3. RAPPORT AUSTRALIEN

by

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I. PRELIMINARY

The Commonwealth of Australia is a federal State comprising six States (New South Wales, Victoria, Tasmania, South Australia, Western Australia and Queensland) each of whom has competence in its own area and has its own legislature ; and several territories : the Northern Territory which attained self-government (though not Statehood) in July 1978 and the Australian Capital Territory which also has a substantial amount of self-government under Federal supervision, and some smaller or barely populated territories administered by the Federal Government (Christmas Island, Cocos (Keeling) Islands, Norfolk Island, Coral Sea Islands and Australian Antarctic Territory).

1. DIVISION OF POWER :

The enumerated powers are ascribed to the Commonwealth (esp. s. 51).

The residual powers are ascribed to States (see the various State constitutions ; cf. ss. 106 and 107 of the Commonwealth Constitution).

2. CONFLICT OF POWERS :

Where the State and the Commonwealth both have inconsistent laws on the same subject matter, the Commonwealth law prevails to the extent of the inconsistency (s. 109).

Any court in Australia can, and does, decide a constitutional question ; and unless the question is taken into the High Court, on removal or on appeal, the decision of the court stands. In fact decisions on major litigation between the States or between States and the Commonwealth are usually taken to the High Court.

3. ADMINISTRATION :

All foreign affairs matters are the responsibility of the Commonwealth Department of Foreign Affairs. Where there is a need to consult the States this is done through the Prime Minister's Department, which has responsibility for relations between the Commonwealth and the States.

Where legal matters are concerned the Commonwealth Attorney-General may consult the State Attorneys-General through the Standing Committee of Commonwealth and State Attorneys-General. Matters may also be raised directly by the Prime Minister (Head of the Commonwealth Government) with the Premiers (Heads of the respective State governments).

Because of the historical development of Australian federation, relations with the British Government were until very recently handled by the Commonwealth Prime Minister's Department and not by the Department of Foreign Affairs, but they now also have come within the responsibility of the Department of Foreign Affairs.

The States do not have their own administrative services for foreign affairs, but they do have some services (usually within the office of the Premier's Departments) which run offices in certain overseas countries e.g. in Britain, where the States have always been separately represented in addition to the Commonwealth representation at Australia House, and in certain other countries where, from time to time, Trade Missions have been established e.g. by N.S.W. and Victoria in Tokyo and in the United States. The States send « Agents-General » or « Commissioners » and they are commercial, not diplomatic officers.

II. TREATIES

1. THE CONSTITUTION :

S.51 (xxix) of the Constitution grants the Commonwealth legislative power over external affairs. The treaty-making power is an executive power which is usually placed in s.61.Note also s.51 (xxxix) which has been relied on by the Commonwealth to pass legislation at the treaty-making stage, e.g. merely to approve a treaty where this is required to be done by a legislative act.

2. CONCLUSION :

States do not themselves conclude international treaties.

3. NEGOTIATION :

States do not participate in the negotiation of treaties concluded by the Commonwealth.

4. EXECUTION :

Treaties negotiated by the Commonwealth have to be approved in the Federal Executive Council (Governor-General and at least two Commonwealth Ministers) ; cf. ss.61 and 62. Treaties are usually tabled in the Commonwealth Parliament for information.

It is Australian practice not to ratify a treaty unless the necessary legislation to bring it into effect domestically has been passed. Where the subject matter of the treaty is within the powers of the Commonwealth, this presents

no particular problem. Where it is within the powers of the States, this has sometimes meant lengthy delays. This became clear in respect of certain Conventions of the International Labour Organization, many of which remained signed, but unratified for years because industrial conditions within the limits of the States are generally regarded as internal affairs within State Competence : contrast s.51 (xxix) on external affairs and contrast s.51 (xxxv) on industrial disputes extending beyond the limits of any State.

During the period of the Labour government (Commonwealth)1972-1975 the Commonwealth relied on the external affairs power in s.51 (xxix) to pass Commonwealth legislation which purported to bring into effect the I.L.O. Conventions.

There is no formal way in which the Commonwealth can force the States to bring down legislation required to carry out the substance of a treaty. The Commonwealth usually, therefore, seeks agreement of the States « in principle » before signing any treaty which relates to their areas of expertise. This, as the history of the I.L.O. Conventions shows, may not be sufficient to ensure that States make time in their crowded legislative programmes for the necessary legislation after the Treaty has been signed.

The Commonwealth can therefore only use persuasion and, as it has the monopoly of financial power, some apparent financial pressure. This is very limited in effect as it can make special grants to the States for specific purposes (s.96) but cannot withhold money for specifie purposes, and its grants of a portion of tax moneys to the States each year is based on the whole range of States' needs and can only be manipulated with difficulty to relate to specific issues (see VIII below).

5. PUTTING INTO EFFECT

The Commonwealth Government carries out the obligations of an international treaty. The State governments would only be concerned where they have to apply their own State legislation, or where Commonwealth legislation supersedes theirs (e.g. privileges and immunities of consular officials under the Consular Privileges and Immunities Act 1972, carrying into effect the Vienna Convention on Consular Relations 1963, supersede State powers over property and persons on consular premises). The primacy of Commonwealth legislation according to the Constitution (s.109) would be recognised by any State court, provided the Commonwealth legislation was allowed by the State court as valid under the external affairs power in s.51 (xxix). If a State court were to hold Commonwealth legislation invalid, the Commonwealth would undoubtedly appeal to the High Court of Australia whose decision would be final and binding both on the Commonwealth and on the State court.

6. « TRANSNATIONALISM »

Some commercial agreements are settled between State instrumentalities e.g. Electricity Commission, Water Board with foreign corporations some of

which may be more or less controlled by their national State (e.g. for loans from foreign banks).

There is no specific legal régime concerning these agreements.

The Federal Government exercises supervisory control over all movement of money in and out of the country, and its agreement would be necessary.

III. DIPLOMATIC AND CONSULAR REPRESENTATION

1. CONSTITUTION

There are no special provisions concerning diplomatic and consular representation ; but compare s.75 (ii) on the High Court's jurisdiction. The matter falls within s.51 (xxix) of the Constitution, the Commonwealth power over foreign affairs.

2. FEDERAL DIPLOMATIC PRACTICE :

States are not formally concerned in diplomatic and consular exchanges. The only exception to this rule are the services performed by State Offices in London and at some other important capital cities (see 1.3 above). These are basically concerned with matters of trade, investment in the State and dissemination of information about the State, and while the general control of inter-governmental relations is with the Commonwealth Department of Foreign Affairs, they do have some direct access at middle levels with the British administration on those matters.

This practice is not formally established by the Constitution and is settled only by custom.

3. INDEPENDENT REPRESENTATION (SENDING REPRESENTATIVES)

States do not have independent diplomatic and consular representation.

4. INDEPENDENT REPRESENTATION (RECEIVING REPRESENTATIVES)

States may not receive direct representation from foreign governments.

IV. INTERNATIONAL ORGANIZATION AND CONFERENCES

1. CONSTITUTION

There are no special Constitutional provisions on this matter which falls within the Commonwealth power under s.51 (xxix).

2. COMMONWEALTH REPRESENTATION

States have no right to be included in Commonwealth delegations.

Where a matter may especially concern a State (or even a Territory) the Commonwealth may, in its absolute discretion, invite a representative to

participate, but this is a rare occurrence. An example was the inclusion of Hammer de Robert from Nauru when the UN General Assembly was discussing the future of Nauru (then a trusteeship territory), see now Nauru Independence Act 1957 (Commonwealth).

Whether the Commonwealth decides to welcome such representation depends a great deal on its own policy preferences : e.g. the Labour Government of 1972-1975 favoured a strong central government ; Liberal Governments have, with varying degrees of emphasis, preferred to stress the « federal » nature of the Australian political system. The present Government has emphasised « the new Federalism » and has invited rather more representation from the States e.g. delegations to the current Law of the Sea Conferences have included representatives of States which have taken especial interest in them, such as Queensland.

Such State representatives within a national delegation have no special voting rights.

3. INDEPENDENT STATE REPRESENTATION

States have no independent right of representation at international organizations or conferences.

V. IMMUNITIES

As far as is known, Australian States grant immunities only to « foreign States ». If a constituent part of a foreign State were to be sued in an Australian State (e.g. the State of Quebec were sued in litigation in New South Wales) it is not possible to state what the result would be. Quebec could claim the benefit of the « sovereign immunity » doctrine, and the result would depend on a) the N.S.W. court's interpretation of that doctrine and b) whether it would follow the decisions of the English courts on that doctrine. The doctrine of the English courts on « sovereign immunity » is currently most confused, but in summary, would seem to be that for actions *in rem* they would not grant such immunity, and that for actions *in personam* there is no clear rule.

I know of no case where an Australian constituent State has sought immunity in a foreign country.

As far as the « Act of State » doctrine is concerned the same considerations apply. I know of no case where « act of State » has been claimed for acts of an Australian State in litigation in other countries. Whether such a claim would be accepted in litigation in Australia e.g. that an act was an « act of State » is an area of doubtful case-law which would require major research.

VI. INTERNATIONAL RESPONSIBILITY

I know of no case where the international responsibility of a constituent State of the Commonwealth has been put in issue, nor of a case within Australia concerning the « international responsibility » of a part of a foreign State — such a concept seems quite foreign to Australian conceptions of international responsibility.

VII. « INTERNATIONAL » AREAS

1. CONSTITUTION

There are no specific constitutional provisions relating to this matter.

2. DIVISION OF POWERS

The Commonwealth of Australia validly declared its sovereignty over territorial waters from the low-water mark seawards ; and its sovereign rights for exploration and exploitation over the continental shelf and contiguous zone beyond. In these respects the Seas and Submerged Lands Act 1972 (Commonwealth) was upheld in the case of *State of New South Wales* v. *the Commonwealth* (1975) 135 C.L.R. 337 ; generally see Lane, *The Australian Federal System,* 2nd ed., 1979, pp. 235-237.

As far as airspace is concerned, the High Court has upheld (under s.51 (i) or under s.51 (xxix) of the Constitution) the Commonwealth power to legislate on air navigation (*Airlines of N.S.W.* v. *N.S.W.* (No. 2) (1965) 113 C.L.R. 54). Since the relevant law, the Air Navigation Act 1920-1963 (Commonwealth) implemented the Chicago Convention on International Civil Aviation 1944, the Commonwealth was able to rely on its external affairs power in s.51 (xxix) and, indeed, it is through this power that the Commonwealth has come to control air navigation throughout Australia, even *intra-State air navigation,* which lies outside the Commonwealth's control under s.51 (i).

VIII. SUNDRY MATTERS

Federalism in Australia has been seriously affected by two financial powers of the Commonwealth : the taxing power and the « special grants » power.

States and Commonwealth have concurrent taxing powers. During World War II the High Court of Australia upheld the right of the Commonwealth Government to establish a single tax for the whole of Australia under a legislative scheme based partly on the taxation power, and partly on the national defence power. Since 1942 the Commonwealth has continued alone to wield the tax power, reimbursing each State a proportion of the sum collected, on condition that it does not levy its own tax. Despite threats from

time to time to exercise their own taxing powers, none of the States have done so since that time. The amount to be reimbursed is settled at a meeting of State Premiers and the Prime Minister each year, and by its calculation of the size of various State budgetary items (e.g. claims for health costs) may have considerable influence on State government policy (e.g. by forcing closure of some medical services). But in 1976 under a newly-installed Government at Canberra, the States were invited to impose their own income tax on top of the already imposed Commonwealth income tax. So far, no State has been prepared to impose its own State income tax.

The « special grants » power (s.96) has been used to influence State government policy e.g. on education by granting money for a specific purpose such as the building of science laboratories in high schools, thus increasing the emphasis on science in school curricula.

The chief influence of federalism on international relations has been the increasing number of international treaties, conferences, etc., which deal with matters earlier considered purely to be within the domestic powers of the States e.g. on wildlife, education, non-discrimination and human rights generally, industrial conditions etc. (See II(4) above).

SUPPLEMENTARY MEMORANDUM

by

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Part I, Para. 2 - *Conflict of Powers*

The Commonwealth or any State Attorney-General may apply to have a case pending before a State court and involving a constitutional question, or the interpretation of the Constitution, removed into the (federal) High Court of Australia. Such an application by *either* Attorney-General *must* be granted. (Judiciary Act, 1903-79, s.40).

It is not competent for a State to legislate so as to invest Her Majesty the Queen in Council (the Judicial Committee of the Privy Coucil in London) with jurisdiction to advise on matters concerning the respective powers of the Commonwealth and State Parliaments ; such is contrary to Chapter III of the Commonwealth Constitution which requires that such matters be finally determined by the High Court of Australia. (*Commonwealth* v. *Queensland* (1975) 134 C.L.R. 298 ; 7 A.L.R. 351.

The position of the Crown is perceived in Australia as being crucial in any efforts to alter the balance of powers under the Constitution of Australia, or to declare Australia to be a Republic. For this reason, one State (Queensland) has legislated to entrench the position of the Crown acting through its officials in London as part of the legal structure of Queensland so as to forestall any attempt to devolve greater powers upon the Governor-General in Canberra, perhaps in the role of Viceroy. (Queensland, Constitution Act Amendment Act, 1977, No. 9 of 1977). See generally O'Connell, « Monarchy or Republic ? » in G. Dutton (ed.), *Republican Australia ?* (1977) 23-43.

Part II, Para. 2 - *Conclusion of treaties (by States)*

Some Australian States have, however, concluded international agreements, but not in treaty form. For example, the Governments of Western Australia and South Australia have been giving assistance to Libya in Dry Land Farming Techniques under the umbrella of project agreements. See, for example, the Agreement dated 14 February 1980 signed between the Gefara Plain Development Authority and the Western Australian Projects

Authority. Article 18 of the Agreement subjects it to Libyan law and all disputes under it are to be referred to the competent Libyan Courts. It is understood that similar agreements were concluded between officers of the South Australian Government and Libya in June 1974, and with Iraq in 1978.

Para. 3 - *Negotiation*

Exceptionally, a State may be invited to join Commonwealth officials in the negotiating team for a treaty where that State's interests are particularly affected. The Government of Queensland was represented in the negociations leading to the conclusion of the Agreement on Maritime Boundaries between Australia and France, 4 January 1982, because an area of the South West Pacific between New Caledonia and Australian islands in question, involved islands which constituted part of Queensland.

Para. 4 - *Execution*

In pursuance of Prime Minister Malcolm Fraser's policy of a new co-operative approach to federalism in Australia, announced in the election campaign of 1976, the matter of treaties was raised at the annual Conference of Prime Minister and State Premiers in October 1977. After that conference the Prime Minister announced that agreement had been reached on the following points :

1. The States are to be told in all cases, and at an early stage, of any discussions towards a treaty that Australia has decided to join.

2. The Commonwealth has given a firm undertaking to consult the States before deciding whether or not to legislate to adopt or implement a treaty that affects a legislative area traditionally regarded as being within the responsibility of the States.

3. The States will be given the first option of legislating to implement any treaty provisions if within an area of State power.

4. Representatives of the States will be included in Delegations to international conferences which deal with State subjects [viz. subject matters within State rather than federal legislative competence]. The purpose of that would not be to share in and make policy decisions, but so that the impact of any treaty, so far as it affects the States, will be made known to the Commonwealth negotiators.

5. Federal clauses will be sought to be included in treaties in appropriate cases.

— Press Conference by Prime Minister, 21 October 1977. See also Burmester, « The Australian States and participation in the foreign policy process », 9 *Federal Law Review* (1978) 257-283.

In 1974 the State Parliament of Queensland enacted the *Treaties Commission Act.* Sections 6 and 7 of the Act set out the functions and duties of the Treaties Commission as follows :

« s.6.(a) to examine international treaties and conventions, whether or not they are in force at the material time, with a view to assessing their benefit to and effect on Queensland ;

(b) to report from time to time and as may be expedient to the Parliament of Queensland upon legislation which would be necessary or desirable to give effect in Queensland to undertakings entered into or to be entered into by the Government of the Commonwealth of Australia pursuant to international treaty or convention and to make recommendations with respect to the substance and form of such legislation ;

(c) to advise the Government of Queensland with respect to international treaties and conventions whether or not —

(i) the Commonwealth of Australia is a party thereto ; or

(ii) the treaties or conventions are in force at the material time,

and to make recommendations to the Government of Queensland concerning co-operation with the Government of the Commonwealth of Australia in the implementation of international treaties and conventions.

s.7. The Treaties Commission may, in the discharge of its functions, act in aid of and co-operate with any other body or entity established by the Government of the Commonwealth of Australia or of any State thereof and having functions similar to those of the Commission under this Act. »

The Commonwealth Government has not responded to the implied invitation of Queensland to establish a reciprocal federal Treaties Commission, or a joint Commonwealth - States Treaties Commission. The Government of Western Australia has expressed interest in setting up a Treaties Commission similar to Queensland, but so far has not done so. The Queensland Treaties Commission has presented two reports to State Parliament. The *First Report of the Treaties Commission,* dated 1 December 1976 (Parl. Pap. A.79-1976) contained an analysis of federal-State treaty relations in Australia, and a comparative study of the situation in West Germany, Canada and the United States. The *Second Report of the Treaties Commission,* dated 4 April 1977, dealt with the International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships. (Parl. Paper A. 89-1976-77).

Part IV, Para. 2 - *Commonwealth representation*

See, in addition, point 4 of the Prime Minister's Press Conference of October 1977, in notes to Part II, Para. 4 *supra.* A representative chosen by all the States joined the Australian Delegation to the United Nations Conference on the Law of the Sea from the Seventh Session (Geneva, March-May 1978) onwards as « States' Adviser ». The delegate chosen in 1978 was Mr. Roger Jennings, Q.C., Solicitor-General of Tasmania. Since then, the position of States' Adviser has rotated to another State for each Session of the Conference.

Part V - *Immunities*

Australian courts tend to follow decisions of United Kingdom courts in matters unaffected by local legislation. In *Mellenger* v. *New Brunswick Development Corp.* [1971] 2 All E.R. 593, Lord Denning M.R. held that the Canadian Province of New Brunswick « is a sovereign State in its own right, and entitled, if it so wishes, to claim sovereign immunity ». A provincial government of Argentina was treated as, in principle, entitled to sovereign

immunity in *Swiss Israel Trade Bank* v. *Government of Salta* [1972] Lloyd's Rep. 497. On one occasion an Australian court has considered this matter. In *Van Heyningen* v. *Netherlands Indies Government* [1948] Queensland Weekly Notes 19, *Annual Digest of International Law Cases*, 1948, Case No. 43 the Supreme Court of Queensland doubted that the Netherlands Indies was a sovereign State as such, but granted its government immunity as part of the Kingdom of the Netherlands.

Part VI - *International Responsibility*

In 1934 a riot occurred at the gold-mining town of Kalgoorlie in the State of Western Australia. Damage was done to property belonging to nationals of Greece, Italy and Yugoslavia. These countries presented claims to the Commonwealth Government, which however, argued that the State Government of Western Australia was responsible. In the event, Western Australia negotiated a settlement satisfactory to all parties, so the issue of responsibility did not come to be tested. The Prime Minister of the day stated that « the responsibility for the preservation of law and order, and, as a consequence, the liability for the payment of compensation for any loss sustained, in cases of civil disturbances were matters for the Government of Western Australia ». A distinguished Australian jurist and High Court judge, by contrast, argued in an extracurial statement that the Commonwealth alone would be internationally responsible : 9 *Australian Law Journal* (1935), Supplement, 9.

Whether the Commonwealth would be internationally responsible for the default of a State on an international loan (a question which arose during the Depression of the 1930s when New South Wales passed « moratorium » legislation on foreign loans) is now settled by the assumption of Commonwealth responsibility under the Financial Agrreements (Commonwealth Liability) Act, 1932-66.

On this question see O'Connell, *International Law in Australia* (1965), 29-31.

Part VII, Para. 2 - *Division of Powers (in sea areas)*

Following their unsuccessful challenge to the validity of the Seas and Submerged Lands Act in *State of New South Wales and Others* v. *The Commonwealth* in 1975, the new federal government of Australia promised a review of the situation in line with its policy of « co-operative federalism ». This review culminated in a package of federal legislation and concomitant legislation in each State which, in broad terms, grants to the States sovereignty over the Sea and seabed of Australia's present territorial sea of 3 nautical miles. If Australia should later proclaim a broader territorial sea, State limits will remain pegged at 3 miles. Co-operative arrangements are made for sharing responsibilities in the control of natural resources of the sea and seabed beyond 3 miles between federal and State authorities. The criminal law of the States also applies in offshore areas, with certain exceptions. The situation is most complex, but for a broad view see *Offshore Constitutional Settlement: A Milestone in Co-operative Federalism*, Australian Go-

vernment Publishing Service, 1980. See also Coastal Waters (State Powers) Act, 1980 ; Coastal Waters (State Title) Act, 1980 ; Fisheries Act, 1952-80 ; Petroleum (Submerged Lands) Act, 1967-81 ; Seas and Submerged Lands Act, 1973-80 ; Continental Shelf (Living Natural Resources) Act, 1968-80 ; Minerals (Submerged Lands) Acts, 1981 ; Crimes at Sea Act, 1979.

POSTSCRIPT

In July 1983 the High Court of Australia delivered judgment in an important case relating to the legislative powers of the federal (Commonwealth) Parliament to give effect to treaties or other matters of international relations in legislative areas otherwise normally reserved to the States. In *Tasmania v. Commonwealth* (to be reported in Vol. 46 of the Australian Law Reports (1983) the High Court upheld the validity of Commonwealth legislation prohibiting the construction of à dam by the Tasmanian government in an area proclaimed as a site of natural and archeological interest and included in the World Heritage List, pursuant to the Convention on the Protection of the World Natural and Cultural Heritage, 1972. This decision confirmes and strengthes the Court's previous decision in *Koowarta v. Bjelke-Peterson* 39 Australian Law Reports (1982) 417 to uphold the validity of Commonwealth legislation implementing the Racial Discrimination Convention, 1966. The difference between the cases is that in *Koowarta* the legislation in question constituted a precise implementation of the detailed provisions of the Convention, whereas in *Tasmania v. Commonwealth* the broader and largely aspirational language of the relevant Convention was held sufficient to attract federal legislative power, to the exclusion of the States, under Section 51 (xxix) of the Constitution which gives power to the federal Parliament to legislate with respect to « external affaires. »