AN AGREEMENT WITH LEGISLATIVE BACKING WITHIN THE COMMONWEALTH'S EXISTING CONSTITUTIONAL AUTHORITY

5.1 Any legislation passed by the Commonwealth Parliament concerning a compact between the Commonwealth and the Aboriginal people must be within the scope of the powers given to the Parliament by the Commonwealth of Australia Constitution Act. In considering the potential heads of power to enact legislation to give effect to a compact, the Committee examined sections 51(xxvi) the 'races power', 51(xxix) the 'external affairs power' and 51(xxvii) the power to legislate on matters referred by the States to the Commonwealth. Of these, s.51(xxvi) is, in our view, potentially the most useful as the basis for a compact.

Section 51(xxvi): the 'races power'[1]

5.2 The framers of the Constitution apparently gave little thought to the particular situation and requirements of the Aboriginal people.[2] It has been noted that, as a consequence, the Constitution in its original form was 'highly negative' in its references to them.[3]

5.3 A source of the Commonwealth Parliament's power to make laws with respect to the Aboriginal people is s.51(xxvi) of the Constitution:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxvi) the people of any race for whom it is deemed necessary to make special laws:

This power, in its original form, specifically excluded the Aboriginal race from its operation. However, this exclusion was deleted by referendum in 1967.

Background to section 51(xxvi)

5.4 Quick and Garran wrote of s.51(xxvi) in its original form:

> It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.[4]

It is clear from the emphasis given by Quick and Garran, and from the cases cited in their analysis, that they considered the primary function of the provision was to empower the Commonwealth to legislate with respect to such influxes of Chinese and Pacific Islanders as had already occurred in Australia's history, and with any future influxes of people of any race which might occur. They concluded that the placitum gave the Commonwealth Parliament quite wide powers, which they described as enabling 'special and discriminating laws relating to the people of any race' to be passed.[5] The provision conferred no legislative power on the Commonwealth with respect to Australian Aborigines, specifically excluding them as they were considered to be a State matter.

5.5 The effect of the 1967 referendum was to amend s.51(xxvi) by deleting the words 'other than the Aboriginal race in any State'. The purpose of this amendment was to give the Commonwealth Parliament the power to legislate with respect to the Aboriginal people, a power which had previously been enjoyed

exclusively by State legislatures. For example, in his second reading speech for the Constitution Alteration (Aboriginals) Bill 1967, the then Prime Minister, Mr Harold Holt, noted that the effect of omitting the words from the placitum

> ... will be the removal of the existing restriction on the power of the Commonwealth to make special laws for the people of the Aboriginal race in any State if the Parliament considers it necessary. As the Constitution stands at present, the Commonwealth has no power, except in the Territories, to legislate with respect to people of the Aboriginal race as such. If the words "other than the Aboriginal race in any State" were deleted from section 51(xxvi), the result would be that the Commonwealth Parliament would have vested in it a concurrent legislative power with respect to Aboriginals as such, they being the people of a race, provided that Parliament deemed it necessary to make special laws for them. It is the view of the Government that the National Parliament should have this power.[6]

5.6 When the amendment proposal was put to the electorate at the referendum, its purpose was clearly indicated:

> First, it will remove words from our Constitution that many people think are discriminatory against the Aboriginal people. Second, it will make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary.[7]

Commentaries on Section 51(xxvi)

5.7 In an opinion on s.51(xxvi) prepared in 1978 for this Committee's Report on Aboriginals and Torres Strait Islanders on Queensland Reserves, Mr Michael Crommelin considered the effect of deleting the express exclusion in 1967 in the following terms:[8]

> In my view, the effect is no more than to nullify the original result of incorporation of the express exclusion; in other words, the effect is to place the "Aboriginal race" squarely within the ambit of section 51(26).

5.8 As a general principle, the High Court does not refer to the Convention Debates or Parliamentary debates in interpreting provisions of the Constitution.[9] Nevertheless, Prime Minister Holt's second reading speech on the Constitution Alteration (Aboriginals) Bill 1967 and the speeches of others participating in the debate leave no doubt that the Commonwealth legislature's intent in proposing the amendment was to gain a plenary legislative power (concurrent with the States) with respect to the Aboriginal race. Lumb and Ryan make it quite clear that the provision confers such a power on the Commonwealth:

> This amendment has ended any doubts which may have existed as to the power of the Commonwealth to enact laws for the benefit of the Aboriginals, for example by providing a special system of Aboriginal social services or bringing in resettlement and land-owning schemes for the Aboriginal populations of the States.[10]

5.9 The Rt. Hon. E.G. Whitlam, A.C. Q.C. gave an opinion in 1981 of the scope of the Commonwealth Parliament's authority in this area. He said:

> After the 1967 referendum the Federal parliament had the spontaneous and unilateral power to pass laws to ratify treaties affecting Aborigines, like ILO Convention number 107.[11]

5.10 This Committee's earlier consideration of the placitum (in its Report on Aboriginals and Torres Strait Islanders on Queensland Reserves) concluded that the Commonwealth does have

plenary power, concurrent with the States, with respect to Aborigines and Torres Strait Islanders subject to certain express and implied limitations within the Constitution.[12] Examples of express limitations cited by the Committee were freedom of interstate trade and commerce (s.92), freedom of religion (s.116) and freedom from discrimination based on State residence (s.117). The High Court may impose limitations upon broad words of the Constitution by implication. The scope of a general power may be confined in order to give effect to limitations placed upon the scope of a more specific power. An example of this cited by the Committee was that the power to make laws with respect to the people of any race could not be exercised so as to acquire property free of the restrictions imposed by section 51 (xxxi) of the Constitution.[13] This does not amount to a limitation precluding the possibility of the Commonwealth entering into a compact with the Aboriginal people.

5.11 In its 1978 consideration of the scope of the Commonwealth's legislative power with respect to the Aboriginal race, the Committee rejected the view put by the Western Australian Government that the States

> ... have the primary, general and and in most circumstances, the final responsibility for all people, including Aboriginal people, within their territorial jurisdiction.[14]

The Committee agreed that it may be appropriate in some circumstances for the Commonwealth to enter into co-operative arrangements with the States and that the Commonwealth was empowered to do this, 'but the Commonwealth Parliament is in no way precluded from taking unilateral action (with respect to Aborigines) when such action appears warranted.'[15]

5.12 The operation of s.51(xxvi) has been given detailed consideration by the High Court only in the last two years. The provision had been briefly considered, however, in several contexts. In 1906, when s.51(xxvi) still excluded the Aboriginal race from its operation, in Robtelmes v. Brenan Barton J, in considering whether the Commonwealth had the legislative authority to deport Pacific Island labourers, concluded that it did.

> Possibly (by way of) the power in sub-section 26, and I think much more clearly the powers as to immigration and external affairs in paragraphs 27 and 29.[16]

5.13 The placitum was also given oblique consideration by Murphy J in the case of Victoria v. Commonwealth in the context of whether it could be relied upon to support a social welfare plan. He noted that 'legislative power has also been exercised to provide social welfare for Aborigines and other peoples (under s.51(xxvi)).'[17]

5.14 The placitum arose for consideration by the High Court again in two recent cases, Koowarta v. Bjelke-Petersen and Others (1982) 39 ALR 417 and Commonwealth v. Tasmania (the Tasmanian Dam Case) (not yet reported). In Koowarta the plaintiff, an Aboriginal, brought an action under the Racial Discrimination Act 1975 (Cth) alleging racial discrimination on the part of the Queensland Government by virtue of its refusal to approve the transfer to him and other members of an Aboriginal group of a pastoral lease acquired by the Aboriginal Land Fund Commission on their behalf. The refusal was based on Queensland Government policy which did not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal

groups in isolation. The Court examined the constitutional validity of certain sections of the Racial Discrimination Act and the plaintiff's standing to sue under the Act. Although the case turns on a majority view of the external affairs power (s.51 xxix), it nevertheless contains interesting comments on the scope of the races power. All members of the Court, with the exception of Murphy and Mason JJ, considered the placitum in some detail. Gibbs CJ, with whom Aickin and Wilson JJ agreed, considered the placitum to have a wide meaning, while Stephen J introduced some limitations on the potential scope of the power.

5.15 Gibbs CJ affirmed that the early purpose of the placitum had been to enable the legislature to control and administer influxes of foreign racial groups but that, in addition, after its amendment in 1967 and 'in its present form', the placitum empowered the Commonwealth legislature to pass laws 'prohibiting discrimination against people of the Aboriginal race by reason of their race.'[18] Gibbs CJ then clarified some of the terminology used in placitum (xxvi). For example, the ambit of racial groups to which the placitum referred had not previously been considered, the only parameter being 'the people of any race.' Gibbs CJ provided a narrower interpretation of the word 'any', stating that it was used in the sense of 'no matter which' and in the context of the placitum did not mean 'all'. He noted that it is not possible to construe par.(xxvi) as if it read simply 'The people of all races.'[19] The Chief Justice then explained that the method of identifying those racial groups to which the placitum could be applied is the qualification 'for whom it is deemed necessary to make special laws.'

> The Parliament may deem it necessary to make special laws for the people of a particular race, no matter what the race. If the Parliament does deem that necessary, but not otherwise, it can make laws with respect to the people of that race. The opinion of Parliament that it is necessary to make a

> special law need not be evidenced by an express declaration to that effect; it may appear from the law itself. However, a law which applies equally to the people of all races is not a special law for the people of any one race.[20]

It follows therefore that if the Commonwealth Parliament deems it necessary either by express declaration or by implication, it may make special laws for the Aboriginal people.

5.16 Like Gibbs CJ, Stephen J also concluded that placitum (xxvi) authorises the enactment of 'special' laws. However, his interpretation of a 'special' law differed from that of Gibbs CJ to the extent that he considered there was a requirement that there be in fact a necessity for special action before 'special' laws authorised by the placitum could be enacted.

> It cannot be that the grant becomes plenary and unrestricted once a need for special laws is deemed to exist; that need will not open the door to the enactment of other than special laws.
>
> Although it is people of 'any' race that are referred to, I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises; without this particular necessity, as the occasion for the law, it will not be a special law such as s.51(26) speaks of. No doubt it may happen that two or more races will share particular problems within the Australian community and that this will make necessary the enactment of one law applying equally to those several races; such a law will not necessarily forfeit the character of a law under par. (26) because it legislates for several races.[21]

5.17 Mr Gary Rumble, a lecturer in Commonwealth constitutional law at the Australian National University, in submissions to the Committee before and after the High Court's decision in Koowarta, concluded that the Commonwealth has sufficient power to enact legislation to carry out the sorts of undertakings likely to be the subject of a compact. In reaching this conclusion, he analysed, among other powers, the potential scope of section 51(xxvi).[22]

5.18 In his second submission to the Committee, in which among other things he discussed the High Court's conclusions on section 51(xxvi) in Koowarta, Mr Rumble noted the wide, though still largely undefined, powers over Aboriginal matters which the Court in that case appears to have guaranteed the Commonwealth Parliament. After quoting from Gibbs CJ's judgment, he commented:

> That discussion suggests no significant restraint on the kind of laws that can be enacted under s.51(xxvi), but it does not say that the power is unlimited.[23]

Later, in a summary of the Court's approach Mr Rumble stated:

> Apart from Stephen J (and to a lesser extent Wilson J) the members of the Court in Koowarta did not indicate the limits to the kind of laws that may be enacted under s.51(xxvi).[24]

The limitation expressed by Stephen J was that s.51(xxvi) would only permit the Commonwealth to legislate to deal with an existing special need associated with a race.[25] However, Mr Rumble considered that this limitation may prove to be of little assistance in determining the scope of the power:

> This test would be unpredictable in its application and could therefore hinder Makarrata implementation. Large doubt, however, exists as to whether this test will be developed.[26]

5.19 In the Tasmanian Dam Case the High Court was concerned with the validity of Commonwealth legislation based on, among other things, the external affairs and races powers, which sought to make illegal the continued construction of the Gordon-below-Franklin dam by the Tasmanian government. In that case the members of the High Court took a wide view of the scope of the races power. In the event, however, three Justices (Gibbs CJ, Wilson and Dawson JJ) found that the provisions purportedly based on the races power were invalid because they did not constitute special laws for the people of the Aboriginal race but were of the nature of general laws.

5.20 Mason J (at p. 121) said that the power under s.51(xxvi) was wide enough to enable the Parliament

> (a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community; and
>
> (b) to protect the people of a race in the event that there is a need to protect them.

Subsequently, in answer to an argument that, as a subject of the legislative power, the cultural heritage of the people of a race is distinct and divorced from the people of that race so that a power with respect to the latter does not include power with respect to the former, Mason J stated (at p. 122):

> The answer is that the cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.

This statement clearly has considerable significance in the context of legislation to enact the likely terms of a compact.

5.21 Murphy J said (at p. 147):

> A broad reading of this power is that it authorizes any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass special laws.

This goes beyond the view taken by Stephen J in Koowarta (to which reference was made at para. 5.16) in that it leaves it to the Parliament to determine whether the necessity for special laws exists, rather than requiring, as Stephen J appeared to do, that the need exists in fact. Stephen J's view was quoted by Mason J in the Tasmanian Dam Case (at p. 121) and must be taken to have his implicit support. Wilson J (at p. 174) and Dawson J (at p. 305) were of the view that it is for the Parliament alone to deem it necessary to make the law, although the Court must still determine whether the law answers the description of a special law.

5.22 Brennan J (at p. 220) inferred from the passage of the 1967 referendum that the primary object of the power under s.51(xxvi) is beneficial. He continued:

> The passing of the Racial Discrimination Act manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws. Where Parliament seeks to confer a discriminatory benefit on the people of the Aboriginal race, par. (xxvi) does not place a limitation upon the nature of the benefits which a valid law may confer, and none should be implied.

Continuing his broad interpretation of the power, His Honour stated (at p. 223):

> I would not construe par. (xxvi) as requiring the law to be "special" in its terms; it suffices that it is special in its operation.

By way of contrast to the characterisation as general rather than special laws, which Gibbs CJ, Wilson and Dawson JJ placed upon the provisions in question, Brennan J took the following view (at p. 224):

> To confine the legislative power conferred by par. (xxvi) so as to preclude it from dealing with situations that are of particular significance to the people of a given race merely because the statute on its face does not reveal its discriminatory operation would be to deny the power the high purpose which the Australian people intended when the people of the Aboriginal race were brought within the scope of its beneficial exercise.

5.23 Deane J said that the words 'people of any race' have a wide and non-technical meaning and that the phrase is apposite to refer both to all Australian Aboriginal people collectively and to any identifiable racial sub-group among them (p. 255). His Honour stated that:

> The relationship between the Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life ... one effect of the years since 1788 and of the emergence of Australia as a nation has been that Aboriginal sites which would once have been of particular significance only to the members of a particular tribe are now regarded by those Australian Aboriginals who have moved, or been born away from ancient tribal lands, as part of a general heritage of their race (pp. 256-57).

With this in mind, although a law to protect such sites was in the sense a law for all Australians the fact that its operation was to protect and preserve sites of universal value which are of particular significance to the Aboriginal people made it also a special law for them.

5.24 Subsequently, Deane J continued (at p. 258):

> The reference to "people of any race" includes all that goes to make up the personality and identity of the people of a race: spirit, belief, knowledge, tradition and cultural and spiritual heritage. A power to legislate "with respect to" the people of a race includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting property which is of particular significance to that spiritual and cultural heritage.

5.25 However, Deane J thought that an acquisition of land by the Commomonwealth would be involved in the provisions seeking the protection and conservation of the Aboriginal sites and that compensation on just terms as required by s.51(xxxi) was not provided. Accordingly, he ruled that the races power was not effectively used in this instance, thereby leading to a majority of the Court (Gibbs CJ, Wilson, Deane and Dawson JJ) rejecting the purported exercise of the power in this particular case. Nevertheless the scope of Deane J's remarks in relation to the races power is very wide and suggests that he also would uphold the kinds of provisions likely to be enacted in pursuit of the terms of a compact. Indeed if the legislation under challenge had contained provisions satisfying the 'just terms' requirement for acquisition, it is likely that a majority of the Court would have upheld the validity of the Act under the 'races' power, as it did under the external affairs and corporations powers.

Could s.51(xxvi) support legislation for a compact?

5.26 On the narrowest view of s.51(xxvi) which emerges from these judgments, it would appear that if the Parliament deems that the necessity exists and passes special laws for the benefit of people of the Aboriginal race, such laws will be valid. This amounts to a significant power vested in the Commonwealth Parliament to legislate with respect to the Aboriginal race.

5.27 The question is whether this power is sufficiently extensive to authorise legislation for a compact between the Aboriginal people and the Commonwealth. In large measure, the determination of this question will arise in the context of the content of a proposed compact. Nevertheless without pre-determining what such a compact might contain, it is possible to reach conclusions as to whether the general concept of such a compact could be upheld under s.51(xxvi).

5.28 The Committee has noted the scope which the provision might offer as a basis for legislation enacting the likely themes of a compact. These could include, for example, laws dealing with the language and culture of Aboriginal communities; laws for the protection of Aboriginal sacred sites and artefacts; laws recognising and giving effect to Aboriginal law; and laws protecting language rights so as to guarantee the assistance of interpreters to Aboriginal people involved with police, the courts or government departments.[27] All such laws would be special laws for the Aboriginal people. Indeed they call to mind a further comment of Brennan J in the Tasmanian Dam Case (at p. 223):

> ... the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may

provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.

The Committee, fortified by the views of the judges in Koowarta and the Tasmanian Dam Case, is confident that s.51(xxvi) is capable of supporting legislation to carry out the themes of a compact.

5.29 That having been stated, however, it is necessary to point out the obvious political limitation on the use of this power. This arises from the vulnerability of any legislation to substantial amendment or repeal by later Parliaments. Such vulnerability is not, of course, unique to legislation dealing with a compact; it is a risk to which all legislation is subject. Even legislation passed under the general terms of a s.105A-type amendment to the Constitution could later be repealed by the Parliament, but in a political sense there would be some inhibition on the Parliament if it decided to withdraw from the exercise of its undoubted powers, conferred in a special referendum. Nevertheless, given the significance of legislation enacting a compact, exposure to such vulnerability represents a serious draw-back to the use of existing powers as a method of implementation.

Section 51(xxix): the external affairs power

5.30 The source of the Commonwealth's power to make laws with respect to external affairs is as follows:

> 51. The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> (xxix) External affairs:

5.31 It is well established that this placitum authorises the Commonwealth Parliament to enact legislation covering all matters affecting Australia's relations with other countries.[28] The power is wide and in respect of international relations and affairs it is, in practical terms, exclusive to the Commonwealth.[29] It is not the only expressly mentioned source of Commonwealth legislative power with respect to external affairs, but it is the only one stated in such general terms.[30] The conduct of external affairs is accomplished by executive action and does not require legislative support except for the appropriation of money for expenses. Thus the provision is not essential to the conduct of Australia's external affairs by the Commonwealth Government. Section 51(xxix) is, therefore, a source of power to legislate to put into effect internally arrangements made as part of the conduct of external relations. It has been stated by Professor Howard as to the scope of the provision that it

> ... enables the Commonwealth to legislate on an indefinite number of subjects not otherwise within its powers provided that it is doing so pursuant to an external affair (emphasis supplied).[31]

Therein lies the provision's relevance to the matter of a compact between the Aboriginal people and the Commonwealth. Howard notes the possibility that section 51(xxix) is 'a vast potential source of legislative power for the Commonwealth' but that this raises a significant question of the power's extent.[32] (The Commonwealth's otherwise strictly defined legislative authority under the Constitution in general is in marked contrast to this interpretation that section 51(xxix) has possibly a very wide ambit.) Is the external affairs power then to be limited in some way, and, if so, what constraints would future High Court interpretations place on the power's scope? Would the scope of the provision encompass authority to legislate for a compact, or would the High Court consider such legislation to be beyond power?

Effect of aboriginal affairs on Australia's external relations

5.32 The relevance of section 51(xxix) lies in the possibility that a compact could be said to relate to Australia's external affairs. If such a connection can be found, then it is possible that legislation to enforce the provisions of a compact could be enacted under the authority of s.51 (xxix).

5.33 There are two possible methods whereby the question of a compact could come within the external affairs power. The first could arise if there was shown to be a strong link between the legislation and Australia's relations with other countries. In this way what would otherwise appear to be a matter of internal Australian concern only - the condition of the Aboriginal people - could very well be regarded by the High Court as a legitimate subject for the enactment of legislation based on the external affairs power.

5.34 In his first submission, Mr Rumble suggested that this link could possibly be established by the High Court taking judicial notice of facts demonstrating the relevance of the legislation to Australia's foreign relations. Such facts could include the following:

- The treatment of indigenous races is a matter of concern to many nations, especially developing nations;
- Australia's ability to speak with credibility and force on the international issues of South African Apartheid and Civil Rights in USSR is severely undercut by its own record of ill-treatment and neglect of Australian Aborigines;

- The condition of Australian Aborigines is a matter of concern to people around the world (as the recent visit by the World Council of Churches demonstrated).[33]

A further consideration could be the attempt by the Aboriginal people in 1982 to effect a boycott of the Brisbane Commonwealth Games by African nations in support of land rights.

5.35 The second means by which compact legislation could come within the orbit of the external affairs power is as a result of Australia's entering into international treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination or ILO Convention 107 relating to the protection of indigenous minorities. As a result of entering into such treaties it is arguable that what would otherwise be a matter of internal concern and one beyond Commonwealth power under the Federal division of powers could be brought within power because, by entering such treaties, the Commonwealth accepts certain international obligations which it can then put into effect by means of legislation based on s. 51(xxix).

5.36 These questions came to be examined recently by the High Court in Koowarta v. Bjelke-Petersen (1982) 39 ALR 417 in which the Court specifically directed its attention to whether legislation relying upon the external affairs power could be used effectively to outlaw discrimination against Aborigines in a matter relating to land. The Court, by a majority of 4 to 3, upheld the validity of the Racial Discrimination Act 1975 as an exercise of the Commonwealth's external affairs power. The fundamental question facing the Court was what effect the fact of Australia's having an international obligation relating to a subject matter within Australia has on the Commonwealth's power under s.51(xxix). Mr Rumble summarised the attitude of members of the Court to this question in the following way:

Mason, Murphy and Brennan JJ answered:

- the existence of a treaty (or other international) obligation prima facie generates correlative legislative power to fulfil the obligation and the existence of such an obligation can therefore convert a subject matter not otherwise an external affair into an external affair.

Gibbs CJ, Stephen, Aickin and Wilson JJ answered:

- the existence of a treaty (or other international) obligation does not automatically generate a correlative power;

Gibbs CJ, Aickin and Wilson JJ (and arguably Stephen J) added that:

- the fulfilment of international obligations would only come within s.51(xxix) if the subject matter of the obligation was inherently an external affair independently of the obligation.[34]

5.37 Of the majority, Brennan J took the following broad view:

> When a particular subject affects or is likely to affect Australia's relations with other international persons, a law with respect to that subject is a law with respect to external affairs. The effect of the law upon the subject which affects or is likely to affect Australia's relationships provides the connection which the words 'with respect to' require.[35]

Having adopted remarks of Stephen J in New South Wales v. The Commonwealth (1975) 135 CLR 337 at 449,450, including a comment that 'conduct on the part of a nation, or its nationals, which affects other nations and its relations with them are external affairs of that nation', Brennan J added:

> Today it cannot reasonably be asserted that all aspects of the internal legal order of a nation are incapable of affecting relations between that nation and other nations. No doubt there are questions of degree which require evaluation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them, but contemporary experience manifests the capacity of the internal affairs of a nation to affect its external relationships.[36]

5.38 Stephen J, although not sharing the view of Mason, Murphy and Brennan JJ that the very existence of a treaty (or other international) obligation converted a subject not otherwise an external affair into an external affair, nevertheless took a broad view of the potential scope of the power:

> Thus areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding. Nevertheless the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation's 'external affairs'. A subject matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject matter a part of a nation's 'external affairs'.[37]

In his judgment Stephen J concluded that the Racial Discrimination Act was based on an international treaty or convention that did relate to a matter of international concern and was therefore constitutionally valid. The judgments of Mason and Murphy JJ can be read as according with the view of Brennan J that international concern about a subject matter is sufficient to make that matter an external affair.[38]

5.39 The minority judges (Gibbs CJ, with whom Aickin J agreed, and Wilson J) rejected the validity of the Racial Discrimination Act and voiced strong fears that permitting the Commonwealth to enact domestic legislation on the grounds that Australia was a party to an international convention or treaty, and for no other reason, could amount to an unbridled expansion of the Commonwealth's power.

> If Parliament is empowered to make laws to carry into effect within Australia any treaty (made) the result will be that the executive can by its own act, determine the scope of Commonwealth power ... It is impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became a party to an appropriate international agreement.[39]

A significant consequence of such an expansion of Commonwealth power which could meet resistance from the Court in future is that the expansion would take place at the expense of the States' powers.

> There would be no field of power which the Commonwealth could not invade and the federal balance achieved by the Constitution would be entirely destroyed.[40]

5.40 The majority of the Court including Stephen J ultimately upheld the validity of the implementation legislation because the elimination of racial discrimination was very much part of Australia's external affairs.

5.41 The extent of the external affairs power was again considered by the Court in the Tasmanian Dam Case, as the Commonwealth legislation under challenge sought to rely in part upon an exercise of that power as a means of meeting its obligations as a party to the World Heritage Convention. The

majority (Mason, Murphy, Brennan and Deane JJ) gave a wide interpretation to s.51(xxvi). Their consideration was largely given over to the connection between treaty obligations and the external affairs power. Nevertheless it is possible to draw tentative conclusions about the likely attitude the Court would take about matters of international concern not the subject of a treaty.

5.42 Mason J suggested (at pp. 83-86) that the Koowarta decision could be taken as turning on Stephen J's view of the external affairs power, as it reflected the narrowest expression of it by the majority Justices. On this basis, the case is authority for the proposition that the power authorises a law giving effect to an obligation imposed on Australia by a bona fide international convention or treaty to which Australia is a party, at any rate so long as the subject matter of the convention or treaty is one of international concern, or of concern to the relationship between Australia and the other party or parties. The question which arises then is: What is meant by the requirement that the subject matter of a treaty should be of international concern or of special concern to the relationship between Australia and the other parties?

After considering this question, Mason J concluded (at p. 86):

> All this indicates an absence of any acceptable criteria or guidelines by which the Court can determine the "international character" of the subject matter of a treaty or convention. The existence of international character or international concern is established by entry by Australia into the convention or treaty.

5.43 Another member of the majority, Brennan J (at pp. 192-93) examined the judgments in Koowarta, including that of Stephen J, but said he would adhere to his own view in that case ((1982) 56 ALJR 625 at p. 664):

> A treaty obligation stamps the subject of the obligation with the character of an external affair unless there is some reason to think that the treaty had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament. Only in such a case is it necessary to look at the subject matter of the treaty, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes in order to ascertain whether there is an international obligation truly binding on Australia.

On the basis both of this test and of that of Stephen J, His Honour had no difficulty in holding that there was sufficient power to make a law to fulfil the obligation which Australia had undertaken in the World Heritage Convention.

5.44 Murphy J (at pp. 136-37) took a very expansive view of the provision, albeit stating that it was preferable that the circumstances in which a law was authorised by the external affairs power be stated in terms of what was sufficient rather than in exhaustive terms. In his view it was sufficient that the law:

(a) implements any international law, or

(b) implements any treaty or convention whether general (multilateral) or particular, or

(c) implements any recommendation or request of the United Nations Organization or subsidiary organizations such as the World Health Organization, The United Nations Education, Scientific and Cultural Organization, The Food and Agriculture Organization or the International Labour Organization, or

(d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia, or

(e) deals with circumstances or things outside Australia, or

(f) deals with circumstances or things inside Australia of international concern.

5.45 The fourth member of the majority, Deane J, also expressed a view which went beyond the link with a treaty obligation, harking back perhaps to the sort of 'matter of international concern' alluded to by some members of the majority in Koowarta. His Honour said (at p. 239):

> The establishment and protection of the means of conducting international relations, the negotiation, making and honouring (by observing and carrying into effect) of international agreements, and the assertion of rights and the discharge of obligations under both treaties and customary international law lie at the centre of a nation's external affairs and of the power which s.51(xxvi) confers. They do not, however, cover the whole field of "external affairs" or exhaust the subject matter of the legislative power. The full scope of the power is best left for determination on a case by case basis - "by a course of decision in which the application of general statements is illustrated by example" (per Dixon J. in Burgess' Case, at p. 669). It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation ... Circumstances could well exist in which a law which procured or ensured observance within Australia of the spirit of a treaty or compliance with an international recommendation or pursuit of an international objective would properly be characterized as a law with respect to external affairs notwithstanding the absence of any potential breach of defined international obligations or of the letter of international law.

5.46 These views of Murphy and Deane JJ, taken together with the broad views expressed by the other majority judges in the Tasmanian Dam Case as to the necessary connection between treaty obligations and the law to effect those obligations, suggest a considerable expansion of the area of operation of the external affairs power. Taken in conjunction with the views of Mason and Murphy JJ in Koowarta, that international concern about a subject is sufficient to bring that matter within the ambit of the external affairs power, it seems likely that the stance of the High Court is such that it may well be sufficient to support a law under s.51(xxix) if it can be shown that the subject matter of the law is a matter of international concern, whether that concern is evidenced by the existence of a treaty to which Australia is a party or by other evidence. Thus, for example, it may be that those arguing the validity of the law would seek to show that the conditio of the Aboriginal people could be shown to be a subject of international concern, likely to affect Australia's relations with other nations. The link could be established as a result of the High Court taking into account either by way of judicial notice (as Mr Rumble suggested - see para 5.34) of certain facts, or by way of evidence led by the Commonwealth. Alternatively, it seems clear that by linking legislation for a compact to Australia's obligations under such treaties as the International Convention on the Elimination of All Forms of Racial Discrimination or ILO Convention 107, it could be brought within the power of s.51(xxix).

5.47 The Committee, having considered the external affairs and races power, is of the view that, there exists adequate constitutional power to support carefully considered legislation for a compact. That having been stated, however, we must reiterate our concern at the political vulnerability to which any such compact legislation would be subject, due to the possibility of amendment or repeal by subsequent Parliaments.

Section 51(xxxvii): reference of powers by States

5.48 The Commonwealth Parliament has power to enact legislation with respect to matters referred to it by State Parliaments. Section 51 (xxxvii) of the Commonwealth Constitution provides as follows:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxxvii) Matters referred by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

This power would operate to enable the States to refer to the Commonwealth their concurrent power with reference to the people of the Aboriginal race thus leaving the field exclusively to the Commonwealth to achieve an agreement affecting all Aboriginal people and Torres Strait Islanders. If it were desired to achieve uniformity, throughout Australia, this technique would require all States to refer power authorising the Commonwealth to legislate for a compact. However, following the inability of all States to agree in recent years to refer family law matters to the Commonwealth, doubts have been expressed about the likelihood of getting all States to agree to such a reference.

5.49 Nevertheless, in the event that the High Court determined that some particular exercise of legislative power purportedly based on the races or external affairs powers was invalid, then a reference of the necessary legislative power could be sought from the States or any one, or some, of them. Section 51(xxxvii) has not been much used because of the difficulties and uncertainties relating to the termination by a State of the reference of power. It is noted, however, that a

Bill for a referendum to alter the Constitution to enable mutual inter-change of powers between the States and Commonwealth is currently before the Parliament. One effect of this constitutional alteration will be to clarify the right of a State to terminate the reference of power. This may make the States more willing to use this type of device in future. However, it will be apparent that this exposes the compact to serious vulnerability as a State could withdraw the reference at any time.

Endnotes

1. This Committee has previously considered the Commonwealth Parliament's powers to make laws with respect to Aboriginals and Torres Strait Islanders, see Senate Standing Committee on Constitutional and Legal Affairs, Report on Aboriginals and Torres Strait Islanders on Queensland Reserves, Canberra, AGPS, November, 1978 (Parl. Paper 330/1978).

2. 'Neither Deakin nor any other delegate ever suggested even in passing that there might be some national obligation to Australia's earliest inhabitants.' G. Sawer, 'The Australian Constitution and the Australian Aborigine', (1966) 12 F.L. Rev. p. 17.

3. ibid p. 18, note that this article was written before the 1967 amendments to the Constitution. The two references to Aborigines which Sawer considered to be negative were sections 51(26) and 127 both of which were subsequently amended.

4. J. Quick, R.R. Garran, The Annotated Constitution of the Australian Commonwealth, London, 1901, p. 622.

5. ibid, p. 623.

6. Australia, House of Representatives, Debates, 1967, Vol. 56, p. 263.

7. Arguments For and Against the Proposed Alteration together With a Statement Showing the Proposed Alteration, p. 13.

8. Report on Aboriginals and Torres Strait Islanders, op. cit., p. 57.

9. Barwick CJ stated the risk of using the Convention Debates in Attorney-General for Australia (at the relation of McKinlay) and Others v. Commonwealth of Australia and Others (1975) 7 ALR 593 at 600. An example of the rule that courts will not look at proceedings in Parliament or to Parliamentary Debates as an aid to the interpretation of a statute is South Australian Commissioner for Prices and Consumer Affairs v. Charles Moore (Aust) Ltd (1977) 139 CLR 449.

10. R.D. Lumb, K.W. Ryan, The Constitution of Australia. Annotated, 2nd ed., Sydney 1977 p.145.

11. Evidence p. 809, Australia's International Obligations on Aborigines, speech by Hon. E.G. Whitlam, A.C., Q.C., University of NSW, 31 October 1981.

12. Report on Aboriginals and Torres Strait Islanders on Queensland Reserves, op. cit., p. 3.

13. ibid, p. 4.

14. ibid, p. 13.

15. ibid.

16. (1906) 4 CLR 395 at 415.

17. (1975) 134 CLR 338 at 419.

18. (1981-82) 39 ALR 417 at 429.

19. (1981-82) 39 ALR 417 at 429.

20. (1981-82) 39 ALR 417 at 429.

21. (1981-82) 39 ALR 417 at 447.

22. Evidence, pp. 451-513.

23. Evidence, p. 499.

24. Evidence, p. 508.

25. (1981-82) 39 ALR 417 at 447, quoted at p. 86 above.

26. Evidence, p. 509.

27. Evidence, pp. 464-5.

28. R. v. Burgess; Ex Parte Henry (1936) 55 CLR 608.

29. Lumb and Ryan, op. cit., p. 151.

30. s.51(i) trade and commerce with other countries; 51(x) fisheries in Australian waters beyond terrtorial limits; 51(xxx) relations with islands of the Pacific: C. Howard, Australian Federal Constitutional Law, 2nd ed. Sydney, 1972, p. 442.

31. ibid.

32. ibid, p. 443.

33. Evidence, p. 485.

34. Evidence, p. 510.

35. Koowarta v. Bjelke-Petersen and Others, per Brennan J (1981-82) 39 ALR 417 at 431.

36. ibid, at p. 486.

37. ibid, at p.453.

38. Evidence, (G. Rumble) p. 512.

39. (1981-82) 39 ALR 417 at 438.

40. Per Gibbs CJ (1981-82) 39 ALR 417 at 438.