THE AUSTRALIAN CONSTITUTION: THE EXTERNAL AFFAIRS POWER AND FEDERALISM

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When the Australian Constitution was passed into law by the British Imperial Parliament in 1900,[1] the structure of government envisaged was a combination of the Westminster system[2] and United States Federalism.[3] In the last ten years the expanding scope of Australia's external affairs power has indicated a move towards a more centeralized form of government. The opinions of the High Court, developments in Australian politics and the increasing interdependence of nations have contributed to the growing use of the external affairs power by the Commonwealth to encroach on areas previously left to the State's[4] control.

Section 51 of the Australian Constitution delegates to the Parliament thirty-nine seperate heads of power under which to legislate for the peace, order and good government of the

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1. The Australian Constitution forms section Nine of the Commonwealth of Australia Constitution Act of 1900. *See* Commonwealth of Australia Constitution Act, 1900, 63-64. VICT. STAT. 25, c. 12. The text of the Australian Constitution is *reprinted in* CONSTITUTIONS OF NATIONS 93 (Peaslee ed. 1950) [hereinafter cited as AUSTL. CONST.].

2. The term Westminster Government derives from a system under which a bicameral Parliament, meeting at Westminster, made laws while the Kings ministers controlled the day-to-day administration of those laws and an independent judiciary enforced them. W. McMinn, A CONSTITUTIONAL HISTORY OF AUSTRALIA ix (1979).

3. Federalism is a system of government that divides political power between a central authority and a number of component territorial units. Any constitution that guarantees independent jurisdiction to a number of component units of government can be characterized as a federal constitution. THE U.S. GOVERNMENT: HOW AND WHY IT WORKS 11-12 (Encyclopaedia Britannica ed. 1978).

4. Australia consists of a federation of six States. These are: New South Wales, Victoria, Queensland, South Austalia, Western Australia and Tasmania. Australia also has extensive territorial interests. The "internal" territories are Northern Territory and Australian Capital Territory. The "external" territories are Papua, Norfolk Island, Australian Antarctic Territory, Ashmore and Cartier Islands, Territory of New Guinea, and Nauru. I CONSTITUTIONS OF NATIONS 90 (Peaslee ed. 1950).

Commonwealth.[5] Of these, the external affairs power of section 51(29) is by far the most expansive. Through this head of power Parliament can legislate domestically in areas not covered by other delegated powers and, on occasion, preempt powers traditionally reserved to the States.

Perhaps the most common way the Australian government invokes the external affairs power for purposes of domestic legislation is through treaties and conventions. Since Australia has no self-executing treaties,[6] a main function of the external affairs power is to give internal affect to treaties by granting Parliament the power to pass effectuating legislation. The areas in which the external affairs power may be used to legislate domestically are not limited, however, to treaties and conventions. The expanding scope of the external affairs power and its consequent effect on Australia's federalism is the subject of this Article.

The scope and evolution of Australia's external affairs power was comprehensively examined in 1971 by Professor Howard.[7] Since that time new decisions touching on this power have been handed down by the Australian High Court. These decisions show the continuing dichotomy between two judicial approaches to the problem of Commonwealth attempts to expand control over matters formerly left to the States. The more liberal approach, taken by the majority of the High Court, views the external affairs power as an independent and express legislative power limited only by express constitutional prohibitions. Their definition of what constitutes an external affair continues to increase in breadth. The more conservative approach, generally taken by the minority of the Court, limits the external affairs power by both express and implied constitutional prohibitions. Their definition of external affairs, for purposes of invoking domestic legislation, is restricted to the more conventional definition of international agreements.

After giving a brief overview of the Australian federal structure and examining the treaty power of the Australian Constitution,

5. AUSTL. CONST., *supra* note 1, § 51.

6. In comparison, the United States does have self-executing treaties, wherein rights and liabilities are created thereunder without the necessity of further action by Congress. *See* Foster and Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); *See also* U.S. CONST., art. VI, § 2.

7. Howard, *The External Affairs Power of the Commonwealth*, 8 MELB. U.L. REV. 193 (1971). This article was later incorporated in chapter seven of Professor Howard's book, AUSTRALIAN CONSTITUTIONAL LAW. All references will be to the textbook C. HOWARD, AUSTRALIAN CONSTITUTIONAL LAW 441 (2d ed. 1972).

this Article surveys the major High Court decisions interpreting the external affairs power up to the time of Professor Howard's article in 1971. The Article then reviews the decisions of the High Court since that time. It will show the emergence of two distinct trends in the Court's interpretation of the external affairs power and the nature of an external affair. The relationship between the external affairs power and the Charter of the United Nations is then examined. Finally, the limitations on the external affairs power are explored.

I. THE AUSTRALIAN FEDERAL STRUCTURE

A. The Commonwealth Constitution

The Australian Constitution was passed into law by the British Imperial Parliament in 1900,[8] at the request and with the cooperation of the Australian colonies. At that time the structure of government envisaged was a combination of the United States federation structure and the Westminister system of parliamentary responsibility. Today, Australia's government can best be characterized as a Federal Commonwealth.[9]

Australia's Federal Parliament consists of the Crown, Senate and House of Representatives. The Executive power of the Crown is vested in the Governor General, who is the Monarch's representative.[10] The Governor General acts on the advice of a Federal Executive Council composed of ministers of state, chosen and summoned by the Governor General,[11] upon the advice of the Prime Minister. Officers of the Executive Government must be members of the Parliament. The Executive Government is wholly responsible to the Parliament.[12]

The Legislative department consists of two chambers. The Senate is the upper chamber and consists of senators elected from each State on a basis of equal representation.[13] The Senate's powers are not quite as strong as those of the United States Senate, but strong enough to resolve the inevitable deadlocks between the lower and upper house when different parties hold majorities in

8. *See* note 1 *supra*.
9. I CONSTITUTIONS OF NATIONS 90 (Peaslee ed. 1950).
10. AUSTL. CONST., *supra* note 1, § 2.
11. *Id.* §§ 61 & 62.
12. *Id.* § 64.
13. *Id.* § 7. The Senate has thirty-six members, six from each of the States elected to six years.

each chamber.[14] The lower chamber is the House of Representatives whose membership is proportionate to the population, with a minimum of five representatives for each State.[15]

Like the United States Constitution, the Constitution Act[16] provides for a Commonwealth Government of delegated or enumerated powers.[17] The powers not delegated to the Commonwealth are considered to be left to the States.[18] One qualification though, is that since the States were separate entities under the Imperial Parliament, they did not have a given legislative power at federation and therefore cannot be considered as having a residue of that power.[19]

Federal laws enacted pursuant to a delegated power will take precedence over inconsistent State laws.[20] Like the United States doctrine of "federal preemption",[21] Commonwealth supremacy also takes place where the Federal Government enacts laws with the intent to "cover the field".[22]

Overseeing the balance between the Commonwealth and the States is the High Court. Its jurisdiction, including for our purposes, treaty matters is covered in section 75:

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14. *Id.* § 57.

15. *Id.* § 24.

16. *See* note 1 *supra*.

17. The United States Federal Government is one of enumerated rather than inherent powers. The Government can only act to effectuate the powers specifically granted to it by Article 1, § 8 of the United States Constitution. However, under the doctrine of implied powers set forth in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) certain broad federal powers are implied from the necessary and proper clause (U.S. CONST., art. 1, § 8, cl. 18).

18. AUSTL. CONST., *supra* note 1, § 107. In the United States the corresponding grant of power comes from the Tenth Amendment to the United States Constitution which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States. . . ." These words no longer have quite the power a literal interpretation would give them. Today, the Tenth Amendment is interpreted to "expressly declare the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542 (1975).

19. C. HOWARD, *supra* note 7, at 12. *Compare* the United States approach in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

20. AUSTL. CONST., *supra* note 1, § 109.

21. Under this doctrine the United States Congress may have the exclusive power to regulate in certain fields where uniform national laws on the subject are deemed necessary and desireable. A good example is Congress' power to pre-empt State regulation of interstate commerce.

22. C. HOWARD, *supra* note 7, at 34. *Compare* the United States Supreme Court's use of the "federal preemption" doctrine in the airline area in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

Original Jurisdiction of High Court
In all matters—
(i) Arising under any treaty: . . .[23]

The power of judicial review along the lines of *Marbury v. Madison*,[24] was established at an early date, even though the United States case was not formally adopted by the Commonwealth until later.[25] Initial problems of strict judicial interpretation of the Constitution Act by English-style statutory construction techniques, rather than constitutional construction methods, have also been overcome.[26] Since the *Engineer's Case* in 1920, it has been a settled canon of construction that Commonwealth powers are to be given a wide construction.[27]

B. The Treaty Power

The Commonwealth follows a Westminster system with respect to treaties. The negotiation, policy making and ratification of a treaty is purely an Executive action which binds only the Crown.[28] The rights of subjects are not affected by a treaty, only by the domestic legislation which implements the treaty.[29] Australia

23. Section 38(a) of the Judiciary Act invests the High Court with exclusive jurisdiction with respect to "matters arising directly under any treaty." For a discussion of the background and analysis of High Court Jurisdiction in respect to treaties, *see* Z. COWEN, FEDERAL JURISDICTION IN AUSTRALIA 24-32 (1951).

24. Marbury v. Madison, 5 U.S. 1 (Cranch) 137 (1803). In this case the United States Supreme Court held that it had the power to review Acts of Congress and declare them void if repugnant to the United States Constitution.

25. Marbury v. Madison, *Id.*, was formally adopted by the Australian High Court in Australian Communist Party v. The Commonwealth, 83 C.L.R. 1, 262-63 (1951).

26. "We must . . . remember that it is a constitution we are construing," R. v. Public Vehicles Licensing Approval Tribunal of the State of Tasmania, *ex parte* Australian National Airways Pty. Ltd., 113 C.L.R. 207, 225 (1964). *See also* Dixon, *Marshall and the Australian Constitution*, 29 A.L.J. 420 (1955).

27. Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd., 28 C.L.R. 129 (1920). The *Engineers' Case* was a landmark decision in Australian constitutional law. After the Great War the government of Western Australia undertook the establishment of a complex of State enterprises ranging from a farm-implement factory to a string of butcher shops. In the *Engineers' Case* it claimed for its new activities the protection from Commonwealth Arbitration Court control of implied immunity, and thus effectively reduced the doctrine to an absurdity. The case clearly overruled the *Railway Servants Case* which held that an award of the Commonwealth Arbitration Court could not bind State railway commissioners. The practical effect of the *Engineers' Case* was to circumscribe the 'areas and subject matters' left to the States. W. MCMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA 127, 136-37 (1979).

28. R. v. Burgess, *ex parte* Henry, 55 C.L.R. 608, 644 (1936) [hereinafter cited as Burgess] (Chief Justice Latham); Attorney-General for Canada v. Attorney-General for Ontario, A.C. 326, 347-48 (1937); Walker v. Baird, A.C. 491 (1892).

29. The implementing legislation may be enacted by the Commonwealth, the States, or

does not have self-executing treaties which become internal law upon ratification.[30] Nor does the Australian Senate have any power to participate in the treaty-making process like its United States counterpart.[31]

Of course, a government with any political sophistication is going to submit major treaties to the Parliament for discussion and possibly for passage of implementing legislation before Executive ratification. Nonetheless, the non-existence of self-executing treaties is vitally important for an understanding of the Australian external affairs power. Treaties do not affect Australian internal law until legislation is enacted pursuant to section 51(29) of the Constitution.[32] Thus, the function of the external affairs power, with respect to treaties, is to authorize the Parliament to legislate domestically to give internal effect to treaties made by the Executive as part of its conduct of external affairs.[33]

An analysis of the structure of treaty making has led some jus-

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both as long as State legislation is not inconsistent. Burgess, *supra* Note 28, at 636-37 (Chief Justice Latham). As for the States continuing exercise residual power in the area of external affairs, such as the appointment of States Agents-General to London, *see* Sawer, *Australian Constitutional Law in Relation to International Relations and International Law*, in INTERNATIONAL LAW IN AUSTRALIA 38-39 (O'Connell ed. 1965). *See also*, Sawer, *Execution of Treaties by Legislation in the Commonwealth of Australia,* 2 U. QUEENSL. L.J. 297, 298 (1956) [hereinafter cited as Sawer, *Execution of Treaties*]. For another view of possible residual powers of "international competence" in the States, *see* Kidwai, *External Affairs Power and Constitutions of British Dominions*, 9 U. QUEENSL. L.J. 167, 182-84 (1976). For an example of where the Commonwealth has ratified an international convention, but failed to legislate pursuant to § 51(29) thus permitting the States to retain legislation contrary to the convention, *see* Georgini v. Electric Power Transmission Pty. Ltd., 80 W.N. (N.S.W.) 41. (Case concerned foreign dependents equal right to state workmen's compensation benefits of deceased under the International Labour Convention.)

30. *Cf.* (the United States position) Foster and Elam v. Neilson, *supra* note 6. *See also* U.S. CONST., art. VI, § 2.

31. United States Constitution, art. II, § 2, cl. 2. While the United States Senate may not participate directly in the treaty negotiating process, the United States Senate does have a policy making role. The President needs to muster two-thirds of the Senators to give their advise and consent to a treaty he desires to ratify. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37-50 (1972). The balance between the United States President and Senate in the area of treaties is one of the major battlegrounds of American foreign policy formulation.

32. Burgess, *supra* note 28, at 644. *See also* R. v. Poole, *ex parte* Henry (No. 2), 61 C.L.R. 634 (1939); Bradley v. The Commonwealth of Australia, 128 C.L.R. 577, 582-83 (1973).

33. From the legislative history, the external affairs power was not conceived as a treaty implementing power. It was most likely originally intended only to give the Commonwealth government the power to deal with British Commonwealth affairs formerly handled by the individual States. Due to the changing international status of Australia and the need for flexible Constitutional construction, the power became converted into what it is today. *See* Justice Barton's opinion in McKelvey v. Meagher, 4 C.L.R. 265, 286 (1906). (The case con-

tices to conclude that the external affairs power permits Parliament to legislate in areas not covered by other delegated powers; thus providing Parliament with an independent source of legislative power.[34] Nevertheless, the mere fact that the Commonwealth has acceded to a treaty or convention may not necessarily attract the legislative power of the Parliament under section 51(29).[35] It has been left to the Australian High Court to determine what an external affair is for the purpose of domestic legislation and whether there is any limitation either on the subject matter of the external affairs power or the legislation enacted pursuant thereto.

II. INTERPRETING AUSTRALIA'S EXTERNAL AFFAIRS POWER

A. The High Court's Interpretation up to 1972[36]

In 1921, the High Court in *Roche v. Kronheimer*,[37] held valid the broad economic regulations passed by Parliament to implement the Versailles Peace Treaty. While the legislation could have been upheld partly under the defense power, the external affairs power was relied upon and mentioned by Justice Higgins: "It is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed."[38]

1. *R. v. Burgess*.[39] The first attempt to find these limits and define an external affair, took place in *R. v. Burgess*, the first of three major decisions considering the external affairs power. In that case, the defendant was convicted of flying an airplane intra-State without a federal license, contrary to Commonwealth regulations. The regulations had been made pursuant to section four of the Air Navigation Act of 1920 which allegedly authorized their making for two main purposes. One, to implement an international convention on air navigation, to which Australia was a party and two, to control aviation in the Commonwealth. The head of power

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cerned laws on fugitive offenders. The laws were held a proper exercise of legislative power pursuant to § 51(29)).

For a survey of the history of § 51(29) *see* Thompson, *A United States Guide to Constitutional Limitations Upon Treaties as a Source of Australian Municipal Law*, 13 W. AUSTL. L. REV. 110, 123-27 [hereinafter cited as Thompson].

34. *See generally* Burgess, *supra* note 28, at 608.

35. *Id.* at 699 (Justice Dixon).

36. This part draws heavily from Professor Howard's article, *supra* note 7, and from JOHNSTON, THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES 198-211 (1969).

37. Roche v. Kronheimer, 29 C.L.R. 329 (1921).

38. *Id.* at 338-39.

39. Burgess, *supra* note 28, at 608.

most nearly allowing the Commonwealth to make regulations for this later purpose was the interstate commerce power of section 51(1). The Court found that the regulations were too broad to be supported by section 51(1) and furthermore, they were invalid because they went beyond the terms of the Convention. The real importance of the case, however, lies in the Court's discussion of the section 51(29) external affairs power.

The scope of the external affairs power was considered by three Justices as being very wide. Chief Justice Latham and Justices Evatt and McTiernan held that section 51(29) was an independent and express legislative power.[40] It was also "impossible to say, *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement."[41] No distinction could be drawn between international affairs and domestic affairs. The kinds of matters to be encompassed within section 51(29) must concern other countries as well as Australia and be matters endeavoring to discern means of living together on practicable terms.[42] In short, a reciprocity of interest would make a valid external affair.

Justices Evatt and McTiernan went very far in holding that the legislative power under section 51(29) did not arise only when there was a binding treaty:

> [I]t is not to be assumed that the legislative power over "external affairs" is limited to the execution of treaties or conventions; . . . Parliament may very well be deemed competent to legislate for the carrying out of . . . other international recommendations or requests upon other subject matter of concern to Australia as a member of the family of nations. The power is a great and important one.[43]

These three Justices saw a limitation in the exercise of the power only in express constitutional prohibitions. Chief Justice Latham specifically mentioned the prohibitions against establishment of religion and State control of liquor.[44] Justices Evatt and McTiernan listed several others, including the federal structure, duration of a session of the House of Representatives, the right to vote, trial by jury, freedom of interstate trade, equal protection of the States in federal trade, commerce and revenue laws, State water rights and

40. *Id.* at 639.
41. *Id.* at 641.
42. *Id.* at 684 (Chief Justice Latham).
43. *Id.* at 687.
44. *Id.* at 642.

privileges and immunities between State citizens.[45]

The two dissenting Justices in the *Burgess* case, Dixon and Starke, held a more restricted view of the external affairs power. They would have allowed the exercise of domestic legislation only if the international agreement was a matter "of sufficient international significance to make it a legitimate subject for international co-operation and agreement."[46] This implied an ability to segregate legislatively the international subjects from the national subjects. In addition, Justice Starke would have limited any legislation by implied as well as express prohibitions in the Constitution Act.[47] The fear of these Justices was an "awareness of the potential of section 51(29) for destruction of the federal balances of legislative power."[48]

All Justices in this case agreed that the Commonwealth could not use an international agreement solely as a device for acquiring domestic legislative power by bringing in section 51(29).[49] The consensus was that of Chief Justice Latham, that there must be, as a minimum, a genuine mutuality of interest in the subject matter between the countries concerned.

It should be noted that each case concerning Commonwealth legislation under section 51(29) can be divided into two issues. The first issue is whether the subject matter pursuant to which Parliament is seeking to invoke section 51(29) is an external affair, that is, an international matter. As we have seen in the *Burgess* case, three Justices defined external matters as co-extensive with all possible subjects of sincere international agreement, even non-binding resolutions. All Justices concurred that agreements on subjects of express constitutional prohibitions were not valid external matters.

The second issue, assuming a valid external affair or international agreement exists, is, to what extent may the legislation implement the agreement domestically? The *Burgess* case again pointed to express constitutional prohibitions. However, on this second issue four of the Justices agreed that the regulations "must in substance be regulations for carrying out and giving effect to the convention."[50] This test required strict adherence to the agreement

45. *Id.* at 687.

46. *Id.* at 658, quoting from W. WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 519 (2d ed. 1929).

47. C. HOWARD, *supra* note 7, at 450.

48. *Id.*

49. *Id.*

50. Burgess, *supra* note 28, at 646.

and the regulations in the *Burgess* case were struck down as being incidental and too far removed. Justice Starke, dissenting, held that once a matter was determined to be within the scope of section 51(29), the power to implement regulations "must be construed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention."[51] As Professor Howard pointed out, Justice Starke's approval is consistent with the belief that section 51(29) constitutes an independent grant of legislative power.[52] If so, then all incidental matters should be within its scope just like any other independent power.

While the regulations in the *Burgess* case were struck down for deviating too much from the legislation enacted pursuant to section 51(29), the importance of the case was that the Commonwealth was conceded the power to enact regulations and legislation in an intra-State area where there was no other power within section 51 delegating that authority.[53] The case was easily decided since there was no direct prohibition in the Constitution on Commonwealth control of intra-State commerce. Nevertheless, intra-State commerce had been reserved to the States by not being expressly delegated to the Commonwealth. The Commonwealth was thus using section 51(29) as a source of independently delegated power, permitting it to encroach upon an area traditionally reserved to the states. These areas have been ones where the Commonwealth would not have been able to legislate under other heads of power.

Between the *Burgess* case and the *Second New South Wales Airlines*[54] case, there were two decisions adding to the number and scope of subjects falling within the definition of external affairs. Both decisions expressed concern over limitations on section 51(29).

2. *Ffrost v. Stevenson*.[55] In 1937, the Court, consisting of nearly all the same Justices who decided *Burgess*, had to rule on the validity of legislation for the extradition of fugitive offenders from

51. *Id.* at 659.

52. C. HOWARD, *supra* note 7, at 454.

53. Regulations setting minimum height levels for flights above airdromes were upheld in R. v. Poole, *ex parte* Henry (No. 2) 61 C.L.R. 634 (1939).

54. Airlines of New South Wales Pty. Ltd. v. The State of New South Wales and Another (No. 2) 113 C.L.R. 54 (1964-65). This was the second major case interpreting the external affairs power of section 51(29). *See* notes 65-75 *supra*, and accompanying text.

55. Ffrost v. Stevenson, 58 C.L.R. 528 (1937).

New Guinea. The legislation was enacted pursuant to the Imperial Fugitive Offenders Act of 1881; an extradition act adopted by the Australian Government. Since New Guinea was not a State of the Australian Commonwealth and the legislation was directly affecting the rights of a fugitive within the territory of one of the states, a separate head of legislative power was needed outside the Commonwealth's civil and criminal power delegated by section 51(29).

Two Justices found the legislative power in section 51(29). Chief Justice Latham stated:

> Provisions for reciprocal surrender of persons charged with criminal offenses constitute one of the most ordinary forms of legislation with respect to external affairs. Therefore, under sec. 51(xxix) of the Constitution, the Commonwealth Parliament has power to legislate for the peace, order and good government . . .[56]

Justice Evatt agreed with Chief Justice Latham on the source of legislative power, while the other three Justices decided the case in favor of extradition without reaching the issue of section 51(29).

Justice Evatt, echoing his view in the *Burgess* case, stated that the power was "limited only by other express provisions of the Constitution and its own terms fairly construed. . . ."[57] Chief Justice Latham held, by implication, that laws passed by virture of sections other than section 122 (legislation over a mandate territory) were subject to parts of the Constitution which treat the Commonwealth as "part of a Federal system in which the Commonwealth is one element and the States are other elements."[58] In other words, all of the section 51 powers are limited by federalism.

While the Case adds nothing in the way of elaboration on the external affairs power, it does point out the continuing use of section 51(29) to find legislative power in an area—in this case, criminal law—that had been left to the States. It also shows that only the federal structure of the Constitution Act would prevent an abuse of section 51(29).

3. *R. v. Sharkey*.[59] The next decision of importance was *R. v. Sharkey* in 1949. In that case legislation passed by the Imperial

56. *Id.* at 557.
57. *Id.* at 601.
58. *Id.* at 556.
59. R. v. Sharkey, 79 C.L.R. 121 (1949) [hereinafter referred to as *Sharkey*]. Mr. Sharkey was the head of the Australian Communist Party.

Parliament, and later adopted by the Commonwealth, made it a crime to attempt to excite disaffection against the Government or Constitution of any Dominions. Thus, if an alleged seditious act was against a non-Australian government, the defendant could be found guilty in Australia. The Justices upheld this Act. Justice Dixon stated that "perhaps only under [the external affairs power] can paragraph (c) be supported."[60] Chief Justice Latham justified the legislation by pointing out the need to maintain good relations with all countries:

> The relations of the Commonwealth with all countries, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs. . . . [The law] may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions.[61]

Justice McTiernan concurred in this reasoning.[62]

In *Sharkey*, two of the three Justices who took the liberal view expressed in *Burgess*, as to what constitutes an external affair, permitted the Federal Government to enact a criminal defamation statute on the grounds of preservation of good relations with sister members of the British Commonwealth. The relationship to external affairs was rather tenuous and certainly failed any test of mutual reciprocity. The Case, in the words of Sawer:

> provides a basis for contending that in order to support Federal legislation, an international agreement need not be in the precise and detailed form of a treaty or convention, and that the Federal Parliament can honor obligations of conscience or of solidarity which are conducive to an international relationship although not distinctly required by its terms.[63]

To the extent this conclusion is accepted, it represents a victory for Justices Evatt and McTiernan's approach to section 51(29) in *Burgess*. The case may also be seen as foreshadowing the argument that legislation can be passed not only for the purpose of implementing an agreement, but also simply because the subject matter is purely an external affair.[64]

In *Sharkey*, a minor intrusion into State criminal law was made. It is interesting to note that the reasoning in this Case could be used to permit restrictive human rights legislation which the

60. *Id.* at 149.
61. *Id.* at 136-37 (emphasis added).
62. *Id.* at 157.
63. Sawer, *Execution of Treaties, supra* note 29, at 298.
64. *See* text accompanying notes 75-99 *infra*.

Commonwealth found necessary for the preservation of "good relations" with foreign governments. This has not happened, but it is important to point out the lack of a United States — style Bill of Rights in the Australian Constitution.

4. *Airlines of New South Wales Pty. Ltd. v. State of New South Wales*.[65] The second of the three major cases concerning section 51(29) was the *Second New South Wales Airline* case.[66] Once again the validity of regulations affecting wholly intra-State aviation was at issue. The treaty used to invoke section 51(29) was the Chicago Convention of 1944. The effect of the regulations was to make wholly intra-State public aviation subject to Commonwealth licensing. This authority permitted the Commonwealth to indirectly prohibit intra-State aviation. Six of the seven Justices held the regulation valid, but split on the power to be relied upon. Chief Justice Barwick and Justices Menzies and Owen used both the external affairs power and the trade and commerce power. Justice McTiernan, taking the most expansive view, held the regulations valid under the external affairs power alone. In contrast, Professor Howard felt that the position adopted in construing the regulations, once a valid external affair was found, should be the plenary power approach of Justice Starke in *Burgess*.[67] Chief Justice Barwick stated:

> Once it is decided, however, that some treaty or convention is, or brings into being, an external affair of Australia, there can be no question that the power under s.51(xxix.) of the Constitution thus attracted is a plenary power and that laws properly made under it may operate throughout Australia subject only to constitutional prohibitions express or implied. In particular, laws, made under this power may operate throughout Australia without regard to the distinction between inter-State and intra-State trade and commerce. . . .[68]

Nonetheless, the mention of implied Constitutional prohibitions recalls the restricted view which Justices Starke and Dixon used when attempting to first decide if there was a valid external affairs power. It appears that, in contrast to the *Burgess* case, Chief Justice Barwick took a more conservative approach in the *Second New South Wales* case when testing the constitutionality of the reg-

65. *See* note 54 *supra*.
66. *Id.*
67. C. HOWARD, *supra* note 7, at 455.
68. 113 C.L.R. 54, 85 (1965).

ulations than did Justice Starke once he found an external matter. For example, Chief Justice Barwick went on to write:

> Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for legislative authority, it is for this Court to determine whether particular provisions, when challenged, are appropriate and adapted to that end. The Court will *closely scrutinize* the challenged provisions to ensure that what is proposed to be done substantially falls within the power.[69]

In spite of the strictness of the above test, the majority of the Justices went on to hold the regulations valid, as a reasonably incidental use of legislative power invoked by section 51(29). Since the regulations were neither inappropriate, inconvenient nor inconsistent with the international obligation, they were held valid even though the international obligation said nothing about intra-State aviation.[70]

In attempting a synthesis of these first two primary cases—the *Second New South Wales* case and *Burgess*—it seems that the Court in the *Second New South Wales* case refused to adopt the broad test used by Justices Evatt and McTiernan in *Burgess* to determine what constitutes an international matter. On the other hand, given a valid external matter, the test for regulations and legislation has been broadened to include incidental matters.

What was different in the *Second New South Whales* case from *Burgess*, was Chief Justice Barwick's straight forward statement that a law enacted pursuant to a valid exercise of the external affairs power can operate on an intra-State basis.[71] The Commonwealth may submit to the High Court that the treaty demands a Commonwealth-wide treatment, and if the Court agrees, the Commonwealth power can reach into areas normally reserved to the States.[72]

The issue of what limitations should be imposed on the external affairs power was also reached in the *Second New South Wales* case. In that case a regulation[73] was struck down which attempted to remove from the States the powers which they otherwise had to

69. *Id.* at 86 (emphasis added).

70. C. HOWARD, *supra* note 7, at 458. This was the test used by Justice Starke in the *Burgess* case. *See* Burgess, *supra* note 28, at 664.

71. This principle was one of the main issues in *Burgess*, but never expressed so clearly or sharply as by Chief Justice Barwick in the *Second New South Wales* case.

72. 113 C.L.R. 54, 84-85 (1965).

73. Commonwealth Regulation 200 (B).

prohibit flights. This shows in striking contrast the different positions taken by the United States Supreme Court and the High Court toward State's powers in commercial aviation.[74] In this particular area of regulation one might conclude that Federalism and State power are more alive in Australia than in the United States.

Up to this point, we have seen Commonwealth domestic legislation enacted, under the authority of section 51(29), to implement a peace treaty, extradite fugitives from a State, control intra-State aviation by licensing, permit Commonwealth regulation of intra-State aviation, and make it a crime to utter seditious statements against certain foreign governments. The limitations upon an external affair encompass express Constitutional prohibitions and possibly implied ones. Regulations enacted under a valid external matter must adhere to the nature of the obligation, yet may also include broad incidental ones, only limited by the Constitution and the federal system.

B. The High Court's Interpretation Since 1972

The latest case interpreting section 51(29), *New South Wales v. The Commonwealth*[75] was handed down by the Court in 1975. Pursuant to the ratification of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf, the Commonwealth Parliament passed the Seas and Submerged Lands Act of 1973. The Act claimed Commonwealth federal jurisdiction over the territorial sea, the air above and the land below it, and over the continental shelf. The Australian States claimed that prior to federation they had held sovereignty over these areas and still did after federation. Apart from the claims of historic title, issues were raised concerning section 51(29).

Justices McTiernan and Murphy held that the Act represented a valid exercise of the external affairs power conferred by section 51(29) to implement an international convention. Justice Murphy

74. In City of Burbank v. Lockheed Air Terminal, Inc., 441 U.S. 624 (1973) the Court per Justice Douglas held a local government authority was preempted by pervasive Federal regulation from enacting a local airport noise ordinance. *But see*, British Airways v. New York and New Jersey Port Authority, 564 F.2d 1002 (5th Cir. 1977). Johnston, *supra* note 36, at 211, takes a much more restrictive view of the results of the *Second New South Wales* case.

75. The State of New South Wales v. The Commonwealth of Australia, 50 A.L.J.R. 218 (1975) [hereinafter referred to as the *Submerged Lands* case]. *See also* Dowal v. Murray and Another, *infra* note 106, and accompanying text, for the most recent High Court case touching on § 51(29).

was the most expansive in his discussion of the power.[76] Considering the scope of what may be regarded as an external affair, he held that such matters included subjects not thought of at the time of federation and not limited to the subject matter of treaties and conventions to which Australia was a party.[77] He stated that: "External affairs may also be internal affiars; they are not mutually exclusive."[78] Justice Murphy was echoing the expansive view of Justices Evatt and McTiernan in the *Burgess* case. Any attempt to delimit subject matter *a priori* was rejected and overlapping subjects were acknowledged.

Considering the legislation and regulations based on a valid external matter, Justice Murphy followed Justice Starke's expansive view of incidental laws. He stated that: "[T]he presumption of validity should be applied as with other enactments. The use of the external affairs power may be novel, but this is no excuse for adopting a narrow, cautious or suspicious approach to Acts which are said to be supported on that power."[79] Justice Murphy feared that narrow interpretations of incidental legislation, or of the scope of external matters, under section 51(29) would result in turning Australia into an "international cripple unable to participate fully in the emerging world order."[80] He stressed the impracticability of dealing with many internal affairs except through international agreements. In his conclusion Justice Murphy held that even if the Conventions had not been signed, the Act would still be valid since "this would still be a law with respect to external affairs."[81]

This last statement of Justice Murphy encompassed the rationale which the other three Justices, forming the majority in this case, used in their opinions. Chief Justice Barwick and Justices Mason and Jacobs expressed their view of Justice Murphy's rationale as follows:

> [External affairs] are not limited, in my opinion, to the making of arrangements with other nations or the implementation of such international arrangements as may properly be made in Australia's interest with other nations, though doubtless these may be

76. For a concurring analysis of the opinions, *see* Kidwai, *External Affairs Power and Constitutions of British Dominions*, 9 U. QUEENSL. L.J. 167, 180-81 (1976). Justice Murphy was appointed to the High Court in 1975. He was the junior justice at the time of this case.

77. 50 A.L.J.R. 218, 277 (1975).

78. *Id.*

79. *Id.* at 278.

80. *Id.*

81. *Id.*

> the most frequent manifestations of the exercise of the power. The power extends, in my opinion, to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole.[82] (Chief Justice Barwick)
>
> The plaintiffs' argument proceeds on the footing that the power is no more than a power to make laws with respect to Australia's relationships with foreign countries. Why the power should be so confined is not readily apparent. The power is expressed in the widest of terms; it relates to "affairs" which are external to Australia. "Affairs" include "matters" and "things" as well as "relationships" . . . .[83] (Justice Mason)
>
> [I]t is my opinion that the power conferred by a s.51(xxix) extends to matters or things geographically situated outside Australia.[84] (Justice Mason)
>
> It is therefore submitted that laws made with respect to external affairs do not comprehend all laws operating upon persons or things beyond the boundaries of the Commonwealth; that the source of power to make such laws must be found in other particular subject matters of legislative power.
>
> In my opinion the Commonwealth has the power to make laws in respect of any person or place outside and any matter or thing done or to be done or prohibited to be done outside the boundaries of the Commonwealth.
>
> The power to make laws in respect of any place outside the boundaries of the Commonwealth is . . . vested in the Australian Crown by virtue of the extenal affairs power. . . . It is not a sufficient reason for reading down the meaning of these words that there are other provisions of the Constitution . . . which expressly confer power to legislate with extra-territorial effect . . . .[85] (Justice Jacobs)

The approach of these three Justices in ascertaining the scope of an external affair gave vitality to the view that a treaty or convention is not always necessary for Parliament to legislate with respect to section 51(29). This was not, however, a novel view for the High Court. In 1933, the Court held in *Jolley v. Mainka*,[86] that laws passed in respect to mandated territory concerned external affairs. In that case the judgment emphasized that the territory, New

82. *Id.* at 221.
83. *Id.* at 264.
84. *Id.* at 265.
85. *Id.* at 275.
86. Jolley v. Mainka, 49 C.L.R. 242 (1933), referred to by Justices Evatt and McTiernan in Burgess, *supra* note 28, at 678.

Guinea, was outside the territorial limits of the Commonwealth and States and involved no competition of constitutional powers between them. Thus, of necessity, the geographically external territory involved external affairs.

Justices Gibbs and Stephen, dissenting in the *Submerged Lands* case, concurred that Parliament's power to legislate with respect to external affairs certainly included external matters.

> The extension of the sovereignty of the Commonwealth over territory, whether on land or at sea, which is not already part of the Commonwealth, is a matter that affects the external relations of the Commonwealth . . . . Legislation which gave effect to an extension of sovereignty or sovereign rights in those circumstances would be legislation with respect to external affairs on the narrowest view of s.51(xxix).[87] (Justice Gibbs)
>
> Treaties and conventions to which a nation may become a party form, no doubt, an important part of those affairs, but "external affairs" will also include matters which are not consensual in character. . . .[88] (Justice Stephens)

The entire Court was willing to give the Commonwealth domestic legislative power where the external matter concerned was geographically external and no convention or treaty was involved.

The above rationale gave Chief Justice Barwick and Justices Mason and Jacobs an easier way out of the section 51(29) discussion than they might otherwise have had. If they would have had to base their decision on the implementation of an international convention, then the second step of evaluating the scope of the incidental powers created in the enacting legislation would have had to been reached. Justices McTiernan and Murphy reached this second step and considered the entire Act valid. Indeed, the only real difference between the dissent and the majority opinion of the above three Justices was that Justices Stephens and Gibbs held that the States had acquired sovereignty in the territorial sea belt. Therefore, with the exception of the continental shelf, the Commonwealth could not expropriate the State's land under these circumstances.[89]

Since the dissenters held that the States owned these areas, a

87. 50 A.L.J.R. 232-33 (1975).

88. *Id.* at 256.

89. *Id.* at 256. Justices Gibbs and Stephens held the States had never asserted sovereignty over the continental shelf, this concept being a past World War II phenomena. *Id.* at 243, 259.

classic problem on the limits of the external affairs power was presented. Justice Gibbs resolved this in favor of the States:

> A law to divest powers from a State and vest them in the Commonwealth could be regarded as a law with respect to external affairs; such a law would relate to the internal organization of the nation and not its international relations. The existence of the Commonwealth as a state and the exercise of its functions as a national government do not enable it to alter at will the distribution of powers made by the Constitution.[90]

In an obvious reference to Justices Murphy and McTiernan's opinion, Justice Stephens added:

> If there is one consistent theme to be found throughout judicial discussion of the nature and extent of the external affairs power of the Commonwealth it is that it is undesirable to seek to express, in dicta, broad ranging views concerning its scope which go beyond the needs of the case in hand.[91]

The above excerpts from the dissenting opinion neatly express the view that the external affairs power of the Commonwealth cannot be used, under the cloak of a treaty or convention, to claim sovereignty for the Federal Government over State land without due process. This is a view which at least three of the majority would probably have concurred in if they had resolved the question of title the other way.

C. Emerging Trends in Australia's External Affairs Power

Where has the *Submerged Lands* case brought us in relation to the *Burgess* case and the *Second New South Wales Airlines* case? I believe two distinct trends have finally emerged. First, the trend to expand the scope of what constitutes an external affair has emerged from the total victory of Justices Evatt and McTiernan's view. Second, the trend toward liberal interpretation of regulations, which is Justice Starke's view, appears to have prevailed. Considering this last trend we have only to look at Chief Justice Barwick's statement:

> But it is clear from the reasons for judgment that if the Regulations had been apt to carry out the Convention, the fact that they operated upon matters which otherwise did not fall within the power of the Parliament would not have invalidated them. Being in themselves valid, they could operate in the States in respect of matters over which the Parliament otherwise had no

90. *Id.* at 233.
91. *Id.* at 256.

> legislative power: further, being valid, they would supercede any inconsistent law of a State. . . . The ambit of the power with respect to external affairs cannot be restrained by any reserve powers doctrine.[92]

On the issue of interpreting regulations, Chief Justice Barwick has considerably changed his statements from the "closely scrutinize" terminology of the *Second New South Wales Airlines* case. With Justice Murphy joining in an expansive view of incidental regulations alongside Justice McTiernan, a solid block of three out of seven Justices have taken a clear position. While it cannot be said with total confidence where the other four Justices stand with respect to incidental legislation, the expansive view of what constitutes an external matter held by the other two members of the majority, Justices Jacobs and Mason, may indicate where their sympathies lie.

It may also be possible to assign the dissenters in the *Submerged Lands* case a role other than one of narrow interpretation. Since Justices Gibbs and Stephens decided the case more on the basis of land title than on a federal versus state balance, they may well favor a more liberal approach. It should be pointed out that those portions of the Act implementing the Continental Shelf Convention were upheld by all seven Justices.[93]

Finally, the trend to expand the scope of an external matter should be considered. While there does not seem to be a belief that subjects can be neatly divided, *a priori*, between external and internal affairs, three Justices decided the *Submerged Lands* case on the basis of the matter being so external that a treaty was not needed to invoke section 51(29).

At first glance, we can add to our list of external affairs those matters which are geographically external from the Commonwealth and States. For those, a treaty or convention is not required for Commonwealth legislation. This would, for example, permit the Commonwealth to legislate penal laws for citizens abroad. These

92. *Id.* at 256.

93. Minister for Justice (W.A.) (at the Relation of Amsett Transport Industries (Operations) Pty. Ltd.) v. Australian National Airlines Commission and Another, 51 A.L.J.R. 299 (1977), a case concerning the validity of aviation regulations permitting control of some intra-State aviation as an incidental regulation pursuant to Commonwealth power as to Territories under § 122 of the Constitution, showed a slightly different line-up of Justices. Justices Stephen, Mason, and Murphy held the regulations were valid as an incidental power to legislation enacted under Parliament's plenary powers in § 122. Chief Justice Barwick and Justice Gibbs dissented. Justice Murphy again took the strongest position on the powers of the Commonwealth Parliament. Justice Gibbs was the most restrictive.

are things it cannot do if the citizen is intra-State, unless the crime directly affects the Commonwealth government, as in the *Sharkey* case. When the subject matter moves within the boundary of the Commonwealth, specifically intra-State, an international treaty, agreement or entanglement of some kind will be needed to support domestic legislation. In other words, Chief Justice Latham's test of reciprocity or mutual interest may have to be met unless the rationale of the *Sharkey* case applies.

Taking Justice Murphy's analysis on the scope of external matters one step further, a question may be raised as to whether the geographical distinction used by Chief Justice Barwick and Justices Mason and Jacobs was what Justice Murphy intended when he stated that the Act, even without a convention, "would still be a law with respect to external affairs."[94] Suppose, for instance, that the Commonwealth desires to legislate domestically in order to outlaw narcotic drugs and usurp all State control via federal preemption of the field. This subject is both external and internal, not delegated specifically to the Commonwealth, and traditionally left to State control. Surely the Commonwealth could ratify an international convention with some country, point to imposing mutual obligations, and thereby invoke domestic legislation under section 51(29). It is not clear how the High Court could legally distinguish those situations where the Commonwealth was signing agreements solely for the purpose of increasing its domestic legislative powers and those situations where it was ratifying an agreement out of genuine interest in resolving an international affair.[95] With the increasing interaction of the nations, there are few subjects on which an agree-

94. 50 A.L.J.R. 278 (1975). This may be especially true in the light of the United States and Canadian cases on the same issue. The United States Supreme Court asserted Federal primacy over the marginal sea on account of Federal "paramounty" in the area of foreign relations. *See* U.S. v. California, 332 U.S. 19 (1947); U.S. v. Louisiana, 339 U.S. 699 (1950); U.S. v. Texas, 339 U.S. 707 (1950); U.S. v. Louisiana, 363 U.S. 1 (1960); U.S. v. California, 382 U.S. 448 (1965). The Canadian case, however, was decided on the same narrow legalistic view of historical land title as the instant Australian case. *See* Reference re Ownership of Off-shore Mineral Rights, 65 D.L.R. (2d) 353 (1967). This narrow view was criticized as overlooking the factor of international responsibility and the unsatisfactory result of having jurisdiction split in federal states. O'Connell, *Problems of Australian Coastal Jurisdiction*, 42 A.L.J. 39, 41 (1968). *See also* Harders, *Australia's Offshore Petroleum Legislation: A Survey of Its Constitutional Background and Its Federal Features*, 6 MELB. U.L. REV. 415, 423-24 (1968). (Author feels Commonwealth has power to legislate under § 51(29) to give effect to rules that are part of customary international law.)

95. C. HOWARD, *supra* note 7, mentions this problem at 451. In the *Burgess* case the Court held it would not tolerate the use of international agreements by the Commonwealth as a facade for the acquisition of domestic legislative power. Burgess, *supra* note 28, at 642, 669 and 687. Also, Chief Justice Barwick has used the famous phrase "[T]he mere fact that

ment could be signed and not involve some mutual reciprocity of obligation. Perhaps for this reason, Justice Murphy was dismissing Chief Justice Latham's test as neither getting at the heart of the issue of what is external nor as serving any limiting purpose.

Perhaps, Justice Murphy was urging a test that would simply say: If upon balance the subject is reasonably related to external affairs and the legislation rationally achieves the Government's external affairs objective, then legislation with domestic effects may be enacted under section 51(29) regardless of the existence of a written international obligation or reliance upon another head of power. The only limitation upon this power would be the High Court's careful watch on the overall federal system. If this is what Justice Murphy really meant, and subsequent cases tend to show that it was, then he has moved significantly toward the United States concept of a federal balance of power.[96]

As for the other members of the majority in the *Submerged Lands* case, certainly Justice McTiernan and possibly Chief Justice Barwick and Justice Mason appear to have accepted the fact of an exercise of the external affairs power that does not meet Chief Justice Latham's test of mutual obligation, yet is nonetheless valid since the subject matter is truly external or foreign. If so, then Justice Murphy may not be as far out in front as first appears.

Regardless of what tests, or even if no tests are used, the real issue for the Australian High Court is going to be whether each individual Justice, on the facts of a particular case, favors an expansion of the central government's power. In the opinions of the *Submerged Lands* case, one can detect a willingness on the part of Chief Justice Barwick and Justice Murphy to favor the Commonwealth. Chief Justice Barwick carried his statements in the *Second New South Wales Airlines* case forward another step by denying States any "reserve powers doctrine" that would prevent a valid law enacted pursuant to section 51(29) from operating on an intra-State basis. This statement was a direct reference to Justice Holmes denial of that same power to the States of the United States under the tenth amendment to the United States Constitution.[97]

A final indication of a growing High Court favoritism toward the Commonwealth was Chief Justice Barwick and Justice Mur-

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the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament." 113 C.L.R. 54, 85 (1975).

96. *See* note 73 *supra*.

97. Missouri v. Holland, 252 U.S. 416, 432-34 (1920).

phy's belief that the demands of twentieth century relationships mean that only the Commonwealth Government can effectively legislate under section 51(29) to give effect to many international agreements:

> Whilst the power with respect to external affairs is not expressed to be a power exclusively vested in the Commonwealth it must necessarily of its nature be so as to international relations and affairs.[98] (Chief Justice Barwick)
>
> The practical experience of our Constitution is that this . . . [making of laws for implementation of treaties and conventions] . . . can only be done effectively by the national Parliament.[99] (Justice Murphy)

The idea of domestic legislation pursuant to section 51(29) for the purpose of implementing a non-binding agreement which covers a non-geographically external matter and involving a subject normally reserved to the States is what the Court may be moving toward. The most obvious context in which this situation may arise is a United Nations Resolution.

III. THE EXTERNAL AFFAIRS POWER AND THE CHARTER OF THE UNITED NATIONS

In *Bradley v. Commonwealth of Australia*,[100] the Commonwealth Postmaster-General issued a direction that all postal and communications services for the Rhodesian Information Center be suspended. The Government sought to justify its action partly on the grounds of implementing a non-binding United Nations Security Council Resolution. The Resolution called upon United Nations members to take action at the national level, under Article 41 of the Charter of the United Nations, to interrupt postal communications with the Smith Regime in Rhodesia.

The suit against the Commonwealth challenged the Postmaster-General's authority to issue such a directive. The governments defense relied on the United Nations Resolution. When the Court reached this issue,[101] Chief Justice Barwick stated that:

> Since the Charter and the Resolutions of the Security Council

98. 50 A.L.J.R. 218, 226 (1975).

99. *Id.* at 278.

100. Bradley v. Commonwealth of Australia, 128 C.L.R. 557 (1973).

101. The decision was 3-2 upholding the injunction against the Postmaster-General. The case was principally decided on the power of the Postmaster as given in the Post and Telegraph Act of 1901-1971. Only Chief Justice Barwick and Justice Gibbs reached the United Nations issue.

> have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified . . . .[102]

Justice Gibbs, concurring, stated that:

> Resolutions of the Security Council neither form part of the law of the Commonwealth nor by their own force confer any power on the Executive Government of the Commonwealth which it would not otherwise possess.[103]

Chief Justice Barwick and Justice Gibbs were saying that although Parliament had passed the United Nations Charter, it was not, in and of itself, implementing legislation. Hence, neither the Charter nor the Resolutions could be relied upon to justify Executive acts. Following the *Walker v. Baird*[104] theory of Westminster Government, subsequent domestic legislation was necessary.

The *Bradley* case is significant because it sets forth a clear statement of the position the United Nations Charter occupies in the Australian legal system and prevents either the courts or the Executive from using the Charter as a legal basis for affecting domestic individual rights.[105] It is important to note that the opinion does not state that the *legislature* may not enact legislation pursuant to non-binding Security Council Resolutions. But again, what if the legislature treads on an area traditionally reserved to the states? Will the Charter serve as a reservoir for Commonwealth central government expansion? The answer to these questions was reached by Justice Murphy in *Dowal v. Murray*,[106] the most recent High Court case touching on section 51(29).

In *Dowal*, the High Court needed to find a head of delegated power to support the Parliament's decision to legislate with respect to child custody after the death of one spouse.[107] The Court found

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102. *Id.* at 582.

103. *Id.*

104. *See* notes 27-30 *supra*, and accompanying text.

105. For cases on the Charter's position in the United States *see* Diggs v. Shultz, 470 F.2d 463 (1972); Sei Fujii v. State, 217 F.2d 481 (Dist. Ct. App. 1950), rev'd, 242 F.2d 619 (1952).

106. Dowal v. Murray and Another, 53 A.L.J.R. 134 (1978) [hereinafter referred to as *Dowal*].

107. The Australian Family Law Act of 1975 provided that on the death of a party to a marriage in whose favor a custody order had been entered in respect of a child, the surviving spouse would be entitled to custody only upon application to the courts. At issue was whether § 51(29) of the Constitution Act gave the Commonwealth power to legislate. The Act gave power over, "Divorce and Matrimonial causes; and in relation thereto, parental rights, and custody and guardianship of infants." Since the Act in the instant case dealt with custody after one of the spouses to the marriage was deceased, the narrow argument was the

the power as an incident to the power to legislate with respect to marriage, section 51(21). Justice Murphy was not satisfied with that result alone and proceeded to reveal the far reaching powers he would assign the Commonwealth under section 51(29):

> On the question of constitutional power to legislate, Parliament's power to make laws with respect to external affairs . . . should not be overlooked. Custody is an aspect of welfare of the child. The welfare of children has long been a subject of international concern . . . .[108]

As examples of international concern for the rights of the child, Justice Murphy went on to cite relevant Articles of the Geneva Declaration of the Rights of the Child of 1924, the United Nations Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1976, the International Covenant on Civil and Political Rights and the United Nations Declaration of the Rights of the Child.[109]

Justice Murphy then stated:

> The Parliament may have recourse to this power with respect to external affairs to carry out its international obligations in regard to children . . . the use of the external affairs power may enable Parliament to remove limitations on the Family Court's jurisdiction which have been criticized in this and other recent cases.[110]

As examples of the use of the external affairs power to make laws which otherwise may not have been within the Commonwealth Parliament's competence, Justice Murphy referred specifically to the 1967 Narcotic Drugs Act, the 1974 Trade Practices Act and the 1975 Racial Discrimination Act.[111]

This approach to the problem of finding a head of power for the Federal Parliament was novel and will no doubt be challenged. None of the other Justices made mention of section 51(29). Justice Murphy revealed in this case, what may be behind his failure to say anything about geographical determinants of what constituted an external matter in the *Submerged Lands* case. He appears very willing to expand the power of the Federal Parliament in order to meet, what he feels, are the demands of the twentieth century. He

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custody did not arise in relation to divorce or marriage (the marriage having ended upon the death of one of the parties.) This is a good example of the very strict interpretation of statutes often applied by Australian courts.

108. 53 A.L.J.R. 134, 140-41 (1978).

109. *Id.*

110. *Id.* at 141.

111. *Id.*

has yet to mention any limitaions, federal or otherwise, on the limits to federal jurisdictional expansion via section 51(29).

Justice Murphy was correct in pointing out the areas in which Parliament's competence has increased. Of course, he has not been the only Justice desiring to increase it. The Trade Practices Act of 1974, was enacted partly to carry into domestic effect the Paris Convention for the Protection of Industrial Property of 1975. The Act provides penalites for trade or commercial conduct "liable to mislead the public . . . ."[112]

In *R. v. Judges of the Australian Industrial Court*; *Ex parte C.L.M. Holdings*,[113] the High Court indirectly was called upon to decide whether these penalties could be applied against wholly intra-State trade practices of the kind covered in the Act. In an opinion by Justice Mason, with Chief Justice Barwick and Justices Stephen, Jacobs and Murphy concurring, the Court held that the external power alone or in combination with section 51(39) — the incidental powers clause — could sustain that section of the Act providing for penalties on intra-State conduct.[114] The Act could be held to be giving effect to an international convention.

The Narcotic Drugs Act of 1967 mentioned by Justice Murphy in the *Dowal* case is the principle Commonwealth legislation in that area other than the Customs Act of 1967. It enacts into Australian law the provisions of the International Convention on Narcotic Drugs of 1961, and therefore relies on the external affairs power as well as the trade and commerce power of section 51(1). Obviously, there has been some trespass into areas formerly reserved to the States. This is so because drug possession, production, use and dealing intra-State would be outside any inter-State commerce power.

In a recent article on Australian drug laws, an Australian barrister expressed the opinion that the Commonwealth Parliament could use section 51(29) to oust all State drug laws inconsistent with Federal legislation.[115] He urged this as a means toward solving Australia's increasing drug problems. Specific reference was made

112. Trade Practices Act 1974, § 55.

113. R. v. Judges of the Australian Industrial Court and Another; *ex parte* C.L.M. Holdings Pty. Ltd. and Another, 136 C.L.R. 235 (1977).

114. *Id.* at 242-43. Justice Gibbs withheld his concurrence on this part of Justice Mason's opinion.

115. Brown, *Federal Drug-Control Laws: Present and Future*, 8 FED. L. REV. 435, 451 (1977). Australia is also a signatory to the 1971 Convention on Psychotropic Substances. The author mentions that the Whitlam government proposed a comprehensive drug act that

to the opinions of Chief Justice Barwick and Justice Murphy in the *Submerged Lands* case as providing a strong basis for permitting this legislation.[116] As long as the argument is presented to the Court in terms of the "inter-national trade in drugs" rather than just "drugs", the author believed international agreements could be used to permit Commonwealth control since the subject matter has an indisputable international character, more so than human rights conventions.[117] If any limitations were raised, they would leave only control of possession crimes and use crimes to State authorities.[118]

The Racial Discrimination Act of 1975 enacted domestically the purposes and principles of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. The preamble to the Racial Discrimination Act specifically refers to Parliament's power to make laws with respect to external affairs as being one of the heads of power on which the Act was to be based. Even a cursory glance at the coverage of the Act reveals a vast arena of intra-State affairs into which the Federal Government has injected itself. These include testementary instruments, deeds and other contracts, employment practices, public accommodations and public organizations. While the external affairs power is not the only power relied upon, its appearance in the preamble justifies Justice Murphy's reference to the Act in *Dowal*.

Finally, there are three other areas not mentioned by Justice Murphy where there has been some movement toward an increased federal presence in areas formerly reserved to the States. In 1973, an argument was cogently put forth urging ratification of a convention dealing with international commercial arbitration and reciprocal enforcement of awards based upon Commonwealth criteria.[119] Previous practice had been to allow each State to set its own policy on recognition and enforcement of foreign awards. The argument in favor of ratification was that the external affairs power would support legislation pursuant to such a convention. The reasoning was that if trade and its regulation were considered as external affairs, then "arbitration as a means of settlement of disuptes arising

would have ousted inconsistent State laws. The act which never became law was justified under the external affairs power alone as enacting the above Convention.

116. *Id.* at 454.

117. *Id.* at 452-53.

118. *Id.* at 453.

119. Goldring, *The 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Australian Constitution*, 5 FED. L. REV. 303 (1973).

in the course of such trade is also either necessarily an external affair or an incident thereof . . . ."[120] The Arbitration (Foreign Awards And Agreements) Act of 1974 was passed in late 1974 and Australia acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The implementing act sets forth the common procedures and criteria to be used by both Federal and State courts when enforcing foreign awards.

Another writer believes the Commonwealth Parliament has legislative competence to take over the field of environmental control of aircraft.[121] Either the trade and commerce power or the external affairs power could support such legislation. But, rather than legislating directly on intra-State activities, the author feels the Commonwealth could accomplish the same result through administrative organs.[122]

Finally, another barrister has argued for the use of section 51(29) as a head of power to support Commonwealth expansion of national health insurance.[123] The Convention concerning Medical Care and Sickness Benefits, adopted by the International Labor Organization in 1969, has not been ratified by Australia. But, the author feels that since the Convention requires all signatories to provide specific types of health services, it could be used by the Australian Government, if it became a signatory, to expand its legislation in the health area.[124] Although the claim has been made that the Commonwealth has no power to nationalize the medical profession or even require the use of a federal standard prescription form, the author feels it is at least arguable, that under the Convention, legislation might be justified in both areas.

Since 1972 we have seen section 51(29) used to justify Federal Government movement into areas formerly reserved or thought to be reserved to the States. These fields include territorial seas and submerged lands, narcotic drug control, trade practices, racial discrimination, arbitration awards and possibly future national health

120. *Id.* at 308.

121. Golden, *Aircraft Noise Emissions in Australia: The Present Framework of Legal Control and Responsibility*, 49 A.L.J. 123, 126 (1975).

122. *Id.* The whole area of environmental law is a ripe one for Federal v. State conflict. The cases so far seem to justify the federal legislation on the trade and commerce power rather than legislation pursuant to an international convention. *See* Murphy Ores Incorporated Pty. Limited v. Commonwealth and Ors, 50 A.L.J.R. 570 (1976).

123. Kennan, *The Possible Constitutional Powers of the Commonwealth as to National Health Insurance*, 49 A.L.J. 261, 266-67 (1975).

124. *Id.* at 266.

care. At least one Jusice would also use section 51(29) to justify federal family law and human rights legislation. How far can Parliament go under this head of power?

IV. LIMITATIONS ON THE EXTERNAL AFFAIRS POWER

Professor Lane has listed four possible limitations on the expansion of the external affairs power, some of which have already been discussed.[125] They include express constitutional prohibitions, *mala fides* government agreements, federalism and judicial review.

The previously discussed cases have shown how legislation enacted pursuant to section 51(29) can circumvent the limitation on other delegated powers in section 51, because each delegated power is a separate head of power, even though interdependent on the others. Nevertheless, express constitutional prohibitions cannot be circumvented. It was also noted that the lack of a Bill of Rights in the Australian Constitution probably means that these express prohibitions are fewer in number and play a less crucial role as a check on the treaty power than in the United States[126]. While express prohibitions are a limitation on section 51(29), it is unlikely a case involving such a clear violation would ever come before the High Court.

Also mentioned above was the warning of the High Court that it would not tolerate bad faith treaties made by a Government simply for the purpose of expansion of domestic power. Again, we saw that this may not prove to be a very important limitation. The shrinking size of the political world has raised all kinds of domestic matters to the level of nation to nation negotiations. As the scope of international agreements extends, the "temptation to Governments to seek '*mala fides*' agreements as a prop for constitutional power becomes less pressing."[127] The problems of proof of evidence in such a case are also apparent.

Perhaps the only real check is the federal system itself. The Australian Constitution provides more express legal substance for the existence of the States than the United States Constitution.[128] This legal basis for the existence of the States was recognized by the

125. Lane, *External Affairs Power*, 40 A.L.J. 259, 262-63 (1966).
126. Thompson, *supra* note 33, at 133.
127. Sawer, *Australian Constitutional Law*, *supra* note 29, at 45.
128. Thompson, *supra* note 33, at 161.

High Court in *Melbourne Corporation v. The Commonwealth*,[129] the classic case on Australian federalism.

> [T]he foundation of the Constitution is the conception of the central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.[130]

But, even if the Court has recognized that the Commonwealth may not destroy the existence of the States, what are the tests used by the Court to decide when the existence of the States as separate entities is being threatened?

The following passage from the *Melbourne Corporation* case probably expresses the most encompassing test for judicial determination that a law tending to destroy the States is unconstitutional.

> No doubt the nature and extent of the activity affected must be considered and also whether the interference is or is not discriminatory but in the end the question must be whether the legislation or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other.[131]

In other words, the Court will look to the practical application of the law.

If the Court should decide to use this test against any treaty implementing legislation, two additional problems complicating the decision will have to be faced. First, as previously discussed, subject matter alone is of no real help unless the subject matter is geographically external, as in the *Submerged Lands* case. Second, the external affairs power is frequently only one pillar supporting the legislation. The trade and commerce power, as in the airlines cases or the defense power, as in *Roche v. Kronheimer*,[132] frequently are used to support domestic legislation.

The issue of where to draw the line between a treaty power capable of centralizing all government power or a federal system unresponsive to twentieth century international obligations has not been faced squarely by the High Court. Like its United States counterpart, the High Court has established a trend toward permitting increased reliance upon section 51(29) to expand Common-

129. Melbourne Corporation v. The Commonwealth, 74 C.L.R. 31 (1947) [hereinafter referred to as *Melbourne Corporation*].

130. *Id.* at 65 (Justice Rich).

131. *Id.* at 75 (Justice Starke). For the United States case on treaty limitations *see* Geofroy v. Riggs, 133 U.S. 258, 267 (1890). *See also* L. Heinkin, *supra* note 31, at 137-56.

132. *See* note 37 *supra*.

wealth powers.[133] Every legislative act under a treaty which expands central government power alters the federal balance in some way, even if ever so subtle. Following this inch by inch approach, the issue of federalism may never be reached. After all, the State governments do not have to be destroyed or one of the express constitutional prohibitions violated for the Commonwealth to radically alter the balance of power. The regulatory activity of the United States Government under the Commerce Clause is an example of this.[134]

If the trend in Australia continues, then any real limitations based upon federalism will depend on the Justices' own perception of the role which judicial review should play in the Australian constitutional structure. In close cases, the Justices, like their United States counterparts, will resort to their personal beliefs on the nature of the federal system. They will have to decide whether the High Court should attempt to draw a firm line in favor of a fixed federal system or whether the fate of federalism should be decided by the electoral process.

V. CONCLUSION

The opinions of the High Court, developments in Australian politics, and the increasing interdependence of the nations of the world are all favorable to continued use of the external affairs power by the Commonwealth to encroach into areas previously left to the States. Both of Australia's political parties have found it necessary to use the external affairs power to their advantage.[135] To a United States lawyer, it is interesting to observe the way in which the High Court has permitted the Commonwealth to accomplish centralization and uniformity in areas which, in the United States, would have been easily justified by resort to the Commerce Clause. The restrictions in the Australian Constitution on Commonwealth exercise of the commerce power, as well as the general reluctance of Commonwealth courts to interpret broadly the definition of commerce, may have been a cause motivating the Commonwealth to resort to the external affairs power to accomplish the same desired objectives.

If the path which the United States Supreme Court has walked

133. For the trend in the United States *see* Thompson, *supra* note 33, at 179-83.

134. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). *But see* National Legue of Cities v. Usury, 426 U.S. 833 (1976).

135. Sawer, *Execution of Treaties, supra* note 29, at 303.

with respect to the Commerce Clause gives guidance, it points in the direction of increasing centralization for Australia and the use of section 51(29) to justify the centralization. Somewhere in the future may lurk a decision by the High Court in the nature of *National League of Cities v. Usury*.[136] Nevertheless, as long as the Commonwealth avoids infringement of an express constitutional prohibition the potential for centralization by use of the external affairs power is vast. If progress in the direction of increased use of this power has seemed slow, one must remember that the Australian treaty power is, in a sense, a Court created power, since the Constitution makers did not even mention the word treaty in the Constitution Act.

Using the history of the United States Supreme Court's development of the Commerce Clause for comparison, it is doubtful that any judicial tests of subject matter or reciprocity of mutual obligation will survive. If for no other reason, they do not fit well into what is basically an area that is highly changeable and filled with political questions. Any future decisions by the High Court will most likely closely reflect the trends of the political arena rather than attempt to construct sophisticated "tests" of the limits of that power.

136. *See* note 134 *supra*.