

# FEDERALISM AND THE EXTERNAL AFFAIRS POWER

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[The author considers the particular problems facing a federal system in the conduct and domestic implementation of its foreign policies. She shows how the paucity of constitutional provisions relating to foreign or external affairs has created conflict and uncertainty in the areas of executive and legislative power in the Commonwealth. In the first place, this lacuna has permitted States to assert independent capacity to operate in international circles. In the second, the expansion in the range of subjects treated in international accords highlights State fears that the Commonwealth use its power under section 51(29) to legislate in areas traditionally governed by State law. The author discusses the unprecedented scope that has been given to the external affairs power in recent years, paying particular attention to the two latest cases of *Koowarta* and the *Dams Case*. Although optimistic that these developments will benefit Australia's participation in the spreading and fostering of the rule of international law, she acknowledges that as long as the federation continues, this area will continue to be one of enormous political difficulty.]

## INTRODUCTION

Recent times have seen an unprecedented growth in the interaction of nation states. The communications boom and the mercurial rise in the number of multilateral treaties formulated, have meant that few matters can now be considered to be of purely domestic concern. As early as 1936, Latham C.J. pointed out:

Modern invention has almost abolished the effects of distance in time and space which enabled most States to be indifferent to what happened elsewhere. Today all people are neighbours whether they like it or not, and the endeavour to discover means of living together upon practicable terms — or at least to minimise quarrels — has greatly increased the number of subjects to be dealt with, in some measure, by international action.<sup>1</sup>

For Australia, this increase highlights particular difficulties that it has faced as a federal state in presenting a unified front to the world community so as to participate fully in developing the rule of international law.

The paper will begin by examining the provision that is made in the Constitution for the nation to operate in the international arena. From this, two facets of the problem emerge for separate consideration.

The first concerns the federal executive's power to enter into agreements with other countries. This 'treaty' power has long been understood to reside solely in the Commonwealth government. As will be seen, however, the absence of a definitive grant of power in the Constitution has facilitated on-going attempts by the States to operate independently in international circles and has allowed the States to insist on their participation in federal treaty-making processes.

The second and more topical area of controversy is the Commonwealth's legislative ability to override the states in the implementation of treaty agreements.

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<sup>1</sup> *R. v. Burgess; ex parte Henry* (1936) 55 C.L.R. 608, 640.

Like England, Australia regards obligations arising under a treaty as having no internal effect, in the sense of changing legal rights or duties, without enabling legislation through the Parliament. The principle was expressed by William Blackstone in 1765:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.<sup>2</sup>

The constitutional provision most strongly relied on by the Commonwealth to implement foreign policy is section 51(29), the 'external affairs' power. During the last two years, two cases have brought the power to the forefront of national attention. Both arose out of matters traditionally regarded as being within the domestic control of states: the use or disposition of land within their territory.

The first case grew out of a dispute over Aboriginal ownership of land in Queensland. *Koowarta v. Bjelke-Petersen*<sup>3</sup> centered on the validity of Commonwealth legislation passed pursuant to section 51(29) to implement the International Covenant on the Elimination of all Forms of Racial Discrimination. The High Court upheld the Federal Act in its purported contradiction of State government policy and in so doing opened the way for a vast extension in the subject matter of the external affairs power.

The full extent of *Koowarta's* potential emerges in the more recent case of *Commonwealth v. Tasmania* (the 'Dams case').<sup>4</sup> In upholding Federal legislation implementing the World Heritage Convention of 1972, the High Court declared the construction of a dam at the junction of the Franklin and Gordon Rivers in Tasmania's south-west to be an 'external affair'. Whether or not one sympathizes with Tasmania's Premier, Robin Gray, who described the Franklin as 'a brown ditch, leech-ridden and unattractive to the majority of people',<sup>5</sup> and whatever one's views on the economic viability of the proposed construction, the result of the *Dams* case sharply illustrates the dangers posed to Australia's federal system in the external affairs power, as interpreted by the High Court.

If the Commonwealth is shown to have unlimited power to enter into and implement treaties on any subject whatsoever, the question arises as to whether the States can retain any realistic function sufficient to the continued existence of the federation.

## I. CONSTITUTIONAL PROVISIONS

The paucity of provision in the Australian Constitution for the conduct of foreign or external affairs is to some extent an accident of history. At federation, Australia still retained its identity as a British colony, and with it, a close dependence on the

<sup>2</sup> *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326, 347.

<sup>3</sup> (1982) 39 A.L.R. 417.

<sup>4</sup> The case in fact involved three actions: *The Commonwealth of Australia and Anor. v. The State of Tasmania and Ors*; *Her Majesty's Attorney-General for the State of Tasmania and Ors. v. The Commonwealth of Australia and Anor.* and *The Commonwealth of Australia and Anor. v. The State of Tasmania and Ors* (1983) 57 A.L.J.R. 450.

<sup>5</sup> Reported in the *Age* (Melbourne), 18 September 1982.

law-making bodies of the United Kingdom.<sup>6</sup> Accordingly, the founding fathers had little concept of the new country possessing an international personality of its own. Not only did they omit from the document any reference to a Commonwealth power over foreign relations, but they also moved to restrict the nation's legislative powers.

At the instigation of Mr Barton, express mention of a treaty power was dropped from the Constitution Bill during the Convention sessions of 1897 and 1898. In the course of his submission, he argued that

as the treaty-making power will be in the Imperial Government, we should omit any reference to the making of treaties by the Commonwealth . . . while they [the British] conceded that we should make certain trade arrangements, which would have force enough if ratified by the Imperial Government, the sole treaty-making power is in the Crown of the United Kingdom.<sup>7</sup>

Barton had the support of his colleagues<sup>8</sup> and of the Colonial Office which reacted strongly to the suggestion made in 1899, that the Imperial Parliament 'intended . . . to divest itself of its authority over the external affairs of Australia and commit them to the Commonwealth Parliament . . .'<sup>9</sup>

Even before federation, the colonies had enjoyed limited rights to participate in the negotiation of commercial treaties.<sup>10</sup> After 1901 this continued, with the Commonwealth acquiring an independent right of adherence to, or withdrawal from, treaties concluded by the Imperial Government. Although it could not negotiate on matters of defence or high policy with foreign countries, the federal government had some say in the formation of British policies and was allowed some representation in technical discussions for treaty purposes.<sup>11</sup> Eventually,<sup>12</sup> Australia achieved full international identity and with it the capacity to enter into agreements on its own behalf and to exchange diplomatic representatives. The Constitution has been interpreted to reflect this reality, even in the absence of an express treaty-making power.

### THE TREATY MAKING POWER

The ability to enter into treaties is understood to fall within the executive power of the Commonwealth.<sup>13</sup> Under sections 61 to 63 this power is vested in the Queen and is exercisable by the Governor-General on the advice of the federal Executive Council. Before any international instrument can be signed, ratified, acceded to,

<sup>6</sup> On the growth of Australia's identity at international law, see Kidwai M. H. M., 'International Personality, and the British Dominions: Evolution and Accomplishment' (1975) 9 *University of Queensland Law Journal* 76; Zines L., 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Zines L. (ed.), *Commentaries on the Australian Constitution* (1977) 1.

<sup>7</sup> *Convention Debates*, Adelaide, 1897, 239.

<sup>8</sup> See Comments of George Reid: *ibid*: 240; and Alfred Deakin during the Convention Debate in Melbourne 1898: *Convention Debates*, Melbourne, 1898, i, 30.

<sup>9</sup> See Doeker G., *The Treaty-Making Power of the Commonwealth of Australia* (1966) 6.

<sup>10</sup> See Kidwai, *op. cit.*

<sup>11</sup> See Starke J. G., 'The Commonwealth in International Affairs' in Else-Mitchell R., (ed.) *Essays on the Australian Constitution* (2nd ed. 1961) 343.

<sup>12</sup> See Burmester H., 'The Australian States and Participation in the Foreign Policy Process' (1978) 9 *Federal Law Review* 257, 260.

<sup>13</sup> See *Jolley v. Mainka* (1933) 49 C.L.R. 242, 281-2 *per* Evatt J; *R. v. Burgess* (1936) 55 C.L.R. 608, 644.

amended or terminated on behalf of Australia, the federal government must have obtained the approval of the Governor-General-in-Council.<sup>14</sup>

With the exception of treaties requiring the appropriation of money for expenses, Parliament plays no formal role in the treaty-making process under the Constitution and has no such function as a matter of practice. Some indirect involvement of the legislature does occur, however, through a procedure that developed in England as the Ponsonby Rule.<sup>15</sup> Since 1961, it has been Government policy to lay on the table of both Houses, for the information of Members of Parliament, the texts of all treaties to which Australia has become a party by signature, or to which it proposes to become a party by ratification or accession.<sup>16</sup> No further action is taken until the documents have lain on the table for at least twelve sitting days and the Members have been given the opportunity to comment on the substance of the treaty and any matters relating to Australia's acceptance of its obligations.

In a centralized system, this scheme may present few problems. As will be seen shortly, with the introduction of subsidiary governments and delegated powers, the situation becomes more complicated.

#### LEGISLATING TO IMPLEMENT FOREIGN POLICY

The omission of an express power in the Commonwealth to legislate with respect to treaties opened the way for considerable controversy as to the respective powers of the Federal and State legislative bodies. As long as a power is not vested exclusively in the Commonwealth Parliament or withdrawn from the Parliament of the States, the competence of the States to legislate continues.<sup>17</sup>

For present purposes the most important power conferred on the Federal Parliament is section 51(29). However this is not the only source of legislative power in the area: on reflection, almost every head of power mentioned in section 51 has the potential for some extra-territorial operation.<sup>18</sup>

If the Commonwealth may legislate beyond its boundaries upon any subject within its powers, the question arises as to the content of the general power over external affairs. As it is clearly superfluous to the other heads of power, the provision appears to enable the Federal Parliament to legislate on an infinite number of subjects not otherwise within its jurisdiction, provided that it acts in reliance on an external affair.

Not all the problems engendered by the apparent breadth of this power will be dealt with here. In the past, peculiar uncertainties have attached to the exercise of

<sup>14</sup> See Feller E., 'Australian Treaty Practice' (Available from Legal and Treaties Division, Department of Foreign Affairs Canberra).

<sup>15</sup> See Wildhaber L., *Treaty-Making Power and Constitution: An International and Comparative Study* (1971).

<sup>16</sup> Feller, *op. cit.* 7-8.

<sup>17</sup> Constitution, s. 107.

<sup>18</sup> To cite but some examples: s. 51(1), trade and commerce with other countries; s. 51(4) public borrowing; s. 51(5) post and telegraph; s. 51(6) defence; s. 51(9) quarantine; s. 51(10) fisheries beyond territorial limits; s. 51(19) the naturalization of aliens; s. 51(27) immigration and emigration; s. 51(28) the influx of criminals. The list could be expanded.

jurisdiction over Australia's off-shore regions. While section 51(29) vests control of the nation's external affairs in the Commonwealth, it gives no indication of what is external to the continent and therefore within the purview of federal rather than state authority.

These uncertainties were clarified to some extent by the High Court in *New South Wales v. Commonwealth*,<sup>19</sup> although confusion has continued with the complex legislation introduced to restore to the States control over, if not title to, the areas adjacent to their coastlines. The 'off-shore' aspect of the external affairs power has already been the subject of extensive literature and will not be considered here.<sup>20</sup>

The latter part of this paper will focus instead on the problems arising in the context of treaty implementation and on the practices that have developed to minimize antagonism between the Commonwealth and the States. This will entail an examination of both recent case law and Government policy. The operation of section 51(29) is now, more than ever, a matter of politics as well as law: while some view the uncertain scope of the power as a threat, others hail it as a solution to the chronic inaction and divisive parochialism of the States.

## II STATE INVOLVEMENT IN THE FIELD OF FOREIGN RELATIONS

### (1) Executive Power

Even in the early years of federation, the Commonwealth's power to enter into treaties was accepted as paramount, if not exclusive. In the *Vondel Case*,<sup>21</sup> for example, the South Australian Premier met with little success when he tried to argue that while the treaty power resided in Westminster, its mechanical operation was through the States. The Premier maintained that the imposition of an intermediary between his State and the King was an indignity to his Government and asked why the States should not be as good a 'channel of communication' as the Commonwealth. In response, the Imperial authorities simply accepted the contention that the Federal Government's power was exclusive and upheld the objections raised to South Australia's behaviour. The decision set the tone of many of the later judicial pronouncements on the subject.<sup>22</sup>

In *R. v. Burgess; ex parte Henry*, Latham C.J. took the view that section 61 of the Constitution confers exclusive power on the Commonwealth to conduct foreign relations. His Honour remarked that:

other countries deal with Australia and not with the States of the Commonwealth and this practice follows the evident intention of the Constitution.<sup>23</sup>

<sup>19</sup> (1975) 8 A.L.R. 1.

<sup>20</sup> See Harders C. W., 'Commonwealth and State Jurisdiction over Off-Shore Areas' (1977) 1 *Australian Mining and Petroleum Law Journal* 7; Crommelin B. M., 'Petroleum (Submerged Lands) Act; The Nature and Security of Off-Shore Title' (1979) 2 *Australian Mining and Petroleum Law Journal* 135, 135-140; Reid P. C., 'Commonwealth-State Relations: Off-Shore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone or Millstone?' (1980) 2 *Australian Mining and Petroleum Law Journal* 58; Crommelin B. M., 'Off-Shore Mining and Petroleum: Constitutional Issues' (1981) *Australian Mining and Petroleum Law Journal* 191.

<sup>21</sup> Australia, *Commonwealth Parliamentary Papers* (1903) ii, 1149 ff.

<sup>22</sup> See, for example, *F.C.T. v. Official Liquidation of E.O. Farley Ltd* (1940) 63 C.L.R. 278, 312; *Commonwealth v. Cigamic Pty Ltd* (1962) 108 C.L.R. 372, 376.

<sup>23</sup> (1936) 55 C.L.R. 608, 645.

This opinion was accepted in later cases that considered the relative capacities of State and Commonwealth officials to create legal rights or obligations in each other and now appears to be beyond question.<sup>24</sup>

However, this line of thought has not been accepted by the States, either in theory or in practice.<sup>25</sup> In the past, the States have sought to argue that they retain at least certain powers to conclude international agreements. They have done so by relying specifically on the paucity of provisions in the Constitution.

Burmester<sup>26</sup> cites as an example, the first report of the Queensland Treaties Commission, where a distinction was drawn between treaties made in exercise of prerogative powers, and therefore requiring the consent of the Governor-General-in-Council, and agreements made with the foreign governments at a departmental level.<sup>27</sup>

The embarrassment caused to the Commonwealth by these assertions of competence is well illustrated by Queensland's move, shortly before the issue of its report, to threaten Japan with refusal to negotiate mining leases in the State unless it resumed purchases from Queensland's languishing beef industry. With the prospect of Japanese retaliation on a recently-signed sugar contract, the Queensland action stood to jeopardize the entire structure of Australia's relations with its most important trading partner.<sup>28</sup>

Most writers agree<sup>29</sup> that the kind of arguments put forward by Queensland are misconceived. Even when a Constitution appears to allow the component units of a federation to contract with foreign countries, there is always a need for international recognition of the State's ability so to act.<sup>30</sup> This need does not diminish according to the manner in which an agreement is concluded. What is important is the creation of international rights and duties. As Burmester argues,<sup>31</sup> there is no substance in the distinction drawn by Queensland between a treaty for which Executive Council approval is sought and a foreign agreement made by a State department. Both give rise to international obligations and both are therefore an exercise of the prerogative power in respect of foreign affairs and go beyond the powers of the States.

## (2) Overseas Representation of the Australian States

In spite of the States' lack of international personality and their general lack of involvement in the external relations of the Commonwealth, by tradition, they

<sup>24</sup> See *Bonser v. La Macchia* (1969) 122 C.L.R. 177, 189-90; *N.S.W. v. Commonwealth* (1975) 8 A.L.R. 1, 19 (McTiernan J.), 27 (Gibbs J.), 80 (Stephen J.), 113 (Jacobs J.), 119-20 (Murphy J.); *Koowarta v. Bjelke-Petersen* (1982) 39 A.L.R. 417, 434 (Gibbs C.J.), 450 (Stephen J.), 458 (Mason J.), 469-70 (Murphy J.), 479-80 (Wilson J.), 482 (Brennan J.), Aickin J., concurring with the Chief Justice.

<sup>25</sup> See Burmester, *op. cit.* 262.

<sup>26</sup> *Ibid.*

<sup>27</sup> A similar argument was put forward by R. Wilson during the *Seas and Submerged Lands Act Case* (1975) 135 C.L.R. 337: see Transcript of Argument, 15 April 1975.

<sup>28</sup> See Burmester, *op. cit.* 274.

<sup>29</sup> See *ibid.*; Bernier I., *International Legal Aspects of Federalism* (1973); Wildhaber, *op. cit.*

<sup>30</sup> Bernier, *op. cit.* 101-2; Vienna Convention on the Law of Treaties 1969, art. 27

<sup>31</sup> *Op. cit.* 264-5.

have enjoyed the right to maintain a presence near the seat of Imperial Government. The Agencies-General in London were initially created to ensure that prompt and adequate attention was given to the affairs of each colony. After federation the posts remained under one of those anomalous powers reserved to the States by Royal Prerogative: powers expressly protected from modification by the Statute of Westminster. This gave the States the right to petition the Crown directly on matters falling within their jurisdiction.<sup>32</sup>

In recent years, the function of these offices has been enlarged to include, not only dealings with the government of the United Kingdom, but also trade promotion and the encouragement of tourism and immigration. More importantly, a practice has developed whereby permanent State representatives have been established in countries outside the British Commonwealth. With no express prohibitions under the federal Constitution, the new positions have been justified under the States' power to spend public funds for the 'peace, welfare and good government' of their citizens.

In addition to the Agents-General in London, State governments have appointed representatives (usually on a statutory basis) in such places as Tokyo (all States but Tasmania), New York (New South Wales), Los Angeles (Victoria), Hong Kong, Djakarta, Singapore and Kuala Lumpur (South Australia).<sup>33</sup> Their functions are generally described as being to keep the State Governments informed of political and economic developments overseas, to promote industrial development and investment in the States, to foster trade and in some cases to act as agents for the State Treasuries. The representatives operate mainly in the commercial field, securing business deals for the government or for local enterprises. Their work is supplemented by regular overseas visits by the State Premiers, to promote their State. With the exception of the Agents-General in London, the State officials have no diplomatic status and are not recognized internationally.

However, on occasion these representatives do deal directly with the Government of the country in which they are stationed. It is often difficult to draw the line between the conduct of international relations and the regulation of international trade and there have been many calls to restrict the entrepreneurial role of States on the international scene. R. F. X. O'Connor<sup>34</sup> found the States ill-equipped to bargain with large multinational concerns and felt attempts to do so only foster discord with the federal government, and duplicates Commonwealth services.

In defence of the States there is no doubt that some value exists in giving them a right to pursue their own interests through representatives overseas, particularly in the areas of foreign investment, immigration and the promotion of tourism.<sup>35</sup> Moreover, if there have been occasions when States' trade and investment policies have not been in the national interest, some of the fault must lie with the

<sup>32</sup> Sharman G.C., 'The Australian States and External Affairs: An Exploratory Note' (1973) 27 *Australian Outlook* 307.

<sup>33</sup> See Yearbooks of various States. In Victoria the representatives outside London are appointed under the Economic Development Corporation Act 1981.

<sup>34</sup> See Sharman, *op. cit.* 316.

<sup>35</sup> *Cf.*, however, the recent closure by Victoria of offices in Paris and Milan because they were unproductive (see the *Age* (Melbourne), 7 August 1982.

Commonwealth. Where there is no Constitutional provision, it is the task of the federal government to set out clear guidelines within which the States can work.

(3) *Participation by States in the Commonwealth's Foreign Policy Process*

The difficulties that Australia experiences in presenting a unified front to the international community are, to some extent, difficulties that face all federal polities. In particular, Australia is not the only federation to encounter problems in the conduct of foreign policy in the domain of human rights. A matter traditionally of domestic concern to the unit powers, human rights treaties have been no less a source of trouble to America, where such treaties are not dependent for their implementation on enabling legislation, but are self-executing. The need for unanimity within the system is simply explained: at international law a federation is responsible for the infringement of treaty obligations by its component States, irrespective of its ability to remedy the situation internally.<sup>36</sup>

(a) *Commonwealth Treaty Making: Arrangements with the States*

In theory, the authority of the federal government to make treaties is both unrestricted and virtually exclusive. The executive power contained in section 61 of the Constitution has been affirmed by a number of High Court decisions to be an independent power which embraces action appropriate to the responsibility vested in the Commonwealth as an independent nation state.<sup>37</sup> It is no longer deemed appropriate to consider the extent of executive power to sign, ratify or accede to treaties, by reference to possible limitations on the Commonwealth's legislative powers.<sup>38</sup>

But the executive does not operate in isolation. The tabling before Parliament of proposed treaty arrangements is a procedure of long standing. Far from ignoring the scope of that body's legislative powers, the executive has been conscious of the possibility that the implementation of a treaty might be the responsibility of the States. The government is also aware of State fears that it might act to indirectly change the balance of power within the federation by providing an ever-expanding range of subject matter for the Commonwealth Legislature, through the external affairs power.

The internationalisation of hitherto domestic concerns such as education, labour standards, criminal justice and administrative law has therefore found the executive loathe to use its powers to 'trench' upon State authority.<sup>39</sup> Executive action is preceded by consultation with the States through various committees. These include the Standing Committee of Attorneys-General, the Conference of Labour Ministers, and other consultative bodies.<sup>40</sup> These conferences have been held over many years to allow the States to review their laws before the Commonwealth and

<sup>36</sup> Vienna Convention on Law of Treaties 1969, art. 27.

<sup>37</sup> See *Burgess' case* (1936) 55 C.L.R. 608, 645, 680-1; *Barton v. Commonwealth* (1974) 48 A.L.J.R. 161; *Victoria v. Commonwealth* (1975) 7 A.L.R. 277, 333-4; *New South Wales v. Commonwealth* (1975) 8 A.L.R. 1, 16, 19, 119; *Koowarta v. Bjelke-Petersen* (1982) 39 A.L.R. 417, 450.

<sup>38</sup> See Richardson P., 'The Executive Power of the Commonwealth' in Zines (ed.), *op. cit.* 50.

<sup>39</sup> See Ghosh, *Treaties and Federal Constitutions: Their Mutual Impact* (1961) 351; Bernier, *op. cit.* 170.

<sup>40</sup> Doeker, *op. cit.* 109.

to indicate the extent to which they are prepared to amend offending provisions to conform with any international obligations.

Commonwealth practice has been to postpone ratification until aberrations in State laws have been rectified by the passage of appropriate legislation. Wherever possible the executive has sought inclusion of Federal clauses in the multilateral and bilateral treaties to which Australia is to become a party. These clauses vary or limit the obligations of the signatory in matters falling within the jurisdiction of the constituent units.<sup>41</sup>

Until the Premiers' Conference of 1977 the consultative arrangements with the States were rather vague and informal. The procedures amplified at the June 1979 Premiers' conference ensure, *inter alia*, consultation with the States, the inclusion of State representatives on international delegations and where necessary, the insertion of 'federal clauses' in treaties involving matters governed by State law.<sup>42</sup>

The policy of caution that developed in response to fears of the federal government engaging in constitutional expansionism is widely criticized as having a straining effect upon Australia's participation in world affairs. As A. C. Castles noted:

In the existing situation, the parochialism of only one State can hinder the conduct of our international relations. It can make it impossible for Australia to set a lead to other countries on the protection of human rights and not surprisingly it can bring criticism to bear on this country for its refusal to join in multi-lateral efforts to consolidate and extend the rule of law.<sup>43</sup>

There is a long history of Australia's incapacity to ratify many of the agreements adopted by the International Labour Organization.<sup>44</sup> For many years the Commonwealth was able to adopt but a small percentage of the Organizations' agreements because of a declared policy to ratify only those I.L.O. Conventions to which the States had given or had promised to give legislative effect. By 1957, Australia had ratified only twenty out of one hundred and seven multi-national agreements adopted by the I.L.O., four agreements being approved by all States. The recalcitrance of the States over this period led one commentator to suggest that the Commonwealth's external affairs power in section 51(29) of the Constitution be amended to include 'industrial matters'.<sup>45</sup> A decade later, Australia had still ratified only twenty-six of the Conventions. State inaction and localised political opposition continued this poor record. Under the Labor government of the early 1970s dramatic improvement was made, with the ratification of nine Conventions, bringing Australia's total to a respectable 42 Conventions signed and ratified. Between 1975 and 1983 the 'new federalism' policy of the Liberal Party again produced a slump in the number of ratifications.<sup>46</sup>

<sup>41</sup> Bernier, *op. cit.* 172.

<sup>42</sup> See Saunders C. and Wiltshire K., 'Fraser's New Federalism 1975-1980: An Evaluation' (1980) *Australian Journal of Politics and History* 355, 368.

<sup>43</sup> (1969) 2 *Justice* 1.

<sup>44</sup> See Wildhaber, *op. cit.* 301.

<sup>45</sup> Bailey K., 'Australia and the International Labour Conventions' (1946) 54 *International Labour Review* 285.

<sup>46</sup> See Castles, *op. cit. supra* n. 43; De Stoop D., 'Australia's Approach to International Treaties on Human Rights' [1970-73] *Australian Yearbook of International Law* 27; Feller *op. cit.*; Australia (Department of Labour and Employment) *Australia's Approach to Ratification of I.L.O. Conventions* (1982).

Not only is it practically impossible to secure unanimous action through consultation with the States, but the process has also proved extremely time consuming.

Even where the federal government is successful in obtaining the approval by the States of a convention dealing with matters within their jurisdiction, ratification may be slow. Doeker cites the example of two conventions accepted in principle by the States, which took no less than thirty-four years to be ratified.<sup>47</sup>

The fact that this problem is political, and not necessarily the result of constitutional inability in the Commonwealth, emerges strongly in the context of those I.L.O. Conventions which touch on the rights of Australian Aborigines. Since 1967 the Commonwealth has had the power to pass laws to implement treaties affecting Aborigines. In spite of this, a succession of Federal Governments abstained, on policy grounds, from ratifying many of the relevant conventions. Perhaps the most important of these is Convention 107, the only multi-lateral treaty ever adopted specifically to protect indigenous populations, to promote their rights and to monitor government treatment of them. Of central importance to the question of land rights of Aboriginal people, the Convention is still not ratified, even though the last State objection was overcome in May 1977. E. G. Whitlam suggested that Australia appears to be using her non-ratification of this and other conventions as a means of avoiding international scrutiny of her treatment of Aborigines.<sup>48</sup>

*(b) Australia's Ratification of the International Covenant on Civil and Political Rights*

An important device introduced to overcome the inability to reach consensus with the States is the 'federal' reservation used by Australia in its ratification of the International Covenant on Civil and Political Rights.

Article 2(2) of the Covenant requires that a State shall uphold the rights recognised in the Covenant 'in accordance with its constitutional processes'. In response, Australia 'advises' that its constitutional processes are those of a federation. Implementation of the Covenant is stated accordingly to be a matter for the 'constitutionally appropriate authority'.

The reservation reflects a number of objections that have been made by the States to the Covenant. The first springs from the fear that the Covenant be used to encroach upon the constitutional power of the States. Under article 50, the provisions of the Covenant are stated simply to extend to 'all parts of federal States without any limitations or exceptions'. If followed by Commonwealth legislation implementing the treaty, the States argued that ratification of the treaty would be tantamount to altering the fundamental relationship between the Commonwealth and the States. The States also argued that the Covenant poses a threat to existing State mechanisms for protecting human rights by introducing an element of uncertainty. They maintained that most of the articles in the Covenant are already recognised and respected as principles of common law. However, because the

<sup>47</sup> *Op. cit.* 240.

<sup>48</sup> See Whitlam E. G., 'Australia's International Obligations on Aborigines': Speech delivered at the University of N.S.W. on 31 October 1981.

provisions are so vague and broadly stated, it may be difficult to assess the extent to which the laws of individual States fail to measure up to requisite international standards.<sup>49</sup>

The function of the reservation has been to allow ratification in spite of dissent among the States and lack of conformity in State laws to the treaty's mandatory provisions. While Australia accepts article 50 of the Covenant, the primary obligation it creates to ensure implementation of the Covenant throughout a federation is therefore interpreted as being spread between the Commonwealth and State Governments.

It has been suggested that the reservation could operate to invalidate the country's ratification of the Covenant at international law.<sup>50</sup> If it genuinely limits Australia's international obligations, the reservation may run counter to the objects and purposes of the Covenant.<sup>51</sup> The aim of the instrument is generally stated to be the establishment of a minimum standard of human rights.<sup>52</sup> It is doubtful whether this is possible where a federal state seeks to escape responsibility for derogations from that standard by pleading its internal constitutional arrangements. The effect of the reservation is to discriminate between persons alleging a violation of rights over which federal authorities exercise control, and those complaining of matters within State jurisdiction. In so doing, the reservation goes beyond an incidental question of jurisdiction, to effect the entire body of substantive rights contained in Part VII of the Covenant.<sup>53</sup> It might be argued that the very nature of article 50 precludes a federal reservation. This is particularly so if the history of the article is considered. Finally, the reservation may offend article 27 of the Vienna Convention on the Law of Treaties (1969) which forbids States invoking internal disabilities to justify failure to perform treaty obligations.<sup>54</sup>

The Australian Government has argued<sup>55</sup> that the federal reservation is intended, not as a derogation from the nation's international responsibilities, but as an explanation of the way in which Australia intends to implement the provisions of the Covenant. Whether the statement is to operate as a 'reservation' or as an 'interpretive declaration', the ambiguity of the language used by the Commonwealth only confirms the uncertainty and confusion that surrounds the exercise of the treaty power.

<sup>49</sup> See 'Consideration of Reports submitted by State Parties under Article 40 of the Covenant' (Human Rights Committee, 15th Session C.C.P.R./C/14/Add.1, Australia) 11 November 1981; Triggs G., 'Australia's Ratification of the International Covenant of Civil and Political Rights: Ratification or Repudiation' (1982) *International and Comparative Law Quarterly*.

<sup>50</sup> See *ibid.*; Rowland D., *Implication of Australia's Ratification of the ICCPR: an interim Report* (A.U.L.S.A. Conference 1981).

<sup>51</sup> The International Law Commission's Draft Articles on State Responsibility, art. 21(1), forbids the adoption of an international obligation on terms that fail to achieve the result required by the obligation: 'Report of the International Law Commission on the work of the twenty-ninth session', General Assembly, *Official Record* (Supplement no. 10) (U.N. Doc. A/32/10) (1977) 38.

<sup>52</sup> See Schachter O., 'The Obligation of the parties to Give Effect to the Covenant on Civil and Political Rights' (1979) 73 *American Journal of International Law* 462.

<sup>53</sup> See Rowland, *op. cit.*

<sup>54</sup> Triggs, *op. cit.*

<sup>55</sup> *Ibid.*

With the recent High Court pronouncements giving unprecedented scope to the Commonwealth power to implement treaties, the need for such reservations may have become a thing of the past. The real question is whether this change will also spell the end of federalism in Australia. It is to this question that the paper now turns.

### III. IMPLEMENTING FOREIGN POLICY

#### (a) *Judicial Interpretation of the External Affairs Power*

The potential breadth of the power to legislate with respect to external affairs was first given recognition by the High Court in 1921. *Roche v. Kronheimer* was a case involving the validity of the Treaty and Peace Act 1919 which was passed pursuant to the Treaty of Versailles. In upholding the Act under both the defence and external affairs powers, Higgins J. referred to section 51(29) and said in part:

It is difficult to see what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed. No doubt, complications may arise should the Commonwealth Parliament exercise the power in such a way as to produce a conflict between the relations of the Commonwealth . . . and British government(s) with foreign governments. It may be that the British Parliament preferred to take such a risk rather than curtail the self-governing powers of the Commonwealth . . .<sup>56</sup>

One early commentator<sup>57</sup> noted that simplicity of language may be a virtue insofar as it promotes flexibility in a constitution, but the inevitable price for it is litigation and expense. The problem has assumed considerable importance in recent years. The gradual increase in the range of subjects susceptible to international agreement has affected the manner and form of executive operations in the field of treaty-making. It has also highlighted the need to adequately define the Commonwealth's power to implement treaties. Here, Parliament has, to some extent, been condemned to a process of 'litigious trial and error'. Costly and time consuming, it remains to be seen whether Phillips' 'uncharted sea' has yet been exhaustively mapped for the 'legislative ship of State'.<sup>58</sup>

In the history of external affairs litigation, at least seven propositions concerning the extent of the power have met with general acceptance.

The first is that the term 'external affairs' is to be given its natural and ordinary meaning. In *New South Wales v. Commonwealth*,<sup>59</sup> section 51(29) was held to empower Parliament to legislate with regard to matters or things physically external to Australia. However, the term is more commonly treated as being synonymous with 'foreign affairs'. In *R. v. Burgess; ex parte Henry*, the first case in which the power was considered in any depth, Latham C.J. held 'the substantial subject-matter of external affairs' to be 'the regulation of relations between Australia and other countries, including other countries within the Empire'.<sup>60</sup> This

<sup>56</sup> (1921) 29 C.L.R. 329, 338-9.

<sup>57</sup> Phillips P. D., 'External Affairs and the Commonwealth' (1937) 1 *Res Judicatae* 200.

<sup>58</sup> *Ibid.*

<sup>59</sup> (1975) 8 A.L.R. 1

<sup>60</sup> (1936) 55 C.L.R. 608, 643.

view was espoused by the other members of the Court in that case<sup>61</sup> and has not been questioned since.

Secondly, it is agreed that section 51(29) is an independent and express legislative power, the content of which is not limited by the subject-matter of the other powers in section 51.<sup>62</sup>

The third undisputed proposition is that the power is not limited to matters geographically external to Australia, but may be used to make laws operating solely within Australia. Examples cited include laws dealing with diplomatic privileges accorded to foreign representatives, legislation concerning fugitive offenders,<sup>63</sup> and acts with respect to seditious conduct capable of jeopardizing friendly relations with other countries.<sup>64</sup> The three aerial navigation cases provide further examples.<sup>65</sup> However, the two most recent cases on the topic are the most extreme examples to date of laws passed in reliance on section 51(29), which have purely domestic application. In *Koowarta v. Bjelke-Petersen*<sup>66</sup> the relevant legislation was the Racial Discrimination Act 1975, sections 9 and 12 of which affirm the human right to equality in treatment by making unlawful, general and particular forms of racial discrimination. The *Dams* case,<sup>67</sup> on the other hand, concerned the World Heritage Properties Conservation Act 1983 and subsidiary legislation aimed at proscribing any activities harmful to the wilderness areas named in the Act as 'identified property'. Both sets of legislation were upheld as a valid exercise of the external affairs power by a majority of the High Court.

The fourth proposition is that section 51(29) empowers Parliament to legislate to implement the provisions of an international agreement to which Australia is privy. This was recognized by the first Attorney-General, Alfred Deakin, as well as by early commentators on the Constitution.<sup>68</sup> It has also formed the basis of virtually all of the decisions in which the external affairs power has been considered. After *Roche v. Kronheimer*,<sup>69</sup> section 51(29) was used by the Court in *Burgess'* case to uphold the validity of at least some of the regulations enacted pursuant to the Paris Convention on Aerial Navigation, to which Australia was a party. Legislation passed to remedy those regulations that did not accurately transcribe the provisions of the Convention, were upheld as a valid exercise of the power in *R. v. Poole; ex parte Henry (No. 2)*.<sup>70</sup> Section 51(29) was also cited in *Airlines of N.S.W. Pty Ltd v. New South Wales (No. 2)*<sup>71</sup> to support regulations giving effect to the Chicago Convention on International Civil Aviation and in *New South Wales v. Commonwealth* on the basis that the Seas and Submerged

<sup>61</sup> *Ibid.* 658 (Starke J.), 669 (Dixon J.), 684 (Evatt and McTiernan JJ.).

<sup>62</sup> *Ibid.* 639 (per Latham C.J.).

<sup>63</sup> See *McKelvey v. Meagher* (1906) 4 C.L.R. 265; *Frost v. Stevenson* (1937) 58 C.L.R. 528, 557.

<sup>64</sup> *R. v. Sharkey* (1949) 79 C.L.R. 121.

<sup>65</sup> *Burgess'* case (1936) 55 C.L.R. 608; *R. v. Poole; ex parte Henry (No. 2)* (1939) 61 C.L.R. 634; *Airlines of N.S.W. v. New South Wales (No. 2)* (1965) 113 C.L.R. 54.

<sup>66</sup> (1982) 39 A.L.J.R. 417.

<sup>67</sup> (1983) 57 A.L.J.R. 450.

<sup>68</sup> See Harrison Moore W., *The Commonwealth of Australia* (1910).

<sup>69</sup> (1921) 29 C.L.R. 329.

<sup>70</sup> (1939) 61 C.L.R. 634.

<sup>71</sup> (1965) 113 C.L.R. 54.

Lands Act 1975 gave effect to the Law of the Sea conventions of 1958. In both *Koowarta's* case and the *Dams* case the main ground for the majority's decision was that the subject Acts served to implement Australia's obligations under international Conventions.

The remaining points of agreement concern the factors that limit the operation of section 51(29). It is accepted that laws supported by this power must be 'indisputably international in character'.<sup>72</sup> Alternatively, the Authorities concur that the power may not be invoked where entry into an international agreement is merely a colourable device to secure power which otherwise would be in the hands of the States.<sup>73</sup> Finally, it is agreed that laws made pursuant to section 51(29) are subject to the constitutional prohibition. In *R. v. Burgess; ex parte Henry* Starke J. said at page 658 that the power 'must be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which generally restrain the exercise of Federal powers'. Care must therefore be taken not to use the power so as to infringe the like of sections 92, 113 or 116. Nor may the power operate to indirectly amend the constitution, by-passing the mechanism for constitutional change provided under section 128.<sup>74</sup> With the two most recent cases,<sup>75</sup> it is now clear that section 51(29) is also subject to the implied limitation in the Constitution that no legislation discriminate against a State, or threaten the Federal polity, by preventing a State from continuing to exist or function as such.

Short of destroying the federal structure of Australia's political system, the question remains as to what extent section 51(29) can be used to pass laws which effectively alter the distribution of power between the Commonwealth and the States. The more subtle the case, the less helpful become the accepted limitations on the power. In *Koowarta's* case Gibbs C.J. made the point that the doctrine of *bona fides* is at best a 'frail shield':

It would be unlikely that an international agreement would be entered into as a mere device. It would not be enough to establish bad faith to show that the executive, when it made a treaty, was fully aware that the Parliament had no legislative power to deal with the subject matter of the treaty . . .<sup>76</sup>

Problems also arise in applying the criterion of 'internationality' to laws passed pursuant to the external affairs power. First enunciated in *R. v. Burgess; ex parte Henry*, the Court in that case offers little guidance as to how the limitation is to operate. The widest view was expressed by Evatt and McTiernan JJ. who clearly did not see that criterion as a limiting factor at all. Their Honours felt that — with the growing sense of community among the world's nations:—

<sup>72</sup> See *Burgess' case* (1936) 55 C.L.R. 608, 644, 658, 669, and 687; *Frost v. Stevenson* (1937) 58 C.L.R. 528, 596-7; *Airlines of N.S.W. v. New South Wales (No. 2)* (1965) 113 C.L.R. 54, 85, 126, 136, 152; *New South Wales v. Commonwealth* (1975) 8 A.L.R. 1, 5, 19-22, 29-30, 75-6, 91, 117-8. See also *Koowarta's* case, discussed *infra*.

<sup>73</sup> See *Burgess' case* (1936) 55 C.L.R. 608, 658 (Starke and McTiernan JJ.); *Frost v. Stevenson* (1937) 58 C.L.R. 528, 601 (Evatt J.); *Airlines of N.S.W. v. New South Wales (No. 2)* (1965) 113 C.L.R. 54, 85 (Barwick C.J.).

<sup>74</sup> See *Burgess' case* at pp 642-3, 658, 687; *Airlines of N.S.W. v. New South Wales (No. 2)* (1965) 113 C.L.R. 54, 85, 87, 118, 165.

<sup>75</sup> See *Koowarta* (1982) 39 A.L.R. 417, 443, 450, 460, 472, 487-8 and *Dams* case (1983) 57 A.L.J.R. 450, 475, 487, 505, 517, 543, 554.

<sup>76</sup> (1982) 39 A.L.R. 417, 439.

it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute of international agreement.<sup>77</sup>

For them, the scope of the external affairs power was co-extensive with the range of subject-matter of international relations. No restriction was placed on the type of international agreement that would be required. Rather, it was suggested that Parliament may be competent to legislate to give effect not only to treaties but, also, to informal arrangements with other countries that are not strictly binding on Australia.<sup>78</sup> A similar view was taken by Latham C.J. He also noted the difficulty of pronouncing any matter 'incapable of affecting international relations so as properly to become the subject-matter of an international agreement' and upheld Parliament's power to legislate to implement international obligations binding the Commonwealth.<sup>79</sup>

The two remaining judges in *Burgess'* case, Dixon and Starke JJ., were more cautious in allowing the power to be used by the Commonwealth to encroach on the domestic jurisdiction of States. While Dixon J. required legislation pursuant to a treaty to concern 'some matter indisputably international in character',<sup>80</sup> Starke J. held that 'the laws will be within the power only if the matter is of sufficient international significance to make it a legitimate subject for international cooperation and agreement'.<sup>81</sup> If the fact of an international agreement is not sufficient to imbue a matter with international 'character' or 'significance', neither Judge gave any hint of the additional elements required to validate a law under section 51(29).

Dixon J.'s view was adopted and to some extent clarified by Barwick C.J. in *Airlines of N.S.W. Pty Ltd v. New South Wales (No. 2)*. The Chief Justice held the Chicago Convention to be an 'external affair' on the following criteria:

having regard to its subject matter, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes upon the parties to it (the Convention) unquestionably is, or, at any rate, brings into existence, an external affair of Australia.<sup>82</sup>

Left unresolved in many of the subsequent cases, the issue of 'internationality' in the exercise of the external affairs power was central to the two most recent decisions. To use Brennan J.'s analysis, in *Koowarta v. Bjelke-Petersen*:

The question resolves itself into an inquiry as to what it is that stamps 'a matter of internal concern' with the character of an external affair, for a law in respect of a matter of internal concern will be supported by para (xxix) if the matter of internal concern is an external affair.<sup>83</sup>

### *Koowarta v. Bjelke-Petersen and Ors: Queensland v. Commonwealth*

The challenge came in response to an action brought by the plaintiff *Koowarta* in the Supreme Court of Queensland. On his own behalf and on behalf of the group of

<sup>77</sup> (1936) 55 C.L.R. 608, 681.

<sup>78</sup> *Ibid.* 687.

<sup>79</sup> *Ibid.* 640.

<sup>80</sup> *Ibid.* 669.

<sup>81</sup> *Ibid.* 658, quoting *Willoughby on Constitutional Law of the Commonwealth* (2nd ed. 1929) 519.

<sup>82</sup> See (1965) 113 C.L.R. 54, 85.

<sup>83</sup> (1982) 39 A.L.R. 417, 485.

Aboriginal people to which he belonged, Koowarta had moved the Commonwealth Aboriginal Land Fund Commission to enter into an agreement to purchase a grazing property for the use of the group. A contract for the purchase of an interest in the land was drawn up but failed when the Queensland Minister for Lands refused to give his permission for the Transfer. The Minister cited the following statement of policy in explanation of his conduct:

The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.<sup>84</sup>

In response, the plaintiff sought declarations and an injunction that claimed damages for breach of sections 9 and 12 of the Racial Discrimination Act 1975. Without denying the substance of the claim, the defendants entered a demurrer and, when the case was removed into the High Court, sought a declaration that the subject Act was beyond the legislative power of the Commonwealth.

Two aspects of the case will not be dealt with here. The first is the question of the Plaintiff's standing to sue, which was decided by the whole Court in the plaintiff's favour. The second concerns the relevance of section 51(26) of the Constitution: all the judges except Murphy J. decided that sections 9 and 12 of the Racial Discrimination Act could not be supported by that placitum.

On the question of the applicability of section 51(29), a majority of four judges (Stephen, Mason, Murphy and Brennan JJ.) upheld the Act as a valid exercise of the external affairs power. Among these four, only Murphy and Mason JJ. went so far as to espouse the view of Evatt and McTiernan JJ. in *Burgess' Case*, holding that the mere fact of international agreement on a matter is sufficient basis for legislation passed in reliance on section 51(29). Murphy J. stated that the Act's validity was not dependent on its conformity with the international Convention it serves to implement. Thus:

The Act relates to matters of international concern, the observance in Australia of international standards of human rights, which is part of Australia's external affairs, so that the Act's operative provisions would be valid even in the absence of the Convention.<sup>85</sup>

For Mason J. the very fact of 'agreement by nations to take common action in pursuit of a common objective' is enough to impress a subject with the character of an 'external affair'. His Honour echoed Murphy J.'s reassertion that Australia would be an international cripple if forced to rely on State action for the implementation of treaty and other agreements, saying that the nation's credibility as a member of the international community was at stake.<sup>86</sup> Mason J. stressed the absence of reserved State powers and held that such disturbance of Commonwealth-State powers as was engendered by the Racial Discrimination Act was necessary. Further, he did not see it as the task of the judiciary to review the

<sup>84</sup> *Ibid.* 490.

<sup>85</sup> *Ibid.* 473.

<sup>86</sup> *Ibid.* at 463 (Mason J.). For Murphy J.'s view see 473. See also *New South Wales v. Commonwealth* (1975) 8 A.L.R. 1, 118.

decision of the executive to enter into treaties by pronouncing on the validity of legislation giving effect to those treaties.<sup>87</sup>

The view expressed by Brennan J. was slightly more circumscribed. According to this third member of the majority, the least requirement for the operation of section 51(29) is that there be in existence an international treaty obligation. His Honour held that where such obligation affects or is likely to affect Australia's internal legal order, the subject of the obligation automatically becomes (if it was not previously) an external affair. He added 'to search for some further quality in the subject, an "indisputably international quality" is a work of supererogation'.<sup>88</sup> By the same token, Brennan J. did not ignore the form of the treaty obligation on which the Racial Discrimination Act was based. Citing Barwick C.J. in *Airlines of New South Wales (No. 2)* and Stephen J. in the present case, he acknowledged as the indicia 'exclud[ing] any suggestion that the treaty was not an "external affair"', the origins of the Racial Discrimination Convention, the extent of international participation in it and the long and profound international concern as to its subject matter.<sup>89</sup> Like Stephen J., Brennan J. suggested that obligations binding at international law outside the treaties may also be a ground for legislation under section 51(29), but he chose not to pursue the issue in the face of the Racial Discrimination Act's obvious conformity with an international Convention.

A more Dixonian view was taken by Stephen J., who defined section 51(29) as:

a power to implement by legislation within Australia such treaties, on matters international in character and hence legitimately the subject of agreement between nations, as Australia may become party to.<sup>90</sup>

In accordance with the test evolved by Barwick C.J. in *Airlines of New South Wales (No. 2)*, his Honour added that 'an examination of subject-matter, circumstances and parties will be relevant whenever a purported exercise of such power is challenged'. He conceded that a challenged law will not necessarily be valid if it gives effect to treaty obligations, but stipulated that the topic must either be of 'special concern to the relationship between Australia and (another) country' or of 'general international concern'.<sup>91</sup> According to his Honour, the ever-expanding range of subjects of general international concern makes the external affairs power analogous to the defence power; a view shared by Brennan J., who described section 51(29) as a 'growth point' in the Constitution.<sup>92</sup> Stephen J. wrote of the power as

a fixed concept with a changing content . . . Its content will be determined not by the mere will of the Executive but by what is generally regarded at any particular time as part of the external affairs of the nation, a concept the content of which lies very much in the hands of the community of nations of which Australia forms a part.<sup>93</sup>

Like the other members of the majority, Stephen J. did not doubt that the prohibition of racial discrimination falls squarely within the scope of 'general

<sup>87</sup> *Ibid.* 463. Murphy J. makes the same point at 478.

<sup>88</sup> See generally 440-1, 479-80.

<sup>89</sup> *Ibid.* 487-8.

<sup>90</sup> *Ibid.* 449.

<sup>91</sup> *Ibid.* 435-40.

<sup>92</sup> *Ibid.* 483.

<sup>93</sup> *Ibid.* 454.

international concern'. In support of his contention his Honour traced the international legal history of the human rights legislation, to which the Racial Discrimination Act was designed to give effect.

The minority of Wilson J. and Gibbs C.J. (with whom Aickin J. concurred), was less prepared to allow the external affairs power to be used by the Commonwealth to encroach on areas traditionally within the jurisdiction of the States. In spite of the doctrine laid down in the *Engineer's* case,<sup>94</sup> the dissenters took judicial notice of the federal nature of the Constitution to limit the operation of section 51(29).<sup>95</sup> They did this by applying a test that is considerably more stringent than the test enunciated by Stephen J. For a domestic law to be 'international in character' so as to qualify as an 'external affair', the minority held that it must operate upon activities or events outside Australia which affect Australia.

In the words of Gibbs C.J.:

Any subject matter may constitute an external affair, provided that the manner in which it is treated in some way involves a relationship with those other countries or with persons or things outside Australia.<sup>96</sup>

Discussing Starke J.'s judgement in *Burgess*' case Gibbs C.J. drew a distinction between a matter of international concern and one of international significance. While racial discrimination may be of pressing concern to the international community, he argued, it is nevertheless a matter of domestic significance that does not directly affect Australia's relations abroad.<sup>97</sup>

In coming to this conclusion, both Gibbs C.J. and Wilson J. stressed the importance of Australia's doing its best to further the cause of racial equality. However, both were clearly of the opinion that such objectives could be pursued within the federal framework.<sup>98</sup>

The philosophical difference between the Chief Justice and Stephen J. emerges most strongly in their discussions of the alternative argument raised by the Commonwealth in support of the subject Act. This was that the Act, being predicated on a rule of customary international law, was automatically an 'external affair'. While Stephen J. held that there was 'much to recommend' this argument,<sup>99</sup> Gibbs C.J. appears to have been less prepared to accept the existence of any customary law of human rights dealing with racial discrimination which might impose a positive obligation on Australia to legislate. Instead, he argued that only universal principles of international law, the breach of which 'threatens the international peace and security', are automatically 'external affairs'. In 'gross violations' he included genocide, torture, imprisonment without trial, and wholesale deprivation of the rights to vote, to work and to be educated.<sup>1</sup>

<sup>94</sup> *The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd and Others* (1920) 28 C.L.R. 129.

<sup>95</sup> (1982) 39 A.L.R. 417, 438.

<sup>96</sup> *Ibid.* 441.

<sup>97</sup> *Ibid.* 440-1.

<sup>98</sup> *Ibid.* 440-1, 479-80.

<sup>99</sup> *Ibid.* 456. See also 467 (Mason J.).

<sup>1</sup> (1982) 39 A.L.R. 417, 442ff.

Although he mentioned the point only in passing, Gibbs C.J. was the only member of the Court to consider the 'incorporation doctrine' enunciated most recently by Denning M.R. in *Trendtex Trading v. Bank of Nigeria*,<sup>2</sup> whereby international law automatically becomes part of the common law. If the prohibition of racial discrimination is accepted as a precept of international custom, this doctrine would obviate reliance on section 51(29) to implement the Racial Discrimination Convention. Gibbs C.J. dismissed the idea as 'It is not submitted that this suggested rule of international law (forbidding the racial discrimination) has become part of the domestic law of Australia . . .'<sup>3</sup>

The diversity of opinion among the majority judges in *Koowarta* meant that a number of matters were left unresolved. Perhaps the most important was the question of exactly how much interference with the domestic jurisdiction of States the Court was prepared to allow under the external affairs power. While the issue of racial discrimination may clearly fall within the ambit of the power, the status of 'lesser' human rights that are not so unquestionably rules of international law, was less certain. *Koowarta's* case did not provide much guidance for the implementation of the many I.L.O. Conventions that still wait ratification by Australia. It is equally doubtful whether the outcome of the case would have affected the terms of Australia's ratification of the International Covenant on Civil and Political Rights.

At the more general level, it was still not clear what nature and extent of treaty obligation was required to transform a domestic matter into an external affair. It is a measure of the difficulty of extracting a principle from *Koowarta's* case that the minority judges in the *Dams* case could rely on the combined opinions of Stephen J. and the three dissenters to support their restrictive view of section 51(29).

The other question left unanswered in *Koowarta's* case was the extent of incidental power attached to section 51(29). Where a law is passed to give effect to an international obligation, it was still unclear with what accuracy the obligation must be transcribed. These matters were directly at issue in the *Dams* case.

### *The Dams Case*

The *Dams* case was born of a much-publicized dispute over the merits of a Tasmanian Hydro Electric Commission ('HEC') scheme involving the construction of a dam at the junction of the Gordon and Franklin rivers in the south-western corner of the State. The rivers formed part of a network of national parks that eventually came to be placed on the 'world heritage' list maintained under the Convention for the Protection of the World Cultural and Natural Heritage ('the Convention').<sup>4</sup> Australia ratified the Convention in August 1974. The main question before the Court was the validity of the Commonwealth World Heritage

<sup>2</sup> [1977] Q.B. 529, 553-4. See also *Chow Hung Ching v. The King* (1949) 77 C.L.R. 449, 462, 477.

<sup>3</sup> (1982) 39 A.L.R. 417, 442.

<sup>4</sup> The parks were nominated for listing on request of the Tasmanian Government on 22 September 1981. Shortly before the Commonwealth presented the nominations to the World Heritage Committee (in December 1982) Tasmania tried, unsuccessfully, to withdraw its consent to the proposal.

Properties Conservation Act 1983 ('the Act') and World Heritage (Western Tasmania Wilderness) Regulations 1983 ('the Regulations'), the latter passed pursuant to section 69 of the National Parks and Wildlife Conservation Act 1975. The legislation purported to implement the Convention: its intended effect was to over-rule the enactment passed by Tasmania's Parliament to authorise the construction of the Gordon-below-Franklin dam and related projects.<sup>5</sup>

The Act (but not the Regulations) was upheld by a majority of four judges to three (Mason, Murphy, Brennan and Deane JJ.; Gibbs C.J., Wilson and Dawson JJ. dissenting). Within the majority neither Brennan nor Deane JJ. accepted the Act in its entirety, while Deane J. joined the dissenters to deny validity to section 69 of the National Parks and Wildlife Conservation Act insofar as it enables the making of the Regulations and to the whole of the Regulations.

Once again, not every aspect of the decision will be considered here. Although a large part of the case was devoted to the applicability of the external affairs power, the Commonwealth draftsmen tried to ensure constitutional validity by relying on three other heads of legislative power: the corporations power (section 51(20)), the special race power (section 51(26)) and the so-called power 'inherent in Nationhood'. Under the first of these heads, the prohibitions directed specifically against the HEC were upheld expressly by Mason, Murphy and Deane JJ. and by implication by Brennan J., who nevertheless considered it unnecessary to make a formal pronouncement on the subject.<sup>6</sup> Under the second head, the provisions of the Act protecting significant Aboriginal archaeological sites were upheld by a clear majority on the ground that the sites threatened with inundation were of special interest to Aboriginal people.<sup>7</sup> The final and most innovative of the Commonwealth's arguments was raised on the ground that the endangered wilderness area was of 'national' significance and thus inherently within Federal rather than State jurisdiction. Of the seven judges, four considered the relevant provision of the Act to be a misuse of power while three did not find it necessary to consider the question.<sup>8</sup>

The first of the positive arguments advanced by Tasmania against the validity of the federal Act was disposed of by the Court in a similar fashion. Four of the judges rejected outright the assertion that the legislation was an unreasonable restriction on the States' use of the waters of its rivers contrary to section 100 of the Constitution.<sup>9</sup> Tasmania's second argument related to the applicability of section 51(31) and was given a more ambiguous reception by the Court. The minority judges did not consider the question. In the result Deane J. was the only member of

<sup>5</sup> S. 109 of the Constitution provides that a Commonwealth law will prevail where a conflict arises with a State law.

<sup>6</sup> (1983) 57 A.L.J.R. 450, 499 (Mason J.), 509 (Murphy J.), 536 (Brennan J.), 549 (Deane J.).

<sup>7</sup> *Ibid.* 500-1 (Mason J.), 510 (Murphy J.), 537-9 (Brennan J.), 550-2 (Deane J.).

<sup>8</sup> Those who considered the question were Gibbs C.J., Wilson, Deane and Dawson JJ. (*Ibid* 478, 520, 542 and 572 respectively).

<sup>9</sup> Mason, Murphy, Brennan and Deane JJ. rejected Tasmania's arguments (see *ibid.* 498, 510, 540 and 542 respectively). The other judges found it unnecessary to consider the question.

the Court to consider the Regulations invalid on the ground that they involved the acquisition of State property by the Commonwealth on other than just terms.<sup>10</sup>

In its interpretation of the External Affairs power the *Dams* case departs significantly from former decisions on the subject. For the first time a majority of the High Court was prepared to hold that any matter of 'international concern' will confer legislative power on the Commonwealth. Accordingly, while a treaty or international law obligation is sufficient, it is no longer necessary to the operation of section 51(29).

Leaving aside for the moment the prohibitions implicit in the federal nature of the constitution, the question of obligation arose on two levels. As well as being important to initial discussions about the operation of section 51(29), it was relevant at the point where the impugned legislation came to be compared with the international instrument it sought to implement. None of the bench saw the entry into a treaty confer a power to legislate on the topic of the treaty without regard to the terms of the instrument. To do this would be to give the subject-matter of the treaty the status of a new head of power. The impugned Act and Regulations clearly imposed obligations to refrain from engaging in certain environmentally harmful activities within the prescribed areas. If, as Tasmania argued, the Convention imposed no obligation but merely cited objectives to be followed, the degree of conformity required with the terms of the treaty becomes crucial to the validity of the enactment.

Among the majority judges only Murphy J. saw the protection of the world cultural and natural heritage to be of sufficient 'international concern' to merit the federal intervention under the external affairs power in the absence of a convention.<sup>11</sup> The other members took the convention as their point of departure.

After Murphy J., the widest views were those expressed by Mason and Deane JJ. Mason J. re-affirmed his statement in *Koowarta* that the subject of a treaty — once ratified — is self-evidently one of 'international concern' to Australia for the purpose of legislating under section 51(29). His Honour nevertheless examined the test proposed by Stephen J. on the basis that his was the narrowest expression of the power within the majority in *Koowarta's* case. In a passage that seems to misinterpret Stephen J.'s use of the term 'general international concern', Mason J. argued that this criterion was an 'elusive one' and for this reason not genuinely restrictive. He ignored the distinction implicit in Stephen J.'s judgment between ideas mooted at an international level and principles of customary international law and stated that it was difficult to conceive of a situation where the subject matter of a *bona fide* treaty would not be of 'international concern'. He cited as an example the mutual benefits of international conventions on topics as parochial as seat belt laws. He stated at page 485:

When we have regard to international affairs as they are conducted today, when nations of the world are accustomed to discuss, negotiate, co-operate and agree on an ever widening range of topics, it is impossible to enunciate a criterion by which potential for international action can be identified from topics which lack this quality.

<sup>10</sup> *Ibid.* 555-9. Mason, Murphy and Brennan JJ. rejected the argument (see *Ibid.* 494, 510 and 540 respectively).

<sup>11</sup> *Ibid.* 138-40.

A similar approach was taken by Deane J. who simply applied *Koowarta* without exploring the diversity of the majority judgments.<sup>12</sup>

The breadth of the judgments handed down by Mason, Murphy and Deane JJ. emerges from the fact that none of the three limits the operation of the external affairs power where a treaty does not impose an obligation, but merely holds out a benefit to its signatories. In such circumstances their Honours still regard the subject matter of the instrument to be self-evidently one of 'international concern'. This view permitted the conclusion that where a treaty creates no duties, domestic legislation couched in mandatory terms to facilitate the conferral of benefit may nevertheless be a valid implementation of the treaty.

The test Mason J. prescribed is that originally expounded by Starke, Evatt and McTiernan JJ. in *Burgess*. All three of those judges held that section 51(29) encompasses anything reasonable to the performance of a treaty: that is, anything appropriate and adapted to that end which is not inconsistent with it.<sup>13</sup>

In conformity with his statements in *Koowarta*, the view taken by Brennan J. is slightly more restrictive. For him it is the existence of a *bona fide* treaty obligation that is crucial, as the treaty stamps the subject of the obligation, with the character of an external affair. Like Mason J., Brennan J. felt that the qualification expressed by Stephen J. was not difficult to satisfy. However this is because:

It is difficult to imagine a case where a failure by Australia to fulfil an express obligation owed to other countries to deal with the subject matter of a treaty in accordance with the terms of the treaty would not be a matter of international concern, a matter capable of affecting Australia's external relations.<sup>14</sup>

Like Mason J., his Honour did not feel it to be the role of the judiciary to pronounce on the executive's action in this regard. According to Brennan J. it is only where a treaty does not impose an obligation that it becomes necessary to consider whether the topic it treats has its own international quality. Reiterating his statements in *Koowarta*, he said that such enquiry would involve

questions of degree which require the valuation of international relationships from time to time in order to ascertain whether an aspect of the internal legal order affects or is likely to affect them.<sup>15</sup>

Although the exact purport of this enquiry is not explained, this proviso appears to come at least a little closer to that suggested by Stephen J. in *Koowarta*.

At all events, Brennan J. joined with Mason, Murphy and Deane JJ. to hold that the Convention does impose obligations on States party to it. In order to come to this conclusion, all four judges took a broad view of the notion of obligation.

Unlike the minority, their Honours did not find the omission of the word 'undertake' from the operative provisions to be conclusive evidence that those provisions are no more than an expression of intention and thus merely precatory in effect. The exhortation to signatory States to work for the protection, conservation

<sup>12</sup> *Ibid.* 544.

<sup>13</sup> See *R. v. Burgess: ex parte Henry* (1936) 55 C.L.R. 608, 658, 688. For Mason J.'s comments see (1983) 57 A.L.J.R. 450, 488.

<sup>14</sup> (1983) 57 A.L.J.R. 450, 527.

<sup>15</sup> *Ibid.*

and presentation of their cultural and natural heritage 'in so far as possible, and as appropriate for each country', Mason J. argued, did not preclude the existence of obligation.<sup>16</sup> The other members of the majority agreed. Dean J. made the point that the linguistic, as well as political, difficulties inherent in setting down the terms of an international accord mean that such agreements are commonly 'not expressed with the precision of formal domestic documents as in English law'.<sup>17</sup> To this, both Brennan and Murphy JJ. added that, even in municipal law, obligations can be expressed in terms that leave a discretion as to the manner of fulfilling the obligation.<sup>18</sup>

In reaching their conclusions, all four judges regarded the terms of the convention to be sufficiently clear in meaning, to obviate the need to refer to the *travaux préparatoires*, or preliminary drafts of the documents. Perhaps more importantly, all four rejected the suggestion that the inclusion of a federal clause in the Convention in any way excused Australia from performing her obligation under the treaty. All four considered that the clause begged the question as to which federal entity was responsible for implementing the treaty. Because responsibility lay with the Commonwealth, the clause was held to be nugatory.<sup>19</sup>

Although the majority judges express similar views on the degree of latitude permitted in transcribing treaty obligations into domestic laws, the tests formulated are not identical and when applied, do not furnish identical results. For example, Murphy J. wrote of the need for legislation to 'reasonably implement' the treaty. Where Mason J. used the same test as Starke, Evatt and McTiernan JJ. in *Burgess*, Brennan J. preferred the view of Dixon J. in that case to hold that the nature of the External Affairs power necessitates a 'faithful pursuit' of the purpose of a treaty. Brennan J. said at page 533:

When an international obligation is expressed in terms of a result to be achieved or aimed at, the means being left to Australia, it gives rise to legislative power which like the defence power — looks to the purpose to be achieved by its exercise. Such a power authorises the making of laws that might reasonably be considered conducive to the main purpose . . .

A very similar test is proposed by Deane J. who spoke of a need for proportionality between the object of the treaty and the means used in the domestic legislation to obtain it. He commented at page 545:

The law must be seen, with reasonable clearness, upon consideration of its operation, to be really, and not fancifully, colourably, or ostensibly, referable to and explicable by the purpose or object which is said to provide its character . . .

The fact that the tests proposed by Brennan and Deane JJ. are more stringent than those of Mason and Murphy JJ. emerges in their analysis of the actual provisions of the subject Act. Unlike the other two majority judges, Brennan and Deane JJ. did not leave the legislation intact. Both judges denied validity to part of the key sections of the Act on the ground that the provisions went beyond what was

<sup>16</sup> *Ibid.* 489-91.

<sup>17</sup> *Ibid.* 546.

<sup>18</sup> *Ibid.* 509 (Murphy J.) and 535 (Brennan J.).

<sup>19</sup> *Ibid.* 491 (Mason J.), 509 (Murphy J.), 531 (Brennan J.), 546-7 (Deane J.).

required under the Convention: namely the protection of 'identified property' in imminent danger of destruction.<sup>20</sup>

In the minority, Gibbs C.J., Wilson and Dawson JJ. contested every step of the majority's reasoning. All three rejected the argument that the Convention imposed obligations. The Chief Justice and Wilson J. both felt that the Convention gave a discretion as to the carrying out of promises and that this, in effect, rendered the promises illusory. Their Honours found the meaning of the Convention to be sufficiently clear not to warrant the examination of any material extraneous to the instrument. However, they added that, should such investigation be required, the deletion of obligatory terminology from the earlier drafts of the Convention strengthen their view. To Wilson J., the lack of any machinery to deal with disputes further mitigated against the existence of obligations. For the minority, the inclusion of a federal clause was the final confirmation that the Convention was not intended to be anything more than conciliatory.<sup>21</sup>

Like the majority, the dissenters also relied strongly on *Koowarta's* case. However, they used the judgment of Stephen J. to extract a different *ratio* from the case. They pointed to similarities between his decision and the principles expounded by the minority and held that the weight of authority in *Koowarta* favoured a more restrictive view of the external affairs power. Even if the Convention did impose obligations — and Dawson J. accepted for the purpose of argument that it did — the minority argued that the subject matter of the Convention had not attracted the degree of international concern which Stephen J. would have considered necessary to stamp it with the characteristics of an 'external affair'. Their Honours compared the level of international activity over environmental issues with the agitation surrounding human rights such as those involved in *Koowarta's* case. As Dawson J. pointed out, the Convention recognises that in the environmental field there can be no absolute imperatives. Its most striking aspect, he felt, is the extreme care which is taken to affirm the rights of parties to choose both the items to be protected and the manner (if any) in which those items are to be protected. Like the other members of the minority, he concluded that non-compliance with the terms of such a treaty was unlikely to adversely affect Australia's relations with other countries.<sup>22</sup>

The greatest difference of opinion between the majority and minority in the *Dams* case, however, was on the question of the prohibition implied from the federal nature of the Constitution. The principle was spelt out by Gibbs C.J. at page 475:

It is to say that no single power should be construed in such a way as to give the Commonwealth parliament a universal power of legislation which would render absurd the assignment of particular, carefully defined powers to parliament.

The majority judges all expressed the fear that Australia could become an 'international cripple': they all stressed the fallacy of the notions of reserved

<sup>20</sup> *Ibid.* 534. (Brennan J.), 547-8 (Deane J.).

<sup>21</sup> *Ibid.* 470 (Gibbs C.J.), 516 (Wilson J.), 567-8 (Dawson J.).

<sup>22</sup> *Ibid.* 567.

powers in the States or of the Commonwealth being in abuse of its legislative power. In the present case, they held, there was no breach of constitutional principle because there had been no discrimination against Tasmania, no threat to its continued existence and no interference with its capacity to govern. Both Brennan and Deane J.J. pointed out that the fact that the land involved was Crown land gave Tasmania no immunity from Commonwealth intervention as to its use.<sup>23</sup> On the same subject, Murphy J. engaged in a lengthy discussion of the 'presumption of validity' which he claimed attaches to federal enactments involving conflict with powers formerly exercised by the States.<sup>24</sup>

The minority, on the other hand, rejected the idea that Tasmania's arguments amounted to a reassertion of the old fallacy of reserved powers in the States. The Chief Justice and Wilson J. both reiterated the warning they had expressed in *Koowarta's* case in allowing the External Affairs power to destroy the federal polity.<sup>25</sup> Dawson J. agreed that what was at stake was not the 'reserved powers' of the States but the survival of federation.<sup>26</sup>

Each of the majority judges gave a different description of the rule in *Koowarta* and a different interpretation of the test proposed by Stephen J. As a result, it is no easier to extract a *ratio decidendi* from the *Dams* case than it was from the earlier decision. The only clear point that emerges is that four of the present High Court members prefer an expansive interpretation of section 51(29).

For the current federal government, this decision provides a clear mandate to pursue the Labor Party's long-time ambition to introduce a Bill of Rights which would be based on the principles set down in the International Covenant on Civil and Political Rights. The case also opens the way for a broadening of the terms of reference of the Human Rights Commission Act to cover complaints about State as well as Federal laws. As it stands, the Commission is far from satisfactory.<sup>27</sup> In this regard the external affairs power may finally begin to fulfill its potential for allowing the federal government to take an active and highly creative role in the development of Australia's international legal relations.

On the other side of the coin, the case has prompted a call for closer liaison between the federal executive and Parliament in the process of ratifying treaties. In a press release shortly after the decision was handed down, Senator Harradine announced that legislation will be introduced into Federal Parliament requiring the Government 'to table treaties in and obtain the endorsement of both Houses of

<sup>23</sup> *Ibid.* 522-6 (Brennan J.), 554 (Deane J.).

<sup>24</sup> *Ibid.* 502-4.

<sup>25</sup> *Ibid.* 475 (Gibbs (C.J.)), 517-8 (Wilson J.).

<sup>26</sup> *Ibid.* 563 ff.

<sup>27</sup> The Human Rights Commission Bill was criticized by Gareth Evans in as early as 1972 as 'cosmetic': see (1972) 4 *Migration Action* 4. The present author has argued that the failure to intrude into the domain of State law may well mean that the Act is itself in contravention of international human rights law. As it stands the Act avoids the very essence of the personal rights problem, which is the issue of enforcement. (See Crock M., 'The Effect in Constitutional Law and Practice of the failure to provide adequately for a foreign or External Affairs power', unpublished undergraduate thesis, University of Melbourne (1983) 60 ff.). On this point see further, O'Brien B., 'The Human Rights Commission Act' (Melbourne University Civil Liberties 9/1982) and Triggs G., 'Australia's Ratification of the International Covenant on Civil and Political Rights: Its Domestic Application to Prisoners' Rights'.

Parliament prior to its signing, ratifying or acceding to such treaties'.<sup>28</sup> The senator added that he would be moving for the establishment of a Senate Standing Committee for the scrutiny of treaties 'with powers to assess the benefits or disadvantages of treaties and their effect on legislative areas traditionally falling within the responsibilities of the States'. Finally he concluded that the consultative measures agreed on at the Premiers' Conferences of 1977 and 1979 would have to be reviewed in the light of the case to ensure an effective role for the States in the treaty-making process.

### CONCLUSION

In *Koowarta's* case Stephen J. went to some lengths to show that Australia's problems in the area of external affairs are shared by most, if not all, of the world's federal systems.<sup>29</sup> A similar point was made by Wheare when he wrote that 'federalism and a spirited foreign policy go ill together'.<sup>30</sup>

Without prejudice to the strong political factors involved, it has been argued that the confusion and uncertainty surrounding the conduct of foreign policy in Australia is at least partly constitutional. To begin with, the States' assertions of competence in the area of treaty making — a source of occasional embarrassment to the Commonwealth — are largely facilitated by the failure to provide in the Constitution for an express power in the Executive to enter into treaties. This omission forms one of the bases for the continuing presence of State representatives in many of the world's capital cities; it has been remarked already that the line between promotion of domestic industrial development and investment on the one hand and the regulation of trade on the other, in a way that has national repercussions, is a very narrow one.

In view of *Koowarta* and the *Dams* case, the constitutional uncertainty that has afflicted the federal government in its foreign policy programmes has become a thing of the past. Whether the decisions offer a solution to the government's political problems in this area, however, is open to question. Because the executive's power to enter into treaties is unlimited and the legislature's power to implement them is expressed in such broad terms, it is feared that by entering into an international agreement the executive can now act indirectly to expand the scope of Parliament's power. In this way, the argument runs, the external affairs power could be used to effectively destroy the political power of the federation's constituent units.

The Constitution offers no indication of the extent to which the external affairs power can legitimately disturb the balance of power between the federal government and the States without endangering the existence of the States. This is particularly relevant in the domain of human rights law. In *Koowarta's* case it was

<sup>28</sup> Press release 8 July 1983.

<sup>29</sup> (1982) 39 A.L.R. 417, 451 ff.

<sup>30</sup> *Federal Government* (4th ed. 1963), 227.

not difficult to see that racial discrimination is of 'international' character and therefore arguably an 'external affair' under section 51(29) of the Constitution. However, the case left a deal of uncertainty surrounding the myriad of other human rights that have not attracted the same degree of international concern and action. After the *Dams* case, the problem would seem to be to find an area that cannot be brought within the ambit of the external affairs power under the auspices of an international agreement.

The difficulties facing the High Court in its consideration of the external affairs power highlight what Michael Coper refers to as the 'intractable dilemma' of the judicial process. His comments are particularly relevant in the light of the criticisms that have been levelled against the ruling in both *Koowarta* and the *Dams* case by those who see the decisions as no more than an expression of the centralist leanings of a group of judges who are thereby placing the whole future of Australia's federal system in jeopardy.<sup>31</sup> Coper writes:

We expect the Court to produce a socially well-adjusted result, even though this is typically the function of the political process and we simultaneously expect the court to act like a court rather than a legislature — to be guided by sources external to itself, although such sources are inconclusive. Consequently, it is not surprising that the achievement of one goal should provoke criticism for failure to achieve the other. When a court is not sufficiently result-oriented it is too legalistic; when it pays attention to the social impact of its decisions it is unprincipled.<sup>32</sup>

In matters of this nature, the task before the High Court is perhaps a thankless one.

<sup>31</sup> See, for example, the comments of B. A. Santamaria in the *Australian* (Sydney), 5 July, 1983.

<sup>32</sup> Coper M., 'Interpreting the Constitution: A Handbook for Judges and Commentators in Blackshield A.R. (ed.), *Legal Change: Essays in Honour of Julius Stone* (1983) 52, 65.