Articles of Faith or Lucky Breaks?[†]

The Constitutional Law of International Agreements in Australia

CHERYL SAUNDERS[*]

1. Introduction

By 1995 it has become almost trite to observe the significance of the number, range and variety of international arrangements which affect national legal systems. While actual numbers vary with definitions used, a recent estimate of "920 treaties which apply to Australia" by Foreign Minister Evans[1] provides some guide to the volume of current arrangements between Australia and other countries or international organisations which are binding under international law.[2] At least 235 of these represent final commitments since 1990.[3] The agreements themselves are the tip of an iceberg, in the sense that some authorise further agreement on related or subsidiary matters[4] or establish international organisations empowered to make decisions which may be binding and will at least be persuasive.[5] In addition to agreements with treaty status, other international activity with indirect effect on Australian law and public policy includes less formal arrangements between Australia and other countries

† "This insularity is now an article of faith. It has its useful side ...", Templeman in Riesenfeld, S A and Abbott, F M (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (1994) at 549.

* Professor of Law and Director, Centre for Comparative Constitutional Studies, Law School, the University of Melbourne.

1 Durack, P, *The External Affairs Power*, IPA Federalism Project, Issues Paper No 1 (1994) at 7, citing a letter by Senator Evans to *The Sydney Morning Herald*, 1 August 1994.

2 The definition is taken from Department of Foreign Affairs and Trade *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* (1994) at 3, 4. Compare with the 59 "multilateral, non-regional treaties deposited with the United Nations and currently in force" to which Australia is a party, listed in *Australia and International Treaty Making*, An Information Kit (1994). Compare also the calculations that New Zealand "is or has been" party to more than 1500 treaties and that approximately one quarter of the 600 current New Zealand statutes in 1991 give effect to international obligations, Legislation Advisory Committee *Legislative Change* (1991) at 78, 81.

3 In response to a question in an Estimates Committee, Senator Evans noted that 235 treaties had received final consent since 1 January 1990: Senate Estimates Committee A *Hansard* 18, 24 May 1994 at 12.

4 For example, the Optional Protocols to the International Covenant on Civil and Political Rights (ICCPR): see the reference to "framework" conventions in "Australia's Treaty-making Processes: Industry's Reform Proposals", (1994) 109 *Business Council Bull* at 6–7.

5 Certain technical organisations fall within the former category: eg, the International Civil Aviation Organisation. See generally, Detter, I, *The International Legal Order* (1994) at 95–124, ch 4.

with "only political or moral weight", including some bilateral aid programs.[6] Increasingly, these arrangements extend beyond traditional and obvious subjects of international law to areas until recently considered largely of domestic concern.[7] Human rights standards and the environment are topical and currently contentious examples.[8]

The relationship between international activity and constitutional principle is not new to Australia. An early cause was colonial status. The unwelcome conclusion in 1888 that Victoria had "merely an instalment of responsible government"[9] followed from the decision of a majority of the Supreme Court that the prerogative power to exclude aliens had not passed to the colonial government but continued to be held by the Imperial authorities. One of the first disputes between the Commonwealth and the states concerned the right to speak for Australia, through the United Kingdom, in international affairs.[10] Other vexed issues, frequently raised during the first decade of federation, included the status of treaties to which one or more of the Australian colonies had adhered before federation[11] and the distribution of responsibility between Britain and the Government and Parliament of the Commonwealth in relation to international affairs.[12] As Australia achieved independence and full international personality, the first wave of litigation over the scope of federal power to legislate for external affairs began.[13]

The current phase of debate about the domestic impact of international activity can be traced to the early 1970s, with speculation about the ICCPR as a possible base for a legislative Bill of Rights,[14] followed by the decision of the High Court in the *Seas and Submerged Lands* case[15] that the benefits of the international Conventions on the Territorial Sea and the Contiguous Zone and on the continental shelf could be claimed for the Commonwealth, to the exclusion of

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6 Department of Foreign Affairs and Trade, above n3 at 5.

7 Riesenfeld, S A and Abbott, F M (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (1994) at xi.

8 One recent analysis assigns treaties to the categories of trade and industry, human rights, transport and communications, social security, health and education, law enforcement, environment, and national security: *Australia and International Treaty Making* above n3. [For further discussion of international law and human rights protection see Burmester above at 142–3 and Mathew below at 169ff, and the environment see Rothwell and Boer below at 242ff.]

9 *Toy v Musgrove* (1888) 14 VLR 349 at 416 per Williams J.

10 Renfree, H E, *The Executive Power of the Commonwealth of Australia* (1984) at 437.

11 Attorney-General's Department *Opinions of Attorneys-General of the Commonwealth of Australia* Vol 1: 19–1–14, (1981) nos 25, 276; Norris, R, *The Emergent Commonwealth* (1975) at 95–106.

12 Attorney-General's Department, id nos 2, 60, 107, 154, 244, 312, 322, 474.

13 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *R v Poole; Ex parte Henry (No 2)* (1938–1939) 61 CLR 634; *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1964–1965) 113 CLR 54.

14 The ICCPR was signed for Australia in 1972. A Human Rights Bill based on the Covenant was introduced into the Commonwealth Parliament in 1973: Commonwealth Senate *Parliamentary Debates* at 1971. It lapsed with the 1974 double dissolution of the Parliament. For a summary of parliamentary and public argument for and against the bill see Electoral and Administrative Review Commission, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (1992), Queensland Electoral and Administrative Review Commisssion, Brisbane, at 66–8. The Covenant was not ratified for Australia until 1980.

15 *New South Wales v Commonwealth* (1976) 135 CLR 337.

the states, by legislation enacted under the external affairs power. The stakes were raised in the 1980s by the decisions in *Koowarta*[16] and *Tasmanian Dam*,[17] making it clear that the Commonwealth could legislate to implement virtually any international agreement to which Australia was a party. The principal focus of attention over this period was the potential implications of international agreements, for the federal distribution of power. This remains a key issue.[18]

More recently, however, a second issue has attracted equal attention: the impact of international activity on the operation of representative government in Australia. In traditional terms, it raises the question of the balance of power and authority between the legislative and executive branches of government. The practical question is the extent to which Parliament and the interested public can or should be able to contribute to decisions to commit Australia to international agreements which must affect domestic law if Australia is to comply with them. It was considered by the Constitutional Commission in 1988, ultimately dividing Commission members over the recommendation to be made, with the majority favouring the status quo.[19] Since then it has gathered force. In 1994, the extent of parliamentary and public involvement in treaty-making in Australia was the subject of a submission to government by 11 industry groups[20] and attracted vigorous debate in the Senate and its committees. In the course of it, a private member's bill was introduced to require parliamentary approval of treaties[21] and an inquiry was established into the role of the Commonwealth Parliament in treaty-making in Australia.[22]

Australia is not alone in grappling with these matters. The impact of internationalisation on democratic federal government, structures and loosely conceived notions of national sovereignty is attracting increasing attention in countries around the world, notwithstanding considerable differences in their constitutional systems. The issues tend to present themselves in a particularly acute form in Europe, where the degree of integration of the European Union (EU) offers novel constitutional challenges to member States. In France, for example in 1992, the *Conseil constitutionnel* found several clauses in the Treaty of Maastricht to be contrary to the French Constitution, including one to entitle citizens of the EU to vote in municipal elections in any member State in which they were resident, on the same basis as nationals of that State.[23] In Germany the Federal Constitutional Court dismissed a challenge to

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16 *Koowarta v Bjelke-Petersen* (1983–84) 153 CLR 168.

17 *Commonwealth v Tasmania* (1984–85) 158 CLR 1.

18 See, eg, recent comments of the Western Australian Constitutional Committee: "the scope of the external affairs power is of particular concern to the States", *Report* (1995) at 30.

19 Constitutional Commission *Final Report*, Vol Two, (1988) at 745–9.

20 The submission was released in January 1994 and subsequently published in the *Business Council Bull*, above n4 at 6–8.

21 Parliamentary Approval of Treaties Bill 1994. For the second reading speech, by Senator Bourne of the Australian Democrats, see Commonwealth Senate *Parliamentary Debates* 29 June 1994 at 2206.

22 The reference on *The Constitution — External Affairs Power* was received by the Legal and Constitutional Committee of the Senate on 9 December 1994, with an obligation to report by 24 August 1995.

23 Case 92–308 (1992) *Journal Officiel de la Republique Francaise (JORF)* 5354. Treaty provisions transferring responsibility to the Union for monetary and exchange policy and

the treaty on the ground that it undermined the constitutionally guaranteed right to vote but warned against future developments which might "have the effect of reducing the content of the decision-making and supervisory powers of the Bundestag to an extent which infringes the democratic principle".[24] The European experience may be a taste of things to come for the rest of us, as other regional supra-national organisations develop. But in any event the impact of internationalism is a current topic of constitutional debate outside Europe; significantly, in countries with expectations of constitutionalism comparable to those of Australia including the United States,[25] Canada[26] and New Zealand.[27]

The current constitutional principles and procedures for treaty-making in Australia are the products of a long period of constitutional evolution; initially in the United Kingdom, whence this aspect of the constitutional system came and, more recently, in Australia itself. In light of the dramatic changes which have taken place in international decision-making in recent times, there is a question whether they are still appropriate, in all respects. From one perspective, the answer may be yes: the ability of the Commonwealth government to enter into international commitments unencumbered by constitutional requirements to involve either the states or the Commonwealth Parliament enables Australia to move quickly and flexibly and to that extent efficiently, in international affairs. On this view, the present arrangements are a fortuitously suitable outcome of the evolutionary process. On the other hand efficiency, even in a more comprehensive sense, is not the sole criterion for democratic governance. Parliaments and states are designed to serve other constitutional purposes, which necessarily must be placed in the equation. One question explored in this article is whether current procedures rely unduly on articles of faith, which might benefit from re-examination in the light of modern circumstances and the comparative experience of others.

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immigration policy also were held unconstitutional, as interferences with essential elements of national sovereignty. The French Constitution was amended. See generally, Oliver, P, "The French Constitution and the *Treaty of Maastricht*" (1994) 43 *ICLQ* 1.

24 *Das Maastricht-Urteil* 2 BvR 2134/92; 2 BvR 2159/92. An English translation appears in [1994] 1 *CMLR* 57. For comment see Foster, N, "The German Constitution and E.C. Membership" [1994] *Pub L* 392. Compare the comparable litigation in the United Kingdom (*R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Rees-Mogg* [1994] 1 All ER 457) where the challenge was dismissed in a context which managed to portray the issue as a conflict between Parliament and the courts: Rawlings, R, "Legal Politics: The United Kingdom and Ratification of the Treaty on European Union (Part Two)" [1994] *Pub L* 367 at 377–8.

25 The impetus for the comparative collection by Riesenfeld and Abbott was their concern "with unicameral efforts by the Senate to appropriate the legislative power to itself" in consenting to treaty ratification: above n7 at 1.

26 In particular in connection with the Canada-US Free Trade Agreement: "The Impact of the Free Trade Agreement on Canadian Policy Autonomy" in Gold, M and Leyton-Brown, D (eds), *Trade-offs on Free Trade* (1988) at 423.

27 Law Commission *The Making and Implementation of Treaties: 3 Issues for Consideration*, August 1993.

2. *The Federal Dimension*

A. *The Constitutional Setting*

The Commonwealth Constitution makes only two references to the conduct of international relations. The first and the most important is the power in section 51(xxix) to legislate with respect to "external affairs". The second is the curious conferral of jurisdiction on the High Court in matters "[a]rising under any treaty" by section 75(i). The relative silence of the Constitution on what now is such a significant constitutional issue reflects both its age and the colonial status of Australia when the Constitution came into effect. It also shows the influence of the Westminster tradition, under which responsibility for external relations falls almost exclusively within the prerogative of the Crown and therefore within the sphere of executive government, but international agreements have no effect on domestic law unless and until implementing legislation is passed.

Earlier drafts of the Constitution were a little more expansive and, probably unintentionally, would have prescribed a quite different regime. In 1891, the jurisdiction conferred on the High Court by the clause corresponding to section 75(i) was limited to treaties "made by the Commonwealth with another country". The legislative power in the equivalent of section 51(xxix) included an express reference to "treaties" as well as to "external affairs". Most significantly of all with hindsight, the forerunner of the present covering clause 5 of the *Commonwealth of Australia Constitution Act* provided that "all treaties made by the Commonwealth" would be "binding on the courts, judges and people of every state, and of every part of the Commonwealth", overriding inconsistent state law.[28]

These additional references were removed at various stages before the final draft. The limitation on jurisdiction did not reappear in the first draft produced by the 1897 session of the Australasian Federal Convention in Adelaide, possibly in response to representations made by British authorities, although the treaty jurisdiction itself survived.[29] The covering clause took its more or less final form in Sydney in 1897. "Treaties" disappeared from the legislative power in 1898, in Melbourne.[30] Each of these changes was made for the same purpose: to make it clear that there was no suggestion that the Act would confer power on Australia to enter into treaties in its own right.[31] This rationale was dubious in the case of the alteration to the legislative power, but does not appear to have been intended to interfere with the practice, already established, of allowing colonial legislatures to implement some treaties made by Britain to which their colonies had chosen to adhere.[32] There was little recognition in the debate that the changes had another important effect, of removing the direct application of treaties in Australian law.[33] In fact, the originals of

28 Quick, J and Garran, R R, *The Annotated Constitution of the Australian Commonwealth* (1901, repr 1976) at 768.

29 La Nauze, J, *The Making of the Australian Constitution* (1972) at 184.

30 Above n28 at 768.

31 Australasian Federal Convention, *Official Record of Debates*, (1897) at 239–40.

32 The practice is assumed in, for example, opinions 2 and 107 of the early Attorneys-General of the Commonwealth: Attorney-General's Department, above n11.

33 George Reid was an exception: above n31 at 240. Patrick Glynn may have been another:

both the covering clause and the treaty jurisdiction of the High Court had been adapted from the Constitution of the United States[34] and it seems unlikely that this departure from British practice was intended in the first place. The failure of the framers to fully grasp the broader significance of what they were doing at this point may explain why they left the High Court with its jurisdiction to deal with matters arising under a treaty after removing the only provision which would have enabled matters to arise in this way.

When the Constitution came into effect in 1901, the power to enter into international agreements on behalf of Australia therefore lay with Britain. Even before this, however, the self-governing status of the Australian colonies had given them an expectation, which eventually hardened into a convention, of some participation in international activity. In due course, this practice extended to the Commonwealth as well, strengthened by nationhood.[35] By the 1880s it became customary to include clauses in treaties of a commercial or even political character to qualify their application to individual colonies unless the colonies themselves chose to adhere.[36] From about the same time, the signature of a representative of the relevant colony might appear on the treaty as well.[37] Any changes to existing law necessary to give effect to treaty obligations of this kind seem to have been effected by legislation of the colonial Parliament concerned.[38] These pre-federation agreements caused some confusion as the Commonwealth assumed the right, not without challenge, to deal with Britain on behalf of Australia as a whole in relation to external affairs.[39] Apart from the recurring issue of whether the Commonwealth was bound by agreements to which one or more of the Australian colonies had adhered there was some uncertainty also over whether the adherence of individual states should continue to be sought, where the treaty lay within the state rather than the Commonwealth sphere.[40]

The relationship between Britain and its colonies changed rapidly in the early years of the 20th century. The Colonial Conference became the Imperial Conference in 1907.[41] The Dominions began to be represented at international conferences, in some cases with voting rights.[42] At the Imperial Conference in 1911 a formal motion of "regret" by Australia over British failure to consult the Dominions in relation to the Hague Conventions of 1899 and 1907 led to an undertaking to consult on the next such occasion.[43] The war marked a new

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Australasian Federal Convention *Official Record of Debates*, (1898) at 320.

34 Above n28 at 345, 764.

35 Lewis, M, "The International Status of the British Self-Governing Dominions" [1922–23] *Brit Ybk Int'l L* 21.

36 Id at 27.

37 Id at 26.

38 Attorney-General's Department, above n11 no 276 at 322–3: "prior to Federation, there were ... six distinct political entities who were within the ambit of their authority practically sovereign. With respect to matters under their jurisdiction, the power to adhere to treaties had been conceded, and having self-government they were able to direct their wills to comply with the provisions of any treaty to which they had adhered."

39 Id no 2.

40 Id no 312.

41 Jenks, E, "The Imperial Conference and the Constitution" (1927) 3 *Camb LJ* 13 at 18.

42 Postal conferences and radio-telegraph conferences were examples: above n35 at 27–8.

43 Id at 24.

turning point, with the involvement of the Dominions in the Imperial War Cabinet and Conference and their inclusion in the peace processes in 1919. In its aftermath the Dominions became individual members of the League of Nations and received mandates directly from it.[44] In 1923, another Imperial Conference agreed to a resolution on "the method and extent of inter-Imperial consultation in connection with the negotiation, signature, and ratification of treaties" which accepted that bilateral treaties would be signed and ratified by the government concerned, exercising Full Powers issued for the purpose. While procedures for other treaties varied, there would at least be consultation with the Dominions affected.[45]

The ambiguous international status of the Dominions in the decade after the war gave rise to some complex constitutional questions[46] which for the most part were avoided by a mixture of common sense and constitutional convention. In the words of one commentator:

> it cannot be too strongly emphasised at the present state of the evolution of the British Empire that to insist on the legal aspects of the case and to ignore the constitutional aspects is fraught with danger ... it would be legal but unconstitutional for His Majesty to ratify a treaty binding the Empire as a whole in the face of contrary advice offered by His Ministers in one or more Dominions, and it is highly unlikely that His Majesty would be advised to do so.[47]

Within another decade the transition of the Dominions to full international personality was complete, recognised at least in theory by resolution of the Imperial Conference of 1926[48] and made practicable by the release of Dominion legislatures from extraterritorial restrictions on their power through the Statute of Westminster 1931.

These events have some interest in their own right, as an earlier phase of cooperation over the making and implementing of treaties affecting Australia, between one level of government with international personality and another with more limited capacity but a real interest in the outcome. There is no precise parallel with current circumstances, of course; the Parliament and Government of the Commonwealth directly represent the Australian people, whereas the Imperial authorities did not. The points in issue are familiar, nevertheless: negotiation; signature and ratification; reservation; implementation.

For present purposes this history also serves to explain how the Commonwealth acquired full power to enter into and implement international agreements on behalf of Australia without alteration of a Constitution deliberately drafted to repudiate any suggestion that it could act in this way. Once federation was achieved, it was natural for the British Government to wish to deal with only one Australian Government, to the extent that consultation was required at

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44 Id at 29–33.

45 (1924) *Brit Ybk Int'l L* 193.

46 For example, the consequences of a Dominion Parliament disapproving the ratification of a treaty which had been signed for the Empire as a whole: above n35 at 39.

47 Id at 39–40.

48 The Dominions "are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs ..." above n41 at 13.

all, on international affairs.[49] As the international status of the colonies evolved, it was natural for the decision whether or not Australia should adhere to imperial treaties to lie finally with the Commonwealth government, with or without consultation with the states.[50] And it was natural for the Commonwealth government to assume full treaty-making authority once Australian autonomy was achieved. As it turned out, a constitutional vehicle was at hand. The general executive power in section 61 of the Constitution has been assumed and construed to be broad enough to encompass this and any other executive function.[51] As a matter of history, however, it was not conceived as part of a comprehensive constitutional framework for international activity. For this and other reasons there may now be an argument that in this respect the Constitution is incomplete.

The conclusion that the power to enter into international agreements, irrespective of their subject-matter, lay with the Commonwealth executive inevitably raised questions about whether the power to implement them lay with the Commonwealth as well or was divided, less conveniently, between the Commonwealth and the states. On this occasion the answer was found, rather more obviously, in the Commonwealth power to legislate with respect to "external affairs". The meaning of that power, foreshadowed by Quick and Garran as "a great constitutional battleground"[52] is the subject of the next part.

B. External Affairs Power

Section 51(xxix) offers a potential head of power for three broad categories of Commonwealth laws, dealing with matters geographically external to Australia;[53] with Australia's relations with other international legal persons;[54] and with the implementation within Australia of elements of international law. Only the last of these is relevant for present purposes.[55]

One difficulty with the power is that the text itself provides so little guidance to its meaning. "External affairs" could be construed literally, to exclude matters with a domestic application. Given that international agreements cannot of themselves directly alter Australian law, however, an equally sustainable interpretation would allow the power to be used to implement international agreements to which Australia is a party. The removal of the reference to treaties from the clause during the drafting process is a curiosity, but no particular help with its current construction; it might be taken to indicate either that the reference to treaties was considered redundant, given the width of the rest of the power or, at the other extreme, that treaties were to be excluded from its scope. The constitutional context, a federal system in which powers are allocated vertically between the Commonwealth and the states, might suggest a more restricted interpretation but the power itself offers no encouragement in

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49 Attorney-General's Department, above n11 no 2.
50 Id, no 312.
51 *Barton v Commonwealth* (1974–75) 131 CLR 477.
52 Above n28 at 631.
53 Above n15; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
54 *R v Sharkey* (1949) 79 CLR 121.
55 The categories may overlap, however; and sometimes with significance for the validity of laws in category three: *Horta v Commonwealth* (1994) 68 ALJR 620.

the form of a clear indication of where such a line might be drawn and arguments to infer limits by reference to the division of powers run the risk that they will be equated with the rejected doctrine of reserved state powers.[56] Other constitutional indicators tend to favour a more expansive approach, including the principles of interpretation laid down by the Court itself in the *Engineers* case[57] and the deference which courts tend to pay to decisions of executive government in the area of international affairs.[58] The concept of an "affair" may yet impose limits on the power, which would affect its scope in relation to some forms of international activity, but they would not restrict its use to implement rights and obligations binding on Australia at international law.

From the first decade of federation the Commonwealth favoured a broad view of its own power to legislate to implement international agreements applying to Australia.[59] Very early opinions expressed some uncertainty on the point, however, where the subject of the agreement clearly lay within the state sphere[60] and in 1908 British authorities suggested a need for caution "until that section has been authoritatively interpreted".[61] Early judicial decisions on the scope of the power in fact revealed a diversity of views in the Court, with some judges accepting that the Commonwealth could legislate to implement any international treaties for Australia, irrespective of subject-matter[62] and others requiring treaties to have "some matter indisputably international in character".[63] Most of these early cases concerned aviation agreements, which, while they involved some state sensibilities, could readily be characterised as international in character and did not pose the problem of the scope of the power in its most acute form.[64]

That function was performed forty years later, in two challenges to the validity of Commonwealth laws implementing conventions dealing respectively with racial discrimination and the environment, both relative newcomers to international action. In the first of these, *Koowarta v Bjelke-Petersen*,[65] the outcome narrowly preserved some restriction on the subject matter of a treaty for which the external affairs power could be used, when the fourth member of the majority, Stephen J, maintained the requirement of "international concern" but found that it was satisfied in the case of racial discrimi-

56 For example, above n16 at 227 per Mason J.

57 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.

58 Above n16 at 229 per Mason J; *Commonwealth v Tasmania* above n17 at 125 per Mason J, at 170 per Murphy J, *Horta v Commonwealth* above n55 at 624.

59 For example, in 1906, Attorney-General Isaacs advised that the Commonwealth could legislate to implement for Australia a Convention between the United States and Great Britain and "[t]hat such a law would affect procedure with respect to the disposal of real and personal property in the States is no objection; the Constitution does not reserve to the States exclusive legislative power as to such disposal": Attorney-General's Department, above n12 no 244 at 294. See also nos 107, 134, 312.

60 For example, in 1902, Attorney-General Deakin acknowledged the need for state concurrence in implementation of the Venice International Sanitary Convention to make Australian adherence "effective": id, no 60.

61 Id, no 312.

62 *R v Burgess; ex parte Henry* above n13 at 681–2 per Evatt and McTiernan JJ.

63 Id at 669 per Dixon J. Also, perhaps, at 658 per Starke J.

64 "It is, perhaps, wise to leave ... international agreements relating only to matters otherwise only of internal concern until questions arise under them", id at 669 per Dixon J.

65 Above n16.

nation.[66] In the following year, in *Tasmanian Dam*,[67] that limitation was swept away, by the decision of a majority that implementation of any treaty obligation was an external affair, and that there was no restriction on the power by reference to the subject matter of the treaty.[68] That matter, at least, is now settled,[69] although questions remain about the use of the power to implement other international norms. [For further discussion of the High Court's interpretation of the external affairs power and the implementation of other international standards see Mathew below at 189–94].

The present position might be summarised as follows.[70] The Commonwealth Parliament may legislate to give effect to rights and obligations which flow from international agreements to which Australia is a party. The High Court takes no narrow approach to the question whether a treaty imposes obligations for this purpose[71] and it may be that the general obligation under article 26 of the Vienna Convention on the Law of Treaties to perform treaties "in good faith" diminishes the practical impact of this qualification further. The external affairs power, augmented if necessary by the incidental power, will support implementing legislation before an agreement becomes binding on Australia as long as the commencement date of the legislation also is postponed.[72] This extension is significant for the validity of the practice which the Commonwealth government seeks to follow, of ensuring that implementing legislation is in place before an international obligation becomes binding on Australia.[73]

Implementing legislation must be "capable of being reasonably considered to be appropriate and adapted" to carrying a treaty into effect[74] but need not, apparently, implement all treaty provisions.[75] Legislation under section 51(xxix) of the Constitution is also subject to other constitutional restrictions on Commonwealth power, whether express or implied. Successive cases have suggested that use of the power is qualified in another way as well, by the need for a treaty to be bona fide, in the sense of being "more than a device to attract domestic legislative power".[76] The rationale appears to be that such an

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66 Id at 217–8.

67 Above n17.

68 Ibid, per Mason, Murphy, Brennan and Deane JJ.

69 Two dissentients in *Tasmanian Dam*, Wilson and Dawson JJ, subsequently accepted its authority on this point: *Richardson v Forestry Commission* (1988) 164 CLR 261.

70 For a comprehensive coverage see Staker, C, in Saunders, C (ed), *Laws of Australia: Government*, Title 19, (1994) at 173–80.

71 Id at 174, 176. In particular Staker notes that the Court will look to the expectations of the international community in construing a treaty, will defer to a degree to the judgment of the Commonwealth Parliament that Australia is subject to an international obligation, and will accept qualified and somewhat general undertakings as obligations which will attract the power. For authority, see above n17 at 226 per Brennan J; *Richardson v Forestry Commission* above n69 at 295–6 per Mason CJ and Brennan J; *Queensland v Commonwealth* (1989) 167 CLR 232 at 239–40 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

72 *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235 at 243 per Mason J, Gibbs, Stephen, Jacobs and Murphy JJ concurring.

73 Department of Foreign Affairs and Trade, above n2 at 14.

74 Above n17 at 260 per Deane J. See generally, above n70 at 176–7.

75 Above n17; *Richardson v The Forestry Commission*, above n69.

76 Above n17 at 259 per Deane J; also at 122 per Mason J; at 219 per Brennan J. Other references to the limitation appear in *R v Burgess*, above n13 at 642, 687; above n16 at 200, 216–7, 231, 260.

agreement could not of itself represent an "external affair", requiring the Court to consider other relevant circumstances, including the number of other parties, before finally determining the issue.[77]

It is difficult to envisage invalidation of Commonwealth legislation on this ground by the Court, and in its present form this limitation may serve no greater practical purpose than a warning to the Commonwealth Parliament and government that there are outer limits to the use of the power to implement treaties, even if it is unlikely that they actually will be reached.[78] The need for bona fides may have some potential for adaptation to other purposes as well, however. It might justify rejection of legislation based on a treaty which is inconsistent with international law, at least where the legislation has a domestic, and not extraterritorial, operation.[79] It might provide a basis for qualifying reliance on the external affairs power for bilateral treaties between Australia and New Zealand, on the ground that the relationship between the two countries is not typically international in character.[80]

While there is no case so far in which the external affairs power has successfully been relied on to implement international norms independently of treaty rights or obligations, a range of statements in individual judgments suggests some potential for this purpose. There is broad support for the proposition that the power may be used to implement obligations under customary international law.[81] There are intermittent expressions of support for the extension of the power to matters otherwise of "international concern",[82] maintaining the rejected qualification on treaties which might be implemented through the power as a basis for the exercise of the power in its own right. "International concern" might be evidenced by, for example, recommendations or other conclusions of international bodies which strictly are not binding in international law.[83]

The final ambit of the external affairs power to implement international law is far from settled. Nevertheless, any suggestion that judicial limitations might be imposed by reference to the other powers allocated between the Commonwealth and the states has long since been abandoned and shows no

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77 Above n18 at 219 per Brennan J.

78 For a similar judicial technique, in different contexts, see *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

79 The rejection of the proposition in *Horta* obviously discourages such an argument but does not, perhaps, rule it out, in the unlikely event that a treaty had independently been found inconsistent with international law: above n55 at 624.

80 See the description of the relationship as "sui generis" and a joint "polity" in Palmer, G, "International Trade Blocs — New Zealand and Australia: Beyond CER" in (1990) 1 *Pub LR* 223 at 231, 233. Compare the debate on the character of the European Union: eg, Temple Lang, J, "The Development of European Community Constitutional Law" (1991) 25 *Int'l Lawyer* 455.

81 Staker above n70 at 180.

82 Id at 180–1. For a particularly expansive formulation see above n17 at 170–2 per Murphy J.

83 Staker, above n70 at 180. For an analysis of the significance of "soft" international law derived from such sources see Detter, above n5 ch 4. She concludes that "The important principle of security of law in international society is endangered if there is uncertainty of existing legal commitments ... the meaning of recommendations must not be distorted and construed to entail obligations per se" at 250–1.

sign of revival. Its passing was accompanied by consideration of options for amendment of the power to limit its reach, initially under the auspices of the Australian Constitutional Convention[84] and later by the Constitutional Commission.[85] Options proposed would have restricted the power by precluding its use to regulate "matters within Australia", with specified exceptions;[86] by requiring a "substantial relationship" with matters outside Australia;[87] by limiting it to subjects already within Commonwealth power;[88] or by identifying a separate, exclusive list of state powers.[89] None was accepted by the Convention or the Commission, in part because of doubts about their workability. Although the Western Australian Constitutional Committee recently recommended amendment of the external affairs power to limit it to "truly international matters"[90] attention now tends to be focussed on intergovernmental cooperation, rather than constitutional change, to handle the federal dimension of the issue. This aspect of the current debate is taken up below.

There may still be a prospect, however, of judicial limitation of the external affairs power in ways which have indirect relevance for the federal distribution of power. Extensions of the power beyond the implementation of rights and obligations under international agreements or customary international law present conceptual and practical difficulties. When, for example, is a matter otherwise of "international concern" and how should such a judicial judgment be made? Will Commonwealth power contract if a matter broadly of international concern subsequently is covered by a more limited treaty? It may be doubted also whether these problems need be incurred; Australia may be an "international cripple"[91] if it is unable to honour its international obligations but a different and less obvious rationale is necessary for extension of the power to matters which, despite the engaging description of "international concern" would not otherwise fall within one of its already generous applications. It may be that, in time, the Court will be persuaded to limit the power to the implementation of rights and obligations under international law, by drawing a requirement of substance from the need for an external "affair".[92] The question whether the Australian constitutional system will evolve to a stage where international obligations automatically become part of domestic law is taken up in the second part of this article.

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84 Australian Constitutional Convention *Proceedings* Adelaide (1983) at xlii–xliv, 103–45; Brisbane (1985) at xlii–xlvii, 206–48. See also External Affairs Sub-Committee, *Report to the Standing Committee* (1984) in *Proceedings* Vol II (1985).

85 Constitutional Commission *Final Report* 1988 at 731–49.

86 Finnis, J M, "Reforming the Expanded External Affairs Power" in External Affairs Sub-Committee, above n84 at 43–51.

87 Above n1 at 9.

88 Dissenting opinion of Rupert Hamer in Constitutional Commission, above n85 at 246–9.

89 Crommelin, M, "Responses to the Franklin Dam Case" in External Affairs Sub-Committee, above n84 at 115–21.

90 Above n18 at 10.

91 Above n17 at 262 per Deane J.

92 Possibly by very broad analogy with the Court's approach to the meaning of the word "matter" in chapter III of the Constitution: eg, *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37.

C. *Intergovernmental Cooperation*

A degree of cooperation between levels of government is required in any federation to assist in tailoring international decision-making to domestic law. This is most obviously so where legislative implementation is required and the requisite legislative power is shared between the levels of government. But even where, as in Australia, the national level of government possesses legal capacity both to enter into international commitments and to implement them, on behalf of the country as a whole, cooperation is likely to be necessary or at least desirable over agreements on subjects which otherwise are wholly or largely a state concern. In these circumstances, state knowledge and experience may be useful during initial negotiation of an agreement and over the decision whether to accede to it, and on what terms. Cooperation may be needed also at the point of implementation where state, rather than Commonwealth legislation is appropriate to maintain the cohesion of a legal regime. The potential gains from cooperation should be borne in mind in devising principles and procedures to achieve it.

Intergovernmental cooperation over international agreements has a long history in Australia. In the early years of federation it involved the Imperial authorities as well as the Commonwealth and the states and in that respect was a more complex affair.[93]

The most recent phase of development covers only the past 20 years, coinciding with the acceleration of international law-making and the expansion of the external affairs power. The decision in the *Seas and Submerged Lands* case[94] confirming the validity of the Commonwealth claim to rights over the territorial sea under the international Convention was followed by cooperative legislation restoring the position of the states to what many previously had assumed it to be.[95] At about the same time, some early guidelines for cooperation over treaties apparently were agreed.[96] Official publications, however, date the first formal guidelines to 1982, as altered by the incoming Hawke Labor Government in 1983.[97] The current Principles and Procedures for Commonwealth-State Consultation on Treaties are the result of a further revision, undertaken under the auspices of the Special Premiers' Conference in 1991 and endorsed by the Commonwealth in 1992.[98]

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93 Attorney-General's Department, above n11 especially nos 312, 322.

94 Above n15.

95 Attorney-General's Department *Offshore Constitutional Settlement: A Milestone in Co-operative Federalism* (1980).

96 A reference to guidelines agreed at the Premiers' Conference on 21 October 1977 can be found in Bush, W, "Aspects of Involvement of Australian States with Treaties", External Affairs Sub-Committee, above n84 at 85.

97 Both are published in External Affairs Sub-Committee, id at 255–8. See also Department of Foreign Affairs and Trade, *The Conclusion of Treaties and Other International Arrangements* (1987).

98 Department of Foreign Affairs and Trade, above n2. Separate, and slightly different procedures operate in relation to International Labour Organisation Conventions: a summary appears in Rebecca, H, "Australia's Treaty Obligations — Is Our Sovereignty At Risk", an unpublished paper prepared under the Australian National Internships Program, June 1994.

While the latest version of the procedures is more sophisticated and precise, there are clear similarities between all three. All require early information to be provided to the states about treaties in which Australia is likely to participate; all recognise ministerial councils as appropriate forums for consultation over treaties; all require state views to be taken into account when their interest in a treaty is "apparent"; all make some provision for state inclusion in delegations to international conferences; all recognise that in some circumstances state, rather than Commonwealth, legislation may implement an agreement. The principal changes between 1982–83 were to remove a Commonwealth commitment to consider seeking federal clauses in selected treaties to which Australia would become a party and to limit the circumstances in which state implementing legislation might be used to areas of "particular concern to the states" where "this course is consistent with the national interest and the effective and timely discharge of treaty obligations".[99]

The revision of the guidelines by the Special Premiers' Conference in 1991 was undertaken "with a view to improving co-ordination".[100] Even on the face of the earlier procedures it was obvious that difficulty would be caused by the lack of any clear structure for conveying information and views between levels of government, other than vague references to exchanges between departments. The current procedures attempt to meet this through provision for a Standing Committee of senior officers of all governments, meeting twice a year to effectuate the operation of the procedures by, for example, identifying treaties of "particular sensitivity or importance to states" and proposing an appropriate mechanism for state involvement. Another addition commits the Commonwealth to consultation over agreements "of strategic significance to states ... in an effort to secure agreement on the manner in which the obligations incurred should be implemented". Nevertheless, rumblings continue, with the implication that further improvement is required.[101]

One alternative to current procedures for intergovernmental cooperation over treaties has been advocated repeatedly over the last ten years. The one substantive recommendation of the External Affairs Sub-Committee of the Australian Constitutional Convention was for the establishment of a Treaties Council.[102] The Council was to be responsible to the Premiers' Conference and its membership would include experts in international law and intergovernmental relations. It would identify and coordinate the interests of the states and advise generally on the effect and implementation of treaties. It would report regularly to Commonwealth and state Parliaments. The recommendation was adopted by the Convention[103] and, subsequently, by the Constitutional Commission.[104] It recently was endorsed again by the Western Australian Constitutional Committee.[105]

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99 Letter from Prime Minister Hawke to the Premiers, 3 November 1983, above n97. This provision reappears in the 1991–2 version, *ibid.*

100 Special Premiers' Conference, 30–31 July 1991, *Communique* at 37.

101 Above n18 at 45.

102 Above n84 at 9–10.

103 Australian Constitutional Convention, 1985, *id* at xlvii.

104 Constitutional Commission, above n84 at 731.

105 Above n18 at 9.

The original Convention proposal was based upon a consultant's paper which, drawing on German experience, recommended a Treaties Council comprising senior officials from each participating government.[106] In this respect, it was partially implemented in 1991–2 by the establishment of the Standing Committee of senior officials, reporting to the Council of Australian Governments. Any continuing difficulties may partly be attributable to the endemic problems of Australian intergovernmental relations: lack of clear and enforceable structures and procedures; lack of an independent and dedicated secretariat; lack of public reporting obligations, offering exposure as a sanction against poor performance. These important but essentially procedural changes aside, it is not obvious that the situation now calls for establishment of another body of experts outside government. That may be an idea whose time has passed.

Further improvements may require a brief return to first principles. At the beginning of this section the point was made that there are potential gains for Australian decision-making on international agreements from intergovernmental cooperation and that these should be borne in mind in framing cooperative procedures. As a generalisation, this is not the assumption on which Australian procedures have been developed so far. Rather, they are the product of a struggle over power between the levels of government, too easily seen as a form of compensation to the states for losing the battle. In consequence, the Commonwealth may regard the procedures as an unnecessary intrusion into its rightful sphere, undermining any real commitment to ensuring that the procedures work. The states for their part have continued to wage the lost war and have been slow to perceive that they have a new role in terms of constructive participation in a joint national enterprise. The result has been acrimony and unnecessary delay, reinforcing an already negative view of the potential of intergovernmental cooperation and thereby compounding the problem.

D. Other Federal Experience

All federations presently are grappling with the problem of accommodating the burgeoning scope of international decision-making within their traditional federal structures. All but the smallest are affected by uncertainty whether the appropriate response to international competition is concerted national action or a more strategic regionalism. With one possible exception, none is much further advanced than Australia in adapting its constitutional arrangements and cooperative procedures to the new demands.

The experience of other federations may be useful to Australia insofar as it suggests that much more lies within the realm of the possible than generally is understood. It demonstrates, for example, that both federalism and international relations can continue to coexist where there are no effective limits on treaty-making and implementation at the federal level, as in the United States;[107]

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106 Burmester, H, "Proposals for an Australian Treaties Council" in External Affairs Sub-Committee, above n84 at 122–8.

107 Kline, J M, "Managing intergovernmental tensions: shaping a state and local role in US foreign relations" in Hocking, B (ed), *Foreign Relations and Federal States* (1993) at 105; Bernier, I, *International Legal Aspects of Federalism* (1973) at 160–1. Query whether there are relevant differences between the US and Australia in effective representation of state interests in federal institutions: *Garcia v San Antonion Metropolitan Transit Authority*

where the power to implement treaties domestically is divided between the two levels of government, as in Canada;[108] where treaties may be rejected by petition and popular referendum, as in Switzerland.[109] While Australians may question in each case whether the result is satisfactory, satisfaction in these matters is at least partly in the eye of the beholder. Comparative experience also shows that sub-national units are increasingly active participants in international activity, whatever their formal status in international law.[110]

These generalisations aside, however, comparative models presently offer relatively little insight into better ways to manage international activity and federalism. The possible exception is Germany. Despite other major differences between the constitutional arrangements of the two countries the German penchant for intergovernmental cooperation makes that aspect of its system, at least, potentially relevant to Australia.[111] Further, the significantly greater pressure placed on German federalism by the advanced state of European integration has forced early consideration of how best to reconcile this new form of international activity with a federal structure. Well-established German procedures include a requirement for consultation over treaties affecting the "special circumstances of a *Land*" in article 32(2) of the Basic Law and a Permanent Treaty Commission established pursuant to the Lindau Agreement to coordinate the *Länder* view on treaties which affect their "exclusive powers" or "essential interests". In 1992, these procedures were supplemented by a new article 23 of the Basic Law dealing specifically with *Land* participation in "matters concerning the European Union", directly or through the *Bundesrat*.[112] An important innovation in the new procedures is the exchange of the requirement for unanimous *Länder* consent through the Treaty Commission for the majority decision-making procedures of the *Bundesrat*, in return for a more active *Länder* role in other aspects of European Union activities.[113]

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469 US 528 (1984).

108 Bernier, id at 155–6.

109 Linder, W, *Swiss Democracy* (1994) at 86–7.

110 Fry, E, "The US States and foreign economic policy: federalism in the 'new world order'" in Hocking above n107 at 122; Kline above n107; Nossal, K R, "'Micro-Diplomacy': the case of Ontario and Economic Sanctions against South Africa" in Chandler, W M and Zollner, C W, *Challenges to Federalism: Policy-Making in Canada and the Federal Republic of Germany* (1988) at 235.

111 For description and analyses of the German arrangements see Leonardy, U, "Federation and Länder in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs" in Jeffery, C and Sturm, R (eds), *Federalism, Unification and European Integration* (1993) at 119; Leonardy, U, "To be continued: The Two German Constitutional Reform Commissions from a Lander Perspective" a paper delivered to a conference on *Redesigning the State; The Politics of Mega Constitutional Change*, (1994) Federalism Research Centre, ANU; Frowein, J and Hahn, M, "The Participation of Parliament in the Treaty Process in the Federal Republic of Germany" in Riesenfeld and Abbott, above n7 at 61; Burmester, H, "Law and Practice in Federations Concerning the Ratification and Implementation of Treaties" in External Affairs Sub-Committee, above n84, Appendix A.

112 Leonardy (1994) id at 7; Act to amend the Basic Law of 21 December 1992, Federal Law Gazette Part I, 1992, at 2086–7.

113 These include a right for the Länder to engage in cross-border cooperation and for a *Land* representative to participate in the European Council of Ministers where exclusive competences of the Länder are in issue: Arts 24(1a), 23(b).

The German experience demonstrates that intergovernmental cooperation can be used effectively in relation to international decisions which affect the interests of sub-national units in a federation. Germany enjoys certain advantages for this purpose, in the form of the principle of *Bundestreue*,[114] the habit of timely cooperation through the *Bundesrat*, the physical presence of *Land* representatives in Bonn. Practical incentives underpin cooperation in Germany, in uncertainty over the precise scope of federal power over external affairs[115] and the necessity for legislation affecting *Land* interests ultimately to attract support in the *Bundesrat*. At the same time, the requirement for approval of the Treaty Commission is made more palatable to the Federation by the relatively narrow scope of exclusive *Länder* authority.

Even allowing for these differences, however, there may be aspects of German practice which could be adapted for Australian needs. The plenary power of the Commonwealth to enter into international agreements and to implement them within Australia probably rules out any formal state veto of proposed agreements and the Senate is no *Bundesrat*, whatever the original expectations of it. Nevertheless, if the two Houses of the Commonwealth Parliament were to assume a role in relation to the ratification of international agreements, there is no reason why the views of Australian Heads of Government, expressed through the Council of Australian Governments or a modified Treaties Council, should not be one of the matters to which the Parliament expressly has regard, at least where the agreements in issue have particular relevance to the states.

3. *Parliaments and People*

A. *Constitutional and Legal Setting*

The manner in which international agreements are undertaken and implemented in Australia affects the allocation of power and authority between the legislative, executive and judicial[116] branches of government as well as the distribution of power between the Commonwealth and the states. This aspect of the Australian constitutional system draws heavily on the British tradition. The principal elements of that tradition are that authority to enter into international agreements lies solely within the executive branch of government, as an attribute of the royal prerogative, but that international agreements will not operate to change domestic law by, for example, affecting the private rights of subjects, unless implementing legislation is secured.[117] British courts appear to accept, however, that the status of customary international law may be somewhat different. While there are obvious problems of definition and evidence, the prevailing

114 Leonardy (1993) above n111 at 123, referring to "the principle of federal loyalty or comity ... which obliges federation and Länder to mutual consideration".

115 The uncertainty arises under Art 32(3) of the Basic Law, which allows the Länder to conclude treaties, with federal consent insofar as they "have power to legislate": Leonardy (1993) above n 111 at 121; Frowein and Hahn above n111 at 63.

116 Rawlings, R, "Legal Politics: the United Kingdom and Ratification of the Treaty on European Union (Part one)" [1994] *Pub L* 254 at 260.

117 *The Parlement Belge* (1878–9) 4 PD 129 at 149, 150; *Walker v Baird* [1892] AC 491; *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326.

view seems to be that the "body of rules which nations accept amongst themselves" will be treated by the courts as part of domestic law "so far as it is not inconsistent with rules enacted by statutes or finally declared by tribunals".[118]

The process by which the provisions of the Australian Constitution were adapted to this tradition following the acquisition of independence and full international personality was described earlier. While there is no specific reference to treaty-making in the Constitution the general executive power in section 61 of the Constitution has long since been interpreted to incorporate all aspects of the prerogative, including the authority to conduct international affairs.[119] Equally, the principle is well established that international agreements have "no direct legal effect" on Australian law unless implemented by legislation.[120] There is a question about precisely what "direct legal effect" means in this context: on one view, the formulation is more expansive than earlier versions which referred specifically to alteration of rights, modification of existing law or the imposition of financial obligations.[121] [For further discussion of the impact of international agreements see Allars below at 230ff.] International agreements may, of course, indirectly influence the content of domestic law in other ways. It is much less clear in Australia than in Britain that customary international law is part of domestic law as long as it is not inconsistent with other rules of law, although it is possible that any distinction between the two approaches is more semantic than real.[122] [For further discussion of the application of customary international law at common law in Australia see Mathew below at 194–7.]

The principal issue raised by this aspect of the constitutional framework for international decision-making in Australia concerns relations between executive government and the legislature including, by extension, the opportunities which exist for wider public consultation and participation. These matters are taken up below. But the increasing significance of executive power in relation to international agreements raises questions about the procedures which should be followed within the executive branch as well and in particular the division of authority between Cabinet, individual Ministers and departments in reaching decisions which ultimately are conveyed to the Governor-General in the form of advice.

The current procedures draw careful distinctions between three types of international arrangements by reference to their legal effect.[123] In concept, at

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118 *Chung Chi Cheung v The King* [1939] AC 160 at 167–8. For a more comprehensive analysis of the authorities see *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 per Denning LJ. See also Higgins, R, "The Relationship between International and Regional Human Rights Norms and Domestic Law" (1992) *18 Cth L Bull* 1268.

119 Above n51.

120 *Dietrich v R* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J.

121 Doeker, G, *The Treaty-Making Power in the Commonwealth of Australia* (1966) at 170.

122 The uncertainty stems from a passage in the judgment of Dixon J in *Chow Hung Ching v R* (1949) 77 CLR 449 at 477, questioning Blackstone's original view and claiming international law as a "source" rather than a "part" of Australian law. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 does not resolve the issue but suggests that the significance of the distinction may be limited: at 41, 42 per Brennan J. For recent comment see Mason, A, "The Relationship Between International Law and National Law, and its Application in National Courts" (1992) 18 *Cth L Bull* 750.

123 Department of Foreign Affairs and Trade (1994) above n4.

least, they provide a useful model for a similar typology of intergovernmental agreements within Australia, with a similar goal of determining who has authority to do what, consistently with prevailing principles of collective and individual ministerial responsibility. The three categories are agreements binding under international law, contracts binding in domestic law or arrangements which are not enforceable in law but impose only "a moral and political commitment".[124] Australian practice terms those in the first category "agreements" whatever name they actually bear and whatever form they take. The procedures outline the circumstances when a legally binding agreement is to be preferred to an "arrangement of less than treaty status" including the legal significance of the subject-matter and the financial significance for Australia as recipient although not, apparently, as donor.[125] Signature and ratification of agreements requires the approval of the Federal Executive Council, which must receive the necessary documentation at least three weeks in advance.[126] The Executive Council decision, in turn, must be based upon Cabinet approval or assurances that the matters fall within the scope of existing policy, that all relevant Ministers have agreed and that the Prime Minister also has agreed or, at least been informed, of the action.[127] Less than one quarter of agreements since 1990 in fact have been deemed to require Cabinet approval for final consent.[128] Once Executive Council approval is obtained, either the Prime Minister or the Foreign Minister have inherent authority to sign agreements: other Ministers or officers require full powers to be issued, signed by the Minister for Foreign Affairs.[129]

B. The Role of Parliament

The assumption that international activity is an executive responsibility, lying wholly within executive power, accords no role to Parliament in the signature and ratification of treaties. It is balanced and rationalised by the dualist approach to international law based on treaties, with its associated requirement for parliamentary involvement if and when implementing legislation is deemed to be necessary.[130] The obvious objection that a Parliament might decline to enact the legislation, thus leaving the State party in breach of its international commitments is answered readily enough in Britain, where the doctrine originated, by reference to the control which executive government exercises over the parliamentary majority in normal circumstances.[131] In Australia, where the government may be unable to rely on the support of the Senate and where political agreement may be reached on the implementation of

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124 Id at 3.
125 Id at 5, 6.
126 Id at 11, 14.
127 Id at 14.
128 Information provided to Senate Estimates Committee A in May 1994 stated that 49 agreements had received Cabinet approval for final consent since 1990 as opposed to 186 which had been approved by relevant Ministers.
129 Id at 11.
130 These circumstances are defined by Templeman above n7 at 156 to include treaties which require the imposition of taxation or appropriation, which affect existing domestic law or which cede important territory.
131 Above n116 at 256.

some agreements by state legislatures the objection is met, at least under the most recent procedures, by the stipulation that implementing legislation must be in place by the time Australia agrees to be bound.[132]

There has long been unease about the adequacy of this response from the standpoint of the role of Parliament, even if that role is conceived narrowly and in traditional terms, by reference to scrutiny of government action and provision of a public forum for debate on major public decisions.[133] In the first place, Parliaments may have little effective choice but to enact implementing legislation once an international commitment is made:[134] Australian legislatures face a similar problem with the implementation of intergovernmental agreements.[135] The specific Commonwealth requirement for implementing legislation to precede international commitment potentially meets this difficulty, although there is evidence that compliance has been incomplete in the past.[136] A more serious difficulty is that only a proportion of international agreements will attract the need for implementing legislation in any event; and it is compounded if the requirement for incorporation is confined narrowly and literally to circumstances in which change is clearly needed to existing law.[137] International commitments in fact may have significant indirect influence on domestic law without attracting the requirement for implementation by Parliament, as the course of events over the *Toonen* communication to the UN Human Rights Committee showed.[138] [For further discussion of the

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132 Department of Foreign Affairs and Trade above n3 at 14, 15. A similar requirement appeared in the earlier version of the procedures (in 1987, above n98 at para 51), but it was made more specific and reinforced in 1994: see in particular para 56 at 14. There appears now to be a general requirement in the United Kingdom as well for implementing legislation to be enacted before ratification occurs: House of Lords Select Committee on the European Communities *Political Union: Law-Making Powers and Procedures* (1990–91) at 7.

133 House of Lords Select Committee (1990–91) id at 56. Saunders, C, "Rethinking the Parliamentary System: Contributions from the Australian Debate" (1991) XXIX *Alberta LR* 336; *Representing the People: The Role of Parliament in Australian Democracy*, Constitutional Centenary Foundation, 1993 (1994).

134 In *The Parlement Belge*, Robert Phillimore quotes Kent's views, in 1873, that it is "morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith" above n117 at 150.

135 Standing Committee of the Western Australian Parliament on Uniform Legislation and Intergovernmental Agreements *First Report: Establishment and Analysis* (1994).

136 Twomey, A, "Procedure and Practice of Entering and Implementing International Treaties" Parliamentary Research Service, Background Paper No 27 (1995) at 12–3.

137 Rawlings claims for Britain that "Crown practice inclines to the minimum", even to the extent of picking and choosing between treaty provisions which are deemed to require legislative imprimatur and those which are not: above n116 at 257. In Australia, some disjunction between the circumstances in which implementing legislation typically is sought and the extent to which the courts recognise the domestic effect of a treaty was exposed by the High Court appeal in *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436. See, eg, the response of Evans in relation to *Teoh* in Senate Estimates Committee A on 24 May 1994, that the Court had struck down a decision "on the ground that it does not have regard to something which is not yet part of Australian law" at 67. [For further discussion of *Teoh's* case see Allars below at 204.]

138 Toonen approached the Committee under the First Optional Protocol to the ICCPR, to which Australia acceded in 1991, without parliamentary debate, much less a legislative framework. According to Twomey above n136 at 8, the Protocol was tabled in the Parliament two months after the Government deposited its instrument of accession. The Com-

Toonen case see Burmester above at 127–8 and Mathew below at 184–7.] Governments in the Westminster tradition also tend to take a sanguine view of the extent to which international commitments already are met by existing law, so that no further action is required.[139] Typically, this tends to occur in relation to human rights treaties. Australia's failure to comprehensively implement the ICCPR, for example, may suggest that more lax procedures were in place when those commitments were undertaken or may represent an assumption, now known to be erroneous, that Australian law already was in tune.[140]

There is some evidence that at earlier periods governments involved Parliaments in international decision-making to a greater degree than has tended to occur in the latter half of the twentieth century.[141] More recently, however, a tabling procedure has been employed, apparently with the objective of ensuring publicity for actions taken rather than encouraging any active role for the Parliament.[142] The procedure has its origins in the Ponsonby Rule, introduced briefly and abandoned for the British Parliament in 1924 and reintroduced in 1929. It obliges the British Government to let treaties lie on the table of the Parliament for 21 days after signature and before ratification and to submit important treaties to the House of Commons for discussion. It applies only where a treaty places "continuing obligations" on the United Kingdom, where a further formal act to signify commitment is required after signature and where the matter is not one of "urgency". In 1990–91, the Select Committee on the European Communities of the House of Lords estimated that approximately one quarter of United Kingdom treaties were subject to the Ponsonby Rule.[143]

A roughly similar procedure was introduced for the Commonwealth Parliament in 1961, by Prime Minister Menzies, with the important differences that it appeared to include a wider range of treaties, but limited the tabling period to 12 sitting days.[144]

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monwealth Parliament responded to the Committee's finding that Australia was in breach of its obligations under the ICCPR with the *Human Rights (Sexual Conduct) Act* 1994. See generally Twomey, A, "Strange Bedfellows: The UN Human Rights Committee and the Tasmanian Parliament" Parliamentary Research Service Current Issues Brief No 6 (1994). A comparable British example cited by Lester is the decision of Prime Minister Wilson in 1965 to allow direct access to the European Court of Human Rights without consultation with Cabinet, much less Parliament: "Taking Human Rights Seriously", unpublished lecture 1994. See also Lester, A, "The Impact of Europe on the British Constitution" (1992) 3 *Pub LR* 228.

139 Lester ibid. As the decision of the House of Lords in *Derbyshire C C v Times Newspapers* [1993] AC 534 shows, this can be a self-fulfilling prophecy.

140 Above n136. See also the observation of Mason CJ and McHugh J in *Dietrich v The Queen* (1992) 177 CLR 292 at 305: "it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, but such an approach is clearly permissible". [For further discussion of *Dietrich* see Mathew below at 196–7].

141 Twomey notes 55 cases in which Commonwealth parliamentary approval was sought before ratification between 1919, when Australia became internationally active and 1963, after the tabling procedure was introduced: above n136 at 7, citing Ryan, K W, *International Law in Australia* (1984) at 54.

142 (1924) 5 *Brit Ybk Int'l L* 190.

143 Above n132 at 57.

144 House of Representatives *Parliamentary Debates* (1961), 10 May 1961.

The observance of these undertakings, limited as they are, has been patchy in both countries.[145] In Britain, however, the issue may have been overshadowed to a degree by the obviously greater impact of the treaties effecting European integration, giving rise to new procedures explicitly creating a substantive parliamentary role.[146] In Australia, the purpose of the 12 day tabling requirement has gradually been eroded by development of a practice of tabling multiple treaties, sometimes every six months and occasionally even after ratification.[147] The current procedures now provide for all treaties to be tabled "as a matter of course" but without a ministerial statement and in terms which make it clear that tabling will not necessarily occur before Australia becomes bound.[148]

Over the past decade proposals for a greater involvement of Parliament in the treaty-making process have been made by two minority members of the Constitutional Commission, business interest groups, and Members of the Parliament itself.[149] The issue is currently the subject of an inquiry by a Senate Standing Committee.[150] Without exception, they represent incremental and limited change. A common element, elaborated in the Parliamentary Approval of Treaties Bill 1994, would impose a statutory requirement to table all treaties, with an opportunity to each House to disapprove, and thereby prevent a treaty entering into force for Australia. So far the government has refused to entertain any change of this kind,[151] although some alterations have been made to other aspects of treaty practice to improve the information that is publicly available during treaty negotiations and on their conclusion.[152] The assumption on all sides seems to be that the essentials of the current system are a given and that the potential for change lies within a small compass.

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145 For the UK see Lester (1994) above n138 citing ratification of the European Convention on Human Rights and the description of the Rule as "somewhat elastic" by the National Council for Civil Liberties, in evidence to the House of Lords Select Committee on the European Communities, *House of Lords Scrutiny of the Intergovernmental Pillars of the European Union* (1992–93) at 72. Compare with Templeman, above n7 at 159 "The Ponsonby rule has been followed by all governments ever since it was pronounced". For Australia, see Twomey, above n136 at 8.

146 For example, *European Parliamentary Elections Act* 1978 s6 precludes ratification of a treaty increasing the powers of the United Kingdom unless "approved by an Act of Parliament". See also *European Communities (Amendment) Act* 1993 s2. See generally Rawlings, above nn 25, 117 and Templeman, above n7 at 166–9.

147 Twomey above n136 at 8.

148 Department of Foreign Affairs and Trade, above n3 at 17.

149 Above, text at nn 19–22.

150 Above n22.

151 On a variety of grounds, including the difficulty of obtaining a final text of a treaty before signature (cf the requirements for Executive Council approval, above n126) and the more appropriate opportunity for parliamentary involvement when implementing legislation is required: Senate Estimates Committee A *Hansard* 18 March 1994.

152 Two such changes include publication of a schedule of multilateral negotiations involving Australia in the departmental magazine *Insight* and provision of a "short explanatory memorandum" with treaties when they are tabled: Department of Foreign Affairs and Trade above n2 at 18; Information Kit above n2 at 6, 8.

C. *Other Countries Compared*

In fact, that is not so. Australia may or may not wish to make major changes to its current legal and constitutional framework for international decision-making but the assumptions on which it is based are confined to countries in the Westminster tradition. The one example of a different approach which tends to be familiar, the United States, is unusual principally in its exclusion of the lower chamber of a bicameral legislature, the House of Representatives, from the approval process while the upper House, the Senate, arrogates to itself control of the meaning and operation of treaties.[153] The proposition that a legislature may play a role in the treaty making process, however, is not unusual at all, but is accepted by most of the constitutional systems of continental Europe[154] and by many of those elsewhere in the world with the same constitutional tradition.[155] Its corollary, that as far as possible international law constitutes part of domestic law, on monist assumptions, is shared by most of these countries as well.[156]

Despite a tendency towards condescension by those with different practices,[157] there is no move in these countries to eliminate the role of legislatures. If anything, there is concern to make it more effective[158] coupled with regret, in some cases, that that cannot be done.[159] The current debate rather is on a host of other issues:[160] the nature of the agreements which attract a requirement for legislative involvement;[161] the manner in which a legislature signifies its views;[162] the extent of the deliberative role of a legislature during the formative stages of negotiation of a treaty or acceptance of its text;[163] the

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153 Riesenfeld and Abbott, above n7 at 1.

154 Rawlings, above n116 at 257.

155 See Stein, E, "International Law in Internal Law: Toward Internationalisation of Central-Eastern European Constitutions?" [1994] *Am J Int'l L* 427, for a description of relevant developments in the new Constitutions of central and eastern Europe.

156 For a discussion of the apparent change in German practice, to give the act of consent "double effect" see Frowein and Hahn, above n111 at 67–8.

157 For example Howe: "Any Danish foreign minister does operate in conditions that I must say I think are not very strengthening for Denmark" in evidence to the House of Lords, Select Committee on the European Communities (1992–93) above n145 at 44.

158 Riesenfeld and Abbott above n7 at xi.

159 For example, Italy: Bognetti, G, "The Role of Italian Parliament in the Treaty-Making Process", Riesenfeld and Abbott, above n7 at 89.

160 See generally Riesenfeld and Abbott, above n7; Zoller, E, *Droit Constitutionnel et Droit International*, General Report to the 14th World Congress on Comparative Law (1994).

161 Variations range from almost all treaties, in the case of the Netherlands, to treaties regulating the political relations of the federation or relating to matters of legislation, in Germany: Riesenfeld and Abbott, above n7 at 120, 64. In principle, as a minimum, parliamentary approval is required for matters which would need legislation within the domestic sphere.

162 See in particular the procedure for "tacit" approval in The Netherlands: in 1991–92 it was estimated that three quarters of all treaties were approved by the States General in this way: House of Lords Select Committee on the European Communities (1992–93) above n145 at 78.

163 Where this occurs at all, it requires the use of a special purpose parliamentary committee, a regular flow of information to the committee and, sometimes, procedures to ensure confidentiality: see in particular The Netherlands and Denmark, House of Lords Select Committee on the European Communities (1992–93) above n145 at 77, 72. Not all countries go to such lengths: compare, for example, the "take-it-or-leave-it" approach in Germany: Riesenfeld and Abbott, above n7 at 69.

manner in which the self-executing effect of treaties is determined;[164] the status of international law vis-a-vis other laws in domestic legal and constitutional systems.[165]

The difference between these two approaches is the product of historical circumstance. The definition of legislative power and, by corollary, executive power was fixed in Britain by 1688, well before there was any concept of the purposes for which treaties eventually would be used and at a time of general acceptance that "the King acts at the international level, Parliament on the internal level".[166] The mechanism of responsible government through which constitutional monarchy was achieved over the succeeding centuries left the executive power with the monarch, to be exercised on the advice of Ministers drawn from and responsible to but ultimately also in control of the elected, sovereign Parliament. There was no incentive in these circumstances to rethink the mutual boundary between legislative and executive power: if anything, there was an incentive not to do so. Only the use of international decision-making to achieve European integration caused the traditional assumptions to be questioned in Britain, and then somewhat belatedly and sparingly. In Australia, they have barely been questioned at all.

By contrast, this aspect of the constitutional system of many other countries began to take shape in more recent times and, generally, in circumstances which encouraged limitations on monarchical or autocratic power through the explicit transfer of some power to representative bodies.[167] While caution about popular involvement in external affairs continued, maintaining the distinction between internal and external sovereignty,[168] the ground was laid for some institutional change in response to changes in treaty theory and practice. This relative flexibility has been put to use in the latter part of the 20th century in the face of further challenges to constitutional systems from new forms of international decision-making. The result is a willingness to distinguish between different forms of treaty, according to their domestic constitutional impact; acceptance that the legislature should be involved, at least formally, in treaties which domestically are legislative in character; ironically, a developing tradition of judicial intervention to keep international activity within constitutional check;[169] and acknowledgment that agreements concluded in this way may form part of domestic law.

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164 The decision normally is one for the courts: in practice, however, where legislation inconsistent with a treaty may be enacted, the self-executing status of a treaty may be affected: Riesenfeld and Abbott, above n7 at 13.

165 While many countries accord international law the same status as domestic law in France it prevails over other laws and in The Netherlands over the Constitution itself: Riesenfeld and Abbott, above n7 at 45, 111. See the variation in some new central European Constitutions, according special constitutional status to human rights treaties: Stein, above n155 .

166 Haggenmacher, in discussion in Riesenfeld and Abbott, above n7 at 401.

167 For a recent, interesting analysis of the influences at work see Haggenmacher, P, "Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function" in Riesenfeld and Abbott, above n7 at 19.

168 Haggenmacher quotes Rousseau, in 1764: "The external exercise of power does not befit the People; the great maxims of State are not within its grasp; in these matters it has to follow its leaders, who, being always more enlightened than itself on this point, are hardly interested in making treaties with foreign powers to the detriment of the country", id at 20.

169 For example, the decisions of French and German Courts, post-Maastricht, with the deci-

In consequence, on the eve of the 21st century there are two broad but diverse approaches to international decision-making. A question of universal relevance is which, if either, is suited to modern needs. It may be asked by Australia also, as it considers its own constitutional arrangements.

4. *Future Directions*

The constitutional framework for the making and implementation of international arrangements in Australia took their present form through evolution and circumstance, rather than design. This most obviously is the case with the provisions of the Australian Constitution itself, which were drafted for a nation which lacked control of its own external affairs. But it can be argued also for the principles and practices which govern relations between the branches of government in international affairs which were automatically adopted by Australia as it progressively acquired full independence.

As the volume and nature of international decision-making increases, there is growing concern about its impact on national constitutional arrangements. The associated question, whether these arrangements in turn provide an adequate framework for national participation in international affairs sometimes is asked as well, although in more muted form. The aspect of the Australian arrangements which initially attracted most attention was the scope of Commonwealth power to implement international law. While interest in that issue by no means has died, it is now matched by debate on the extent to which Parliaments and the public have the opportunity to contribute to decisions about international commitments which ultimately will affect Australian law.

The present system has undoubted strengths. It enables Australia to move relatively swiftly and efficiently in the international arena. It has been argued that it increases Australian influence in international affairs.[170] The Commonwealth can enter into international commitments on behalf of Australia with confidence in its own capacity to implement them domestically. Some of the more obvious objections based on constitutional principle have been met in recent years through cooperative procedures with the states, a more explicit commitment to the passage of implementing legislation before international agreements are adopted, proposals to enable greater public access to international negotiations in which Australia is a party and to commitments that have been made.

It has its weaknesses as well, however, from the standpoint of both constitutional and international law. The extent of the former depends to a degree on individual approaches to representative democracy and federalism. The opportunity for Parliamentary and public involvement in international decision-making is more important for those who prefer participatory style representative democracy and less for those who believe in the model of Parliamentary government under which governments exercise power relatively without hindrance during their term of office, subjecting themselves to electoral judgment every

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sion of the House of Lords in *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Rees-Mogg* above n24; for comment, see Rawlings, above n24 at 369.

170 Information Kit above n2 at 4.

three or four years.[171] The scope of the external affairs power matters less to those who, for a variety of different reasons favour broad central power over a federal system which continues to function in more or less traditional style.

The weaknesses of the current arrangements for international law tend to attract less attention, but may be of equal significance. While they encourage initial commitment to international obligations, not all are implemented in domestic law. Where implementation occurs, it takes the form of a domestic statute which may, accidentally or by design, alter the original intent. Consistency in the interpretation and application of international law may more readily be achieved if national courts are working from the same basic text. While the provisions of many international agreements are excessively vague from a common law perspective, the automatic incorporation of those capable of being dealt with in this way might encourage more rigour in the long run.

While the common law approach to international decision-making has become, in Templeman's words, an article of faith,[172] there are some signs of disquiet. For the most part, they come from the United Kingdom and are at least in part the product of experience with an integrated Europe. Richard Rawlings, in his discussion of political and legal machinations over implementation of the treaty of Maastricht refers to the "antiquated and inherently undemocratic character of the British Constitution" and to the "dichotomy between executive and legislature in treaty-making, which distinguishes Britain from the rest of the EC".[173] Anthony Lester has argued for a host of practical ways in which Parliaments may be more actively involved in international activity, including the scrutiny of reports on national compliance which are submitted to international bodies, concluding that "it is time to bring down the curtain on this comic opera, in which Governments use parliamentary sovereignty to shield themselves against effective accountability to Parliament and to the rule of law".[174] The draft Constitution for the United Kingdom produced by the Institute for Public Policy Research would require parliamentary consent to all treaties, but give treaties automatic effect as domestic law.[175]

Despite all the concern expressed about the constitutional significance of international activity in Australia, there is no sign of interest in major change, or even of consciousness that it may be an option. Most notably, none of the proposals for a greater degree of Parliamentary involvement in treaty-making refer to the possibility of direct incorporation of the treaties thus approved, which is a logical although not inevitable concomitant. Oddly, no clear link has yet been made between the debate on the republic

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171 Saunders, C, "Democracy: Representation and Participation" in Finn, P (ed), *Essays on Law and Government*, (1995) forthcoming.

172 Above n7. In other parts of the same passage, Templeman described the current approach as "a hangover from history. In past centuries, the Monarch did it all, foreign relations belonged to him, treaties were his and the courts kept themselves to their side of the Channel and never looked across ... as everyone else manages to construe treaties, I think we ought to do so".

173 Above n116 at 257.

174 Above n139.

175 Institute for Public Policy research, *A Written Constitution for the United Kingdom* (1993) cl 51.

and the constitutional tradition which assumes that international affairs are a matter for the executive alone.

In the short term, therefore, it is likely that the basic features of the Australian system will remain the same, although matters of important detail may change. The only substantive change presently under consideration is a statutory procedure for parliamentary approval or disapproval of all or some treaties. If adopted at all, it would be likely to include a tacit approval mechanism, consistent with Australian practice in relation to delegated legislation. It could be coupled with a requirement for the parliament to take into account the views of state Heads of Government on agreements peculiarly in the state sphere. It is likely to become convenient if not essential, in due course to include a provision in the Australian Constitution to facilitate supra-national arrangements, most obviously with New Zealand but ultimately, perhaps, with other regional countries as well. It was argued earlier that the High Court may identify limits to the external affairs power by reference to obligations binding in international law, in the interests of workability and predicability.

In the longer term, there is a question whether Australia could or should move to direct incorporation of all or part of international law binding on Australia and, if so, the status which such rules should have in relation to the rest of the legal system. This approach would be consistent with what at present, seems to be a clear international trend. Curiously, it would give effect at long last to a step which the framers of the Constitution almost took 100 years ago, apparently by accident, but still reflected in the hitherto unused jurisdiction of the High Court in section 75(i) of the Constitution. At this stage in world development it may provide a more appropriate way of giving constitutional effect to international human rights norms. This option also should be explored as the debate on an Australian Bill of Rights gathers speed yet again.