ABORIGINAL LAND RIGHTS: THE CONSTITUTIONAL BASES OF THE PRESENT REGIME

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INTRODUCTION

On 3rd March, 1986 the Minister for Aboriginal Affairs, Mr. Clyde Holding, announced the Commonwealth Government's preference that Aboriginal land rights be implemented by State action, consistent with the Commonwealth's stated principles, rather than by overriding national legislation.[1]

In his statement to Parliament of 18th March, 1986 Mr. Holding acknowledged that '[the] Government accepts that the 1967 referendum gave the Commonwealth a special and overriding responsibility for the welfare of Aboriginal people'.[2] Yet he stressed that '[r]esponsibility for Aboriginal advancement does not, as some would believe, lie solely with the Commonwealth as a result of the 1967 referendum . . . It is a shared responsibility' (with the states).[3] Thus, the Government reaffirmed its support for the principles embodied in its 'Preferred National Land Rights Model', as enunciated in February, 1985[4] but expressed its intention to seek to implement those principles, in the first instance, 'by cooperation with the States'.[5]

There can be no doubt that the competing approaches articulated by the Minister in his statement to Parliament — special Commonwealth responsibility on the one hand and a shared Commonwealth-State responsibility on the other — are firmly supported by Australian

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[1] Statement to Parliament by the Minister for Aboriginal Affairs, 18th March, 1986 — Land Rights.

[2] *Ibid.*

[3] *Ibid.*

[4] The 'Preferred National Land Rights Model', distributed by the Commonwealth Government for discussion in February 1985, called for the granting of secure tenure to Aboriginal groups occupying traditional land; the capacity for those groups to exercise control over mining on that land; the protection of sacred sites; the payment of royalty equivalents; and the negotiation of compensation for dispossesion of land. Under the preferred model, Commonwealth legislation was to 'be capable of operating concurrently with compatible State legislation'; the Commonwealth was 'not to seek to override State land rights legislation which is consistently with the Commonwealth's preferred model'; and the Aboriginal Land Rights (Northern Territory) Act (1976) was to be amended consistent with the Commonwealth preferred model.

[5] Statement to Parliament, 18th March, 1986.

Constitutional law.[6] The criticism which greeted the Government's 3rd March pronouncement[7] did not challenge the constitutionality of the Government's approach; rather, the Government's political will to fulfill its special responsibility was attacked by those sympathetic to the cause of Aboriginal land rights. The purpose of this paper is not to speculate on that political controversy . Rather, the purpose is to examine the constitutional basis for Commonwealth, State and territorial legislation on Aboriginal land rights, and to comment on the manner in which the present structure of Aboriginal land rights is consistent with this allocation of powers.

SECTION 51(26)

In 1901, when the Australian Constitution came into effect, governmental responsibility for Aboriginal affairs was regarded as a matter for the States. Section 51(26) of the Constitution, in its original form, stated that:

> The Parliament shall, subject to this Constitution, have power to make laws . . . with respect to . . . the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws. (Emphasis added).

The 'special laws' power was not an enabling provision through which beneficial laws were intended to be enacted for minority groups; rather, s.51(26) was designed to empower the Commonwealth 'to deal with the people of any alien race after they have entered the Commonwealth'[8]. In other words, the special laws power was designed to permit Commonwealth discriminatory legislation against 'outsiders' in dealing with the perceived threat to European dominance in Australia.

As late as 1929, the Royal Commission on the Constitution acknowledged that the effect of s.51(26) was to vest control over Aboriginal affairs in the States, particularly in view of the State control of 'police and the lands'[9]. The Royal Commission recommended against amending s.51(26) so as to give the Commonwealth full responsibility for Aboriginal affairs.[10]

Nevertheless, the Commonwealth did assume some responsibility for Aboriginal affairs in the Northern Territory, pursuant to the broad territorial power of section 122 of the Australian Constitution.[11]

[6] The Commonwealth Government's special authority in this area is most clearly articulated in s.51(26) of the Constitution. The States' legislative authority, in the absence of overriding Commonwealth legislation within the meaning of s.109, is acknowledged in s.107 of the Constitution.

[7] *Age* (Melbourne), 5 March 1986 (Editorial: 'Shattered hopes of land rights'); *Age* (Melbourne), 5 March 1985 ('Backlash on rights'); *Age* (Melbourne), 6 March 1985 ('Compassion has declined: PM'); *Age* (Melbourne), 26 March 1985 ('Betrayal of Trust', essay by Dr. Coombs); *Age* (Melbourne), 8 July 1985 ('Tempers flare in land rights vote').

[8] Quick, J. and Garran, R.R., *The Annotated Constitution of the Australian Commonwealth* (1901) 622.

[9] Australia, *Report of the Royal Commission on the Constitution* 1929, 270.

[10] *Ibid.* 270, 303.

[11] See *e.g.,* the Northern Territory Aboriginals Act 1910 (Cth) and the Aboriginals Ordinance (No. 9 of 1918), under which Commonwealth power over Aborigines in the Northern Territory was exercised through the Commonwealth Government's Department of External Affairs.

In 1967, Prime Minister Holt introduced a bill to amend the Constitution by repealing s.127 (which prohibited the inclusion of 'aboriginal natives' in determining the population of Australia) and by deleting the words 'other than the aboriginal race in any State' from the special laws power of s.51(26).[12]

The Prime Minister stated that the amendment to s.51(26) would give the Commonwealth Parliament 'concurrent legislative power with respect to Aboriginals';[13] nevertheless, he indicated his support for what later became known (during the Fraser Government) as 'cooperative federalism' by stating that the Government would seek to secure with the States 'the widest measure of agreement with respect to Aboriginal advancement'.[14]

On 27th May, 1967 in the 'most massive expression of the general will ever known' in Australia,[15] the people of Australia approved the granting to the Commonwealth Parliament of the power to pass laws with respect to Aboriginal people under s.51(26). In the words of E. G. Whitlam:

> The referendum was not designed merely to remove discrimination against Aboriginals; its purpose was to give the National Parliament and the National Government authority to grant especially favourable treatment to them to overcome the handicaps we have inflicted on them.[16]

Although the parameters of s.51(26) came to be explored through Commonwealth legislation in the 1970's and 1980's,[17] the extension of the special laws power to Commonwealth land rights legislation, let alone to a national land rights code, has not been tested. Nevertheless, it seems clear that s.51(26) would provide an adequate basis for comprehensive Commonwealth land rights legislation should the Parliament see fit to enact it.

Like sections 51(19) (aliens) and 51(20) (corporations), s.51(26) is a 'persons power'; that is, it deals not with activities or functions of government, but with a class of persons. Once an individual or a corporation has been found to be within the category of a section 51(19) or 51(20) 'person', the Commonwealth Parliament's power to legislate with regard to that subject matter has been regarded as plenary.[18] The one limitation on the Commonwealth's legislative power is that the exercise thereof must be 'subject to this Constitution'.[19] Thus, in the example of comprehensive land rights legislation, the requirements of s.51(31) would have to be taken into account where appropriate — property acquired from any State or person by the

[12] Australian Parliamentary Debates, House of Representatives, 1 March, 1967, 263.
[13] *Ibid.*
[14] *Ibid.*
[15] Whitlam, E.G., Commonwealth, *Parliamentary Debates,* House of Representatives, 13 August 1968, 15.
[16] *Ibid.*
[17] See *e.g.,* the Racial Discrimination Act 1975 (Cth) and the Aboriginal and Torres Strait Islanders (Queensland Reserve and Communities Self-Management) Act 1978 (Cth).
[18] See *e.g., Huddart Parker & Co. Pty Ltd v. Moorehead* (1909) 8 C.L.R. 330, 393 *per* Isaacs J. and *Strickland v. Rocla Concrete Pipes* (1971) 124 C.L.R. 468 (corporations power).
[19] The Commonwealth legislative powers enumerated in s.51 are expressly 'subject to this Constitution'. Thus, for example, legislation under s.51(26) could not prohibit the free exercise of religion in contravention of s.116.

Commonwealth for land rights purposes would presumably be subject to the 'just terms' requirement.[20]

In the *Franklin Dam* case,[21] the scope of the special laws power was addressed by the High Court. Sections 8 and 11 of the World Heritage Properties Conservation Act 1983 (Cth) were enacted in express reliance[22] on the s.51(26) power to legislate with respect to 'the people of any race for whom it is necessary to make special laws'. Under s.11 of the Act, the carrying out of various acts which would ordinarily be performed in the construction of a dam were made unlawful, except with the consent of the Minister. Proclamations under s.8 applied the provisions of s.11 to certain sites described as 'Aboriginal sites'.

All seven of the High Court justices were prepared to accept that a law which conferred rights or imposed duties 'on members of the Aboriginal race as such, or on other persons in relation to their dealings with members of the Aboriginal race'[23] were valid laws under s.51(26). Where the opinions departed from one another was on the issue of whether sections 8 and 11 of the World Heritage Properties Conservation Act 1983 were 'special' in the sense that they had a 'special connection with the people of a race',[24] or were not 'special' because they applied equally to people of all races.[25] Gibbs C.J. and Wilson and Dawson JJ. held that, despite the declaration of s.8, the provisions of sections 8 and 11 were not valid under the special laws power because those sections could only be applied to sites with 'outstanding universal value', and members of the Aboriginal race had no special rights, privileges or obligations in relation to a protected site.[26] Mason, Murphy, Brennan and Deane JJ. held that sections 8 and 11 were a valid exercise of the special laws power, in part because 'something which is of signficance to mankind may have a special and deeper significance to a particular people because it forms part of their cultural heritage'.[27] In the words of

[20] See *e.g.,* the *Franklin Dam* case (1983) 57 A.L.J.R. 450, 552 *per* Deane J. In order to make the guarantee of 'just terms' effective, the High Court has held that s.51(31) 'comprises the totality of the Commonwealth's power of complusory acquisition of property' : Hotop, S.D., *Principles of Australian Administrative Law* (6th ed. 1985) 42. See *Johnston, Fear & Kingham v. Commonwealth* (1943) 67 C.L.R. 314 ; *Trade Practices Commission v. Tooth & Co. Ltd* (1979) 142 C.L.R. 397. In general, the 'just terms' requirement means that 'fair compensation be paid to the expropriated owner having regard to the interests of both that person and the acquiring community, although this need not necessarily amount to full money equivalence' : Hotop, *supra* 42. Thus, the cost of Commonwealth intervention in the area of Aboriginal land rights could be substantial.

[21] (1983) 57 A.L.J.R. 450; (1983) 46 A.L.R. 625.

[22] Section 8(1) declared that it was necessary to enact ss 8 and 11 as special laws for the people of the Aboriginal race.

[23] (1983) 57 A.L.J.R. 450, 479 *per* Gibbs C.J.

[24] *Ibid.*

[25] *Koowarta v. Bjelke-Petersen* (1982) 56 A.L.J.R. 625, 642 *per* Stephen J.; 632 *per* Gibbs C.J.; 658 *per* Wilson J. Note that it was not necessary for the Court to determine whether Aboriginal people were a 'race' within the meaning of s.51(26). The 1967 amendment clearly extended the subject matter of s.51(26) to cover Aboriginal people.

[26] (1983) 57 A.L.J.R. 450, 479 *per* Gibbs C.J.; 520 *per* Wilson J.; 571 *per* Dawson J.

[27] *Ibid.* 501 *per* Mason J.; 510 *per* Murphy, J.; 539 *per* Brennan J.; 550-1 *per* Deane J.

Brennan J., '[t]he protection of sites of particular significance to the Aboriginal people is a purpose which attracts the support of s.51(xxvi)',[28] even though the law 'on its face, does not discriminate in favour of the people of a race'.[29]

Applying these principles to the prospect of Commonwealth land rights legislation, there is little doubt even under the narrower test of Gibbs C.J. and Wilson and Deane JJ. that such legislation would be valid under the special laws power. National land rights legislation would confer rights on members of the Aboriginal race as such, and it would impose duties or restrictions on other persons in their dealings with Aboriginal people. National land rights legislation would not be (in the words of Stephen J. in *Koowarta v. Bjelke-Petersen*[30]) a 'perfectly general law, addressed to all persons regardless of their race';[31] rather, it would meet the test pronounced by Brennan J. in *Koowarta* and approved by Dawson J. (in the minority) in the *Franklin Dam* case: '[i]t is of the essence of a law falling within par. (xxvi) that it discriminates between the people of the race for whom the special laws are made and other people'.[32]

Under the broader view of the majority in the *Franklin Dam* case, which recognises that a law may be valid if it discriminates in favour of Aboriginal people by its 'operation upon the subject matter to which it relates',[33] national land rights legislation would almost certainly be a valid exercise of the special race power.

In so concluding, the expansive view of Commonwealth legislative power, as stated by Dixon C.J. in *Grannall v. Marrickville Margarine Pty Ltd,* must be borne in mind:

> [E]very legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter[34].

SECTION 51(29)

The *Franklin Dam* case also addressed the scope of the Commonwealth's 'external affairs' power under s.51(29) of the Constitution.

In *Koowarta v. Bjelke-Petersen*[35], a majority of the High Court held that the implementation of bona fide international treaty obligations through Commonwealth legislation was a valid exercise of the external affairs power, at least (according to Stephen J.) if the subject matter of the treaty was of

[28] *Ibid.* 539 *per* Brennan J.
[29] *Ibid.* 538 *per* Brennan J.
[30] (1982) 56 A.L.J.R. 625
[31] *Ibid.* 642
[32] *Ibid.*
[33] (1983) 57 A.L.J.R. 450, 538 *per* Brennan J.
[34] (1955) 93 C.L.R. 55, 77. See also s.51(39) of the Commonwealth Constitution, which provides *inter alia* that Parliament shall have power to make laws with respect to '[m]atters incidental to the execution of any power vested by this Constitution in the Parliament.'
[35] (1982) 56 A.L.J.R. 625.

'international concern',[36] or 'of concern to the relationship between Australia and the other party or parties'[37].

Thus, the Racial Discrimination Act 1975 (Cth) was a valid exercise of the s.51(29) power as it gave effect to the 'International Convention on the Elimination of All Forms of Racial Discrimination' to which Australia was a party. Stephen J. was satisfied that racial discrimination was a matter of international concern.[38]

In the *Franklin Dam* case, Australia was a party to the Convention for the Protection of the World Cultural and Natural Heritage. The World Heritage Properties Conservation Act 1983 (Cth) and the National Parks and Wildlife Conservation Act 1975 (Cth) sought in part to carry out the World Heritage Convention. A 4:3 majority of the High Court upheld these Acts as within the external affairs power.

In both *Koowarta* and the *Franklin Dam* case, the High Court accepted that the external affairs power could be extended to legislation pertaining to 'matters and things done entirely within Australia'.[39] An issue which divided the majority from the minority was the scope of the legislative power which emanated from a particular treaty. Although Stephen J.'s test of 'international concern' proved an elusive one for the majority in the *Franklin Dam* case, and may no longer be a requirement,[40] it seems clear that one limitation on the use of the external affairs power to implement international treaty obligations is that the legislation must not go beyond the treaty or be inconsistent with it.[41]

Thus, the fact that national land rights legislation would pertain to a subject matter wholly internal to Australia would not of itself prevent such legislation from otherwise falling within the external affairs power. But national land rights legislation could only be regarded as a valid exercise of the s.51(29) power if there existed a bona fide international agreement to be implemented through domestic legislation.

If, for example, the International Labour Organisation's Convention 107 'Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries' were ratified by Australia, that Convention's affirmation of the principle of land rights could be the basis for legislative validity under s.51(29). As indicated, another limitation would be that the land rights legislation must reasonably conform to any international agreement which is sought to be implemented.

[36] *Ibid.* 645
[37] (1983) 57 A.L.J.R. 450, 485 *per* Mason J. See also (1982) 56 A.L.J.R. 625, 645.
[38] (1982) 56 A.L.J.R. 625, 645
[39] (1983) 57 A.L.J.R. 450, 474 *per* Gibbs C.J.
[40] In *Koowarta*, Mason, Murphy and Brennan JJ. 'thought that it was enough that by entering into a genuine international treaty Australia had assumed an international obligation to enact domestic laws. . . notwithstanding that they were purely domestic in character': (1983) 57 A.L.J.R. 450, 484 *per* Mason J. In the *Franklin Dam* case, Deane J. shared this view: (1983) 57 A.L.J.R. 450, 544.
[41] (1983) 57 A.L.J.R. 450, 533 *per* Brennan J. and 545 *per* Deane J.

Given the breadth of the special laws power, as previously discussed, it is doubtful that national land rights legislation would be based solely, if at all, on the more nebulous scope of the external affairs power.

SECTION 122

The Commonwealth Parliament's first active interest in Aboriginal matters was manifested in the Northern Territory Aboriginals Act 1910 (Cth) and the Aboriginals Ordinance (No. 9 of 1918).[42] The Commonwealth Parliament's power over Aboriginal affairs in the Northern Territory derived from its plenary power under s.122 of the Constitution.[43]

In *Western Australia v. The Commonwealth*,[44] it was held that s.122 is 'a proviso or exception to s.7' of the Constitution.[45] In other words, as one commentator has put it, s.122 stands 'outside the federal structure. . . if there are limitations on the exercise of section 51(xxvi), the Commonwealth may still have greater power to legislate for Aborigines in the Territories, by virtue of the plenary power in section 122, than in the States'.[46]

The most significant example of this exercise of the territories power, in the context of land rights, is of course the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). As the Act is limited in its application to the Northern Territory, it may be characterised as an exercise of the plenary power under s.122. No separate head of power, such as the special laws power or the external affairs power, is required to render the Act valid.

Although the Northern Territory legislature has the authority to enact legislation in the area of Aboriginal land rights (pursuant, for example, to the Northern Territory (Self-Government) Act 1978 (Cth)), such legislation would be subject to the Commonwealth's plenary authority over the territory.

SECTION 109

Section 109 of the Commonwealth Constitution provides that:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

In the absence of overriding national land rights legislation, several States have taken legislative action in this regard.

In New South Wales, the Aboriginal Land Act 1983 (N.S.W.) transferred approximately 171 square kilometres of land to local Aboriginal land councils.

[42] Hanks, P. and Keon-Cohen, B. (eds), *Aborigines and the Law* (1984) 21.
[43] 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth. . .'
[44] (1975) 134 C.L.R. 201.
[45] *Ibid.* 272 *per* Jacobs J. This language was accepted and applied in *Attorney-General (N.S.W.) ex rel. McKellar v. The Commonwealth* (1977) 51 A.L.J.R. 328. See also *Lamshed v. Lake* (1958) 99 C.L.R. 132.
[46] Eastick, J.E., 'The Australian Aborigine: Full Commonwealth Responsibility Under the Constitution' (1980) 12 M.U.L.R. 516, 524. The interrelationship between the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Northern Territory (Self-Government) Act 1978 (Cth) has not yet been finally determined. See *e.g. Re Toohey; Ex parte Northern Land Council* (1982) 56 A.L.J.R. 164.

In Victoria, a Bill has been prepared to grant land known as the Framlingham Forest to the local aboriginal community.[47] In South Australia, the Pitjantjatjara Land Rights Act 1981 (S.A.) passed title to 100,000 square kilometres in the northwest of the State to the Pitjantjatjara people. In 1984, 'similar legislation provided for Aboriginal ownership of 76,000 square kilometres of Maralinga land'.[48]

In Western Australia, negotiations are proceeding between the Commonwealth and State governments to secure title to Aboriginal reserves by way of long term leases[49]. In Queensland, the Commonwealth and State governments have discussed the State's 'intention to issue deeds of grant in trust to all reserve communities and to provide those communities with an administrative structure based on the principles of local government'.[50]

These various State developments in the area of land rights are based upon the States' inherent right to enact legislation for their citizens. The Victorian Constitution, for example (like the Commonwealth Constitution), does not mention Aboriginal people. Section 16, however, states that 'The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.' In the absence of exclusive Commonwealth powers or of 'repugnant Commonwealth legislation operating on the same field', States are free to enact land rights legislation. There are, of course, no 'reserved powers' under s.107,[51] immune from valid exercises of overriding Commonwealth legislative power according to the terms of s.109; but in the absence of national land rights legislation by the Commonwealth Parliament, the States' power to give legislative effect to schemes such as those listed above is undoubted. Indeed, even if the Commonwealth Parliament were to enact national land rights legislation, the State legislation referred to would co-exist unless it were repugnant to the Commonwealth legislation. In cases of inconsistency, State legislation would only be invalid 'to the extent of the inconsistency'.[52]

CONCLUSION

Since *The Engineers'* case,[53] it has been clear that the Commonwealth Parliament has the constitutional authority to enact legislation binding on the States, in regard to any matter which is within the Commonwealth's legislative competence.

[47] Aboriginal Lands (Framlingham Forest) Bill 1982 (Vic.)
[48] Statement to Parliament by the Minister for Aboriginal Affairs, 18th March 1986.
[49] *Ibid.*
[50] *Ibid.*
[51] *The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129. Under s.107, 'State Parliaments continue to possess all their powers not exclusively given to the Commonwealth Parliament by the Constitution or withdrawn from them by the Constitution' : *South Australia v. Commonwealth* (1941) 65 C.L.R. 373, 408 *per* Latham C.J. If both the Commonwealth and the State have power to make laws then, in case of inconsistency, the Commonwealth law prevails under s.109.
[52] Section 109.
[53] (1920) 28 C.L.R. 129.

The *Franklin Dam* case has given a broad interpretation to the Commonwealth Parliament's legislative competence under s.51(26), the special laws power. Even under the High Court minority's analysis, national land rights legislation would almost certainly be a valid exercise of Commonwealth power, as it would confer rights on members of the Aboriginal race and impose duties or restrictions on other persons in their dealings with Aboriginal people.

As a power conferred on the Commonwealth by reference to persons, s.51(26) would be given a broad scope by the High Court, subject to the limitations found in the Constitution itself. Indeed, in *Actors and Announcers Equity Association of Australia v. Fontana Films Pty. Ltd.*[54], Gibbs C.J. seemed prepared to accept that even among the 'persons powers' s.51(26) 'stands in a special position, for it proceeds on the assumption that special laws may be deemed necessary for the people of a particular race'. Thus, the power under s.51(26) may even be broader in scope that those authorized by sections 51(19) or 51(20).

Under the *Franklin Dam* and *Koowarta* decisions, the external affairs power of s.51(29) might provide an alternative basis for Commonweatlh legislative competence to enact national land rights legislation if an appropriate international treaty or convention were to be implemented and if the legislation conformed reasonably to the terms of the international agreement.

In regard to the Northern Territory, the Commonwealth Parliament's legislative authority is plenary. Land rights legislation such as the Aboriginal Land Rights (Northern Territory) Act 1976 may be considered as a valid exercise of Commonwealth power under s.122, regardless of other heads of power that might be relied upon.

In the absence of overriding Commonwealth land rights legislation, the States retain full legislative authority in this field. Moreover, State legislation would continue to operate concurrently with national land rights legislation, save insofar as a State law were inconsistent with a law of the Commonwealth.

The present regime of Aboriginal land rights in Australia, while abhorrent to those who feel that only with the exercise of the Commonwealth's undoubted power to enact overriding national legislation will effective land rights be achieved, rests on solid constitutional grounds. The Australian constitutional structure permits the Commonwealth Government to enact land rights legislation for the Northern Territory, to negotiate with the States for State legislation furthering the objectives of the 'preferred model', and to wait in the wings with national land rights legislation should the various States' actions prove inadequate.

[54] (1982) 150 C.L.R. 169.