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Gary A. Rumble

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Federalism, External Affairs and Treaties: Recent Developments in Australia

by Gary A. Rumble*

I. INTRODUCTION

Federalism is a loose concept. Most would say that federalism essentially involves the continued separate existence of the component parts or states of the federation. Some would say that federalism essentially involves a division of legislative authority.¹ Arguably, this second typical characteristic is itself part of the first principle—the continued existence of states as states.²

On July 1, 1983 the High Court of Australia handed down a decision—*Commonwealth v. Tasmania* (The *Tasmanian Dam Case*)³—which split the Court and some say signals the end of true federalism in Australia. The most important general constitutional issue in the case⁴ is the scope of the Commonwealth Parliament's express power in section 51 (xxix) of the Constitution of the Commonwealth of Australia to legislate with respect to "external affairs." That issue had been rehearsed a year

* Lecturer in Law, Australian National University; Ph.D (1984), LL.B. (1975), B.A. (1973), Australian National University. The author did some of the work for this article while a visiting scholar at the University of Virginia School of Law, and benefitted from discussions with Professor L.F.E. Goldie.

¹ Other characteristics might be considered essential to, or typical of, federalism. See generally K. WHEARE, *FEDERAL GOVERNMENT* (1947) (especially Chapter 1 which sets out federalism as independent but coordinate general and regional governments); G. SAWER, *MODERN FEDERALISM* (1976) (especially Chapter 1); S. DAVIS, *THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING* (1978); G. STEVENSON, *UNFULFILLED UNION* ch. 1 (1979) However, this article is limited to the two characteristics of federalism set out in the text. For comparative discussions of the interaction of federalism with international affairs see K. WHEARE, *supra*, at ch. 9; J. HENDRY, *TREATIES AND FEDERAL CONSTITUTIONS* (1975); R. GHOSH, *TREATIES AND FEDERAL CONSTITUTIONS: THEIR MUTUAL IMPACT* (1961); I. BERNIER, *INTERNATIONAL LEGAL ASPECTS OF FEDERALISM* (1973); see also *infra* note 10.

² See *infra* notes 224-36 and accompanying text.

³ 46 Austl. L.R. 625 (1983).

⁴ Other constitutional issues included the scope of other Commonwealth legislative powers: § 51(xx) relating to corporations; § 51(xxvi) relating to races; powers implicit in the Commonwealth's status as the national government; the operation of overriding prohibitions (§ 51(xxii) against acquisition of property other than on just terms, and § 100 against the abridgement of States' right to reasonable use of rivers for irrigation or conservation, implied prohibitions against intergovernmental interferences). It is the author's understanding that a forthcoming volume of the *Federal Law Review* will publish a series of papers on this case.

earlier in the case of *Koowarta v. Bjelke-Petersen*,⁵ a decision which also split the High Court (composed of different membership)⁶ but which did not receive as much publicity or public reaction in Australia as did the *Tasmanian Dam Case*.⁷ Both cases involved application of section 51(xxix) to implement international treaties.

In *Koowarta*, Justice Wilson described the general issue and its significance thus:

The technological revolution in communications coupled with the search for peace and security during the decades of this century have led to the close interdependence of nation with nation. Both economically and socially the earth is now likened to a global village where the international community concerns itself increasingly with matters which formerly were regarded as only of domestic concern. There is now no limit to the range of matters which may assume an international character, and this question is unlikely to change. These considerations underline the importance of identifying clearly the criteria which will attract to a law of the Parliament the character of a law with respect to external affairs.⁸

It is the purpose of this article to discuss what *Koowarta* and the *Tasmanian Dam Case* decided about the Commonwealth of Australia's "external affairs" power and its use for treaty implementation. Moreover, since the United States Constitution affected the drafting of the Commonwealth of Australia's Constitution, some comparisons between the Australian and American experiences of external affairs and federalism will be made.⁹

II. FEDERAL DISTRIBUTION OF LEGISLATIVE COMPETENCE

The Australian Constitution¹⁰ follows the model of the Constitution of the United States in its division of legislative competence between the

⁵ 39 Austl. L.R. 417 (1982).

⁶ In *Koowarta*, the Court was composed of the Chief Justice, Sir Harry Gibbs, and Justices Stephen, Mason, Murphy, Aickin, Wilson and Brennan. After *Koowarta*, Justice Stephen left the Court to take up his appointment as Governor-General of Australia and Justice Aickin died. They were replaced by Justices Deane and Dawson.

⁷ The decision in the case and reactions to the decision were front page news in every major newspaper in Australia. See, e.g. *Canberra Times*, July 2, 1983, at 1, col. 1.

⁸ 39 Austl. L.R. at 479.

⁹ For a thorough discussion of this aspect of Australian constitutional law before *Koowarta* and the *Tasmanian Dam Case*, see Thomson, *A United States Guide to Constitutional Limitations Upon Treaties as a Source of Australian Municipal Law*, 13 U. W. AUSTL. L. REV. 110 (1977); Van Son, *The Australian Constitution: the External Affairs Power and Federalism*, 12 CAL. W. INT'L L.J. 46 (1982); see also Looper, *Limitations on the Treaty Power in Federal States*, 34 N.Y.U. L. REV. 1046 (1959).

¹⁰ 63 & 64 Vict., ch. 12.

central legislature and the regional legislatures.¹¹ The Commonwealth Parliament is given legislative competence over express subject matters,¹² while the state legislatures through the operation of the state constitutions have general lawmaking power for their respective areas.¹³ In case of conflict between a central and a state law, the central law prevails.¹⁴

The first enumerated legislative power in the Australian Constitution was adapted from the U.S. Constitution's commerce clause. The U.S. provision is in these terms: "The Congress shall have power To Regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."¹⁵ The Australian provision is: "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: — (i) Trade and commerce with other countries and among the States" ¹⁶

The last express subject matter in the Australian Constitution's listing in section 51 is also an adaptation of a U.S. provision in article I, section 8. The U.S. power is: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Australian subject matter of power is: "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."¹⁷ It is accepted in Australian constitutional law that in addition to the express incidental power of section 51(xxxix), there is an implied power associated with each of the subject matters of power collected in section 51.¹⁸

¹¹ Contrast the Canadian model. The British North America Act, also an act of the Imperial Parliament (30 & 31 Vict., ch. 3) draws up two lists of specific subject matters of legislative power and vests one in the central legislature (§ 91) and the other in the provincial legislatures (§ 92). The residue is vested in the central legislature (§ 91).

¹² Most of the Commonwealth Parliament's legislative powers are collected in section 51 of the Constitution. Section 52 also vests some subject matters of power, not relevant to this article, in the Commonwealth and makes those subject matters exclusive to the Commonwealth.

¹³ The Constitutions of the Australian colonies, which were to become states on federation, consisted primarily of imperial enactments. For the development of the colonial/state constitutions see generally W. McMinn, *A CONSTITUTIONAL HISTORY OF AUSTRALIA* (1979); A. Melbourne, *EARLY CONSTITUTIONAL DEVELOPMENT IN AUSTRALIA* (rev. by R. Joyce 1963). The colonies' constitutions were continued by the Constitution of the Commonwealth of Australia in section 106.

¹⁴ AUSTL. CONST. § 109.

¹⁵ U.S. CONST. art. I, § 8.

¹⁶ AUSTL. CONST. § 51(i).

¹⁷ AUSTL. CONST. § 51(xxxix).

¹⁸ See, e.g., *Le Mesurier v. Connor*, 42 C.L.R. 481, 497 (1929). This author discusses elsewhere the distinction between the express grant of legislative power in section 51(xxxix) regarding

The U.S. Supreme Court has found the commerce power (and/or that which is "necessary and proper" for carrying it into execution) broad enough to reach many kinds of intrastate activities. That conclusion has been based on the reasoning that those local activities might have, or might rationally be thought by Congress to have, an effect on intrastate commerce.¹⁹

The Australian High Court has not given such a broad interpretation to the commerce power. The U.S. experience has been referred to as a departure from "true federalism"²⁰ and the federal principle of the Australian Constitution has been invoked to prevent the interstate commerce power from extending to broad control of local activities.²¹ The main judicial device for constraining section 51(i) has been the rule that the economic effects of local activities on interstate commerce will not suffice to justify the control of those local activities under the incidental aspects of section 51(i).²² That rule and the attitude underlying it have been disincentives for the Commonwealth to seek to justify control of local activities with chains of cause and possible effects as tenuous as those accepted by the U.S. Supreme Court in cases such as *Wickard v. Filburn*,²³ *Heart of Atlanta Motel v. United States*²⁴ and *Hodel v. Virginia Surface Mining and Reclamation Association*.²⁵

Some other specific powers in the long list of the Commonwealth of

that which is incidental to the *exercise* of other legislative powers and the implied power to legislate in areas incidental to the *subject matter*, of each grant. Compare in the American context: "Congress . . . may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities," *United States v. Darby*, 312 U.S. 100, 121 (1941), with "[t]he power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce" *United States v. Darby*, 312 U.S. at 119-20. See Rumble, *Section 51 (xxxix) of the Constitution and the Federal Distribution of Power*, 13 FEDERAL L. REV 182 (1982).

¹⁹ See *infra* notes 23-25 and accompanying text.

²⁰ See *Airlines of New South Wales Pty. Ltd. v. New South Wales* [No. 2], 113 C.L.R. 54, 115 (1964).

²¹ *Id.* at 77-79 (Barwick, C.J., concurring); *id.* at 106-07 (McTiernan, J., concurring); *id.* at 113-15 (Kitto, J., concurring); *id.* at 143-44 (Menzies, J., concurring); see also *Attorney-General (Western Australia) v. Australian National Airlines Commission*, 138 C.L.R. 492, 499 (1976) (Barwick, C.J.); *id.* at 502-03 (Gibbs, J., concurring); *id.* at 508-11 (Stephen, J., dissenting); *id.* at 530-31 (Murphy, J., dissenting).

²² See *Attorney-General (Western Australia) v. Australian National Airlines Commission*, 138 C.L.R. 492, 499 (1976) (Barwick, C.J.); *id.* at 502-04 (Gibbs, J., concurring); *id.* at 508-11 (Stephen, J., concurring). Dissenting, Justice Murphy rejected the rule, *id.* at 529-30.

²³ 317 U.S. 111 (1942).

²⁴ 379 U.S. 241 (1964).

²⁵ 452 U.S. 264 (1981). However, this is not to imply that deference by the U.S. judiciary to Congressional policy making and fact finding of itself means that Congress is not moved by federalism concerns. See generally WECHSLER, *Political Safeguards of Federalism*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 185 (1963); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1982).

Australia's legislative powers allow control of local activities without any requirement of interstate connection.²⁶ However, generally the difference between the United States and Australia in judicial attitudes to the respective (similarly expressed) commerce clauses has meant that legislative competence has hitherto been more centralized in the United States than in Australia.²⁷

III. EXTERNAL AFFAIRS: THE CONSTITUTIONAL PROVISIONS

A comparison of the texts of the United States' and the Commonwealth of Australia's Constitutions signals some basic differences in approach to external affairs. These textual differences are traceable to fundamental historical differences. The Constitution of the United States of America was born of a revolt against perceived excesses and injustices committed under the executive authority of the British Crown.²⁸ Accordingly, it is based on distrust of governmental authority and assumes the desirability of checks and balances. Perhaps nowhere else in the Constitution are these factors more evident than in the provisions relating to foreign affairs.²⁹ The Constitution of the Commonwealth of Australia represented a peaceful devolution of, and derived its authority from the continuity of, British sovereignty. The Constitution of the Commonwealth of Australia came into operation as section 9 of the Commonwealth of Australia Constitution Act, an Act of the (British) Imperial

²⁶ In particular, section 51(xx)'s grant of power to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" has been relied upon regularly. Section 51(xx) has been held to support legislation both 1) regulating (*see, e.g.*, *Strickland v. Rocla Concrete Pipes Ltd.*, 124 C.L.R. 468 (1971)), and 2) protecting (*see, e.g.*, *Actors and Announcers Equity Association of Australia v. Fontana Films Pty. Ltd.*, 40 Austl. L.R. 609 (1982)) the intrastate trading activities of such corporations. *See also* *The Queen v. Australian Industrial Court; Ex parte CLM Holdings Pty. Ltd.*, 136 C.L.R. 235 (1977); *Fencott v. Muller*, 46 Austl. L.R. 41 (1983). In the *Tasmanian Dam Case*, 46 Austl. L.R. 625 (1983), the World Heritage Properties Conservation Act § 10 (1983) was upheld under section 51(xx) of the Constitution.

²⁷ The United States commerce clause has been found to contain not only an express grant of power to the central legislature but also an implied exclusion of some state control of interstate commerce. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). No such implication has been drawn from section 51(i) of the Constitution of the Commonwealth of Australia. The Commonwealth Constitution does, however, contain an express provision, section 92, which provides, *inter alia*, that "the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." This section has been much litigated and discussed. *See generally* L. ZINES, *THE HIGH COURT AND THE CONSTITUTION* chs. 6-8 (1981); M. COPER, *FREEDOM OF INTERSTATE TRADE* (1982). As currently construed § 92 binds both the Commonwealth and the States. *James v. Commonwealth*, 55 C.L.R. 1 (P.C. 1936).

²⁸ *See, e.g.*, the Declaration of Independence (U.S. 1776).

²⁹ *See generally* L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972); F. WILCOX, *CONGRESS, THE EXECUTIVE, AND FOREIGN POLICY* (1971).

Parliament.³⁰

At common law the representation of the nation in foreign affairs is within the prerogative of the Crown.³¹ The U.S. Constitution departed from the common law position³² by making several detailed provisions which purport to exclude or limit the executive in particular aspects of foreign affairs. Foremost for the purpose of this article is the involvement of the Senate in treaty making.³³

The treaty power in the U.S. Constitution provides that the President can make treaties "by and with the advice and consent of the Senate" and "provided two-thirds of the Senators present concur."³⁴ Self-executing treaties have the force of law within the United States.³⁵

A reluctance to accept the treaty power, with its onerous restrictions, as the focus of U. S. foreign affairs activities, has been present since the Constitution's creation.³⁶ Some argue that alternative procedures must exist by which the President can enter international agreements and by which domestic law can deal with international problems.³⁷ Those who argue for such alternatives to the treaty power rely primarily on the necessities of national government and international statehood, and, where agreements are ratified by Congress, the democratic "legitimacy" of such action.³⁸

Such arguments have achieved some vindication in U.S. Supreme Court decisions. The Court has held that Congress has implied power to make laws for certain aspects of foreign affairs not expressly provided for

³⁰ 63 & 64 Vict., ch 12. For a discussion of the historical background to the Constitution of the Commonwealth of Australia, see generally J. QUICK & R. GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 1-252 (1901).

³¹ *Walker v. Baird*, [1891] A.C. 491 (P.C.); 8 HALSBURY'S LAWS OF ENGLAND paras. 984-85 (4th ed. 1974). Australian authorities for this proposition are collected *infra* note 64.

³² Hamilton emphasized this departure from the common law position: "In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign." *THE FEDERALIST* No. 69, at 448 (A. Hamilton).

³³ U.S. CONST. art. II, § 2. The power to declare war vested in Congress by article I, § 8 is also a limitation of the executive's foreign affairs power.

³⁴ U.S. CONST. art. II, § 2.

³⁵ U.S. CONST. art. IV. Additionally, Congress may legislate under the Necessary and Proper Clause to implement a treaty which is not self-executing. *Missouri v. Holland*, 252 U.S. 416 (1920). See also *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our Constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision.")

³⁶ McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 237-42 (1945) (reviews the United States experience from the end of the eighteenth century until their time of writing).

³⁷ McDougal & Lans, *supra* note 36; L. HENKIN *supra* note 29, at ch. VI. Compare Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944) with *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616 (1945) who argued that the constitutional scope for non-treaty international agreement was very limited.

³⁸ McDougal & Lans, *supra* note 36, at 185-86, 534-82; L. HENKIN, *supra* note 29, at 175.

in the Constitution.³⁹ Moreover, the President can bind the United States under international law to an agreement on any subject matter without involving either House of Congress.⁴⁰

The Supreme Court has indicated that the President can enter into some international compacts⁴¹ which are not treaties requiring the participation of the Senate, and which will override state laws and policies.⁴² It is accepted that the President can make such international agreements in areas corresponding to express presidential powers;⁴³ however, it is uncertain whether such executive agreements can be made absent an express grant of presidential power.⁴⁴

It is generally accepted that executive agreements made with the support of a majority of each House, or perhaps even simply with the acquiescence of Congress,⁴⁵ will make domestic law if the subject of the

³⁹ See *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Jones v. United States*, 137 U.S. 202 (1890); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See also the discussion in L. HENKIN, *supra* note 29, at chs. I, II.

⁴⁰ *Curtiss-Wright Export Corp.*, 299 U.S. at 319-20 (1936); see also L. HENKIN, *supra* note 29, at ch. II.

⁴¹ See *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). These cases held that an aspect of the Litvinov Agreement, under which the Soviet government assigned to the United States rights based on a Soviet appropriation of bank accounts in New York, overrode a state court doctrine of refusing to recognize foreign confiscatory law. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court held to be valid the effective Executive Orders terminating claims in United States courts by United States nationals against Iran and nullifying U.S. court judgments against Iran and attachments against Iranian property. These Executive Orders were made to fulfill undertakings given by the Executive as part of the agreement for the release of the American hostages in Iran. (This claim settlement was not associated with the President's recognition power as was the Litvinov agreement). The Court might be read as having limited its decision solely to the effect of executive agreements when it said: "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.* at 680. The Court also states: "Thus, even if the pre-1952 cases should be disregarded, Congressional acquiescence in settlement agreements since that time supports the President's power to act here." *Id.* at 684. That passage should, however, be read in light of the fact that the Court said that because the case had been given expedited treatment, the Court would "rest decision on the narrowest possible ground capable of deciding the case." *Id.* at 660. Furthermore, the court cited *Pink* several times with apparent approval. *Id.* at 679, 682-83.

⁴² One federal court of appeals has held that an executive agreement cannot override an earlier act of Congress. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). That view is criticised by L. HENKIN, *supra* note 29, at 186 and material cited therein.

⁴³ The President has express power to "receive Ambassadors." U.S. CONST. art. II, § 3. This connection was emphasized by the Court in *Pink*, 315 U.S. at 226-30 and in *Dames & Moore*, 453 U.S. at 682-83, commenting on *Pink*.

⁴⁴ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 121 (1965); RESTATEMENT OF FOREIGN RELATIONS LAW § 308 (Tent. Draft No. 1, 1980). The Litvinov Agreement, was associated with recognition of, and establishment of diplomatic relations with, the Soviet government.

⁴⁵ It is significant to note that U.S. Congressional acquiescence in Executive action, acting as an aid to judicial "lawmaking" concerning issues of Executive versus Legislative power, has no parallel in the Australian system. Compare *Dames & Moore*, 453 U.S. 654 (1981) with *Koowarta*, 39

agreement comes within a power of the Congress or the President.⁴⁶ There is also support for the view that such agreements are interchangeable with treaties.⁴⁷ Despite the support for this view, the treaty power has not withered away. Presidents continue to submit some agreements to its procedures.⁴⁸

Federation is, from one viewpoint, part of the arrangement of checks and balances. Federal considerations have, however, played little part in debate about either the scope of the treaty power or the alternatives to the treaty power.⁴⁹ The founders' decision to adopt the two-thirds Senate vote rule for treaties was informed, not so much by a perception of the Senate as the state's House (though this may have been a factor)⁵⁰ but, rather, by (a) a belief that the Senate could (and that the more numerous House of Representatives could not) function as a consultative chamber,⁵¹ and (b) a desire to check the President's power to involve the United States in international affairs.⁵²

Austl. L.R. at 434 (Gibbs, C.J.); *id.* at 449 (Stephen, J., concurring); *id.* at 459 (Mason, J., concurring).

⁴⁶ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 120 (1965); see *Cotzhausen v. Nazro*, 107 U.S. 215 (1882); *Field v. Clark*, 143 U.S. 649 (1892); *B. Altman & Co. v. United States*, 224 U.S. 583 (1912); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); L. HENKIN, *supra* note 29, at 174-75. The powers of the Congress include implied or inherent powers in the area of foreign relations. *The Chinese Exclusion Case*, 130 U.S. 518 (1889); *Jones v. United States*, 137 U.S. 202 (1890); *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁴⁷ See *McDougal & Lans*, *supra* note 36; L. HENKIN, *supra* note 29, at 175; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 120 reporters' note (1965); RESTATEMENT OF FOREIGN RELATIONS LAW § 307 comment b and reporters' notes 1 and 2 (Tent. Draft No. 1, 1980).

⁴⁸ Some of the political considerations which may contribute to this pattern are discussed by R. GHOSH, *supra* note 1, at 100-01; L. HENKIN, *supra* note 29, at 176, 183-84; see also RESTATEMENT OF FOREIGN RELATIONS LAW § 307 reporters' notes 2 and 3 (Tent. Draft No. 1, 1980); Oliver, *Getting the Senators to Accept the Reference of Treaties to Both Houses for Approval by Simple Majorities*, 74 AM. J. INT'L L. 142 (1980); Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257 (1983).

⁴⁹ Borchard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616 (1945), saw a federal objection to the use of Congressional-Executive agreements:

But what condemns to sterility the suggestion of a Congressional-Executive agreement by which the Congress purportedly acts in approval of the President's agreements, and what makes it a dangerous device for changing the form of the American Government, is that majorities in Congress could thus, by the same majorities as are required for any statute, arrogate to themselves and drain away all state power on any subject they felt disposed to control.

Id. at 662; see also *id.* at 635. Even for Borchard, however, the merit of the two-thirds Senate vote rule was not that the Senate would protect state interests, but that a two-thirds vote of one House might be more difficult to obtain than a simple majority in each House. *Id.* at 659-61, 663-64.

⁵⁰ *McDougal & Lans*, *supra* note 36, at 538-44, and material cited therein.

⁵¹ *Id.* at 539-40 and materials cited therein.

⁵² *Id.* at 544, 549 and material cited therein. See also L. HENKIN, *supra* note 29, who suggests that the two-thirds rule was, consistent with the checking purpose of the treaty power, intended to make up for the absence of the check of a majority in both Houses. *Id.* at 422 n.9.

The potential for treaty-making to shift legislative competence to the federation's center has received attention from the U.S. Supreme Court⁵³ and from commentators.⁵⁴ The Supreme Court has protected the state domain only to the extent of suggesting that a treaty must relate to a subject matter "properly the subject of negotiation with a foreign country" and even this suggestion is framed in terms of what is sufficient rather than in terms of what is necessary.⁵⁵ The view once put forward that a treaty must relate to a matter of "international concern" is now no longer generally accepted.⁵⁶ No treaty or other international agreement has ever been held invalid because its subject matter was not "properly" the subject of international negotiation or because there was no "international concern" about its subject matter.⁵⁷

The defense of the two thirds rule (and the case for limiting alternative forms of international agreements) is presented primarily in terms of the "virtues" of inhibiting presidential and/or congressional action.⁵⁸ No suggestion is made that when one third plus one member of the Senate blocks a treaty that the goal is to protect some localized state interest from national encroachment. Rather, treaties are usually opposed because of their foreign policy content.⁵⁹ That is, the treaty blocking power typically does not operate as a function of federalism. Rather the power functions, as originally intended, to restrict the Executive's freedom of action in international affairs.

The American experience of foreign affairs in constitutional law can be summarized as a conflict between the international pressures for presidential action and the domestic pressures for Senate and/or congressional rights to veto decisions. The Australian experience might be

⁵³ *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Holland*, 252 U.S. at 432; see also the citations collected by L. HENKIN, *supra* note 29, at 389 n.50, 391 n.62.

⁵⁴ L. HENKIN, *supra* note 29, at 140-48 and cases cited therein.

⁵⁵ *Geofroy*, 133 U.S. at 267; see also *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).

⁵⁶ Compare RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, 117 (1965) with RESTATEMENT OF FOREIGN RELATIONS LAWS § 304 comments c and d and reporters' notes 2 and 3 (Tent. Draft No. 1, 1980).

⁵⁷ See *United States v. Belmont*, 301 U.S. 324, 331, where the U.S. Supreme Court made it clear that notions of federally preserved areas of state competence would fail when state law and policy conflicted with a sole executive agreement as the national government must of necessity be unhindered by state law or policy when acting in the area of international affairs.

⁵⁸ The arguments in favor of the two-thirds rule are brought together and criticized acerbically by McDougal & Lans, *supra* note 36, at 574-82; see also Borchard, *supra* note 49, at 660-63.

⁵⁹ McDougal & Lans, *supra* note 36, at 553-73; F. WILCOX *supra* note 29; Oliver, *supra* note 48; Glennon, *supra* note 48. See also L. HENKIN, *supra* note 29, who identifies occasions where the Senate has acted to protect local interests from national encroachment. He also points out that the House of Representatives can sometimes be more "parochial," or protective of local interests, than the Senate. *Id.* at 248.

summarized as a conflict between the international pressures for national action, and the domestic pressures for states' rights to veto decisions.

Although the Constitution of the Commonwealth of Australia relied on the U.S. model in many respects, it did not incorporate the U.S. Constitution's pattern of checks and balances. While a doctrine of separation of powers exists, it is much weaker than its U.S. ancestor.⁶⁰ The Commonwealth of Australia's Constitution relies on British principles of responsible government.⁶¹ The Executive is without a doubt, subordinate to the legislature. The Ministers, who control executive power, must be members of, and are therefore directly answerable to, Parliament.⁶² Perhaps just as important for determining the nature of the Australian provisions relating to international affairs is the fact that the Commonwealth of Australia was not intended to assume international statehood immediately upon its establishment. Rather, the Commonwealth of Australia was to continue to be part of the British Empire.⁶³

These two factors then—the British notion of responsible government and the belief that Australia was not going to be confronted immediately with the problems and responsibilities of international statehood—resulted in there being no *detailed* provision for the conduct of foreign relations. The lack of detail in the relevant provisions which were inserted has allowed Australian Constitutional law to adapt to changes in Australia's circumstances.

The Australian Constitution contains no express reference to treaty *making*.⁶⁴ According to common law principles, treaty making is a mat-

⁶⁰ For a discussion of the doctrine of separation of powers in the Australian Constitution see L. ZINES, *supra* note 27, ch. 9; Lane, *The Decline of the Boilermakers Separation of Powers Doctrine*, 53 AUSTL. L.J. 6 (1981).

⁶¹ Moffat, *Philosophical Foundations of the Australian Constitutional Tradition*, 5 SYDNEY L. REV. 59 (1965) (discusses the general influences of the British and American constitutional traditions on the Australian constitutional framework). For the British concept of responsible government see 34 HALSBURG'S LAWS OF ENGLAND paras. 1005-1006 (4th ed. 1974), and O. PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 26-27 (5th ed. 1973).

⁶² AUSTL. CONST. § 64. "After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives."

⁶³ See generally Zines, *The Growth of Australian Nationhood and its Effects on the Powers of the Commonwealth*, in *COMMENTARIES ON THE AUSTRALIAN CONSTITUTION* (L. Zines ed. 1977); L. ZINES, *supra* note 27, at ch. 13. In the cases of *China Ocean Shipping Co. v. South Australia*, 145 C.L.R. 172 (1978-79) (noted at 11 FEDERAL L. REV. 229 (1980)), *Southern Centre of Theosophy Inc. v. South Australia*, 145 C.L.R. 246 (1979) and *Pochi v. Minister for Immigration and Ethnic Affairs*, 43 Austl. L.R. 261 (1982), the High Court has considered the constitutional relationship between Australia and the United Kingdom.

⁶⁴ AUSTL. CONST. § 75(i) gives the High Court original jurisdiction "In all matters: — (i) Arising under any treaty." This provision is discussed by Thomson, *supra* note 9, at 127-29.

ter of external royal prerogative.⁶⁵ At one stage in drafting the Constitution, the legislative subject matter in section 51(xxix) was termed "external affairs and treaties."⁶⁶ It seems that the reference to "treaties" was deleted, however, so as not to offend the Empire within whose international statehood the Commonwealth of Australia was to be subsumed on its establishment.⁶⁷ It is generally accepted that the Crown in right of the Commonwealth now represents Australia internationally⁶⁸ and that the prerogative power to make treaties binding Australia internationally has become part of the general executive power of the Crown in right of the Commonwealth of Australia.⁶⁹

The nature of the power of the Commonwealth Executive in relation to treaties must be emphasized. The Commonwealth Executive can bind Australia internationally to a treaty on any subject matter and is not limited to treaties on subject matters corresponding to Commonwealth legislative powers.⁷⁰ Furthermore, the Commonwealth Executive can so bind Australia without involving either House of Parliament.⁷¹ In accordance with common law principles, however, the fact that the Commonwealth Executive has bound Australia to an international treaty, does not of itself affect domestic law within Australia.⁷² Ordinarily, implementing legislation is required.⁷³

Any of the Commonwealth's legislative powers might be relied on to

⁶⁵ See generally, *supra* note 31 and accompanying text; L. ZINES, *supra* note 27, at 202-07 (1981); *Tasmanian Dam Case*, 46 Austl. L.R. at 838-40 (1983).

⁶⁶ J. LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 51-52 (1972).

⁶⁷ Thomson, *supra* note 9, at 123-27 discusses the historical evidence for this explanation of the change. See also J. LA NAUZE, *supra* note 66, at 172, 184, 252.

⁶⁸ See *The Queen v. Burgess; Ex parte Henry*, 55 C.L.R. 608, 643-44 (1936) (Latham, C.J.); *id.* at 681-86 (Evatt and McTiernan, JJ., concurring); *Koowarta*, 39 Austl. L.R. 434 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *id.* at 449 (Stephen, J., concurring); *id.* at 458 (Mason J.); *id.* at 469-70 (Murphy, J.); *id.* at 479 (Wilson, J.); *id.* at 482-83 (Brennan, J.). In the *Tasmanian Dam Case*, 46 Austl. L.R. 838-40 842, Justice Dawson, while acknowledging that the Crown in right of the Commonwealth can bind Australia internationally to a treaty on any subject matter, expressed his doubts as to whether section 61 is the source of this power. See generally Zines, *The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth* & Richardson, *The Executive Power of the Commonwealth*, in *COMMENTARIES ON THE AUSTRALIAN CONSTITUTION*, *supra* note 63, at 1, 50.

⁶⁹ AUSTL. CONST. § 61 provides: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

⁷⁰ See *The Queen v. Burgess; Ex parte Henry*, 55 C.L.R. 608 (1936); *id.* at 639 (Latham, C.J.); *id.* at 682 (Evatt and McTiernan, JJ.); *Koowarta*, 39 Austl. L.R. at 434 (Gibbs, C.J.); *id.* at 450 (Stephen, J.); *id.* at 463 (Mason, J.); *id.* at 470 (Murphy, J.); *id.* at 479 (Wilson, J.).

⁷¹ See *supra* notes 30 and 64 and accompanying text.

⁷² *Koowarta*, 39 Austl. L.R. at 434 (Gibbs, C.J.); *id.* at 449 (Stephen, J., concurring); *id.* at 459 (Mason, J., concurring), and cases cited therein.

⁷³ *Koowarta*, 39 Austl. L.R. at 434 (Gibbs, C.J.); *id.* at 449 (Stephen, J., concurring); *id.* at 459 (Mason, J., concurring), and cases cited therein.

implement a treaty if the treaty's subject matter corresponds to the subject matter of the head of power. The power in section 51(xxix) to make laws with respect to "external affairs" is a power which might be invoked not because of the subject matter of the treaty, but because the treaty is an international agreement. The legislative subject in section 51(xxix) is described tersely as "external affairs."

A. A Power to Make Laws With Respect to "External Affairs"

The potential of section 51(xxix) to affect the distribution of legislative competence within Australia has long been recognized.⁷⁴ Whatever else might be included within the subject matter,⁷⁵ "external affairs" includes Australia's relation with other countries.⁷⁶ The negotiation and engagement in treaties by Australia's international representative, the Commonwealth Executive, is clearly part of Australia's relations with other countries. A law controlling the Commonwealth Executive in such activities would be consistent with the British perception of the relationship between the Executive and Parliament.⁷⁷ Such a law is clearly within Parliament's power under section 51(xxix) and/or section 51(xxix) in section 51(xxxix)'s operation in relation to matters incidental to exercises of Executive power.⁷⁸ The controversy begins when Parliament legislates to control the activities within Australia of persons who are not international states or their representatives.

The contexts in which the issues of section 51(xxix) were raised and considered in *Koowarta* and in the *Tasmanian Dam Case* each represented a direct conflict between Commonwealth and state wills. In *Koowarta*, the following facts were assumed for the purposes of argument

⁷⁴ Moore, *The Commonwealth of Australia Bill*, 16 L.Q. REV. 35, 39 (1900).

⁷⁵ See *infra* notes 117-28 and accompanying text.

⁷⁶ Of the nine Justices involved in the *Koowarta* and *Tasmanian Dam Case* decisions, only Justice Dawson did not expressly accept this proposition, although he came close to doing so. *Tasmanian Dam Case*, 46 Austl. L.R. at 839-40 (1983). For clear acceptance by the other Justices see *Koowarta*, 39 Austl. L.R. at 430-31 (Gibbs, C.J., with Aickin and Wilson, JJ. concurring); *id.* at 449 (Stephen, J.); *id.* at 458 (Mason, J.); *id.* at 469 (Murphy, J.); *id.* at 486 (Brennan, J.); *Tasmanian Dam Case*, 46 Austl. L.R. at 805 (Deane, J.). It must be noted that the clause speaks of external rather than foreign affairs so as to include relations with countries within the Empire which, at the time of the establishment of the Commonwealth of Australia, owed allegiance to the same sovereign and were therefore not "foreign." *The Queen v. Burgess*, 55 C.L.R. 608, 684 (Evatt and McTiernan, JJ.). British subjects are now, however, foreigners in Australia. *Pochi v. Minister for Immigration and Ethnic Affairs*, 43 Austl. L.R. 261 (1982). Justice Mason has offered the alternative, not incompatible explanation, that the word "foreign" would have been inappropriate at the establishment of Australia, as Australia at that stage lacked international status and would therefore have been incapable of having "foreign" affairs. *Koowarta*, 39 Austl. L.R. at 458.

⁷⁷ See *supra* notes 61-62 and accompanying text.

⁷⁸ See *Tasmanian Dam Case*, 46 Austl. L.R. at 839-40 (Dawson, J.); compare *Koowarta*, 39 Austl. L.R. at 459 (Mason, J.); *id.* at 470 (Murphy, J.) ("Otherwise the executive power in relation to external affairs, unless confined by Parliament, is unconfined.") (Emphasis added).

on demurrer: A corporation which had been established under Commonwealth law to aid in the advancement of Aborigines had made arrangements to purchase, from its current holder, a lease of Crown land being used for pastoral purposes. It was proposed that the land be developed for pastoral purposes by a group of Aborigines.⁷⁹ The Crown from which the land was leased was the Crown in right of the State of Queensland. Queensland statute law provided that a Crown lease could not be transferred without the state Minister's consent. The Minister refused to give his consent.⁸⁰ The state government announced that it was opposed to the transfer because it thought there was enough land in Aboriginal hands and because it was opposed to any more land being developed by Aboriginal groups in isolation.⁸¹ Koowarta, one of the Aborigines who was going to work the land, sought injunctive and declaratory remedies under the Commonwealth's Racial Discrimination Act of 1975 which, inter alia, purported to implement the International Convention for the Elimination of All Forms of Racial Discrimination by prohibiting discrimination on account of race in land dealings.⁸² The High Court, by a vote of four (Justices Stephen, Mason, Murphy and Brennan) to three (Chief Justice Gibbs and Justices Aickin and Wilson), held that the relevant provisions of the Racial Discrimination Act of 1975⁸³ were supported by section 51(xxix). By the time the *Tasmanian Dam Case* was argued, Justices Stephen and Aickin had been replaced by Justices Deane and Dawson.⁸⁴

The *Tasmanian Dam Case* involved a proposal to build a hydroelectric dam in the southwest region of the State of Tasmania. The proposed dam would have flooded portions of two rivers, the Gordon and the Franklin, which flow through wilderness in a high rainfall area.⁸⁵ The area contains spectacular scenery, unusual flora and archaeological sites from human habitation in the region more than 20,000 years ago.⁸⁶ The dam proposal had been an important issue in both Federal and Tas-

⁷⁹ *Koowarta*, 39 Austl. L.R. at 419-21.

⁸⁰ *Id.* at 420.

⁸¹ *Id.*

⁸² A parallel debate in the United States about the possibility that international treaties may create human rights enforceable as part of the domestic law of the United States has lost some of its urgency with the expansion, through judicial interpretation, of the Bill of Rights. R. LILLICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS* 96-97 (1979); Oliver, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 *HOFSTRA L. REV.* 411 (1981). For a recent article suggesting that sources external to the Constitution be used to add substantive content to the due process and equal protection clauses of the U.S. Constitution in ways that prevent conflict with international law, see Christensen, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 *U. CIN. L. REV.* 3 (1983).

⁸³ §§ 9, 12, 24.

⁸⁴ See *supra* note 6.

⁸⁵ 46 Austl. L.R. at 633-34.

⁸⁶ *Id.* at 637-38.

manian elections. Eventually at the state level both the Liberal government and the opposition Australian Labor Party supported the building of a dam while at the Federal level not only the contenders for government—the Liberal/National Country Party coalition and the Australian Labor Party—but also the Australian Democrats, with potential to control the Senate, were opposed to a dam in the area.⁸⁷ Until early 1983 the Federal government was in the hands of the Liberal/National Country Party coalition under Prime Minister Fraser. This government considered it inappropriate to do anything more than to offer inducements to the Tasmanian government not to build the dam.⁸⁸

A Labor government under Prime Minister Hawke was returned early in 1983 and promulgated regulations under an existing Commonwealth Act—the National Parks and Wildlife Conservation Act of 1975.⁸⁹ With the support of the Australian Democrats in the Senate, the Labor government secured the enactment of a new Act (the World Heritage Properties Conservation Act of 1983)⁹⁰ which was designed to prevent, inter alia, dam construction in the Gordon/Franklin region. The legislation purported to be, inter alia, an implementation of Australia's obligations under the Convention for the Protection of the World Cultural and Natural Heritage.⁹¹ In 1981, the Tasmanian (then Labor) Government had requested the Federal (then Liberal/National Country Party) Government to apply for World Heritage listing for the Gordon and Franklin rivers.⁹² The Federal Government made that application and refused to withdraw it when requested to do so by the Tasmanian Government (Liberal at that stage).⁹³ The World Heritage Committee had listed the area late in 1982.⁹⁴ When the validity of the New Federal Labor Government's action was tested before the High Court, enough of it was upheld (by the vote of Justices Mason, Murphy, Brennan and Deane over the dissents of Chief Justice Gibbs and Justices Wilson and

⁸⁷ 97 AUSTL. PARL. DEB., SENATE (Hansard) 3240-70 (1982), sets out the views of the major parties shortly before the 1983 federal election. The development of the views of the major parties is set out in Bates, *The Aftermath of Lake Pedder*, in *THE SOUTH WEST DAM DISPUTE: THE LEGAL AND POLITICAL ISSUES* 2-5 (M. Sornarajah ed. 1983); P. THOMPSON, *BOB BROWN OF THE FRANKLIN RIVER* 113-80 (1984) (Bob Brown was the leader of the campaign against the damming of the Franklin).

⁸⁸ See 97 AUSTL. PARL. DEB., *supra* note 87, at 3241, 3248; Bates, *supra* note 87, at 4; P. THOMPSON, *supra* note 87, at 171-72.

⁸⁹ 12 AUSTL. ACTS P. 101 (1975).

⁹⁰ 65 AUSTL. ACTS P. (1983).

⁹¹ The Convention for the Protection of the World Cultural and National Heritage was adopted and ratified by Australia on Aug. 22, 1974. *Tasmanian Dam Case*, 46 Austl. L.R. at 651 (Gibbs, C.J.).

⁹² 46 Austl. L.R. at 634.

⁹³ *Id.*

⁹⁴ *Id.*

Dawson) for the dam construction to be stopped.⁹⁵

It was against these highly charged backgrounds—race relations in *Koowarta* and conservation versus economic development in the *Tasmanian Dam Case*—that the content of section 51(xxix) was considered. The consideration of the content of section 51(xxix) revolved around the following three main issues:

1. Whether the potential of section 51(xxix) need be constrained so as to preserve a “federal” distribution of legislative competence?

2. What will suffice to bring a subject matter within the reach of section 51(xxix)?

3. Is it sufficient to bring a subject matter within the reach of section 51(xxix) that the Commonwealth Executive has made Australia subject to international treaty obligations relating to that subject matter?

The first two issues interlock and logically precede the third. The reader should, at this point, be warned that, in accordance with the High Court tradition of judicial independence, eight of the nine judges involved in these cases wrote a full judgment in each case in which he was involved. Thirteen separate sets of reasoning and many differences in approach were the result.

1. Need the Potential of section 51(xxix) be Constrained so as to Preserve a Federal Distribution of Legislative Competence?

The Chief Justice, Sir Harry Gibbs answered emphatically and unambiguously yes—the federal nature of the Constitution did have to be taken into account.⁹⁶ In this conclusion, and the reasoning behind it, he received the support of Justices Aickin and Wilson in *Koowarta*⁹⁷ and of Justices Wilson and Dawson in the *Tasmanian Dam Case*.⁹⁸ The basic point was simple: whatever the words “external affairs” might mean at first sight, it could not have been the intention of the Constitution that any one of the Commonwealth’s powers in section 51 should render otiose the other powers in the list.⁹⁹ This basic point was embellished by

⁹⁵ Most of the facts are set out in the judgment of Chief Justice Gibbs, 46 Austl. L.R. at 633-39.

⁹⁶ *Koowarta*, 39 Austl. L.R. at 438-45; *Tasmanian Dam Case*, 46 Austl. L.R. at 668-69.

⁹⁷ In *Koowarta*, both Justices expressed full agreement with the judgment of the Chief Justice. 39 Austl. L.R. at 475. Justice Wilson also made some supplementary remarks of his own at 475-82. In particular Justice Wilson found encouragement in the “repeated references in the United States Supreme Court to the operation of constitutional implications to restrain Congressional power.” *Id.* at 481-82. This aspect of Justice Wilson’s judgment is considered further *infra* at notes 239-40 and accompanying text.

⁹⁸ 46 Austl. L.R. at 752, 841-43, respectively.

⁹⁹ *Koowarta*, 39 Austl. L.R. at 438-39 (Gibbs, C.J., Aickin and Wilson, JJ. concurring); *Tasmanian Dam Case*, 46 Austl. L.R. at 669 (Gibbs, C.J.); *id.* at 752 (Wilson, J.); *id.* at 842-43 (Dawson, J., referring to the judgment of Chief Justice Gibbs in *Koowarta*).

the proposition that Australia was intended to be a "true" federation.¹⁰⁰ It was unthinkable that the Commonwealth Executive should be able, by its own actions in the sphere of external affairs, to increase the scope of Commonwealth legislative powers.¹⁰¹

The response of Justice Stephen in *Koowarta* was ambiguous. He neither expressly accepted or rejected the proposition that the federal nature of the Constitution could be taken into account when considering section 51(xxix).¹⁰² However, it might be inferred that his Honour was accepting that the federal nature of the Constitution could be taken into account because he eventually adopted a formula¹⁰³ similar to one which he had earlier described as being designed to take account of the federal nature of the Constitution.¹⁰⁴

Justices Mason, Murphy and Brennan in *Koowarta*¹⁰⁵ and in the *Tasmanian Dam Case*,¹⁰⁶ and Justice Deane in the *Tasmanian Dam Case*,¹⁰⁷ all answered unambiguously that the federal nature of the Constitution could not be allowed to limit the natural meaning of "external affairs." The grant of power with respect to "external affairs" was itself part of the federal structure of the Constitution, and a part of the definition of Commonwealth legislative competence.¹⁰⁸ While the founders may well not have foreseen the growth in external affairs that has taken place this century, that in itself was no reason for narrowing the meaning of the grant of power. If anything, the inclination should be to give constitutional grants of legislative power a broad construction.¹⁰⁹

¹⁰⁰ *Koowarta*, 39 Austl. L.R. at 439 (Gibbs, C.J., Aickin and Wilson, JJ. concurring). Reference was made to the discussion of the incidental area of the commerce power in *Airlines of New South Wales*, 113 C.L.R. 54 (1964), discussed *supra* note 20 and accompanying text.

¹⁰¹ *Koowarta*, 39 Austl. L.R. at 438-40 (Gibbs, C.J., Aickin and Wilson, JJ., concurring). *Tasmanian Dam Case*, 46 Austl. L.R. at 669 (Gibbs, C.J.); *id.* at 843 (Dawson, J., referring to the judgment of Chief Justice Gibbs in *Koowarta*).

¹⁰² *Koowarta*, 39 Austl. L.R. at 445-57 (Stephen, J.).

¹⁰³ *Id.* at 453. "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.'" *Id.*

¹⁰⁴ *Id.* at 450. "The real issue in these cases is confined to the question whether this power to implement treaty obligations is subject to any and if so what overriding qualifications derived from the federal nature of our Constitution. It is such qualifications which, in my statement of a highest common factor, have led to the introduction of the phrases 'matters international in character' and 'legitimately the subject of agreement between nations.'" Note his Honour's reference to L. HENKIN, *supra* note 29, at 140-41. *Id.* at 452.

¹⁰⁵ 39 Austl. L.R. at 461-62, 472, 484 respectively.

¹⁰⁶ 46 Austl. L.R. at 692-94, 726-28, 772-74, respectively.

¹⁰⁷ *Id.* at 801-02.

¹⁰⁸ *Koowarta*, 39 Austl. L.R. at 462 (Mason, J.). In the *Tasmanian Dam Case* Justice Murphy said "no rational argument is advanced for disregarding the particular federal power relied upon when achieving the [federal] balance." 46 Austl. L.R. at 727. See also the opinion of Judge Deane, *id.* at 802.

¹⁰⁹ See *supra* text accompanying notes 105, 106-07.

Has the majority vote in the *Tasmanian Dam Case* of these four Justices (Mason, Murphy, Brennan, and Deane) settled the issue that the content of section 51(xxix) is not to be constrained by federal considerations?¹¹⁰ That is most unlikely given that four judges in *Koowarta* (a majority on this sub-issue but not on the outcome of the case)—Chief Justice Gibbs, Justices Aickin and Wilson clearly, and Justice Stephen by inference—accepted the propriety of limiting section 51(xxix) to take account of the federal nature of the Constitution.¹¹¹ In any case, given the looseness and generality of the issues of federalism, it is a relatively simple matter to rework a federal argument so as to distinguish the new version from the “discredited” federal argument.¹¹² Furthermore, as the ensuing discussion will demonstrate, some specific propositions which limit the use of the external affairs power seem to have taken on a separate existence of their own (although originally federally based).

2. What Will Bring a Subject Matter Within the Reach of Section 51(xxix)?

Capacity to affect Australia’s international relations is the core of the characterization problem. However, just as with the commerce power’s application to local activities,¹¹³ the determining question is what kind of chain of cause and possible effect is sufficient. It is not a prerequisite for legislation under section 51(xxix) that there be a relevant treaty.¹¹⁴ It is accepted, for example, that a law prohibiting persons

¹¹⁰ The application of stare decisis to constitutional issues is discussed in *Queensland v. the Commonwealth (The Second Territories Representation Case)*, 129 C.L.R. 585 (1977). In that case Justice Gibbs (as he then was) was adamant that a change in the membership of the High Court was not of itself sufficient to justify review of a recent High Court decision even though he had been in dissent in that recent decision (*Western Australia v. the Commonwealth (The First Territories Representation Case)*, 134 C.L.R. 201 (1975)). 129 C.L.R. at 599-600.

¹¹¹ 39 Austl. L.R. at 438-40 (Gibbs, C.J., and Aicken, J., concurring); *id.* at 479-82 (Wilson, J.); *id.* at 450-52 (Stephens, J.).

¹¹² *Amalgamated Society of Engineers v. Adelaide Steamship Co. (The Engineer’s Case)*, 28 C.L.R. 129 (1920) was thought to have exploded both the doctrine of intergovernmental immunity (which implied from the federal nature of the Constitution some immunity for the Commonwealth and the states from each other’s actions) and the doctrine of reserved powers (which construed Commonwealth legislative powers on the assumption that specific subject matters had been reserved to the states). See L. ZINES, *supra* note 27, at Ch. 14, and *infra* notes 232-44 and accompanying text for the revival of a doctrine of implied intergovernmental immunity. The dissenting judges in both *Koowarta*, 39 Austl. L.R. at 438-39 (Gibbs, C.J., Aickin and Wilson, JJ., concurring) and the *Tasmanian Dam Case*, 46 Austl. L.R. at 669 (Gibbs, C.J.), *id.* at 752 (Wilson, J.), *id.* at 841 (Dawson, J.), considered that their approach of construing Commonwealth legislative powers in accordance with the federalism principle that there be some *unspecified* subject matters beyond Commonwealth legislative power was consistent with the *Engineer’s Case* explosion of the reserved powers doctrine.

¹¹³ See *supra* notes 17-25 and accompanying text.

¹¹⁴ *Koowarta*, 39 Austl. L.R. at 449, 456 (Stephen, J.); *id.* at 458, 466 (Mason, J.); *id.* at 486 (Brennan, J.). *Tasmanian Dam Case*, 46 Austl. L.R. at 667 (Gibbs, C.J.); *id.* at 728 (Murphy, J.); *id.* at 772 (Brennan, J.); *id.* at 805 (Deane, J.); *id.* at 840 (Dawson, J.). A portion of Justice Mason’s

within Australia from exciting disaffection against foreign governments is per se within section 51(xxix).¹¹⁵ Similarly, a law relating to the treatment of diplomats within Australia would be within the external affairs power with or without a relevant treaty.¹¹⁶

Both *Koowarta* and the *Tasmanian Dam Case*, however, involved relevant treaties and it was not therefore necessary for the majority judges upholding the legislation (prohibiting racial discrimination in one case and protecting cultural and natural heritage in the other) to decide whether the legislation would have been within power if there had not been relevant treaties.

Even though it was not necessary to go further, Justice Mason (inferentially) and Justice Murphy (directly) in *Koowarta* indicated that racial discrimination within Australia would have been sufficiently relevant to Australia's international relations to be within power even without a treaty.¹¹⁷ Justice Mason spoke of the threat that racial discrimination provides to peaceful and friendly relations among nations.¹¹⁸ Justice Murphy pointed out how the existence of racial discrimination within Australia devalues any criticism which Australia levels at racial discrimination or other human rights violations in other countries.¹¹⁹

In the *Tasmanian Dam Case* only Justice Murphy expressed the opinion that section 51(xxix) would support legislation protecting world heritage in the absence of a treaty.¹²⁰ It seems that his Honour is willing to accept as sufficient to establish power a tenuous connection between local activity and Australia's international relations. His Honour said:

The preservation of the world's heritage must not be looked at in isolation but as part of the co-operation between nations which is calculated to achieve intellectual and moral solidarity of mankind and to rein-

opinion in the *Tasmanian Dam Case* might be construed as saying that the entering into of a treaty might reduce the extent to which the subject matter could be dealt with under the external affairs power. *Id.* at 697. This is, to say the least, a surprising proposition. See *infra* text accompanying notes 220-25.

¹¹⁵ See *The Queen v. Sharkey*, 79 C.L.R. 121 (1949) where a law prohibiting the doing of certain acts with intention to excite disaffection against the Government or Constitution of any of the King's Dominions was upheld under the external affairs power. See also *Koowarta*, 39 Austl. L.R. at 432 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *id.* at 466 (Mason, J.).

¹¹⁶ Cf. *Koowarta*, 39 Austl. L.R. at 432 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *Tasmanian Dam Case*, 46 Austl. L.R. at 840 (Dawson, J.). There is an act relating to crimes against Diplomats (Crimes (Internationally Protected Persons) Act, 1976, 8 AUSTRALIAN ACTS P. 21 (1977)) implementing the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.

¹¹⁷ 39 Austl. L.R. at 466-67 (Mason, J.); *id.* at 473 (Murphy, J.).

¹¹⁸ *Koowarta*, 39 Austl. L.R. at 467-68.

¹¹⁹ *Id.* at 471, 473.

¹²⁰ Apparently the Commonwealth had not even submitted that the subject matter would be within the reach of the external affairs power in the absence of a treaty. 46 Austl. L.R. at 742 (Brennan, J.); *id.* at 807 (Deane, J.).

force the bonds between people which promote peace and displace those of narrow nationalism and alienation which promote war.¹²¹

Justice Murphy also offered these obiter comments:

It is preferable that the circumstances in which a law is authorized by the external affairs power be stated in terms of what is sufficient, even if the categories overlap, rather than in exhaustive terms. To be a law with respect to external affairs it is sufficient that it: —

- (a) Implements any international law;¹²² 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;¹²³ 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;¹²⁴ or
- (e) deals with circumstances or things outside Australia;¹²⁵ or
- (f) deals with circumstances or things inside Australia of international concern.¹²⁶

While this list contains much that is highly contentious, all of the items can quite easily be referred to a power to make laws with respect to external affairs, so long as federal considerations of maintaining areas of action for the states are excluded.

Other majority judges—Justices Stephen and Brennan in *Koowarta*,¹²⁷ and Justices Mason, Brennan and Deane in the *Tasmanian*

¹²¹ *Id.* at 733.

¹²² There is nothing particularly surprising about the proposition that section 51(xx) may support legislation implementing customary international law, as the rationale supporting *treaty* implementation (see *infra* notes 138-40 and accompanying text) applies with equal force to customary international law implementation. L.R. ZINES, *supra* note 27, at 230 (quoted with approval by Justice Mason in *Koowarta*, 39 Austl. L.R. at 466). Chief Justice Gibbs and Justice Stephen also tended to treat implementation of customary international law as being analogous to implementation of treaty based international law. *Id.* at 442-44, 456 respectively.

¹²³ This point is tied up with the question of what is a sufficient international obligation to found power. See *infra* notes 183-89 and accompanying text.

¹²⁴ It is common ground that the subject matter "external affairs" includes Australia's relations with other countries. See *supra* note 76. The reference to relations with other kinds of entities is radical.

¹²⁵ This view had been taken previously in *New South Wales v. Commonwealth (The Seas and Submerged Lands Case)*, 135 C.L.R. 337 (1975) (Barwick, C.J.); *id.* at 471 (Mason, J.); *id.* at 497 (Jacobs, J.); see also *Koowarta*, 39 Austl. L.R. at 458 (Mason, J.). Chief Justice Gibbs has, however, expressed some doubt about this proposition. *Id.* at 430-32.

¹²⁶ *Koowarta*, 39 Austl. L.R. at 729-30.

¹²⁷ 39 Austl. L.R. at 456-57 (Stephens, J.); *id.* at 488-89, 494-95 (Brennan, J.).

*Dam Case*¹²⁸—were reluctant to go further than was necessary to decide the cases which were before them and which involved treaties. Their judgments were, however, compatible with an open-ended approach to the power. The proposition that international concern about a subject matter will suffice to bring the subject matter within the reach of section 51(xxix) (even without there being a treaty thereon) has been accepted not only by Justice Murphy¹²⁹ but also by Justices Mason¹³⁰ and Brennan.¹³¹

In accordance with his forcefully expressed belief that federal considerations required section 51(xxix) to be limited, Chief Justice Gibbs, with the support of Justices Aickin and Wilson, set out in *Koowarta* a formula which would close off the power:

Any subject matter may constitute an external affair, provided that the manner in which it is treated [by legislation seeking to rely on section 51(xxix)] in some way involves a relationship with other countries or with persons or things outside Australia. A law which regulates transactions between Australia and other countries, or between residents of Australia and residents of other countries, would be a law with respect to external affairs, whatever its subject matter.¹³²

This seems to say connection of a law controlling activities within Australia can only be made out if the law bears *on its face* an external aspect. Without such a connection appearing on the face of the law, the law controlling local activities cannot be upheld under section 51(xxix) no matter what effect on Australia's international relations those local activities may *in fact* be having. The provisions at issue dealing with racial discrimination, "an act done within Australia by one Australian to or in relation to another and taking effect only within Australia,"¹³³ did not pass this facial test.¹³⁴

Neither the outcome of the *Koowarta* or the *Tasmanian Dam Case*, both of which involved treaties, prevent this restricting formula from be-

¹²⁸ 46 Austl. L.R. at 707-09 (Mason, J.); *id.* at 762, 790 (Brennan, J.); *id.* at 814-16 (Deane, J.).

¹²⁹ See paragraph (f) in the quote set out *supra* text accompanying note 126 and *Koowarta*, 39 Austl. L.R. at 473.

¹³⁰ *Koowarta*, 39 Austl. L.R. at 466-67; *Tasmanian Dam Case*, 46 Austl. L.R. at 697.

¹³¹ *Tasmanian Dam Case*, 46 Austl. L.R. at 772.

¹³² 39 Austl. L.R. at 441. Justices Aickin and Wilson agreed generally with the judgment of Chief Justice Gibbs. *Id.* at 475. For Justice Wilson's additional comments see *id.* at 477. Chief Justice Gibbs, *id.* at 432-33, and Justice Wilson, *id.* at 477, both argued that all the laws previously held to be within section 51(xxix) exhibited this characteristic. It is not particularly clear to this writer, however, why their Honours considered that legislation controlling air navigation over Australia by Australians passed this test. *Id.* at 431-33, 476-77, respectively, referring to *The Queen v. Burgess Ex parte Henry*, 55 C.L.R. 608 (1936), *The Queen v. Poole, Ex parte Henry* (No. 2), 61 C.L.R. 634 (1939) and *Airlines of New South Wales* [No. 2], 113 C.L.R. 54 (1965).

¹³³ *Koowarta*, 39 Austl. L.R., at 429-30 (Gibbs, C.J., Aickin and Wilson, J.J., concurring).

¹³⁴ *Id.* at 442.

ing used in situations where the Commonwealth seeks to legislate *without* any relevant treaty. The test has the advantage of greatly simplifying the inquiry into validity. It is to be noted, however, that this test has no justification other than the necessity perceived by some, and vigorously denied by others, of restricting Commonwealth power. In its severity the test is without parallel in doctrines relating to other Commonwealth legislative powers. Even with the incidental aspect of the commerce power, where the Court has chosen to ignore *certain kinds* of effects of local activities on the subject matter of power,¹³⁵ the Court still allows some control of local activities (unsafe intrastate air navigation) even though no connection with the subject matter of power (interstate and overseas commerce) appears in the operative provisions of the legislation.¹³⁶ There the Court takes account of the effect that the local activity could have on the subject matter of power. It is arguable that the test adopted by Chief Justice Gibbs and Justices Aickin and Wilson in *Koowarta* denies that anything at all is incidental to the subject matter of section 51(xxix).¹³⁷

3. What Effect Does It Have on the Scope of Section 51(xxix) for the Commonwealth Executive to Incur International Treaty Obligations?

For those who feel no need to limit section 51(xxix) on account of its federal context, it is not at all difficult to connect legislation fulfilling Australia's treaty obligations with Australia's international relations. There are a range of ways in which that connection can be explained. If the Australian Executive incurs, on Australia's behalf, treaty obligations

¹³⁵ See *supra* note 20 and accompanying text.

¹³⁶ *Airlines of New South Wales* [No. 2] 113 C.L.R. 54 (1965).

¹³⁷ The question of where the center of the "external affairs" power ends and the incidental aspect comes into play has not been directly discussed by members of the Court. The dissenting judges have, however, emphasized the difference between activities related to carrying on Australia's international relations and activities within Australia which are not themselves Australia's relations with other countries but which the Commonwealth may wish to control because those activities are having or could have an effect on Australia's international relations. See *Koowarta*, 39 Austl. L.R. at 440 where Chief Justice Gibbs (with the concurrence of Justices Aickin and Wilson) comments on the submission of Sir Daryl Dawson, then Solicitor-General for the state of Victoria. As a Justice of the High Court, Dawson later developed this principle in the *Tasmanian Dam Case*, 46 Austl. L.R. at 839-40. Such an approach tends to treat control of activities which are not themselves international relations but which may affect international relations, as an issue of incidental power.

Rather than focus on the incidental power, the majority judges have tended to speak of activities within Australia becoming "external affairs." See, e.g., *Koowarta*, 39 Austl. L.R. at 473 (Murphy, J.); *id.* at 487 (Brennan, J.). Such language tends to implicate the center of the external affairs power. The choice of language is not merely semantic because an initial decision that the activity being controlled is not itself within the center of the subject matter of the power, and therefore can only be reached, if at all, by recourse to the incidental power makes arguments for limiting the power to maintain a federal balance, albeit still of debatable worth, more respectable. Cf. *Gazzo v. Comptroller of Stamps*, 38 Austl. L.R. 25 (1981).

in relation to a subject matter, then that subject matter is taken into external affairs. Treaties are a formalization of a part of Australia's international relations. A treaty is evidence of the existence of international concern about the subject matter of the treaty. Failure to fulfill treaty obligations tends to invite international protest about that particular failure and deprives Australia of credibility when carrying on other international relations. Based upon similar reasoning, Justices Mason, Murphy and Brennan in *Koowarta*¹³⁸ and the *Tasmanian Dam Case*¹³⁹ and Justice Deane in the *Tasmanian Dam Case*¹⁴⁰ clearly accepted the proposition that if the Commonwealth Executive has incurred an international treaty obligation, then a correlative power for the Commonwealth parliament is generated to legislate under section 51(xxix) to implement the obligation.

Justices Stephen,¹⁴¹ Mason,¹⁴² Brennan¹⁴³ and Deane¹⁴⁴ have indicated that if a treaty is arranged and entered into by the Commonwealth Executive *solely* as a device for attracting legislative power then legislative power will not or may not be attracted. Justice Brennan offered the fullest explanation of why this should be so. His Honour said: "Such a colourable attempt to convert a matter of internal concern into an external affair would fail because the subject of the treaty obligation would not in truth affect or be likely to affect Australia's relations with other nations."¹⁴⁵

If all the parties to a treaty were aware that it was a sham contrived merely to generate legislative power for the Commonwealth of Australia, then it might be understandable that the treaty would be deprived of any force as evidence of either the international concern of the parties or the likelihood that failure to implement the treaty would provoke international reaction. If, however, some or all of the other parties were unaware of the lack of bona fides of the Commonwealth Executive, then the treaty and the fact that Australia was *apparently* bound thereby, would still seem to establish the relevance of the subject matter of the treaty to Australia's international relations. The difficulties of establishing a lack of *bona fides* by the Commonwealth Executive would be large enough.¹⁴⁶

¹³⁸ 39 Austl. L.R. at 459, 463-64, 467 (Mason, J.); *id.* at 473 (Murphy, J.); *id.* at 486-87 (Brennan, J.).

¹³⁹ 46 Austl. L.R. at 691 (Mason, J.); *id.* at 728-29 (Murphy, J.); *id.* at 771-72 (Brennan, J.).

¹⁴⁰ *Id.* at 803-804.

¹⁴¹ *Koowarta*, 39 Austl. L.R. at 452-53.

¹⁴² *Id.* at 459, 464. *But see* his Honour's statements in the *Tasmanian Dam Case*, 46 Austl. L.R. at 692, set out *infra* text accompanying note 146.

¹⁴³ *Koowarta*, 39 Austl. L.R. at 487-88; *Tasmanian Dam Case*, 46 Austl. L.R. at 771.

¹⁴⁴ *Tasmanian Dam Case*, 46 Austl. L.R. at 805.

¹⁴⁵ *Koowarta*, 39 Austl. L.R. at 488.

¹⁴⁶ *See generally* Sankey v. Whitlam, 142 C.L.R. 1 (1978); *Re Toohey; Ex parte Northern Land Council*, 38 Austl. L.R. 439 (1981); L. ZINES, *supra* note 27, at 177-87, 227. Justice Brennan seems willing to test bona fides indirectly by examining objective indicia such as the treaty's subject

The difficulties of testing the bona fides of other parties to a treaty would be enormous.¹⁴⁷

It is not likely, however, that the Commonwealth Executive would arrange many sham treaties. Too many bona fide treaties exist for the Commonwealth Executive to need to arrange shams. In *Koowarta*, Justice Wilson commented:

In addition to the Covenant on Racial Discrimination, there is now the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, in addition to the Covenants of the International Labour Organization. There are Declarations on the rights of the child, the rights of mentally retarded persons, and the rights of disabled persons. It is no exaggeration to say that what is emerging is a sophisticated network of international arrangements directed to the personal, economic, social and cultural development of all human beings. The effect of investing the Parliament with power through section 51(xxix) in all these areas would be to transfer to the Commonwealth virtually unlimited power in almost every conceivable aspect of life in Australia, including health and hospitals, the workplace, law and order, the economy, education, and recreational and cultural activity, to mention but a few general heads.¹⁴⁸

For Chief Justice Gibbs and Justices Aickin, Wilson and Dawson, it was unthinkable that the Commonwealth Executive, by incurring treaty obligations, should be able to effect such a shift in legislative competence.¹⁴⁹ In *Koowarta*, Chief Justice Gibbs and Justices Aickin and Wilson were of the opinion that the Commonwealth Parliament could only legislate under section 51(xxix) to implement an international treaty obligation if the subject matter would have been within the reach of section 51(xxix) *without* the treaty.¹⁵⁰ Such a restrictive view of the effect of a treaty had not been adopted previously by any member of the High Court.¹⁵¹ Again, no positive reasoning, beyond the perceived necessity of

matter, manner of formation and extent of international participation and the nature of obligations created by the treaty. *Koowarta*, 39 Austl. L.R. at 488; *Tasmanian Dam Case*, 46 Austl. L.R. at 771.

¹⁴⁷ The act of state doctrine might not operate to prevent an examination of the bona fides of foreign states as that doctrine is concerned with preventing courts from adjudicating on the lawfulness or rightness of the foreign sovereign's act of state. See *Nissan v. Attorney-General* [1970] A.C. 179, 237 (Lord Pearson). For purposes of the external affairs power the issue is not whether the foreign sovereign acted lawfully or rightly in becoming party to a treaty, but whether there is, in fact, international concern about the subject matter of the treaty.

¹⁴⁸ 39 Austl. L.R. at 481.

¹⁴⁹ *Id.* at 438-40 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *Tasmanian Dam Case*, 46 Austl. L.R. at 669 (Gibbs, C.J.); 840-42 (Dawson J., concurring).

¹⁵⁰ 39 Aust. L.R. at 440 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *id.* at 481 (Wilson, J.).

¹⁵¹ Chief Justice Gibbs believed his approach was the same used by Justice Dixon in *The Queen v. Burgess; Ex parte Henry*, 55 C.L.R. 608, 669 (1936). 39 Aust. L.R. at 440. In *Burgess*, Justice Dixon had said that the Commonwealth could legislate to implement a treaty the subject

restricting Commonwealth power, was advanced to support this approach.¹⁵² Their Honours pointed out that it was not unusual for federal systems to have a division of competence to implement international treaty obligations¹⁵³ and that inability of the Commonwealth Parliament to fulfill Australia's international obligations would not deprive Australia of international statehood.¹⁵⁴ In their view, Australia would have competence to fulfill treaty obligations divided between the Commonwealth and the states.¹⁵⁵ As it had done on previous occasions, the Commonwealth could request the states to enact implementing legislation.¹⁵⁶

In making these points their Honours had to some extent answered the broader language of Justices Mason and Murphy, who had described the possibility of the Commonwealth Parliament being without power to implement international relations as equivalent to Australia being an international cripple unable to carry on international relations.¹⁵⁷ What the narrow view judges failed to explain, however, was why only arguments alleging a threat to Australia's international sovereignty deserved an answer; the central consideration would seem to be *relevance* to Australia's international relations. Their approach treated Australia's international treaty obligations as irrelevant to Australia's international relations. To state it so indicates just how determined these judges were

matter of which was "indisputably international in character." 55 C.L.R. at 669. One should note, however, that although Justice Dixon regarded as "extreme" the view that a treaty could bring any subject matter within the external affairs power, his Honour did not say that it was necessary, merely that it was sufficient, that the subject matter of a treaty be indisputably international. *Id.*

¹⁵² See *supra* notes 96-101 and accompanying text.

¹⁵³ *Koowarta*, 39 Austl. L.R. at 434 (Gibbs, C.J., Aickin and Wilson, JJ., concurring). Compare the opinions of Stephen, J. at 451-53 and Brennan, J., at 483. Justice Wilson drew particular attention to the Canadian experience and to the Privy Council decision in *Attorney General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, holding that the Dominion and Provincial legislature together had sufficient power to implement treaties. 39 Austl. L.R. at 480. His Honour noted one commentator's opinion (McWhinney, *Canadian Federalism, and the foreign Affairs and Treaty Power*, 7 CANADIAN YEARBOOK OF INTERNATIONAL LAW, 3, 4-5 (1969)) that the Privy Council decision had not even caused mild inconvenience let alone practical difficulties. Justice Wilson did not, however, refer to the doubts expressed by the Canadian Supreme Court in *Francis v. The Queen* [1956] S.C.R. 618, 621, *The Offshore Mineral Rights Case* [1967] S.C.R. 792, 815-17, and by other commentators. See P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 97 (1977); Milani, *The Canadian Treaty Power: Decidedly Anachronistic; Potentially Antagonistic*, 44 SASK. L. REV. 195 (1980); McDonald, *The Problem of Treaty-Making and Treaty Implementation in Canada*, 19 ALBERTA L. REV. 293 (1981); Scott, *Labour Conventions Case: Lord Wright's Undisclosed Dissent*, 34 CAN. BAR REV. 114, 115 (1956) for discussions of the standing of the Privy Council decision.

¹⁵⁴ *Koowarta*, 39 Austl. L.R. at 483.

¹⁵⁵ 39 Austl. L.R. at 434-35 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *id.* at 479-80 (Wilson, J.).

¹⁵⁶ *Id.* at 445 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *id.* at 480 (Wilson, J.). Justice Wilson referred to Burmester, *The Australian States and Participation in the Foreign Policy Process*, 9 FEDERAL L. REV. 257 (1978). 39 Austl. L.R. at 480. The same Burmester campaigned to prevent dam construction in South West Tasmania.

¹⁵⁷ See *Koowarta*, 39 Austl. L.R. at 459-60, 462-63 (Mason, J.); *id.* at 473 (Murphy, J.).

to protect their perception of the true federation. To say that the Commonwealth and the states between them have full legislative competence and that the Commonwealth could ask the states to implement treaty obligations involves the possibility that the states could refuse to control private citizens.¹⁵⁸ In both *Koowarta* and the *Tasmanian Dam Case* states were by their own action allegedly breaching treaty obligations.

Justice Stephen took a compromise position in *Koowarta*.¹⁵⁹ The existence of a treaty was neither conclusive (as Justices Mason, Murphy and Brennan would have it)¹⁶⁰ nor irrelevant (as Chief Justice Gibbs and Justices Aickin and Wilson would have it).¹⁶¹ Justice Stephen took the view that a treaty could generate a correlative legislative power but would not do so unless the subject matter of the treaty were one of international concern.¹⁶² In this he referred to limitations which had been suggested for the treaty-making power of the United States Constitution.¹⁶³ He went on to conclude that enough evidence of international concern about racial discrimination existed for the convention to generate a correlative legislative power.¹⁶⁴

In the *Tasmanian Dam Case*, Chief Justice Gibbs and Justices Wilson and Dawson¹⁶⁵ accepted that the *Koowarta* decision had foreclosed the approach taken by Chief Justice Gibbs and Justices Aickin and Wilson in *Koowarta*.¹⁶⁶ These judges accepted Justice Stephen's reasons in *Koowarta* as the ratio decidendi of the case, and Justice Dawson assumed

¹⁵⁸ Discussed further *infra*, text accompanying notes 261-64.

¹⁵⁹ *Koowarta*, 39 Austl. L.R. at 453.

¹⁶⁰ 39 Austl. L.R. at 464 (Mason, J.); *id.* at 488-89, 494-95 (Brennan, J.).

¹⁶¹ In the *Tasmanian Dam Case* Justice Dawson expressed the opinion (1) that Justice Stephen had taken the same position in *Koowarta* as that taken by Chief Justice Gibbs and Justices Aickin and Wilson regarding the effect of a treaty on the external affairs power—that a treaty can only be implemented if its subject matter would be within the external affairs power in the absence of the treaty; and (2) that it was only because Justice Stephen disagreed with Chief Justice Gibbs and Justices Aickin and Wilson on the issue of what would suffice to bring a subject matter within the external affairs power absent a treaty that Justice Stephen joined Justices Mason, Murphy and Brennan to uphold the Racial Discrimination Act's provisions. 46 Austl. L.R. at 844-45. This writer was once compelled by that construction of Justice Stephen's opinion in *Koowarta* because of the passages at 39 Austl. L.R. at 453-54. However, the writer is now in agreement with those members of the Court in the *Tasmanian Dam Case*, 46 Austl. L.R. at 669-70 (Gibbs, C.J.), *id.* at 743-744 (Wilson, J.); *id.* at 771 (Brennan, J.) who read Justice Stephen as having treated the presence of a treaty obligation as being a relevant but not a conclusive factor. This interpretation can be inferred from the fact that Justice Stephen reserved the question on whether the Commonwealth could have legislated even if Australia were not a party to the Convention. *Koowarta*, Austl. L.R. at 456.

¹⁶² *Koowarta*, 39 Austl. L.R. at 453.

¹⁶³ *Id.* at 452-53. For one author's view of such limitations, see L. HENKIN, *supra* note 29, at 151-56.

¹⁶⁴ 39 Austl. L.R. at 454-56.

¹⁶⁵ 46 Austl. L.R. at 670, 752, 841 respectively.

¹⁶⁶ See *supra* text accompanying note 150.

them to be such for the purposes of argument.¹⁶⁷ They pointed out that Justice Stephen seemed to treat the issue of international concern as one of degree.¹⁶⁸ Their Honours were able to distinguish *Koowarta* on the basis that more international concern exists about racial discrimination than about preservation of the world's cultural and natural heritage.¹⁶⁹ Further, what international concern existed for preservation of the world's cultural and natural heritage was insufficient for a treaty on the subject to generate a correlative legislative power.¹⁷⁰

In deciding that international concern about cultural and natural heritage was insufficient to bring it within power, Justice Wilson commented:

When it is said that the subject matter of the Convention is a matter of international concern it may be relevant in judging the strength of that concern to observe that to date 74 nations have become parties to it; that is to say, a little less than half the total membership of the United Nations. Furthermore, there are some notable absentees from the list of parties, including the United Kingdom, the Soviet Union, China, Belgium, Holland, Norway, Sweden, Japan, New Zealand, Singapore, Malaysia, Thailand and the Phillipines.¹⁷¹

Apparently, for Justice Wilson at least, the concern of some nations is less significant than is the concern of other nations. It is, with respect, quite inappropriate for the judiciary to make comparisons which could embarrass the conduct of Australia's international relations.

It is ironic that Justice Wilson, to strengthen his argument in *Koowarta* that no weight could be given to the existence of a treaty, had asserted that it would be impossible to distinguish one kind of international obligation from another and that if the International Convention on the Elimination of all Forms of Racial Discrimination could be implemented, then all international obligations would be within power.¹⁷² Feeling compelled in the *Tasmanian Dam Case* to accept Justice Stephen's position as representing the ratio decidendi of *Koowarta*, Justice Wilson adapted to the task of finding distinctions.¹⁷³

In the *Tasmanian Dam Case*, as already noted, Justices Mason, Murphy, Brennan and Deane took the view that a treaty would per se

¹⁶⁷ 46 Austl. L.R. at 670 (Gibbs, C.J.); *id.* at 743-44 (Wilson, J.); *id.* at 844-45 (Dawson, J.).

¹⁶⁸ *Id.* at 670 (Gibbs, C.J.); *id.* at 753 (Wilson, J.); *id.* at 844 (Dawson, J.).

¹⁶⁹ 46 Austl. L.R. at 670-71 (Gibbs, C.J.); *id.* at 473 (Wilson, J.); *id.* at 845-46 (Dawson, J.).

¹⁷⁰ *Id.* at 670-71 (Gibbs, C.J.); *id.* at 743, 753 (Wilson, J.); *id.* at 848 (Dawson, J.).

¹⁷¹ *Id.* at 750

¹⁷² 39 Austl. L.R. at 478-79.

¹⁷³ However, in doing so, his Honour commented: "I do not regard this as a satisfactory interpretation of the power, but consistently with existing authority it would appear to be the best that can be done." 46 Austl. L.R. at 753.

generate a correlative legislative power.¹⁷⁴ However, these judges each took different approaches in explaining their reasons for rejecting Justice Stephen's approach and for rejecting other compromises which would allow treaties to be relevant but not conclusive.¹⁷⁵

For Justice Brennan, Justice Stephen's approach of requiring both that there be a treaty and that there be international concern about the subject matter of the treaty failed to acknowledge that the treaty itself was evidence of the concern of the parties thereto.¹⁷⁶ Justice Mason also took this point,¹⁷⁷ but he introduced another level of argument. Justice Mason stated:

Whether the subject matter as dealt with by the Convention is of international concern, whether it will yield, or is capable of yielding, a benefit to Australia, whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the Executive Government for determination. The Court should accept and act upon the decision of the Executive Government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention.¹⁷⁸

This passage is unremarkable insofar as it indicates that whether or not governmental action is "beneficial" is entirely a political issue on which courts must accept the decisions of the executive and legislature. What is remarkable, indeed radical, about this passage is that it reaches the same conclusion concerning issues such as whether a subject matter is of international concern and whether a subject matter is likely to affect Australia's international relations. If this willingness to accept executive and legislative decisions on these matters were carried over to situations where *no* relevant treaty existed, then the Commonwealth executive and legislature would be the sole judges of the parameters of Commonwealth legislative power under section 51(xxix). It is one thing to accept that, because of the nature of the subject matter of power in section 51(xxix), actions by Australia's international representative can increase Commonwealth legislative power. It is quite another to say that, on questions of fact relevant to the existence of Commonwealth power, the opinion of the Commonwealth Executive and/or Parliament can be conclusive. It is

¹⁷⁴ See *supra* notes 138-40 and accompanying text.

¹⁷⁵ The other submissions are summarized by Justice Mason, 46 Austl. L.R. at 690.

¹⁷⁶ *Id.* at 771.

¹⁷⁷ *Id.* at 691. Justice Mason rejected not only Justice Stephen's approach, but also all suggestions that 1) only those treaties which would benefit Australia could be implemented; and 2) only those treaties requiring observance to forestall adverse international reaction could be implemented. *Id.* at 692.

¹⁷⁸ *Id.* at 692.

axiomatic in the constitutional tradition of Australia that the existence of constitutional facts is a matter for the judiciary.¹⁷⁹ The approach of Justice Brennan is more consistent with the principle of judicial review of constitutionality: if there is in fact international concern about a subject matter then the subject matter will be within the ambit of section 51(xxix), the existence of a treaty being strong evidence that the international parties to the treaty are in fact concerned about its subject matter.

So far the discussion has referred cryptically to the possibility of a correlative legislative power generated by the existence of a treaty. Earlier cases had indicated that if legislation bases its constitutional validity on the existence of a treaty obligation, then the operative provisions of the legislation will be valid only if they are an implementation of the treaty obligation.¹⁸⁰

In *Koowarta* it was conceded both that the relevant treaty (The International Convention on the Elimination of All Forms of Racial Discrimination) created "obligations" and that the Commonwealth legislation was a fulfillment of those treaty obligations.¹⁸¹ In the *Tasmanian Dam Case*, however, both points were disputed.

IV. INTERNATIONAL OBLIGATION

Chief Justice Gibbs and Justice Wilson took the view that the only relevant obligation could be an obligation under international law.¹⁸² Mere political or moral obligations could not generate power.¹⁸³ Under the Convention for the Protection of the World Cultural and Natural Heritage¹⁸⁴, Australia had no international legal obligation to protect any part of its national heritage because the enforcement of its provisions was entirely discretionary.¹⁸⁵ Furthermore, the possibility of legislative power being generated from the existence of customary international law

¹⁷⁹ *Australian Communist Party v. Commonwealth*, 83 C.L.R. 1 (1951). Justice Murphy weakened the force of this axiom in the *Tasmanian Dam Case* by arguing that the existence of facts necessary for constitutional validity is to be presumed until rebutted. 46 Austl. L.R. at 726. Justice Brennan suggests that the opinion of the Executive about issues of fact relevant to the existence of external affairs power, would have to be, at least, relevant. *Id.* at 771.

¹⁸⁰ See the references collected by Chief Justice Gibbs in the *Tasmanian Dam Case*, 46 Austl. L.R. at 671-74.

¹⁸¹ 39 Austl. L.R. at 456 (Stephen, J.). Chief Justice Gibbs seemed, however, to regard the issue of implementation as still being open. *Id.* at 442.

¹⁸² 46 Austl. L.R. at 663 (Gibbs, C.J.); *id.* at 745-46 (Wilson, J.).

¹⁸³ 46 Austl. L.R. at 663, 674 (Gibbs, C.J.); *id.* at 745-46, 749 (Wilson, J.).

¹⁸⁴ 46 Austl. L.R. at 663, 674 (Gibbs, C.J.); *id.* at 745-46, 749 (Wilson, J.).

¹⁸⁵ *Id.* at 660-61 (Gibbs C.J.); *id.* at 747-49 (Wilson, J.). Justice Dawson clearly sympathized with much of what Chief Justice Gibbs and Justice Wilson had to say on these issues, but rested his decision on his finding that there was insufficient international concern about the subject matter of the treaty. *Id.* at 846, 848, 850-51.

was cut off by their Honours' finding that there was no relevant customary international law.

The majority judges—Justices Mason, Murphy, Brennan and Deane—found that the Convention did create relevant international legal obligations. In particular, it created an obligation to protect property on the World Heritage List.¹⁸⁶ These judges emphasized that “obligation” is a much looser concept in international relations and in international law than it is in Australian domestic law.¹⁸⁷ Their Honours also commented that it was probably not a prerequisite for the “implementation” of a treaty that the treaty create obligations.¹⁸⁸ Justice Deane emphasized again the nature of the subject matter of power as it pertained to Australia's relations with other countries with this comment: “[T]he 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 obligations.”¹⁸⁹

V. FEDERAL CLAUSE

Interacting with the question of whether or not the Convention did create a relevant obligation was the issue of the significance of the federal clause, article 34, in the Convention. That clause provides:

The following provisions shall apply to those States parties to this Convention which have a federal or nonunitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those states parties which are not federal states:

(b) with regard to the provisions of this convention the implementation of which comes under the legal jurisdiction of individual constituent states, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such states, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.¹⁹⁰

¹⁸⁶ *Id.* at 698 (Mason, J.); *id.* at 734-35 (Murphy, J.); *id.* at 775, 778 (Brennan, J.); *id.* at 807-08 (Deane, J.).

¹⁸⁷ *Id.* at 734-35 (Murphy, J.); *id.* at 776-79 (Brennan, J.); *id.* at 807 (Deane, J.).

¹⁸⁸ Justice Mason considered that the legislation could be upheld on the alternative ground that it was a means of securing to Australia the *benefit* of having other nations protect *their* world heritage sites. *Id.* at 695-96, 700; *id.* at 734 (Murphy, J.); *id.* at 774 (Brennan, J.); *id.* at 805-06 (Deane, J.).

¹⁸⁹ *Id.* at 805. *See also id.* at 777 (Brennan, J.).

¹⁹⁰ *Id.* at 658.

For the majority, the Commonwealth had power to legislate under section 51(xxix) to fulfill its international treaty obligations and therefore article 34(a) applied.¹⁹¹ Chief Justice Gibbs in dissent, however, raised and reserved the question of whether article 34(a) could impose an obligation which was conditional on the existence of a central government power which was itself conditioned on the existence of the obligation.¹⁹² If article 34 were so construed, then article 34(b) could never apply in Australia. His Honour suggested that article 34(a) should be construed to apply if the central government would have power to implement without recourse to an external affairs power.¹⁹³ It is, with respect, difficult to see why Chief Justice Gibbs felt that article 34(b) of the Convention should be read so as to apply to Australia.¹⁹⁴ Australia is not the only federation in the world. It is probable, for example, that article 34(b) would apply to Canada's position.¹⁹⁵ In any case, article 34 was appropriate to the problems of the Australian federation at the time the Convention was drafted because of the uncertainty existing in Australia at that time about the constitutional position.

Justice Dawson, also in dissent, stated that had he found it necessary to decide whether the Convention did impose obligations on the Commonwealth, he would have found that the treaty did *not* impose any relevant obligations on the Commonwealth under the federal clause.¹⁹⁶ It is not clear whether his Honour was accepting the construction of article 34 suggested by Chief Justice Gibbs or whether he was stating the circular proposition that the Commonwealth lacked implementing power and article 34(b) applied, because of (rather than as an alternative to) his holding that the external affairs power could not be used to implement the treaty in issue because the subject matter of the treaty involved insufficient international concern.¹⁹⁷

The other dissenting judge, Justice Wilson, proceeded, as did the majority judges, on the basis that the operation of article 34 in relation to Australia depended on the content of the Commonwealth's external affairs power, rather than on the basis that the content of the external affairs power depended on article 34.¹⁹⁸ His Honour did, however, find that the conciliatory tone of article 34 reinforced his conclusion that

¹⁹¹ *Id.* at 700 (Mason, J.); *id.* at 735 (Murphy, J.); *id.* at 779 (Brennan, J.); *id.* at 808-09 (Deane, J.).

¹⁹² *Id.* at 674.

¹⁹³ *Id.*

¹⁹⁴ Compare the opinion of Justice Brennan on this point. *Id.* at 679.

¹⁹⁵ See *supra* note 153.

¹⁹⁶ 46 Austl. L.R. at 850-51.

¹⁹⁷ See *supra* text accompanying notes 166-69 for Justice Dawson's ground for decision.

¹⁹⁸ 46 Austl. L.R. at 750.

other provisions of the Convention were not imposing obligations.¹⁹⁹

VI. IMPLEMENTATION

It is noteworthy that all of the majority judges (who otherwise took a broad view of the external affairs power) accepted without question the limiting requirement that legislation under the external affairs power based on the existence of a treaty obligation can be valid only to the extent that it is an implementation of the treaty obligation.²⁰⁰ In part, this rule is traceable to the idea that if a subject matter is only within power because the Commonwealth has undertaken treaty obligations relating thereto, then it is only to the extent that the subject matter has been dealt with by the treaty that it is brought within power.²⁰¹ So much can be readily accepted and would explain a requirement that the subject matters of a treaty and legislation at least correspond. That reasoning does not, however, explain why the Commonwealth legislature is limited to enacting legislation carrying out its treaty obligations.²⁰²

The Commonwealth can use other powers to legislate in breach of international law.²⁰³ Why should it not be able similarly to use the external affairs power? The criterion of validity for the external affairs power is relevance to Australia's relations with other countries. What would be more relevant to Australia's relations with other countries than legislating in breach of international treaty obligations? Why can not the Parliament legislate under the external affairs power to aggravate Australia's relations with another country? It is, indeed, very often the case that aggravating relations with one country improves relations with another country.

How is this rule—that if the Commonwealth legislates in reliance on the existence of a treaty then it must legislate to *implement* the treaty—to be explained? The original authors of the rule may have been influenced by the use in the United States of the necessary and proper clause to legislate to fulfill non-self-executing treaties. The original authors of the rule may also have been influenced by a federal consideration that the

¹⁹⁹ *Id.* at 750-51. Contrast Justice Mason who considered that article 34 assumed that other provisions in the Convention created obligations. *Id.* at 699.

²⁰⁰ *Id.* at 696-97 (Mason, J.); *id.* at 730 (Murphy, J.), *id.* at 782-83 (Brennan, J.); *id.* at 805 (Deane, J.).

²⁰¹ Compare *The Queen v. Burgess*; *Ex parte Henry*, 55 C.L.R. 608, 688 (1936) per Justices Evatt and McTiernan: "[I]t is only because and *precisely so far as*, the Commonwealth statute or regulations represent the carrying into local operation of the relevant portion of the international convention that the Commonwealth Parliament or Executive can deal at all with the subject matters of the convention." (Emphasis added).

²⁰² The majority judges laid to rest the suggestion that treaty implementation was an all or nothing matter. The Commonwealth can legislate for partial implementation. *Tasmanian Dam Case*, 46 Austl. L.R. at 730 (Murphy, J.); *id.* at 783-84 (Brennan, J.); *id.* at 812-13 (Deane, J.).

²⁰³ *Polites v. Commonwealth*, 70 C.L.R. 60 (1945).

rule would reduce encroachment upon the state domain.²⁰⁴ If such a federal consideration does exist, then it is even more surprising that Justices Mason, Murphy, Brennan and Deane accepted the implementation requirement without question when they also purported to exclude federal considerations from the determination of the content of the external affairs power.²⁰⁵

Whatever the motivation of the original authors of the rule, the rule is not finely attuned to protecting the interests of the states. To the extent that the rule reduces the range of legislation that the Commonwealth can enact in reliance on the existence of a treaty it protects state interests. It may be, however, that the rule will prevent the Commonwealth from authorizing those who administer implementing legislation to take account of state interests. Or, at least that is what Justice Brennan's application of the requirement of implementation in the *Tasmanian Dam Case* would seem to indicate.

Justice Brennan considered that some of the Commonwealth provisions, which apply to all World Heritage sites in Australia, were invalid because they were too broad. According to Justice Brennan, it was in the nature of preservation of property that protective measures be adapted to the individual property.²⁰⁶ For Justice Brennan, legislative provisions prohibiting persons from engaging in excavating, drilling, erecting buildings, destroying buildings, damaging trees, constructing roads, or using explosives on a World Heritage site without the consent of the Commonwealth Minister were not justifiable as an implementation of an obligation to *protect* world heritage sites.²⁰⁷ It might be that protection of a site would require, for example, the demolition of a building on the site.²⁰⁸ An overly broad prohibition might be saved by provisions making its operation subject to being lifted by administrative action according to acceptable criteria. Apparently Justice Brennan was satisfied that the Minister's discretion to consent to activities on heritage sites was confined so that the discretion would be exercised only by considerations

²⁰⁴ See, e.g., *The Queen v. Burgess, Ex parte Henry*, 55 C.L.R. at 688 (Evatt and McTiernan, JJ.). "Any departure from such a requirement would be completely destructive of the general scheme of the Commonwealth Constitution" Justice Evatt, the likely author of this joint judgment, blended internationalist and state rights sympathies. For an overview of Evatt's approach to constitutional issues see Zines, *Mr. Justice Evatt and the Constitution*, 3 FEDERAL L. REV. 153 (1969); see also the *Tasmanian Dam Case* where Chief Justice Gibbs bases the requirement of correlative implementation on federal considerations of minimizing the expansion of Commonwealth power. 46 Austl. L.R. at 674.

²⁰⁵ See *supra* text accompanying notes 105-08.

²⁰⁶ *Tasmanian Dam Case*, 46 Austl. L.R. at 786. Other areas of Australia are also on the World Heritage List. *Id.* at 730.

²⁰⁷ World Heritage Act § 9(1)(a)-(g), 9(2).

²⁰⁸ 46 Austl. L.R. at 786.

relevant to protection of the site.²⁰⁹ However, Justice Brennan found this broad legislation invalid because it did not guarantee that there would be an accessible administrative framework for responding to applications for consent to engage in activities on heritage sites.²¹⁰ It is not clear whether Justice Brennan was concerned that administrative problems could prevent consent being granted to do acts necessary to protect a site or whether he was concerned that administrative problems could prevent consent being obtained to do acts which were simply neutral and irrelevant to protection.²¹¹

Justice Deane also held some of the blanket prohibitions²¹² invalid.²¹³ His concern, however, was not with their potential to hinder the fulfillment of the international obligation of preserving heritage sites, but rather with their severity and drastic effect.²¹⁴ Justice Deane required that there be a "proportionality" between the international obligation and the legislative action taken to implement that obligation.²¹⁵ This seems to contemplate a balancing of the effects that the legislation may have relevant to implementing the international obligation *against* other effects of the legislation.

Justices Mason and Murphy took an opposing view and would have upheld all the relevant legislative provisions as being calculated to protect heritage sites.²¹⁶ Since Justices Brennan²¹⁷ and Deane²¹⁸ upheld

²⁰⁹ *Id.* at 786-87.

²¹⁰ *Id.* at 787

²¹¹ *Id.* His Honour relied on *Armstrong v. Victoria*, 93 C.L.R. 264, 281 (1955), a case addressing the question of what licensing requirements can be imposed on interstate carriage consistent with section 92 of the Constitution which declares that "trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free" This requirement, that any licensing system be readily accessible, is derived from the fact that section 92 is a guarantee of freedom to traders. Principles derived in that context do not seem truly analogous to the problem of establishing the nexus between a law and a subject matter of power. Hitherto the possibilities that the difficulty of challenging exercises of administrative discretion could result in a law operating in situations irrelevant to the grant of power supporting the law has not been seen as a sufficient reason for denying validity to the law. See *Dawson v. Commonwealth*, 73 C.L.R. 157, 182 (Dixon, J.) (1946).

²¹² World Heritage Act § 9(1)(a)-(g).

²¹³ 46 Austl. L.R. at 811.

²¹⁴ *Id.* at 810-12.

²¹⁵ *Id.* at 806.

²¹⁶ *Id.* at 702-03, 706-07 (Mason, J.); *id.* at 735-36 (Murphy, J.).

²¹⁷ *Id.* at 787-88. His Honour would have upheld both the regulations promulgated in 1983 under the National Parks and Wildlife Conservation Act of 1975, and the power in section 9(1)(h) of the World Heritage Properties Conservation Act of 1983 to prohibit particular acts in relation to particular properties.

²¹⁸ *Id.* at 812. Justice Deane would have upheld both section 9(1)(h) and section 9(2) of the World Heritage Properties Conservation Act of 1983. His Honour considered that the regulations made in 1983 under the National Parks and Wildlife Conservation Act of 1975 were within the

some of the provisions, enough of the legislation²¹⁹ was upheld to stop dam construction. The wider significance of this disagreement among the majority judges on the question of "implementation" is that it weakens the decision in the *Tasmanian Dam Case* for the purposes of precedent and complicates any future attempts to legislate to implement treaty obligations. Moreover, the disagreement provides opportunities, especially in Justice Deane's notion of "proportionality," for the explicit or implicit limiting of Commonwealth power by the judiciary.

Finally, under the heading of "implementation," mention needs to be made of the following passage in the judgment of Justice Mason in the *Tasmanian Dam Case*:

The fact that the power may extend to the subject matter of the treaty before it is made or adopted by Australia, because the subject matter has become a matter of international concern to Australia, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it.²²⁰

While this passage may simply have been intended to reserve this issue for later consideration, it might be construed to state that entering into a treaty will circumscribe and perhaps reduce the extent to which a subject matter, otherwise inherently relevant to Australia's international relations, can be dealt with under the external affairs power. Such a proposition is inconsistent with a statement which Justice Murphy had made in the *Seas and Submerged Lands Case*²²¹ to the effect that if a subject matter is inherently within the external affairs power, then legislation dealing with that subject matter need not correspond to a treaty on the subject matter.²²² Mr. Justice Murphy's approach would seem to accord with principle. As already noted, international law does not operate as an overriding constraint on exercises of Commonwealth power.²²³ Furthermore, the test of validity for laws based on the external affairs power is relevance to international relations.²²⁴ If evidence or judicial notice, apart from a treaty, reveals how laws are in fact relevant to international relations, why should that evidence/judicial notice be ignored simply because a treaty is not as revealing? The treaty is evidence of the concern of its signatories about its subject matter.²²⁵ It is by no means evidence

external affairs power but offended section 51(xxxi)'s requirement that acquisitions of property be on just terms. *Id.* at 821, 828.

²¹⁹ World Heritage Act § 9(1)(h).

²²⁰ 46 Austl. L.R. at 697.

²²¹ *New South Wales v. Commonwealth*, 135 C.L.R. 337 (1975).

²²² *Id.* at 504.

²²³ See *supra* text accompanying note 203.

²²⁴ See *supra* text accompanying notes 113-81.

²²⁵ In principle, if nations are parties to a treaty, the Commonwealth should be able to refer to

that the parties are not concerned about subject matters not dealt with, nor is it evidence that the parties are only concerned about the subject matter of the treaty to the extent that the treaty deals with it.

VII. GENERAL LIMITATIONS ON THE USE OF SECTION 51(xxix)

To this point, only the limitations inherent in the nature of the subject matter of power in section 51(xxix) have been discussed. Other limitations, however, do exist on the use of section 51(xxix) which apply both to treaty implementation and to legislation dealing with matters inherently relevant to Australia's international relations.

The legislative power in section 51(xxix) is, like all others in section 51, governed by the proviso "subject to this constitution."²²⁶ Therefore, whatever the prima facie content of section 51(xxix), the power could not be exercised to breach express provisions in the Constitution (such as section 51(xxxi),²²⁷ section 92²²⁸ and section 116²²⁹) or implied prohibitions.²³⁰ Justice Murphy has indicated²³¹ that he would be willing to make implications into the Constitution to protect basic liberties from exercises of governmental power, including legislation under section 51(xxix). However, he has had no support in this cause. The only established category of implications limiting exercises of Commonwealth power are those drawn from the federal nature of the Constitution which prohibits the Commonwealth from exercising its powers so as to discrim-

that fact to demonstrate the existence of international concern about the subject matter of the treaty and thus bring the subject matter within the reach of section 51(xxix) even if Australia is not party to the treaty. See *supra* text accompanying notes 129-31.

²²⁶ See the language introducing section 51, *supra* text accompanying note 7. The U.S. power to make law by making treaties is not expressly so limited. U.S. CONST. art. VI. Fears that international treaties might override constitutional limitations contributed to the proposal of the Bricker Amendment. G. GUNTHER, CONSTITUTIONAL LAW 252-53 (10th ed. 1980). Justice Black speaking for the majority in *Reid v. Covert*, 354 U.S. 1, 16-17 (1957), allayed those fears by stating that any treaty law would have to comply with the Constitution.

²²⁷ See *supra* note 4.

²²⁸ "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." AUSTRAL. CONST. ch. iv, § 92. See also the discussion and references *supra* note 27.

²²⁹ "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." AUSTRAL. CONST. ch. v, § 116. For a U.S. Supreme Court opinion holding that the treaty power cannot confer power free of other constitutional restraints, see *Reid v. Covert*, 354 U.S. 1 (1957).

²³⁰ *Koowarta*, 39 Austl. L.R. at 432-33 (Gibbs, C.J., Aickin and Wilson, JJ., concurring); *id.* at 450, 452 (Stephen, J.); *id.* at 460 (Mason, J.); *id.* at 472 (Murphy, J.). *Tasmanian Dam Case*, 46 Austl. L.R. at 695 (Mason, J.); *id.* at 801 (Deane, J.).

²³¹ *Koowarta*, 39 Austl. L.R. at 472. For a discussion of Justice Murphy's general approach to constitutional issues, see Bickovskii, *No Deliberate Innovators: Mr. Justice Murphy and the Australian Constitution*, 8 FEDERAL L. REV. 460 (1977).

inate against the states or to threaten the continued existence of the states as such.²³² Neither of these federal implications has yet settled to any precise content.

Because of the issues raised before the Court on demurrer in *Koowarta*, the Court did not have to uphold the validity of the application of the Commonwealth legislation to states.²³³ In the *Tasmanian Dam Case*, however, issues of intergovernmental immunity did arise. The majority in the *Tasmanian Dam Case* held that the application of the Commonwealth legislative provisions to the state actions involved did not offend any federal implication.²³⁴ Apparently, being able to build a hydroelectric dam on Crown land was not, for the majority, essential to the existence of a state "as such."²³⁵ This was true even though: (1) the state government considered the construction of the dam to be essential to the economic survival of the state; (2) state governments in Australia have traditionally provided utilities; (3) the devolution of control of wastelands was a central aspect of the development of colonial self-government; (4) control of wastelands involves royal prerogatives and (5) a large area of the state was affected by the Commonwealth legislation.²³⁶

Those majority judges who did discuss the opaque formula "as such" treated it as being merely a structural guarantee. That is, a mere guarantee of the continued existence of the basic organs of the state government—the judiciary, the executive and the legislature—rather than a guarantee of freedom to engage in activities traditionally or characteristically carried on by state government.²³⁷

²³² *Victoria v. Commonwealth (The Payroll Tax Case)*, 122 C.L.R. 353 (1971). *Koowarta*, 39 Austl. L.R. at 433 (Gibbs, C.J., Aickin and Wilson, JJ concurring); *id.* at 452 (Stephen, J.); *id.* at 460 (Mason, J.); *id.* at 472 (Murphy, J.). *Tasmanian Dam Case*, 46 Austl. L.R. at 695, 703-05 (Mason, J.); *id.* at 728 (Murphy, J.), 752 (Wilson, J.); 767 (Brennan, J.). Justice Deane put it no more strongly than to accept the existence of such implications for the purpose of argument. *Id.* at 823-24.

²³³ Chief Justice Gibbs, although holding the legislation invalid on other grounds (*see supra* text accompanying notes 132-34, and 150-56), expressly said that the "provisions" of the legislation did not prevent a state from continuing to exist and function. 39 Austl. L.R. at 475. Although Justice Wilson (along with Justice Aickin) expressed agreement with the reasoning as well as the conclusion of the Chief Justice, his Honour also noted without explaining their relevance, some decisions and statements of the United States Supreme Court. *Id.* at 475. Justice Wilson described *National League of Cities v. Usery*, 426 U.S. 833 (1975), as a decision by the Supreme Court which "restrained Congress from wielding its commerce power in a fashion that would impair the States' ability to function effectively in a federal system." *Id.* The *Usery* decision has recently been overruled. *Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135 (1985).

²³⁴ 46 Austl. L.R. at 703-05 (Mason, J.); *id.* at 728 (Murphy, J.); *id.* at 765-68 (Brennan, J.); *id.* at 823-24 (Deane, J.).

²³⁵ 46 Austl. L.R. at 703-05 (Mason, J.); *id.* at 728 (Murphy, J.); *id.* at 765-68 (Brennan, J.); *id.* at 823-24 (Deane, J.).

²³⁶ The fullest discussion of these factors is that of Justice Brennan. *Id.* at 760-66.

²³⁷ *Id.* at 703 (Mason, J.). See also the opinion of Justice Brennan where he said that a state might have grounds for invoking a federal implication of immunity if the Commonwealth provisions

Since the minority judges held that the legislation was not law with respect to external affairs, no comment was necessary on the implied constitutional guarantee of continued existence to the states.²³⁸ Justice Wilson did, however, seek to draw from the guarantee of continued state existence a guarantee to the states of a freedom to govern, through exercises of legislative and executive power, subject matters traditionally governed by state government. For His Honour, the mere existence of the possibility of preemptive Commonwealth legislation applying to private citizens was itself an unacceptable interference with this state freedom to govern.²³⁹ This perception reinforced his Honour's conclusion that the Commonwealth Executive could not bring subject matters within Commonwealth legislative power simply by incurring treaty obligations.²⁴⁰ Thus, His Honour ran together the two aspects of federalism—the continued separate existence of states and the division of legislative authority—identified at the commencement of this article.²⁴¹

The proposition that the continued existence of states necessarily involves the exclusion of the central government from the regulation of some subject matters does carry some force. Indeed, that was the essence of the view of the majority of the High Court until 1920.²⁴² Justice Wilson's argument contains two principle difficulties. First, the early view of the High Court was discredited in 1920.²⁴³ Second, the trend in High Court judgments since 1920 has been to distinguish the problem of determining when a law relates to subject matters of Commonwealth legislative power from the problem of determining when particular exercises of Commonwealth power will offend the federal nature of the Constitution in their application to states.²⁴⁴

Another significant limitation on the use of section 51(xxix) is that any legislation must be endorsed by a majority of both Houses of Com-

were applied to the buildings that house the principal organs of a state. *Id.* at 767. This reminds one of dicta in *New York v. United States (the Saratoga Springs Case)*, 326 U.S. 572, 587-88 (1945).

²³⁸ 46 Austl. L.R. at 685 (Gibbs, C.J.); *id.* at 859 (Dawson, J.).

²³⁹ *Id.* at 752.

²⁴⁰ *Id.*

²⁴¹ See *supra* text accompanying note 1.

²⁴² See, e.g., *D'Emden v. Pedder*, 1 C.L.R. 91 (1904); *The Queen v. Barger*, 6 C.L.R. 41 (1908); *Union Label Case*, 6 C.L.R. 469 (1908).

²⁴³ *Engineer's Case*, 28 C.L.R. 129 (1920).

²⁴⁴ This trend is exemplified by the majority judgments in the *Tasmanian Dam Case*. It is a trend also supported in the past, however, by Sir Harry Gibbs. See generally his judgments in the *Payroll Tax Case*, 122 C.L.R. 353 (1971) and *Murphyores Incorporated Pty Ltd. v. Commonwealth*, 136 C.L.R. 1 (1976). It is a trend which has its parallels in the U.S. Supreme Court approach in the case of *National League of Cities v. Usery*, 426 U.S. 833 (1976), from which Justice Wilson sought to draw support. *Koowarta*, 39 Austl. L.R. at 475, discussed *supra* at note 233. The *Usery* decision has recently been overruled. *Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135 (1985).

monwealth Parliament.²⁴⁵ Although the lower house (whose confidence determines, according to British principles, who controls executive government) is structured so that seats are allocated to states according to the relative size of their populations,²⁴⁶ the upper house, the Senate, is federally structured. Each state is guaranteed an equal number of Senators (currently twelve) in the Senate regardless of population.²⁴⁷ Senators are elected directly by the people of each state.²⁴⁸ As might be expected from the British background of disciplined party voting, voting within the Australian Senate has traditionally been along party lines. All political parties must, however, take account of the possibility that their policies, while acceptable to the majority of the Australian population, might provoke regional displeasure which could manifest itself in voting for Senate representation. Furthermore, alienating one of the six states of the Australian federation is relatively more significant to the party system in the Australian States House, than is alienating one of the fifty states represented in the U.S. Senate.

Furthermore, federal politicians who depend for their election on party backing cannot help but be aware that their actions at the federal level may affect the electoral prospects of their party colleagues who are seeking office at state levels. By capitalizing on resentment of central government "bullying," votes can be picked up at the state level.

A firm political commitment would be required, therefore, for any Commonwealth government to use the external affairs power to create Commonwealth law on any topic where either regional opposition to the policy of the legislation, or an existing state framework of regulation with its associated entrenched interests, exists.²⁴⁹ When assessing the possible

²⁴⁵ AUSTL. CONST. § 23 (Senate), § 40 (House of Representatives).

²⁴⁶ AUSTL. CONST. § 24. This principle is qualified by a guarantee that each original state shall have at least five members. *Id.* Tasmania has benefited from the provision because on a population basis Tasmania would otherwise only have been entitled to four members.

²⁴⁷ AUSTL. CONST. § 7. The "federal" principle of the Parliament and of the Senate in particular has been qualified by the exercise of section 122 of the Constitution to introduce representatives for Commonwealth territories into both houses of Parliament. *See Western Australia v. Commonwealth*, 134 C.L.R. 201 (1975); *Queensland v. Commonwealth*, 239 C.L.R. 585 (1977).

²⁴⁸ Until the Seventeenth Amendment in 1917 the U.S. Constitution provided for two Senators to be chosen by the Legislature of each State. U.S. CONST. art. I, § 3. The Seventeenth Amendment provides for the election of each State's two Senators to be by the people of the State.

²⁴⁹ For United States analogies, see Wechsler, *Political Safeguards of Federalism*, 154 COLUM. L. REV. 543 (1954). The Australian Labor Party (A.L.P.) has traditionally been more willing to expand central government activity than have the other parties which have held office in the short history of the Australian federation. The A.L.P. was in office for most of World War II and greatly expanded central government activity by using the defense power contained in the Constitution. AUSTL. CONST. § 51(vi)). *See* Sawyer, *The Defence Power of the Commonwealth in Time of War*, 20 AUSTL. L.J. 295 (1946). The defense power shrank as did the defense "needs" against which it was measured. *The Queen v. Foster*, 79 C.L.R. 43 (1949). The A.L.P. was out of office from 1949 until 1972. For discussion of the A.L.P. government's attempts to expand central government activity in

political consequences of using the external affairs power, Commonwealth legislators need to take account of the fact that, as currently constituted, the High Court has three members who will resist expansion of Commonwealth power on federal grounds.²⁵⁰ These three could quite easily find themselves in a majority, holding Commonwealth legislation invalid, if one of the "centralist" judges finds that the legislation offends an implied basic liberty,²⁵¹ is not exactly fitted to a treaty being implemented²⁵² or is disproportionate.²⁵³ A decision by the High Court that legislation is invalid, no matter what the grounds for decision, may well be perceived by the general populace as a decision that the Commonwealth action was "wrong."

VIII. WHITHER FEDERALISM IN AUSTRALIA?

It is clear that the states are not about to disappear from the map of Australia. They have already survived and adapted to other centralising High Court decisions. The *Engineer's Case* in 1920 held the states to be subject to Commonwealth legislation in general and to industrial arbitration under section 51(xxxv) binding states as employers in particular.²⁵⁴ The *First Uniform Tax Case*, decided in 1942²⁵⁵ and confirmed in the *Second Uniform Tax Case* in 1956,²⁵⁶ acknowledged that the Commonwealth has power to deprive the states of financial independence and to reduce states to mere conduits for Commonwealth spending.

It is also clear that "federalism" is not about to disappear from High Court decisions concerning the content of the external affairs power. The preceding discussion has indicated that a number of contentious issues remain concerning the content of the external affairs power and that the resolution of these issues may depend on explicit or implicit federal considerations.

For all these qualifications, however, there is no doubting the importance of the decisions in *Koowarta* and the *Tasmanian Dam Case* and the encouragement that these cases give to Commonwealth action. These

the period 1972-1975 see LABOR AND THE CONSTITUTION 1972-1975 (Evans ed. 1977). Lionel Murphy, now a Justice of the High Court, was associated with many of those attempts in his capacity as Commonwealth Attorney-General from 1972 to 1974. The A.L.P. government which came to office early in 1983 seems generally to be intent on projecting an image of calm and continuity rather than of exciting change. *But see infra* note 252.

²⁵⁰ See *supra* notes 96-101 and 110-112 and accompanying text. If, for any reason, only six Justices were to decide a case, in the event of a three-three split the vote of the Chief Justice would decide the case. Judiciary Act (1903) § 23(2)(b).

²⁵¹ See *supra* text accompanying note 231.

²⁵² See *supra* text accompanying notes 206-11.

²⁵³ See *supra* text accompanying notes 214-15.

²⁵⁴ *Engineer's Case*, 28 C.L.R. 129 (1920). See generally *supra* note 112.

²⁵⁵ *South Australia v. Commonwealth*, 65 C.L.R. 373 (1942).

²⁵⁶ *Victoria v. Commonwealth*, 99 C.L.R. 575 (1957).

cases demonstrate that the external affairs power can have the same effect in Australia of centralizing legislative competence as the commerce power has had in the United States. Doubtless the Commonwealth will not be in a hurry to sweep aside state regulation in areas such as general criminal law, testamentary disposition, property and building controls. These cases do, however, signal that federal politics contains strong elements which will not tolerate localized action which offends the national conscience.²⁵⁷ In this the pressures which led to the expansion of the American Commerce power are paralleled. It is in just such issues, however, that emotions are most powerfully involved and that local resentment to being told how to live by centralized authority is most intense.²⁵⁸ The American experience with desegregation exemplifies this intensity.²⁵⁹

But even if one accepts that what the Commonwealth sought to achieve in *Koowarta* (the elimination of racial discrimination) and in the *Tasmanian Dam Case* (the preservation of the South West Tasmanian wilderness) was worthwhile, the issue remains whether the external affairs power was appropriately construed by the majority judgment, or did those majority judgments do disproportionate damage to federalism?²⁶⁰

This takes us back again to the dominating issue in these cases—should the potential of the external affairs power be limited so as to preserve a sphere of action exclusively for the states? While the federal spirit of the Constitution undoubtedly supports such an argument, the national purpose to the Constitution provides a countervailing point of view. The minority judges who, whenever their stringent tests for use of section 51(xxix) are not passed, would have the Commonwealth ask the states to fulfill treaty obligations or legislate for other matters affecting Australia's international relations,²⁶¹ would necessarily leave to each

²⁵⁷ There is a possibility that the Federal Labor Government will attempt to use the external affairs power to enact a Bill of Rights. Gareth Evans, now a Senator and a Minister in the Federal Labor Government, worked on a similar proposal for an earlier Federal Labor Government. See generally Evans, *Benign Discrimination and the Right to Equality*, 6 FEDERAL L. REV. 26 (1974); Crommelin & Evans in LABOR AND THE CONSTITUTION *supra* note 49, at 45-50. Such a Bill of Rights would represent a dramatic change in the nature of government in Australia. It is to be noted that if it were based on the external affairs power then it would have the same standing as any other Commonwealth legislation. It would therefore override inconsistent State law but could be repealed by later Commonwealth enactments. Compare *Koowarta*, 39 Austl. L.R. at 445.

²⁵⁸ Compare the pattern of spirited resistance in cases such as Attorney-General (Victoria) v. Commonwealth (the *Marriage Act Case*), 107 C.L.R. 529 (1962) and *Gazzo v. Comptroller of Stamps*, 38 Austl. L.R. 25 (1981) to exercises of Commonwealth legislative power with respect to marriage and divorce. AUSTRALIAN CONST. §§ 51(xxi), 51(xxii) respectively.

²⁵⁹ See *supra* text accompanying notes 96-112.

²⁶⁰ Compare, G. GUNTHER, *supra* note 226, at 203.

²⁶¹ In *Koowarta*, 39 Austl. L.R. at 480, Justice Wilson, former Solicitor-General for Western Australia stated:

The task of ensuring the co-operation of the States may present a political challenge,

state a veto over Commonwealth decisions concerning Australia's international relations. It is not a question of whether Australia should act or not act. It is a question of who should make the decisions about Australia's international relations. It is difficult to think of an area of government, apart from the closely related area of defense,²⁶² where it is so inappropriate for decisionmaking to be delayed and confused by fragmentation²⁶³ and where the ramifications of decisions are so national.²⁶⁴

In the United States, such considerations have compelled acceptance of alternatives to the two-thirds Senate vote. The apparent restrictiveness of the text of the U.S. Constitution has not been allowed to prevent, *inter alia*, the emergence of the Congressional-Executive agreement which involves (a) the President (necessarily as the nation's international representative), (b) the House of Representatives (democratically as the house of the People), and (c) the Senate (federally as the house of the states, and, it might be added, prudently, as a house of review).

Under the Constitution of the Commonwealth of Australia there are no textual obstacles to the use of section 51(xxix) to implement treaties (or to legislate for other matters of "external affairs") through a similar democratic and federal structure. As one of the minority judges, Justice Wilson, himself said in the passage set out²⁶⁵ at the commencement of the article:

The technological revolution in communications coupled with the search for peace and security during the decades of this century have led to the close interdependence of nation with nation. Both economically and socially the earth is now likened to a global village where the

although the developing practice of including State representatives in Commonwealth delegations to international conferences on subjects which may call for implementation by State legislatures augurs well for future co-operation in the pursuit of an effective foreign policy and the maintenance of good international relations.

Justice Mason, formerly Solicitor-General for the Commonwealth, had quite a different perception of the viability of pursuing foreign policy by obtaining consensus of all governments within Australia:

It is unrealistic to suggest in the light of our knowledge and experience of Commonwealth State co-operation and of co-operation between the States that the discharge of Australia's international obligations by legislation can be safely and sensibly left to the States acting uniformly in co-operation.

Id. at 462.

²⁶² AUSTL. CONST. § 51(vi) gives legislative power with respect to "The naval and military defence of the Commonwealth and of the several States . . ." See references, *supra* note 248.

²⁶³ See, e.g., *Koowarta*, 39 Austl. L.R. at 459-60 (Mason, J.).

²⁶⁴ Compare *McCulloch v. Maryland*, 4 Wheat 316, 431 (1819):

In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.

²⁶⁵ See *supra* text accompanying note 8.

international community concerns itself increasingly with matters which formerly were regarded as only of domestic concern.²⁶⁶

Those are undoubtedly the facts. The "external affairs" power of the Parliament of the Commonwealth of Australia is singularly appropriate for application to those facts.

²⁶⁶ *Koowarta*, 39 Austl. L.R. at 479.