proposed a test, purportedly "*established* by the earlier decisions" of the Court,[85] requiring that the manner of implementation of an international agreement "necessarily exhibits an international character". Since ss.9 and 12 of the Racial Discrimination Act 1975 did not satisfy that test, they were not laws with respect to external affairs. Then follows this passage:

> It will be appreciated that thus far I have confined my attention to a construction of the scope of the power in relation to the Act in question, without any specific regard to the effect of implications which are to be drawn from the federal nature of the Constitution. Yet it will be evident that those implications provide strong support for the conclusions I have expressed.

The suggestion that the reasoning and conclusions (to that point) proceeded *independently* of 'federal implications' is, with respect, unrealistic. Among other things, it seeks to disguise the fact, acknowledged by Gibbs C.J., Stephen and Aicken JJ., that the justification for the rejection of a wide view of s.51(xxix) rested principally, if not entirely, on implications to be drawn from the federal nature of the Constitution. In the

83 (1982) 56 A L J R 625 at 657

83a This matter is raised again at 27 and 29 below

84 Id at 658

85 Id at 660 (emphasis added) Cp the earlier reference to the *very limited* authority' provided by those same decisions (supra n 84)

absence of 'federal implications', neither authority nor logical reasoning necessitated the conclusions reached by Wilson J. More realistic is Stephen J.'s assessment that it is the use of overriding federal implications that has resulted in qualifications narrowing the otherwise literal meaning of certain subject-matters of Commonwealth legislative power.[86]

Two propositions were accepted by all members of the Court in both *Koowarta* and the *Franklin Dam* case. First, 'the possible subjects of international agreement are infinitely various'.[87] Secondly, the Executive has an extremely wide (if not unfettered) power to enter into a treaty.[88]

The divergence between the two fundamentally opposed views of the Court was apparent in the description of the consequences of a wider construction of s.51(xxix). The judges in *Koowarta* and the *Franklin Dam* case who took a narrower view of the power (Gibbs C.J., Stephen, Aicken, Wilson and Dawson JJ) all relied on a view similar to the following:

> [I]f s.51(xxix) empowers the Parliament to legislate to give effect to every international agreement which the executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power. 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.[89]

Against that background, Gibbs C.J. (with whom Aicken and Wilson JJ. agreed), while specifically acknowledging that the reserved State powers doctrine had been rejected in *Engineers*, considered that "in determining the meaning and scope of a power conferred by s.51 it is necessary to have regard to the federal nature of the Constitution".[90] He sought to justify the use of this implication by reference to a principle of construction adopted by the Court in cases involving the defence power, summed up in the following statement by Latham C.J. in the *Bank Nationalisation* case:[91]

> Accordingly, no single power should be construed in a way as to give to the Commonwealth Parliament a universal power of legisla-

86 Id at 645, also supra n 81 and accompanying text

87 See, e g , Franklin Dam Case (1983) 46 A L R 625 at 669 per Gibbs C J , 691 (Mason J ), 728 (Murphy J ), 752 (Wilson J ), 773 (Brennan J ), 804 (Deane J ) and 843 (Dawson J )

88 Id See also Dawson J at 838-9

89 Koowarta (1982) 56 A L J R 625 at 637 per (Gibbs C J )

90 Id

91 Bank of NSW v Commonwealth (1948) 76 C L R 1, at 184-5

tion which would render absurd the assignment of carefully defined powers to that Parliament.[92]

The Chief Justice noted that the defence power "resembles the external affairs power in the vagueness with which the power is described and in its potentially expansive nature".[93] Next, he analysed what he referred to as "the suggestion of Evatt and McTiernan JJ. in *R* v *Burgess; Ex parte Henry*" that the doctrine of *bona fides* would be an "effective safeguard against the destruction of the federal character of the Constitution".[94] After some consideration, he dismissed this limitation as "at best a frail shield, and available in rare cases". In these circumstances, he concluded, a wide view of the power would result in the Commonwealth having a universal power of legislation that would "render meaningless that 'limitation and division of sovereign legislative authority' which is 'of the essence of federalism'".[95] Thus, the implication based on the federal nature of the Constitution must be utilised to justify a "narrower interpretation of para. (xxix)".

As the only detailed justification in recent times for the use of a federal implication in construing the 'core' content of a Commonwealth legislative power, the argument requires close analysis. First, the clear rationale for the use of the 'federal nature of the Constitution' implication in defence cases has been as a last resort when no other effective limitation was available to prevent the Commonwealth acquiring a 'universal power of legislation'. In relation to the external affairs power, Gibbs C.J. argued that the '*bona fide*' doctrine was not an effective safeguard against such a possibility. But he made no reference at all to the existence of the 'conformity' limitation pursuant to which it has been held that the legislative power under s.51(xxix) is not a power to make laws 'with respect to' the subject matter of a treaty but, rather, to make laws 'carrying out and giving effect to' or 'in conformity with' the subject matter of the treaty. In *Burgess*, Evatt and McTeirnan JJ., who took a very wide view of the external affairs power, not only suggested the '*bona fide*' doctrine (referred to by Gibbs C.J.) but went on to assert that any departure from the requirements of the 'conformity' limitation *"would be completely destructive of the general scheme of the Constitution".*[96]

92 Koowarta (1982) 56 A L J R 625 at 637 This passage was also cited by Gibbs C J , Wilson and Dawson JJ in the Franklin Dam Case (1983) 46 A L R 625, at 669, 752 and 841 respectively Interestingly, of all the judges who took a narrow view of s 51(xxix), only Stephen J did not seek to justify the use of this principle or of a federal balance implication He merely outlined what '*is said to*' be the reasons for its use without any discussion of the validity or merits of those reasons Koowarta, at 643-4

93 Koowarta (1982) 56 A L J R 625 at 637

94 Id at 638

95 Id The quoted words are taken from Spratt v Hermes (1965) 114 C L R 226 at 274

96 (1936) 55 C L R 608 at 687-8 (emphasis added)

The failure by Gibbs C.J. (or any of the Judges who reached a similar conclusion) even to mention this limitation is crucial to an evaluation of the force and merits of his reasoning. It is clearly evident that an integral part of the Chief Justice's reasoning was that if a literal interpretation were to be given to s.51(xxix), the non-existence of an 'effective safeguard against the destruction of the federal character of the Constitution' was a conclusive reason to give to the paragraph a narrow interpretation. Since he relied on the inadequacies of the '*bona fide*' doctrine to argue for the necessity of an implied limitation on the scope of a Commonwealth power, his argument is therefore deficient to the extent that he made no reference to the conformity limitation and, thus, no attempt to assess its adequacies as an effective safeguard. (In passing, it might be also observed that the Chief Justice seriously misrepresented the argument of Evatt and McTiernan JJ. in *Burgess* insofar as he implied that those judges relied solely or mainly on the '*bona fide*' doctrine as an effective safeguard when, in fact, as has been shown, they relied very heavily on the conformity principle.)

The point is significant in another way. If, as has been accepted by every member of the High Court, the Commonwealth's power to implement a treaty under s.51(xxix) is *not* a power to legislate with respect to the subject matter of a treaty but merely a power to carry out and give effect to the provisions of the treaty, then the assumption that, as a result of the executive making international agreements, "the Commonwealth would be able to acquire *unlimited* legislative power" (as Gibbs C.J. stated in *Koowarta*[97]), is logically unsupportable. In any event, no attempt has been made to support that proposition. Indeed, in the *Franklin Dam* case, the terms of the Chief Justice's statements on this matter were moderated somewhat: he spoke of a "capacity for *almost unlimited* expansion".[98a]

The issue is more than a semantic one. Once it is acknowledged that the States have *some* residue of power, the question becomes whether the 'federal nature of the Constitution' principle, invoked to prevent 'a universal power of legislation' being granted to the Commonwealth, would continue to be appliable to protect and preserve a greater measure of State power. In other words, what was originally a question of the *existence* of any State power becomes a question of the *degree* of State power. As will be seen, the latter inquiry raises its own quite different and very serious problems.

To accomodate the concession (from 'unlimited' to 'almost unlimited' Commonwealth powers), the terms in which the safeguarding implica-

97 (1982) 56 A L J R 625 at 637

98 (1983) 46 A L R 625 at 669 (emphasis added) Statements to a similar effect were made by Wilson J (at 752) and Dawson J (at 843)

98a (1982) 56 A L J R 625 at 637

tion was couched also altered accordingly. No longer was the sole concern with the Commonwealth acquiring "a universal power of legislation leading to a unitary system of government" being brought into existence. Instead, the evil to be avoided was "the consequence that the federal balance of powers intended to be protected by the Constitution may be destroyed". However, the 'federal balance' implication is not as easily distinguishable from the reserved State powers doctrine rejected in the *Engineers* case. No serious attempt has been made to do so. In the *Franklin Dam* case, Gibbs C.J., Wilson and Dawson JJ. each countered the charge that the 'federal balance' argument resembled (what they continued to acknowledge to be) the heresy of the reserved powers doctrine by referring to the passage from Latham C.J. in the *Bank Nationalisation* case cited earlier.[99] But the reference is unconvincing because of the important distinction referred to above between the principle endorsed by Latham C.J. and the wider 'federal balance' implication. Wilson J. went further in stating that this approach had nothing to do with the reserved powers doctrine "as it operated before the Engineers case";[100] rather, it "is a question of the survival of the indissoluble federal Commonwealth as the Constitution conceived it to be".[101]

The fundamental weakness of the 'federal balance' argument is that the Constitution itself does not 'conceive' or achieve any particular federal balance. Individual perceptions vary, and will always vary, about what constitutes an ideal balance. It will be recalled that the use of such perceptions in constitutional interpretation was precisely what the *Engineers* case rejected. Federal implications were characterized as "vague, individual conceptions" of the spirit of the Constitution, not referable to "any specific language" but arrived at on the mere "opinions of Judges as to hopes and expectations respecting vague external conditions".[102]

Attempts have been made by commentators to seek to distinguish from the *Engineers* principles a method of constitutional interpretation "by reference to a residue of powers exercisable by the States without Commonwealth intervention" (cf. particular powers notionally reserved to the States).[103] In this context, the distinction is superficial and does little to justify a narrower construction of Commonwealth legislative

99 Supra n 92 and accompanying text

100 One implication from this phrase is that Wilson J may be conceding some operation for the doctrine *since* the Engineers Case

101 (1983) 46 A L R 625 at 732

102 Supra at page 4 Cp Professor Lane's view, supra n 25, at 975, that a "balanced federation is a nice federal balance between fully sovereign States on the one side and an equally sovereign central government on the other side" This notion of the ideal is, under currently accepted principles, not attainable in Australia, cp Windeyer J in Bonser v La Macchia (1968) 122 C L R 177 at 221-2 "The former Australian colonies became States in the new Commonwealth but not sovereign States That term is sometimes heard but it is clearly wrong "

103 See, e g Saunders, *'The National Implied Power and Implied Restrictions on Commonwealth Power'* (1983) ANU Law Faculty Paper, at 13

power. An attempt to determine the content of a Commonwealth power by reference to a residue of State power cannot be undertaken without first determining 'how much' State power is comprised in that residue. The approach adopted in the defence cases to which Gibbs C.J. referred would ensure that the States must have *some* legislative power (in order to deny the Commonwealth a universal power of legislation). To go further to determine, and insist upon, some *particular* measure of State power must involve reference to considerations of the very type that were condemned in *Engineers*. It should be emphasised that the measure of State power must be 'particular' because it bears a direct relationship with the precise content of Commonwealth power.

There is another objection to the 'federal balance' argument that amply demonstrates its inherently subjective character. In the first place, it is arguable that part of the balance of powers between the Commonwealth and the States achieved, and intended to be achieved, by the Constitution was the committal of the "wide and general power" over the subject of external affairs to the Commonwealth.[104] As Deane J. pointed out in the *Franklin Dam* case, there is evidence that even in the 1890's, the 'founding fathers' regarded this as a power of fundamental importance.[105] Secondly, the international expansion since 1900 of the scope of 'external affairs', rather than any change in the meaning of that expression, allows the Commonwealth to enter into new legislative fields; it provides no reason for giving s.51(xxix) an unduly restrictive interpretation. This follows inevitably from the well-established principle that the affirmative grants of Commonwealth legislative powers should be construed in a way that enables the content of those powers (i.e. their 'denotation' rather than their 'connotation') to expand to embrace new events and changed times.[106]

Finally, if the 'balance of powers' notion is a fixed equilibruim — and its proponents have not suggested otherwise — then it is open to the criticism that the true effect of any such 'balance' would be to freeze not only the distribution but the *content* of the distributed powers as at 1900.[107] And, as Brennan J. has pointed out, the approach to constitutional interpretation endorsed in the *Engineers* case "gives the Constitution a dynamic force which is incompatible with a static constitutional balance".[108]

As for the reasoning adopted to support the wider view of the external affairs power, it was mentioned earlier that Justices Mason, Murphy,

104 See, e g , Koowarta (1982) 56 A L J R 625 at 650-1 per Mason J

105 Franklin Dam (1983) 46 A L R 625 at 802

106 Id at 733 and supra at page 3 Cf Dawson J at 842 where the principle is incorrectly stated

107 This point was made by both Mason J (at 692) and Brennan J (at 772) in the Franklin Dam Case

108 Id at 773

Brennan and Deane considered that the application of the principles of construction endorsed in the *Engineers* case (including the rejection of the reserved State powers doctrine) was a comprehensive legal answer to the argument that a construction of s.51(xxix) should be limited by reference to a 'federal balance' implication. Nevertheless, both *Koowarta* and the *Franklin Dam* case contain statements indicating policy reasons why a wide view of the external affairs power, having been justified on 'strictly legal' grounds, should be accepted. The most striking of these was Murphy J.'s contention that if the power was to be narrowly construed, "Australia would be an international cripple, unable to participate fully in the emerging world order".[109] Similarly, Mason J. considered that there was little, if any, evidence to indicate the likelihood of a substantial disturbance of the 'balance of powers' as distributed by the Constitution. But, to the extent that there is to be such a disturbance, "then it is a necessary disturbance, one essential to Australia's participation in world affairs".[110]

The preceding analysis indicates a critical distinction between the approaches of the majority and minority in these cases. Those who favoured the wide view of the power were able to base their conclusions on no more than the plain words of the text interpreted broadly in accordance with accepted principles of construction, although policy reasons were referred to for added support by demonstrating the 'political' advantages of a conclusion reached on legal grounds. In contrast, the members of the Court who took a narrow view of the power needed to find some further justification beyond the words of the text. The 'apparent width' of the content of the power was accepted.[111] But, due to a clearly different, but unacknowledged, doctrinal position some restriction or limitation was sought. Because the existing limitations were held not to provide adequate safeguards, the 'balance of powers' implication was developed.

Consequently, the criticism that the majority in the *Franklin Dam* case failed to deal adequately with the policy issues raised by the arguments of the minority may be not only factually incorrect but misplaced. Mention has already been made of the majority's reasons for rejecting the 'federal balance of powers' implication.[112] Those reasons are not without substance. The question whether they are compelling reasons can be left aside because the majority judges were able to reach their

109 Koowarta (1982) 56 A L J R 625 at 636 Cp Sir Henry Parkes' statement at the 1891 Convention that Australia 'must be sufficiently strong to carry the name and fame of Australia with unspotted beauty and with uncrippled power throughout the world" cited by Deane J in Koowarta, at 802

110 Id at 650 The minority's answer to this is that "the Commonwealth must seek the co-operation of State legislation to ensure that Australia's international obligations are fulfilled" (Wilson J at 661)

111 Supra at 124-25

112 Supra

conclusions by applying accepted principles (which, in the context of s.51(xxix), clearly suited their own doctrinal positions), without any inquiry into the basis of, or justification for, those principles. That battle had been fought and determined in the *Engineers* case. The reasoning and conclusions of the majority was thereby given respectability and, accordingly, there was no reason, in the light of the accepted legalism of the High Court in approaching constitutional issues, why any further inquiry should have been undertaken.

On the other hand, there are strong grounds for arguing that the failure of the 'minority' judges to adequately justify the use of a 'federal balance' implication can be attributed to their unwavering acceptance of the judicial approach favouring a "strict and complete legalism".[113] In *Koowarta* and particularly in the *Franklin Dam* case, there was strong general support for this approach. It was insisted that the questions before the Court were "strictly legal questions",[114] "to be resolved in accordance with legal method and legal principle"[115] and *not* "by according preference to one policy over another".[116] While the merits of such an approach may be questionable (and have been questioned many times), it is clear that, in the context of the interpretation of the scope of the external affairs power, such an approach was ideally suited to those members of the Court who sought to rely on the full import of the words of s.51(xxix) and to reject the use of implications.

Finally, reference should be made to an issue that at least evidences the important underlying differences between the views in *Koowarta* and the *Franklin Dam* case. It concerns the judges' perceptions of the role of the High Court and its relationship with the other organs of government. The members of the Court who argued for a 'federal balance of powers' limitation clearly saw the Court's role as the "guardian of the Constitution".[117] providing a legal impediment to any Commonwealth attempt to 'invade a field of power' traditionally occupied by the States. As Wilson J. stated:

> It is not a satisfactory answer to observe that State laws will be ousted only if the Commonwealth chooses to legislate. Ultimately absolute political power must come to reside with the paramount authority.[118]

113 The expression is, of course, taken from Sir Owen Dixon's speech on being sworn in as Chief Justice (1962) 85 C L R xi at xiv

114 "Statement of the Court" (1983) 46 A L R 625 at 632 and also in the judgment of Gibbs C J at 633

115 Id at 798 per Deane J

116 Id at 762 per Brennan J , see also Wilson J (at 758)

117 See Victoria v Commonwealth (1975) 134 C L R 81 at 118 per Barwick C J

118 Franklin Dam (1982) 56 A L J R 625 at 752

On the other hand, the members of the Court who favoured a wider view of the power relied on the *Engineers* case in support of the proposition that "(a)ny 'extravagent' use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituency and not by the courts (*Engineers* . . .)".[119] Brennan J. rejected the suggestion that the High Court should

> perform what was said to be the great curial function of sustaining the 'balance of our Constitution' . . . it is not the function of the Court to strike some balance between the Commonwealth and the States; that would be to confuse the political rhetoric of State rights with the constitutional question of Commonwealth legislative powers.[120]

However, it was Mason J. who came closest to drawing attention to the serious and delicate institutional problems involved in the High Court adopting a more assertive role vis-a-vis the Executive and the Parliament. The problems are even more acute where use is made of vague and subjective legal standards. According to Mason J., many of the tests suggested by the minority judges

> are not questions on which the court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the Executive Government for determination. The court should accept and act upon the decision of the Executive Government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention.[121]

## Conclusion

The generally unsuccessful attempts by members of the High Court to develop and apply, in the construction of Commonwealth legislative powers, a 'federal balance of powers' implication based on the federal nature of the Constitution has been tentative and unconvincing. The major flaw in their reasoning is the continued insistence of joining the united front of all High Court judges in paying homage to a decision of the Court handed down over 60 years ago. Quite simply, the principles enunciated and endorsed by the majority in the *Engineers* case are fundamentally inconsistent with a process of constitutional construction

119 Id at 728 per Murphy J , see also Deane J (at 802) and supra n 5 and accompanying text
120 Id at 772 and 774 per Brennan J
121 Id at 692

under which the 'apparent width' of expressly conferred Commonwealth powers is sought to be restricted (or 'reconciled') for no other reason than that a literal interpretation would constitute an invasion of some measure (but not all) of the powers traditionally exercised by the States.

Few would deny that there are strong grounds for arguing that in construing the powers of the central government under a federal Constitution, the High Court should have regard to the degree of legislative power retained by the States. However, the judicial proponents of this view have been unable to articulate effectively the grounds for their conclusions. They have been hamstrung by the self-imposed constraints not only of a method of reasoning based on 'strict and complete legalism' but also of a logically insurmountable adherence to the *Engineers* principles of constitutional construction (including the rejection of reserved powers reasoning). This is particularly so in relation to the extra-legal considerations of the type branded as 'political' and outlawed in the *Engineers* case. The result is unfortunate both for those who support the conclusions of the minority judges on broad philosophical or political grounds and for those who would prefer to see a more intellectually coherent level of debate.

There are no such problems for the present majority judges on this issue. If evaluated by reference to accepted methods and principles of constitutional interpretation, the majority's reasoning is logically coherent. Policy considerations may provide a political setting or give some added support but they are strictly unnecessary.

The dual effect of the constraints on the minority's reasoning and the aura of inevitability on the part of the majority's reasoning is disturbing. If, in relation to such a vital issue that goes to the heart of our system of government, important policy questions are addressed, if at all, only in passing, it may be seriously questioned whether the recognized methods and attitudes of the High Court are appropriate. The continued acceptance and use of the *Engineers* principles will inevitably lead to further decisions favouring increased Commonwealth legislative power at the expense of the States and those decisions will have a legal respectability that has in the past provided the Court with a good deal of protection against controversy. But there is undoubtedly significant support — and not only from hard-line 'State righters' — for a change in direction. In the context of the issues considered in this paper, the irony is that the members of the Court whose reasoning would benefit from what would be a radical change in the Court's approach are more traditional and conservative in their views and thus least likely to initiate such a change.

of the parties subsequent to the contravention and it may make any of the orders notwithstanding that the contract has been fully performed. A grant of injunction may be made pursuant to s.80. As any person other than the Minister and the Commissioner may apply for the grant of an injunction, the idea of protecting the public as consumers and the notion of public interest which support the standing to bring suit under s.80 assumes a more remote meaning in the context of s.52A. For a person who seeks an injunction under s.80in respect of unconscionable conduct in a proposed but specific and private contract between parties champions the public interest in a discernibly different sense from one who seeks to restrain misleading or deceptive conduct in trade or commerce within s.52.

Finally attention may be briefly drawn to a matter of terminology and drafting. The proposed s.75B(3) states that a "reference in a provision of this Part, other than sections 80 and 83, to a contravention of, or of a provision of, Part V does not include a reference to a contravention of section 52A". In the light of the convenient distinction between a breach of Division 2 obligations and a contravention of Division 1 provisions in *Zalai* v *Col. Crawford* confusion may arise as follows: if an infringement of s.52A is not a contravention, it is a 'breach' which on the authority of *Zalai* v *Col. Crawford* is not a matter within the jurisdiction of the Federal Court, contrary to the references to "the Court", that is, the Federal Court. This reasoning is of course specious. The breach of a Division 2 implied term entitles the aggrieved party to recover damages as a matter of contractual right and not by virtue of s.82. Moreover the breach of a Division 2 provision is not a contravention to which s.82 applies. Hence the Federal Court which has exclusive jurisdiction in actions, prosecutions and other proceedings under [Part VI] cannot hear a Division 2 matter except as an associate matter. Clearly, an infringement of s.52A not being a contravention only means that it does not entitle one to recover damages under s.82. It does not become a 'breach' which because of some intrinsic quality takes it outside the jurisdiction of the Federal Court and leaves it in a jurisdictional limbo. An aggrieved party who pursues a remedy under s.82A or s.80 is undoubtedly involved in a proceeding under Part VI for which the Federal Court has exclusive jurisdiction.