CONSTITUTION ALTERATION (EXTERNAL AFFAIRS) BILL 1984
(Private Senator's Bill)

Date Introduced: 12 September 1984
House: Senate
Presented by: Senator the Hon. P.D. Durack

Short Digest of Bill

Purpose

Subject to approval by referendum to amend the Constitution by adding a new section 51A limiting the ambit of the external affairs power presently conferred by section 51(xxix) of the Constitution.

Background

The extent of the external affairs power conferred upon the Commonwealth by section 51(xxix) has been the subject of two recent decisions by the High Court of Australia. These decisions were delivered in Koowarta v Bjelke-Peterson and ors 39 ALR 417 (Koowarta's Case), and Commonwealth of Australia and anor v State of Tasmania and ors 46 ALR 625 (The Franklin Dam Case).

In Koowarta's Case the High Court by a majority of 4 to 3 upheld the provisions contained in sections 9 and 12 of Racial Discrimination Act 1975 as being valid laws with respect to external affairs within section 51(xxix) of the Constitution being in implementation of the International Convention on the Elimination of all Forms of Racial Discrimination (1966).

In his Second Reading Speech on this Bill Senator Durack quotes from the dissenting judgement of the Chief Justice Sir Harry Gibbs in Koowarta's case where he said:-

"If s.51(29) empowers the Parliament to legislate to give effect to every international agreement which the Executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed".
Senator Durack states that the interpretation of the external affairs power against which the Chief Justice cautioned in Koowarta's case was adopted by the majority of the High Court in the Franklin Dam case. In respect of the external affairs power the High Court again by a majority of 4 to 3 held in the Franklin Dam case that the existence of a treaty obligation under the UNESCO Convention for the Protection of the World Cultural and Natural Heritage was sufficient to give rise to an external affair and that the Commonwealth had validly prohibited the construction of the dam by virtue both of section 9(1)(h) of the World Heritage Properties Conservation Act 1983 and the regulations thereunder, and of the application of section 10(4) of the Act to the Tasmanian Hydro-Electric Commission. The majority of the Court held that there was no additional, independent requirement that the subject-matter of the treaty be "of international concern".

To overcome the problems that he sees as emanating from the decisions in Koowarta's case and the Franklin Dam case Senator Durack proposes by this Bill to limit the scope of the external affairs power. If the proposed law is enacted pursuant to section 128 of the Constitution, section 51(xxix) of the Constitution would only support a law where the subject matter of the legislation has a substantial relationship to other countries or to persons, matters or things outside the Commonwealth and the law deals with that relationship or if it concerns the movement of persons or things into or out of the Commonwealth. This limitation would apply to an Act notwithstanding the existence of any rule of customary international law or of a treaty or other international agreement, resolution or declaration on the subject.

Provisions

Clause 2 of the Bill seeks to insert in the Constitution a new section 51A which would give effect to the proposals outlined in the preceding paragraph. Sub-section (2) of the proposed section attempts to specifically preserve the treaty-making power of the Commonwealth whilst sub-section (1) would restrict its application to enactments passed after the date of commencement of the legislation.

For further information, if required, contact [Contact Information]

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