Chapter Two

The External Affairs Power : The State of the Debate

S E K Hulme, AM, QC

Introductory

The Background

It is hardly necessary to say to this audience that section 51 (xxix) of the Constitution gives the Commonwealth Parliament power to "make laws for the peace, order, and good government of the Commonwealth with respect to ÄÄ External affairs". This is "the external affairs power", which we are to consider this morning. Three Features of the Constitution

While you are considering what has happened with the external affairs power in recent years, it will do you no harm to have in mind three elementary facts concerning the Constitution.

The first is that in its creation the Constitution was setting out to create a federal system of government: "federal" in the sense that governmental power over people living in the same geographical area was to be shared between co-ordinate and independent governments operating in different spheres, the division of powers being effected and controlled by a written document. That aim was basal. The United Kingdom statute entitled the Commonwealth of Australia Constitution Act 1900, which sets out the Constitution in its section 9, begins by declaring in its preamble that the people of the Australian colonies "have agreed to unite in one indissoluble Federal Commonwealth under the Crown". The Proclamation which the good Queen Victoria issued at Balmoral on 17 September, 1900 in the sixty-third year of her reign declared that the people of the six States "shall be united in a Federal Commonwealth under the name of The Commonwealth of Australia".

The second fact to remember is that the way the Constitution goes about its task of sharing powers between Commonwealth and States is by giving the Commonwealth power over particular topics listed in the Constitution. Section 109 of the Constitution makes dominant the laws which the Commonwealth enacts under these powers. If you want to give the Commonwealth further power, you amend the Constitution by adding to the list.

The third fact to remember is that section 128 of the Constitution provides that the Constitution "shall not be altered except in the following manner", namely, putting it broadly, by a law passed by an absolute majority of both Houses of the Parliament, and approved at a referendum by a majority of the electors voting in a majority of the States, and constituting further a majority of the overall vote.

Amendment of the Constitution

Since facile remarks as to amendment abound, it is worth saying a little on the matter. The score for attempts to induce the people of Australia to approve proposals to alter the Constitution is well known and I fancy commonly misinterpreted, as by Professor Cheryl Saunders when she said that our Constitution had become "notoriously resistant to change".1 A contrast is often made with an allegedly more flexible attitude to amendment in the United States. The facts do not support the comment. In 94 years the Australian people have eight times approved a law

amending their Constitution. The United States score for the same period is nine times, and one of those amendments (repeal of Prohibition) cancelled out an earlier amendment (introducing Prohibition). Measured by what has been achieved, the notorious reluctance of the Australian people to change their Constitution is hardly evident.

It is most certainly true, that while these eight proposals have been approved, many other proposals to amend the Constitution have been rejected. In analysing these it is illuminating to break the proposals into two groups. Eleven were to amend the Constitution otherwise than for the purpose of giving the Commonwealth more power. Of these, the Australian people approved six. The other group contains no less than 31 proposals to amend the Constitution by giving the Commonwealth more power. Of these the Australian people have rejected 29. Only twice has such a proposal been approved : in 1946 (social security) and in 1967 (Aboriginals). Overall the figures show in the Australian people no deep reluctance to changing the Constitution as such, but a savage resistance to doing so in order to give more power to the Commonwealth.

Again the United States comparison is revealing. Only twice since the adoption of their Constitution in 1789 have the American people amended their Constitution in order to give the central government more power : in the 16th amendment, getting rid of an unintended but arguable constitutional anomaly which would have prevented the central government imposing an income tax, and in the 18th amendment, empowering Congress (and the governments of the States) to enact laws enforcing Prohibition. Nor am I aware of any other proposal having been made, to give the central government of the United States more power than was vested in it in the horse and buggy days of 1789. The United States has gone from being a combination of a few rural communities on the eastern side of the Alleghany Mountains to being the greatest power the world has ever seen, without once needing to amend its Constitution in order to give the central government more power. What ought to be notorious in relation to amendment of the Australian Constitution, then, is not some mythical deep-seated reluctance on the part of the Australian people to amend it, but the continuing zeal of Commonwealth governments in bringing forward proposals to amend it in such manner as to give themselves more power (combined with promises that Paradise on earth will be established shortly afterwards). The zeal of the Labor Party has scored one win out of 23 attempts; the zeal of non-Labor parties one win out of eight attempts. Seeing that this is the season of Test cricket, one may observe that measuring reluctance to amend the Constitution by the number of proposals rejected, is like comparing cricket umpires not on the basis of the number of appeals upheld, but on the number of appeals rejected. That latter number may tell us more about the propensity of the fielding side to appeal, than it tells us about the umpire.

Recent Growth in Application of the External Affairs Power

I return to the external affairs power. It is a commonplace that the last generation has seen a vast increase in the application of this power. The power has been held :

1982 : to empower the Commonwealth to make a law controlling the granting by the State of Queensland of pastoral leases over land in Queensland : Koowarta v Bjelke-Petersen;2

1983 : to empower the Commonwealth to make a law preventing the Government of the State of Tasmania from authorising the construction of a dam on the Gordon River, downstream of its junction with the Franklin River, in south-western Tasmania : The Commonwealth v Tasmania: the Tasmanian Dam Case;3

1988 : to empower the Commonwealth to make a law controlling the activities of the Government of the State of Tasmania in an area of forest in Tasmania (being 4.5 per cent of the State of Tasmania), while that area was being considered by the Commonwealth for designation

by it as a "world heritage area" within the Commonwealth law : Richardson v Forestry Commission;4

1988 : to empower the Commonwealth to control the law of land title on the Murray Islands, part of the State of Queensland : Mabo v Queensland, 5 commonly known these days as Mabo No. 1;

1989 : to empower the Commonwealth to make a law restraining the carrying out of activities by the Government of the State of Queensland within an area of rainforest within the State of Queensland : Queensland v The Commonwealth.6

The power has been relied on to support the creation by the Commonwealth of a whole structure of Commonwealth control over such matters as racial discrimination, sexual discrimination, sexual harassment, discrimination on grounds of religion, height, obesity, ugliness, and much else.

The power has been relied on to support the Industrial Relations Act 1993, using eight Conventions and four "Recommendations" of the International Labour Organization as the basis for adding some 300 sections to the Industrial Relations Act 1988.

Onlookers have asked two questions as to all this. The first question they have asked is how it comes about, that matters such as these, internal to Australia, are controlled by way of the external affairs power.

In fact the reasoning by which the High Court has reached these results is simple. In each case the law by which the Commonwealth intervened to control the matter concerned was a law which, by international treaty, the Commonwealth had assumed an obligation to pass. Each treaty was itself an external affair, the Court has said, and the law carrying out the treaty obligation to enact a law was therefore a law with respect to external affairs. Thus entry into a treaty which obliges the Commonwealth to enact the law, confers on the Commonwealth constitutional power to enact the law.

The lines of demarcation on the matter became clear in Koowarta.2 Mason, Murphy and Brennan JJ. took what long earlier Dixon J. had called "the extreme view".7

Mason J. said:

"It would seem to follow inevitably from the plenary nature of the power that it would enable the Parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty."8

Murphy J. said:

- "It was conceded by Queensland . . . that the challenged sections of the Act conform to the Convention. The legislation thus falls easily within the external affairs power as an implementation of this treaty."9

Brennan J. said:

"The international quality of the subject is established by its effect or likely effect upon Australia's external relations and that effect or likely effect is sufficiently established by the acceptance of a treaty obligation with respect to that subject."10

Gibbs CJ., Aickin J. and Wilson J. took a more limited view of the power, requiring that the treaty be made in respect of a matter "international in character".

Gibbs CJ. (with Aickin J. concurring) said:

"I conclude, therefore, . . . that a law which gives effect within Australia to an international agreement will only be a valid law under s.51 (xxix) if the agreement is with respect to a matter which itself can be described as an external affair."11

Wilson J. said:

"It follows that Australia's obligation to eliminate racial discrimination within Australia will only assume the character of an external affair . . . if the manner of its implementation necessarily exhibits an international character."12

Stephen J. took a view which initially seemed similar. But for him "international" included "of international concern", so that if two countries worry about identical internal problems, and enter into a treaty by which each agrees to do something about the problem in its own country, the matter concerned becomes "international", and in the case of Australia the matter comes within the control of the Commonwealth Parliament.13 So at the end of the day Stephen J. decided the case in line with Mason, Murphy and Brennan JJ.

In the Tasmanian Dam Case, the extreme view (subject, in the case of Brennan and Deane JJ. in particular, to qualifications which have small practical importance) was adopted by a majority. It remains current doctrine.

Now under our Constitution the treaty-making power rests not merely with the Commonwealth, but with the Executive arm of the Commonwealth (Prime Minister, Cabinet, Ministers, bureaucrats). Without going near the Australian people, or near the Parliament, the Executive can, by bringing about entry into a treaty, add to the list of topics on which the Commonwealth Parliament may enact laws a topic which was not there before. And that is in fact what happens.

In form there has been no amendment of the Constitution. Any law so enacted will get to be upheld as a law with respect to external affairs, not as a law with respect to the topic concerned. Many feel that in substance there has been an amendment, and they feel that over the last generation there has in substance been a quite drastic series of amendments to the Constitution, none of which has ever been put to the Australian people.

The position is exacerbated by the fact that one cannot find out how many and what amendments there have been. Australia is party to something like 1500 treaties (it seems impossible to get a precise score), and the task of deciding their full ramifications would be enormous. Certainly the task has not been carried out. Yet if any one of the treaties is found to contain a relevant provision, it must be given its full constitutional operation.

I should add at this point that it has recently been held that the existence of a ratified treaty creates an expectation that bureaucrats exercising discretionary powers will exercise their powers consistently with the terms of the treaty, notwithstanding that no law has been passed by the Parliament to introduce the terms of the treaty into the law of Australia.14

Thus those concerned are told that entry into each treaty confers on the Commonwealth Parliament power to enact laws to implement the treaty. They see the untrammelled nature of the treaty-making power, and the enthusiasm of modern bureaucrats for spending more and more time discussing on an international level (perhaps even in international places) the manifold problems common to many countries. Put these various features together, and to these onlookers the external affairs power begins to resemble nothing so much as a blank cheque capable of taking to the Commonwealth power over, in practice, whatever the Executive and its bureaucrats choose. And that leads the onlookers to ask the further question, namely how all this is consistent with the federal nature of the Constitution.

The Debate of April 1995

The matter was discussed at the Society's Sydney conference in April 1995.

Dr Colin Howard

Dr Colin Howard had already recorded, mourned, and attacked what has happened.15 His April, 1995 paper did not seek to re-tell the tale, but merely to bring it up to date. His view may be summed up in his statement:

"The perversion of the external affairs power has a fair claim to be the most blatant and cynical departure from the original constitutional intention that we have yet seen."16

Dr Howard's primary topic was remedying the matter. He distinguished two ways of going about it. One was based on what he called a positive approach, of seeking a more precise statement of the kind of laws which the external affairs power authorises. This remedy he thought could at best be only partially successful, "for no more than any other legislative power can it cover every possible situation".17 The approach he thought more likely to be effective was one based on what he called a negative approach, of stating what the external affairs power did not authorise. His preferred amendment was as follows:

"What I would propose is adding after the words `external affairs' in s.51 (xxix) the following:

`provided that no such law shall apply within the territory of a State unless

(a) the Parliament has power to make that law otherwise than under this sub-section;

(b) the law is made at the request or with the consent of the State;

(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia."18

Professor George Winterton

Professor Winterton delivered a paper entitled A Framework for Reforming the External Affairs Power.19 The paper has some curious aspects.

Professor Winterton first sets out his logical framework, which is to include an initial examination of the effect of the external affairs power as regards federalism, representative government, and responsible government, followed by establishment of criteria for overcoming any deficiencies so revealed, and evaluation of the deficiencies against those criteria.

Professor Winterton turns to consider the effect of the recent developments on federalism. He acknowledges the legal potential to reduce the federal nature of the system to a mere facade. While doing so he sideswipes Sir Harry Gibbs' comment that "It is hardly an exaggeration to say that it would not make any difference if the word `anything' were substituted for `external affairs' in s.51 (xxix)", describing this as a considerable overstatement because, while it is true that any subject may potentially fall within the power, legislation implementing a treaty must be reasonably appropriate to that end.20

One may comment that Sir Harry's comment was directed to the range of topics on which laws might be made. It did not say that the power conferred on Parliament the right to enact simply whatever it thought fit on each topic.

There is a more fundamental point. The cases up until now have concerned treaties which have set out in some detail the provisions to be implemented. The Court has required that the legislation implementing the treaty follow those treaty provisions closely. But nothing requires that treaties take this form. We may in future run across treaties in which several countries undertake with each other to enact legislation dealing with the problem in their own country, without the treaty saying what the treatment shall be. Is Professor Winterton so sure that the implementing legislation will be held invalid ? Will it not still be legislation implementing the treaty?

For the present, Professor Winterton sees little likelihood of the Commonwealth seeking to make wholesale invasion of areas presently subject to State power, and he says that constitutional reform should be based on realities, not apprehensions.21 Many would say the Commonwealth has already made wholesale invasion. I fancy that Richard Court would. And many would say that the mere existence in one government of effective power to destroy the independence of the

other governments goes far to destroy the federal nature of the compact, without formal exercise of the power. Such considerations Professor Winterton does not examine.

Professor Winterton then introduces into the discussion the desirability of the Commonwealth having full power to bring about compliance with treaties on any and every subject. What that countervailing benefit is doing in this initial inquiry into the existence or otherwise of an asserted deficiency as regards federalism, it is not easy to tell. The countervailing benefit may well be relevant to the question whether we should be willing to surrender this part of the federal nature of the Constitution. It would seem totally irrelevant to the anterior question whether the existence of the power does or does not threaten that federal nature.

The sidenote Democratic deficit and the words "The other major complaint regarding the external affairs power" herald the conjoint discharge of the earlier promise to consider the external affairs power in relation to representative government and responsible government. Professor Winterton acknowledges that the Commonwealth Parliament may feel an obligation to implement treaty obligations assumed by the Executive, and turns to the desirability of the Commonwealth Parliament and the States having opportunity to contribute to the treaty-making process, and of the Commonwealth Parliament having a power of veto as to treaty-making. These questions of course arise irrespective of the width given to the external affairs power. Professor Winterton is in favour of there being opportunity for Parliament to contribute to the treaty-making process, but is against any parliamentary power of veto.

Professor Winterton then turns to Criteria for reform.22 His first criterion is that since it is very difficult to get the Australian people to amend the Constitution, no attempt should be made unless there is a very strong case for the amendment. Again we see the traditional assumption as to the attitude of the Australian people to constitutional amendment. Why it should be assumed that a people so reluctant to add to Commonwealth power will prove equally reluctant to reduce it, we are not told.

The second "criterion" asserts again that the main concern as to the external affairs power arises from apprehension as to future use, not from what has been done to date. There is no clear and present danger, and it is premature to undertake preventive constitutional reform. This is of course not a separate criterion, but a reason for finding failure to satisfy the first criterion.

The third "criterion" is that requiring the Commonwealth to rely on the cooperation of the States to any extent will pro tanto impair the Commonwealth in its conduct of foreign relations. That is not a criterion, but simply an argument the other way.

The fourth (this time a true) criterion is that any limitation on the treaty-implementation power must be expressed in a manner suitable for judicial determination. The point is valid, though discussion on the point is not assisted by quoting Mason CJ.'s dictum that "It is scarcely sensible to say that when Australia and other nations enter into a treaty the subject-matter of the treaty is not a matter of international concern-obviously it is a matter of concern to all the parties."23 That is not the matter under discussion at this point.

The fifth "criterion" is simply a brief re-statement of things said earlier as to representative and responsible government.24 The passage includes the statement that a power of parliamentary veto "would appear to be inconsistent with the separation of powers". If that means that a Commonwealth law giving Parliament such a veto would be invalid, it is contrary to what Professor Winterton said three pages earlier.25

Finally Professor Winterton turns to consider Dr Howard's proposal. He comments that the proposal leaves the Commonwealth with no power beyond that to make laws as to diplomatic representation, a position he finds far too narrow, far narrower than State autonomy requires, and

including a withdrawal from the Commonwealth of power having no essential impact on States, as e.g. the power to enact such legislation as the War Crimes Amendment Act 1988, making criminal conduct engaged in countries overseas, by persons who later came to Australia.26 Accordingly Professor Winterton came out against Dr Howard's proposal.

Professor Michael Coper

A third paper was delivered by Professor Michael Coper.27 Professor Coper comments that in this area one does not have absolute rights and wrongs; he is content to find the High Court's present interpretation of the external affairs power at any rate a constitutionally appropriate one, and one he would not seek to alter. It is appropriate, firstly, because no one has formulated a judicially workable alternative narrower view. A test such as "inherently international in character" he regards as both subjective and elusive. The current interpretation is appropriate, secondly, because it is in line with approaches taken earlier. All that has happened is that there has been a marked growth in the list of matters which the international community sees as suitable for international agreement.

Professor Coper turns to political constraints. As to formal mechanisms, he sees a strong case for a greater role for the Commonwealth Parliament.28 He would prefer that greater role to be merely a matter of practice, but sees the case for there being a statutory requirement for tabling treaties in Parliament for a prescribed period as a pre-condition to ratification. This tabling is for information and to create an opportunity to contribute to discussion. He rejects parliamentary veto, pointing out that it means in practice a Senate veto, something no party would risk. Professor Coper also sees a case for a role for an Intergovernmental Treaties Council, involving the States.29 Indeed, it is for reasons of flexibility with regard to fitting together the participation of the Council with that of the Parliament that he would prefer the informative and consultative procedures to rest in practice rather than in more formal and almost automatically more rigid statutory requirement.

Professor Coper would prefer to avoid amendment, preferring to rely on political processes of the kinds just mentioned to reconcile the Commonwealth's legislative control in relation to external affairs, with federal values. If there is to be amendment, he finds Dr Howard's proposal too narrow, and would prefer that put forward in 1993 by Senator Peter Durack.30 This proposal adopts Professor Howard's preferred negative approach, but using different language. It would amend section 51 (xxix) to provide that the power does not authorise Parliament to make laws: "regulating persons, matters or things in the Commonwealth, except to the extent that:

(a) those persons, matters or things have a substantial relationship to other countries or to persons, matters or things outside the Commonwealth; or

(b) the laws relate to the movement of persons, matters or things into or out of the Commonwealth."

I must say that I would like to hear Dr Howard's views on Senator Durack's proposal, which does seem to me to avoid certain criticisms validly to be made against his own proposal.

The Early Warning

As so often, Sir Owen Dixon saw the problem years ahead. In R. v Burgess : ex parte Henry 31 the issue concerned the validity of air navigation regulations reflecting in large but not complete measure the provisions of a Convention drawn up in Paris at the 1919 Peace Conference, signed by representatives of the allied and associated powers, and ratified by King George V on behalf of the British Empire, with separate signatures on behalf of the Dominions and India. The Convention is mentioned in article 319 of the Treaty of Versailles.

The Convention recognised the complete and exclusive sovereignty of each country over the air space above its territory, so settling between the Convention Powers a long-standing and controversial issue. Some countries had asserted a "freedom of the air", akin to freedom of the seas. Others had asserted sovereignty, but subject to easements of peaceful passage. Other countries had other suggestions.32 Defeated Germany was of course not a Convention Power, but the Treaty of Versailles bound it also to the Convention. Numerous other provisions dealt with questions concerning the entry of aircraft of one power into the air space of another. It would have been hard indeed to dispute the international character of the problem or of the Convention dealing with it (though the case was decided against the regulations as regards the external affairs power, on the basis that the regulations did not implement the Convention properly).

Dixon J. always had firm views about Australian politicians. He saw the possibilities and sounded the warning. He began with something pretty obvious:

"It is not easy to interpret and apply the power to make laws with respect to external affairs."33

He saw the power as intended first to operate directly, independent of treaty :

"I think it is evident that its purpose was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external relations of the Commonwealth. The Commonwealth might under this power legislate to ensure that its citizens did nothing inside the Commonwealth preparatory to or in aid of some action outside the Commonwealth which might be considered a violation of international comity, as, for instance, a failure on the part of private persons to behave as subjects of a neutral power during a war between foreign countries."

He then turned to the question of treaties, and there he sounded the warning and indicated the likely limitation:

"If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a certain way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligations undertaken by the Executive, could not be considered as a matter of external affairs. The limits of the power can only be ascertained by a course of decision in which the application of general statements is illustrated by example. We are here concerned with a convention adopted under the full authority of the Crown and internationally binding in relation to this country. The matters with which it deals include the international recognition of sovereignty over the air and the relations of governments to the aircraft of other governments. It is, perhaps, wise to leave less formal arrangements with other countries and international agreements relating only to matters otherwise only of internal concern until questions arise under them. For, in my opinion, air navigation cannot be regarded as of this description."34

Of course Sir Owen Dixon was not always right, and of course every judge takes his own judicial oath and must follow his own mind, not Sir Owen Dixon's. But I cannot help observing that adopting a view which Sir Owen Dixon regarded as "extreme" is judicial valour indeed. "Very courageous", Sir Humphrey Appleby would have called it. Only since that "extreme" view has been adopted have good and respectable citizens, with plenty of things to do elsewhere, felt compelled to spend Saturday mornings discussing the external affairs power.

The commentators will tell you that none of the other judges in Burgess indicated any such limitation. Certainly none expressed the matter so clearly, but two comments must be made on those who would call the rest of that Court in aid for their modern view. The first is that no general statement should be held to cover an issue, unless that issue was present to the mind of the maker of the statement.35 The second is that certain of the other judgments do in fact contain statements able to distinguish between treaties which do and treaties which do not confer power to enact laws for their implementation.

Latham CJ. said that "It is very difficult to say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement."36 That simply is not saying that it will be enough if a matter not otherwise affecting international relations is dealt with by an agreement between two countries, each of which happens to be concerned about that matter. Equally, the further statement that modern conditions had "greatly increased the number of subjects to be dealt with, in some measure, by international action" says nothing as to problems which do not require to be dealt with by international action, as distinct from domestic action in more than one country. Starke J. cited Willoughby on The Constitutional Law of the United States (2nd edn., 1929) for the test "of sufficient international significance to make it a legitimate subject for international co-operation and agreement",37 and seemed to regard that as consistent with his own view. Certainly he saw a good deal to be decided in the future, saying "It is impossible, I think, to define more accurately, at the present time, the precise limits of the power."

Some Comments on the Debate

This paper is primarily a description of the state of play, not one for a more personal contribution. But it seems fair to indulge myself a little.

The Merely Potential Nature of the Threat to Federalism

I find it difficult to agree that response should be withheld until the Commonwealth has clearly marched toward using the external affairs power to swallow up most of the rest of the Constitution. In the first place, there is the authority of someone whose politics were very different from mine, for the proposition that the longest journey begins with a single step. When one sees how many steps have already been taken, one cannot but ask, how many steps did you want? It is worth recalling Churchill's comment on the response of the European countries to Hitler's incursions in the 1930s. "Each one hopes that if he feeds the crocodile enough, the crocodile will eat him last."

In fact, the perceived existence of unused power is dangerous. To adapt an aphorism, All power calls for its use, absolute power calls absolutely.

The knowledge that whatever one does in a certain area can be overreached by a different entity can discourage the intended handling of that area. As the Attorney-General said last night, Victoria has withdrawn from some areas it would otherwise occupy, and would prefer to occupy, simply because the Commonwealth has come in, and the duplication seems wasteful. If the Commonwealth can pass controlling legislation, bureaucrats and others will treat the Commonwealth view as controlling, even while the Commonwealth has not done so.

I have already commented on the connected argument, that unless something outrageous has already happened the Australian people would not vote for an amendment. It is worth noting that on that basis the appropriate time for amendment would never come. It is not likely that a Labor government would sponsor the necessary legislation for constitutional amendment on the issue, and no Liberal government would say that it wished to take matters any further.

But a little thought will show this point to be largely irrelevant. It is likely that at some point there will actually take place the Constitutional Convention which has already been accorded so much newsprint. The assumption underlying this promised Convention seems to be that there is a real likelihood of the Australian people adopting an "improved" Constitution emerging from the Convention. I imagine that the choice given to them will be acceptance or rejection of that Constitution as a single package. When the Convention does take place, those who pass up the chance to have this issue dealt with in the Convention, along with all the issues which others seem likely to bring forward, will have only themselves to blame for whatever happens in this area thereafter. In the period up to the Convention, those who are concerned with what is happening with the external affairs power should make sure that when the time does come, this issue will be well and truly on the agenda.

An Increased Role for the Commonwealth Parliament

Few I think would disagree that it is scandalous that even the Commonwealth Parliament should not be able to ascertain the terms of a treaty until after it has been ratified. A requirement to table impending treaties in Parliament is an obvious step forward. Certainly compulsory tabling will create some opportunity for comment. Given the usual time constraints, probably not very much. If there is no power of veto, the role of Parliament has not been expanded very much. But every step toward better government helps.

That increased role for the Commonwealth Parliament would not do much for the States, though it would create some opportunity for knowledge and intervention. Whether the Intergovernmental Treaties Council would prove any further use may be doubted. What concerns the States is the effect of entry into a treaty, on the balance of power between Commonwealth and States. The Intergovernmental Treaties Council and the opportunity for argument which its intervention would create seem unlikely to contribute to the solution of that problem.

Dr Howard's Amendment and Senator Durack's

Professor Howard's formulated amendment seems to me to be subject to two valid criticisms. Firstly, the formulation seems narrow indeed. It does not cater for treaties of a genuinely international character. On Dr Howard's formulation the air navigation regulations dealt with in R v Burgess, ex parte Henry7 would be dependent on State co-operation, and that seems to me unsatisfactory. Those regulations would be unworkable if they operated in some States and not in others. Further, it excludes the power Dixon J. mentioned first in the passage from Burgess cited above. Further, it excludes power to deal with matters of the war criminal/overseas paedophilia types, for no reason justified by protection of the States. Secondly, this is a Commonwealth power we are dealing with, and it seems to me unfitting and inappropriate for the Constitution to express it in terms suggesting that the Commonwealth is here little more than a supplier to States of laws they request. Senator Durack's formulation set out above seems to me better in these respects.

The Threat of Judicial Activism

We have seen the warning given, that use of a criterion on the lines of "international character", distinguishing which treaties do and which do not bring legislative power will involve an activist investigative judiciary of the kind of which this Society is supposed to disapprove. The difficulty may perhaps be overstated. True it no doubt is, that almost any matter might properly become international in character, and properly the subject of international agreement. That does not mean that it is beyond the wit of man to decide whether a particular matter has done so. During and for some years after the war the High Court was charged with deciding whether items of legislation were justified as laws with respect to defence. At no time, even at the height of

danger, did the Court leave that question to determination by government or Parliament. The Court handled the matters without acquiring a reputation for judicial investigative activism. It is not the topics the Court handles, but the way in which it handles them, that does or does not produce criticism on that score.

An associated matter arises, when we are told that no criterion has yet emerged to tell us which things are international in character. The method of the common law has been to deal with matters case by case, without ever seeking to achieve a total statement at the start. As the cases are decided, features emerge which are seen as indicia one way or the other. The location of a line may be unknown, but as decided cases begin to muster on one side and on the other side of the line, the location of the line slowly emerges. To assert the absence of "guidelines" to indicate international character, is in large part simply to say that the test has not been adopted. To reject the test on the basis that one does not at the start know the answers to all the questions which may arise in applying it, is to depart from the system of the common law.

Endnotes:

1. See the paper of Professor Saunders in the first Newsletter of the Constitutional Centenary Foundation.
2. (1982) 153 CLR 168.
3. (1983) 158 CLR 1.
4. (1988) 164 CLR 261.
5. (1988) 166 CLR 186.
6. (1989) 167 CLR 232.
7. R. v Burgess: ex parte Henry (1936) 55 CLR at p.669. The case is discussed in more detail below.
8. 153 CLR at p.224.
9. 153 CLR at pp.241-242.
10. 153 CLR at pp.259-260.
11. 153 CLR at p.200.
12. 153 CLR at p.251.
13. 153 CLR at pp.213-216.
14. Minister for Immigration v Teoh (1995) 69 ALJR 423.
15. See Howard (1991) Institute of Public Affairs Backgrounder, The External Affairs Power, and the paper presented to the Inaugural Conference of this Society, When External Means Internal, in Upholding the Australian Constitution, vol. 1, p.141.
16. Howard, Amending the External Affairs Power, in Upholding the Australian Constitution, vol. 5, at p.16.
17. Ibid. at p.10.
18. Ibid. at p.11.
19. Winterton, A Framework for Reforming the External Affairs Power, in Upholding the Australian Constitution, vol. 5, p.17.
20. Ibid. at pp.19-20.
21. Ibid. at p.21.
22. Ibid. at p.32.
23. Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at p.229-230. 24. Upholding the Australian Constitution, vol. 5, p.34.
25. Ibid. at p.31.

26. See Polyukhovich v The Commonwealth (1991) 172 CLR 501. 27. The Proper Scope of the External Affairs Power, in Upholding the Australian Constitution, vol. 5, p.47.
28. Ibid. at pp.58-60.
29. Ibid. at pp.60-61.
30. See Durack, The External Affairs Power - What is to be Done ?, in Upholding the Australian Constitution, vol. 3, p.211, esp. at p.219.
31. (1936) 55 CLR 608.
32. See per Starke J., 55 CLR at p.656.
33. 55 CLR at p.668.
34. 55 CLR at p.669.
35. Few who forgot this when arguing before Kitto J. ever forgot it again. There was no quicker way to bring his Honour to a seething fury than to cite a judge's statement as authority on an issue not present to that judge's mind when he made that statement.
36. 55 CLR at p.640.
37. 55 CLR at p.658.