

**SECTION 51(xxix)
OF THE AUSTRALIAN CONSTITUTION AND
'MATTERS OF INTERNATIONAL CONCERN':
IS THERE ANYTHING TO BE CONCERNED ABOUT?**

ABSTRACT

The ambit of s 51(xxix) of the *Australian Constitution* was most recently expounded by the High Court in *XYZ v Commonwealth*. Provisions of the *Crimes Act 1914* (Cth) were upheld by a majority of the Court under the external affairs power as laws with respect to places, persons, matters or things outside the geographical limits of Australia. Accordingly, only a minority of the Court had direct cause to consider the Commonwealth's alternative submission, namely, that the impugned provisions were laws with respect to a 'matter of international concern' and were, by virtue of that quality alone, sustained under the placitum. Despite the apparent alarm with which the submission was received by the Court, this article demonstrates that the so-called 'international concern doctrine' does not stand for a radical expansion of the boundaries of the external affairs power as presently understood.

INTRODUCTION

In 1901, John Quick and Robert Randolph Garran prophesied that s 51(xxix) of the *Australian Constitution*, vesting in the newly-created Commonwealth Parliament power over 'external affairs', 'may hereafter prove to be a great constitutional battle-ground.'¹ Over a century later, in *XYZ v Commonwealth*,² the Commonwealth wielded a hitherto little-utilised weapon in its constitutional armoury. It was submitted that provisions of the *Crimes Act 1914* (Cth) were laws with regard to a 'matter of international concern' and were, by virtue of that quality, sustained by s 51(xxix). In the event, the impugned provisions were upheld under the placitum by a majority of the Court as 'laws with respect to places, persons, matters or things outside the geographical limits of, that is, external to, Australia.'³ Accordingly, only

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¹ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, 1995 ed), 631.

² (2006) 227 CLR 532 ('XYZ').

³ Ibid 539 (Gleeson CJ); see also 546-7 (Gummow, Hayne and Crennan JJ); cf 582 (Kirby J).

a minority had direct cause to consider the Commonwealth's alternative submission.⁴ The majority preferred to reserve the questions raised by 'matters of international concern' for an occasion on which they expressly arose. It was remarked that 'further analysis and elaboration'⁵ was needed before the so-called 'international concern doctrine'⁶ could be accepted as a basis for legislation under s 51(xxix).

Despite the apparent alarm with which the Commonwealth's submission was received by the Court in *XYZ*, the aim of this article is to demonstrate that the international concern doctrine does *not* stand for a radical expansion of the scope of s 51(xxix) as presently understood. In fact, in its likely practical application, the doctrine is largely superfluous. Federal legislative competence over matters pertaining to Australia's relations with other countries has been described as '[o]ne of the longest standing, and least disputed' aspects of the external affairs power.⁷ In reality, matters attracting 'international concern' will bear upon Australia's foreign relations and so *already be within power*. It is concluded that the language of 'international concern', unless used to convey the significance of a subject-matter to Australia's relationships within the international community, should be discarded. This argument comprises several parts.

Part I outlines the origins of the phrase 'matters of international concern' in American constitutional doctrine. In that country, the expression denotes a restriction upon federal executive power to enter into treaties,⁸ namely, the subject-matter of a treaty must concern 'international', as distinct from 'domestic', affairs.

Part II traces the evolution of the concept of 'matters of international concern' in Australian jurisprudence, from its genesis as a limitation upon the subject-matter of laws giving effect to treaties, to a supposed independent basis for s 51(xxix) lawmaking.

⁴ Ibid 606-12 (Callinan and Heydon JJ).

⁵ Ibid 582 (Kirby J).

⁶ Ibid 606 (Callinan and Heydon JJ).

⁷ Donald R Rothwell, 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits' (1993) 15 *Adelaide Law Review* 209, 236, citing *McKelvey v Meagher* (1906) 4 CLR 265, *Roche v Kronheimer* (1921) 29 CLR 329 and *R v Sharkey* (1949) 79 CLR 121 ('*Sharkey*'). See also Quick and Garran, above n 1, 632; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910), 460-1.

⁸ For the purposes of this article, 'treaty' is defined in accordance with the *Vienna Convention on the Law of Treaties*, opened for signature 22 May 1969, 1155 UNTS 331, art 2(a) (entered into force 27 January 1980) as 'an international agreement concluded between States in written form and governed by international law'. The term 'convention' is used synonymously.

The preceding parts having provided a backdrop against which the doctrine might be analysed, Part III addresses the difficulty of characterising ‘matters of international concern’. ‘International concern’ has been described as ‘an elusive concept’,⁹ potentially embodying ‘a diverse multitude of topics, lacking any precise definition or meaning’.¹⁰ In *XYZ*, it was stressed that the question whether the subject that was there under consideration - the sexual exploitation of children - was ‘of international concern’ for doctrinal purposes was ‘entirely distinct’ from the question whether that subject was ‘a “matter of international concern” in a more general sense’.¹¹ How, then, is a ‘matter of international concern’ to be characterised in the constitutional context? Three definitions suggested by the jurisprudence are considered. First, as a matter possessing the capacity to affect foreign relations. Secondly, as a matter corresponding to an international obligation, whether derived from treaty or custom.¹² Thirdly, as a topic of debate, discussion or negotiation in the international arena. It is concluded that, whilst the last-mentioned definition affords some room for an extension of s 51(xxix) beyond its presently recognised limits, the ultimate benchmark for any definition of a ‘matter of international concern’ is its relevance to international relations.

Part IV examines potential limitations upon ‘international concern’ as a criterion for legislative validity under s 51(xxix).¹³ First, adjectival qualifications, requiring that the relevant concern be ‘pressing’, or ‘widespread’, for example, are discussed. Secondly, additional requirements, such as a connexion between Australia and the subject-matter of the identified concern, or that legislation be ‘appropriate and adapted’ to addressing that concern, are considered. Finally, limitations inherent in the federal scheme of the *Constitution* are raised. It is concluded that an acceptance of ‘matters of international concern’ as synonymous with ‘matters concerning Australia’s foreign relations’ would render the outer limits of the power more susceptible of judicial determination.

⁹ *Commonwealth v Tasmania* (1983) 158 CLR 1 (*‘Tasmanian Dam Case’*) 123 (Mason J); see also 197 (Wilson J).

¹⁰ *XYZ* (2006) 227 CLR 532, 572 (Kirby J), paraphrasing Brennan J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (*‘Polyukhovich’*), 561.

¹¹ *XYZ* (2006) 227 CLR 532, 606 (Callinan and Heydon JJ).

¹² For a definition of ‘treaty’, see above n 8. For the purposes of this article, ‘international custom’ is defined in accordance with the *Statute of the International Court of Justice* art 38(1)(b) as ‘evidence of a general practice accepted as law’. The definition incorporates the twin elements of first, state practice and secondly, sense of legal obligation (*opinio juris sive necessitatis*): see generally Donald W Greig, ‘Sources of International Law’ in Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi, *Public International Law: An Australian Perspective* (2nd ed, 2005) 52.

¹³ See *XYZ* (2006) 227 CLR 532, 574 (Kirby J), providing the basis for this part.

I ‘MATTERS OF INTERNATIONAL CONCERN’: UNITED STATES ANTECEDENTS

In the first edition of his treatise *The Constitutional Law of the United States*, published in 1910, W W Willoughby considered that federal executive authority over foreign relations comprised not only those powers expressly bestowed by the *United States Constitution*, ‘but all those powers which sovereign States in general possess with regard to *matters of international concern*.’¹⁴ Conversely, it did not encompass matters relating purely ‘to the reserved powers of the States,’¹⁵ nor ‘to the private rights of individuals.’¹⁶ So to allow, Willoughby opined, would confer ‘unlimited powers’ upon the central government.¹⁷ Likewise, the federal treaty-making power¹⁸ was confined to subject-matters ‘properly and fairly ... of international concern’ or ‘legitimately a subject for international agreement’.¹⁹ In Willoughby’s opinion, however, the power was exercisable with regard to *any* subject-matter fitting this description, ‘*even though* thereby the rights ordinarily reserved to the States are invaded.’²⁰ In 1929, Chief Justice-elect Charles Evan Hughes similarly declared that the object of the treaty-making power was ‘to deal with foreign nations with regard to matters of international concern’,²¹ as distinct from ‘matters ... normally and appropriately ... within the local jurisdictions of the States’.²² Willoughby and Hughes have each been credited with introducing the phrase ‘matters of international concern’ into constitutional parlance.²³

Supreme Court decisions have endorsed the proposition that the treaty-making power in the United States extends only to those matters ‘properly the subject of

¹⁴ Westel Woodbury Willoughby, *The Constitutional Law of the United States* (1st ed, 1910), § 190 (emphasis added). A second edition was published in 1929.

¹⁵ Ibid. The 10th Amendment of the *United States Constitution* provides that ‘[t]he powers not delegated to the United States by the Constitution ... are reserved to the States respectively’. Cf *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (‘*Engineers’ Case*’), rejecting the existence of reserved powers in Australian constitutional doctrine.

¹⁶ Willoughby, above n 14, § 190.

¹⁷ Ibid.

¹⁸ *United States Constitution* art 2, § 2.

¹⁹ Willoughby, above n 14, § 216.

²⁰ Ibid (emphasis added). *Missouri v Holland*, 252 US 416 (1920) subsequently held to that effect (see below n 25 and accompanying text). Cf *XYZ* (2006) 227 CLR 532, 552-3 (Gummow, Hayne and Crennan JJ), implying that Willoughby held a contrary view.

²¹ *American Society of International Law Proceedings* (1929) 194 (Charles Evans Hughes).

²² Ibid 196.

²³ See, eg, Louis Henkin, *Foreign Affairs and the Constitution* (1972) 152; see also *XYZ* (2006) 227 CLR 532, 552-3 (Gummow, Hayne and Crennan JJ).

negotiation with a foreign country.²⁴ In *Missouri v Holland*,²⁵ however, the Court denied that this limitation necessarily excluded from the scope of the power subject-matters otherwise reserved to the States by the 10th Amendment.²⁶ The Court declared that whilst ‘the great body of private relations’ were reserved to the States, a treaty on a matter of national exigency could ‘override’ State power.²⁷

The *Restatement (Second) of Foreign Relations Law of the United States* confirmed that a treaty ‘must relate to the external concerns of the nation as distinguished from matters of a purely internal nature.’²⁸ However, this view was expressly rejected when the matter was reconsidered 22 years later, in the *Restatement (Third)*.²⁹ It was therein asserted that, contrary to previous suggestions, the only limit to the power was that, under international law, treaties must not violate ‘peremptory norms’ of international law.³⁰ Other commentators regard ‘international concern’ as a continuing limitation upon the treaty-making power in the *United States Constitution*.³¹ Whatever its present status in that country, the concept of ‘international concern’ as a qualification upon the subject-matter of treaty obligations shaped early Australian jurisprudence on s 51(xxix).³²

II AUSTRALIAN JURISPRUDENCE

A *R v Burgess; Ex parte Henry*³³

In 1936, the High Court was required to consider the validity of regulations made under the *Air Navigation Act 1920* (Cth). Section 4 of that Act authorised the Governor-General to make regulations ‘for the purpose of carrying out and giving

²⁴ *Geofroy v Riggs*, 133 US 258 (1890), 267; see also *Holden v Joy*, 84 US 211, 243 (1872), and *Asakura v City of Seattle*, 265 US 332, 341 (1924).

²⁵ 252 US 416 (1920).

²⁶ See above n 15.

²⁷ *Missouri v Holland*, 252 US 416, 434 (1920).

²⁸ *Restatement (Second) of Foreign Relations Law of the United States* (1965), § 117.

²⁹ *Restatement (Third) of Foreign Relations Law of the United States* (1987), § 302.

³⁰ *Ibid*, referring to the rule embodied in the *Vienna Convention on the Law of Treaties*, above n 8, arts 53, 64. See also Henkin, above n 23, 400. Cf *Horta v Commonwealth* (1994) 181 CLR 183 (*‘Horta’*), declaring that the invalidity of a treaty under international law was immaterial for the purposes of s 51(xxix): 195 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

³¹ See, eg, J Killian, G Costello and K Thomas, *The Constitution of the United States of America: Analysis and Interpretation* (2002) 508 (a ‘limitation of sorts’); Laurence H Tribe, *American Constitutional Law* (3rd ed, 2000) 646 (a ‘meaningful restriction’).

³² As to the significance of the American authorities in this regard, see generally M Sornarajah, ‘International Law and the *South West Dam Case*’ in M Sornarajah (ed), *The South West Dam Dispute: The Legal and Political Issues* (1983) 23, 30.

³³ (1936) 55 CLR 608 (*‘Burgess’*).

effect to’ a 1919 convention regarding aerial navigation.³⁴ The Court held that laws enacted for the purpose of implementing a treaty to which Australia was a party could be supported by s 51(xxix).³⁵ However, the regulations were invalidated on the ground that they did not ‘carry out and give effect to’ the treaty, as they departed widely from its terms.³⁶ Such departure was impermissible because, in the words of Dixon J, ‘under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates.’³⁷

In addition to the requirement of conformity with the terms of the treaty, the Court made several observations about the scope of the power to implement treaty obligations under s 51(xxix). First, the power was plenary in the sense that it was not limited by reference to the other grants of power under s 51.³⁸ Secondly, the power was subject to the *Constitution* and any limitations, express or implied, arising thereunder.³⁹ Thirdly, the power could not be used as a device for procuring jurisdiction.⁴⁰ However, as to whether the power was limited with respect to subject-matter, as suggested by the American authorities,⁴¹ the Court was divided.

Several members of the Court observed that, in the light of the ever-increasing interdependency of states, a limitation in respect of ‘matters which *in se* concern external relations’ would be meaningless. To quote Latham CJ, it was ‘difficult to

³⁴ *International Convention Relative to Air Navigation*, opened for signature 13 October 1919, [1922] ATS 6 (entered into force 1 June 1922).

³⁵ *Burgess* (1936) 55 CLR 608, 644 (Latham CJ), 657 (Starke J), 669 (Dixon J), 681 (Evatt and McTiernan JJ). In Australia, treaty obligations are not self-executing and require legislative implementation: see *Walker v Baird* [1892] AC 491. As to self-executing treaty obligations in the United States, see, eg, Henkin, above n 23, 156-67.

³⁶ *Burgess* (1936) 55 CLR 608, 645-54 (Latham CJ), 673-5 (Dixon J), 687-95 (Evatt and McTiernan JJ); cf 659-65 (Starke J, dissenting). Cf *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634 and *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54, upholding subsequent regulations made under the same Act.

³⁷ *Burgess* (1936) 55 CLR 608, 674-5; see also 645-6 (Latham CJ), 659-60 (Starke J), 687-8 (Evatt and McTiernan JJ). See further below Part IV(C).

³⁸ *Ibid* 639 (Latham CJ), 658 (Starke J), 668 (Dixon J), 684 (Evatt and McTiernan JJ).

³⁹ Eg, the express limitations in ss 92 and 116: *ibid* 642-3 (Latham CJ), 658 (Starke J), 687 (Evatt and McTiernan JJ). Subsequently, in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, an implied limitation was recognised, namely, a federal law must not discriminate against a State nor inhibit or impair its continued existence or capacity to function (the ‘*Melbourne Corporation* principle’).

⁴⁰ *Burgess* (1936) 55 CLR 608, 642 (Latham CJ), 658 (Starke J), 669 (Dixon J), 687 (Evatt and McTiernan JJ). Subsequent decisions have reiterated the requirement of bona fides, whilst recognising that it offers ‘a frail shield ... available in rare cases’: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (‘*Koowarta*’), 200 (Gibbs CJ).

⁴¹ Several members of the Court referred to the American authorities in this regard: see *Burgess* (1936) 55 CLR 608, 638-9 (Latham CJ), 658 (Starke J), 680 (Evatt and McTiernan JJ).

say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement.⁴² In any event, his Honour reasoned, the subject-matter of the convention clearly fell within any such limits.⁴³ Starke and Dixon JJ held to similar effect.⁴⁴ Dixon J opined that it seemed ‘an extreme view’ that legislative power over a matter ‘otherwise only of internal concern’, as distinct from ‘some matter indisputably international in character’,⁴⁵ could be acquired by entry into a treaty.

In a joint judgment, Evatt and McTiernan JJ expounded the broadest view of the power. In their Honours’ opinion, ‘the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement.’⁴⁶ In other words, the simple existence of a treaty on a subject provided the requisite link between that subject and inter-party relations. Moreover, their Honours posited recommendations or draft conventions of international organisations, ‘or requests upon subject matters of concern to Australia as a member of the family of nations’,⁴⁷ as alternative bases for s 51(xxix) lawmaking.

B *Koowarta*⁴⁸

A broad conception of the power gained ground with the decision in *Koowarta*, upholding provisions of the *Racial Discrimination Act 1975* (Cth). According to its preamble, the Act gave effect to the 1965 *International Convention for the Elimination of all Forms of Racial Discrimination*.⁴⁹ Whilst reaffirming that s 51(xxix) could support legislation enacted for the purpose of treaty implementation, the Court was again divided as to the ambit of that power.

Gibbs CJ, Aickin and Wilson JJ, in the minority, insisted that the subject-matter of a treaty be capable of description as an ‘external affair’.⁵⁰ Any matter could constitute an ‘external affair’ provided it was ‘international in character’ or concerned ‘a relationship with other countries or with persons or things outside Australia.’⁵¹ However, a matter did not become an ‘external affair’ simply by being

⁴² Ibid 640; see also 680-1 (Evatt and McTiernan JJ).

⁴³ Ibid 642 (Latham CJ).

⁴⁴ Ibid 656 (Starke J), 669-70 (Dixon J).

⁴⁵ Ibid 669.

⁴⁶ Ibid 681. See also *Frost v Stevenson* (1937) 58 CLR 528, 599 (Evatt J).

⁴⁷ *Burgess* (1936) 55 CLR 608, 687.

⁴⁸ (1982) 153 CLR 168.

⁴⁹ *International Convention for the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 60 UNTS 195 (entered into force 4 January 1969) (*‘Racial Discrimination Convention’*).

⁵⁰ *Koowarta* (1982) 153 CLR 168, 200 (Gibbs CJ, Aickin J agreeing), 251 (Wilson J).

⁵¹ Ibid 201 (Gibbs CJ, Aickin J agreeing); see also 251 (Wilson J).

the subject of treaty negotiations.⁵² Nor did ‘international concern’ about an otherwise internal affair transform the subject of that concern into an ‘external affair’.⁵³ In their Honours’ view, the disputed provisions, which were of purely domestic operation, fell into the latter category.

Mason and Murphy JJ, in separate judgments, appeared to endorse the ‘extreme view’ portended by Dixon J in *Burgess* that a treaty itself was an ‘external affair’.⁵⁴ According to Mason J, it was ‘scarcely sensible’ to suggest that the subject-matter of a multilateral treaty concluded under the auspices of the United Nations, or other international agency, could be anything but ‘of international concern’.⁵⁵ Whilst maintaining that it was the subject-matter of a treaty, rather than the treaty itself, which invoked s 51(xxix), Brennan J similarly reasoned that a treaty provided ‘a powerful indication’⁵⁶ that its subject-matter had become, if it was not already, an ‘external affair’. Thus, it was ‘a work of supererogation’ to require that the subject-matter display some “‘indisputably international” quality’.⁵⁷

Stephen J, however, considered that legislation purporting to implement a treaty on a subject-matter that was ‘neither of especial concern’ to bilateral relations ‘nor of general international concern’ would be beyond power.⁵⁸ Whereas areas of purely domestic concern were ‘steadily contracting’, those of international concern were ‘ever expanding’.⁵⁹ Nonetheless, ‘the quality of being of international concern’ remained ‘a valid criterion’ for legality:

A subject-matter of international concern necessarily possesses the capacity to affect a country’s relations with other nations and this quality is itself enough to make a subject-matter a part of a nation’s ‘external affairs’.⁶⁰

In his Honour’s view, the subject of racial discrimination had ‘become for Australia, in common with other nations, very much a part of its external affairs’.⁶¹

⁵² Ibid 202 (Gibbs CJ, Aickin J agreeing); see also 251 (Wilson J).

⁵³ Ibid.

⁵⁴ Ibid 224 (Mason J), 238 (Murphy J).

⁵⁵ Ibid 229-30.

⁵⁶ Ibid 258.

⁵⁷ Ibid 259.

⁵⁸ Ibid 216. His Honour cited several American authorities, including J A Thomson, ‘A United States Guide to Constitutional Limitations upon Treaties as a Source of Australian Municipal Law’ (1977) 13 *University of Western Australia Law Review* 153, and Henkin, above n 23, 214-17.

⁵⁹ *Koowarta* (1982) 153 CLR 168, 217.

⁶⁰ Ibid.

⁶¹ Ibid 220. See further below Part III(A).

He therefore joined Mason, Murphy and Brennan JJ in upholding the impugned provisions.⁶²

Evidently, Stephen J considered that, *even in the absence of a treaty*, a ‘subject-matter of international concern’ could enliven s 51(xxix). Mason and Murphy JJ, in their respective judgments, equally regarded ‘international concern’ as an independent ground for validity. Mason J expressed the view that a

matter which is of external concern to Australia having become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it.⁶³

Murphy J likewise argued that

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.⁶⁴

*C Tasmanian Dam Case*⁶⁵

A year after the ruling in *Koowarta*, a differently constituted Court⁶⁶ affirmed the expansive interpretation of s 51(xxix) foreshadowed in the earlier case. By a 4:3 majority,⁶⁷ legislation giving effect to the *Convention for the Protection of the World Cultural and Natural Heritage*⁶⁸ was upheld as a valid exercise of the external affairs power.

⁶² It being conceded that they conformed to the convention: *ibid* 221 (Stephen J), 235 (Mason J), 241 (Murphy J).

⁶³ *Ibid* 234. See further below Part III(C).

⁶⁴ *Ibid* 242. His Honour previously stated in *New South Wales v Commonwealth* (1975) 135 CLR 337, 502-3 (*‘Seas and Submerged Lands Case’*) that ‘external affairs’ included ‘a whole range of economic, social and political subjects of *international concern*’. See also *Dowal v Murray* (1978) 143 CLR 410, 429-30 (Murphy J). (1983) 158 CLR 1.

⁶⁵ Deane and Dawson JJ having replaced Stephen and Aickin JJ.

⁶⁶ Mason, Murphy, Brennan and Deane JJ (Gibbs CJ, Wilson and Dawson JJ dissenting).

⁶⁷ *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 152 (entered into force 17 December 1975) (*‘World Heritage Convention’*), as given effect by the *National Parks and Wildlife Conservation Act 1975* (Cth) s 69 and the *World Heritage Properties Conservation Act 1983* (Cth) ss 6, 9.

Gibbs CJ and Wilson J, once again in the minority, stated their preference for the approach their Honours had advocated in *Koowarta*.⁶⁹ However, their Honours conceded that the ratio decidendi of that case derived from the reasoning of Stephen J. That is, that s 51(xxix) authorised laws of domestic operation enacted for the purpose of bona fide treaty-implementation, provided that their subject-matter was ‘of international concern’.⁷⁰ Dawson J similarly accepted the test propounded by Stephen J⁷¹ and joined with the other minority justices in holding that ‘international concern’ over the subject-matter of the legislation had not been established.⁷²

Mason, Murphy, Brennan and Deane JJ adhered to the position that it was unnecessary to inquire into the subject-matter of bona fide treaty obligations.⁷³ In any event, Mason and Murphy JJ agreed that the subject-matter of the convention was self-evidently ‘of concern’ to the international community.⁷⁴ Their Honours further emphasised that the power was not confined to the implementation of treaty obligations.⁷⁵ According to Mason J, laws facilitating the enjoyment of treaty-derived *benefits* would also be within power.⁷⁶ Murphy J envisaged that the power extended to relations with international organisations, referring to ‘recommendations or requests’⁷⁷ of United Nations organs such as the World Health Organisation, the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the Food and Agriculture Organisation or the International Labour Organisation (ILO).⁷⁸ Deane J added that legislation could be enacted in ‘pursuit of an international objective’.⁷⁹ Significantly, ‘international concern’ was again

⁶⁹ *Tasmanian Dam Case* (1983) 158 CLR 1, 99 (Gibbs CJ), 184 (Wilson J).

⁷⁰ *Ibid* 101 (Gibbs CJ), 187 (Wilson J). Gibbs CJ ‘should have preferred a more precise test’: 101.

⁷¹ *Ibid* 306-7.

⁷² *Ibid* 102 (Gibbs CJ), 198-9 (Wilson J), 311 (Dawson J).

⁷³ *Ibid* 123 (Mason J), 171 (Murphy J), 256-8 (Deane J). Brennan J regarded such an enquiry necessary only where there was reason to suspect lack of bona fides (219), or the treaty did not impose a binding obligation (220).

⁷⁴ *Ibid* 135 (Mason J), 172 (Murphy J).

⁷⁵ *Ibid* 130 (Mason J), 170-2 (Murphy J), 222 (Brennan J), 258-9 (Deane J).

⁷⁶ *Ibid* 130, contemplating a bilateral treaty joint enterprise conferring ‘technological and other benefits’; see also 170 (Murphy J).

⁷⁷ As proposed by Evatt and McTiernan JJ in *Burgess* (1936) 55 CLR 608 (see above n 47 and accompanying text).

⁷⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 171-2; see also 259 (Deane J).

⁷⁹ *Ibid* 259.

posited as a foundation for s 51(xxix) lawmaking.⁸⁰ According to Murphy J, ‘even if international concern is not always necessary, it is sufficient.’⁸¹

D *Richardson v Forestry Commission*⁸²

In *Richardson*, legislation⁸³ giving effect to the *World Heritage Convention* was again upheld under s 51(xxix).⁸⁴ The Court, now under Mason CJ,⁸⁵ accepted that the *Tasmanian Dam Case* was authority for the proposition that the power extended to the implementation of bona fide treaty obligations, on any subject-matter.⁸⁶ Several members of the Court again stressed, however, that the compass of the power was not thus confined.⁸⁷ According to Dawson J, the majority in the *Tasmanian Dam Case* had gone so far as to establish that ‘it is enough to attract legislative power if, even though there is no treaty, a subject-matter is of *sufficient international concern*’.⁸⁸

E *Polyukhovich*⁸⁹

In 1991, the Mason Court further extended the reach of s 51(xxix) to ‘matters and things, as well as relationships, outside Australia’.⁹⁰ Amendments to the *War*

⁸⁰ As submitted by Victoria, intervening in support of the Commonwealth: *ibid* 49; see also 131 (Mason J), 171 (Murphy J), 220 (Brennan J), 258 (Deane J), *contra* 194 (Wilson J), describing such a proposition as ‘far-flung’.

⁸¹ *Ibid* 171.

⁸² (1988) 164 CLR 261 (*‘Richardson’*).

⁸³ *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth).

⁸⁴ Per Mason CJ, Wilson, Brennan, Dawson and Toohey JJ. Deane and Gaudron JJ dissented on the ground that the legislation was not ‘reasonably capable of being viewed as appropriate or adapted to’ the treaty: *Richardson* (1988) 164 CLR 261, 317 (Deane J), 345-6 (Gaudron J).

⁸⁵ Having replaced Gibbs CJ in 1987.

⁸⁶ *Richardson* (1988) 164 CLR 261, 289 (Mason CJ and Brennan J), 298 (Wilson J), 322 (Dawson J), 332 (Toohey J), 342 (Gaudron J); see also 309 (Deane J), citing *Burgess* (1936) 55 CLR 608 as authority for the same proposition. The *Tasmanian Dam Case* (1983) 158 CLR 1 was also followed in *Queensland v Commonwealth* (1989) 167 CLR 232 (*‘Rainforest Case’*).

⁸⁷ *Richardson* (1988) 164 CLR 261, 289 (Mason CJ and Brennan J), 309 (Deane J), 332-3 (Toohey J), 342 (Gaudron J). Mason CJ and Brennan J referred to legislative measures designed to avert the risk of failing to discharge ‘reasonably apprehended’ treaty obligations: 295.

⁸⁸ *Ibid* 322 (emphasis added). His Honour repeated this view in the *Rainforest Case* (1989) 167 CLR 232, 249. As to the requirement of sufficiency of concern, see below Part IV(A).

⁸⁹ (1991) 172 CLR 501.

⁹⁰ *Ibid* 528 (Mason CJ); see also 599 (Deane J), 632 (Dawson J), 696 (Gaudron J), 714 (McHugh J). Their Honours relied upon the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 360 (Barwick CJ), 470-1 (Mason J), 497 (Jacobs J), 503-4 (Murphy J),

Crimes Act 1945 (Cth), making certain acts committed in Europe during the Second World War criminal offences in Australia, were upheld on this basis by five members of the Court.⁹¹

The remaining two members of the Court, Brennan and Toohey JJ, in separate judgments, denied that geographic externality was sufficient. Their Honours advocated a *qualified* principle of geographic externality, requiring ‘some nexus, not necessarily substantial, between Australia and the “external affairs” which a law purports to affect’.⁹² Whereas Toohey J considered that Australia’s participation in the war provided the requisite connexion,⁹³ Brennan J rejected any link between ‘transgressions of other laws in other places in other times’ by non-Australian citizens and the nation’s external affairs.⁹⁴ Nor, in his Honour’s view, did the amendments discharge an obligation, whether under a treaty or customary international law,⁹⁵ or vest in Australian courts a universal jurisdiction.⁹⁶

As to the submission that the disputed amendments dealt with a ‘matter of international concern’,⁹⁷ Brennan J concluded that there was insufficient evidence that the apprehension and trial of suspected war criminals in countries outside those

Robinson v Western Australian Museum (1977) 138 CLR 283, 294 (Barwick CJ), 335 (Mason J) and *Viro v The Queen* (1978) 141 CLR 88, 162 (Murphy J). Subsequent decisions have endorsed the geographic externality principle: see *Horta* (1994) 181 CLR 183, 194 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), *Victoria v Commonwealth* (1996) 187 CLR 416 (*‘Industrial Relations Act Case’*), 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) and *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640, 650 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ). The principle was most recently applied in *XYZ* (2006) 227 CLR 532, discussed below. As to marking out Australia’s boundaries for these purposes, see Rothwell, above n 7, 215-17.

⁹¹ Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

⁹² *Polyukhovich* (1991) 172 CLR 501, 551 (Brennan J); see also 653 (Toohey J), *contra* 530 (Mason CJ); cf 696 (Gaudron J). As to the nexus requirement, see further below Part IV(B).

⁹³ *Ibid* 655.

⁹⁴ *Ibid* 554-5. Nor did the fact that the plaintiff, a Ukrainian citizen at the time of the alleged offending, had subsequently acquired Australian citizenship supply the requisite nexus.

⁹⁵ *Ibid* 558-60; see also 657 (Toohey J).

⁹⁶ *Ibid* 562-72; cf 684 (Toohey J), upholding the Act as an exercise of universal jurisdiction. Toohey J’s reasoning in this regard was approved by Kirby J in *XYZ* (2006) 227 CLR 532, 558 (see below n 203 and accompanying text).

⁹⁷ See *Polyukhovich* (1991) 172 CLR 501, 561-2. Whilst the ‘international concern’ submission was distinct from that as to universal jurisdiction, Brennan J observed that the former depended on the latter insofar as ‘there is nothing to suggest that the postulated ... concern was to be satisfied or met by a trial in exercise of a jurisdiction which is not conferred by international law’: 563; see also 657-8 (Toohey J).

where their crimes were allegedly committed had ever been the subject of concern amongst nations.⁹⁸ His Honour acknowledged, however, that the power would be enlivened if such concern were demonstrable.⁹⁹

F *Industrial Relations Act Case*¹⁰⁰

In the *Industrial Relations Act Case*, the Court, under Brennan CJ,¹⁰¹ again endorsed a broad interpretation of s 51(xxix) in upholding the validity of amendments to the *Industrial Relations Act 1988* (Cth). On the authority of the *Tasmanian Dam Case*, the majority rejected a submission advanced by the States¹⁰² that federal legislative competence to implement treaties was qualified by a requirement of ‘international concern’.¹⁰³ In a separate judgment, Dawson J agreed that such a proposition should be laid to rest.¹⁰⁴ Moreover, his Honour noted, ‘[i]nternational concern of itself has become a touchstone, and thus there is no need for a treaty at all’.¹⁰⁵ The majority further accepted that the power extended to the implementation of multilateral instruments *that did not have treaty status*, such as, relevantly, recommendations of the ILO.¹⁰⁶ The significance of this recognition is discussed below.¹⁰⁷

G *Souliotopoulos v La Trobe University Liberal Club*¹⁰⁸

‘International concern’ was again the focus of judicial scrutiny in a 2002 decision of the Federal Court. In *Souliotopoulos*, proceedings were brought under the *Disability Discrimination Act 1992* (Cth). The application of the Act was governed by s 12, which invoked several constitutional heads of power, including s 51(xxix). Section 12(8) relevantly provided that the Act applied in relation to discrimination against persons with a disability to the extent that it gave effect to an international convention¹⁰⁹ or related to ‘matters of international concern’.¹¹⁰ Although consider-

⁹⁸ Ibid 562.

⁹⁹ Ibid 560; see also 657 (Toohey J).

¹⁰⁰ (1996) 187 CLR 416.

¹⁰¹ Having replaced Mason CJ in 1995.

¹⁰² See *Industrial Relations Act Case* (1996) 187 CLR 416, 425-7 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹⁰³ Ibid 484-5.

¹⁰⁴ Ibid 570.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 483.

¹⁰⁷ See Part III(B)(1).

¹⁰⁸ (2002) 120 FCR 584 (*‘Souliotopoulos’*).

¹⁰⁹ *Disability Discrimination Act 1992* (Cth) s 12(8)(a)-(c), referring respectively to the *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960), the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*‘ICCPR’*) and the *International*

ing it to be ‘arguable’ that the Act gave effect to a conventional obligation to prohibit disability discrimination,¹¹¹ Merkel J focused upon the latter criterion. After reviewing the authorities, his Honour concluded that ‘matters of international concern’ were ‘external affairs’ for the purposes of s 51(xxix), regardless of whether they were the subject of a treaty obligation.¹¹² His Honour’s finding that the Act dealt with a ‘matter of international concern’ and was applicable on that basis is examined below.¹¹³

H XYZ¹¹⁴

It is therefore against the backdrop of a steadily expanding s 51(xxix) that the decision in *XYZ* must be examined. The plaintiff was charged with offences allegedly committed in Thailand contrary to provisions of the *Crimes Act 1914* (Cth)¹¹⁵ inserted by the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth). A majority of the Court applied the geographic externality principle to dismiss the plaintiff’s challenge to constitutionality.¹¹⁶ Gleeson CJ¹¹⁷ considered that a contrary ruling would have dictated a departure from *Polyukhovich*, which represented ‘the current doctrine of the Court’ and, in his Honour’s view, ‘should be maintained because it is correct.’¹¹⁸ Gummow, Hayne and Crennan JJ, in a joint judgment, refuted that a successful challenge to the theory of geographic externality would necessitate overruling *Polyukhovich*. Their Honours argued that the decision was explicable on the grounds that

[a]t the time the information against him was laid, Polyukhovich was an Australian citizen and resident and the charges arose out of events in the then

Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) (*ICESCR*).

¹¹⁰ *Disability Discrimination Act 1992* (Cth) s 12(8)(e).

¹¹¹ Referring to the *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171, arts 22, 26 (entered into force 23 March 1976): *Souliotopoulos* (2002) 120 FCR 584, 593.

¹¹² *Souliotopoulos* (2002) 120 FCR 584, 592.

¹¹³ See below Part III(A). See also *O’Connor v Ross (No 1)* [2002] FMCA 210, [9], in which Driver FM held that ‘the equal access of disabled persons to accommodation ... has been ... and remains a matter of international concern’ for the purposes of the *Disability Discrimination Act 1992* (Cth) s 12(8)(e).

¹¹⁴ (2006) 227 CLR 532.

¹¹⁵ Sections 50BA, 50BC.

¹¹⁶ *XYZ* (2006) 227 CLR 532, 538 (Gleeson CJ), 546-7 (Gummow, Hayne and Crennan JJ).

¹¹⁷ Having replaced Brennan J in 1998.

¹¹⁸ *XYZ* (2006) 227 CLR 532, 538-9.

Soviet Union during the Second World War, in which Australia had been allied to the Soviet Union.¹¹⁹

In so finding, their Honours appeared to adopt Brennan and Toohey JJ's line of reasoning in that case, espousing a theory of geographic externality qualified by the requirement of an Australian nexus.¹²⁰ Ultimately, however, their Honours' finding of validity in *XYZ* hinged upon the fact that the legislation operated in respect of conduct outside Australia.¹²¹ They did not consider whether validity could have been sustained under a *qualified* geographic externality principle, on account of the plaintiff's Australian citizenship.¹²²

Kirby J confessed that doubt had been planted in his mind with regard to the geographic externality principle.¹²³ His Honour's misgivings derived from 'two important and sometimes conflicting features'¹²⁴ of the constitutional design. First, 'the *federal* character of the polity thereby created' and secondly, 'the *functional* capacity of the Constitution to adapt so as to be relevant to a world in which Australia must now operate as an independent nation State'.¹²⁵ In the light of the complexity of the world beyond Australia's borders — 'a world quite different from that of 1900'¹²⁶ — a criterion of geographic externality, without more, would not meaningfully contain federal lawmaking under s 51(xxix). His Honour urged the Court to reconsider Brennan J's reasoning in *Polyukhovich* before endorsing a theory of unqualified geographic externality.¹²⁷ In the event, however, his Honour circumvented these issues by finding that the impugned provisions were validly made with respect to Australia's international relationships.¹²⁸

¹¹⁹ Ibid 547, observing that the facts in *Horta* (1994) 181 CLR 183 likewise disclosed an 'obvious and substantial' Australian nexus. See also 558 (Kirby J), 604 (Callinan and Heydon JJ).

¹²⁰ Evidently agreeing with Toohey J as to its existence (see above n 93 and accompanying text). As to the nexus requirement, see further below Part IV(B).

¹²¹ *XYZ* (2006) 227 CLR 532, 547.

¹²² In *Polyukhovich* (1991) 172 CLR 501, Brennan J indicated that had the Act only targeted offending by Australian residents or citizens, it might have been valid: 554. (2006) 227 CLR 532, 571.

¹²³ Ibid 571.

¹²⁴ Ibid 571-2 (emphasis in original).

¹²⁵ Ibid.

¹²⁶ Ibid. His Honour agreed that *Polyukhovich* (1991) 172 CLR 501 was supportable on a qualified view of the power (558), but stressed that the ratio decidendi depended 'not on what a majority ... *might* have reasoned ... but upon the way in which the majority *in fact* reasoned' (558-9 (emphasis in original)); see also 554 (Callinan and Heydon JJ).

¹²⁷ *XYZ* (2006) 227 CLR 532, 582.

The minority justices, Callinan and Heydon JJ, in a joint judgment, argued that the geographic externality principle should be rejected.¹²⁹ Their Honours also dismissed a submission that the legislation protected Australia's foreign relations. In fact, their Honours conjectured, the laws could have the opposite effect, insofar as they could be construed as 'an attempted intrusion ... into the affairs of those other nations.'¹³⁰ Their Honours' reasoning appeared to import a requirement that, for legislation to be supported by s 51(xxix) on the ground that it affects Australia's foreign relations, its effect must be to somehow foster those relations.¹³¹

As to the submission that the legislation could be supported by s 51(xxix) because its subject-matter was a 'matter of international concern', the Court refused to be drawn. Gleeson CJ commented on 'the potential width of a concept which may go beyond obligations assumed by Australia under a treaty, to matters that *could* properly be the subject of a treaty (if that is what is meant)'.¹³² Indeed, his Honour mused, '[t]he range of topics that might, on one view, be described as being of international concern, is wide and constantly increasing.'¹³³ Gummow, Hayne and Crennan JJ observed that the majority in the *Tasmanian Dam Case* had seemingly endorsed 'international concern' as a basis for validity.¹³⁴ It was, however, unnecessary for their Honours to address the 'unsettled questions'¹³⁵ thereby posed to the Court. Kirby J similarly remarked that the concept was 'still undeveloped in Australia',¹³⁶ and likewise cast it to one side.

Only the minority justices, Callinan and Heydon JJ, having rejected the other grounds for validity, necessarily had to consider the submission. Their Honours found it 'curious' that a former qualification upon the treaty aspect of the power

¹²⁹ Ibid 604. The 'inconvenience' of a 'wholesale overruling' of *Polyukhovich* (1991) 172 CLR 501 and *Horta* (1994) 181 CLR 183 was avoidable, however, as the decisions 'could be justified on other grounds': 604. It is unclear whether this amounted to recognition of a qualified geographic externality principle, as it seemed to in the judgment of Gummow, Hayne and Crennan JJ.

¹³⁰ *XYZ* (2006) 227 CLR 532, 606, contemplating the prospect of charges being brought for acts that were lawful in the country where they occurred, on account of the age of consent in that country being lower than that stipulated in the *Crimes Act 1914* (Cth) sections 50BA, 50BC (16 years).

¹³¹ Or, at least, its effect must be that contended by the Commonwealth. Such language evokes that of Latham CJ in *Sharkey* (1949) 79 CLR 121, where his Honour spoke of '[t]he preservation of *friendly* relations' with other countries: 136-7 (emphasis added). Cf Leslie Zines, *The High Court and the Constitution* (4th ed, 1997), 292 (see below n 231 and accompanying text).

¹³² *XYZ* (2006) 227 CLR 532, 543 (emphasis in original).

¹³³ Ibid.

¹³⁴ Ibid 553.

¹³⁵ Ibid 553.

¹³⁶ Ibid 575.

was ‘said to widen s 51(xxix) where no treaty can be relied on.’¹³⁷ Had the doctrine been deemed applicable, they reflected, the result in *Australian Communist Party v Commonwealth*¹³⁸ would have been different, for

[i]f anything could be described as being a matter of international concern, it was Communism in the 1950s. Yet it did not occur to any of the Justices or any of the many counsel during the lengthy arguments in that hard-fought case that the legislation banning the Australian Communist Party could be validated because it related to a matter of international concern.¹³⁹

Whilst this was ‘not logically fatal’ to the submission, ‘it weaken[ed] its credibility’.¹⁴⁰ In any case, their Honours concluded, ‘[e]ven if there are relevant matters of international concern, and even if the international concern doctrine is sound,’¹⁴¹ the legislation would not be saved. Whereas the material before the Court disclosed ‘concern — let it be assumed to be “international”’¹⁴² about the sale of children, child prostitution and child pornography,¹⁴³ the legislation, by targeting child sex tourism, criminalised ‘different conduct’.¹⁴⁴

I *Summary*

No decision of the High Court, and only one of the Federal Court,¹⁴⁵ has relied upon ‘international concern’ to uphold validity under s 51(xxix). Nonetheless, curial support for the doctrine is not absent. Indeed, it may be traced back to *Burgess*, where Evatt and McTiernan JJ spoke of matters ‘of concern to Australia as a member of the family of nations’.¹⁴⁶ In addition to Stephen J’s subsequent

¹³⁷ Ibid 607. Callinan J had previously criticised the notion of ‘international concern’ extra-curially: see Justice Ian Callinan, ‘International Law and Australian Sovereignty’ (2005) July-August *Quadrant* 9, 11.

¹³⁸ (1951) 83 CLR 1 (*‘Communist Party Case’*).

¹³⁹ XYZ (2006) 227 CLR 532, 610, referring to the *Communist Party Dissolution Act 1950* (Cth). See also 569 (Kirby J), noting that the geographic externality principle would likewise have altered the result, owing to ‘the world-wide character of the communist threat’.

¹⁴⁰ XYZ (2006) 227 CLR 532, 610.

¹⁴¹ Ibid 612.

¹⁴² Ibid.

¹⁴³ Seemingly referring to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, GA Res 263, UN GAOR, 54th sess, 97th plen mtg, UN Doc A/Res/54/263, Annex II (2000) (see further below n 209 and accompanying text).

¹⁴⁴ XYZ (2006) 227 CLR 532, 612.

¹⁴⁵ *Souliotopoulos* (2002) 120 FCR 584. See also, in the Federal Magistrates Court, *O’Connor v Ross (No 1)* [2002] FMCA 210 (see above n 113).

¹⁴⁶ *Burgess* (1936) 55 CLR 608, 687.

pronouncement in *Koowarta*,¹⁴⁷ ‘international concern’ has been propounded as an independent touchstone for validity by Mason,¹⁴⁸ Murphy,¹⁴⁹ Brennan,¹⁵⁰ Deane,¹⁵¹ Dawson¹⁵² and Toohey JJ,¹⁵³ and, most recently, by Merkel J.¹⁵⁴ Nonetheless, in *XYZ*, Callinan and Heydon JJ declared that ‘there is less to these dicta than meets the eye’.¹⁵⁵ Against this jurisprudential backdrop, a closer examination of the concept may now be attempted, beginning with the question of how to characterise a ‘matter of international concern’.

III WHAT IS A ‘MATTER OF INTERNATIONAL CONCERN’?

A *A Matter Possessing the Capacity to Affect Foreign Relations?*

In international law, the phrase ‘matters of international concern’ is used in contradistinction to the reference in art 2(7) of the *Charter of the United Nations*¹⁵⁶ to ‘matters which are essentially within the domestic jurisdiction of any state’, in respect of which outside intervention is prohibited.¹⁵⁷ The domestic jurisdiction reservation is said to be overridden in the event of conduct by states that has aroused ‘*serious international concern*’, or that is considered to be a ‘*threat to the maintenance of international peace and security*’.¹⁵⁸ It is on this basis that the General Assembly and, on occasion, the Security Council, have been deemed

¹⁴⁷ See above n 60 and accompanying text.

¹⁴⁸ *Koowarta* (1982) 153 CLR 168, 234; *Tasmanian Dam Case* (1983) 158 CLR 1, 131.

¹⁴⁹ *Seas and Submerged Lands Case* (1975) 135 CLR 337, 502-3; *Dowal v Murray* (1978) 143 CLR 410, 429-30; *Koowarta* (1982) 153 CLR 168, 242; *Tasmanian Dam Case* (1983) 158 CLR 1, 171-2.

¹⁵⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 220; *Polyukhovich* (1991) 172 CLR 501, 560.

¹⁵¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 258.

¹⁵² *Richardson* (1988) 164 CLR 261, 322; *Rainforest Case* (1989) 167 CLR 232, 249; *Industrial Relations Act Case* (1996) 187 CLR 416, 570-1. His Honour was not himself advocating such a proposition, but rather conceding that others had.

¹⁵³ *Polyukhovich* (1991) 172 CLR 501, 657.

¹⁵⁴ *Souliotopoulos* (2002) 120 FCR 584, 592.

¹⁵⁵ *XYZ* (2006) 227 CLR 532, 607.

¹⁵⁶ Hereafter ‘*United Nations Charter*’.

¹⁵⁷ See, eg, John M Howell, ‘The Commonwealth and the Concept of Domestic Jurisdiction’ (1967) 5 *Canadian Yearbook of International Law* 14; ‘A Matter of International Concern’ (1969) 63 *American Journal of International Law* 771; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law* (9th ed, 1992), § 433; Myres S McDougal and W Michael Reisman, ‘Rhodesia and the United Nations: The Lawfulness of International Concern’ (1968) 62 *American Journal of International Law* 1; D P O’Connell, *International Law* (2nd ed, 1970), 310-13; Lawrence Preuss, ‘Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction’ (1949) 74 *Recueil des Cours* 553, 3.

¹⁵⁸ Jennings and Watts, above n 157, 433.

competent to respond to domestic human rights violations.¹⁵⁹ This conception of ‘international concern’, linked to actual or perceived threats to the peaceful coexistence of states, has permeated Australian constitutional jurisprudence.

In *Koowarta*, Stephen J had regard to a range of materials to determine whether the subject-matter of the *Racial Discrimination Convention* was one of ‘international concern’.¹⁶⁰ They included the *United Nations Charter*;¹⁶¹ writings of scholars of international law;¹⁶² decisions of the International Court of Justice¹⁶³ and various other human rights instruments.¹⁶⁴ His Honour concluded that there existed ‘a quite precise treaty obligation’ that was, moreover, ‘*on a subject of major importance in international relationships*’.¹⁶⁵ A capacity to influence relations between nations was therefore central to his Honour’s understanding of ‘international concern’. Several dicta have underscored his Honour’s reasoning in this respect, both in the context of ‘international concern’ as a (now clearly obsolete) restriction upon the subject-matter of a treaty obligation, and as a ground of validity independent of any such obligation.

On the basis of Stephen J’s reasoning in *Koowarta*, for example, it will be recalled that the minority justices in the *Tasmanian Dam Case* accepted a test of ‘international concern’ over the subject-matter of treaty obligations. Gibbs CJ was of the view that

[w]hether a matter is of international concern depends on the extent to which it is regarded by the nations of the world as a proper subject for international

¹⁵⁹ For examples, see *ibid*.

¹⁶⁰ See *Koowarta* (1982) 153 CLR 168, 218-19. His Honour effectively consulted the sources of international law enumerated in the *Statute of the International Court of Justice* art 38(1), which refers to ‘(a) international conventions ... (b) international custom ... (c) the general principles of law recognized by civilised nations (d) ... judicial decisions and the teachings of the most highly qualified publicists’.

¹⁶¹ Article 1(3) (‘promoting and encouraging respect for human rights ... for all’).

¹⁶² Such as Sir Hersch Lauterpacht, *International Law and Human Rights* (1950) 177-8.

¹⁶³ Such as *Barcelona Traction, Light and Power Co (Belgium v Spain) (Merits)* [1970] ICJ Rep 3.

¹⁶⁴ Such as the *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/810 (1948) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

¹⁶⁵ *Koowarta* (1982) 153 CLR 168, 221 (emphasis added). It is unclear whether Stephen J would have reached the same conclusion absent the *Racial Discrimination Convention*; cf 238-42 (Murphy J).

action, and on *the extent to which it will affect Australia's relations with other countries*.¹⁶⁶

In refuting that the subject-matter of the *World Heritage Convention* was one 'of international concern', his Honour opined that a failure to take action in its regard was unlikely to significantly affect inter-signatory relations.¹⁶⁷ Similarly, Wilson J reasoned that 'international concern ... must mean something more than the mere existence of that interest or concern among nations which finds expression in a convention.'¹⁶⁸ In his Honour's view, it depicted '[o]nly those obligations resting on the Commonwealth of such a quality that a failure to implement threatens serious disruption to its international relationships'.¹⁶⁹ By contrast, the *World Heritage Convention* was characterised by 'a conciliatory and informal engagement' of those relationships.¹⁷⁰ Dawson J also observed that the convention took pains to safeguard 'the sovereign right of nations to determine for themselves the manner in which they will exploit their resources'.¹⁷¹ In his Honour's opinion, this indicated that 'international concern' over its provisions, in the sense that 'any failure on the part of this country to observe them would affect other nations and this country's relations with them', was wanting.¹⁷²

Brennan J diverged from the minority approach in the *Tasmanian Dam Case* insofar as he argued that if a treaty imposed a binding obligation, it was unnecessary to separately establish 'international concern' over its subject-matter. His Honour stated, however, that 'what is in form an obligation can be taken to be an obligation ... if a failure to act in conformity with those terms is likely to affect Australia's relations with other nations and communities.'¹⁷³ Thus, it is clear that the capacity of an obligation to affect inter-party relations was important also to Brennan J.¹⁷⁴ Whereas the minority justices equated such capacity with the existence of 'international concern' over the subject-matter of an obligation, however, Brennan J saw it as relevant to the question whether an obligation was binding. In holding that the *World Heritage Convention* placed 'a clear obligation upon Australia'¹⁷⁵ to take

¹⁶⁶ *Tasmanian Dam Case* (1983) 158 CLR 1, 101 (emphasis added). See further below Part III(B)(1).

¹⁶⁷ Ibid 102.

¹⁶⁸ Ibid 197-8.

¹⁶⁹ Ibid 198.

¹⁷⁰ Ibid 195.

¹⁷¹ Ibid 310.

¹⁷² Ibid, contradistinguishing the *World Heritage Convention* from the *Racial Discrimination Convention*. As to the requirement of sufficiency of concern, see below Part IV(A).

¹⁷³ *Tasmanian Dam Case* (1983) 158 CLR 1, 226.

¹⁷⁴ See also *Koowarta* (1982) 153 CLR 168, 260 (Brennan J), agreeing with Stephen J that the implementation of the *Racial Discrimination Convention* was 'of first importance' to Australia's international relationships.

¹⁷⁵ *Tasmanian Dam Case* (1983) 158 CLR 1, 226.

steps to protect its national heritage, his Honour opined that inaction on its part would affect its relations with other nations. To conclude otherwise, he declared, would be ‘to attribute hypocrisy and cynicism to the international community’.¹⁷⁶ Although this was enough to enliven s 51(xxix), his Honour noted that the ‘stricter test’ proposed by the minority was ‘not difficult to satisfy’.¹⁷⁷ For, he explained, with an evident degree of circularity:

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*.¹⁷⁸

The capacity to affect foreign relations has also been linked to the existence of ‘international concern’ *independently of a relevant treaty obligation*. In *Koowarta*, for example, although it was unnecessary on account of his Honour’s finding that s 51(xxix) was enlivened by Australia’s entry into the *Racial Discrimination Convention*, Murphy J was prepared to hold that, *even without* the convention, its subject-matter was one ‘of international concern’.¹⁷⁹ In so holding, his Honour referred to the post-war proliferation of universal human rights instruments,¹⁸⁰ which had elevated humanitarian concerns to the forefront of international affairs. His Honour observed that, ‘[i]n the practical realm of international politics’, a failure by Australia to eliminate racial discrimination within its own borders would weaken its entitlement to criticise human rights’ violations elsewhere.¹⁸¹ In the *Tasmanian Dam Case*, his Honour conducted a similar enquiry to establish that, *even absent* the *World Heritage Convention*, its subject-matter was one ‘of international concern’.¹⁸² Once again, the significance of the subject-matter to international relations was highlighted.¹⁸³

Brennan J in the *Tasmanian Dam Case* likewise averred that the test of ‘international concern’ absent a treaty obligation was ‘whether the subject-matter affects or is likely to affect Australia’s relations with other international persons’.¹⁸⁴ This

¹⁷⁶ Ibid.

¹⁷⁷ Ibid 219.

¹⁷⁸ Ibid (emphasis added).

¹⁷⁹ *Koowarta* (1982) 153 CLR 168, 242.

¹⁸⁰ Such as the *United Nations Charter*, the *Universal Declaration of Human Rights*, the *ICESCR* and the *ICCPR*.

¹⁸¹ *Koowarta* (1982) 153 CLR 168, 239.

¹⁸² *Tasmanian Dam Case* (1983) 158 CLR 1, 174-7, referring to, eg, the *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*, opened for signature 12 October 1940, 161 UNTS 228 (entered into force 1 May 1942).

¹⁸³ *Tasmanian Dam Case* (1983) 157 CLR 1, 177.

¹⁸⁴ Ibid 220. As to relations with international ‘persons’, see below n 232 and accompanying text.

was ‘an inquiry of some difficulty’,¹⁸⁵ which, as his Honour had observed in *Koowarta*, involved ‘questions of degree’ and the ‘evaluation of international relationships from time to time’.¹⁸⁶ In *Polyukhovich*, his Honour repeated his view that the phrase ‘international concern’ was ‘used to indicate that the power relates to matters affecting Australia’s external relations even if those matters are not obligations under international law’.¹⁸⁷ Whilst his Honour there found insufficient evidence of ‘international concern’ over the *extraterritorial* prosecution of war criminals, he found that their prosecution in the jurisdiction where the crimes were committed was ‘a matter of serious international concern’.¹⁸⁸ In so finding, his Honour had regard to various materials,¹⁸⁹ including General Assembly resolutions,¹⁹⁰ the Charter of the Nuremberg Tribunal¹⁹¹ and the 1949 Geneva Conventions.¹⁹²

In *Souliotopoulos*, Merkel J agreed that, absent a treaty obligation, it was a subject-matter’s significance to foreign relations that determined the existence of ‘international concern’. His Honour observed that

¹⁸⁵ Ibid.

¹⁸⁶ *Koowarta* (1982) 153 CLR 168, 258.

¹⁸⁷ *Polyukhovich* (1991) 172 CLR 501, 562; see also 657 (Toohey J).

¹⁸⁸ Ibid 558. That the *extradition* of alleged war criminals is a matter that ‘directly concern[s] Australia’s relations with other countries and [is] part of that aspect of its external affairs’, even absent a treaty, was recently affirmed in *Vasiljkovic v Commonwealth* (2006) 228 ALR 447, 460 (Gleeson CJ), 471 (Gummow and Hayne JJ, Heydon JJ agreeing), 498 (Kirby J).

¹⁸⁹ See *Polyukhovich* (1991) 172 CLR 501, 556-8.

¹⁹⁰ Such as the *Resolution on the Extradition and Punishment of War Criminals*, GA Res 3(I), UN GAOR, 1st sess, 32nd plen mtg, UN Doc A/Res/3(I) (1946).

¹⁹¹ *Charter of the International Military Tribunal*, annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945).

¹⁹² *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1959); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), as scheduled to the *Geneva Conventions Act 1957* (Cth).

[i]t is clear that a broad view has been taken of matters that have the capacity to affect Australia's relations with other countries, particularly in the area of human rights, and such matters need not necessarily arise from a treaty obligation assumed by Australia.¹⁹³

His Honour consulted numerous sources as evidence of 'international concern' over disability discrimination,¹⁹⁴ including the *United Nations Charter*,¹⁹⁵ a report by the United Nations Committee on Economic, Social and Cultural Rights,¹⁹⁶ General Assembly resolutions,¹⁹⁷ human rights instruments, both international and regional,¹⁹⁸ and, at a domestic level, the second reading speech¹⁹⁹ and explanatory memorandum²⁰⁰ to the Disability Discrimination Bill 1992 (Cth). His Honour concluded that a failure to prohibit discrimination on the ground of disability 'would undoubtedly have the capacity to affect Australia's relations with other countries'²⁰¹ and was, therefore, 'of international concern'.²⁰²

The overlap between matters 'of international concern' and those capable of influencing foreign relations is further illustrated by Kirby J's reasons in *XYZ*. His Honour considered that in *Polyukhovich* there was 'at least one matter of "international concern"', being the prosecution of crimes of universal jurisdiction.²⁰³ This was 'arguably also a matter affecting Australia's relations with

¹⁹³ *Souliotopoulos* (2002) 120 FCR 584, 592.

¹⁹⁴ See *ibid* 593-9.

¹⁹⁵ With its emphasis on 'fundamental human rights' and 'the dignity and worth of the human person': *ibid* 594.

¹⁹⁶ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 5: Persons with Disabilities*, 11th sess, 38th mtg, UN Doc E/1995/22 (1995).

¹⁹⁷ Such as the *Declaration on the Rights of Disabled Persons*, GA Res 3447, UN GAOR, 30th sess, 2433rd plen mtg, UN Doc A/Res/3447 (1975).

¹⁹⁸ In the first category, see, eg, the *ICCPR*, arts 22, 26 ('[e]veryone shall have the right to freedom of association' and '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law', respectively). In the second category, see, eg, *Treaty Establishing the European Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958), as amended by *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340, 173 (entered into force 1 May 1999).

¹⁹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2751 (Brian Howe, Minister for Housing, Local Government and Community Services).

²⁰⁰ Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth).

²⁰¹ *Souliotopoulos* (2002) 120 FCR 584, 599.

²⁰² Cf *O'Connor v Ross (No 1)* [2002] FMCA 210, [9] in which Driver FM likewise found 'international concern' over disability discrimination, without considering its effect on Australia's foreign relations.

²⁰³ See further above n 96 and accompanying text.

other states and international organisations’ and, in his Honour’s view, the laws there contested could have been upheld on that basis.²⁰⁴ Similarly, although declining to find that the laws in XYZ dealt with a ‘matter of international concern’, his Honour held that they were ‘validly made with respect to Australia’s external relations with other nation states and with international organisations’.²⁰⁵ His Honour highlighted the ‘active involvement of many states, including Australia, in multilateral and bilateral relationships’ and the ‘active debates in the agencies of the United Nations and in other international and regional bodies’ concerning the protection of children from sexual predation by foreign nationals.²⁰⁶ His Honour’s finding appeared to rest upon material earlier considered as evidence of ‘international concern’,²⁰⁷ including the *Convention on the Rights of the Child*²⁰⁸ and Optional Protocol;²⁰⁹ the report of a United Nations Special Rapporteur,²¹⁰ bilateral memoranda of understanding,²¹¹ the laws of other nations²¹² and, at a

²⁰⁴ XYZ (2006) 227 CLR 532, 558.

²⁰⁵ Ibid 582. In the first category of relations was that with Thailand (as the country where the alleged offending occurred) and in the second category that with the United Nations Committee on the Rights of the Child (as the body responsible for the implementation of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)): 532-3.

²⁰⁶ XYZ (2006) 227 CLR 532, 578.

²⁰⁷ See *ibid* 573-4; see also 606-7 (Callinan and Heydon JJ).

²⁰⁸ Arts 19, 34 (committing state parties to ‘take all appropriate legislative ... measures to protect the child from all forms of ... injury or abuse ... including sexual abuse’ and ‘to protect the child from all forms of sexual exploitation and sexual abuse’, respectively). Although it entered into force for Australia on 16 June 1991, it was not submitted that the 1994 amendments to the *Crimes Act 1914* (Cth) gave effect to the convention: see XYZ (2006) 227 CLR 532, 555 (Kirby J), 609 n 331 (Callinan and Heydon JJ).

²⁰⁹ *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, GA Res 263, UN GAOR, 54th sess, 97th plen mtg, UN Doc A/Res/54/263, Annex II (2000). Australia has signed, but not ratified, the Optional Protocol, perhaps explaining why the Commonwealth did not seek to uphold the amendments on the basis of treaty-implementation (see above n 208).

²¹⁰ Vitit Muntarbhorn, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, [170], UN Doc E/CN.4/1994/84 (1994).

²¹¹ *Memorandum of Understanding between the Government of Australia and the Government of the Republic of the Philippines for Joint Action to Combat Child Sexual Abuse and Other Serious Crimes* (11 October 1997), *Memorandum of Understanding between the Government of Australia and the Government of Fiji for Joint Action to Combat Child Sexual Abuse and Other Serious Crimes* (18 December 1998).

²¹² See XYZ (2006) 227 CLR 532, 573.

domestic level, a parliamentary committee report on the Crimes (Child Sex Tourism) Amendment Bill 1994 (Cth).²¹³

The appropriateness of judicial scrutiny of the conduct of foreign relations has, at times, been questioned.²¹⁴ In the *Tasmanian Dam Case*, for example, Mason J criticised attempts to distinguish obligations ‘of international concern’ by their relevance to foreign relations, declaring that ‘[w]hether the subject-matter as dealt with by the convention is of international concern’ or ‘whether non-observance ... is likely to lead to adverse international action or reaction’ were ‘not questions on which the Court can readily arrive at an informed opinion.’²¹⁵ Brennan J also noted that ‘an inquiry into the extent to which a failure to fulfil a treaty obligation has the capacity to affect Australia’s relations with other countries ... could hardly be pursued by this Court without advice given by the executive government.’²¹⁶

In *XYZ*, Callinan and Heydon JJ noted Mason J’s unease that a test of ‘international concern’ would compel the Court to ‘substitute its judgment for that of the executive government and Parliament’.²¹⁷ In their Honours’ view, such reasoning was analogous to that of Latham CJ in the *Communist Party Case*,²¹⁸ where his Honour asserted, in the context of the defence power,²¹⁹ that it was not open to the Court to challenge the factual assertions contained in the recitals to the impugned legislation.²²⁰ This logic was soundly rejected by the majority.²²¹ As Williams J declared, ‘[i]t is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation.’²²² According to Callinan and Heydon JJ in *XYZ*, ‘[t]he similarity between Latham CJ’s conclusion and the international concern doctrine in this respect casts grave doubt on the latter.’²²³

With respect, Mason J’s remarks were made in the context of ‘international concern’ as a qualification upon the treaty aspect of s 51(xxix) — which, in any case, his Honour himself was seeking to disprove. What is more, the majority

²¹³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes (Child Sex Tourism) Amendment Bill 1994* (1994).

²¹⁴ For a United States perspective, see Jonathan Charney, ‘Judicial Deference in Foreign Relations’ (1989) 83 *American Journal of International Law* 805.

²¹⁵ *Tasmanian Dam Case* (1983) 158 CLR 1, 125.

²¹⁶ *Ibid* 219; cf 226, arguing that such a proposition was ‘easily tested’.

²¹⁷ *Ibid* 125 (Mason J), cited in *XYZ* (2006) 227 CLR 532, 610 (Callinan and Heydon JJ).

²¹⁸ (1951) 83 CLR 1.

²¹⁹ *Constitution* s 51(vi).

²²⁰ *Communist Party Case* (1951) 83 CLR 1, 151-2.

²²¹ *Ibid* 200-1 (Dixon J), 205-6 (McTiernan J), 222-3 (Williams J), 244-5 (Webb J), 263-5 (Fullagar J), 271-4 (Kitto J).

²²² *Ibid* 222.

²²³ *XYZ* (2006) 227 CLR 532, 610; see also Justice Callinan, above n 137, 11-12.

approach in the *Tasmanian Dam Case* did not seek to absolve the Court of its constitutional duty, in that it had still to be satisfied of the existence of a bona fide treaty.²²⁴ It is true, however, that his Honour did not elaborate on what he considered the task of the Court might be where the sole basis for a law's validity was its relevance to foreign relations; that is, in the absence of a treaty obligation. In such a case, Zines has observed, 'there seems no escape from the duty of the court to engage in the relevant fact finding and evaluation that is involved.'²²⁵

In any case, it is evident that a definition of 'matters of international concern' as those having the capacity to affect foreign relations, with or without a treaty obligation, is superfluous. For, as Kirby J most recently demonstrated in *XYZ*, even in the absence of a treaty obligation, such matters are *already within power*. It is meaningless to superimpose a requirement of 'international concern' in this context; matters capable of affecting relations between nations are self-evidently 'of concern' to those nations. Moreover, as the reasons of Kirby J in *XYZ*, and those of Stephen J in *Koowarta*, Murphy J in both *Koowarta* and the *Tasmanian Dam Case*, Brennan J in *Polyukhovich* and Merkel J in *Souliotopoulos* before him, reveal, the sources used to demonstrate the existence of either the requisite capacity or the requisite concern are the same.²²⁶ At the international level, they include, inter alia, the constitutive instruments of the United Nations; documents of United Nations organs; treaties and other bilateral and multilateral instruments;²²⁷ laws of other nations; decisions of international judicial bodies and publications of distinguished scholars. At the domestic level, some weight has been given to expressions of executive intent, as contained, for example, in second reading speeches and explanatory memoranda.

Indeed, it is not necessarily evident that Stephen J in *Koowarta* meant to posit 'international concern' as a sub-head of power distinct from that pertaining to foreign relations. It is possible that, by referring to 'matters of international concern', his Honour was simply restating his view that 'external affairs' were not confined to obligations assumed under a treaty, but included 'matters which are not consensual in character', such as 'conduct on the part of a nation, or of its nationals, which affects other nations and its relations with them'.²²⁸ Zines has similarly suggested that his Honour's rationale was that '[a]ny subject affecting Australia that another country is concerned about as a matter of policy has at least the potential to

²²⁴ Admittedly, it is difficult to see how lack of bona fides may be proved: see, eg, Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996) 429-30.

²²⁵ Zines, above n 131, 294.

²²⁶ Covering the sources of international law enumerated in the *Statute of the International Court of Justice* art 38(1): see above n 160.

²²⁷ Including those to which Australia is not a party, as illustrated by references to other regional instruments.

²²⁸ *Seas and Submerged Lands Case* (1975) 135 CLR 337, 450, repeated in *Koowarta* (1982) 153 CLR 168, 220-21.

affect Australia's relations with that other country'.²²⁹ Despite what was implied by Callinan and Heydon JJ in *XYZ*,²³⁰ it seems clear that '[w]hether the Commonwealth wishes to pursue friendly or unfriendly relations is a matter of policy for the executive' and that the *only* question for the Court 'is whether the law has as its subject relations between Australia and other countries.'²³¹ It appears, moreover, that this sub-head of power is sufficiently wide to encompass relations with international organisations in addition to nation states.²³²

B *An Obligation under International Law?*

1 Treaty Obligations

The Court in the *Tasmanian Dam Case* was divided as to the interrelationship of treaty obligations and 'international concern'. Gibbs CJ and Wilson J reasoned, in the words of the latter, that 'the element of international concern is *cumulative upon, and not alternative to, the presence of a relevant international obligation*'.²³³ That is, the question of 'international concern' was the second of a two-part test that was not reached *unless* a treaty imposed a 'legally binding'²³⁴ obligation. For Dawson J, the first part of that test was non-essential. His Honour was 'prepared to assume'²³⁵ that the *World Heritage Convention* bound state parties and proceeded to the question of 'international concern' over its subject-matter. For Brennan J, that question did not arise unless a treaty *failed* to impose a binding obligation.²³⁶ Finally, Mason, Murphy and Deane JJ were of the view not only that s 51(xxix) was triggered automatically by entry into a bona fide treaty on any subject, but that its reach extended to *non-obligatory* instruments, such as recommendations of international organisations.²³⁷ As noted above, the majority approach was followed

²²⁹ Zines, above n 131, 293.

²³⁰ See above n 131 and accompanying text.

²³¹ Zines, above n 131, 292; see also Rothwell, above n 7, 237.

²³² See, eg, *Tasmanian Dam Case* (1983) 158 CLR 1, 170 (Murphy J), 220 (Brennan J), *XYZ* (2006) 227 CLR 532, 566-7 (Kirby J), 590 (Callinan and Heydon JJ).

²³³ *Tasmanian Dam Case* (1983) 158 CLR 1, 199 (Wilson J); see also 101 (Gibbs CJ).

²³⁴ As distinct from 'political or moral': see *ibid* 92 (Gibbs CJ). As to the enforceability of treaty obligations, see generally Sam Blay, 'The Nature of International Law' in Blay, Piotrowicz and Tsamenyi, above n 12, 1.

²³⁵ *Tasmanian Dam Case* (1983) 158 CLR 1, 308.

²³⁶ Although see above n 174 and accompanying text.

²³⁷ As to so-called 'soft-law' instruments under international law, see generally Michael Bothe, 'Legal and Non-Legal Norms: A Meaningful Distinction in International Relations' (1980) 11 *Netherlands Yearbook of International Law* 65; Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850; Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 *American Journal of International Law* 259.

in the *Industrial Relations Act Case*, in which validity was founded partly upon recommendations of the ILO.

In the latter case, however, the Court foresaw another possibility, namely, that ‘[t]here may be some treaties which do not enliven the legislative power conferred by s 51(xxix) even though their subject-matter is of international concern.’²³⁸ Their Honours gave the example of an agreement couched in aspirational terms, exhorting signatories to strive for some broadly defined goal. Such an instrument may not, their Honours cautioned, articulate ‘with sufficient specificity ... the general course to be taken by the signatory states’ so as to afford a foundation for legislation under s 51(xxix).²³⁹ Their Honours quoted Zines’ observation that:

Accepting ... that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which *common* action can be taken. Admittedly, this raises questions of degree; but *a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description.*²⁴⁰

By way of example, Zines cites arts 55(a) and 56 of the *United Nations Charter*, pursuant to which member states pledge to take steps towards the realisation of various goals, including ‘full employment’. According to Zines, an undertaking of such breadth would provide ‘no adequate means for the court to ascertain whether the law is one giving effect to it’.²⁴¹

It has been suggested that the *Industrial Relations Act Case* ‘replaced the “obligation” requirement (if it had ever existed) with a “specificity” criterion.’²⁴² Such a criterion, by seeking to *confine* the discretionary power conferred upon the Commonwealth by its ratification of a treaty or acceptance of a non-obligatory multilateral instrument,²⁴³ would render incongruous ‘international concern’ as a

²³⁸ *Industrial Relations Act Case* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

²³⁹ Ibid.

²⁴⁰ Zines, above n 131, 291 (first emphasis in original, second emphasis added). The Court referred to an earlier edition (3rd ed, 1992).

²⁴¹ Ibid 291. Cf Jennings and Watts, above n 157, 433, asserting that arts 55 and 56 of the *United Nations Charter* impose ‘at least a moral — and, however imperfect, a legal’ obligation (emphasis added).

²⁴² Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006) 122.

²⁴³ Not being subject to ratification. For example, pursuant to art 19(6) of the *Constitution of the International Labour Organisation*, annexed to the *Instrument for the Amendment of the Constitution of the International Labour Organisation of 28 June 1919, as Amended*, adopted 9 October 1946, 15 UNTS 35 (entered into force 20 April 1948), member states are simply required to place a recommendation before

separate criterion for validity. It would be a curious result if, on the one hand, a treaty or other multilateral instrument, by its lack of specificity, precluded federal action under s 51(xxix), whilst, on the other hand, a nebulous ‘concern’, not the subject of *any* documented consensus amongst nations, gave the Commonwealth legislative carte blanche.²⁴⁴

The Court in the *Industrial Relations Act Case* acknowledged, however, citing Deane J in the *Tasmanian Dam Case*, that ‘absence of precision does not ... mean any absence of international obligation.’²⁴⁵ Indeed, each of the majority justices in the *Tasmanian Dam Case* recognised that treaty obligations, as the product of multilateral diplomatic compromise, were unlikely to exhibit the degree of precision expected of contractual obligations in municipal law.²⁴⁶ In practice, therefore, ‘[t]he line between sufficient and insufficient specificity will be difficult to draw’.²⁴⁷ One commentator has warned that a specificity criterion, insofar as it refocuses attention upon the subject-matter of treaty obligations, ‘may reincarnate, in a different guise, the now discarded distinction between the narrow and broad approaches to treaty implementation.’²⁴⁸

At any rate, a definition of ‘international concern’ that is linked to a treaty obligation or other non-obligatory multilateral instrument is superfluous. Let it be assumed, as a minimal proposition, that s 51(xxix) authorises legislation passed to fulfil obligations under a bona fide treaty that are sufficiently defined so as to make clear the action required by state parties. It is meaningless to then declare that ‘[t]he existence of ... international concern is established by entry ... into the ... treaty’²⁴⁹ or that the treaty is ‘all but conclusive evidence of ... international concern’.²⁵⁰ As

a competent lawmaking authority ‘with a view to effect being given to it by national legislation or otherwise’.

²⁴⁴ Subject, of course, to any controlling requirements. As to ‘matters of international concern’ themselves being subject to a precision requirement, see below Part IV(A).

²⁴⁵ *Industrial Relations Act Case* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), citing *Tasmanian Dam Case* (1983) 158 CLR 1, 261 (Deane J).

²⁴⁶ See *Tasmanian Dam Case* (1983) 158 CLR 1, 132-4 (Mason J), 177-8 (Murphy J), 225-8 (Brennan J), 261 (Deane J). See also Richard Marlin, ‘The External Affairs Power and Environmental Protection in Australia’ (1996) 24 *Federal Law Review* 71, 86-7, arguing that the imprecision of the *Rio Declaration on Environment and Development* (1992) 31 ILM 874 should not prevent it being given legislative effect.

²⁴⁷ Joseph and Castan, above n 242, 123.

²⁴⁸ Deborah Z Cass, ‘Traversing the Divide: International Law and Australian Constitutional Law’ (1998) 20 *Adelaide Law Review* 73, 80.

²⁴⁹ *Tasmanian Dam Case* (1983) 158 CLR 1, 125 (Mason J); see also 561 (Brennan J).

²⁵⁰ *Industrial Relations Act Case* (1996) 187 CLR 416, 570 (Dawson J). Of course, where no *specific* obligation is relied upon, treaties play an evidentiary role in demonstrating ‘international concern’ over a subject-matter, in the sense of a capacity to affect foreign relations. See, eg, Kirby J in *XYZ* (2006) 227 CLR 532, 578-9, thus referring to Australia’s ratification of the *Convention on the Rights of the Child*.

the Court has made clear, such legislation is *already within power*. Likewise, although the ambit of the power to enact laws giving effect to non-obligatory multilateral instruments is yet to be adequately explained by the Court,²⁵¹ it appears that such laws are *already within power*. Once again, recourse to the terminology of ‘international concern’ is unnecessary — unless used synonymously with that aspect of s 51(xxix) pertaining to Australia’s foreign relations. For, as Zines has observed, ‘those who uphold the Commonwealth’s power to pass laws in pursuance of some or all treaties do so because either a treaty itself, or (in the case of the more limited view) the nature of its provisions, *concerns Australia’s relations with other countries*.’²⁵²

Finally, the suggestion that ‘matters of international concern’ are those ‘*legitimately* the subject of international agreement’ is equally unhelpful. As early as 1936, the Court in *Burgess* recognised the futility of such a definition in the light of the growing complexity of international interactions. To quote Evatt and McTiernan JJ, ‘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 or international agreement.’²⁵³ In the 1983 *Tasmanian Dam Case*, Dawson J declared that ‘any distinction between foreign and domestic affairs for this purpose has practically disappeared.’²⁵⁴ Its apparent revival by Gleeson CJ in *XYZ*²⁵⁵ should, respectfully, be disregarded.

2 Customary Obligations

Several dicta have endorsed the proposition that s 51(xxix) extends not only to obligations derived from treaties, but also from international custom.²⁵⁶ Indeed, in the *Tasmanian Dam Case*, Deane J declared that ‘the discharge of obligations under both treaties *and customary international law* lie at the centre of a nation’s external affairs and of the power which s 51(xxix) confers.’²⁵⁷ The correlation of customary international law norms and ‘matters of international concern’ has also been highlighted.

²⁵¹ Joseph and Castan have queried whether it would extend beyond recommendations of a United Nations organ to those of ‘a less authoritative body such as the International Olympic Committee, or a body with more limited membership, such as the International Cricket Council ... or an international non-governmental organisation, such as Amnesty International’: above n 242, 126.

²⁵² Zines, above n 131, 293 (emphasis added).

²⁵³ *Burgess* (1936) 55 CLR 608, 681; see also 640 (Latham CJ).

²⁵⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 303 (Dawson J); see also 124 (Mason CJ). For an American criticism, see Henkin, above n 23, 402-3.

²⁵⁵ See above n 132 and accompanying text.

²⁵⁶ For a definition of ‘international custom’, see above n 12. As to the difficulty in establishing its existence, see Hilary Charlesworth, ‘Customary International Law and the Nicaragua Case’ (1988) 11 *Australian Yearbook of International Law* 1.

²⁵⁷ *Tasmanian Dam Case* (1983) 158 CLR 1, 258 (emphasis added).

For example, in *Koowarta*, Stephen J commented that there was ‘much to be said’ for a submission that the principle of racial equality had attained the status of a rule of customary international law and was therefore part of Australia’s ‘external affairs’, independently of any equivalent treaty obligation.²⁵⁸ ‘As with slavery and genocide,’ his Honour observed, ‘the failure of a nation to take steps to suppress racial discrimination has become of immediate relevance to its relations within the international community.’²⁵⁹ Conversely, in the *Tasmanian Dam Case*, the minority justices, in disproving ‘international concern’ over the subject-matter of the *World Heritage Convention*, stressed the absence of any equivalent customary rule obliging states to protect their national heritage.²⁶⁰

The correlation of ‘international concern’ and international custom was expressly recognised by Brennan and Toohey JJ in *Polyukhovich*. In respect of the submission that the prosecution of war criminals amounted either to an obligation under customary international law or to a ‘matter of international concern’, Brennan J noted that ‘[a]s the sources of the postulated obligation and of the postulated concern are the same, there is no difference in content between the obligation and the concern.’²⁶¹ Toohey J similarly observed that ‘[m]uch of the learning that is relevant to the question whether there is an obligation to prosecute and punish war criminals ... is naturally relevant to the question whether it is a matter of international concern to do so.’²⁶²

Nonetheless, the recognition that ‘matters of international concern’ correspond to obligations arising under customary international law is unhelpful. For, it would appear, legislation passed in fulfilment of a customary international law obligation is *already within power*. In any case, that the failure to discharge an obligation founded upon the common practice of states and accepted by them as legally binding would have at least the potential to affect relations between them is obvious. Indeed, as Stephen J in *Koowarta* appreciated,²⁶³ as with treaty obligations, it is the significance of such obligations to foreign relations that ultimately brings them within s 51(xxix). Once again, a criterion of ‘international concern’ in this context is superfluous.

C *A Topic of International Debate, Discussion and Negotiation?*

It will be recalled that, in *Koowarta*, Mason J suggested that ‘matters of international concern’ included those that had become ‘the topic of international

²⁵⁸ *Koowarta* (1982) 153 CLR 168, 220.

²⁵⁹ *Ibid.*

²⁶⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 102 (Gibbs CJ), 198-9 (Wilson J), 310-11 (Dawson J); see also 222 (Brennan J).

²⁶¹ *Polyukhovich* (1991) 172 CLR 501, 559.

²⁶² *Ibid* 657.

²⁶³ See above n 259 and accompanying text.

debate, discussion and negotiation’.²⁶⁴ In *XYZ*, the Commonwealth submitted that whether a subject of multilateral talks was one ‘of international concern’ for the purposes of s 51(xxix) depended on several factors. For example:

Much would depend on whether those conferences were attended by accredited government representatives as opposed to individuals who are concerned. Much might depend on whether the suggested solutions to the problem involve legislation. Much would depend upon the extent to which the particular problem has actual international implications or elements.²⁶⁵

Two broad observations may be made.

First, the submission implied that the concern must be expressed by representatives of national governments, as distinct from individuals or private interest groups. By way of illustration, it was submitted that an international meeting of local government councillors at which zoning practices were debated would *not* render that topic one ‘of international concern’.²⁶⁶ By contrast, a multilateral symposium calling for a worldwide prohibition of tobacco or alcohol consumption, convened under the auspices of the United Nations and attended by official government delegates, *could* evidence ‘international concern’ over that subject.²⁶⁷ Such a submission considerably narrows the ambit of the power as perceived by Murphy J in the *Tasmanian Dam Case*, where his Honour stated that:

It is not necessary that the subject be one of concern demonstrated by the other nation States generally. For example, concern expressed by the world’s scientific community or a significant part of it over action or inaction in Australia might be enough to bring a matter within Australian external affairs.²⁶⁸

It is unclear whether, in keeping with the Commonwealth’s submission, the views of non-state actors — even those with a major worldwide presence²⁶⁹ or access to

²⁶⁴ *Koowarta* (1982) 153 CLR 168, 234 (Mason J); see also above n 63 and accompanying text.

²⁶⁵ *XYZ v Commonwealth* [2005] HCA Trans 957 (High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 17 November 2005), 62 (D M J Bennett, Solicitor-General (Cth)).

²⁶⁶ *Ibid* 57.

²⁶⁷ *Ibid* 61-2. The *extent* of state concern required is queried below in Part IV(A).

²⁶⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 171.

²⁶⁹ Including, eg, non-governmental organisations (NGOs) active in the fields of, inter alia, human rights (such as Amnesty International); the environment (such as Greenpeace or the Climate Institute), labour and social policy (such as the International Organisation of Employers, which has consultative status at the ILO), or even religion (such as the Catholic Church).

the United Nations system²⁷⁰ — would evince any or some degree of ‘international concern’.

Secondly, by emphasising the ‘international implications or elements’ of a subject, the submission implied that it is not the fact of its debate, discussion or negotiation that is important, but the quality of the subject itself. In fact, it was submitted, ‘international concern’ attached to ‘a fairly small number of matters’,²⁷¹ being global warming, genocide, race relations, torture, terrorism,²⁷² space exploration, air and maritime safety, and, of course, the exploitation of children.²⁷³ There is an unmistakable resemblance between this submission and that requiring that the subject-matter of a treaty display an ‘international’ character. In view of the Court’s rejection of a criterion of ‘internationality’ in that context, its suggested application to the international concern doctrine is surprising. Indeed, if given so narrow a compass as that implied by the Commonwealth in *XYZ*, it would greatly diminish the potential scope of the doctrine.

In reality, ‘matters of international concern’ in this category will arise infrequently. A topic of international debate, discussion or negotiation will, as a rule, bear upon Australia’s relations with another country or international organisation and come under s 51(xxix) on that basis.²⁷⁴ Moreover, arguably few matters of public policy are not subject to international regulation, whether in the form of binding instruments, such as treaties,²⁷⁵ or standard-setting instruments, such as recommendations or declarations of United Nations organs. Following the *Industrial Relations Act Case*, it is evident that both classes of instrument are within the purview of s 51(xxix). Indeed, absent *any* such instrument, evidentiary issues

²⁷⁰ Article 71 of the *United Nations Charter* provides that the United Nations Economic and Social Council ‘may make suitable arrangements’ for NGO consultation. As to NGOs and the United Nations, see generally Steve Charnowitz, ‘Two Centuries of Participation: NGOs and International Governance’ (1997) 18 *Michigan Journal of International Law* 183; Dianne Otto, ‘Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society’ (1996) 18 *Human Rights Quarterly* 107 and Thomas G Weiss and Leon Gordenker (eds), *NGOs, the UN and Global Governance* (1996).

²⁷¹ *XYZ v Commonwealth* [2005] HCA Trans 957, 62.

²⁷² As to ‘international concern’ as ‘a useful external affairs alternative’ for upholding counter-terrorism legislation, see Greg Carne, ‘Detaining Questions or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)’ (2004) 27 *University of New South Wales Law Journal* 524, 541-5.

²⁷³ *XYZ v Commonwealth* [2005] HCA Trans 957, 62, cited in *XYZ* (2006) 227 CLR 532, 608-9 (Callinan and Heydon JJ).

²⁷⁴ As Kirby J essentially demonstrated in *XYZ* (2006) 227 CLR 532 (see above Part III(A)).

²⁷⁵ In *Al-Kateb v Godwin* (2004) 219 CLR 562, it was estimated that Australia is party to approximately 900 treaties: 590 (McHugh J).

may arise as to ‘what other material, proved by what means’²⁷⁶ might be considered by the Court to determine the existence of ‘international concern’.²⁷⁷

Assuming, however, that ‘matters of international concern’ that do not have a direct bearing upon Australia’s foreign relations, nor equate to an obligation assumed under international law, do exist — and are capable of judicial determination — controls are needed to ensure that the concept affords a sound criterion for constitutional validity. As Brennan J warned in *Polyukhovich*, ‘[i]t would be erroneous to attribute a scope to the external affairs power which depended on the broadest meaning which could be given to the imprecise phrase “international concern”’.²⁷⁸

IV LEGISLATIVE POWER OVER ‘MATTERS OF INTERNATIONAL CONCERN’: WHAT ARE THE LIMITS?

A *Sufficiency of Concern?*

In *XYZ*, the plaintiff advocated the application of an adjectival qualification to the criterion of ‘international concern’, such as ‘“real”, “genuine”, “widespread”, “pressing”, “established” or “undisputed”’.²⁷⁹ For convenience, this submission will be taken to convey a requirement of ‘sufficient’ concern.

In the *Tasmanian Dam Case*, the minority justices were of the view that ‘international concern’ over the subject-matter of the *World Heritage Convention* had been insufficiently established. For Gibbs CJ, the protection of world heritage was not ‘such a burning international issue’ as to impact upon nations’ relations with one another.²⁸⁰ Wilson J considered that ‘the extent and intensity of international concern’ over the *World Heritage Convention* was ‘in no way

²⁷⁶ *XYZ* (2006) 227 CLR 532, 608-9 (Callinan and Heydon JJ).

²⁷⁷ Callinan and Heydon JJ contemplated reliance upon an executive certificate: *ibid.* Executive competence to determine by certificate disputed constitutional facts was left open in *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128, 149 (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), referring to Geoffrey Lindell, ‘Judicial Review of International Affairs’ in Brian R Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 160. The discussion in Part III(A) illustrates what evidentiary material might be considered in this context.

²⁷⁸ *Polyukhovich* (1991) 172 CLR 501, 562.

²⁷⁹ See *XYZ* (2006) 227 CLR 532, 574-5 (Kirby J).

²⁸⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 101-2 (Gibbs CJ). This finding might be contrasted with the worldwide outrage over the 2001 Taliban edict ordering the destruction of all non-Islamic effigies in Afghanistan, and the response of the international community in the form of the *Resolution on the Destruction of Relics and Monuments in Afghanistan*, GA Res 243, UN GAOR, 55th sess, 94th plen mtg, UN Doc A/Res/55/243 (2001).

comparable' to that respecting the *Racial Discrimination Convention* evidenced in *Koowarta*.²⁸¹ Dawson J agreed that the subject-matter of the *World Heritage Convention* did not attract 'international concern of the requisite kind or degree'.²⁸² Moreover, his Honour declared, it went 'without saying' that 'if the degree of international concern is insufficient to support the implementation of the Convention, it is insufficient to support legislation upon the subject-matter of the Convention independently of it'.²⁸³

The notion that 'international concern' over a subject-matter must be 'sufficient' to support legislation *independently of a treaty obligation* was revisited by Brennan J in *Polyukhovich*. In an apparent attempt to contain the concept, his Honour stressed that 'not every subject of international dialogue or even of widespread aspiration has the capacity to affect Australia's relations'²⁸⁴ and so be 'of international concern'. It will be recalled that, in that case, his Honour rated the observance of standards that had not attained obligatory status, but that were 'expected of and by' the international community, as a 'matter of international concern'.²⁸⁵ His Honour added the following caveat:

However, unless standards are broadly adhered to or are likely to be broadly adhered to in international practice and unless those standards are expressed in terms which clearly state the expectation of the community of nations, the subject of those standards cannot be described as a true matter of international concern.²⁸⁶

This statement presents two difficulties.

First, it is not clear what constitutes 'broad adherence'. For example, Rothwell has queried the sufficiency of concern expressed by two states in a joint declaration, or by an international body with less than full United Nations membership.²⁸⁷ In the

²⁸¹ *Tasmanian Dam Case* (1983) 158 CLR 1, 194.

²⁸² *Ibid* 311.

²⁸³ *Ibid*.

²⁸⁴ *Polyukhovich* (1991) 172 CLR 501, 561.

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid* (emphasis added). In the *Industrial Relations Act Case* (1996) 187 CLR 416, Dawson J suggested that this passage implied 'that the only way in which international concern may ordinarily be established is by reference to standards which are obligatory or tantamount to obligatory in international law': 571.

²⁸⁷ Rothwell, above n 7, 229-30, giving the examples of the South Pacific Forum (since 2000, the Pacific Islands Forum), comprising 16 heads of government, or the Commonwealth, with 53 member states, compared with the 192 member states of the United Nations. Other examples could include the Asia-Pacific Economic Cooperation forum (APEC), with 21 member states; the Association of South East Asian Nations (ASEAN), with 10 member states and 10 dialogue partners, including Australia, and the Cairns Group, with 19 member states. It is difficult to see why the

Tasmanian Dam Case, Wilson J was influenced by the fact that there were then only 74 signatories to the *World Heritage Convention* — ‘a little less than half the total membership of the United Nations.’²⁸⁸ In *XYZ*, Callinan and Heydon JJ similarly noted that the Commonwealth had only been able to point to 34 other nations with laws similar to those under challenge — ‘about a sixth of the nations in the world’.²⁸⁹ By insisting that adherence to a standard be widespread, it is clear that a sufficiency of concern requirement precludes Australia from acting as an international *standard-setter*.²⁹⁰ Moreover, by focussing upon what proportion of states observe a particular standard, such a requirement overlooks what effect Australia’s own observance or non-observance of that standard might have upon its foreign relations. As Kirby J illustrated in *XYZ*, it is sufficient if relations with any *one* other country or international organisation are implicated.²⁹¹ It is not an essential requirement of validity under s 51(xxix) that a law concern Australia’s relations with the international community as a whole.

Secondly, Brennan J’s reasoning in *Polyukhovich* assumes that the degree of precision with which a standard of conduct is articulated is proportionate to the level of ‘international concern’ over its subject-matter. However, as his Honour himself appreciated in the *Tasmanian Dam Case*, a failure to agree upon precise standards of conduct does not necessarily reflect a lack of concern on the part of the international community.²⁹² In the case of the *World Heritage Convention*, for example, his Honour recognised that securing more specific commitments from state parties would not have been practicable, in view of their differing developmental and environmental priorities.²⁹³

A final difficulty with a sufficiency of concern requirement must be mentioned. In *Richardson*, Dawson J noted that the intensity of ‘international concern’ over a subject ‘may expand, and at least theoretically, contract from time to time.’²⁹⁴ Thus,

activities of such organisations should be excluded from the scope of s 51(xxix), given their obvious relevance to Australia’s foreign policy.

²⁸⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 194. On 21 September 2006, Sao Tome and Principe became the 183rd state party to the *World Heritage Convention*: see UNESCO, *Sao Tome and Principe Ratifies the World Heritage Convention* (2006) <<http://whc.unesco.org/en/news/285>> at 28 October 2006.

²⁸⁹ *XYZ* (2006) 227 CLR 532, 606.

²⁹⁰ Marlin observes that, by assuming a ‘purely reactive role’ for Australia in international law-making, Brennan J ignores the potential of Australia’s participation in that process to affect its foreign relations: see Marlin, above n 246, 86. That potential was in fact recognised by Callinan and Heydon JJ in *XYZ* (2006) 227 CLR 532 (see above n 130 and accompanying text).

²⁹¹ See above n 205 and accompanying text.

²⁹² *Tasmanian Dam Case* (1983) 158 CLR 1, 225.

²⁹³ *Ibid* (see further above n 246 and accompanying text). See generally Marlin, above n 246, 85.

²⁹⁴ *Richardson* (1988) 164 CLR 261, 327.

in *Polyukhovich*, Brennan J doubted whether, over 40 years after the event, ‘international concern’ persisted over the prosecution of Second World War criminals.²⁹⁵ The possibility that a subject-matter could cease to be ‘of international concern’ was apparently recognised by Merkel J in *Souliotopoulos*, where his Honour endeavoured to show the requisite concern over the subject-matter of the impugned provisions both at the date of their enactment and of their contravention.²⁹⁶ In *XYZ*, Callinan and Heydon JJ declared that:

These statements reflect the possibility that at different times a matter may not be of international concern, may then become of international concern, and may then cease to be of international concern again. But if validity is to depend on the position not only at the time of enactment but also at the time of contravention, the outcome will be that legislation which was once invalid can later become valid, and legislation which was valid when enacted can become invalid.²⁹⁷

Their Honours concluded that ‘international concern’ as a criterion for validity thereby operated ‘antithetically to the rule of law’.²⁹⁸ As Brennan J observed in *Polyukhovich*, however, like the defence power,²⁹⁹ the scope of the external affairs power will *necessarily* fluctuate according to ‘the international conditions prevailing at the material time’.³⁰⁰ Nonetheless, it is argued that a sufficiency of concern requirement *is* problematic and, for the reasons discussed earlier, should be rejected.

B *Nexus with Australia?*

In *Polyukhovich*, it will be recalled, Brennan and Toohey JJ espoused a principle of geographic externality that was qualified by the requirement of a connexion between the subject-matter of federal legislation and Australia.³⁰¹ Brennan J was especially perturbed by the prospect of laws regulating conduct that did not affect Australian interests or concerns, observing that:

To take an extreme example: would a law be properly characterized as a law with respect to external affairs if it imposed a criminal penalty on a person

²⁹⁵ *Polyukhovich* (1991) 172 CLR 501, 558.

²⁹⁶ *Souliotopoulos* (2002) 120 FCR 584, 592, 598, 599.

²⁹⁷ *XYZ* (2006) 227 CLR 532, 608 (footnotes omitted).

²⁹⁸ *Ibid.*

²⁹⁹ *Constitution* s 51(vi).

³⁰⁰ *Polyukhovich* (1991) 172 CLR 501, 554-5; cf *Richardson* (1988) 164 CLR 261, 326-7 (Dawson J). See also *Industrial Relations Act Case* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), 572 (Dawson J).

³⁰¹ See above n 93 and accompanying text.

who, being a citizen and resident of France, had dropped litter in a Parisian street forty years ago?³⁰²

In his Honour's view, although the requisite interest or concern was for parliamentary determination in the first instance, whether its existence could 'reasonably be supported' was a matter for judicial resolution.³⁰³ For Mason CJ, however, it was 'inconceivable that the Court could overrule Parliament's decision on that question.'³⁰⁴ Other members of the Court expressed similar misgivings about the justiciability of such a requirement.³⁰⁵

Applying a nexus requirement to 'matters of international concern', as proposed by the plaintiff in *XYZ*,³⁰⁶ is even more problematic. In the case of the geographic externality principle, the existence of 'places, matters or things physically external to Australia'³⁰⁷ provides an 'objective *discrimen*'³⁰⁸ in respect of which an Australian connexion might conceivably be tested. In the case of the international concern doctrine, however, the sole ground for validity is the existence of an intangible 'concern'. Whether that concern *warrants* the interest of the Australian body politic is not a question suitable for judicial determination. If any nexus is required, it is necessarily supplied by the Australian Parliament sharing the concern, as demonstrated by its selection as an appropriate subject for federal legislation. For, to adapt the words of Toohey J in *Polyukhovich*, 'it might be thought more than passing strange' that the Parliament would choose 'to legislate with respect to

³⁰² *Polyukhovich* (1991) 172 CLR 501, 552. This possibility also troubled Kirby J during argument in *XYZ*, where his Honour contemplated laws regulating, inter alia, the treatment of Australian citizens at Heathrow Airport, or the speed limit in Outer Mongolia: *XYZ v Commonwealth* [2005] HCA Trans 957, 38, 55 (Kirby J).

³⁰³ *Polyukhovich* (1991) 172 CLR 501, 552; see also 653-4 (Toohey J).

³⁰⁴ Ibid 530. It has been suggested that the use of the word 'could', rather than 'would', indicates that it was non-justiciability, rather than judicial deference, that his Honour was advocating: James A Thomson, 'Is it a Mess? The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and the Australian Constitution' (1992) 22 *Western Australian Law Review* 197, 207. As to the question of justiciability in Australian constitutional law, see generally Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and George Winterton, *Australian Constitutional Perspectives* (1992) 180.

³⁰⁵ *Polyukhovich* (1991) 172 CLR 501, 606 (Deane J), 636 (Dawson J), 713-14 (McHugh J); cf 696 (Gaudron J).

³⁰⁶ See *XYZ v Commonwealth* [2005] HCA Trans 957, 32-3 (S J Gageler); see also *XYZ* (2006) 227 CLR 532, 574-5 (Kirby J).

³⁰⁷ *Polyukhovich* (1991) 172 CLR 501, 632 (Dawson J), discussed in the *Industrial Relations Act Case* (1996) 187 CLR 416 as an expression of '[t]he modern doctrine' as to the scope of s 51(xxix): 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), in turn cited in *XYZ* (2006) 227 CLR 532, 546-7 (Gummow, Hayne and Crennan JJ).

³⁰⁸ The phrase is Kirby J's: *XYZ* (2006) 227 CLR 532, 563.

a matter in which it had no interest.’³⁰⁹ Accordingly, it is argued that a nexus requirement would have a very limited application to ‘matters of international concern’.

C ‘Appropriate and Adapted’?

The above-mentioned limits are aimed at confining the scope of ‘matters of international concern’ as a choice of subject-matter for legislation under s 51(xxix). A potential limitation upon the Commonwealth’s discretion to select the *means* by which legislation deals with such a subject-matter has also been recognised. Namely, the legislation must be ‘capable of being reasonably considered to be “appropriate and adapted”’ to addressing the identified concern.³¹⁰ For the sake of simplicity, this formulation will be referred to as ‘the “appropriate and adapted” test’.³¹¹

The ‘appropriate and adapted’ test is used by the Court to determine the validity of laws implementing treaty obligations. As *Burgess* and subsequent cases have made clear, entry into a treaty does not permit the Commonwealth to legislate upon the subject-matter of the treaty as if it were a new head of power.³¹² Whilst the means by which treaty obligations are given effect is a matter for the legislature, the Court has insisted that those means be ‘capable of being reasonably considered appropriate and adapted to that end’.³¹³ In the *Tasmanian Dam Case*, Deane J observed that this formulation essentially demanded ‘reasonable proportionality’ between means and end.³¹⁴ However, in the *Industrial Relations Act Case*, the

³⁰⁹ *Polyukhovich* (1991) 172 CLR 501, 654.

³¹⁰ *Ibid* 604-5 (Deane J).

³¹¹ This is not to detract from the words ‘capable of being reasonably considered to be’, which make the formulation a “‘low level” test’: see Bradley Selway, ‘The Rise and Rise of the Reasonable Proportionality Test in Public Law’ (1996) 7 *Public Law Review* 212, 214.

³¹² See *Burgess* (1936) 55 CLR 608, 645-6 (Latham CJ), 659-60 (Starke J), 674-5 (Dixon J), 687-8 (Evatt and McTiernan JJ) (see above n 37 and accompanying text). For subsequent affirmations, see below n 313.

³¹³ *Richardson* (1988) 164 CLR 261, 289 (Mason CJ and Brennan J) (emphasis added), paraphrasing Barwick CJ in *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54, 86; see also 300, 303 (Wilson J), 311-12 (Deane J), 336 (Toohey J), 342, 346 (Gaudron J). It will be recalled that Deane and Gaudron JJ there dissented on this ground (see above n 84). See, earlier, the *Tasmanian Dam Case* (1983) 158 CLR 1, 106 (Gibbs CJ), 131-2 (Mason J), 172 (Murphy J), 231-2 (Brennan J), 259-60 (Deane J). The test was most recently expressed in the *Industrial Relations Act Case* (1996) 187 CLR 416, 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); cf 571 (Dawson J).

³¹⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 260, repeated in *Richardson* (1988) 164 CLR 261, 311-12. As to ‘reasonable proportionality’ in Australian constitutional law, see generally Brian F Fitzgerald, ‘Proportionality and Australian Constitutionalism’ (1993) 12 *University of Tasmania Law Review* 263 and Jeremy Kirk, ‘Constitutional

notion of ‘reasonable proportionality’ in this context was described as not ‘particularly helpful’ insofar as it ‘restate[d] the basic question’.³¹⁵

At first blush, the application of an ‘appropriate and adapted’ test to laws purporting to address a ‘matter of international concern’ is problematic. As Callinan and Heydon JJ observed in *XYZ*:

That test, employed in applying s 51(xxix) in relation to implementing treaties, seems very hard to apply to matters of international concern: for treaties, indeterminate though the language of some of them is, are normally incomparably more detailed and specific than “matters of international concern”.³¹⁶

However, in maintaining that reliance upon the international concern doctrine would not affect the invalidity of the impugned laws, their Honours applied that very test. Whereas the material before the Court evidenced concern over sexual activity with children under the age of 12 years, their Honours held, the relevant provisions criminalised such activity with children under the age of 16 years.³¹⁷ Accordingly, the laws went ‘*beyond the area of international concern*’ and were invalid.³¹⁸ In fact, therefore, their Honours demonstrated how an ‘appropriate and adapted’ test *could* be applied to invalidate an exercise of legislative power over ‘matters of international concern’.

One issue that could arise for the Court in this context is that of conflicting ‘international concerns’. For example, Carne has suggested that s 51(xxix) could be relied upon to uphold counter-terrorism legislation on the basis that preventing and responding to acts of terror is a ‘matter of international concern’.³¹⁹ However, he

Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21 *Melbourne University Law Review* 1.

³¹⁵ *Industrial Relations Act Case* (1996) 187 CLR 416, 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); but see Kirk, above n 314, 34-5.

³¹⁶ *XYZ* (2006) 227 CLR 532, 610. This argument was made by New South Wales, intervening in *Polyukhovich* (1991) 172 CLR 501, 519-20. See also Marlin, above n 246, 89, arguing that, absent treaty obligations, the test would have ‘a very limited application’; cf Carne, above n 272, 542, implying that the absence of such obligations would make the test *more* effective vis-à-vis ‘matters of international concern’.

³¹⁷ *Crimes Act 1914* (Cth) ss 50BA, 50BC.

³¹⁸ *XYZ* (2006) 227 CLR 532, 612 (emphasis added); cf 579-82 (Kirby J), holding that the impugned provisions, which were ‘neither unusual nor impermissibly overreaching’ (582), were ‘proportionate’ as laws with respect to Australia’s foreign relations.

³¹⁹ Carne, above n 272, 541-2. In fact, this submission was argued before the High Court in the context of the validity of control orders issued under Part 5.3, Division 104 of the *Criminal Code Act 1995* (Cth): see *Thomas v Mowbray* [2006] HCA Trans 660, [2006] HCA Trans 661, [2007] HCA Trans 76, [2007] HCA Trans 78 (High Court of

notes the existence of a countervailing ‘international concern’ that governmental responses to terrorism will erode basic human rights standards.³²⁰ Accordingly, in determining legislative validity, potential breaches of Australia’s obligations under relevant human rights instruments would have to be addressed.³²¹ Any such breach could imply that the legislation failed the ‘appropriate and adapted’ test.³²²

One final potential problem must be noted. In the *Tasmanian Dam Case*, Mason J contemplated a scenario in which a ‘matter of international concern’ is subsequently dealt with by a treaty. In that event, his Honour declared:

The fact the power may extend to the subject-matter of the treaty before it is made or adopted by Australia, because the subject-matter has become a matter of international concern ... does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it.³²³

In *Richardson*, Dawson J had ‘some difficulty’ with this statement, observing:

I cannot see why, if it is international concern which gives a subject-matter the character to bring it within the description of external affairs, the conclusion of a limited treaty upon that subject matter should place outside the ... power that part of the subject-matter which is beyond the limits of the treaty.³²⁴

Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 5-6 December 2006, 20-21 February 2007). A majority of the Court went on to find that the impugned provisions were a valid exercise of the defence power under s 51(vi) of the *Constitution*, and so did not have to address the submission. Only Kirby J (dissenting) referred briefly to the submission in his reasons, noting that: ‘Whilst I do not doubt that “terrorism” is a matter of concern to the community of nations, I do not accept that declaring Div 104 invalid, if that result were otherwise required, would affect Australia’s international relations’: *Thomas v Mowbray* (2007) 237 ALR 194, 274-5. Accordingly, in his Honour’s opinion, the external affairs power lent no support to the constitutionality of the impugned provisions. His Honour’s allusion to matters of international concern as being analogous to matters capable of influencing Australia’s foreign relations is consistent with his reasoning in *XYZ* (2006) 227 CLR 532.

³²⁰ Carne, above n 272, 543-5, citing, eg, *Resolution on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, GA Res 219, UN GAOR, 57th sess, 77th plen mtg, UN Doc A/Res/219 (2003).

³²¹ *Ibid* 543-5.

³²² *Ibid* 545.

³²³ *Tasmanian Dam Case* (1983) 158 CLR 1, 131-2; see also 106 (Gibbs CJ).

³²⁴ *Richardson* (1988) 164 CLR 261, 325. In *XYZ* (2006) 227 CLR 532, Callinan and Heydon JJ suggested that ‘[o]ne solution to these problems would be to reject the existence of “international concern” not reflected in treaties as a basis for s 51(xxix) validity’: 560.

Zines, also finding the statement ‘somewhat ambiguous’, has agreed that if a treaty covers only one part of a matter, ‘it is difficult in principle to see why that part of the matter not covered by the treaty could not be the subject of valid legislation’.³²⁵ He suggests, however, that what Mason J had in mind was a situation in which a matter of international debate and discussion is ‘negotiated to a conclusion’ by the execution of a treaty, which, by virtue of its comprehensiveness, ‘sets the limits of valid Commonwealth legislation’.³²⁶

The problem with such reasoning is its supposition that a treaty represents the apex of ‘international concern’ over its subject-matter. As Rothwell points out,

to achieve consensus amongst the delegates of many states and produce an acceptable and workable international treaty, the resulting legal instrument may not always address every matter of existing genuine international concern on the topic. It cannot be said, therefore, that international treaties truly represent existing international concern on certain subject-matters.³²⁷

Nonetheless, as Dawson J recognised in the *Tasmanian Dam Case*, the conclusion of a treaty upon a subject-matter *does* represent ‘the furthest point to which the international community has been prepared to go generally in adopting a common standpoint’ in respect of that subject-matter.³²⁸ Aspects of that subject-matter *not* covered by the treaty are effectively removed from the sphere of international relations, insofar as how they are dealt with is intentionally left to the discretion of individual state parties. A law upon those aspects of the subject-matter would not, therefore, be a law with respect to external affairs.

Of course, differences between national approaches to dealing with those aspects of a subject-matter not covered by a treaty may themselves become a subsequent topic of international debate and discussion and hence of renewed importance to Australia’s foreign relations. Whether s 51(xxix) was thus enlivened would involve ‘questions of degree’ and the ‘evaluation of international relationships’ as they had evolved over time.³²⁹ Once again, it is important to recognise that it is not the existence per se of either a treaty or a ‘matter of international concern’ that brings s 51(xxix) into play, but their relevance to foreign relations. So long as a law is ‘capable of being reasonably considered appropriate and adapted to’ dealing with an aspect of Australia’s relations with another country or international organisation, it will be within power³³⁰ — subject to any final limitations, discussed below.

³²⁵ Zines, above n 131, 294.

³²⁶ Ibid.

³²⁷ Rothwell, above n 7, 229.

³²⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 307. This argument assumes, of course, an absence of any applicable international customary law rules.

³²⁹ To borrow Brennan J’s language in *Koowarta* (1982) 153 CLR 168, 258.

³³⁰ As Kirby J demonstrated in *XYZ* (2006) 227 CLR 532, 579 (see above n 318).

D *Federal Limitations*

It has long been accepted that the external affairs power is subject to limitations, express or implied, arising under the *Constitution*.³³¹ The dividing line between narrow and broad interpretations of s 51(xxix) has instead been drawn by conflicting views on the function of the judiciary in preserving the constitutional distribution of power between the Commonwealth and the States. The debate resurfaced in *XYZ*, where it was submitted by the plaintiff that ‘international concern’ as a criterion of legislative validity would bestow ‘virtually limitless’ power upon the Commonwealth and hence be ‘potentially destructive of Australian federal arrangements.’³³²

In fact, this was the very argument that convinced Stephen J in *Koowarta* of the necessity to limit the power to implement treaties under s 51(xxix) to subject-matters ‘of international concern’, lest indiscriminate use of that power ‘place in jeopardy the federal character of our polity’.³³³ Such reasoning was, however, dismissed by the other majority justices in *Koowarta* as a thinly-disguised revival of the doctrine of reserved powers.³³⁴ Mason J pointed out that:

The rejection of the [reserved powers] doctrine was a fundamental and decisive event in the evolution of this Court’s interpretation of the Constitution and ... the correctness of the rejection has never been doubted. The consequence is that it is *quite illegitimate* to approach any question of interpretation of Commonwealth power on the footing that an expansive construction should be rejected because it will effectively deprive the State of a power which has hitherto been exercised or could be exercised by them.³³⁵

Despite the enthusiasm with which Kirby J appeared to greet the plaintiff’s submission in *XYZ*,³³⁶ it is therefore argued that the Court should not be distracted

³³¹ See, eg, above n 39 and accompanying text.

³³² As the submission was summarised by Kirby J: *XYZ* (2006) 227 CLR 532, 574.

³³³ *Koowarta* (1982) 153 CLR 168, 213; see also 198 (Gibbs CJ, Aickin J agreeing), 249 (Wilson J). See also *Tasmanian Dam Case* (1983) 158 CLR 1, 100 (Gibbs CJ), 197 (Wilson J), 303 (Dawson J).

³³⁴ *Koowarta* (1982) 153 CLR 168, 227-8 (Mason J), 241 (Murphy J), 255 (Brennan J). See also *Tasmanian Dam Case* (1983) 158 CLR 1, 126 (Mason J), 169 (Murphy J), 220 (Brennan J), 254-5 (Deane J). As to the doctrine of reserved powers, see above n 15.

³³⁵ *Koowarta* (1982) 153 CLR 168, 227 (emphasis added). His Honour later expounded his reasoning extra-curially: see Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience’ (1986) 16 *Federal Law Review* 28, 13-28.

³³⁶ *XYZ* (2006) 227 CLR 532, 575; see also 570-1, discussing the ‘[d]angers to federalism’ of the geographic externality principle.

by federalism issues in characterising legislation under s 51(xxix).³³⁷

As an aside, it is worth noting that, notwithstanding the amount of ink spilled in the wake of the *Tasmanian Dam Case* about the ramifications of an expansive interpretation of s 51(xxix),³³⁸ the power has had a relatively limited effect upon the ‘federal balance’. The late Justice Selway and John Williams have observed that the greatest shift in the Commonwealth-State relationship since federation has instead been caused by State reliance upon federal revenues.³³⁹ It might also be noted that, despite the potential of the external affairs power to support a federal industrial relations regime,³⁴⁰ recent sweeping amendments to the *Workplace Relations Act 1996* (Cth)³⁴¹ relied principally upon the corporations power.³⁴²

In any event, it is argued that it is not the role of the judiciary to attempt to strike some ‘static constitutional balance’.³⁴³ That a law properly characterised as a law with respect to external affairs may confer power upon the Commonwealth over a sphere of activity hitherto regulated by the States is an inevitable consequence of the growth in complexity of Australia’s dealings with the international community. As Mason J has observed, whilst this state of affairs might not have been anticipated by the framers of the *Constitution*,

³³⁷ As to the Court’s increasing willingness to consider these issues in interpreting the *Constitution*, however, see generally Greg Craven, ‘Cracks in the Façade of Literalism: Is There an Engineer in the House?’ (1992) 18 *Melbourne University Law Review* 540.

³³⁸ See, eg, Tony Blackshield, ‘Damadam to Infinities! The Tourneyold of the Wattarfalls’ in Sornarajah, above n 32, 37; LJM Cooray and Suri Ratnapala, ‘The High Court and the Constitution — Literalism and Beyond’ in Greg Craven (ed), *The Constitution Debates: Commentaries, Indices and Guide* (1986) 203, critical of ‘the Murphy-Mason principle of broad interpretation’: 206; Michael Coper, ‘The Role of the Courts in the Preservation of Federalism’ (1989) 63 *Australian Law Journal* 463; Sir Daryl Dawson, ‘The Constitution — Major Overhaul or Simple Tune-up?’ (1984) 14 *Melbourne University Law Review* 353.

³³⁹ Justice Bradley Selway and John Williams, ‘The High Court and Australian Federalism’ (2005) 35 *Publius* 467, 486-7. See also Cheryl Saunders, ‘Fiscal Federalism — A General and Unholy Scramble’ in Greg Craven (ed), *Australian Federation: Towards the Second Century* (2002) 101.

³⁴⁰ See, eg, Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005), 110, George Williams, *Labour Law and the Constitution* (1998), 100.

³⁴¹ The constitutional validity of which was upheld in *New South Wales v Commonwealth* (2006) 231 ALR 1.

³⁴² *Constitution* s 51(xx).

³⁴³ As Brennan J put it in the *Tasmanian Dam Case* (1983) 158 CLR 1, 221. See also Coper, above n 338, 464-5.

the difference between those expectations and subsequent events as they have fallen out seems to have been a difference in the *frequency and volume* of external affairs rather than a difference *in kind*.³⁴⁴

In *XYZ*, Callinan and Heydon JJ similarly acknowledged that an interpretation of s 51(xxix) that was limited to relationships between Australia and other nations or international organisations, whilst giving primacy to the framers' intentions,³⁴⁵ allowed for 'fresh denotations' of the power to take into account the evolution of Australia's international personality.³⁴⁶

V CONCLUSION

Throughout the 1980s and 1990s, various dicta built upon the foundations laid by Evatt and McTiernan JJ in *Burgess* to develop 'international concern' as a criterion for validity under s 51(xxix). In 1996, one commentator deemed its place in constitutional doctrine 'clear'.³⁴⁷ Following the reasons of the Court in *XYZ*, however, the boundaries of the external affairs power are far from settled.³⁴⁸ Insofar as the decision cast fresh doubt upon the principle of geographic externality, it augured a prospective winding back of the power.³⁴⁹ In fact, the only basis for an 'external affair' presently to have unanimous acceptance is that pertaining to

³⁴⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 126 (emphasis added).

³⁴⁵ And, in their Honour's view, to the syntax of the composite expression 'external affairs': *XYZ* (2006) 227 CLR 532, 592-5; cf 562, 563-4] (Kirby J).

³⁴⁶ *Ibid* 584-5. This appears to be a version of Goldsworthy's 'moderate originalism': see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1. As to the effect of federation upon s 51(xxix), see generally Geoffrey Lindell, 'Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; Anne Twomey, '*Sue v Hill* — The Evolution of Australian Independence' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 77; George Winterton, 'The Acquisition of Independence' in Justice Robert French, Geoffrey Lindell and Cheryl Saunders, *Reflections on the Australian Constitution* (2003) 31; Leslie Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1977) 1.

³⁴⁷ Hanks, above n 224, 430.

³⁴⁸ One commentator has since remarked that we seem to be 'back to ABC after *XYZ*': Sarah Murray, 'Back to ABC after *XYZ*: Should We be Concerned about 'International Concern'?' (2007) 35 *Federal Law Review* 317.

³⁴⁹ For a detailed consideration of the status of the geographic externality principle in the light of *XYZ*, see Anne Twomey, 'Geographic Externality and Extraterritoriality: *XYZ v Commonwealth*' (2006) 17 *PLR* 253. See also Daniel Vujcich, 'As Easy as *XYZ*: Changing the World through Corporate Law and the External Affairs Power' (2007) 35 *ABLR* 338, predicting that 'future decisions of the court may lead to qualifications of this principle, particularly where the subject of the legislation has no nexus to Australia': 351.

Australia's relations with other nations and, it would now seem, international organisations. Nonetheless, as this paper has demonstrated, this sub-head of power is sufficiently wide to encompass the preponderance of Australia's interactions with the international community. As the range of matters the subject of dealings amongst nations continues to grow in complexity, so too does the nature of the Court's task in characterising laws under s 51(xxix). However, the ultimate touchstone of validity has remained constant; namely, the capacity of a matter to affect Australia's international relations. Once it is accepted that this is precisely what is conveyed by the notion of 'international concern', it becomes clear that there is nothing new for the Court to be concerned about.