The External Affairs Power of the Commonwealth and the Protection of World Heritage

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In The Commonwealth v Tasmania *and later cases, the High Court interpreted the scope of the 'external affairs' power of the Commonwealth far more broadly than it had previously done. In this paper, originally delivered as a speech to the Samuel Griffith Society, Sir Garfield Barwick, a former Chief Justice of the High Court, examines the validity of this approach.*

The Commonwealth is a federation of states, formerly self-governing colonies within the imperial system, and was itself a colony within the British Empire, a circumstance which should be remembered when the Constitution is being construed. The state constitutions, though statutory and as modified by the federal constitution,[1] were confirmed by it. The federal constitution is in writing and is explicit as to the powers it creates. It provides for a separation of powers and for a parliamentary democratic system of government.

The constitution lists the matters on which the Commonwealth parliament can legislate. The matters are very succinctly described. The power to levy duties of customs and excise was given exclusively to the Commonwealth but otherwise the powers nominated by section 51 of the constitution are the same legislative powers as are retained by the states. Consequently virtually all the powers given to the Commonwealth, other than the authority to levy customs and excise, are concurrent powers. Any possible conflict of legislation on these subjects is dealt with by section 109 which makes the law of the Commonwealth paramount in case of any conflict

† AK GCMG. Chief Justice of the High Court of Australia, 1964-1981.
1. Constitution Act 1901 (Cth).

of legislative activity; that is to say, paramount to the extent of any inconsistency between the federal and state law on that subject.

It is for the courts to construe the descriptive phrases contained in section 51 to determine their meaning. That determination will be made as of 1900 and the descriptions will retain that meaning throughout, though the field that meaning will cover will depend upon current circumstances and will be found in the course of time to authorise ever-widening actions. Illustrations will be found in the decisions of the courts.

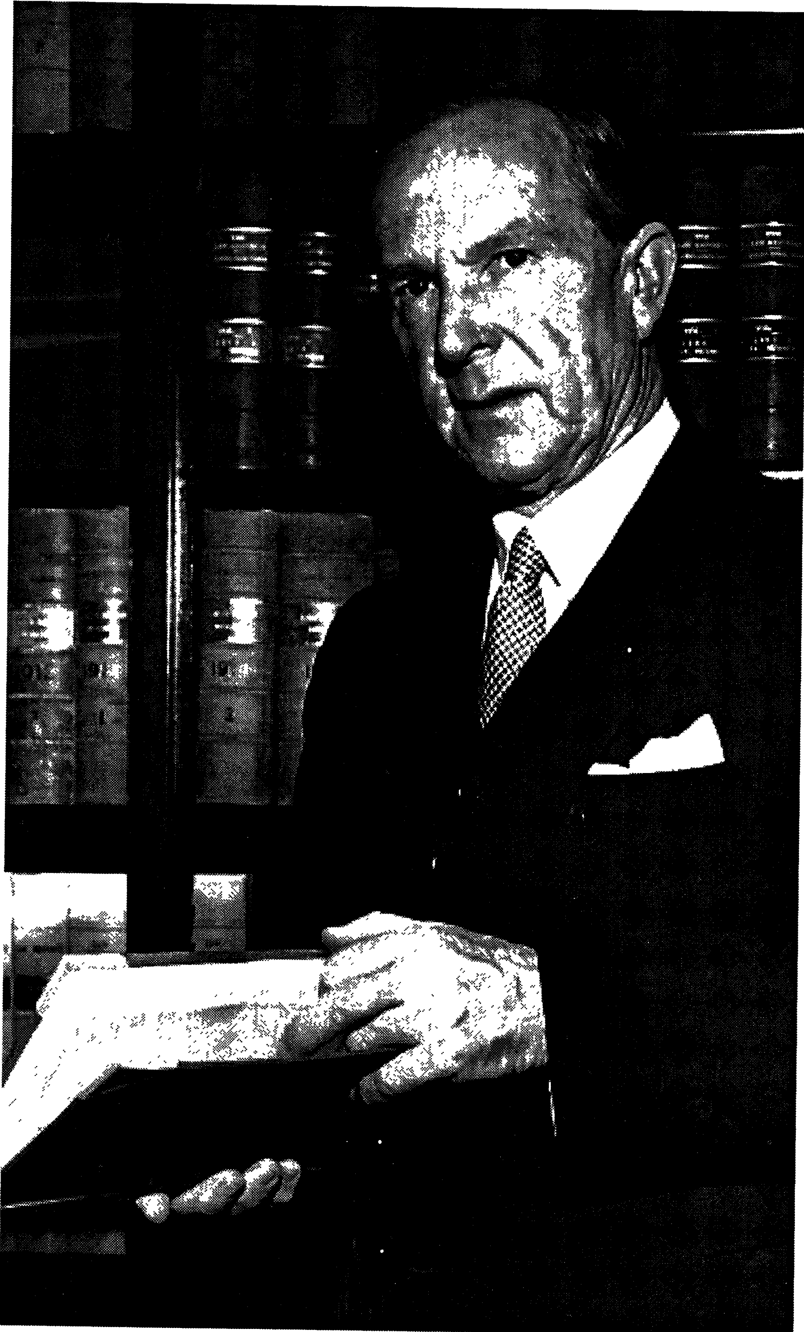
Thus far, we have not adopted the view of the majority of the Supreme Court of the United States about the incorporation of the grant of legislative power in the constitution of that country. That majority has taken the view, strongly opposed by a vigorous minority, that the meaning of the grant will change with the circumstances.

The legislative power to make laws on external affairs is granted by those two words, 'external affairs'.[2] The power granted in this respect will be governed by the meaning of the words 'external affairs' as they were understood in 1900. This cannot properly be read as a grant of power with respect to international relationships but rather, as the words indicate, with respect to external affairs, which must mean the external affairs of the federation, of the Commonwealth of Australia. An affair of the Commonwealth will be a matter of concern to the federation and if, because of its nature, that matter would need external action to accomplish it — to bring it to fruition — it is an external affair of the federation.

An illustration of such an affair would be the national need to make an arrangement with a foreign power or powers, the affair being of intrinsic national quality and the external aspect of it being provided by the external treaty.

In 1974, the Commonwealth became a signatory to the Convention for the Protection of the World Cultural and Natural Heritage under which the Commonwealth undertook obligations expressed in very general and wide-ranging terms to protect the environment, and to submit an inventory of territorial features suitable for inclusion in a list which the World Heritage Committee ('WHC') was required to keep of properties considered to be of world heritage value. The Commonwealth nominated an area in Tasmania known as 'the Gordon River below Franklin Dam area' as suitable for inclusion in the world heritage list. Subsequently that area was accepted as a suitable piece of international heritage by the WHC. The nomination by the Commonwealth was not pursuant to any obligation to make a nomination but entirely voluntary and gratuitous. Thereafter a section of the World Heritage Properties Conservation Act 1983 (Cth)[3] empowered the minister

2. S 51(xxix).
3. S 6.



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to forbid any development of the item nominated to the WHC as suitable for world heritage.

Of course, in 1900 there was no concept of the United Nations nor any activities of that body. The United Nations decided to establish a list of physical manifestations which were to be regarded as the international heritage list and to be voluntarily protected by the nations. The process of identifying the physical object to be included in the international heritage list included the voluntary surrender of power on the part of the national state. It is as well to remember that the United Nations has no legislative power but rather that its activities depend upon the voluntary concurrence of nations in what is proposed.

The Convention for the Protection of the World Cultural and Natural Heritage, to which Australia was a party, did not impose any obligation on the Commonwealth to nominate a piece of territory as suitable for inclusion in the world heritage list. So the Commonwealth's act in nominating the Tasmanian river as suitable for inclusion in the world heritage list was a purely gratuitous act.

The High Court in several recent decisions[4] has taken a much wider view of the grant of legislative power. It seems to me that it has not considered the validity of a statute purportedly giving the ministry authority to prevent development on a slice of Australian land because it has, with the approval of an appointed committee of the United Nations, been placed on a list of heritage properties. The court does not address the question of whether what is authorised is an affair of the federation and test its validity accordingly.

The proposal before the Australian government in 1982 was that it should nominate a slice of Australian territory as suitable for inclusion in a list of international heritage items to be kept by a committee nominated by the United Nations. The statute provided that, as a consequence of the acceptance by that committee of the nominated item as suitable for inclusion in the list, the local government lost control of the territory in the interests of its maintenance and preservation. By no stretch of the imagination could that proposal excite the interest and concern of the Australian community so as to become an external affair of the Commonwealth. In terms the proposal is of international interest and evidently of academic interest, but lacking practical reality. It would be stretching matters beyond breaking point to call the proposal a Commonwealth affair, a matter of interest and concern to the country.

Yet a statute providing for the consequences of the submission of a slice of Australian territory for inclusion in the list of international heritage

4. *Cth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Cth* (1989) 167 CLR 232; *Polyukovich v Cth* (1991) 172 CLR 501; *Horta v Cth* (1994) 181 CLR 183.

items was held by the High Court to be a valid exercise of the legislative power with respect to external affairs.[5] It seems to me that if the very terms of the proposal were taken to represent the circumstances which would justify a statute in carrying them into existence, such an act could not be held to be a valid exercise of the power with respect to external affairs for the reason that the proposal did not constitute an affair of the Commonwealth at all, but was little more than an academic exercise of the United Nations. On that footing the Act would be invalid as a piece of Commonwealth legislation. The idea of placing a slice of Australian territory at the disposal of a committee of the United Nations is little better than fanciful, yet the Court upheld the statute and authorised the submission of a piece of Australian territory for inclusion in the list of international heritage items. It seems to me that it did so not by testing the validity of the statute in the light of the circumstances in which it was being passed, but in the light of the circumstances which would have been created if it had been valid and placed in effect.

On the footing that the grant of legislative power is a power to accomplish an affair of the Commonwealth by external activity it seems to me that if the question be asked, what affair of the federation called for the listing by an appointed committee of the United Nations of a physical item of Australian territory? the answer must be 'none'. It was of no concern to the federation, to the Commonwealth of Australia, to have this area listed by the WHC, however much it was of importance to the international community. I therefore conclude that the nomination of Australian territory as being of international heritage value was not an affair of the federation, and consequently for that reason the statute was void.

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5. *Cth v Tasmania* id.