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# THE IMPACT OF TREATIES ON AUSTRALIAN FEDERALISM

Brian R. Opeskin\*  
Donald R. Rothwell\*\*

## I. INTRODUCTION

A well-known commentator on federal government, Sir Kenneth Wheare, once observed that “[f]ederalism and a spirited foreign policy go ill together.”<sup>1</sup> Whether or not one agrees with Wheare’s conclusion, there is little doubt that his aphorism highlights a complexity faced by federal States in the conduct of their foreign relations, which is not shared by unitary States.<sup>2</sup> In federal States, both the decision to incur international treaty obligations and the implementation of those obligations in domestic law may need to accommodate the interests and competencies of national governments, as well as those of the constituent states of the federation. Thus, it has been remarked that “[d]ivided legislative competence is a feature of federal government that has, from the inception of modern federal [S]tates, been a well recognized difficulty affecting the conduct of their external affairs.”<sup>3</sup> As a federal State, Australia shares many of the problems of other federations in pursuing a robust foreign policy.<sup>4</sup> In this

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<sup>1</sup> K.C. WHEARE, *FEDERAL GOVERNMENT* 196 (3rd ed. 1953).

<sup>2</sup> In this Article “State” refers to the geopolitical entity that is the subject of international law, while “state” refers to a constituent unit of a federation. All references to “Acts” are references to those of the Australian parliament unless another jurisdiction is indicated.

<sup>3</sup> *New South Wales v. Commonwealth* [hereinafter *The Seas and Submerged Lands Case*], 135 C.L.R. 337, 445 (Stephen, J.) (1975).

<sup>4</sup> Australia comprises six states, two internal territories, and numerous external territories. The six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) were formerly British colonies, which federated in 1901 to become the Commonwealth of Australia. The two internal territories (the Northern Territory and the Australian Capital Territory) were formed at a later date from land surrendered by the states and accepted by the Commonwealth. Both territories have now been granted self-governing status. See Northern Territory (Self-Government) Act, AUSTRAL. C. ACTS No. 58 (1978); Australian Capital Territory (Self-Government) Act,

article we examine these difficulties, and the solutions that have been found to some of them, in the context of the Australian federal system.

In Australia, two factors underlie the importance of examining the dynamic of federal-state relations in respect of international affairs. The first arises from the constitutional division of power between state and federal governments. Curiously, the Australian Constitution is silent on many aspects of the internal allocation of power and responsibility for the conduct of the country's foreign relations.<sup>5</sup> The Constitution does not mention whether the federal executive power extends to the making of treaties, nor whether that power is exclusive of the states. Similarly, the Constitution does not expressly confer legislative power on the federal Parliament to implement treaties or customary international law.<sup>6</sup> Rather, federal Parliament is granted power to make laws with respect to "external affairs,"<sup>7</sup> and the ambit of this power has been a fertile source of dispute between state and federal governments over the last decade.

The second factor arises not from legal constraints imposed by the Constitution, but from the functional division of power between state and federal governments, reflecting political rather than legal concerns. Since the late 1970s, Australia's federal (Commonwealth) government has generally approached its relationship with the states in a spirit of cooperative federalism. The key aspects of this approach have been the federal government's self-imposed restraint in exercising its constitutional powers, and its willingness to involve the organs of state government in matters that touch or affect traditional state interests. In the field of international relations, cooperative federalism has resulted in the involvement of state governments in the processes of treaty negotiation and treaty implementation.

In light of these issues, this Article examines the manner in which

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AUSTL. C. ACTS No. 6 (1988). Although important constitutional differences remain, for most practical purposes the position of the internal territories has been assimilated to that of the states.

<sup>5</sup> The Australian Constitution was drafted at a number of constitutional conferences in the 1890s, when international law was in its infancy. The Constitution makes only one reference to treaties, namely, when conferring judicial power on the High Court "in all matters arising under any treaty." AUSTL. CONST. ch. III, § 75 (i).

<sup>6</sup> Like the U.S. Constitution, the Australian Constitution grants power to the federal legislature only over a defined class of matters, which are principally found in the 39 placita of § 51. AUSTL. CONST. ch. I. By virtue of § 107, and subject to the Constitution, each state maintains the plenary legislative power that it enjoyed as a colony prior to federation. AUSTL. CONST. ch. V, § 107. However, to the extent that state law is inconsistent with federal law, federal law prevails. AUSTL. CONST. ch. V, § 109.

<sup>7</sup> AUSTL. CONST. ch. I, § 51 (xxix).

the implementation of international treaties in Australia has been affected by the dynamics of federal-state relations.<sup>8</sup> Parts II, III and IV provide the legal and institutional framework in which these federal issues may be considered by presenting an overview of the role of the federal government, the state governments and the courts in making, implementing and interpreting treaties in Australia. Given that responsibility for international relations may potentially be shared between the state and federal spheres, and between the three principal arms of government within each sphere (the executive, the legislature and the judicature), the picture is indeed a complex one. However, it is not intended to do more here than provide a conspectus of these issues.

Parts V and VI then present two case studies, which examine in detail the way in which federal-state relations have affected the implementation of treaties in Australia. The first study concerns the World Heritage listing of large wilderness areas in the states of Tasmania and Queensland, pursuant to the World Heritage Convention.<sup>9</sup> Recommendations by the federal government for the listing of state land as World Heritage property have generated sharp conflict between federal and state governments because of the restrictions on land usage that such conservation measures necessarily entail. The second case study concerns the conflict between the Commonwealth and the state of Tasmania over certain provisions of Tasmania's Criminal Code, which have placed Australia in breach of its obligations under the International Covenant on Civil and Political Rights (hereinafter ICCPR).<sup>10</sup> In March, 1994 the Human Rights Committee ruled that Australia was in breach of the privacy provision of the ICCPR<sup>11</sup> as a result of Tasmanian laws that prohibit sexual relations between consenting adult males in private. Tasmania's repeated refusal to repeal the offending laws has posed considerable difficulties for the federal government in honouring Australia's international treaty obligations. Finally, Part VII offers some

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<sup>8</sup> This Article is confined to the role of treaties in Australian law. For a discussion of the relationship between customary international law and Australian law, see James Crawford & W.R. Edeson, *International Law and Australian Law*, in INTERNATIONAL LAW IN AUSTRALIA 71 (K.W. Ryan ed., 2d ed. 1984); Gillian Triggs, *Customary International Law and Australian Law*, in THE EMERGENCE OF AUSTRALIAN LAW 376 (M.P. Ellinghaus et al. eds., 1989). For analogous discussion of the English position, see J.G. Collier, *Is International Law Really Part of the Law of England?*, 38 INT'L & COMP. L.Q. 924 (1989).

<sup>9</sup> Convention for the Protection of World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37; 1975 Austl. T.S. No. 47.

<sup>10</sup> Dec. 19, 1966, 999 U.N.T.S. 171; 1980 Austl. T.S. No. 23.

<sup>11</sup> Art. 17 protects an individual, *inter alia*, from arbitrary or unlawful interference with privacy, family, home or correspondence. ICCPR *supra* note 10, at 177.

brief conclusions on the impact of federalism on the implementation of international treaties in Australia.

## II. THE ROLE OF FEDERAL GOVERNMENT

### A. *Federal Executive*

Section 61 of the Australian Constitution vests the executive power of the Commonwealth in the Queen of Australia, and provides that the power is exercisable by the Governor-General as the Queen's representative.<sup>12</sup> This power is expressed to extend "to the execution and maintenance of this Constitution, and of the laws of the Commonwealth," but nowhere does the Constitution enumerate the powers of the federal executive or make specific mention of the executive's authority to enter into treaties or conduct foreign relations.

In view of Australia's colonial history, this silence is unsurprising. Prior to federation in 1901, the U.K. had the power to conduct foreign relations and conclude treaties on behalf of the various Australian colonies, as part of the British Empire. After federation it was thought that the Imperial government should continue to conduct the foreign policy of the Empire. Only gradually did Australia develop an independent international personality.<sup>13</sup> As indicia of its gradual international awakening, Australia was an original signatory to the Covenant of the League of Nations in 1919;<sup>14</sup> created its first separate department of External Affairs in 1935; established its first diplomatic representation outside London in 1940;<sup>15</sup> and took special care when declaring war on Japan in 1941 to adopt a procedure consonant with its full status over its external

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<sup>12</sup> GEORGE WINTERTON, *PARLIAMENT, THE EXECUTIVE, AND THE GOVERNOR-GENERAL* 23 (1983).

<sup>13</sup> See D.P. O'Connell, *The Evolution of Australia's International Personality*, in *INTERNATIONAL LAW IN AUSTRALIA* 1 (D.P. O'Connell ed., 1965); Malcolm M. Lewis, *The International Status of the British Self-Governing Dominions*, 3 *BRIT. Y.B. INT'L L.* 21 (1922-23); Leslie Zines, *The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth*, in *COMMENTARIES ON THE AUSTRALIAN CONSTITUTION: A TRIBUTE TO GEOFFREY SAWER* 1 (Leslie Zines ed., 1977). Justice Murphy, a vocal opponent of this view, claimed that federation in 1901 brought about a fundamental legal and political change in which the Commonwealth emerged as a new political entity with the status of a nation. *China Ocean Shipping Co. v. South Australia*, 145 C.L.R. 172, 236-39 (1979).

<sup>14</sup> 13 *AM. J. INT'L L.* 128 (Supp. Apr. 28, 1919). The Covenant constituted Part I of the Treaty of Versailles.

<sup>15</sup> John Ravenhill, *Australia*, in *FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNATIONAL UNITS* 76, 116 n.3 (Hans J. Michelmann & Panayotis Soldatos eds., 1990).

relationships.<sup>16</sup>

Since Australia's coming of age in the international community, there is no doubt that the federal executive possesses full capacity to conduct Australia's relations with foreign countries. This power includes making, terminating and performing treaties; declaring peace and war; annexing and ceding territory; seizing land or goods as conquest; appointing ambassadors and so on. As one High Court judge stated in relation to the making of treaties, "the federal executive, through the Crown's representative, possesses exclusive and unfettered treaty-making power."<sup>17</sup> Moreover, executive action in relation to the making of treaties is free from formal legislative control or scrutiny. In the words of the current Minister for Foreign Affairs and Trade, Senator Gareth Evans, "[t]he Constitutional power to enter into treaties is one that belongs to the Governor General in Council. The Commonwealth Parliament, in consequence, has no formal function to exercise by way of review or oversight of international Conventions, treaties and agreements which the Federal Government is considering signing."<sup>18</sup>

Notwithstanding that the power of the federal executive to enter into treaties is unfettered, the current practice of the Australian government carves out an important role for federal and state legislatures. After the text of a treaty has been settled, it is necessary to obtain the approval of the Federal Executive Council before any treaty action is taken, whether by way of signature, ratification or other step subsequent to signature.<sup>19</sup> As a matter of policy, this approval will not be given unless all necessary steps have been taken to bring Australian law into conformity with the treaty obligations by the time the treaty enters into force for Australia.<sup>20</sup>

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<sup>16</sup> O'Connell, *supra* note 13, at 20. A different view had been taken of the declaration of war on Germany in 1939, when it was apparently assumed that the U.K.'s declaration of war compelled the same response by Australia. See 161 PARL. DEB., H. R., 28-29 (Sept. 6, 1939).

<sup>17</sup> *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168, 215 (Stephen, J.) (1982). See also *Commonwealth v. Tasmania*, 158 C.L.R. 1, 298-99 (Dawson, J.) (1983).

<sup>18</sup> 133 PARL. DEB., S., 2525 (May 23, 1989), reprinted in 12 AUSTL. Y.B. INT'L L. 467 (1992).

<sup>19</sup> The Federal Executive Council is established by the Constitution to advise the Governor-General (in whom the executive power is reposed), and comprises federal ministers of State. AUSTL. CONST. ch. II, §§ 61-64. Executive Council approval is not required for the signature of arrangements of less than treaty status. Such arrangements have moral and political force, but are not legally binding.

<sup>20</sup> DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, *THE CONCLUSION OF TREATIES AND OTHER INTERNATIONAL ARRANGEMENTS* 16-17 (1987). See also the answers submitted by the Australian Government to questions asked by the European Committee on Legal Cooperation in a survey of State practice on treaty-making, 11 AUSTL. Y.B.

Indeed it has only been on rare occasions, such as with the ratification of the World Heritage Convention, that Australia has ratified an international convention in advance of the necessary implementing legislation.<sup>21</sup> The reason for this practice is that, where legislation is necessary to give effect to the provisions of a treaty, the executive cannot know whether the relevant legislature will pass that legislation.<sup>22</sup> If Australia were to become party to a treaty on the assumption that the implementing legislation would be passed, but it was not passed, Australia might be placed in breach of the treaty. Such a situation would embarrass Australia in its conduct of foreign affairs, especially if there were no provision for withdrawal from the treaty. As a result, the federal executive will generally not risk breaching its international obligations by taking hasty treaty action, notwithstanding its clear power to do so.

### B. Federal Legislature

In contrast to the position in some countries, Australia's international treaty obligations do not automatically have the force of law within the municipal legal system. As the Judicial Committee of the Privy Council has stated the matter:

Within the British Empire there is a well-established rule that the

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INT'L L. 500 (1991).

<sup>21</sup> Australia ratified the World Heritage Convention on Aug. 22, 1974, nearly a decade before the enactment of the World Heritage Properties Conservation Act, No. 5 (1983). See Part V *infra*. A more recent example is the Convention Concerning Termination of Employment at the Initiative of the Employer 1982 (ILO Convention) No. 158, June 22, 1982, which was ratified by Australia on Feb. 26, 1993, before the Industrial Relations Reform Act 1993 implemented the treaty obligations. See Breen Creighton, *Industrial Regulation and Australia's International Obligations*, in A NEW PROVINCE FOR LEGALISM: LEGAL ISSUES AND THE DEREGULATION OF INDUSTRIAL RELATIONS 101, 110 (Paul Ronfeldt & Ron McCallum eds., 1993).

<sup>22</sup> Bill Campbell, *Domestic Implementation of International Law*, in INTERNATIONAL LAW AND AUSTRALIAN DOMESTIC LAW 15 (Henry Burmester & Rosalie Balkin eds., 1994); Michael Kirby, *The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes*, 16 U. N.S.W. L.J. 363, 369 (1993). In the case of federal implementation, it is necessary for a Bill to pass both the House of Representatives and the Senate. Because the federal executive is formed from the ranks of parliamentarians who belong to the political party or parties that command a majority in the House, the executive can generally be assured of passage of the legislation through the House. However, the Senate is frequently controlled by an opposition party or coalition of parties, which may obstruct passage of the Bill. In the case of state implementation, the difficulties may be greater still because opposition parties might control both Houses of the state legislature.

making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.<sup>23</sup>

The rationale for this approach lies in the doctrine of the separation of legislative and executive power. If the executive were able to alter the law of the land merely by entering into a treaty with another country, the authority of the legislature, which is vested with responsibility for making laws for the "peace, order, and good government of the Commonwealth,"<sup>24</sup> would be usurped. Consequently, though the federal executive may create valid legal obligations for Australia on the international plane by entering into a treaty, domestic law will generally not be affected by that action unless the treaty has been implemented by legislation.<sup>25</sup>

There are various ways in which a treaty may be implemented by legislation. The simplest method is for the legislation to declare that the treaty provisions have the force of law in Australia.<sup>26</sup> This technique is only available when the treaty obligations are expressed in a form suitable for immediate incorporation into domestic law. A second method is for the legislation to refer to the treaty but to rewrite its obligations as a separate statutory regime.<sup>27</sup> When this method is employed, the treaty is usually annexed to the legislation and may be used as an aid in interpreting the legislation.<sup>28</sup> This technique has been widely used in the field of human rights and anti-discrimination law, where general obligations imposed by a treaty have been translated into detailed statutory regimes

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<sup>23</sup> *Attorney-General for Canada v. Attorney-General for Ontario*, 1 D.L.R. 673, 678 (1937).

<sup>24</sup> AUSTL. CONST. ch. I, §§ 51-52.

<sup>25</sup> *E.g.*, in *Bradley v. Commonwealth*, 128 C.L.R. 557 (1973), the High Court held that the termination of postal and telecommunication services to the Rhodesia Information Centre in Sydney was not justified by mandatory sanctions imposed by the U.N. Security Council. The U.N. Charter had not been given the force of law in Australia, and the formal "approval" of the Charter by the Charter of the United Nations Act 1945 did not have the effect of incorporating the treaty into domestic law. *See infra* note 31.

<sup>26</sup> *See, e.g.*, Diplomatic Privileges and Immunities Act, AUSTL. C. ACTS No. 16, § 7 (1967); Limitation of Liability for Maritime Claims Act, AUSTL. C. ACTS No. 151, § 6 (1989).

<sup>27</sup> *See, e.g.*, World Heritage Properties Conservation Act, AUSTL. C. ACTS No. 5 (1983); Ozone Protection Act, AUSTL. C. ACTS No. 7 (1989).

<sup>28</sup> Acts Interpretation Act, AUSTL. C. ACTS No. 2, § 15AB (1901). *See also infra* Part IV(B).



of obligations, rights and remedies. Finally, legislation is sometimes enacted in terms that make no mention of a particular treaty, but whose underlying purpose is to ensure that Australian law conforms with that treaty.<sup>29</sup>

Not every treaty to which Australia becomes a party requires a change in municipal law. There are several reasons for this. The language of the treaty might be aspirational, or might leave a wide margin of appreciation to States such that no specific action need be taken; existing state and federal legislation might be adequate to give effect to the treaty obligations such that no new legislation is required; or the treaty might impose obligations on governments such that its implementation can be achieved through administrative rather than legislative changes. Moreover, certain types of treaties (for example those relating to peace and war, and the cession of territory) belong to the Crown's historic prerogative and require no legislative action. However, where changes to domestic law are necessary, democratic principles are clearly at work in allowing parliamentary scrutiny of the implementing legislation before the treaty becomes binding on Australia.<sup>30</sup> Legislative implementation of treaties is therefore the principal, but not the only mechanism for parliamentary review of executive action in relation to treaties.<sup>31</sup>

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<sup>29</sup> *E.g.*, the Protection of Movable Cultural Heritage Act, AUSTL. C. ACTS No. 11 (1986) is intended to implement the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, though it makes no reference to the Convention.

<sup>30</sup> This view was expressed by the Minister for Foreign Affairs and Trade, Senator Gareth Evans, in the House of Representatives in 1988, when he said that "[t]he people of Australia, through their elected representatives, determine whether necessary legislation is enacted to give effect to the provision of particular treaties in Australia." PARL. DEB., H. R., 3752 (Dec. 1, 1988), *reprinted in* 12 AUSTL. Y.B. INT'L L. 467 (1992).

<sup>31</sup> Three further avenues for parliamentary scrutiny of executive action in relation to treaties deserve mention. First, there is a practice of tabling treaties in Parliament for the perusal of Members. This practice derives from a commitment made by Prime Minister Menzies in 1961 to lay before both Houses of Parliament the text of treaties that would not otherwise be brought to Parliament's attention. N.D. Campbell, *Australian Treaty Practice and Procedure*, in INTERNATIONAL LAW IN AUSTRALIA 53, 54 (K.W. Ryan ed., 2d ed. 1984). For those treaties that enter into force upon signature, the tabling and debating of such treaties is of little practical importance because Australia's international obligations will already have been engaged as a result of the executive's prior action. For those treaties that enter into force by a step subsequent to signature, parliamentary debate may be of greater significance provided the treaties are tabled sufficiently early. The Commonwealth government claims to make every effort to table such treaties before they are ratified in order to give Parliament the opportunity to express its views on the treaties. Secondly, if implementation of a treaty requires

The implementation of treaties in domestic law may be achieved through either state or federal legislation. The choice between these alternatives depends both on the constitutional division of legislative power between the state and federal spheres, and on the principle of cooperative federalism, which creates functional divisions of responsibility between the two levels of government. The circumstances in which reliance is placed on state legislation are considered further below.<sup>32</sup> In the present context it is necessary to make some brief observations on the constitutional power of the federal Parliament to enact laws to give effect to international treaties to which Australia is party.<sup>33</sup>

The federal legislature is an organ whose powers are confined to enacting laws with respect to specific subject matters enumerated in the Australian Constitution. Section 51 gives the federal Parliament power "to make laws for the peace, order, and good government of the Commonwealth" with respect to thirty-nine listed matters. Any of these heads of power could support federal legislation implementing an international treaty on that subject matter.<sup>34</sup> Indeed, many pieces of legislation implementing international treaties, such as that giving effect to the World Heritage Convention, have derived cumulative support from a number of such powers.<sup>35</sup> However, the most important head of power in the present context is the power over "external affairs."<sup>36</sup> The interpretation and ambit of this power have assumed great importance in situations where other heads of power have not been able to provide constitutional support for the federal legislation in question.

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financial outlay, and hence an appropriation of money from consolidated revenue, federal legislation will usually be required to make the appropriation. Thirdly, the executive used to seek the formal approval of Parliament for treaties of political significance. *E.g.*, the United Nations Charter was formally approved by the Charter of the United Nations Act, AUSTRL. C. ACT, No. 32 (1945). Although this practice has now ceased, it has been noted that between 1919 and 1963 Parliamentary approval was sought prior to executive ratification in 55 cases. GÜNTHER DOEKER, *THE TREATY-MAKING POWER IN THE COMMONWEALTH OF AUSTRALIA* 138, 257-61 (1966).

<sup>32</sup> See *infra* Part III(B).

<sup>33</sup> These constitutional issues are explored in greater detail below. See *infra* Part V(B) and V(C).

<sup>34</sup> *E.g.*, the power over taxation in § 51(ii) of the Constitution would support federal legislation implementing an international tax treaty. See LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 237 (3d ed. 1992).

<sup>35</sup> The World Heritage Properties Conservation Act 1983, which gives effect to Australia's obligations under the World Heritage Convention, was drafted to rely on the Commonwealth's power over external affairs, corporations, territories and "people of any race for whom it is deemed necessary to make special laws."

<sup>36</sup> AUSTL. CONST. ch. I, § 51(xxix).

Prior to the 1980s, there was little judicial consideration of the ambit of the external affairs power.<sup>37</sup> In one of the earliest cases, *R v. Burgess, ex parte Henry*,<sup>38</sup> the High Court had to consider whether the Air Navigation Act 1920, and regulations made thereunder, were a valid exercise of the external affairs power insofar as they purported to give effect to the Convention Relating to the Regulation of Aerial Navigation.<sup>39</sup> Although the Court struck down the regulations because they failed to conform with the terms of the Convention, the Court was unanimous in upholding the Commonwealth's power to implement the Convention by appropriate legislation. There were, however, differences of opinion between members of the Court as to the ambit of the external affairs power. Three justices took a broad view in holding that section 51(xxix) gave the federal legislature power to implement an international treaty whatever its subject matter.<sup>40</sup> The two other justices were prepared to accept that the subject of air navigation had a sufficiently international character to support appropriate implementing legislation, but denied that section 51(xxix) allowed the implementation of any international treaty whatsoever.<sup>41</sup>

Until the 1980s, none of the cases on the external affairs power raised in an acute form problems of the balance of legislative power between the state and federal spheres.<sup>42</sup> However, beginning in 1982, the High Court decided several important cases on the external affairs power which had a profound impact on the distribution of power within the Australian federation. These cases arose out of the circumstance that the federal executive had ratified international treaties in subject areas that were traditionally regarded as falling within state competence, namely human rights and the environment. Attempts by the federal Parliament to implement the treaties drew a hostile response from several states, which

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<sup>37</sup> Principal early cases were *R. v. Burgess ex parte Henry*, 55 C.L.R. 608 (1936); *Airlines of N.S.W. Pty. Ltd. v. New South Wales (No. 2)*, 113 C.L.R. 54 (1965); and *New South Wales v. Commonwealth (the Seas and Submerged Lands Case)*, 135 C.L.R. 337 (1975). For a review of recent developments, see Andrew C. Byrnes & Hilary Charlesworth, *Federalism and the International Legal Order: Recent Developments in Australia*, 79 AM. J. INT'L L. 622 (1985); Andrew C. Byrnes, *The Implementation of Treaties in Australia after the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism*, 8 B.C. INT'L & COMP. L. REV. 275 (1985); Mary Crock, *Federalism and the External Affairs Power*, 14 MELB. U. L. REV. 238 (1983).

<sup>38</sup> 55 C.L.R. 608 (1936).

<sup>39</sup> Oct. 13, 1919, 11 L.N.T.S. 174.

<sup>40</sup> *R v. Burgess*, 55 C.L.R. at 608, 640-41 (Latham, C.J.), 696 (Evatt & McTiernan, JJ.).

<sup>41</sup> *Id.* at 658-59 (Starke, J.), 669 (Dixon, J.).

<sup>42</sup> See Byrnes, *supra* note 37, at 286.

regarded the creeping expansion of federal legislation as undermining the balance of power between central and state governments.<sup>43</sup>

In several key challenges to the power of the federal Parliament to implement treaties in areas of traditional state concern, the High Court upheld the relevant federal legislation as a valid exercise of the external affairs power.<sup>44</sup> In *Koowarta v. Bjelke-Petersen*<sup>45</sup> the High Court upheld the Racial Discrimination Act 1975, implementing the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>46</sup> In *Commonwealth v. Tasmania* (hereinafter *Tasmanian Dam*),<sup>47</sup> *Richardson v. Forestry Commission* (hereinafter *Tasmanian Forests*)<sup>48</sup> and *Queensland v Commonwealth* (hereinafter *Daintree Rainforest*),<sup>49</sup> the Court upheld the validity of federal legislation implementing the World Heritage Convention.

A recurrent question in these cases, and one presaged in *R v. Burgess, ex parte Henry*,<sup>50</sup> was whether the mere existence of a treaty obligation was sufficient to enliven the federal Parliament's power to make laws with respect to external affairs, or whether the subject matter of a treaty must additionally be of international concern. The additional requirement was thought necessary by some judges in order to prevent a gradual accretion of power by federal Parliament, which might in time destroy the traditional division of powers between the states and the centre.<sup>51</sup> As Chief Justice Gibbs expressed the matter in *Koowarta v. Bjelke-Petersen*:<sup>52</sup>

[i]f s.51(xxix) empowers the Parliament to legislate to give effect to every international agreement which the executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by

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<sup>43</sup> Christine Chinkin, *The Conclusion and Implementation of Treaties in Federal and Unitary States*, in *AUSTRALIAN LAW AND LEGAL THINKING BETWEEN THE DECADES* 241, 247 (Alice E.-S. Tay ed., 1990).

<sup>44</sup> The relevant cases are elaborated *infra* Part V.

<sup>45</sup> 153 C.L.R. 168 (1982).

<sup>46</sup> Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter *Racial Discrimination Convention*].

<sup>47</sup> 158 C.L.R. 1 (1983).

<sup>48</sup> 164 C.L.R. 261 (1988).

<sup>49</sup> 167 C.L.R. 232 (1989).

<sup>50</sup> 55 C.L.R. 608 (1936).

<sup>51</sup> *Tasmanian Dam*, 158 C.L.R. at 99-100 (Gibbs, C.J.), 197-98 (Wilson, J.), 302-06 (Dawson, J.) (1983).

<sup>52</sup> 153 C.L.R. 168, 198 (1982).

the Constitution could be entirely destroyed.

In the result, these concerns did not command the assent of the Court and the requirement that a treaty be of international concern was rejected.<sup>53</sup> However, the High Court's expansive interpretation of the power to implement treaties has not meant that this power is without constraint.<sup>54</sup> The legislation must conform with the treaty in that it must be appropriate and adapted to achieve the objectives of the treaty. And the international obligation must be incurred *bona fide* and not as a colourable attempt to enhance the power of federal Parliament over areas otherwise beyond its legislative competence.

The upshot of the High Court's interpretation of federal legislative power over external affairs is that Parliament does not lack power to implement treaties to which Australia is or intends to become a party, whatever their subject matter. However, as demonstrated in the following section, federal Parliament has not always been willing to use its powers to the full extent permitted by the Constitution. Pursuant to its policy of cooperative federalism, the Commonwealth government has frequently involved the executive and legislative organs of state government in the process of making and implementing Australia's international treaty obligations.

### III. THE ROLE OF STATE GOVERNMENTS

#### A. *State Executives*

Section 61 of the Australian Constitution vests the federal executive power in the Queen of Australia, but it does not expressly make executive power over foreign affairs exclusive to the federal sphere of government. The lack of express provision has provided fertile ground for claims by Australian states that they possess some competence over foreign relations, independently of the federal executive.

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<sup>53</sup> It is doubtful whether the subject matter of a treaty can fail to be of international concern, particularly when the treaty is a multilateral standard-setting convention.

<sup>54</sup> There are also some unanswered constitutional questions, such as whether the external affairs power can support legislation that implements recommendations and declarations of international organizations, where those statements fall short of creating binding obligations for Australia. See, e.g., Donald R. Rothwell, *The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits*, 15 ADEL. L. REV. 209, 234-35 (1993). This matter particularly arises in the context of recommendations by the International Labour Organisation. In relation to Australia's past implementation of International Labour Organisation standards, see J.G. Starke, *Australia and the International Labour Organisation*, in INTERNATIONAL LAW IN AUSTRALIA 115, 120 (D.P. O'Connell ed., 1965).

The High Court has, however, taken a robust line against this view, and the jurisprudence of the Court emphasizes the exclusive or pre-eminent role of the Commonwealth in the conduct of the country's foreign affairs. As early as 1923 the High Court remarked that it was a fallacy to treat a state of Australia as a "sovereign State."<sup>55</sup> Similarly, in the *Seas and Submerged Lands Case*,<sup>56</sup> Justice Murphy stated that "[t]he [s]tates have no international personality, no capacity to negotiate or enter into treaties, no power to exchange or send representatives to other international persons and no right to deal with other countries, through agents or otherwise. Their claims to international personality or to sovereignty are groundless . . . ."

Notwithstanding these pronouncements, states have been vocal in claiming some competence in international affairs. Prior to federation there were signs of nascent international activity by the Australian colonies. Towards the end of the 19th century several colonies negotiated postal agreements with foreign countries, and in 1894 the Colonial Conference authorized the colonies to negotiate their own commercial treaties.<sup>57</sup> After 1901 several states claimed that their emerging status in international affairs was unchanged by federation.<sup>58</sup> Today there are still signs of direct state participation in foreign affairs, ranging from the signing of international agreements and the maintenance of overseas representation, to direct intrusion into national foreign policy.<sup>59</sup> Similar

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<sup>55</sup> *Commonwealth v. New South Wales*, 32 C.L.R. 200, 210 (1923).

<sup>56</sup> *New South Wales v. Commonwealth (the Seas and Submerged Lands Case)*, 135 C.L.R. 337, 506 (1975).

<sup>57</sup> O'Connell, *supra* note 13, at 2-8. Additionally, the Imperial government ceased the practice of automatically applying its commercial treaties to the colonies, and granted the colonies freedom to adhere voluntarily to commercial treaties concluded between the Imperial government and foreign States.

<sup>58</sup> *E.g.*, as late as 1974 Queensland established a Treaties Commission to advise the state government on the benefit of various international treaties and conventions. See *Treaties Commission Act 1974 (Queensl.)*. The Act establishing the Commission did not itself suggest that Queensland was competent to enter into international treaties or conventions. However, in its First Report to the Queensland Parliament, the Commission claimed that the Australian states could make agreements with foreign governments, governed by international law. See Henry Burmester, *The Australian States and Participation in the Foreign Policy Process*, 9 FED. L. REV. 257, 262-64 (1978).

<sup>59</sup> G. Campbell Sharman, *The Australian States and External Affairs: An Exploratory Note*, 27 AUSTL. OUTLOOK 307 (1973); see Burmester, *supra* note 58, at 262-275; Hugh Collins, *Federalism & Australia's External Relations*, 39 AUSTL. OUTLOOK 123 (1985); Brian Hocking, *Pluralism and Foreign Policy: The States and the Management of Australia's External Relations*, 38 Y.B. WORLD AFF. 137, 143-44 (1984); Ravenhill, *supra* note 15, at 95-104. Additional international activities undertaken by states include

claims for state participation in international affairs have been made by Canadian provinces, principally Quebec, in circumstances where the Canadian Constitution likewise fails to identify the location of executive power to conclude international agreements.<sup>60</sup> In the U.S. the matter is settled by the express constitutional prohibition on states entering into agreements or compacts with other states or foreign powers without congressional consent.<sup>61</sup>

More importantly for present purposes is the way in which the state executives have participated in the treaty-making process itself through cooperative federal-state arrangements. Since 1977 the Commonwealth government has endeavoured to involve the states at an early stage in the treaty-making process by facilitating consultation between the federal and state executives on treaties to which Australia is contemplating becoming a party. The principles of consultation have varied over the years, but in their current form they provide for substantial involvement of the state executives on matters of particular sensitivity or importance to the states.<sup>62</sup> Of course, it is ultimately a matter for the federal executive, not the states, to decide whether participation in a treaty is in Australia's national interest and ought to be pursued.<sup>63</sup> However, the principles on consultation recognize that state cooperation can facilitate the implementation of international obligations, as well as ameliorate tensions in federal-state relations. In order to facilitate this consultative process, a Standing Committee of federal and state officials has been established and charged with responsibility for overseeing the various stages of the process. The work of this Committee is supplemented by existing mechanisms for consultation between the federal and state executives.<sup>64</sup>

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the establishment of sister-state relationships with foreign governmental units, the granting of foreign aid and official visits by state leaders to foreign countries.

<sup>60</sup> See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 282-83, 297-99 (3d ed. 1992).

<sup>61</sup> U.S. CONST., art. 1, § 10.

<sup>62</sup> Attorney General's Department, *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1992) (on file with authors), *reprinted in* 5 *PUB. L. REV.* 291 (1994).

<sup>63</sup> *E.g.*, in 1991 the Commonwealth Attorney General, Mr. Duffy, indicated to Parliament that the Standing Committee of Attorneys General (a federal-state consultative body) was a valuable forum for discussing with the states and territories whether or not Australia should accede to the First Optional Protocol to the ICCPR. However, he stressed that the view of the Committee was not determinative because the matter was one for decision of the Australian Government alone. *PARL. DEB., H. R.*, 2542 (Apr. 11, 1991), *reprinted in* 13 *AUSTL. Y.B. INT'L L.* 381 (1992).

<sup>64</sup> Additional mechanisms include meetings of the Standing Committee of Attorneys General, direct communication between functional departments of the state and federal

The consultative process comprises two aspects. First, mechanisms have been established for the state executives to be informed at an early stage of the treaties to which Australia is considering becoming a party. To this end, a Treaties Schedule is circulated to the states twice a year, with information on forthcoming treaty negotiations over the next twelve months. This allows the states to identify treaties of special importance to them, bearing in mind their traditional areas of responsibility; to propose appropriate mechanisms for their involvement in the negotiation process; and to provide input relevant to the formulation of Australian policy. Secondly, representatives of the states may be included in delegations to relevant international conferences. Inclusion in a delegation does not entitle state representatives to speak for Australia, but is for the purpose of keeping them informed and allowing them to express their views. In general, it is for the states to initiate moves for inclusion in a delegation.

### *B. State Legislatures*

Notwithstanding the broad powers conferred on the federal legislature by the external affairs power, state legislatures also play a significant role in the implementation of treaties in Australia. There are legal, administrative and political reasons for this.<sup>65</sup> The first reason is a legal one arising from the distribution of legislative power under the Constitution. As previously mentioned, the Constitution defines federal legislative power by reference to enumerated subject matters. The states, on the other hand, enjoy the plenary legislative powers formerly possessed by the Australian colonies,<sup>66</sup> and may therefore enact laws on nearly any subject matter. There are some limitations on the legislative power of the states. For example, the Constitution itself vests certain powers in the federal Parliament exclusively,<sup>67</sup> and the extra-territorial operation of state laws is limited by the requirement that the laws have some connection with the state.<sup>68</sup> But these limitations aside, a state may enact

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executives and direct communication between each state's Premier's Department and the federal Department of Prime Minister and Cabinet.

<sup>65</sup> See Campbell, *supra* note 22.

<sup>66</sup> AUSTL. CONST. ch. V, § 107.

<sup>67</sup> *E.g.*, § 52(i) (power to make laws with respect to places acquired by the Commonwealth for public purposes), and § 90 (power to impose duties of customs and excise).

<sup>68</sup> The constitution of each state confers on the legislature power to make laws for the "peace, welfare and good government" of the state, or uses words to similar effect. See § 5 Constitution Act 1902 (N.S.W.); § 2 Constitution Act 1867 (Queensl.); § 5 Constitution Act 1934 (S. Austl.) read in conjunction with §§ 7 and 14 of the Australian Constitutions Act (No. 2) 1850 (Imp) (13 & 14 Vict. c. 59); § 16 Con-



laws to implement a treaty, whatever its subject matter.<sup>69</sup>

The second reason for the importance of states in implementing Australia's treaty obligations is of an administrative nature. If the Commonwealth were to implement a treaty by legislation, it would be responsible for providing the finances and administration necessary to operate the legislative scheme. In some fields, such as nature conservation, this would substantially duplicate administrative arrangements already in place under state law. In such cases, the federal government often prefers to rely on state law and existing state structures to implement Australia's treaty obligations.

The third reason for the continued significance of state legislatures is political. Although the federal Parliament has constitutional power to implement treaties regardless of their subject matter, in practice it chooses not to do so in relation to matters that fall within the traditional responsibility of the states.<sup>70</sup> Under existing federal-state consultative procedures,

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stitution Act 1975 (Vict.); § 2 Constitution Act 1889 (W. Austl.). For the position in Tasmania, see the preamble to the Constitution Act 1934 (Tas.), and § 14 of the Australian Constitutions Act (No. 2) 1850 (Imp) (13 & 14 Vict. c. 59). A law that purports to operate outside the territory of a state may not be one for the peace, welfare and good government of the state. However, the nexus required between the subject matter of the legislation and the state has been increasingly weakened over the course of this century by judicial interpretation. In *Union Steamship Co. of Austl. Pty. Ltd. v. King*, 166 C.L.R. 1 (1988), the High Court unanimously endorsed this liberal approach in stating, that:

the requirement for a relevant connexion between the circumstances on which the legislation operates and the [s]tate should be liberally applied and . . . even a remote and general connexion between the subject-matter of the legislation and the [s]tate will suffice.

*Id.* at 14 (*aff'd*, *Port MacDonnell Professional Fishermen's Ass'n Inc. v. South Australia*, 168 C.L.R. 340, 372 (1989)).

The same result is probably achieved by § 2(1) of the Australia Acts 1986, AUSTL. C. ACTS No. 142 (1985), which were enacted simultaneously by the U.K. and the Commonwealth to clarify the constitutional powers of the states. The section declares that "the legislative powers of the Parliament of each [s]tate include full power to make laws for the peace, order and good government of that state that have extra-territorial operation."

<sup>69</sup> If a state law is inconsistent with a federal law, the federal law prevails. AUSTL. CONST. ch. V, § 109. However, in the absence of inconsistency, state laws may coexist with federal laws, or may exist independently of federal laws, as a means of implementing Australia's treaty obligations.

<sup>70</sup> This attitude of cooperation is reflected in the Attorney General's Department's Principles and Procedures for Commonwealth-State Consultation on Treaties (1992), which state:

The Commonwealth will consider relying on [s]tate legislation where the treaty affects

agreement is sought between both levels of government as to the manner in which the treaty obligations are to be implemented, whether it be by complementary federal and state legislation or by state or federal legislation alone. The organs of state government may thus have a role in the Australian treaty process beyond the participation of the state executives in treaty negotiation.

An interesting example of the constitutional and political significance of the states in implementing treaties may be found in the history of legislation implementing Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>71</sup> In 1975 the Commonwealth Parliament enacted the Racial Discrimination Act 1975 to give effect to the Convention. In 1982 the Act was upheld by the High Court as a valid exercise of the federal legislative power over external affairs.<sup>72</sup> In the following year, the question arose in *Viskauskas v. Niland*<sup>73</sup> whether New South Wales legislation prohibiting discrimination on the ground of race<sup>74</sup> was consistent with the federal legislation, such that the two Acts could operate concurrently. The High Court held that the federal Act was intended to "cover the field" of racial discrimination in fulfillment of Australia's obligations under the Convention, and that it accordingly left no room for the operation of the state Act.

It soon became apparent, however, that the Commonwealth Parliament had not intended to exclude the operation of state anti-discrimination law. Within a week of the High Court's judgment an amendment was introduced into the House of Representatives to reduce the coverage of the federal Act.<sup>75</sup> During its passage through the House, the Minister for Trade, Mr. Bowen, stated that federal measures should not impinge upon constructive developments that had taken place in some states in the field of anti-discrimination law.<sup>76</sup> Accordingly, section 6A was inserted in the

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an area of particular concern to the [s]tates and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However, the Commonwealth does not accept that it is appropriate for the Commonwealth to commit itself in a general way not to legislate in areas that are constitutionally subject to Commonwealth power.

<sup>71</sup> *Racial Discrimination Convention*, *supra* note 46, 1975 Austl. T.S. No. 40. The Convention entered into force for Australia on Oct. 30, 1975.

<sup>72</sup> *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168 (1982).

<sup>73</sup> 153 C.L.R. 280 (1983).

<sup>74</sup> §§ 6-22 Anti-Discrimination Act, No. 48 (N.S.W.) (1977). The Act also proscribes discrimination on other grounds (e.g. sex, marital status), but only the provisions relating to racial discrimination were impugned in the case.

<sup>75</sup> See Racial Discrimination Amendment Act, No. 38 (1983).

<sup>76</sup> PARL. DEB., H. R., 923-24 (May 25, 1983).

federal Act, and stipulated that "[t]his Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a [s]tate or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act."

The effect of this provision was considered by the High Court in *University of Wollongong v. Metwally*,<sup>77</sup> where it was held that the provision did not cure the inconsistency between the federal and state anti-discrimination laws prior to the commencement of section 6A of the federal Act. However, the prospective operation of section 6A was not expressly considered by the Court and it has generally been assumed that the federal Act and the New South Wales anti-discrimination legislation are now capable of standing side by side as cooperative implementation of Australia's obligations under the Convention.<sup>78</sup> Today most states have anti-discrimination legislation of the kind considered in *Viskauskas v. Niland*, and the coexistence of federal and state legislation implementing international conventions has become commonplace in the field of human rights.<sup>79</sup>

The reliance on state legislation to implement Australia's treaty obligations was for many years reflected in Australia's practice of seeking the inclusion of federal clauses in international treaties.<sup>80</sup> One federal clause commonly advocated by Australia limited Australia's international obligations whenever the provisions of the relevant convention fell within the legislative jurisdiction of the constituent states of the federation. In such a case, the federal government was obliged only to bring the convention provisions to the notice of the relevant state authorities with a recommendation that they be adopted. The pursuit of federal clauses in international negotiations was strongly advocated in 1976 by the newly elected conservative federal government. Following a policy of cooperative federalism, the federal Guidelines on Treaty Consultation (1977)

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<sup>77</sup> 158 C.L.R. 447 (1984).

<sup>78</sup> Cf. Greg McCarry, *Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws*, 63 AUSTL. L.J. 327 (1989).

<sup>79</sup> E.g., the preamble to the Anti-Discrimination Act, No. 85 (Queensl.) (1991) states that the Queensland Parliament supports the Commonwealth's ratification of international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination. After acknowledging the existence of federal legislation in fulfillment of Australia's obligations under these instruments, the preamble stipulates that state legislation is necessary to extend the federal legislation, to apply it consistently throughout the state and to ensure that determinations of unlawful conduct are enforceable in courts of law.

<sup>80</sup> Henry Burmester, *Federal Clauses: An Australian Perspective*, 34 INT'L & COMP. L.Q. 522 (1985).

provided that "federal clauses will be sought to be included in treaties in appropriate cases."<sup>81</sup> State governments strongly supported this policy because it was perceived to be a commitment on the part of the Commonwealth to rely on state legislation in areas of traditional state concern. With a change of federal government in 1983, the policy of seeking the inclusion of federal clauses was abandoned, and this remains the position today.<sup>82</sup>

There were several reasons for this change in policy. First, the High Court's decision in *Tasmanian Dam*<sup>83</sup> in 1983 effectively deprived the Commonwealth of the constitutional basis for pressing for the inclusion of federal clauses in international treaty negotiations. There was no longer uncertainty about the competence of the federal Parliament to implement Australia's treaty obligations, and any claim that the subject matter of a treaty fell solely within the legislative jurisdiction of states was thus disingenuous. Secondly, Australia met with limited success in pursuing its claims for federal clauses during the period in which that was government policy. The international community disfavoured federal clauses because they detracted from the mutuality of treaty obligations; countries with a federal system of government were able to plead the deficiencies of their internal constitutional arrangements to lessen their obligations vis á vis other countries. Moreover, as many treaty negotiations demonstrated, Australia could not always rely on the support of other federations because each sought a federal clause in terms appropriate to its own domestic position. Thirdly, the negotiation of such clauses consumed a significant amount of time and effort and diverted resources from the pursuit of

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<sup>81</sup> *Id.* at 530.

<sup>82</sup> The current Principles and Procedures for Commonwealth-State Consultation on Treaties (1992) state that "[t]he Commonwealth does not favour the inclusion of federal clauses in treaties and does not intend to instruct Australian delegations to seek such inclusion." However, notwithstanding the disfavour with which the federal government currently regards federal clauses, a practice has developed of making a unilateral "federal statement" on signing or ratifying certain treaties. The statement is generally in the following terms:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between its central, [s]tate and territory authorities. The implementation of the treaty throughout Australia will be effected by the Federal, [s]tate and Territory governments having regard to their respective constitutional powers and arrangements concerning their exercise.

The statement is generally made where it is intended that the states will play a role in the legislative implementation of the treaty. An example of the use of the federal statement is Australia's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, No. 9 (1983).

<sup>83</sup> 158 C.L.R. 1 (1983).

more substantive issues in treaty negotiation.<sup>84</sup>

There is no doubt that reliance on state legislation for the implementation of some treaty obligations has been important in maintaining harmonious relations between state and federal governments. However, there is equally little doubt that it has given rise to considerable difficulties, which are elaborated in the case studies and the conclusion in Parts V, VI and VII below. These difficulties include uncertainties of constitutional interpretation; delays in assuming or fulfilling international treaty obligations; lack of uniformity in Australian implementing legislation; and the danger of a state placing Australia in breach of its international obligations by legislating inconsistently with the treaty.

#### IV. THE ROLE OF THE COURTS

The Australian court system is a complex one that reflects the federal nature of the Constitution.<sup>85</sup> Each state and territory has its own system of superior courts and there is also a system of federal courts comprising a number of specialized tribunals and the High Court of Australia.<sup>86</sup> Despite these separate state and federal court structures, in many respects the Australian judiciary operates as a unified court system. This is because the High Court serves as a general court of appeal for federal and non-federal matters,<sup>87</sup> state courts are invested with federal jurisdiction<sup>88</sup> and the jurisdiction of federal courts and superior state courts is cross-vested pursuant to a nationwide statutory scheme.<sup>89</sup> The importance of this for present purposes is that questions pertaining to Australia's treaty obligations may arise and be dealt with in any Australian court, be it a state, territory or federal court.

In order to understand the role of the courts in respect of Australia's treaty obligations it is necessary to distinguish between the courts' function in reviewing executive action in relation to the conduct of foreign affairs, and its role in superintending the implementation of treaties in Australia. The former is principally concerned with the extent

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<sup>84</sup> Burmester, *supra* note 80, at 536-37; Principles and Procedures for Commonwealth-State Consultation on Treaties (1992).

<sup>85</sup> See JAMES CRAWFORD, AUSTRALIAN COURTS OF LAW 23-57 (3d ed. 1993).

<sup>86</sup> The federal courts, with dates of their establishment, are: the High Court of Australia (1903), the Family Court of Australia (1975), the Federal Court of Australia (1976) and the Industrial Relations Court of Australia (1994).

<sup>87</sup> AUSTL. CONST. ch. III, § 73.

<sup>88</sup> AUSTL. CONST. ch. III, § 77 (iii), and Judiciary Act, AUSTL. C. ACTS No. 6, § 39(2) (1903).

<sup>89</sup> See Jurisdiction of Courts (Cross-vesting) Act, No. 24 (1987), and cognate state and territory legislation.

to which the courts are willing to supervise the treaty-making power of the executive, while the latter is concerned with the use that courts make of treaties in interpreting and developing domestic law.

#### A. *Supervision of the Treaty-Making Power*

Judicial supervision of the executive's treaty-making power reflects an underlying tension between the function of the courts as guardians of the Constitution, on the one hand, and an attitude of self-restraint in reviewing the conduct of the political arms of government, on the other. As the United States Supreme Court observed in *Baker v. Carr*,<sup>90</sup> "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," but finding the appropriate balance is often a difficult task.

In their role as interpreters of the Constitution, Australian courts have occasionally been willing to adjudicate on the question of whether the treaty actions of government fall within the scope of the federal executive power conferred by section 61 of the Constitution.<sup>91</sup> Thus an allegation of lack of constitutional power is one for judicial determination, though a question that goes merely to the propriety of the executive's action within the scope of its constitutional powers over foreign relations is not justiciable. The High Court, in particular, has been vigilant in maintaining its role as final arbiter of the meaning of the Constitution.<sup>92</sup>

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<sup>90</sup> 369 U.S. 186, 211 (1962).

<sup>91</sup> See, e.g., *Barton v. Commonwealth*, 131 C.L.R. 477 (1974); *Re Ditford ex parte Deputy Comm'r of Taxation (N.S.W.)*, 83 A.L.R. 265, 285-86 (1988). However, courts are often reluctant to decide such questions unless it is necessary to do so. E.g., in *Horta v. Commonwealth*, 123 A.L.R. 1 (1994), certain Australian residents from East Timor argued that the Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, Austl.-Indon., 1991 Austl. T.S. No. 9, was not within the executive power of the Commonwealth because the treaty was void under international law. The basis of the claim was that, in concluding a treaty with Indonesia relating to the use of maritime areas adjacent to the coast of the disputed territory of East Timor, Australia had violated the right of the East Timorese people to self-determination and permanent sovereignty over their natural resources. The Court went to some lengths to avoid having to decide whether the plaintiffs' allegations were justiciable, and rejected the claim on other grounds.

<sup>92</sup> E.g., in *Bonser v. La Macchia*, 122 C.L.R. 177, 193 (Barwick, C.J.), 207 (Kitto, J.), 217 (Windeyer, J.) (1969), several judges stated emphatically that it was for the High Court, and not the executive, to determine the extent of "Australian waters" for the purpose of interpreting federal legislative power over "fisheries in Australian waters beyond territorial limits" within § 51(x) of the Constitution. The High Court's central role arises from the circumstance that the Court has original, but not exclusive, jurisdiction in any matter arising under the Constitution or involving its interpretation.

In contrast to this constitutional role, courts are often cautious in reviewing the exercise of the executive's treaty-making power. Through the use of numerous doctrines of self-restraint, courts frequently defer to the decisions of other branches of government in the field of foreign affairs. In this context it has frequently been observed that matters arising out of the conduct of Australia's international relations are non-justiciable<sup>93</sup> because review of the executive's decisions to enter into treaties would undermine the executive's effective control of foreign policy.<sup>94</sup>

There are several techniques by which Australian courts decline to review the actions of the executive branch of government in matters of foreign affairs. Among these are the political question doctrine, restrictions on a person's standing to sue and deference to executive certificates. Under the political question doctrine, a court will decline to adjudicate an overtly political question that might take the court beyond its true function and into the province of other branches of government.<sup>95</sup> In one

AUSTL. CONST. ch. III, § 76(i) and Judiciary Act, AUSTL. C. ACTS No. 6, § 30 (1903). Moreover, any such matter pending in another court may be removed into the High Court for determination. Judiciary Act, AUSTL. C. ACTS No. 6, § 40 (1903).

<sup>93</sup> Minister for Arts, Heritage and Env't v. Peko-Wallsend Ltd., 75 A.L.R. 218, 253 (1987). See also Peter Cane, *Prerogative Acts, Acts of State and Justiciability*, 29 INT'L & COMP. L.Q. 680 (1980).

<sup>94</sup> See *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168, 229 (Mason, J.) (1982). This approach is similar to that taken by courts in the U.K. In *Blackburn v. Attorney-General*, 1 W.L.R. 1037 (1971), Lord Denning M.R. remarked, when reviewing the executive's pending decision to become a party to the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, that:

[t]he treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts.

*Id.* at 1040.

<sup>95</sup> *Gerhardy v. Brown*, 159 C.L.R. 70, 138-39 (Brennan, J.) (1985); Alex C. Castles, *Justiciability: Political Questions*, in *LOCUS STANDI* 202 (Leslie A. Stein ed., 1979); see generally Geoffrey Lindell, *The Justiciability of Political Questions: Recent Developments*, in *AUSTRALIAN CONSTITUTIONAL PERSPECTIVES* 180 (H.P. Lee & George Winterton eds., 1992) (examining the political questions doctrine and its relevance in the U.S. and elsewhere). Under the Australian Constitution, courts exercising federal jurisdiction may only adjudicate "matters," as that term is understood in its constitutional setting. AUSTL. CONST. ch. III, §§ 75-77. Like the analogous term "cases and controversies" in art. III, § 2(1) of the U.S. Constitution, the notion of a "matter" has excluded the adjudication of overtly political questions. For a critique of the U.S. political question doctrine, see Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY*,

case an applicant sought a declaration from the High Court that certain federal Ministers were acting in breach of international human rights standards and in breach of the Australian Constitution in failing to impose an embargo on the sale of arms to "repressive" foreign governments.<sup>96</sup> In the course of dismissing an allied claim, Justice Brennan stated that it was essential to understand that courts performed a different function to the executive, and that the applicant had mistaken the branch of government to which his plea must be directed.<sup>97</sup>

A second mechanism for limiting review of foreign affairs decisions stems from the common law rules relating to standing to sue.<sup>98</sup> Under the law relating to standing, a member of the public who has no greater interest than any other person in upholding the law has no standing to prevent the violation of a public right or to enforce the performance of a public duty.<sup>99</sup> A mere intellectual or emotional concern does not suffice to give a person standing to sue; rather, the person must have a "special interest in the subject matter of the action."<sup>100</sup> These rules have special bearing on judicial review of foreign affairs decisions. In the absence of implementing legislation, dealings between Australia and foreign States will not normally create rights for or impose obligations on individuals.<sup>101</sup> Accordingly, it may be difficult for a plaintiff to demonstrate the special interest that makes his or her claim rise above those of other ordinary members of the public.<sup>102</sup>

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AND FOREIGN AFFAIRS 79-91 (1990).

<sup>96</sup> Re Limbo, 64 A.L.J.R. 241 (1989).

<sup>97</sup> *Id.* at 242-43.

<sup>98</sup> See Castles, *supra* note 95; AUSTRALIAN LAW REFORM COMMISSION, REP. NO. 27, STANDING IN PUBLIC INTEREST LITIGATION, (1985); Henry Burmester, *Locus Standi in Constitutional Litigation*, in AUSTRALIAN CONSTITUTIONAL PERSPECTIVES, *supra* note 95, at 148.

<sup>99</sup> Australian Conservation Found. v. Commonwealth, 146 C.L.R. 493 (1980); Onus v. Alcoa of Austl. Ltd., 149 C.L.R. 27 (1981); Davis v. Commonwealth, 61 A.L.J.R. 32 (1986).

<sup>100</sup> In 1985 the Australian Law Reform Commission recommended that the law relating to standing be liberalized, and that any person should have standing to initiate public interest litigation unless a court finds that the person instituting proceedings is "merely meddling." AUSTRALIAN LAW REFORM COMMISSION, *supra* note 98, at xxi.

<sup>101</sup> Ingram v. Commonwealth, 54 A.L.J.R. 395 (1980); Simsek v. Macphee, 148 C.L.R. 636 (1982); Tasmanian Wilderness Society Inc. v. Fraser, 153 C.L.R. 270, 274 (Mason, J.) (1982).

<sup>102</sup> This was demonstrated in Ingram v. Commonwealth, 54 A.L.J.R. 395 (1980). In that case the plaintiff sought a declaration from the High Court to the effect that the Commonwealth and the Minister for Foreign Affairs were in breach of international law by supporting the SALT II Treaty between the U.S. and the former U.S.S.R. See



A final restriction on the role of the courts in reviewing the conduct of Australia's foreign affairs arises from the deference paid by the judiciary to certificates issued by the federal executive indicating its attitude to certain matters relating to Australia's foreign affairs.<sup>103</sup> At common law, executive certificates are generally regarded as conclusive of the facts stated in them,<sup>104</sup> in the sense that evidence is not admissible to contradict the certificates and certificates cannot be questioned in proceedings for judicial review.<sup>105</sup> Judicial obeisance to such certificates is intended to avoid the courts and the executive speaking with different voices on matters pertaining to the country's foreign affairs.

### B. *The Use of Treaties in Domestic Law*

Australian courts may have regard to a treaty to which Australia is

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Treaty on the Limitation of Strategic Offensive Arms (SALT II), June 18, 1979, U.S.-U.S.S.R. (signed but not ratified), S. EXEC. DOC., 96th Cong., 1st Sess. (1979), reprinted in 18 INT'L LEGAL MATERIALS 1138 (1979). The basis of the claim was the plaintiff's belief that the SALT II Treaty enhanced the danger of nuclear war and conflicted with the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161, 1973 Austl. T.S. No. 3, to which Australia is a party. In striking out the claim, Gibbs, A.C.J., acknowledged the plaintiff's deep concern for the issues in question, but denied that they amounted to a special interest because "an interest is not special if it is one which is shared with the public at large." *Ingram*, 54 A.L.J.R. at 397. Accordingly, the alleged breach of international law was not a matter justiciable in Australian courts at the suit of a private citizen who could show neither a breach of his private rights nor a special interest in vindicating a public right.

<sup>103</sup> There are many matters about which the executive may issue certificates. These include the existence or recognition of a foreign state, the recognition of a person as a diplomatic agent or consular officer, the existence of a state of war and the extent of territorial claims.

<sup>104</sup> A.B. Lyons, *The Conclusiveness of the Foreign Office Certificate*, 23 BRIT. Y.B. INT'L L. 240 (1946); W.R. Edeson, *Conclusive Executive Certificates in Australian Law*, 7 AUSTL. Y.B. INT'L L. 1, 16 (1981); Colin Warbrick, *Executive Certificates in Foreign Affairs: Prospects for Review and Control*, 35 INT'L & COMP. L.Q. 138 (1986).

<sup>105</sup> *Re Ditford; ex parte Deputy Comm'r of Taxation (N.S.W.)*, 83 A.L.R. 265, 285 (1988). The importance of this issue is probably in decline. The federal Parliament has increasingly given legislative foundation to executive certificates in terms that indicate that certificates are only evidence of the facts stated in the certificate and are not conclusive. See also Diplomatic Privileges and Immunities Act, AUSTL. C. ACTS No. 16, § 14 (1967); Consular Privileges and Immunities Act, AUSTL. C. ACTS No. 62, § 12 (1972); International Organisations (Privileges and Immunities) Act, AUSTL. C. ACTS No. 50, § 11 (1963); Crimes (Internationally Protected Persons) Act, AUSTL. C. ACTS No. 8, § 14 (1976); *Duff v. R.*, 39 F.L.R. 315, 356 (1979). In contrast to these provisions, some recent federal legislation retains the common law practice of exclusive executive certification; see, e.g., Foreign State Immunities Act, No. 196, § 40 (1985).

a party both when the treaty has been incorporated into domestic law through appropriate legislation and, in some circumstances, when it has not been incorporated.<sup>106</sup> This reflects a general principle of statutory construction that, in cases of ambiguity, courts should favour a construction that accords with Australia's international treaty obligations.<sup>107</sup>

When a treaty has been implemented by means of federal legislation, federal law expressly identifies the use that may be made of the treaty in interpreting the implementing legislation. In particular, section 15AB of the Acts Interpretation Act 1901 permits reference to a treaty referred to in an Act where this is necessary to resolve an ambiguity or obscurity in the legislation, or where the ordinary meaning of the legislation leads to a result that is manifestly absurd or unreasonable. However, the courts have tended to take a rather narrow view of section 15AB in holding that, where there is no ambiguity in the text of the legislation, a doubt cannot be created by reference to the treaty itself.<sup>108</sup> When a treaty has been implemented by means of state legislation, section 15AB is inapplicable, but it would appear that reference can still be made to the relevant treaty under common law principles of statutory interpretation.<sup>109</sup> Additionally, it is clear that when courts have occasion to refer to a treaty, international law rules of treaty interpretation rather than domestic rules of statutory construction should be applied.<sup>110</sup>

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<sup>106</sup> See INTERNATIONAL LAW ASSOCIATION, AUSTRALIAN BRANCH, REPORT ON INTERNATIONAL LAW IN MUNICIPAL COURTS (1993) (on file with authors).

<sup>107</sup> *Chu Kheng Lim v. Minister for Immigration*, 176 C.L.R. 1, 38 (Brennan, Deane & Dawson JJ.) (1992) (considering the detention of persons pending determination of refugee status).

<sup>108</sup> See *I.C.I. Australia Operations Pty. Ltd. v. Fraser*, 106 A.L.R. 257, 262-63 (1992); *Minister for Foreign Affairs and Trade v. Magno*, 112 A.L.R. 529, 534-35 (Gummow, J.) (1992).

<sup>109</sup> See *R. v. Home Secretary; ex parte Brind*, 1 A.C. 696, 747-48 (Lord Bridge of Harwich) (1991); D.C. PEARCE & R.S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 42-45 (3d ed. 1988).

<sup>110</sup> See *Shipping Corp. of India Ltd. v. Gamlen Chem. Co. (A/Asia) Pty. Ltd.*, 147 C.L.R. 142, 159 (1980) (interpretation of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155, as amended); *Tasmanian Dam*, 158 C.L.R. 1, 94 (Gibbs, C.J.), 222 (Brennan, J.) (1983) (interpretation of World Heritage Convention); *Thiel v. Federal Comm'r of Taxation*, 171 C.L.R. 338, 349 (Dawson, J.), 356 (McHugh, J.) (1990) (interpretation of Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income, Feb. 28, 1980, Austl.-Switz., 1981 Austl. T.S. No. 5); *S.S. Pharmaceutical Co. v. Qantas Airways*, 22 N.S.W.L.R. 734 (1988) (interpretation of the International Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 137 L.N.T.S. 11), *aff'd* 1 Lloyd's Rep. 288 (1991).

When a treaty has not been implemented in Australia by domestic legislation, the situation is more subtle. It is a well-settled principle that an unincorporated treaty has no direct legal effect upon the rights and duties of Australian citizens and that a treaty does not become a part of Australian law merely by virtue of its ratification by the executive.<sup>111</sup> However, this does not mean that an unincorporated treaty is of no effect whatever. In recent years there has been a growing tendency for Australian courts to have regard to norms established by international treaties for the purpose of deciding cases where domestic law, be it constitutional, statute or common law, is uncertain or incomplete.<sup>112</sup> This trend has been most pronounced in relation to universal human rights norms established by the numerous conventions and covenants concluded since the Second World War.<sup>113</sup> The willingness of the courts to have regard to international developments represents a marked departure from the

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<sup>111</sup> *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168, 224-25 (1982). This position may be contrasted with the position in the U.S., where some treaties are self-executing and create rights and liabilities without the need for legislation by Congress.

<sup>112</sup> Unincorporated treaties may be used by the courts for other purposes. Thus courts have sometimes held that the provisions of an unincorporated treaty must be taken into account by federal administrative decisionmakers in exercising a discretion conferred on them by statute. *E.g.*, in *Teoh v. Minister for Immigration, Local Gov't and Ethnic Affairs*, 121 A.L.R. 436 (1994), the appellant, a Malaysian citizen, had been refused residency status in Australia by a delegate of the Minister in circumstances that would have caused the appellant to be separated from his wife and children, who were all Australian citizens. On appeal, the Federal Court upheld the appellant's claim that he had been denied natural justice because of the delegate's failure to take into account the effect of the decision on the children. In the Court's opinion, at 443 (Black, C.J.), 449-50 (Lee, J.), 466 (Carr, J.), the delegate ought to have considered the principles set out in the Convention on the Rights of the Child, Nov. 20, 1989, 1991 Austl. T.S. No. 4, which Australia ratified on Dec. 17 1990, but which had not relevantly been made part of domestic law. In the words of Justice Lee:

ratification of the Convention by the executive was a statement to the national and international community that the Commonwealth recognised and accepted the principles of the Convention. That statement provided parents and children . . . with a legitimate expectation that [Commonwealth] actions would be conducted in a manner which adhered to the relevant principles of the Convention. . . . After executive ratification of the Convention persons exercising delegated administrative powers to make decisions which concerned children were expected to apply the broad principles of the Convention in so far as it was consonant with the national interest and not contrary to statutory provisions to do so.

*Id.* at 449-50. *See also* *Gunaleela v. Minister for Immigration and Ethnic Affairs*, 74 A.L.R. 263, 280 (1987) (examining subject matter, scope and purpose of Migration Act 1958).

<sup>113</sup> This issue assumes considerable importance in Australia, where there is neither a constitutional nor statutory Bill of Rights.

insularity that has characterised the judiciary's attitude toward sources of Australian law in the past. This change of attitude has been encouraged in Commonwealth countries by statements such as the Bangalore Principles,<sup>114</sup> which declare that:

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.<sup>115</sup>

For some time, the cause of the Bangalore Principles was prosecuted by only a few judges in Australia.<sup>116</sup> However, in 1992 the High Court gave its imprimatur to the use of unincorporated treaties in *Mabo v. Queensland [No. 2]*.<sup>117</sup> In that case Justice Brennan, with whom Chief

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<sup>114</sup> The Principles were established at a high-level judicial colloquium on the domestic application of international human rights norms, held at Bangalore, India, on Feb. 24-26, 1988. See *Miscellaneous, Some Notes, The Bangalore Principles on the "Domestic Application of International Human Rights Norms,"* 14 COMMONWEALTH L. BULL. 1196 (1988). For a personal reflection on the influence of the Bangalore Principles on the exercise of the judicial function, see Kirby, *supra* note 22.

<sup>115</sup> Justice M.D. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514 app. at 531-32 (1988).

<sup>116</sup> Principally among them was the President of the New South Wales Court of Appeal, Justice Kirby. See *Daemar v. Industrial Comm'n of New South Wales*, 12 N.S.W.L.R. 45, 53 (1988) (considering international obligations in a bankrupt's right of access to courts); *S & M Motor Repairs Pty. Ltd. v. Caltex Oil (Austl.) Pty. Ltd.*, 12 N.S.W.L.R. 358, 360-61 (1988) (recognizing international obligations in the independence and impartiality of judiciary); *Jago v. District Court of New South Wales*, 12 N.S.W.L.R. 558, 569-70 (1988) (recognizing the international right of accused to a speedy trial), *aff'd*, 168 C.L.R. 23 (1989); *Gradidge v. Grace Bros. Pty. Ltd.*, 93 F.L.R. 414, 422 (1988) (recognizing the right of litigant to court interpreter in civil proceedings); *Cachia v. Hanes*, 23 N.S.W.L.R. 304, 312-13 (1991) (recognizing the recoverability of cost of legal representation); *Gill v. Walton*, 25 N.S.W.L.R. 190, 206 (1991) (recognizing the double jeopardy in disciplinary proceedings against a medical practitioner); *Smith v. R.*, 25 N.S.W.L.R. 1, 15 (1991) (recognizing the reasonableness of fine for contempt of court); *R. v. Greer*, 62 A. Crim. R. 442, 450-51 (1992) (recognizing the right to legal representation in criminal trials); *R. v. Astill*, 63 A. Crim. R. 148, 157-58 (1992) (recognizing the right of accused to question witnesses whose evidence might be exculpatory); *Director of Pub. Prosecutions (Cth) v. Saxon*, 28 N.S.W.L.R. 263, 274 (1992) (recognizing the right of accused to use of property for defence of criminal proceedings).

<sup>117</sup> 175 C.L.R. 1 (1992). In earlier cases, Justice Murphy had been a largely solitary

Justice Mason and Justice McHugh concurred, stated that:

The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>118</sup>

The use now made of unincorporated treaties in Australia, and the limitations on that use, may be illustrated by reference to a High Court decision delivered shortly after *Mabo*. In *Dietrich v. R.*,<sup>119</sup> the Court had to consider whether the common law recognised the right of an accused person to legal representation in a criminal trial. The accused in that case was charged under federal law with the offence of importing a trafficable quantity of heroin into Australia. His applications for public legal assistance were unsuccessful, and he was consequently unrepresented at trial, where he was duly convicted. On appeal to the High Court, the accused argued that one source of the right to legal representation at the expense of the State was to be found in Australia's obligations under the ICCPR.<sup>120</sup> The relevant provision of the Covenant had not been incorporated into Australian law by legislation. Nevertheless, in deciding whether the trial had miscarried by reason of the accused's lack of legal representation, a majority of the Court acknowledged that, where the common law is uncertain, judges may look to Australia's international treaty obligations as an aid to the explanation and development of the common law.<sup>121</sup> In

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voice on the High Court in upholding the relevance of international human rights standards in deciding domestic cases. See *Dowal v. Murray*, 143 C.L.R. 410, 429-30 (1978) (concerning custody of children); *McInnis v. R.*, 143 C.L.R. 575, 588 (1979) (concerning the right to legal representation in criminal trials); *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168, 238-40 (1982) (concerning proscription of racial discrimination).

<sup>118</sup> *Mabo*, 175 C.L.R. at 42.

<sup>119</sup> 177 C.L.R. 292 (1992). See also *Young v. Registrar*, Court of Appeal [No. 3], 32 N.S.W.L.R. 262 (1992).

<sup>120</sup> Art. 14(3) provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

ICCPR, *supra* note 10, at 176-77.

<sup>121</sup> *Dietrich*, 177 C.L.R. at 306 (Mason, C.J. & McHugh, J.), 321 (Brennan, J.), 360

the circumstances of the case, this principle did not assist the accused, since the Court was not being asked to resolve an uncertainty or ambiguity in domestic law, but to declare the existence of a right that had hitherto never been recognised. However, the majority of the Court went on to declare that the common law recognised the right of an accused to a fair trial, which might be jeopardized in particular cases by a lack of legal representation. It is difficult to resist the conclusion that the Court was influenced by the international developments in declaring this new common law right, even if the international developments were not determinative of the case at bar.

As *Dietrich v. R.* demonstrates, the move towards increasing judicial use of unincorporated international norms has been a cautious one. This may be in part for the pragmatic reason that many judges are still unfamiliar with relevant international instruments and the jurisprudence of international tribunals that interpret those instruments. However, the cautious attitude may also be for the principled reason that the judiciary should not usurp the function of the legislature by implementing indirectly provisions of international treaties, which the legislature has declined to implement directly.<sup>122</sup> It is for this reason that judges have generally looked to unincorporated treaties only when there is an acknowledged gap or ambiguity in existing law. Although little use has been made of unincorporated treaties outside the field of human rights, within that field judicial interpretation is increasingly likely to narrow the gulf between international norms and Australia's domestic law, notwithstanding the legislature's failure to implement some treaty provisions to which Australia has expressed its consent to be bound.

#### V. CASE STUDY: PROTECTION OF PROPERTY UNDER THE WORLD HERITAGE CONVENTION

During the 1980s the High Court of Australia considered various aspects of the Commonwealth Parliament's power over "external affairs."

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(Toohey, J.). Justice Brennan nonetheless dissented on the ground that it would be an unwarranted intrusion into the legislative and executive functions of government for the Court to declare a new common law entitlement to legal aid. *Id.* at 321. His Honour acknowledged, however, that the ICCPR was a "legitimate influence on the development of the common law" and a "concrete indication of contemporary values" of criminal justice. *Id.* Justice Dawson also dissented, stating that it was "not so clearly established" whether an unincorporated treaty could be used to resolve ambiguity in the common law, as opposed to statute. *Id.* at 349.

<sup>122</sup> See Justice Michael D. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514, 519-24 (1988); *Dietrich*, 177 C.L.R. at 315-26 (Brennan, J., dissenting) (1992).

In each case the question at issue was whether section 51(xxix) of the Australian Constitution conferred power upon the federal Parliament to implement the terms of a treaty to which Australia had become a party. In the first case, *Koowarta v. Bjelke-Petersen*,<sup>123</sup> the Court failed to reach a common view on this issue.<sup>124</sup> However, in 1983 the Court held in *Tasmanian Dam*<sup>125</sup> that the Commonwealth's power extended to the implementation of treaties to which Australia was a party without the need to demonstrate any particular international obligation upon Australia to legislate on the subject matter of the treaty.<sup>126</sup> In two subsequent decisions, *Tasmanian Forests*<sup>127</sup> and *Daintree Rainforest*,<sup>128</sup> the High Court further expanded the scope of the external affairs power. A common link between the latter three cases, apart from the Commonwealth's reliance on the external affairs power, was that in each case the Commonwealth was seeking to protect an area of property which had been placed on the World Heritage List. The List, maintained by the World Heritage Committee, creates a protective regime for significant areas of the world's cultural and natural heritage under the World Heritage

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<sup>123</sup> 153 C.L.R. 168 (1982).

<sup>124</sup> See Current Topics, *The Plentitude of the External Affairs Power*, 56 AUSTL. L.J. 381 (1982); P.H. Lane, *The Federal Parliament's External Affairs Power: Koowarta's Case*, 56 AUSTL. L.J. 519 (1982).

<sup>125</sup> 158 C.L.R. 1 (1983).

<sup>126</sup> See MICHAEL COPER, *THE FRANKLIN DAM CASE* (1983); *THE SOUTH WEST DAM DISPUTE: THE LEGAL AND POLITICAL ISSUES* (M. Somarajah ed., 1983); Byrnes & Charlesworth, *supra* note 37; Crock, *supra* note 37; John Goldring, *Initial Reactions to the Dam Case: Dams or Floodgates?*, 8 LEGAL SERVICE BULL. 156 (1983); P.H. Lane, *The Federal Parliament's External Affairs Power: The Tasmanian Dam Case*, 57 AUSTL. L.J. 554 (1983); Philip McNamara, *The Implementation of Treaties in Australia*, 24 ARCHIV DES VOLKERRECHTS 41 (1986); Geoffrey Sawer, *The External Affairs Power*, 14 FED. L. REV. 199 (1984); Philip Tighe, *Environmental Values, Legalism and Judicial Rationality: The Tasmanian Dam Case and Its Broader Political Significance*, 4 ENVTL. & PLAN. L.J. 134 (1987).

<sup>127</sup> 164 C.L.R. 261 (1988). See Donald R. Rothwell, *Dams, Forests and More External Affairs: A Case Note on Richardson v. Forestry Commission (Tas)*, 18 QUEENSL. L. SOC'Y. J. 507 (1988); J.G. Starke, *A Major Extension of the Commonwealth Parliament's External Affairs Power*, 62 AUSTL. L.J. 319 (1988); B. Martin Tsamenyi & Juliet Bedding, *The World Heritage Convention in the High Court: A Commentary on the Tasmanian Forests Case*, 5 ENVTL. & PLAN. L.J. 232 (1988).

<sup>128</sup> 167 C.L.R. 232 (1989). See E.K. Christie, *The Daintree Rainforest Decision and its Implications: Comment*, 20 QUEENSL. L. SOC'Y. J. 223 (1990); Thomas H. Edmonds, *The Queensland Rainforest and Wetlands Conflict: Australia's External Affairs Power - Domestic Control and International Conservation*, 20 ENVTL. L. 387 (1990); Donald R. Rothwell, *The Daintree Rainforest Decision and its Implications*, 20 QUEENSL. L. SOC'Y. J. 19 (1990).

Convention.<sup>129</sup> The impact of these three decisions (hereinafter *World Heritage Cases*) was that, as a result of the combination of the High Court's expanded interpretation of the external affairs power and the opportunity that the World Heritage Convention gave to the Commonwealth Parliament to protect certain areas of Australia, areas within the limits of a state could fall under substantial Commonwealth control if they had World Heritage characteristics. This had substantial implications for Australian federalism because the Commonwealth Parliament had never before been able to legislate comprehensively in respect of state properties in reliance on an international treaty. The Commonwealth Parliament also gained expanded powers over the environment.<sup>130</sup>

#### A. *The World Heritage Convention*

The World Heritage Convention was adopted by the United Nations Education, Scientific and Cultural Organisation (hereafter UNESCO) General Conference at its 17th session in Paris on November 16, 1972. The Convention entered into force in 1975 and, as of July 1994, had 138 parties.<sup>131</sup> The Convention provides for the identification and protection of the world's cultural and natural heritage.<sup>132</sup> Each State Party to the Con-

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<sup>129</sup> See Convention for the Protection of World Cultural and National Heritage *supra* note 9.

<sup>130</sup> See James Crawford, *The Constitution and the Environment*, 13 SYDNEY L. REV. 11 (1991).

<sup>131</sup> For a general review of the Convention and its operation, see Ben Boer, *World Heritage Listings in Australia*, 7 J. ENVTL. L. & LITIG. 247, 249-56 (1992); Ralph O. Slatyer, *The Origin and Evolution of the World Heritage Convention*, 12 AMBIO 138 (1983); Keith D. Suter, *The UNESCO World Heritage Convention*, 8 ENVTL. & PLAN. L.J. 4 (1991).

<sup>132</sup> These terms are defined in art. 1 and 2 of the Convention for the Protection of World Cultural and National Heritage, *supra* note 9. Art. 1 provides:

For the purposes of this Convention, the following shall be considered as "cultural heritage":

monuments: architectural works, works of monumental sculpture and painting, elements of structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: the works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Article 2 provides:

For the purposes of this Convention, the following shall be considered as "natural



vention is "to identify and delineate the different properties situated on its territory" which constitute either the world's cultural or natural heritage.<sup>133</sup> Once properties have been identified, the contracting party that has the properties within its territory has the "duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage."<sup>134</sup> To that end, the obligations imposed on a contracting party can include taking "appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage."<sup>135</sup>

Every contracting Party to the Convention is required to submit to the World Heritage Committee<sup>136</sup> an inventory of property which is part of the cultural or natural heritage for inclusion on the World Heritage List.<sup>137</sup> The List is to contain not only those properties forming part of the world's cultural or natural heritage as defined in the Convention, but also those properties considered by the Committee to possess "outstanding universal value in terms of such criteria as it shall have established."<sup>138</sup> The Convention makes clear that the List is not exhaustive, and a property that has not been included, but nonetheless meets World Heritage criteria, is still subject to protection.<sup>139</sup> Apart from the status that a property receives from inclusion on the World Heritage List, the only benefit bestowed on such properties by the Convention is the eligibility of a State Party for special assistance to secure the "protection, conservation, presentation or rehabilitation of such property."<sup>140</sup> The principal aims of the Convention are therefore to ensure that State Parties take

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heritage":

natural features consisting of physical and biological formations or groups of such formations which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

<sup>133</sup> *Id.* art. 3.

<sup>134</sup> *Id.* art. 4.

<sup>135</sup> *Id.* art. 5(d).

<sup>136</sup> This Committee is established by art. 8. *Id.* at art. 8.

<sup>137</sup> *Id.* art. 11.

<sup>138</sup> *Id.* art. 11(2). The inclusion of property on the List requires the consent of the State concerned. *Id.* art. 11(3).

<sup>139</sup> *Id.* arts. 11(1) and 12.

<sup>140</sup> *Id.* art. 13(1).

steps to conserve and protect properties that form part of the world's cultural or natural heritage, and to provide special assistance to properties included on the World Heritage List.

Australia was one of the first States to ratify the Convention<sup>141</sup> and has since been an active supporter of the Convention.<sup>142</sup> Notwithstanding that potential World Heritage sites may lie within the geographic boundaries of an Australian state and territory, only the State Party to the Convention has responsibility for bringing forward nominations to the World Heritage Committee. This responsibility has therefore been taken up by the Commonwealth government in Australia. There are currently ten Australian properties on the World Heritage List.<sup>143</sup> Five of these had been listed by 1982 without any major dispute from the state or territorial governments, and in most cases the listings had been supported by these governments.

## B. *The Convention in the High Court*

### 1. Tasmanian Dam Case

In 1982 the Commonwealth government, in cooperation with the Tasmanian government, successfully nominated an area in southwest Tasmania, known as the Western Tasmanian Wilderness National Parks, for inclusion on the World Heritage List. The Commonwealth did not immediately move to protect the area, but preferred to allow continued management by Tasmania.<sup>144</sup> However, not long thereafter it was announced that the Tasmanian Hydro-Electric Commission, an instrumentality of the Tasmanian government, planned to build a dam on an area of the Franklin River, which fell within the World Heritage site. This resulted in con-

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<sup>141</sup> Australia ratified the Convention on Aug. 22, 1974.

<sup>142</sup> *E.g.*, Australia served as a member of the World Heritage Committee from 1976-83 and 1985-89.

<sup>143</sup> These properties are, noting their location and date of listing: Great Barrier Reef (Queensl. 1981); Kakadu National Park (N. Terr. 1981, extended in 1987 and 1992); Willandra Lakes Region (N.S.W. 1981); Lord Howe Island Group (N.S.W. 1982); Tasmanian Wilderness (Tas. 1982, extended 1989); Australian East-Coast Temperate and Sub-Tropical Rainforest Parks (N.S.W. 1986); Uluru-Kata Tjuta National Park (N. Terr. 1987); Wet Tropics of Queensland (Queensl. 1988); Shark Bay (W. Austl. 1991); Fraser Island (Queensl. 1992).

<sup>144</sup> At the time, some of the areas that fell within the site were National Parks. However, in Australia, National Parks are predominantly controlled by the states under state legislation. *See, e.g.*, National Parks and Wildlife Act, No. 47 (Tas.) (1970), National Parks and Wildlife Act, No. 80 (N.S.W.) (1974), National Parks Act, No. 8702 (Vict.) (1975).

siderable political controversy, and the protection of the area became a campaign issue during the 1983 federal election. The Australian Labor Party (hereafter A.L.P.) promised that, if elected, it would halt construction of the dam by exercising the Commonwealth's power over external affairs - a previously untested power in relation to environmental issues. Following its victory, the new A.L.P. government enacted the World Heritage Properties Conservation Act 1983. The Act, which is the only statute in the world enacted to ensure domestic implementation of the World Heritage Convention, was specifically aimed at halting construction of the dam.<sup>145</sup> By relying on the external affairs power, the Commonwealth sought to extend the operation of that power to an aspect of Australia's domestic and national affairs in a manner that had not previously been attempted.

The legislation was subjected to immediate challenge by Tasmania on the ground, *inter alia*, that it was beyond the Commonwealth Parliament's constitutional competence over external affairs to legislate on this matter.<sup>146</sup> Until this time, the external affairs power had been given a rather restricted interpretation. However, in 1982 the High Court indicated that a more liberal view was now favoured by some judges.<sup>147</sup> As a result, *Tasmanian Dam* gave rise to considerable legal and popular interest.<sup>148</sup> If the Court were to hold that the Commonwealth had broad powers to implement Australia's treaty obligations, a virtually limitless range of matters would come within Commonwealth power by virtue of the large range of topics dealt with in international treaties.

By a majority of four to three, the Court held that the World Heritage Properties Conservation Act 1983 was a valid exercise of the external affairs power. In doing so, the majority judges discarded the test adopted in *Koowarta* that a treaty had to be a matter of "international concern" before it could be used to support domestic implementing

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<sup>145</sup> Boer, *supra* note 131, at 260.

<sup>146</sup> The Commonwealth argued that the legislation was supported by other powers, namely ch. I, § 51(xx) - the power over trading corporations formed within the limits of the Commonwealth; and ch. I, § 51(xxi) - the power to make laws for the people of any race who it is deemed necessary to make special laws. AUSTL. CONST. In this instance it was argued that there were sites within the area of significance to Aboriginal Australians.

<sup>147</sup> *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168 (1982).

<sup>148</sup> Between the High Court's 1982 decision in *Koowarta* and its decision in *Tasmanian Dam* the following year, there was a change in the composition of the Court. Justice Stephen, whose view in *Koowarta* constituted the minimum position taken by the majority, had retired to become Governor-General of Australia, while Justice Aitkin had died. The new judges appointed to the court were Justices Deane and Dawson.

legislation.<sup>149</sup> The majority took the view that the external affairs power conferred authority on the Commonwealth to implement by legislation any international treaty to which Australia was a party. As noted by Justice Brennan:

a treaty obligation stamps the subject of the obligation with the character of an external affair unless there is some reason to think that the treaty had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament. Applying the test . . . the acceptance by Australia of an obligation under the Convention suffices to establish the power of the Commonwealth to make a law to fulfil the obligation.<sup>150</sup>

In adopting this expansive view of section 51(xxix) of the Constitution, the majority judges also indicated that they would not question the judgment of the government in entering into certain treaties, or in deciding to implement some treaties by way of domestic legislation and not others. As Justice Mason stated:

The fact of entry into, and of ratification of, an international convention, evidences the judgment of the executive and of Parliament that the subject-matter of the convention is of international character and concern and that its implementation will benefit Australia. Whether the subject-matter dealt with by the convention is of international concern, whether it will yield, or is capable of yielding, a benefit to Australia, whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the executive government for determination. The Court should accept and act upon the decision of the executive government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention.<sup>151</sup>

The decision of the High Court resulted in the proposed dam not being constructed and the World Heritage area in southwest Tasmania being subject to continued protection. The decision also substantially reinterpreted the extent of the external affairs power and made it possible

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<sup>149</sup> *Koowarta*, 153 C.L.R. 168, 216 (Stephen, J.) (1982).

<sup>150</sup> *Tasmanian Dam*, 158 C.L.R. 1, 218-19 (Brennan, J.). Some of the other majority judges took a more expansive view of whether or not there was a need to demonstrate the existence of an international obligation. See 158 C.L.R. 1, 127 (Mason, J.), 170-71 (Murphy, J.), 258 (Deane, J.) (1983).

<sup>151</sup> *Id.* at 125-26.

for the Commonwealth Parliament to legislate on a wide variety of matters dealt with in international conventions.

## 2. Tasmanian Forests Case

In 1987 the Commonwealth enacted the Lemnathyme and Southern Forests (Commission of Inquiry) Act 1987 for the purpose of establishing a Commission of Inquiry into the World Heritage values of certain forests in Tasmania, and implementing an interim protection regime over those forests while the inquiry was being conducted. The Commission was established as a result of concern over logging in the forests, and uncertainty over whether the areas were eligible for protection under the World Heritage Convention.<sup>152</sup>

Litigation resulted after the relevant Commonwealth Minister sought to enforce the provisions of the Act against the Tasmanian Forestry Commission and a private timber operator. A constitutional question was immediately raised and the matter went before the High Court.<sup>153</sup> The two major issues were whether the Commonwealth could rely on the World Heritage Convention to establish the Commission of Inquiry, and whether the terms of the Convention extended to the provision of interim protection while the inquiry was taking place. In reaching a decision, the Court was mindful of its decision in *Tasmanian Dam*. Although that case dealt with different Commonwealth legislation, it was based on the same Convention, and the decision was therefore strong authority for the Commonwealth's ability to legislate so as to give effect to the terms of the Convention. As Justice Toohey remarked:

The Convention imposes an obligation on Australia as a State Party to the Convention to ensure that effective and active measures are taken for the protection, conservation, presentation and transmission to future generations of its cultural and natural heritage, including the taking of legal measures to this end. This is sufficient, though not necessary, to bring such measures within the external affairs power of the Constitution: s.51(xxix). Furthermore, the implementation of the Convention is, independently of a specific obligation to do so, an exercise of the external affairs power.<sup>154</sup>

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<sup>152</sup> B.M. Tsamenyi et al., *Determining World Heritage Values of the Lemnathyme and Southern Forests: Lessons from the Helsham Inquiry*, 6 ENVTL. & PLAN. L.J. 79, 80-81 (1989).

<sup>153</sup> Chief Justice Mason considered the case at first instance *Richardson v. Forestry Comm'n*, 73 A.L.R. 589 (1989).

<sup>154</sup> *Tasmanian Forests*, 164 C.L.R. 261, 332-33 (1988).

On the first issue, the Court had no difficulty in finding that the Commonwealth was justified in establishing the Commission. As the Convention placed Australia under an obligation to protect areas of World Heritage value, it was necessary for a process to be established by which such areas could be identified and recommended for World Heritage listing and subsequent protection by the Commonwealth. The establishment of the Commission was one such process, and it was justified under the incidental aspect of the external affairs power.<sup>155</sup>

On the second question, namely the validity of the interim protection measures, the Court held by a five to two majority that the legislation was valid under the external affairs insofar as the Act relied on the World Heritage Convention.<sup>156</sup> The majority judges emphasized that the interim protection measures could be "supported as action which can reasonably be considered appropriate and adapted to the attainment of the object of the Convention, namely the protection of the heritage."<sup>157</sup> In this respect, some members of the Court emphasized that there is no need to demonstrate that the relevant terms of the Convention provide for the exact measures implemented. Rather, as Justice Wilson stated:

provided a law is capable of being reasonably considered to be appropriate and adapted to carrying out or giving effect to an object that impresses it with the character of a law with respect to external affairs, the choice of the legislative means for achieving that object is for the Parliament and not for the Court.<sup>158</sup>

In this instance, the activities that were prohibited during the interim period were also those that the forestry industry was likely to engage in, with resultant damage to the forests. Consequently, the majority considered that there was a sufficient connection between interim protection of the forests while World Heritage Listing was under consideration and the international obligations imposed on Australia by the terms of the Convention.<sup>159</sup>

The decision in *Tasmanian Forests* confirmed the approach that the High Court had adopted in *Tasmanian Dam* with respect to the ability of the Commonwealth to rely on the terms of a Convention to enact legisla-

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<sup>155</sup> *Id.* at 286-87 (Mason, C.J. & Brennan, J.), 313 (Deane, J.), 333-34 (Toohey, J.), 343-44 (Gaudron, J.).

<sup>156</sup> The majority justices were Mason, C.J., Brennan, Wilson, Dawson and Toohey, JJ.; Deane and Gaudron, JJ. in dissent.

<sup>157</sup> *Tasmanian Forests*, 164 C.L.R. at 291 (Mason, C.J. & Brennan, J.), 336 (Toohey, J. agreeing), 303 (Wilson, J. agreeing) (1988).

<sup>158</sup> *Id.* at 303. *See also id.* at 327 (Dawson, J.).

<sup>159</sup> *Id.* at 291-92 (Mason, C.J. & Brennan, J.), 336 (Toohey, J.).

tion under the external affairs power. In addition, the decision indicated that the Commonwealth was able to implement a range of measures in furtherance of the purposes of the Convention, provided such measures were "appropriate and adapted" to the terms of the Convention. In this instance, permitted measures extended to the establishment of a Commission of Inquiry to determine World Heritage values and interim protection measures, neither of which was expressly provided for in the Convention.

### 3. Daintree Rainforest Case

The Daintree Rainforest is located in the northern part of Queensland, in an area which experiences a sub-tropical climate. During the 1980s the future status of the rainforest was the subject of considerable community debate. The timber industry was keen to exploit the area, while conservationists argued for protection.<sup>160</sup> The Commonwealth government finally intervened in 1987.<sup>161</sup> Relying on its previous successful use of the World Heritage Convention to protect certain wilderness areas in Tasmania, the Commonwealth decided to nominate the Wet Tropics of Queensland for World Heritage listing. The Queensland government opposed the nomination and claimed that the decision would have a devastating impact upon the timber industry.<sup>162</sup> Nevertheless, the Commonwealth proceeded to prepare an application for submission by December 31, 1987.<sup>163</sup>

At the June 1988, meeting of the World Heritage Bureau, both the Commonwealth and Queensland governments made submissions regarding the suitability of the nominated area for World Heritage listing. At the

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<sup>160</sup> See H. Tarlo, *The Cape Tribulation Affair*, 1 ENVTL. & PLAN. L.J. 106 (1984); Z.M. Lipman, *Cape Tribulation: The Legal Issues*, 2 ENVTL. & PLAN. L.J. 131, 206 (1985); Aila Keto, *Australia's Tropical Rainforests: The Case for World Heritage*, 15 HABITAT, Aug. 1987, at 3.

<sup>161</sup> See Bruce Davis, *Federal-State Tensions in Australian Environmental Management: The World Heritage Issue*, 6 ENVTL. & PLAN. L.J. 66, 71-73 (1989).

<sup>162</sup> See M. Seccombe, *Stage Set for Legal Duel Over Logging*, SYD. MORNING HERALD, Jan. 21, 1988, at 3.

<sup>163</sup> Queensland responded by challenging the Commonwealth's decision to nominate the area for World Heritage listing, and sought an injunction from the High Court on Dec. 24, 1987, to restrain the Commonwealth from continuing with the nomination process. The injunction was refused on the ground that Queensland had not made out a sufficient case to demonstrate that the area under consideration did not possess World Heritage characteristics. *Queensland v. Commonwealth*, 62 A.L.J.R. 143 (1988). In the view of Chief Justice Mason, the remedy was inappropriate because the question of World Heritage status could still be litigated after nomination rather than a few days before the 1987 nomination deadline.

time it was unprecedented for a state from a federal system to participate in the nomination process, especially as it was contesting the nomination. An official recommendation was eventually made that the nominated area be placed on the World Heritage List and this was confirmed when formal listing took place on December 9, 1988.

The formal response of the Commonwealth government to the listing was a Proclamation on December 15, 1988, which placed the area under the protection of the World Heritage Properties Conservation Act 1983. Amendments made on the following day to the World Heritage Properties Conservation Regulations<sup>164</sup> gave legislative effect to the Proclamation.<sup>165</sup> It is important to appreciate the process followed in order for the Commonwealth legislation to become operative in this instance. Before the Proclamation could be made, it was necessary for the area to be considered "identified property" under the Act.<sup>166</sup> If the property met this requirement, the Governor-General's Proclamation could be made only if the requirements of section 6(2) of the Act were also fulfilled.<sup>167</sup>

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<sup>164</sup> Statutory Rules 1983, No. 65 as amended.

<sup>165</sup> The Proclamation was made pursuant to § 6(3) of the World Heritage Properties Conservation Act, AUSTRL. C. ACTS., No. 5 (1983). Schedule 2B of the Regulations defined the Wet Tropics of Queensland as being two sections of land that fell within the Cape Tribulation region of north Queensland. These areas were respectively 8,990 and 7.5 square kilometres in size, and included the Daintree Rainforest.

<sup>166</sup> § 3A(1)(a) of the Conservation Legislation Amendment Act, AUSTRL. C. ACTS., No. 196 (1988) provides that "identified property" is

any property in respect of which one or more of the following conditions is satisfied:

- (i) the property is subject to an inquiry established by a law of the Commonwealth whose purpose, or one of whose purposes, is to consider whether the property forms part of the cultural or natural heritage;
- (ii) the property is subject to World Heritage List nomination;
- (iii) the property is included in the World Heritage List provided for in paragraph 2 of Article 11 of the Convention;
- (iv) the property forms part of the cultural or natural heritage and is declared by the regulations to form part of the cultural heritage or natural heritage. . . .

<sup>167</sup> The relevant provisions of § 6(2) of the World Heritage Properties Conservation Act, AUSTL. C. ACTS 1983 are as follows:

- (b) the protection or conservation of the property by Australia is a matter of international obligation, whether by reason of the Convention or otherwise;
- (c) the protection or conservation of the property by Australia is necessary or desirable for the purpose of giving effect to a treaty (including the Convention) or for the purpose of obtaining for Australia any advantage or benefit under a treaty (including the Convention);
- (d) the protection or conservation of the property by Australia is a matter of international concern (whether or not it is also a matter of domestic concern), whether by reason that a failure by Australia to take proper measures for the protection or conservation of the property would, or would be likely to, prejudice Australia's relations with



These conditions relate back to Australia's obligations to protect property under the World Heritage Convention. By this mechanism, the necessary connection is made in the legislation between the Commonwealth's power over external affairs and the international obligations imposed by the Convention.

In December 1988, Queensland commenced legal proceedings in the High Court in which it sought a declaration that the Proclamation of December 15, 1988, was invalid. Queensland questioned whether the protected area was truly an area to which the World Heritage Properties Conservation Act applied. The High Court dismissed the application, holding that for the purposes of the Act the listing of the area by the World Heritage Committee was conclusive evidence of Australia's international obligation to protect the area under the World Heritage Convention. The Court declared that the Commonwealth's nomination of the area for inclusion on the World Heritage List, and the subsequent acceptance by the World Heritage Committee, was not subject to judicial review. Consequently, the Proclamation protecting the area was valid.

The six judges who wrote the joint judgment, Chief Justice Mason, Justices Brennan, Deane, Toohey, Gaudron and McHugh, reviewed in some detail the provisions of the World Heritage Properties Conservation Act and noted how it provided a legislative framework for the implementation of the World Heritage Convention.<sup>168</sup> In this case, at the time the Proclamation was made, the property met the requirements of section 3A(1)(a)(iii) of the Act because it had been included on the World Heritage List.<sup>169</sup> The judges then turned their attention to subsections (b), (c) and (d) of section 6(2) and noted that the protection or conservation of such an identified property fell within Australia's international obligations under the World Heritage Convention. In response to Queensland's argument that the inclusion of the property on the World Heritage List was not conclusive of the Proclamation's validity, the judges saw this as an issue of whether the protection or conservation of the property gave rise to an international duty.<sup>170</sup> If an international duty could be established, there was little doubt that the external affairs power would support the legislation, especially in light of the decision in *Tasmanian Dam*. The Commonwealth's response to Queensland's challenge was to argue that "the inscription of the property in the World Heritage List by the Committee is sufficient and conclusive to establish that there is an

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other countries or for any other reason.

<sup>168</sup> *Queensland v. Commonwealth*, 167 C.L.R. 232, 235-36 (1989).

<sup>169</sup> *Id.* at 237.

<sup>170</sup> *Id.* at 239.

international duty to protect and conserve it . . . ."<sup>171</sup> Citing *Tasmanian Forests*<sup>172</sup> as authority for the Court's power to determine whether or not a fact upon which a law is based exists, the judges set out to determine whether international law created an international duty to protect this property.

After analyzing the relevant provisions of the Convention with respect to the nomination of properties for the World Heritage List, the judges were convinced that:

the status of a particular property as one of outstanding universal value forming part of the cultural heritage or natural heritage is an objective fact, ascertainable by reference to its qualities; but, as evaluation involves matters of judgment and degree, an evaluation of the property made by competent authorities under the Convention is the best evidence of its status available to the international community.<sup>173</sup>

While a State Party's nomination of property for World Heritage Listing was some evidence of the property's status, the decision by the World Heritage Committee was conclusive for international purposes, and it followed that this was conclusive of Australia's international duty to protect and conserve that property.<sup>174</sup> In the opinion of the judges, the basis for the Proclamation could not be reviewed, and the Queensland case therefore failed. It was acknowledged that, irrespective of what the High Court decided as to the eligibility of the area for inclusion on the World Heritage List, the international community had already decided the matter conclusively. This created an international obligation for Australia under the World Heritage Convention, which prevailed over the decision of any municipal court.<sup>175</sup>

The decision of the High Court in *Daintree Rainforest* further

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<sup>171</sup> *Id.*

<sup>172</sup> 164 C.L.R. at 294 (1988).

<sup>173</sup> *Queensland v. Commonwealth*, 167 C.L.R. 232, 240 (1989).

<sup>174</sup> *Id.*

<sup>175</sup> Justice Dawson wrote a separate but concurring judgment. After a thorough review of the Convention, he noted that the initial obligation to identify properties as forming part of the world's cultural or natural heritage fell on State Parties to the Convention and not on the World Heritage Committee. However, the obligation to protect identified property under arts. 4 and 5 was not dependent on the property being included on the World Heritage List, as such identified property "does not cease to be part of the cultural or natural heritage and the obligations imposed by the Convention in relation to it remain in force." *Id.* at 245. Once the property had been included on the World Heritage List, the provisions of § 3A become operative, and this justified the making of the Proclamation to protect the property. *Id.* at 248.

demonstrated the extent of the powers conferred on the Commonwealth Parliament under the external affairs power. It also reaffirmed the ability of the Commonwealth to rely on the World Heritage Convention to protect areas which had been placed on the World Heritage List, despite opposition from the state in which the property is located. The High Court also gave a strong indication that it was not prepared to reconsider whether a property possessed World Heritage characteristics once the World Heritage Committee had ruled on a nomination.

### C. *Federal Implications of the World Heritage Cases*

The most important impact of the *World Heritage Cases* on Australia's federal system has been the adoption of an expansive view of the Commonwealth's power to implement treaties to which Australia is a party by enacting appropriate domestic legislation. In previous decisions dealing with the external affairs power, the High Court had required the treaty to be one that was truly international in character or reflected substantial international concern.<sup>176</sup> In *Tasmanian Dam*, however, the majority judgments of Justices Mason, Murphy, Brennan and Deane accepted that any international obligation imposed upon Australia by a bona fide international treaty could form the basis for legislation under the external affairs power.<sup>177</sup> In subsequent decisions, the need for the treaty to impose an international obligation has been dispensed with.<sup>178</sup> Accordingly, the current position is that irrespective of whether or not a treaty is representative of international concern or that it contains an international obligation upon State Parties, the mere acceptance of the treaty by Australia is a sufficient basis for the Commonwealth to rely on the terms of the treaty to enact implementing legislation.<sup>179</sup>

While the expanded interpretation of the treaty implementing aspect of section 51(xxix) was the major outcome of the *World Heritage Cases*, other aspects of the external affairs power were also considered, which are important for understanding the influence of international law on Australian domestic law. For example, in *Tasmanian Dam* some of the

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<sup>176</sup> See *R. v. Burgess ex parte Henry*, 55 C.L.R. 608 (1936); *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168 (1982).

<sup>177</sup> PETER HANKS, *CONSTITUTIONAL LAW IN AUSTRALIA* 344 (1991).

<sup>178</sup> This was the view of Justices Mason, Murphy and Deane in *Tasmanian Dam*, 158 C.L.R. 1, 125-26 (Mason, J.), 170-71 (Murphy, J.), 257-59 (Deane, J.) (1983). For the views of other judges in the subsequent decisions, see *Tasmanian Forests*, 164 C.L.R. 261, 321 (Dawson, J.), 332-33 (Toohey, J.), 342-43 (Gaudron, J.) (1988); *Daintree Rainforest*, 167 C.L.R. 232, 245-49 (Dawson, J.) (1989).

<sup>179</sup> Crawford, *supra* note 130, at 23; cf. R.D. Lumb, *The External Affairs Power and Constitutional Reform*, 62 AUSTRALIAN L.J. 679, 681 (1988).

judges adopted a view, previously pursued by Justice Stephen in *Koowarta*, that a matter of "international concern" could be the subject of legislation under the external affairs power. As such, international concern, without the need for a treaty, could form the basis for a section 51(xxix) law.<sup>180</sup> The High Court has also suggested that the external affairs power could be utilized by the Commonwealth to enact legislation in discharge of an international obligation imposed by customary international law.<sup>181</sup> In addition, the Court has noted in *obiter dicta* that the external affairs power also extends to the enactment of legislation intended to give effect to recommendations made by international bodies. Justice Murphy noted in *Tasmanian Dam* that the recommendations of the U.N. and its agencies could be relied upon as the basis for a law dealing with external affairs,<sup>182</sup> while in the same case Justice Deane referred to laws enacted in "compliance with recommendations of international agencies."<sup>183</sup>

Despite these decisions regarding the width of the treaty-implementing aspect of section 51(xxix), the High Court has consistently held that the Commonwealth does not acquire, merely by entering into a treaty relationship with another State, plenary power over the general subject matter of the treaty.<sup>184</sup> One of the accepted limitations on the Commonwealth's use of the external affairs power is that domestic legislation based on an international treaty must be "appropriate and adapted" to the purposes of the treaty in question.<sup>185</sup> The application of this test caused a five to two division within the Court in *Tasmanian Forests*. The majority judges were of the opinion that the measures adopted for the interim protection of the forests were in accordance with Australia's international obligations under the World Heritage Convention.<sup>186</sup> However, Justices Deane and Gaudron wrote strong dissents on

<sup>180</sup> See *Tasmanian Dam*, 158 C.L.R. at 171 (Murphy, J.); *Polyukhovich v. Commonwealth*, 172 C.L.R. 501, 561-62 (Brennan, J.), 657-58 (Toohey, J.) (1991); Rothwell, *supra* note 54, at 228-30.

<sup>181</sup> In *Tasmanian Dam*, Justice Deane accepted that the discharge of "obligations under both treaties and customary international law lie at the centre of a nation's external affairs." 158 C.L.R. at 258 (1983). See also *Polyukhovich v. Commonwealth*, 172 C.L.R. 501, 560 (Brennan, J.), 657 (Toohey, J.) (1991).

<sup>182</sup> 158 C.L.R. at 171-72, making reference to the World Health Organisation, the Food and Agriculture Organisation and the International Labor Organisation.

<sup>183</sup> *Id.* at 258-59.

<sup>184</sup> *Id.* at 131 (Mason, J.), 172 (Murphy, J.).

<sup>185</sup> The accepted test is that laid down by Chief Justice Barwick in *Airlines of N.S.W. Pty. Ltd. v. New S. Wales* (No. 2), 113 C.L.R. 54, 87 (1965); *aff'd Tasmanian Dam*, 158 C.L.R. 1, 130 (Mason, J.), 259 (Deane, J.) (1983); *Tasmanian Forest*, 164 C.L.R. 261, 289 (Mason, C.J. & Brennan, J.), 303 (Wilson, J.) (1988).

<sup>186</sup> *Tasmanian Forest*, 164 C.L.R. at 290-91 (Mason, C.J. & Brennan, J.), 303

the basis of their belief that the Commonwealth legislation went beyond what the Convention prescribed. Justice Deane argued that the test in these cases should be whether there exists "a 'reasonable proportionality' between that purpose or object and the means which the law adopts to pursue it."<sup>187</sup> In this instance, his Honour was of the view that the Commonwealth had failed to demonstrate such a relationship because the protective measures implemented in reliance on the World Heritage Convention prohibited a range of activities beyond the commercial exploitation of the forests.<sup>188</sup> Justice Gaudron made a similar point, noting that the Commonwealth law prohibited activities which posed no threat to those qualities of the identified property that were integral to its potential as a World Heritage area.<sup>189</sup> These strong dissents may be seen as a warning to the Commonwealth that, even though the test for the validity of legislation implementing a treaty is settled, the Court may review the legislation to ensure that it represents an appropriate implementation of the treaty in question.<sup>190</sup>

#### *D. Current Practice Concerning World Heritage Sites*

Following the political and legal debates of the 1980s over the nomination and protection of World Heritage areas, a more cooperative approach towards World Heritage management has emerged. The process of nomination has been revised to ensure greater participation by state governments in assessing the obligations that flow from World Heritage listing. In 1986 the Commonwealth's nomination of Stage 2 of Kakadu National Park in the Northern Territory was declared void because of a flaw in the consultative process between the government and interested parties over the consequences of nomination, especially in regard to the interests of mining companies.<sup>191</sup> Though this decision was subsequently

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(Wilson, J.), 327 (Dawson, J.), 336 (Toohey, J.) (1988).

<sup>187</sup> *Id.* at 311-12. Justice Gaudron adopted the view, that the Commonwealth law must be "reasonably capable of being viewed as conducive to the purpose of the treaty if it is also reasonably capable of being viewed as appropriate, or adapted to, the circumstance which engages the power." *Id.* at 342.

<sup>188</sup> *Id.* at 317-18.

<sup>189</sup> *Id.* at 346-47.

<sup>190</sup> In recent years, the relationship between Commonwealth legislation relating to labour relations and the provisions of certain ILO Conventions has been questioned from the perspective of whether the legislation appropriately implements the ILO standards or whether it is at variance with such standards. See Breen Creighton, *Enforcement in the Federal Industrial Relations System: An Australian Paradox*, 4 AUSTL. J. LAB. L. 197, 199-206 (1991); J.T. Ludeke, *The External Affairs Power: Another Province for Law and Order?*, 68 AUSTL. L.J. 250 (1994).

<sup>191</sup> *Peko-Wallsend Ltd. v. Minister for Arts, Heritage and Env't*, 70 A.L.R. 523

reversed by a Full Court of the Federal Court,<sup>192</sup> the potential for a World Heritage nomination to be contested in the courts because of a flaw in the nomination processes within Australia caused a change in government policy.<sup>193</sup> When the World Heritage values of the Tasmanian Forests were subsequently considered by the Commonwealth government, a different approach was adopted. Instead of nominating the area for the World Heritage List unilaterally, an independent Commission of Inquiry was established to investigate whether the identified property was suitable for nomination. The Commission, headed by a retired judge, Mr. Justice Helsham, published a report,<sup>194</sup> which generated further political debate between the conservationists, the Commonwealth and the Tasmanian government, and ensured that the nomination process was canvassed in public.<sup>195</sup> However, the Commonwealth retreated from initiating an inquiry in the case of the Queensland Wet Tropics nomination, and unilaterally put forward the nomination against the wishes of the Queensland government. It was this act which sparked the Queensland challenge in the *Daintree Rainforest* case. The query raised in that decision as to the bona fides of a federal executive decision to nominate or protect an area under the World Heritage Convention, may have been the catalyst for a further change in policy.

Since then, the Commonwealth has sought to cooperate with the states in making World Heritage nominations. After prompting by the Commonwealth government, Western Australia established a Ministerial Committee to consider whether the state should proceed with the listing of Shark Bay.<sup>196</sup> Following a positive response from the Committee to possible listing, the Western Australian and Commonwealth governments entered into detailed discussions concerning legislative and administrative arrangements for Shark Bay in preparation for listing. An inter-governmental agreement was signed in October 1990, in which the future management of the area was detailed, and soon after the nomination process commenced.<sup>197</sup> In the case of Fraser Island, located off the

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(1986).

<sup>192</sup> *Minister for Arts, Heritage and Env't v. Peko-Wallsend Ltd.*, 75 A.L.R. 218 (1987). See also Boer, *supra* note 131, at 270-72.

<sup>193</sup> See Ben Boer, *Natural Resources and the National Estate*, 6 ENVTL. & PLAN. L.J. 134, 144 (1989).

<sup>194</sup> REPORT OF THE COMMISSION OF INQUIRY INTO THE LEMONTHYME AND SOUTHERN FORESTS, Vol 1 & 2 (1988).

<sup>195</sup> See Tsamenyi et al., *supra* note 152.

<sup>196</sup> See Keith Suter, *Shark Bay, Western Australia: A Case Study of UNESCO World Heritage Listing*, 11 ENVTL. & PLAN. L.J. 31, 36 (1994).

<sup>197</sup> *Id.* at 37.

Queensland coastline, a similar cooperative approach was taken. This process was facilitated by a change of government in Queensland, which undertook a comprehensive study of the environmental and heritage values of the area<sup>198</sup> and assisted in the nomination process. This cooperative approach has continued with the recent nomination of "Australian Fossil Sites," two of which are located in Queensland and one of which is in South Australia.<sup>199</sup> The New South Wales government has also recently enthusiastically endorsed the nomination of the Sydney Opera House as a cultural heritage site.<sup>200</sup>

Another area of change in relation to World Heritage sites in Australia is that the Commonwealth has adopted a more cooperative approach towards management of the listed areas. This has not resulted in the Commonwealth abdicating responsibility for protecting the listed areas.<sup>201</sup> Rather, a more cooperative approach has been taken instead of relying solely on Commonwealth management under Commonwealth legislation.<sup>202</sup> A number of Commonwealth-state management plans have now been adopted for the various World Heritage sites, and in some instances state legislation controls certain activities within the areas.<sup>203</sup>

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<sup>198</sup> COMMISSION OF INQUIRY INTO THE CONSERVATION, MANAGEMENT AND USE OF FRASER ISLAND AND THE GREAT SANDY REGION, REPORT (1991)

<sup>199</sup> NOMINATION OF AUSTRALIAN FOSSIL SITES BY THE GOVERNMENT OF AUSTRALIA FOR INSCRIPTION ON THE WORLD HERITAGE LIST (Department of the Environment, Sport and Territories, Australia, 1993); Julian Cribb, *Fossil Sites Aim for Heritage Listing*, AUSTRALIAN, May 19, 1993, at 18.

<sup>200</sup> However, not all nominations of World Heritage sites receive complete support from state governments, see, e.g., Alec Marr, *Green Light for World Heritage Assessments*, WILDERNESS NEWS, Aug.-Sept. 1994, at 15, discussing a campaign in Tasmania for more areas to be nominated for World Heritage Listing despite the opposition of the Tasmanian state government.

<sup>201</sup> E.g., in 1992 the Commonwealth acted under the World Heritage Properties Conservation Act 1983 to curtail the activities of a limestone quarry in Tasmania, which was considered to be having a harmful impact on the Exit Cave system within the Tasmanian Wilderness World Heritage Property. See MONITORING REPORT ON AUSTRALIA'S WORLD HERITAGE PROPERTIES JUNE 1992 - JUNE 1993 (Department of the Environment, Sport and Territories, Australia, 1993) [hereinafter MONITORING REPORT].

<sup>202</sup> See Benjamin J. Richardson, *A Study of Australian Practice Pursuant to the World Heritage Convention*, 20 ENVTL. POL'Y & L. 143, 151-53 (1990).

<sup>203</sup> See MONITORING REPORT, *supra* note 201.

## VI. CASE STUDY: HUMAN RIGHTS AND THE ICCPR

A. *Acceptance of the ICCPR and Optional Protocol*

Australia has been a strong supporter of human rights throughout the U.N. era. It is a party to the major U.N. human rights conventions, and successive Australian governments have taken a strong stand on human rights issues within the Asian Pacific region.<sup>204</sup> However, although Australia has taken a strong international stand on human rights issues, its domestic record is variable. This is partly a consequence of Australia's federal structure, as there is no distinctive power conferred on the Commonwealth Parliament to deal with human rights matters. Nor does Australia have an entrenched or enacted Bill of Rights.<sup>205</sup> As a result, human rights issues in Australia have traditionally been matters within state legislative jurisdiction. In recent times, however, Australia's acceptance of various human rights treaties, together with the expansion of the external affairs power following the *World Heritage Cases*, have enabled the Commonwealth Parliament to take a more active role in implementing international human rights standards in Australian law.<sup>206</sup>

Australia ratified the ICCPR<sup>207</sup> in 1980. At the time of ratification Australia lodged a reservation, which took the form of an "advice" to the effect that Australia was a federal State with powers divided between a central and state governments, and that implementation of the ICCPR would be a matter for the level of government responsible in the circumstances.<sup>208</sup> In 1984 the federal reservation was replaced by a "federal

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<sup>204</sup> See Senator Gareth Evans, Minister for Foreign Affairs and Trade, Speech to Amnesty International (Aug. 26, 1991), reprinted in 13 AUSTL. Y.B. INT'L L. 358 (1992).

<sup>205</sup> See PETER BAILEY, HUMAN RIGHTS: AUSTRALIA IN AN INTERNATIONAL CONTEXT 45, 105 (1990).

<sup>206</sup> The major High Court decision which preceded *Tasmanian Dam, Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168 (1982), dealt with the validity of the Racial Discrimination Act 1975, which was enacted to give effect to Australia's obligations under the *Racial Discrimination Convention*, *supra* note 46. For a review of human rights legislation in Australia, see BAILEY, *supra* note 205, at 106-247; see generally NICK O'NEILL & ROBIN HANDLEY, RETREAT FROM INJUSTICE: HUMAN RIGHTS IN AUSTRALIAN LAW (1994) (providing an extensive analysis of human rights legislation in Australia).

<sup>207</sup> ICCPR, *supra* note 10.

<sup>208</sup> See Gillian Triggs, *Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?*, 31 INT'L & COMP. L.Q. 278, 304-06 (1982). The Australian reservation is also reproduced at 1980 Austl. T.S. No. 23, 18; see also ICCPR, *supra* note 10.



statement" having a similar effect.<sup>209</sup> Australia's efforts to ensure that its constitutional system would be appreciated by the U.N. and other parties to the ICCPR was undoubtedly a reaction to the uncertainty then surrounding the extent of the external affairs power, and may also have been influenced by article 50 of the ICCPR, which indicated that federal States had equal obligations to respect the rights guaranteed by the Covenant.<sup>210</sup> The lodgment of the initial reservation and later statement indicated a particularly cautious approach on the part of the Commonwealth government towards Australia's acceptance of the obligations under the ICCPR.<sup>211</sup>

Notwithstanding Australia's adoption of the ICCPR in 1980, there was protracted debate between the Commonwealth and state governments over whether Australia should also accede to the First Optional Protocol to the Covenant.<sup>212</sup> Eventually, it was announced on September 25,

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<sup>209</sup> See BURMESTER, *supra* note 80, at 537 n.54.

<sup>210</sup> Art. 50 provides that "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." ICCPR, *supra* note 10, at 185.

<sup>211</sup> One of the more extensive obligations imposed on State Parties is that found in art. 2, which provides:

1 Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, within distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2 Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

3 Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

*Id.* at 173-74. It is the view of some commentators that this Article imposes an obligation upon the contracting parties to give effect to the terms of the Covenant in their domestic law. See, e.g., Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL & POLITICAL RIGHTS* 311 (Louis Henkin ed. 1981).

<sup>212</sup> Dec. 19, 1966, 999 U.N.T.S. 171; 1991 Austl. T.S. No. 39. See Hilary

1991, that Australia would accede,<sup>213</sup> and the Optional Protocol entered into force for Australia on December 25 that same year.<sup>214</sup> Acceptance of the Optional Protocol was an important step in enhancing human rights protection in Australia because it opened the possibility of individuals communicating directly with the United Nations Human Rights Committee with respect to alleged violations of the ICCPR.<sup>215</sup> As Australia has yet to legislate comprehensively at either Commonwealth or state level to give effect to provisions of the ICCPR, the procedures available under the Optional Protocol provide Australians with a valuable opportunity to have their claims adjudged by an international body.

### B. *The Toonen Decision*

The first communication that the Human Rights Committee received from Australia was lodged on December 25, 1991, the day the Optional Protocol entered into force for Australia.<sup>216</sup> The communication was

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Charlesworth, *Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights*, 18 MELB. U. L. REV. 426 (1991); Peter Kirby, *Federal - State Issues in Australia's Accession to the Optional Protocol*, in INTERNATIONALISING HUMAN RIGHTS: AUSTRALIA'S ACCESSION TO THE FIRST OPTIONAL PROTOCOL 46 (Centre for Comparative Constitutional Studies, University of Melbourne, 1992); Peter Thomson, *Implications of Australian Ratification and Potential Ratification of International Human Rights Treaties*, in PROCEEDINGS 1991 INTERNATIONAL LAW WEEKEND 86, 89-91 (Centre for International and Public Law, Australian National University, 1991).

<sup>213</sup> News Release by Senator Gareth Evans, Minister for Foreign Affairs and Trade, and Mr. Duffy, Attorney General (Sept. 25, 1991), reprinted in 13 AUSTL. Y.B. INT'L L. 361 (1992).

<sup>214</sup> For discussion of the potential effect of the Protocol, see Christopher Caleo, *Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights*, 4 PUB. L. REV. 175 (1993); Charlesworth, *supra* note 212.

<sup>215</sup> The ICCPR itself provides far more restricted mechanisms for enforcement. Under art. 40, State Parties are required to submit periodic reports to the Secretary-General of the United Nations on the measures they have adopted to give effect to the rights recognized in the Covenant. ICCPR, *supra* note 10, at 181. Under art. 41, State Parties may declare that they recognize the competence of the Human Rights Committee to consider communications from other State Parties, who have made a similar declaration, in respect of breaches of the Covenant. *Id.* at 182. See also Charlesworth, *supra* note 212, at 429.

<sup>216</sup> See Wayne Morgan, *Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, 14 AUSTL. Y.B. INT'L L. 277 (1993).

lodged by a Tasmanian resident, Mr. Nick Toonen. Toonen alleged that his rights under the ICCPR had been infringed because, as a gay man, he was subject to certain Tasmanian laws which criminalized all male homosexual acts between consenting adults in private.<sup>217</sup> It was alleged that the relevant provisions of the Tasmanian Criminal Code infringed Toonen's rights to privacy<sup>218</sup> and equality<sup>219</sup> under the ICCPR. As noted by the Human Rights Committee when ruling on this matter:

Although in practice the Tasmanian police has not charged anyone either with "unnatural sexual intercourse" or "intercourse against nature" (section 122) nor with "indecent practice between male persons" (section 123) for several years, this author argues that because of his long-term relationship with another man, his active lobbying of Tasmanian politicians and the reports about his activities in the local media, and because of his activities as a gay rights activist and gay HIV/AIDS worker, his private life and his liberty are threatened by the continued existence of Sections 122(a), (c) and 123 of the Criminal Code.<sup>220</sup>

One of the difficulties that Australia faced when this communication was lodged was that the Commonwealth government had not established adequate procedures to deal with such cases. This was an important factor in this case because, although Australia is the party that is bound by the

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<sup>217</sup> The claims were specifically directed to §§ 122 and 123 of the Criminal Code Act, No. 69 (Tas.) (1924). These sections provide as follows:

§ 122. Any person who (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of an animal; or (c) consents to a male person having carnal knowledge of him or her against the order of nature, is guilty of a crime.

§ 123. Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.

<sup>218</sup> Art. 17 of the ICCPR provides:

1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.  
2 Everyone has the right to the protection of the law against such interference or attacks.

ICCPR, *supra* note 10, at 181.

<sup>219</sup> Art. 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* at 179.

<sup>220</sup> Human Rights Committee, Views, Communication No. 488/1992 (CCPR/C/50/D/488/1992: 4 April 1994) (hereinafter *Toonen Decision*), § 2.3.

Covenant and required to respond to the Committee's enquiries concerning the matter,<sup>221</sup> it is Tasmania that was responsible for the enactment and enforcement of the laws in question. Following the request from the Committee in early 1992 for an Australian response to the communication, the Commonwealth Attorney-General's Department requested a report from Tasmania on the admissibility of the claim. Notwithstanding that the Tasmanian government requested that admissibility of the claim be contested, the Commonwealth government did not do so.<sup>222</sup> In addition, when the case proceeded to the merits stage, the Commonwealth government proffered the view that the Tasmanian law violated the right to privacy (art. 17) and the right to freedom from discrimination on the ground of sex (art. 26).<sup>223</sup>

The Human Rights Committee ruled on the communication on March 31, 1994, and forwarded its views to both the author of the communication and Australia.<sup>224</sup> It concluded that there had been a violation of Article 17 of the Covenant. As such, the Committee's finding stated that the author was entitled to a remedy, and that "[i]n the opinion of the Committee, an effective remedy would be the repeal of Sections 122 (a), (c) and 123 of the Tasmanian Criminal Code."<sup>225</sup>

Consistently with a new procedure established by the Human Rights Committee in 1990, States whose laws or actions are considered to be in violation of the ICCPR are given a period of three months to respond to the Committee's findings. In this instance, Australia was requested to give information "on the measures taken to give effect to the views" of the Committee.<sup>226</sup>

### C. *The Australian Response*

In the days preceding the release of the Human Rights Committee's ruling in the *Toonen Decision*, it became evident that a dispute could

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<sup>221</sup> Dec. 19, 1966, 999 U.N.T.S. 171; 1991 Austl. T.S. No. 39., at art. 4.

<sup>222</sup> Morgan, *supra* note 216, at 290.

<sup>223</sup> Hilary Charlesworth, *International Law Notes, Developments in the Toonen Case*, 5 PUB. L. REV. 72 (1994).

<sup>224</sup> For a discussion of the decision by a member of the Human Rights Committee, see Elizabeth Evatt, Report of the 50th Session of the Human Rights Committee 21 March - 8 April 1994, New York, in PROCEEDINGS OF THE SECOND ANNUAL MEETING 1994, 7, 7-8 (Australian & New Zealand Society of International Law, 1994).

<sup>225</sup> *Toonen Decision*, *supra* note 220, § 10. As the Committee found a violation under art. 17, it did not consider whether there had been a violation of art. 26, other than to make an oblique reference in § 8.7 to its view that "sex" in art. 26 may be taken to include sexual orientation.

<sup>226</sup> *Id.* § 12.

develop between the Commonwealth and Tasmanian governments over the matter, if the ruling were unfavourable to Australia. The Tasmanian Attorney General indicated that the relevant Tasmanian legislation "will be retained and the U.N. decision ignored," and that, if the Commonwealth attempted to override the Tasmanian legislation by relying on the external affairs power, Tasmania would consider a High Court challenge.<sup>227</sup> In response, the Commonwealth Attorney General indicated that the "states were expected to conform with international standards" and that "[i]f they failed to cooperate, the Commonwealth would be forced to intervene."<sup>228</sup> In the weeks that followed, both the Tasmanian and Commonwealth governments maintained their positions, though the Commonwealth indicated that it was reluctant to intervene without first giving Tasmania an opportunity to review its position and consider a response to the Human Rights Committee ruling.<sup>229</sup> At the same time as the debate between the state and federal governments was taking place, concern was raised by some commentators about the impact of the Human Rights Committee ruling on Australia's sovereignty.<sup>230</sup> The Commonwealth Attorney General, Mr. Lavarch, responded by stating that the Human Rights Committee was not interfering in Australian domestic legal matters. He described its views in the *Toonen Decision* as no "stronger than an advisory opinion" and argued that "[t]he action of sovereignty is to decide whether to do anything or not. We are under absolutely no obligation to do anything."<sup>231</sup>

The Australian government response to the *Toonen Decision* was not only a political issue between the Commonwealth and Tasmanian governments; political leaders of other parties in federal Parliament also entered

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<sup>227</sup> *Tasmania May Ignore UN on Gay Rights*, SYDNEY MORNING HERALD, Apr. 7, 1994, at 3.

<sup>228</sup> Amanda Meade & Andrew Darby, *Gov't Will Enforce Ruling on Tas Gay Law: Lavarch*, SYDNEY MORNING HERALD, Apr. 8, 1994, at 3.

<sup>229</sup> Amanda Meade & Andrew Darby, *UN Gays Ruling Puts Pressure on Tasmania*, SYDNEY MORNING HERALD, Apr. 12, 1994, at 3; Andrew Darby, *Tasmania Defiant on Gay Exclusion*, SYDNEY MORNING HERALD, Apr. 13, 1994, at 7.

<sup>230</sup> Padraic P. McGuinness, *Kangaroo Court Takes Liberties with our Rights*, AUSTRALIAN, Apr. 20, 1994, at 11; Padraic P. McGuinness, *Parliament Left Behind in Embrace of International Treaties*, AUSTRALIAN, May 18, 1994, at 13.

<sup>231</sup> Amanda Meade, *Lavarch Denies Gay Law Danger*, SYDNEY MORNING HERALD, Apr. 18, 1994, at 6. A State Party to the Optional Protocol is not required to take any specific measures under the Protocol in response to an adverse finding by the Human Rights Committee. However, State Parties remain under an obligation, in accordance with art. 2 of the ICCPR, to take such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant; see ICCPR, *supra* note 10, and ICCPR art. 2, *supra* note 211.

the debate. The parliamentary leaders of both official Opposition parties stated that they would oppose any attempt by the Commonwealth government to override the Tasmanian law.<sup>232</sup> It was argued that, in the light of this case, Australia's treaty-making processes should be reformed to ensure that international bodies did not have as much power over Australian domestic law.<sup>233</sup> After further discussions between the Tasmanian and Commonwealth governments, at which Tasmania confirmed that it did not intend to repeal or amend the offending provisions of its Criminal Code, the Commonwealth government announced that it would prepare legislation to override the Tasmanian law. This intention has now been communicated to the Human Rights Committee and the Commonwealth government has recently enacted legislation to deal with the matter.<sup>234</sup>

The Commonwealth has a number of options available to it in overriding the Tasmanian legislation.<sup>235</sup> In each case the constitutional basis for the federal legislation will be the external affairs power, by which the Commonwealth will seek to implement some of the terms of the ICCPR into Australian law.<sup>236</sup> Following the High Court's decisions in the *World Heritage Cases*, the Commonwealth can be confident that it has a solid basis upon which to enact appropriate and adapted legislation

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<sup>232</sup> Amanda Meade, *Hewson Won't Fight Tas Gay Ban*, SYDNEY MORNING HERALD, Apr. 20, 1994, at 3. At the time of the Committee's ruling the Leader of the Opposition was Dr. John Hewson, who was replaced soon thereafter by Mr. Alexander Downer.

<sup>233</sup> Alexander Downer, Speech to the National Press Club (June 8, 1994) (transcript on file with authors). Mr. Downer stated:

We believe that the protection of Australia's national interests are most effectively upheld by Australians through our Parliaments, our courts and other bodies, and not through U.N. or other international committees that are ill-suited to playing any direct role in the Australian legal system and many of which are themselves widely recognised as being in need of reform. We believe that Australia's international treaty-making processes need to be reformed to ensure that the Australian Parliament, the States, industry and the community are given a proper say in international law-making by Australian Governments.

<sup>234</sup> Letter from Duncan Kerr, Acting Attorney General, to Dr. Nisuke Ando, Chairperson, Human Rights Committee (July 8, 1994) (on file with authors); Michael Lavarch, Attorney General, News Release - Bill to Protect Privacy in the Bedroom (Aug. 22, 1994) (on file with authors); Human Rights (Sexual Conduct) Act 1994.

<sup>235</sup> In § 109 the Australian Constitution provides that "[w]hen a law of a [s]tate is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." The effect of an appropriately drafted Commonwealth law in this case would thus be to override inconsistent provisions of Tasmania's Criminal Code. AUSTL. CONST. ch. V, § 109.

<sup>236</sup> For a review of previous efforts by the Commonwealth government to implement the terms of the ICCPR, see Calco, *supra* note 214, at 181.

and that any constitutional challenge by Tasmania would fail.<sup>237</sup> It would seem, therefore, that Commonwealth legislation enacted to override the Tasmanian law would not be controversial on constitutional grounds.

However, the *Toonen Decision* demonstrates once again the potential for the external affairs power to be relied on to legislate on topics that have traditionally fallen within the competence of the Australian states, and that the Commonwealth has hitherto been content to relegate to the states. The case also demonstrates for the first time the potential impact of rulings of the Human Rights Committee on Australian law. While the Committee's decisions are not binding on State Parties, and despite the circumstance that there is no adequate mechanism under the Optional Protocol for enforcement of its rulings, the importance of such decisions should not be underestimated. States that freely submit to the authority of the Committee under the Optional Protocol are likely to be subject to strong criticism if they ignore a ruling against them. This may especially be so in the case of Australia, which prides itself on its comparatively good human rights record and takes an active role in reviewing the human rights compliance of other States in the region.<sup>238</sup> The *Toonen Decision* demonstrates that Australia will respond to rulings of the Human Rights Committee. Moreover, although the rights of states to determine their own affairs will generally be respected, if they fail to ensure that their laws conform with Australia's international obligations under the ICCPR, the Commonwealth is prepared to override state laws through use of the external affairs power. As there are other Australian communications currently before the Human Rights Committee, it is possible that the Commonwealth government may be called on to respond in similar ways in the future.<sup>239</sup>

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<sup>237</sup> Two potential constitutional difficulties which could arise in respect of the Commonwealth legislation are (1) whether the legislation is "appropriate and adapted" to the terms of the ICCPR, particularly art. 17; and (2) whether the legislation discriminates against Tasmania, or singles it out from the other states, and thereby infringes an implied constitutional limitation on federal legislative power; see, e.g., *Melbourne Corp. v. Commonwealth* 74 C.L.R. 31 (1947); *Queensland Elec. Comm'n v. Commonwealth*, 159 C.L.R. 192 (1985).

<sup>238</sup> Caleo, *supra* note 214, at 187, takes the view that "[i]n Australia, a country with - relatively speaking - an impressive record of democratic freedom, where freedoms are well enjoyed if not so well protected, the pressure which would be brought to bear on government to ensure compliance with any Committee view is likely to be heavy."

<sup>239</sup> For a history of three recent communications, see Hilary Charlesworth, *International Law Notes, Admissibility Decisions of the United Nations Human Rights Committee*, 4 PUB. L. REV. 265, 266 (1993); Hilary Charlesworth, *International Law Notes, New Communication Filed Against Australia Under the First Optional Protocol*, 5 PUB. L. REV. 71 (1994).

## VII. CONCLUSION

This article has canvassed a range of issues that confront Australia in dealing with international law on the domestic front. Many of these difficulties result from a federal Constitution that fails to define clearly the role of the federal executive or the constitutional power of the federal Parliament in respect of the country's foreign affairs. When these factors are combined with the political nature of the federal compact in Australia, recent federal governments have sought to involve the states in the process of implementing international treaties in Australia. This cooperative approach to federalism has not always been successful, and certain legal and political issues concerning the impact of international law in Australia remain unsettled. As Australia's involvement in world affairs grows, and as international law exerts its growing influence on States within the international community, the issues confronting Australia are likely to assume greater prominence. In the context of this Article, a number of conclusions can be drawn from the issues which have been raised.

### A. *The External Affairs Power and Australian Federalism*

At the time Australia became a federation in 1901, the powers conferred on the Commonwealth Parliament were considered adequate to meet the expected functions of central government. However, viewed in the late 20th Century, the failure to include amongst the subject matter of Commonwealth power such areas as environmental protection and management, human rights and civil liberties, seems incongruous. An important consequence of the decisions in the *World Heritage Cases* is that an expansive interpretation of the legislative power over external affairs enables the Commonwealth to implement into Australian law the terms of a wide range of treaties. These treaties may deal not only with environmental protection, human rights and civil liberties, but also with topics that were never envisaged at the time of federation as being the subject of international law. Providing such laws meet the tests laid down by the High Court in the *World Heritage Cases*, the Commonwealth has the ability to expand the ambit of its legislation by entering into and implementing a growing list of treaties dealing with an ever expanding subject matter.

This development has raised concern over the federal balance of powers between the Commonwealth and the states. It is feared that, if the Commonwealth continues to enter into treaties and rely on them as the constitutional basis for its legislation, the role of the states will diminish to such an extent that Australia will cease to be a federation in which legislative power is shared between central and regional governments. The



High Court, however, has not been prepared to limit the potential scope of Commonwealth power in this area. In *Tasmanian Dam*, Justice Murphy noted that, while in that case and at that time reliance on the external affairs power may have been considered exceptional, "[i]ncreasingly, use of the external affairs power will not be exceptional or extraordinary but a regular way in which Australia will harmonize its internal order with the world order."<sup>240</sup> It is not surprising that, since this comment was made, the Commonwealth has continued to rely on the external affairs power to legislate on subject matters that were previously considered to be within the competence of the states.<sup>241</sup>

The *World Heritage Cases* not only confer upon the federal Parliament power to legislate with respect to treaties, but also suggest that matters the subject of customary international law, international recommendations, or even international concern, can form the basis of an "external affair" for the purpose of section 51(xxix) of the Constitution. This opens up to the Commonwealth Parliament an even wider field of subjects upon which it might choose to legislate.<sup>242</sup>

### B. Cooperative Federalism and International Law

One response during the past ten years to the expanded scope of the Commonwealth Parliament's power over external affairs has been to adopt a more cooperative approach to federalism in Australia. Through this process, the states have had a greater policy input into decisions concerning Australia's treaty relations, and an expanded role in the domestic

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<sup>240</sup> 158 C.L.R. 1, 170 (1983).

<sup>241</sup> *E.g.*, between 1975 and 1992 there were 15 occasions on which the Commonwealth enacted environmental legislation in reliance on international treaties. *See* Crawford, *supra* note 130, at 21; Gerry Bates, ENVIRONMENTAL LAW IN AUSTRALIA 56-57 (3d ed. 1992).

<sup>242</sup> The Commonwealth has recently taken this action with amendments to the Industrial Relations Act, AUSTL. C. ACTS No. 86 (1988), introduced by the Industrial Relations Reform Act, No. 98 (1993). The now revised Industrial Relations Act, § 170BA gives effect to two recommendations adopted by the General Conference of the International Labour Organisation (ILO), copies of which are appended to the Act as part of the Schedule. These ILO Recommendations, in conjunction with certain ILO Conventions are relied upon as a basis for Commonwealth power over certain areas of industrial relations which are not covered in § 51(xxxv), Constitution which confers upon the Commonwealth certain powers in regard to "industrial disputes". These issues may soon be ventilated before the High Court in a challenge by several states to the constitutional validity to the Industrial Relations Reform Act, No. 98 (1993). *See* W.J. Ford, *The Constitution and the Reform of Australian Industrial Relations*, 7 AUSTL. J. LAB. L. 105 (1994).

implementation and enforcement of the obligations imposed by those treaties. This approach has generally been a successful one provided there has been a clear division of responsibility between Commonwealth and states over the relevant subject matter and the Commonwealth has been able to gain the cooperation of the states in creating a cooperative legislative scheme.<sup>243</sup>

However, this cooperative federal approach has not always been a success for a number of reasons. First, cooperative legislation has caused delays in assuming or fulfilling international treaty obligations. In the case of Australia's accession to the Optional Protocol to the ICCPR, the lack of agreement among the states was the principal reason for the eleven year delay between Australia's ratification of the Covenant and its eventual acceptance of the Protocol.<sup>244</sup> Secondly, reliance on state legislation has often resulted in lack of uniformity in Australian laws implementing international treaties. For example, state anti-discrimination laws, which partially implement several international human rights instruments, differ widely in their scope, complaint procedures and remedies. Thirdly, the coordination of state and federal legislation has thrown up substantial legal problems, which the Commonwealth Solicitor-General has described as the "steps of a dance in the mine-field of constitutional law."<sup>245</sup> Amongst these difficulties are the issues of whether the external affairs power permits the Commonwealth to implement a treaty only partially and, if so, whether such legislation can validly leave room for the operation of state laws that conflict with the treaty obligations. Finally, there is a danger that a state may put Australia in breach of its international obligations by legislating inconsistently with the relevant treaty. Given established principles of State responsibility,<sup>246</sup> it is the Common-

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<sup>243</sup> An example would be the cooperative arrangements entered into concerning sea dumping in the Australian offshore; *see, e.g.*, Environment Protection (Sea Dumping) Act, AUSTL. C. ACT, No. 101, § 9 (1981), Environment Protection (Sea Dumping) Act, No. 60 (Tas.) (1987).

<sup>244</sup> *See* Gough Whitlam, *Australia and the UN Commission on Human Rights*, 45 AUSTL. J. INT'L AFF. 51 (1991); Alan Rose, *Commonwealth State Aspects: Implementation of the First Optional Protocol*, in INTERNATIONALISING HUMAN RIGHTS: AUSTRALIA'S ACCESSION TO THE FIRST OPTIONAL PROTOCOL 35, 42-43 (Centre for Comparative Constitutional Studies, University of Melbourne, 1992); 159 PARL. DEB., H. R., 369 (Feb. 18, 1988).

<sup>245</sup> Gavan Griffith, *Dancing Through the Minefield: Can Co-operative Federalism Work?*, in HUMAN RIGHTS: THE AUSTRALIAN DEBATE 98, 99 (Lynne Spender ed., 1987). *See also* McCarry, *supra* note 78.

<sup>246</sup> Under international law, a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331. Moreover, the actions of the

wealth that is held accountable to the international community for any such breach, as is evident in the Commonwealth's response to the ruling of the Human Rights Committee in the *Toonen Decision*. Although this problem may be righted by terminating the treaty or by enacting overriding federal legislation, the potential need for executive or legislative action of this kind demonstrates the difficulties of cooperative federalism in implementing Australia's international treaty obligations.

### *C. Balancing Federal Interests and Foreign Policy Obligations*

As has been apparent from the foregoing discussion, the conduct and review of Australia's foreign affairs involves a complex matrix of interaction between all branches of government at both the state and federal levels. Within this matrix the federal executive has the pre-eminent role. The state executives have only a consultative role in relation to the conclusion of treaties whose subject matter falls within an area of traditional state responsibility. The legislature has a more circumscribed role in Australia's foreign affairs process because no formal legislative approval is required before Australia expresses its consent to be bound by a treaty. The principal function of the legislature is to ensure that Australian law conforms with the obligations imposed on Australia by treaties to which the federal executive has expressed or intends to express Australia's consent to be bound. While implementing legislation is most frequently enacted by the federal Parliament, state Parliaments are sometimes called on to enact laws to implement treaties falling within areas of their traditional legislative responsibility, pursuant to principles of cooperative federalism. This requires a delicate balance to be struck between the need to ensure that Australia is not placed in breach of its treaty obligations as a result of aberrant state laws, and the need to preserve an acceptable division of power between the federal and state legislatures.

In addition to the role of the executive and legislature, the judiciary also plays an important part. In accordance with their common law heritage, Australian courts show considerable deference to decisions made by the executive in the conduct of the country's foreign relations. Such self-imposed limitations are evident in the courts' refusal to adjudicate upon foreign affairs questions that are regarded as political, to grant standing to individuals seeking to impugn foreign affairs decisions, and to inquire into certain facts certified by the executive as true. Notwith-

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legislature of an Australian state are attributable to Australia itself; INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON STATE RESPONSIBILITY, pt. I, art. 6, *reprinted in* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I), 284 (1983).

standing this attitude of deference, the High Court has maintained its position as the final arbiter of the meaning of the Constitution. In this capacity, the Court has recently played a significant role in interpreting the extent of the Commonwealth Parliament's constitutional powers to make laws with respect to matters dealt with in treaties to which Australia has become a party.

It is clear that a continuing difficulty in the conduct of Australia's foreign affairs is the need to balance the national interest in pursuing a robust foreign policy with the political exigencies of a federal system of government. Although the federal government faces few formal impediments to the formulation and implementation of its desired foreign policy, the political need to involve the states in the foreign policy process when the subject matter of the policy involves state interests is potentially problematic. The recent events surrounding the *Toonen Decision* are a telling reminder that Sir Kenneth Wheare's observation that "[f]ederalism and a spirited foreign policy go ill together"<sup>247</sup> contains more than a modicum of truth in the Australian federation.

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<sup>247</sup> WHEARE, *supra* note 1.

