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The Implementation of Treaties in Australia After the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism

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The Implementation of Treaties in Australia after the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism

by Andrew C. Byrnes*

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I. INTRODUCTION

Federal states, with their internal division of powers, experience particular problems when participating in the development of the international legal order. While the central government in a federal state generally possesses exclusive power to enter into treaties on behalf of the nation, it does not necessarily possess the power under the constitution to carry out the terms of the treaty domestically. It may, therefore, be forced to rely on the cooperation of the constituent units of the federation to carry out its obligations. Even where the federal government has a virtually unlimited power of treaty implementation, the states or provinces may still be able to bring political pressure to bear to influence the extent of the federal government's participation in multilateral treaty regimes.

This article examines the extent to which Australia's participation in the international legal order has been influenced by its federal system of government. The development and judicial exposition of the federal government's power to enter into and implement treaties is considered, followed by a discussion of the impact that party politics at the federal and state level has had on the exploitation of this power. Next, the article examines Australia's record of ratification of a number of multilateral conventions. Finally, the author assesses the extent to which the federal system retards Australia's participation in the international legal order.

II. THE DEVELOPMENT OF THE FEDERAL POWER TO LEGISLATE WITH RESPECT TO EXTERNAL AFFAIRS

A. *The Australian Federal System*

The Commonwealth of Australia came into existence on January 1, 1901, by operation of an Act of the United Kingdom Parliament.¹ At present the federation consists of six states and various territories, the latter under the control of the federal government. The structure of government is a hybrid of the British Parliamentary system and the U.S. federal model.

At the federal level there is a bicameral legislature, which consists of a House of Representatives and a Senate. The members of the House are elected by

1. Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. ch.12, reprinted (as amended) in 2 A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (1983).

popular franchise on the basis of individual electoral districts, while Senators are elected by voting on a state or territory-wide basis. In addition, there is an executive government (appearing in the constitutional garb of the Governor-General in Council), as well as a supreme judicial tribunal, the High Court of Australia.²

The parallels to the U.S. model are obvious. One significant variation is, however, the relationship between the executive and the legislature: the formation of a government is the entitlement of the party or coalition of parties with a majority of seats in the House of Representatives.³

The Australian Constitution's allocation of legislative powers between the federal and state legislatures is also modeled on the U.S. Constitution, at times even reproducing the wording of that instrument. The federal government is one of enumerated powers only, and may only enact legislation with respect to specific constitutionally enumerated grants of power.⁴ The residue of legislative power may be exercised by the states.⁵ Although some of the federal government's powers are exclusive, most of its legislative powers are concurrent. As a result, both the states and the federal government may possess the power to legislate on a particular subject matter.⁶ In the case of a conflict between federal and state law, the state law is deemed to be invalid to the extent of the inconsistency.⁷

2. The High Court of Australia is modeled after the U.S. Supreme Court, although a number of important differences exist. Established by Chapter III of the Australian Constitution, the Court presently consists of seven justices and functions as the supreme appellate tribunal in matters involving questions of federal law, including the interpretation of the Australian Constitution. The court also possesses original jurisdiction in a number of areas. See *AUSTL. CONST.*, §§ 75-76. In addition, it has appellate jurisdiction in relation to questions of state law, and in most cases it is the final appellate court on questions of state law, although litigants may still appeal questions of state law directly from the supreme courts of the individual states to the Judicial Committee of the Privy Council in London. See *AUSTL. CONST.* §§ 73-74.

Generally, each judge of the High Court writes a separate opinion. In some cases the Court issues a *per curiam* opinion, although this is relatively unusual in constitutional cases. Unlike the procedure adopted by the U.S. Supreme Court, the High Court does not assign the writing of the majority opinion to a particular judge. Judges will on occasion join the judgments of other judges of the Court, with the resulting judgment delivered as a joint judgment, or will confine themselves to concurring in a particular judgment. The holding of any particular case is ascertained by aggregating the various judgments. In some cases there may be no basis for the decision that is common to a majority of the Court. The decisions of the Court bind all other Australian courts, but the Court itself is not bound to follow its own earlier decisions.

3. For an outline of the Westminster system of government inherited by Australia from the United Kingdom, see generally O. HOOD PHILLIPS & P. JACKSON, *O. HOOD PHILLIP'S CONSTITUTIONAL AND ADMINISTRATIVE LAW* 27-30 (O. Hood Phillips & P. Jackson 6th ed. 1978).

4. See *Attorney-General (Cth) v. Colonial Sugar Refining Co.*, [1914] A.C. 237.

5. *AUSTL. CONST.* § 107.

6. See *id.* §§ 106-09. See generally W.A. WYNES, *LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA* 93-95 (5th ed. 1976).

7. *AUSTL. CONST.* § 109. The position is similar in other federal countries. See, e.g., U.S. CONST. art. VI, cl. 2; *GRUNDGESETZ*, arts. 31, 72(1); *Attorney-General (Ontario) v. Attorney-General (Canada)*, [1896] A.C. 348 Canada.

The federal government attempts on occasion to regulate an area not covered by an explicit constitutional grant of legislative power. In such cases, legislation is drafted in piecemeal fashion, drawing on the various grants of power in an attempt to cover the total problem. This process inevitably produces fragmented and often unsatisfactory legislation. For example, the federal government does not have the power to regulate employment conditions nationwide under the commerce clause.⁸ Therefore, any legislative package attempting to regulate terms and conditions of employment throughout the country must draw on the federal powers to legislate with respect to interstate trade and commerce,⁹ trading and financial corporations,¹⁰ conciliation and arbitration for the prevention and settlement of interstate industrial disputes,¹¹ external affairs,¹² and any other available powers. This pattern is repeated whenever the federal government seeks to extend its power into new areas perceived to require uniform national regulation, but over which it lacks a specific grant of legislative power.

When the federal government chooses to implement Australia's treaty obligations by means of federal legislation, it may rely on any of the various powers conferred on it by the Constitution, including the power to legislate with respect to "external affairs."¹³ The external affairs power, although viewed by some as an important source of untapped legislative power, was not exploited to any great extent until the early 1970's due to uncertainty about the extent of the power and because of the limited independent participation of Australia in the international community until the 1940's. Since the 1970's, the external affairs power has been discovered to be a potentially large source of additional power available to remedy other inadequacies in federal power.

B. *Development of the Constitutional Provisions Relating to Foreign Affairs*¹⁴

Although the Australian Constitution derived its legal force from an Act of the United Kingdom Parliament, the text of the Constitution was largely the product of a series of national constitutional conventions held in Australia during the last decade of the 19th century. At these conventions, a number of factors were considered in deciding what provision should be made in the new Constitution in relation to the treaty-making power of the Commonwealth. The United Kingdom had previously had the power to conclude treaties which bound Australia as

8. See AUSTL. CONST. § 51(1).

9. *Id.*

10. *Id.* § 51(20).

11. *Id.* § 51(35).

12. *Id.* § 51(29).

13. *Id.*

14. For a complete discussion of these provisions, see Bailey, *Australia and the International Labour Conventions*, 54 INT'L LAB. REV. 285 (1946). See also Thomson, *A United States Guide to Constitutional Limitations Upon Treaties as a Source of Australian Municipal Law*, 13 U.W. AUSTL. L. REV. 110, 112-29 (1977).

part of the British Empire. It was generally believed that this should continue to be the case as any attempt to give the new Dominion an independent treaty-making power would usurp the Imperial monopoly and run the risk of conflicting with the foreign policy of the United Kingdom and other members of the Empire. Another factor considered was the U.S. Constitution, which was used as an overall model for the Australian Constitution. The U.S. Constitution, however, embodied quite different approaches to both the making and implementation of treaties than was the case in the British Empire. Finally, there was a desire to equip the new Commonwealth with the capacity to adopt the full powers of a sovereign nation as it attained recognition as an independent nation at the international level.

Originally, covering clause 5 of the Constitution¹⁵ contained a clause based on Article VI of the U.S. Constitution,¹⁶ whereby "all treaties made by the Commonwealth" were to be binding on the courts of every state.¹⁷ In addition, what is currently section 51(29) at one time conferred power on the Commonwealth to pass legislation with respect to "external affairs and treaties."¹⁸ These references to treaties were both omitted at a later stage, apparently in the belief that they would encroach upon the right of the Imperial government to make treaties on behalf of the self-governing Dominions of the Empire, and also because of a misunderstanding concerning the difference between treaty-making and treaty implementation.¹⁹ Even if these provisions had not been omitted, the power of the Imperial government to enter into treaties binding Australia could have been preserved while retaining the practice of adopting self-executing treaties as domestic law without the need for implementing legislation.

As a result, the Constitution remained silent both on the question of whether the federal government could enter into treaties and on the effect of treaties in domestic law. The position subsequently adopted by the courts reflects the settled view in many of the nations which inherited the English position: although customary international law may form part of the common law to the extent that it is not inconsistent with statute or judicial decision,²⁰ treaties affect-

15. The Australian Constitution was established by the United Kingdom's Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., ch. 12. For the text of the Constitution, see *id.* § 9. The nine sections of the U.K. Act are referred to as the covering clauses of the Constitution.

16. See U.S. CONST. art VI, cl. 2.

17. OFFICIAL RECORD OF THE PROCEEDINGS AND DEBATES OF THE NATIONAL AUSTRALASIAN CONVENTION, held in Parliament House, Sydney, New South Wales, in March and April 1891, at CXXIV (1891) [hereinafter cited as OFFICIAL RECORD 1891], cited in Thomson, *supra* note 14, at 120 (with full text of original form of covering clause 5).

18. OFFICIAL RECORD 1891, *supra* note 17, at CXXXIX, cited in Thomson, *supra* note 14, at 123-24.

19. See, e.g., Thomson, *supra* note 14, at 122. The position in the United Kingdom at the time was that when the Crown entered into a treaty with another nation in the exercise of the Crown prerogative in relation to foreign affairs, the terms of the treaty did not thereby become part of the domestic law of the United Kingdom. Only after the treaty had been adopted by legislative enactment was it enforceable as domestic law.

20. See *Chung Chi Cheung v. R.*, [1939] A.C. 160.

ing the rights and duties of subjects do not become part of the law of the land until adopted by an authoritative legislative act.²¹ While statutes are to be construed where possible to conform with international law, a statute contrary to international law has primacy in the Australian domestic legal system if a conflict is unavoidable.²²

C. *Australia's Emergence as a Nation Internationally and Nationally*

While as a matter of both domestic and international law the establishment of the Commonwealth of Australia in 1901 did not create a new member of the international community, events between 1901 and 1942 did result in Australia achieving full international status.²³ This change in status reflected the recognition within the British Empire of the autonomy and independence of the various Dominions. The first major entry of Australia and the other Dominions into the international arena as independent nations was the Treaty of Versailles, which was signed by the British delegate on behalf of the British Empire, as well as by each of the Dominion governments. The Balfour Declaration, approved at the Imperial Conference of 1926, formally recognized the autonomy of the Dominions. This status was given statutory recognition in the Statute of Westminster 1931 (U.K.).²⁴

Judicial and executive interpretation of the constitutional allocation of power in respect of foreign affairs has naturally been influenced by these historical developments. After Australia began to undertake international obligations in its own right, the transfer in political power from the United Kingdom to Australia was reflected in the legal relocation of the Crown prerogative in respect of foreign affairs from the Crown in right of the United Kingdom (acting upon the advice of British Ministers)²⁵ to the Crown in right of Australia (the Governor-

21. *Bradley v. Commonwealth*, (1972) 128 C.L.R. 557, 582-83; *Chow Hung Ching v. R.*, (1948) 77 C.L.R. 449; *Polites v. Commonwealth*, (1945) 70 C.L.R. 60; *Attorney-General (Canada) v. Attorney-General (Ontario)*, [1937] A.C. 326; *Walker v. Baird*, [1892] A.C. 491.

22. See *supra* note 21.

23. See generally Lewis, *The International Status of the British Self-governing Dominions*, 3 BRIT. Y.B. INT'L L. 21 (1922-23); Zines, *The Growth of Australian Nationhood and its Effects on the Powers of the Commonwealth*, in COMMENTARIES ON THE AUSTRALIAN CONSTITUTION 1-50 (L. Zines ed. 1977); O'Connell & Crawford, *The Evolution of Australia's International Personality*, in INTERNATIONAL LAW IN AUSTRALIA (K.W. Ryan 2d ed. 1984) 1-34.

24. See generally O'Connell & Crawford, *supra* note 23, at 17-21; Zines, *supra* note 23, at 25-30; Scott, *The British Commonwealth of Nations*, 21 AM. J. INT'L L. 99 (1927)(editorial comment); I. BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 68 (1973).

25. In a Westminster system of government, the expression "the Crown" refers to the monarch as the titular embodiment of the executive government. According to established constitutional conventions, the monarch acts on the advice of his or her Ministers of State, who are members of, and therefore responsible to the elected Parliament. The British monarch is both the formal embodiment of the executive government of the United Kingdom as well as the executive government of Australia. The expression "Crown in right of the United Kingdom" thus means the executive government of the United Kingdom (in constitutional theory the Queen acting on the advice of her British Ministers) and

General of Australia acting upon advice of Australian Ministers).²⁶ The political exclusion of the Australian states from the conduct of foreign affairs was reflected in the exclusive vesting of the foreign affairs prerogative in the Crown in right of the Commonwealth. Today it is generally accepted that the states have no international personality and no capacity to enter into international treaties.²⁷ Nonetheless, it has taken from the inception of the Commonwealth in 1901 until the High Court's decision in the *Tasmanian Dams*²⁸ case in 1983 for there to emerge a definitive statement of the Commonwealth's power to implement domestically its international treaty obligations.

The gradual expansion in the scope of the external affairs power reflects both the gradual expansion of federal powers in other areas since the Second World War, as well as the High Court's narrow construction of a number of other heads of federal legislative power. The prime example of this has been the power to legislate with respect to interstate trade and commerce. In interpreting this power, the High Court has refused to follow U.S. Supreme Court jurisprudence on the commerce clause of the U.S. Constitution, the U.S. Supreme Court having construed that clause so broadly that it subsumes practically all other heads of federal legislative power.²⁹ The High Court's decisions have been considerably narrower in construing the corresponding commerce power of the Australian Constitution.³⁰ As a result, the federal government has been obliged to rely upon whatever other powers were available to it. Recently, in many areas, the external affairs power seemed to be the most suitable candidate. On the whole, it has been the less conservative governments which have sought to make extensive use of the power, partly because of their commitment to implementing various economic and social policies on a national scale, and partly because of their commitment to achieve acceptable standards of human rights in Australia.

the expression "Crown in right of the Commonwealth [of Australia] or of the states" means the executive government of the Commonwealth or of the states. In Australian context, the Queen is represented by the Governor-General at the Commonwealth level and by Governors at the state level, who act on the advice of federal and state Ministers respectively. See O. HOOD PHILLIP'S CONSTITUTIONAL AND ADMINISTRATIVE LAW, *supra* note 3, at 697-99.

26. See *Barton v. Commonwealth*, (1974) 31 C.L.R. 477, 498-99 (Mason, J.); *O'Connell & Crawford*, *supra* note 23, at 27-28. A similar development took place in Canada. *Forest, The Labour Conventions Case Revisited*, 12 CAN. Y.B. INT'L L. 137, 138 (1974).

27. *Burmester, The Australian States and Participation in the Foreign Policy Process*, 9 FED. L. REV. 257 (1978). This is not to say that the states do not assert some limited competence in concluding informal agreements with foreign nations (primarily in the areas of trade and cultural exchanges), and in sending trade representatives to other countries. *Id.* at 272-74. The position in Canada is similar, although the extent of Canadian provincial international activities is probably greater than in Australia.

28. *Commonwealth v. Tasmania*, (1983) 57 Austl. L.J.R. 450; (1983) 46 Austl. L.R. 625.

29. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 232-39 (1978).

30. See L. ZINES, *THE HIGH COURT AND THE CONSTITUTION* 37-58 (1981). See, e.g., *Airlines of New South Wales v. New South Wales* (No.2), (1965) 113 C.L.R. 54, 77-78, 113-15, 144, 149; *Grannall v. Marrickville Margarine Pty. Ltd.*, (1955) 93 C.L.R. 55, 77.

III. DEVELOPMENT OF THE EXTERNAL AFFAIRS POWER: HISTORICAL BACKGROUND

A. *The Early Years: (1901-36)*

The limited nature of the Australian government's participation in the international arena in the first quarter of the twentieth century meant that federal legislation in the area of external affairs was primarily concerned with the implementation of treaty obligations by which Australia had become bound as a member of the British Empire. The little judicial commentary on the power was primarily in this context.³¹ Not until 1936 was it necessary for the High Court to consider the validity of a federal law based solely upon the external affairs power. Nonetheless, prior to 1936 some members of the Court thought that the external affairs power would encompass legislation on various matters, including: the extradition of fugitive offenders;³² the implementation of provisions of the Treaty of Peace (1919) relating to the vesting of German property to pay debts and reparations;³³ the acceptance and administration by Australia of New Guinea as a Class C mandate under the League of Nations system;³⁴ and the deportation of Pacific Islanders.³⁵ In each of these cases, however, a decision on the extent of the external affairs power was not necessary, as another clear source of power was available in each instance.

B. *The Burgess Case (1936)*

The first important case involving the external affairs power was *R. v. Burgess ex parte Henry*.³⁶ Henry had been convicted of failure to comply with certain federal regulations made pursuant to section 4 of the Air Navigation Act 1920 (Cth).³⁷ Section 4 authorized the making of such regulations as were necessary to give effect to the 1919 Paris Convention for the Regulation of Aerial Navigation,³⁸ to which Australia was a party. Although the High Court quashed Henry's conviction on the ground that the regulations did not in fact conform to the terms of the Convention, all members of the Court upheld the power of the

31. See cases cited *infra* notes 32-35.

32. See *McKelvey v. Meagher*, (1906) 4 C.L.R. 265, 279.

33. See *Roche v. Kronheimer*, (1921) 29 C.L.R. 329, 338 (Higgins, J., who also thought that the law in question could be upheld under the defense power). *Accord R. v. Burgess*, (1936) 55 C.L.R. 608, 641 (Latham, C.J.).

34. See *Jolley v. Mainka*, (1933) 49 C.L.R. 242, 249-50 (Starke, J.), 286 (Evatt, J.); *Frost v. Stevenson*, (1937) 58 C.L.R. 528, 557 (Latham, C.J.), 595-96 (Evatt, J.) (other judges placed the assertion of power as firmly rooted in the power to legislate for the peace, order, and good government of territories acquired by the Commonwealth. See AUSTRALIAN CONST. § 122.

35. See *Robtelmes v. Brennan*, (1906) 4 C.L.R. 395.

36. (1936) 55 C.L.R. 608.

37. Air Navigation Act 1920 (Cth).

38. Convention Relating to the Regulation of Aerial Navigation, signed at Paris, October 13, 1919, 11 L.N.T.S. 174.

Commonwealth to implement the Convention under section 51(29) of the Constitution.³⁹ Three members of the Court took a very broad view of the power. Justices Evatt and McTiernan believed that the power clearly extended to the implementation of treaties entered into by the Commonwealth and were prepared to extend it to implement recommendations of international organizations such as the International Labour Organisation, which were not formally binding on Australia.⁴⁰ Chief Justice Latham considered the power to be sufficient for the Commonwealth to implement all treaties into which it entered.⁴¹ All three of these judges noted the wide range of topics that had formed the subject of international agreement, and denied that there was any subject matter that was not capable of becoming the basis of an international agreement.⁴²

The remaining two members of the High Court were somewhat more cautious about the scope of the external affairs power, although they agreed that the subject of air navigation as regulated by the Convention was encompassed by the power.

Mr. Justice Dixon, for example, sounded a note of caution in a passage which was later seized upon by judges anxious to restrict the broad statements by the other members of the *Burgess* Court:

[I]t seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered a matter of external affairs.⁴³

Nevertheless, Mr. Justice Dixon considered air navigation to be a subject possessing an international character because of the issues of mutual recognition of sovereignty over airspace and the practical advantage of securing uniformity in the case of the airplane that "defie[d] territorial boundaries."⁴⁴

The next significant case following *Burgess* also involved air navigation. In *Airlines of New South Wales v. New South Wales (No. 2)*,⁴⁵ the plaintiff, Airlines of New South Wales, sought a declaration that its activities were not subject to statutes passed by the State of New South Wales regulating intrastate air navigation. It argued that the state legislation was inconsistent with federal regulations

39. The regulations were subsequently upheld in an amended form in the face of another challenge by Henry in *R. v. Poole ex parte Henry*, (1939) 61 C.L.R. 634.

40. *Burgess*, 55 C.L.R. at 687.

41. *Id.* at 644.

42. *Id.* at 640-42, 680.

43. *Id.* at 669.

44. *Id.* at 669. Mr. Justice Starke concurred. *Id.* at 658.

45. (1964) 113 C.L.R. 54.

made pursuant to the Air Navigation Act of 1920 (Cth), which purported to implement the 1944 Chicago Convention on International Civil Aviation.⁴⁶ A majority of the Court upheld the federal regulations under the external affairs power, and all but one member of the Court were prepared to uphold them under the trade and commerce power. The only significant statement about the scope of the external affairs power was made by Chief Justice Barwick:

I find no need in this case for any general discussion of the external affairs power . . . Suffice it now to say that in my opinion the Chicago Convention, having regard to its subject matter, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes upon the parties to it unquestionably is, or, at any rate, brings into existence, an external affair of Australia . . . I would not wish to be thought to say that all these features must in every case be present if a treaty or convention is to attract the external affairs power, but I would wish to be understood as indicating that in my opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament.⁴⁷

C. *The Seas and Submerged Lands Case* (1975)

The next major case construing the external affairs power concerned the Commonwealth's attempt to implement the 1958 Geneva Conventions on the Continental Shelf⁴⁸ and on the Territorial Sea and Contiguous Zone.⁴⁹ In *New South Wales v. Commonwealth*,⁵⁰ all six states of the Commonwealth challenged the Seas and Submerged Lands Act 1973 (Cth),⁵¹ which declared that sovereignty over the territorial sea and continental shelf was vested in and exercisable by the Crown in right of the Commonwealth.⁵² A unanimous Court upheld the provisions of the Act relating to the continental shelf on the ground that the Act secured to Australia only those benefits guaranteed by the Continental Shelf Convention.⁵³ Three judges upheld the provisions of the Act because they also

46. Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591.

47. (1964) 113 C.L.R. 54, 85.

48. Convention on the Continental Shelf, *done* at Geneva Apr. 29, 1958 (entry into force June 10, 1964), 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

49. Convention on the Territorial Sea and Contiguous Zone, *done* at Geneva Apr. 29, 1958, (entry into force, Sept. 10, 1964), 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

50. (1975) 135 C.L.R. 337.

51. Seas and Submerged Lands Act 1973 (Cth).

52. *Id.* at §§ 6, 11.

53. (1975) 135 C.L.R. 337, 360-64 (Barwick, C.J.), 375-78 (McTiernan, J.), 415-16 (Gibbs, J.), 456-58 (Stephen, J.), 472-76 (Mason, J.), 497-98 (Jacobs, J.), 502-03 (Murphy, J.).

related to things geographically external to Australia.⁵⁴ Additionally, a majority of the Court upheld the provisions of the Act vesting sovereign rights in the territorial sea and its subsoil in the Commonwealth on the ground that the provisions gave effect to the Territorial Sea Convention.⁵⁵

The disagreement between the majority and the minority on the validity of the provisions relating to the territorial sea arose out of their views as to whether the states possessed any rights to the territorial sea and its subsoil as a matter of domestic law.⁵⁶ The majority held that the states had no such rights;⁵⁷ the minority disagreed⁵⁸ and argued that the Territorial Sea Convention only affected the sovereignty of the Commonwealth vis-à-vis other nations and therefore, it could not be read as intending an internal redistribution of rights between the constituent units of a federal nation.⁵⁹ Accordingly, because the Convention neither contemplated nor authorized the divestiture of the states' rights in the territorial sea in favor of the Commonwealth, the minority refused to uphold the Act as a lawful measure to implement the Convention.⁶⁰ Had the majority found that the Act operated to divest the states of territorial rights in favor of the Commonwealth, the Act would probably have been struck down on the ground that entry into a treaty may not be used as the legal basis for depriving the states of part of their territory.⁶¹

Even after the *Seas and Submerged Lands* case, the scope of the external affairs power was far from definitive. Although the cases which had upheld federal regulation of intrastate air navigation on the basis of international conventions had made inroads into areas that had traditionally been regulated by the states, an expansion of Commonwealth power into at least some areas of state power

54. See *id.* at 360 (Barwick, C.J.), 470 (Mason, J.), 497 (Jacobs, J.). Mr. Justice Murphy's views also extend this far. See *id.* at 502-04.

55. *Id.* at 361 (Barwick, C.J.), 376-77 (McTiernan, J.), 474-75 (Mason, J.), 503-04 (Murphy, J.).

56. The Australian federal/state battle over offshore resources was similar to experiences in the United States and Canada. In each nation's battle, the federal government was victorious. In the Australian battle, the High Court relied at least in part on the following North American authorities: *Re Ownership of Offshore Mineral Rights*, (1967) 65 D.L.R. (2d) 353; *United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Maine*, 420 U.S. 515 (1975).

57. (1975) 135 C.L.R. 337, 368-70 (Barwick, C.J.), 378 (McTiernan, J.), 459-68 (Mason, J.), 480-95 (Jacobs, J.), 504-06 (Murphy, J.).

58. *Id.* at 391-414 (Gibbs, J.), 417-43 (Stephen, J.).

59. (1975) 135 C.L.R. 337, 385 (Gibbs, J.), 451-54 (Stephen, J.). Similar criticisms have been made of the judgment of the Canadian Supreme Court in the *Offshore Mineral Rights* case, 65 D.L.R. (2d) at 376, 380. McWhinney, *Canadian Federalism and the Foreign Affairs and Treaty Power: The Impact of Quebec's 'Quiet Revolution'* 7 CAN. Y.B. INT'L L. 3, 17-20 (1969).

60. (1975) 135 C.L.R. 337, 390-91 (Gibbs, J.), 453-54 (Stephen, J.). Mr. Justice Stephen, one of the minority on the territorial sea issue, did consider that in relation to the right of innocent passage which a coastal state was required to guarantee to the vessels of foreign nations, the Commonwealth could pass overriding legislation in order to discharge effectively this obligation. *Id.* at 454-55. Interestingly enough, none of the majority considered that the failure of the Act to implement the provisions of the Territorial Sea Convention relating to innocent passage in any way meant that the Act could not be considered to implement the Convention.

61. See (1975) 135 C.L.R. 337, 476 (Mason, J.), 480 (Jacobs, J.).

had to be expected if the external affairs power was to be given any meaningful content at all. The federal regulation of air navigation, which involved tangible international links, could be viewed as a reasonable subject for Commonwealth regulation under section 51(29), particularly because it did not seem to open up the whole range of state legislative activity to federal preemption.

In the cases not involving air navigation decided through 1975, little or virtually no competition between federal and state legislative power was involved. In the *Seas and Submerged Lands* case, a number of members of the majority pointed out that in light of their conclusion that the states possessed no rights in the territorial sea, there could be no question of inroads being made into state legislative power: the federal and state governments were not in competition beyond the low-water mark.⁶² Other references to the scope of the external affairs power had involved some sort of foreign connection, whether it was the treatment of a fugitive offender from another country,⁶³ the deportation of an alien,⁶⁴ or the possibility of harm to Australia's foreign relations arising out of subversive activities in Australia.⁶⁵ In addition, in all these cases there was at least one other plausible and uncontroversial head of power, aside from the external affairs power, upon which the legislation could have been based.⁶⁶

IV. THE EXTERNAL AFFAIRS POWER: RECENT DECISIONS

None of the cases before 1975 raised in an acute form the problems that a broad construction of the external affairs power would pose for the detailed allocation of responsibilities between Commonwealth and States as prescribed by the Constitution. Perhaps the most difficult and significant question in this context was whether the mere fact of entry into a treaty gave the federal government the power to pass implementing legislation notwithstanding the fact that the legislation applied only to nationals of the country in relation to their activities within that country, or whether the treaty had to deal with a "matter of international concern."⁶⁷

Those supporting a broad construction of the external affairs power have argued that, because the federal government both represents the nation in the international sphere and enters into binding obligations internationally, it is logical and appropriate that the federal government have the power to fulfill

62. A similar analysis applies to those cases dealing with the federal government's power in relation to Papua-New Guinea (*see supra* note 34) and seems to have been adopted by the High Court in *Fishwick v. Cleland*, (1960) 106 C.L.R. 186. *See also* Zines, *The Australian Constitution 1951-1976*, 7 FED. L. REV. 89, 101-02 (1976).

63. *McKelvey v. Meagher*, (1906) 4 C.L.R. 265; *Frost v. Stevenson*, (1937) 58 C.L.R. 528.

64. *Robtelmes v. Brenan*, (1906) 4 C.L.R. 395.

65. *R. v. Sharkey*, (1949) 79 C.L.R. 121.

66. *See, e.g.*, *Koowarta v. Bjelke-Petersen*, (1982) 56 Austl. L.J.R. 625, 658 (Wilson, J.).

67. *Id.* at 645 (Stephen, J.).

those obligations domestically. Mr. Justice Murphy took this approach in the *Seas and Submerged Lands* case:

The Constitution, particularly section 51(xxix) is intended to enable Australia to carry out its functions as an international person, fulfilling its international obligations and acting effectively as a member of the community of nations. If not, Australia would be an international cripple unable to participate fully in the emerging world order.⁶⁸

A subsidiary argument is the historical argument that, in the past, it was difficult or impossible to get all states to agree to the implementation of many treaties and that, consequently, the best or even only solution is to confer paramount authority on the federal government.⁶⁹ In those federations where the upper house of a bicameral legislature is theoretically a states' house, the argument may also be advanced that the states already participate in the treaty implementation process when the upper house considers the legislation designed to implement the provisions of the treaty. Such an argument tends to be somewhat unconvincing in those countries in which the upper house has given up all pretense of actually representing the states rather than being organized on party lines.⁷⁰

Those arguing for a more restrictive view of the external affairs power point out that, while international law does indeed impose obligations on the central government and does not accept a plea of internal constitutional arrangements to excuse its failure to carry out the nation's international obligations, international law does not attempt to redistribute the powers already allocated among the various governments in a federation. Moreover, in many cases there is nothing to prevent many international obligations from being performed at the state level (which indeed may be preferable in many cases), and therefore a cooperative approach to the implementation of treaties is desirable and possible.⁷¹

The major thrust of the restrictive argument is, however, based upon the fear that, if one permits the mere existence of a treaty to give rise to greater legislative power in the central authority, there may be no limit to the expansion of that

68. (1975) 135 C.L.R. 337, 503.

69. See, e.g., *Koowarta v. Bjelke-Petersen* (1982) 56 Austl. L.J.R. 625, 649 (Mason, J.), and the discussion *infra* section IV.

70. Cf. I. BERNIER, *supra* note 24, at 26; (Federal Republic of Germany, where the members of the Länder government and all members from one Land must vote in a bloc). See generally Sharman, *The Australian Senate as a States House*, in *THE POLITICS OF NEW FEDERALISM* 64-75 (D. Jaensch ed. 1977) for a discussion of the role of the Senate.

71. *Attorney-General (Canada) v. Attorney-General (Ontario)*, [1937] A.C. 326, 348; *N.S.W. v. Commonwealth*, (1975) 135 C.L.R. 337, 445 (Stephen, J.). Cf. Article 16 of the Austrian Constitution, which imposes an obligation on the provinces to take such measures as are necessary for the implementation of treaties dealing with subjects within their competence. If they fail to do so, "the competence to enact the necessary legislation passes to the federation." I. BERNIER, *supra* note 24, at 98.

power into virtually every area of national life.⁷² Thus, to allow such an expansion would destroy the basis of the federal compact, which is predicated on a careful distribution of specified powers. As Chief Justice Gibbs stated in *Koowarta v. Bjelke-Petersen*:

In other words, if [section 51(29)] 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 the Constitution could be entirely destroyed.⁷³

A. *The Racial Discrimination Case: Koowarta v. Bjelke-Petersen*

The question of whether there were any matters which were "purely domestic" and thus immune from the reach of the federal government under the external affairs power presented itself in the form of a challenge to federal legislation implementing the International Convention on the Elimination of All Forms of Racial Discrimination 1966.⁷⁴ In *Koowarta v. Bjelke-Petersen*,⁷⁵ a group of Aborigines living in Queensland⁷⁶ sought to gain the benefit of a pastoral lease by requesting the Aboriginal Land Fund Commission to purchase the lease for use by them for grazing purposes. Such a transaction required the consent of the Queensland Minister for Lands. However, when his consent was requested, the Minister refused to grant it on the ground that to do so would not be in

72. This is combined with the fear that entry into treaties could be used as a colorable device by the federal government to arrogate power to itself. Interestingly enough, the Canadian Royal Commission on Dominion-Provincial Relations that followed the *Labour Conventions* case recommended the granting of power to the federal government to implement I.L.O. conventions, as the manner of their formation was such that they could not be exploited as merely colorable devices to attract power. See Sorensen, *Federal States and the International Protection of Human Rights*, 46 AM. J. INT'L L. 195, 201 (1952).

73. (1982) 56 Austl. L.J.R. 625, 637 (Gibbs, C.J.).

74. International Convention on the Elimination of All Forms of Racial Discrimination 1966, 660 U.N.T.S. 195.

75. (1982) 56 Austl. L.J.R. 625; 39 Austl. L.R. 417. *Koowarta* has been commented on in a number of law review notes, primarily from the perspective of Australian constitutional law, with little reference to its international significance. See, e.g., Finnis, *The Power to Enforce Treaties in Australia - the High Court goes Centralist?*, 3 OXFORD J. LEGAL STUD. 126 (1983); Note, 13 FED. L. REV. 360 (1983); Note, 13 MELB. U.L. REV. 635 (1982); Note, 56 Austl. L.J. 519 (1982); Crock, *Federalism and the External Affairs Power*, 14 MELB. U.L. REV. 238, 252-56 (1983); H. Charlesworth, *Federal States and the International Protection of Human Rights*, 79-83 (1983) (unpublished LL.M. paper, Harvard Law School); Sawyer, *The External Affairs Power of the Commonwealth and Koowarta's Case*, 54 AUSTR. Q. 428-34 (1982).

76. Queensland is a state with an historically poor record in its treatment of Aborigines. For a select bibliography of Aboriginal history, see the judgment of Murphy, J. in *Koowarta*, (1982) 56 Austl. L.J.R. 625, 656-57.

accordance with Queensland Government policy, as the Cabinet did not favor the acquisition of large areas of land by Aborigines or Aboriginal groups.⁷⁷

Koowarta, a member of the Aboriginal group seeking to gain the benefit of the lease, brought an action against the Premier and Minister for Lands of Queensland, alleging that the refusal to agree to the transfer was in violation of sections 9 and 12 of the federal Racial Discrimination Act 1975 (Cth). Subsection 9(1) of that Act provided:

9(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom.

Subsection 9(2) defined a "human right or fundamental freedom" as including rights referred to in Article 5 of the Convention, which referred to a number of rights including "the right to own property alone as well as in association with others."⁷⁸

Subsection 12(1) of the Act provided:

12(1) it is unlawful for a person, whether as a principal or agent —
 (a) to refuse or fail to dispose of any estate or interest in land or any residential or business accommodation to a second person . . .
 (d) to refuse to permit a second person to occupy any land or any residential or business accommodation, . . . by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

All members of the Court accepted that the provisions of the Act challenged by Koowarta implemented the relevant provisions of the Convention. The question was whether the topic of racial discrimination, as dealt with by the Convention, was part of the nation's external affairs.

Three judges (out of a majority of four) who upheld the Act took the view that a treaty obligation forms part of the nation's external affairs almost by definition.⁷⁹ Only if it could be shown that the treaty had been entered into *mala fide*, with the sole purpose of attracting further legislative power to the Commonwealth, would any doubt arise; such a case was difficult to imagine.⁸⁰ These three members of the court held that any treaty between Australia and another country is unequivocal evidence that the subject matter of the treaty is of international concern.⁸¹ Central to this view was the acceptance of the changing

77. (1982) 56 Austl. L.J.R. 625, 627 (Gibbs, C.J.).

78. 660 U.N.T.S. 195, 220-21.

79. (1982) 56 Austl. L.J.R. 625, 651 (Mason, J.), 656 (Murphy, J.), 664 (Brennan, J.).

80. *Id.* at 651 (Mason, J.), 664 (Brennan, J.).

81. *Id.* at 648 (Mason, J.), 656 (Murphy, J.), 664 (Brennan, J.).

nature of the international community and the difficulty of maintaining that there are some matters which are purely domestic and not subjects of genuine international concern.

The other majority judge, Mr. Justice Stephen, taking a slightly less broad view, stated:

It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive [scrutiny].⁸²

Mr. Justice Stephen considered that international concern over racial discrimination clearly satisfied this additional criterion of "general international concern."⁸³

The minority opinions were heavily influenced by the desire to ensure that the federal government not be permitted to expand its powers limitlessly by entering into treaties, no matter how genuine those treaties might be.⁸⁴ Accordingly, an attempt was made, based on previous cases, to draw a distinction between purely domestic affairs, actions within Australia involving only citizens, and external affairs, involving other countries, foreigners, or persons or things outside of Australia.⁸⁵ The minority viewed the Act as a law regulating domestic matters and not one relating to external affairs.⁸⁶

Having decided that previous authority did not support the Commonwealth's argument in favor of a power to implement treaties without regard to their subject matter and being of the view that acceptance of this argument would entail the destruction of the federal balance,⁸⁷ the minority in *Koowarta* had to deal with the argument that customary international law imposed an obligation on Australia to eliminate racial discrimination within its borders.⁸⁸ The federal nature of the Constitution once again did service here, since the appropriate method of fulfilling international obligations dealing with "domestic" matters was argued to be through cooperation between the states and the federal government.⁸⁹ The minority, however, failed to recognize an important difference between a nation's assumption of a treaty obligation and the development of a

82. *Id.* at 645.

83. *Id.* at 646-47.

84. *Id.* at 637-39 (Gibbs, C.J.); 659-61 (Wilson, J.). Mr. Justice Aickin concurred in the judgment of Chief Justice Gibbs. *Id.* at 657.

85. *Id.* at 638-39 (Gibbs, C.J.), 658-59 (Wilson, J.).

86. *Id.*

87. *Id.* at 638, 658.

88. The external affairs power clearly extends to some customary international law obligations. L. ZINES, *supra* note 30, at 230-34.

89. (1982) 56 Austl. L.J.R. 625, 634 (Gibbs, C.J.), 660 (Wilson, J.).

norm of customary international law: the genesis of a rule of customary international law may not be as easily manipulated as they assumed treaty obligations. Under the minority's approach, Australia could be hamstrung — bound by a norm of customary international law, yet unable either to secure the cooperation of the states or to fulfill the obligation itself.

More extreme, however, was Chief Justice Gibbs' opinion. Recognizing that racial discrimination was a subject of major international concern, and noting the existence of certain customary international law obligations to prevent it, the Chief Justice asserted that the scope of those obligations did not include the prohibition of the type of action involved in the present case:

It can readily be understood that international law should treat a violation of human rights as not merely a matter of domestic jurisdiction, but as a breach of international obligation, if the violation "threatens the international peace and security" . . . or if there are "gross violations or consistent patterns of violations" Genocide, torture, imprisonment without trials, and wholesale deprivations of the right to vote, to work or to be educated provide examples of violations of that kind. The act of discrimination alleged in the present case — the exercise, in a discriminatory way, of a discretionary power to refuse consent to the transfer of a Crown lease — stands on an entirely different plane. It could not in my opinion be said that the refusal of the Minister to grant this consent was a gross violation of a human right or fundamental freedom.⁹⁰

Not only does Chief Justice Gibbs' opinion manifest a highly distorted reading of the development of international law, but it also ignores the fact that in the Convention (which clearly has had an impact on the development of customary law in the area) a large number of nations specifically attacked the sort of conduct involved in *Koowarta*. It further ignores the correlation between allegedly "minor" incidents of racial discrimination and the ideology of racial superiority, as well as the effect that such incidents have on relations between nations. The opinion also demonstrates an almost complete insensitivity to the issue of racial discrimination, as it trivializes an incident which involved the application of a government policy in a state notorious for its gross and consistent discrimination against Aborigines.⁹¹

90. *Id.* at 640.

91. The unsuccessful attempts of the federal government to persuade the Queensland government to repeal certain laws discriminating against Aborigines, which led to the enactment of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth), demonstrates the attitude of the Queensland government. 92 AUSTL. PARL. DEB., H.R., 42 (1974). See generally G. NETTHEIM, VICTIMS OF THE LAW: BLACK QUEENSLANDERS TODAY (1981); HUMAN RIGHTS COMMISSION, ANNUAL REPORT 1981-82, VOLUME 2, REPORT OF THE COMMISSIONER FOR COMMUNITY RELATIONS 3, 24-28 (1982)(Parliamentary Paper No. 444, 1982).

The discriminatory policies of the Queensland government have given rise to criticism of Australia

The majority in *Koowarta* adopted a more plausible interpretation of the attention given to government-endorsed acts of racial discrimination:

[It seems] that the community of nations, or at least a very large number of them, are vigorously opposed to racial discrimination, not only on idealistic and humanitarian grounds, but also because racial discrimination is generally considered to be inimical to friendly and peaceful relations among nations and is a threat to peace and security among peoples . . . the failure of a party to fulfill its obligations [under the Convention] becomes a matter of international discussion, disapproval and perhaps action by way of enforcement.⁹²

The result of the *Koowarta* case was to uphold the validity of the Racial Discrimination Act and to affirm the power of the federal government to implement at least some treaties dealing with "purely domestic" matters. The split in the Court and the approach taken by Mr. Justice Stephen, however, still left open the question of whether the federal government had the power to implement all treaties irrespective of whether the subject matter of any particular treaty could be viewed as a topic of "general international concern"⁹³ or as "indisputably international in character."⁹⁴

B. *The Tasmanian Dams Case*

The question concerning the scope of the federal government's external affairs power was resolved in favor of the Commonwealth in *Commonwealth v. Tasmania* (the *Tasmanian Dams* case).⁹⁵ The case arose out of a major political dispute between the federal and Tasmanian governments over the construction of a dam and a hydroelectric power station on the Gordon River below its junction with the Franklin River in southwest Tasmania. The Tasmanian gov-

internationally. See, e.g., Burgmann, *Aborigines: The Struggle Continues*, in *THE PIECES OF POLITICS* 308-09 (R. Lucy 3d ed. 1983). A critical report prepared by a team from the World Council of Churches has aroused much international attention and has been widely circulated among United Nations bodies. See E. ADLER, *JUSTICE FOR ABORIGINAL AUSTRALIANS: REPORT OF THE WORLD COUNCIL OF CHURCHES TEAM VISIT TO THE ABORIGINES* (1981).

92. (1982) 56 Austl. L.J.R. 625, 653 (Mason, J.). See also *id.* at 646-47, 655, 664.

93. *Id.* at 645 (Stephen, J.).

94. *R. v. Burgess ex parte Henry*, (1936) 55 C.L.R. 608, 669 (Dixon, J.).

95. (1983) 57 Austl. L.J.R. 450; 46 Austl. L.R. 625 (Mason, Murphy, Brennan, and Deane JJ.; Gibbs, C.J., Wilson, and Dawson JJ., dissenting). The background to the case and the relevant legislation are summarized by Chief Justice Gibbs. See *id.* at 456-69. The case has been the subject of comment in a number of journals and books. See, e.g., M. COPER, *THE FRANKLIN DAM CASE* 1-26 (1983); Connolly, *The Tasmanian Dam Case: Treaties and the Australian Constitution*, 54 *AUSTL. FOREIGN AFF. REC.* 756-58 (July 1983); Lane, *The Federal Parliament's External Affairs Power: The Tasmanian Dams Case*, 57 *AUSTL. L.J.* 554 (1983); Howard, *External Affairs Power of the Commonwealth*, *CURRENT AFF. BULL.* 16 (Sept. 1983); Walker, *A Legal Wilderness Preserved*, *LAW INSTITUTE JOURNAL* 307 (July 1983); Crock, *Federalism and the External Affairs Power*, 14 *MELB. U.L. REV.* 238, 256-63; Connell, *External Affairs Power and the Domestic Implementation of Treaties*, 55 *AUSTL. FOREIGN AFF. REC.* 492 (Sept. 1983); *THE SOUTH WEST DAM DISPUTE: THE LEGAL AND POLITICAL ISSUES* (M. Sornarajah ed. 1983).

ernment favored construction of the dam because it considered the resulting increased capacity to generate large amounts of electricity essential to economic growth and the creation of employment opportunities in Tasmania's ailing economy. In March 1983, a new federal Labor government, which had committed itself to stopping the construction of the dam, came to power. This new federal government believed that construction of the dam would result in the flooding of significant Aboriginal archaeological sites, as well as damaging a wilderness area of outstanding natural significance.⁹⁶

The Commonwealth government promulgated regulations under the National Parks and Wildlife Act 1975 (Cth),⁹⁷ and subsequently enacted the World Heritage Properties Conservation Act 1983 (Cth), under which regulations were also made. The World Heritage Properties Conservation Act and regulations were intended to stop construction of the dam and any preparatory or associated works by prohibiting a wide range of activities within designated areas⁹⁸ (broadly, the dam site, the Franklin River valley and various areas containing archaeological sites).

Because the Commonwealth possessed no specific power to legislate with respect to the environment or the preservation of the national or world cultural heritage within its territory, it sought to justify the legislation by reference to various powers, including: the power to legislate with respect to external affairs;⁹⁹ the power to legislate with respect to the people of any race for whom the Parliament deems it necessary to make special laws;¹⁰⁰ the power to legislate with respect to trading corporations;¹⁰¹ and the power to legislate arising from the national nature of the government in respect of matters particularly appropriate to be regulated at the national level.¹⁰²

The Court split as to which particular sections of the Act and regulations were valid, but in the end sufficient legislation survived to prevent the Tasmanian

96. The area that would have been affected by the construction had been placed on the World Heritage List, which was maintained pursuant to the provisions of the UNESCO Convention for the Protection and Preservation of the World Cultural and Natural Heritage 1972, 27 U.S.T. 37, T.I.A.S. No. 8226, 1037 U.N.T.S. 151 (entry into force Dec. 17, 1975). Australia had been a party to this Convention since 1974.

97. World Heritage (Western Tasmania Wilderness) Regulations.

98. (1983) 57 Austl. L.J.R.450, 460-66 (Gibbs, C.J.).

99. AUSTRALIAN CONSTITUTION § 51(29). Under this power, it was argued that the relevant sections of the Act and regulations gave effect to the World Heritage Convention.

100. *Id.* § 51(26). Under this power, it was argued that the protection of Aboriginal sites was such a special law.

101. *Id.* § 51(20). Under this power, it was argued that the Tasmanian Hydroelectric Commission was a trading corporation and was prevented from going ahead with the construction of the dam by those sections of the legislation addressed specifically to trading corporations.

102. The use of the "implied national power" was based on judicial comments in *Attorney-General (Victoria) v. Commonwealth*, (1945) 71 C.L.R. 237, and in *Victoria v. Commonwealth*, (1975) 134 C.L.R. 338. Under this power, it was argued that the areas were part of a distinctive national heritage which the national government could preserve if endangered.

Hydroelectric Commission from proceeding with the construction of the dam without the permission of the responsible federal Minister.

A majority of the Court held that paragraph 9(1)(h) of the World Heritage Properties Conservation Act and the World Heritage Properties Conservation Regulations¹⁰³ were valid under the external affairs power.¹⁰⁴ The majority reasoned that the prohibition of acts which were likely to damage or destroy items of the world heritage in Australia was a reasonable and appropriate way of fulfilling the obligations imposed on Australia by Articles 4 and 5 of the World Heritage Convention, namely, the taking of appropriate measures to identify and preserve items of the world heritage within its territory.¹⁰⁵

The difference in views between the various members of the minority and majority resulted from different readings of the meaning of *Koowarta* (in each instance grounded in a particular vision of the appropriate balance of federal and state powers), and from divergent constructions of the Convention itself (informed by different understandings of the nature of the international legal process and the appropriate form of national participation in that process). The holdings of the majority and minority on the issues relevant in the present context are summarized below.

1. Majority Holding

The majority¹⁰⁶ held that: (a) the external affairs power permitted the federal government to carry out treaty obligations by means of domestic legislation regardless of the subject matter of the treaty;¹⁰⁷ (b) Articles 4 and 5 of the Convention imposed obligations on Australia;¹⁰⁸ (c) the federal clause contained in the Convention, Article 34,¹⁰⁹ was of no relevance to Australia, as implementa-

103. The effect of paragraph 9(1)(h) of the Act and the World Heritage (Properties Conservation) Regulations was to make unlawful the carrying out of works involving or associated with the construction of a dam, in an area that formed part of the world heritage, without the consent of the responsible federal Minister.

104. (1983) 57 Austl. L.J.R. 450, at 491-92 (Mason, J.), 505-09 (Murphy, J.), 534-36 (Brennan, J.). A majority of the Court also held that provisions of the legislation relying on the race power were supported by the external affairs power. *Id.* at 500-01 (Mason, J.), 510 (Murphy, J.), 537-39 (Brennan, J.), 550-52 (Deane, J.). Mr. Justice Deane, however, took the view that the provisions effected an acquisition of property without just compensation, and therefore declared that the provisions as formulated were invalid. *Id.* at 555-59. Certain of the provisions relying on the corporations power were upheld, while a majority held that the provisions based on the implied national power were invalid. *Id.* at 478-79 (Gibbs, C.J.), 520 (Wilson, J.), 542 (Deane, J.), 572-73 (Dawson, J.). See generally M. COPER, *supra* note 95.

105. See Convention for the Protection and Preservation of the World Cultural and Natural Heritage, *supra* note 96. For the relevant provisions of Articles 4 and 5 of the Convention, see *infra* notes 126-127.

106. The majority consisted of Justices Mason, Murphy, Brennan, and Deane.

107. (1983) 57 Austl. L.J.R. 450, 484-87 (Mason, J.), 506 (Murphy, J.), 526-27 (Brennan, J.), 544 (Deane, J.).

108. *Id.* at 489-90 (Mason, J.), 508-09 (Murphy, J.), 528-31 (Brennan, J.), 545-46 (Deane, J.).

109. For the text of Article 34, see *infra* text accompanying note 140.

tion of the Convention was within the "legal jurisdiction" of the federal government;¹¹⁰ and (d) paragraph 9(1)(h)¹¹¹ of the Act in conjunction with the regulations was a reasonable and appropriate manner of fulfilling Australia's obligations under the Convention.¹¹²

2. Minority Holding

The minority¹¹³ held that: (a) the external affairs power extended to the implementation of treaties only if the treaty imposed an obligation and if the subject matter of the obligation was a matter of "international concern" (in the sense that failure by Australia to fulfill its obligation would be likely to affect significantly Australia's relations with other countries);¹¹⁴ (b) Articles 4 and 5 of the Convention imposed no relevant obligations on Australia;¹¹⁵ and (c) protection of items of the world heritage in Australia was not a "matter of international concern" in the same way that racial discrimination was.¹¹⁶

3. Analysis

The majority judgments share a number of features that reflect an internationalist view of the world and of Australia's role in it. They embody a commitment to the development of the international order by removing the internal fragmentation of the power to implement treaties, which had been a significant impediment to that development. This commitment amounts to the expression of a preference in favor of the demands of the international order over those arising from the federal aspects of the domestic order. The judgments also demonstrate a realistic understanding of the nature of international relations, and adopt an approach to the construction of treaties that is grounded more in international practice than in domestic concepts of statutory interpretation.

The focus of the minority on the other hand, is far less internationalist. Their starting point is the premise that the states' desire to maintain as much autonomy as possible should be preferred to the needs of a national government or the international community. At the heart of the disagreement between the minority and majority is the minority's belief that the potential for the external affairs

110. (1983) 57 Austl. L.J.R. 450, 491 (Mason, J.), 509 (Murphy, J.), 531 (Brennan, J.), 546-47 (Deane, J.).

111. See *supra* note 104.

112. (1983) 57 Austl. L.J.R. 450, 493-94 (Mason, J.), 509 (Murphy, J.), 534-36 (Brennan, J.), 548 (Deane, J.).

113. The minority consisted of Chief Justice Gibbs and Justices Wilson and Dawson.

114. (1983) 57 Austl. L.J.R. 450, 475-76 (Gibbs, C.J.), 517-18 (Wilson, J.), 563-65 (Dawson, J.).

115. *Id.* at 470-72 (Gibbs, C.J.), 514-16 (Wilson, J.), 563-65. Dawson, J. considered the case on the assumption that Articles 4 and 5 did impose obligations, although he considered that "there is much to be said for the view that no relevant obligation is imposed by the Convention." *Id.* at 566. [For the text of Articles 4 and 5, see n.126-27 *infra*.]

116. *Id.* at 475-76 (Gibbs, C.J.), 516 (Wilson, J.), 566-67 (Dawson, J.).

power to expand without limit to cover virtually all aspects of Australian life, with the result that the states would be reduced to mere formal entities, must be guarded against if the concept of federation is to be preserved.¹¹⁷ Accordingly, some limit to the range of matters which could be covered by the external affairs power had to be found. Since *Koowarta* had ruled out the possibility of utilizing the untenable distinction between “domestic” and “international” matters,¹¹⁸ some other distinction had to be divined.

The solution arrived at by the minority, that the subject matter of the treaty had to be “of international concern,” is just as unsatisfactory as the distinction rejected in *Koowarta*. Having been forced to accept the proposition that matters previously considered to be solely of domestic concern can become external affairs, the minority aimed to make the threshold for this change in characterization as high as possible. In achieving this aim, the minority was forced to rely on an analysis of the world of international relations that was distorted, incoherent, and implausible. Furthermore, the minority’s approach necessitated the adoption by the Court of the task of assessing the nature and extent of international concern, in any particular instance, in order to determine whether Australia’s relations would be affected significantly if the federal government failed to act in accordance with its treaty obligations. This is a task the Court is not well-equipped to perform.

The judgment of Chief Justice Gibbs exemplifies this approach. He wrote:

The protection of the environment and the cultural heritage has been of increasing importance in recent times, but it cannot be said to have become such a burning international issue that a failure by one nation to take protective measures is likely adversely to affect its relations with other countries, unless of course damage or pollution extends beyond the borders. If one nation allows its own natural heritage (and no other) to be damaged, it is not in the least probable that other nations will act similarly in reprisal, or that the peace and security of the world will be disturbed — in this respect, damage to the heritage stands in clear contrast to such practices as racial discrimination¹¹⁹

A passage from the judgment of Mr. Justice Wilson is also striking:

When it is said that the subject matter of the Convention is a matter of international concern it may be relevant in judging the strength of that concern to observe that to date seventy-four nations have become parties to it; that is to say, a little less than half the total

117. *Id.* at 475 (Gibbs, C.J.), 517 (Wilson, J.), 564 (Dawson, J.). See also *supra* text accompanying notes 68-69.

118. *Koowarta*, (1982) 56 Austl. L.J.R. 625, 645-46 (Stephen, J.), 649-50 (Mason, J.), 656 (Murphy, J.), 663-64 (Brennan, J.).

119. (1983) 57 Austl. L.J.R. 450, 475-76 (Gibbs, C.J.).

membership of the United Nations. Furthermore, there are some notable absentees from the list of parties, including the United Kingdom, the Soviet Union, China, Belgium, Holland, Norway,¹²⁰ Sweden, Japan, New Zealand, Singapore, Malaysia, Thailand and the Philippines. The significance of this observation depends upon the understanding that is to be given to the term "international concern" as used by Stephen J. in *Koowarta* and the capacity of a matter to affect Australia's relations with other nations Be that as it may, the extent and intensity of international concern that is reflected in the present Convention is in no way comparable to that which was evidenced by the Convention on the Elimination of Racial Discrimination which was under consideration in *Koowarta*.¹²¹

It is unfortunate that racial discrimination was at issue in *Koowarta*, as it is one of the most compelling examples of general international consensus. The elevation of racial discrimination to the status of a paradigm of "international concern" distorts the realities of international law and relations. To assert, as Mr. Justice Wilson does, that the participation of almost half the total membership of the United Nations in the World Heritage Convention does not make the preservation of the world heritage a matter of international concern because there were a number of "notable absentees," and because the extent and intensity of international concern was not as great as it was in the case of the Racial Discrimination Convention, is wholly unpersuasive.

The appeal to racial discrimination as a paradigm clearly represented an attempt by the minority to restrict the scope of the external affairs power as much as was possible while remaining consistent with the actual outcome in *Koowarta*. The minority also extrapolated from *Koowarta* the additional requirement, for a treaty obligation to be part of nation's external affairs, that there be a likelihood that, if Australia did not fulfill its obligations, its relations with other countries would be significantly affected.¹²² The minority considered that this additional requirement was not satisfied in the case of the World Heritage Convention.¹²³ No evidence is given to demonstrate that Australia's failure to fulfill its obligations would not adversely affect its relations with other nations, nor is there any indication of the standard by which the likelihood is to be determined judicially. The fact that some behavior (such as racial discrimination) produces international repercussions of considerable impact does not mean that other behavior (such as the failure to live up to one's obligations under the World Heritage Convention) will not also have serious consequences for Australia's relations with other countries. The view taken by the majority was that the

120. Norway was in fact a party to the World Heritage Convention, despite Mr. Justice Wilson's assertion to the contrary. See 1044 U.N.T.S. 424 (ratification with effect from August 12, 1977).

121. (1983) 57 Austl. L.J.R. 450, 516 (Wilson, J.).

122. *Id.* at 476 (Gibbs, C.J.), 518 (Wilson, J.), 567 (Dawson, J.).

123. *Id.* at 476, 518, 567.

existence of an international obligation was in itself sufficient to justify a presumption that failure by Australia to fulfill the obligation would have international consequences, and that it was the executive's duty to assess the importance of these consequences.¹²⁴

When interpreting the provisions of the Convention itself, the majority and minority disagreed on two important questions: first, whether the Convention imposed any relevant obligations on parties; and second, if so, whether the federal clause in any way limited the scope of that obligation in the case of Australia. The two members of the minority who considered these questions¹²⁵ found that Articles 4¹²⁶ and 5¹²⁷ of the Convention did not impose any obligations on the parties to the Convention.¹²⁸ In reaching this conclusion, they adopted a method of interpretation more suited to a carefully drafted domestic statute than to a document such as the Convention. Their conclusion was based on a number of factors, including: a comparison of the words used in Articles 4 and 5 with those used in other articles of the Convention,¹²⁹ and with language used in the Racial Discrimination Convention;¹³⁰ the changes in language that had taken place during the drafting and adoption of the Convention reducing

124. *Id.* at 692 (Mason, J.), 771 (Brennan, J.).

125. These two members were Gibbs, C.J. and Wilson, J. Dawson, J. assumed for the sake of argument that Articles 4 and 5 imposed obligations, but held the legislation to be invalid nonetheless. *See id.* at 566.

126. Article 4 of the Convention provides:

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Convention for the Protection and Preservation of the World Cultural and Natural Heritage, *supra* note 96, art. 4.

127. Article 5 of the Convention provides:

To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country:
 (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification . . . of this heritage

Id. art. 5.

128. (1983) 57 Austl. L.J.R. 450, 469-73 (Gibbs, C.J.), 514-15 (Wilson, J.).

129. *Id.* at 469 (Gibbs C.J.), 515 (Wilson, J.). Articles 6(2), 6(3), 16(1) and 27(2) use the word "undertake"; Articles 17, 18 and 29(1) provide that the Parties "shall" do certain things. Convention for the Protection and Preservation of the World Cultural and Natural Heritage, *supra* note 96. The obligations imposed by these Articles, however, do not seem significantly less vague or self-defining than the "duty" imposed by Article 4 and the "endeavour" required of a Party by Article 5.

130. *Id.* at 515 (Wilson, J.). Both Gibbs, C.J. and Wilson, J. also considered that the absence of a complaints procedure similar to that in the Racial Discrimination Convention militated against the existence of an obligation. *Id.* at 470, 516. This is not a particularly persuasive argument in view of its failure to take into account the supervisory role of the World Heritage Committee and the normal procedures available for raising grievances at the international level.

the burden on parties;¹³¹ the self-defining nature of the "duties" imposed;¹³² and the general respect for state sovereignty they saw embodied in the Convention.¹³³

The majority adopted a different approach. It believed that the methods of construction appropriate to domestic statutes and contracts were not suitable when dealing with international conventions.¹³⁴ The obligation imposed by the Convention was to take appropriate steps to identify and preserve the world heritage and, although this meant that the exact details of performance would be decided by the nation involved, it still meant that there was an obligation on each party to consider in good faith what steps were appropriate for it to undertake. An allegation that this obligation had not been fulfilled was clearly a justiciable question.¹³⁵ In addition, the adoption by UNESCO of a resolution containing non-obligatory recommendations for protection of the cultural and natural heritage not forming part of the world heritage¹³⁶ at the same time as the convention was adopted confirmed the view of two members of the majority that the provisions of the Convention were intended to impose obligations.¹³⁷

The majority's view that the Convention did impose obligations on Australia is considerably more persuasive than the interpretation offered by the minority. It seems clear that, even had the majority found that there was no obligation in a strict sense, at least some of the majority (if not all of them) may still have held the law to be a valid exercise of the external affairs power.¹³⁸

Article 34 of the Convention,¹³⁹ the federal clause, also gave rise to the expression of contrary views by various members of the Court. Article 34 provides:

The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system:

(a) with regard to the provisions of this convention, the implementa-

131. *Id.* at 472-73 (Gibbs, C.J.), 515 (Wilson, J.). See generally Goy, *The International Protection of the Cultural and Natural Heritage*, 4 NETH. Y.B. INT'L L. 117, 135-36 (1973); Meyer, *Travaux Préparatoires for the UNESCO World Heritage Convention*, 2 EARTH L.J. 45, 49-50 (1976).

132. (1983) 57 Austl. L.J.R. 450, 470-72 (Gibbs, C.J.).

133. As evidenced, *inter alia*, by references to respect for the sovereignty of Parties in Articles 5, 6(1) and 11 and Article 34, as well as references to the protection of property rights. *Id.* at 470 (Gibbs, C.J.), 514-15 (Wilson, J.), 567 (Dawson, J.).

134. For example, Mr. Justice Deane wrote: "it would be contrary to both the theory and practice of international law to . . . deny the existence of international obligations unless they be defined with the degree of precision necessary to establish a legally enforceable agreement under the common law." *Id.* at 546 (Deane, J.). See also *id.* at 509 (Murphy, J.), 530-31 (Brennan, J.).

135. *Id.* at 489-90 (Mason, J.), 509 (Murphy, J.), 530-31 (Brennan, J.), 546 (Deane, J.).

136. UNESCO Doc. 17 C/107, 16 Nov. 1972, reproduced in 11 INT'L LEGAL MATERIALS 1367-74 (1972).

137. (1983) 57 Austl. L.J.R. 450, 490 (Mason, J.), 531 (Brennan, J.); *Contra id.* at 473 (Gibbs, C.J.), 525 (Wilson, J.), 566 (Dawson, J.).

138. *Id.* at 490-91 (Mason, J.), 505-06 (Murphy, J.), 530 (Brennan, J.), 544-45 (Deane, J.).

139. Convention for the Protection and Preservation of the World Cultural and Natural Heritage, *supra* note 96, art. 34.

tion of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;

(b) with regard to the provisions of this convention, the implementation of which comes under the legal jurisdiction of individual constituent States, counties, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption.¹⁴⁰

All members of the majority held that the effect of the federal clause could only be ascertained after a determination of whether the federal government had the legislative power to implement the obligations imposed by Articles 4 and 5 of the Convention.¹⁴¹ As they held that the federal government did have this power, they reasoned that implementation of these articles came within the legal jurisdiction of the federal government and Article 34(b) had no application.¹⁴² The fact that the federal government and the Tasmanian government had concurrent legislative power in this case did not affect the position.

This interpretation of Article 34 is clearly correct. Any argument that the existence of concurrent federal and state jurisdiction brought the implementation of the treaty within the jurisdiction of a constituent state, for the purpose of Article 34(b), would run counter to the rationale behind the use of federal clauses and for the insertion of this particular federal clause. Federal clauses are a departure from equality of obligation as between unitary and federal states and are a concession to federal states in order to facilitate their participation in treaties to which they might not otherwise be able to become parties. Accordingly, such clauses should not be broadly construed to limit the obligations of federal states as opposed to unitary states. In the case of the World Heritage Convention, the clause appears to have been inserted as a result of the assertion by the Austrian government that the Austrian federal government had neither exclusive nor concurrent power over most of the matters covered by the Convention.¹⁴³ Thus, it would seem incontrovertible that in a case where the federal government possesses concurrent power, Article 34(a) should apply.

140. *Id.*

141. (1983) 57 Austl. L.J.R. 491 (Mason, J.), 509 (Murphy, J.), 531 (Brennan, J.), 546-47 (Deane, J.).

142. *Id.*

143. The *travaux préparatoires* show that Austria stated that it would be unable to ratify the Convention if no reservations were permitted, because of its constitutional distribution of powers (under which the Länder possessed power over conservation of nature, building, and land use planning). UNESCO Doc. SCH/MD/18/Annex 1 at 2 and Annex II para. 7. The result was the insertion of Article 33. UNESCO Doc. 17 C/18/Annex, para. 56. *Cf. supra* note 71.

Nonetheless, Mr. Justice Dawson was prepared to advance a rather unorthodox interpretation of the clause. He argued that, assuming the Convention imposed relevant obligations, the nature of those obligations required for their fulfillment the formation of a judgment involving a "balancing of environmental, social and economic considerations which are by no means wholly, or even largely, entrusted to the Commonwealth."¹⁴⁴ The Commonwealth was not in a position to exercise such judgment in relation to the energy needs of Tasmania and it followed "inevitably" from this that the obligations under Articles 4 and 5 did not come within the jurisdiction of the federal government. Not only is this premise of the inability of the Commonwealth to make an informed judgment highly questionable (as is the restriction of the inquiry solely to questions of state energy needs), but Mr. Justice Dawson's "inevitable" conclusion is also a non sequitur in view of the fact that the clause speaks of "legal" jurisdiction and not of optimal administrative and operational arrangements. Such an interpretation of Article 34 involves a distortion of the clear terms of the Article and of the intent with which it was inserted in the Convention.¹⁴⁵

4. The Likely Impact of the *Dams* Case on Australian Federal Relations

The decision in the *Dams* case was greeted with prophecies of doom for the Australian federal system by advocates of states' rights. Premier Bjelke-Petersen of Queensland, an avid states' rights advocate and one of the defendants in the *Kooowarta* case,¹⁴⁶ described the decision as "the first big crack in our federal system since Federation," and called for a referendum to amend the Constitution so that the High Court would be required to reach a unanimous decision in cases involving states' rights before a federal law would be upheld.¹⁴⁷ The acting leader of the federal opposition expressed similar sentiments,¹⁴⁸ and one newspaper editorial predicted that the result of the decision would be an increase in the size of Australian delegations sent overseas to negotiate treaties "as the States scramble to assert their interest in foreign affairs."¹⁴⁹

The legal and historical realities of Australia's development belie the accuracy of the prophecies of doom uttered by states' rights advocates. The *Dams* case is

144. (1983) 57 Austl. L.J.R. 450, 568-69 (Dawson, J.).

145. Mr. Justice Wilson inexplicably saw the clause as tending to confirm that the Convention sought to achieve its purposes "by a conciliatory and informal engagement of international relationships" falling short of creating any obligations. *Id.* at 516-17. He also combined the "effective level of decision-making" argument of Mr. Justice Dawson with the argument that, as in his view the federal government does not have the power to implement the treaty, Article 34(a) has no application. His whole discussion, however, is less than lucid. Chief Justice Gibbs does not express a concluded view on the issue, *See id.* at 472.

146. (1982) 56 Austl. L.J.R. 625. *See supra* text accompanying notes 74-83.

147. The Sydney Morning Herald, July 2, 1983, at 6.

148. He stated, "[i]t effectively marks the beginning of the end for the keystone of our federal system — the sovereign rights of the States — and perhaps even for the system itself." *Id.* at 6.

149. *Id.* at 12. *See also* 57 AUST. L.J. 487-88 (1983).

not an isolated and unanticipated explosion of federal power; rather, it is one of a series of High Court decisions since federation which have adopted broad interpretations of federal power.¹⁵⁰

The confirmation of federal power to regulate areas traditionally subject to state control does not inevitably lead to major intrusions by the federal government into those areas. The external affairs power is no exception, and the extent of its use to regulate subjects under state control will be influenced by political and institutional pressures, as well as by the extent of commitment by different federal and state governments to the substantive policies embodied in international instruments. The rhetoric of both the states' rights advocates and centralists in the wake of the *Dams* case is part of the ongoing debate attempting to limit or to legitimize the federal government's intrusion into more and more areas traditionally regulated by the states.

The *Dams* case has clearly established the power of the federal government to implement treaties whatever their subject matter, provided that the implementing legislation is a reasonably appropriate way of carrying out the terms of the treaty and does not infringe any express or implied constitutional prohibition.¹⁵¹ While the decision has been hailed as a significant legal event, the question arises as to what practical impact the affirmation of broad federal power in this area will have. The purpose of the following section is to assess the likely impact of the *Dams* case against the background of Australian domestic and international practice relating to treaties and their implementation.

V. AUSTRALIAN TREATY PRACTICE: INTERNATIONAL AND DOMESTIC CONSIDERATIONS

A. *Federal States and International Treaties*

Under most federal constitutions, the central government is primarily, if not exclusively, responsible for the conduct of the nation's foreign affairs, and

150. The case can be viewed "as part of a fairly consistent trend in High Court cases over many years to enhance the power of the Commonwealth." M. COPER, *supra* note 95, at 25. See also W.G. McMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA 169-79 (1979); Hutchinson, *Australian Federalism*, in THE PIECES OF POLITICS 193-94 (R. Lucy 3d ed. 1983). A similar trend has been evident, if not inevitable, in the other classical models of federal systems of government. K.C. WHEARE, FEDERAL GOVERNMENT 237-38 (4th ed. 1963). For a recent illustration of insistence on the requirement that the implementing legislation conform to the terms of the relevant treaty, see *Kirmani v. Captain Cook Cruises Party Ltd.*, (1985) 59 Austl. L.J.R. 265, 270-71 (Gibbs, C.J.), 278-79 (Wilson, J.), 309-10 (Dawson, J.). These judges, who dissented in the result on other grounds, were the only members of the court to deal with this issue as to constitutional prohibitions.

151. See generally M. COPER, *supra* note 95, at 9-10, 21-22. The express prohibitions of the Constitution are contained in AUSTL. CONST. §§ 92, 99, 113, 114, 116, and 117. The most important of these prohibitions has been the guarantee of freedom of interstate trade (*id.* § 92). The implied prohibitions prevent the Commonwealth from legislating in violation of the separation of powers, from imposing a discriminatory burden on the states, or from threatening their capacity to function in the federal system.

generally possesses exclusive capacity to enter into treaties. A federal government, however, may be reluctant to enter into, or implement treaties without the acquiescence or agreement of its states and may therefore emphasize in both the domestic and international arenas the necessity or desirability of consulting with the constituent member of the federation prior to assuming treaty obligations. Internationally, it may also argue that some special provision should be made for it in view of its federal nature. There are a number of reasons why such a policy may be adopted by a federal government participating in the drafting of a convention. First, there may be a perceived or actual lack of federal power to implement the provisions of a treaty or class of treaties. Second, it may be the states which, in many cases, can most effectively implement the treaty in practice, since in areas traditionally regulated by the states the necessary administrative structures will often already be in place. Third, there may be the necessity of ascertaining whether law and practice is in accordance with the provisions of the treaty in cases where this is a prerequisite to ratification — in relation to state law and practice such information is most efficiently obtained by means of input from the states themselves. Fourth, there may be political disadvantages resulting from action by the federal government without consultation with the states; conversely, political benefits may accrue from a readiness to cooperate with the states. Fifth, as a tactic of delay or concealment, decisions that could prove difficult or unpopular in the domestic context may be hidden behind rhetoric about considerations of federalism; similarly, on the international level, a lack of commitment to a particular convention, or the desire to appear to be supporting a measure while not in fact undertaking an obligation, may also be concealed behind the rhetoric or reality of the demands of the federal system.

Much has been written analyzing the behavior of federal states in the formulation and ratification of multilateral conventions, particularly International Labour Organisation Conventions and United Nations human rights instruments. It has been shown that the existence of a broad or restricted power to implement treaties and the insertion of federal clauses have been relatively unimportant factors in explaining the pattern of ratification of these conventions by federal states.¹⁵² In other contexts a reluctance to ratify multilateral treaties has also been evident, although to a lesser extent.¹⁵³ Very often political considerations or substantive disagreement with a particular policy explains such behavior, yet in many cases these influences have been concealed behind the rhetoric of federalism. The extent of federal reluctance or indifference may vary from issue to issue and according to the political complexion of governments at the state and federal level. The next section discusses the political background of Australia's treaty practice.

152. See H. Charlesworth, *supra* note 75, at 18-38, 90-92; I. BERNIER, *supra* note 24, at 152-71 (1973).

153. See generally I. BERNIER, *supra* note 24.

B. *Australia: The Political Background*

The history of government in Australia at the federal level has been primarily the story of competition between the Australian Labor Party (ALP) and the anti-Labor parties. The dominant post-war anti-Labor force has been the coalition formed by the Liberal Party of Australia (LPA) and the Country Party (which changed its name to the National Country Party in 1974). Since 1949 the Liberal/Country Party coalition has governed for the greatest length of time.¹⁵⁴

The difference between the Labor Party and the conservative parties has been summarized as follows:

The Labor Party and other groups on the left have traditionally been self-conscious advocates of strengthening the powers of the central government, especially for welfare and industrial legislation and economic management. After some early experiments at state level with public enterprises and welfare legislation, Labor increasingly focused on the federal level as crucial for implementing social reforms and economic coordination, a focus which was reinforced by the experience of wars, depression, and the growing fiscal dominance of the federal government.

Conservative parties, on the other hand, have traditionally supported a 'federalist' ideology whereby the 'checks and balances' of the federal system would constitute a safeguard against socialist concentration. Individual liberty would thus be preserved and the interests of regions would be better served by strong State-level governments in touch with local needs and desires.¹⁵⁵

The Labor Party has differed from the Liberal-National Party in several aspects that are relevant in the present context. First, the Labor Party has maintained a commitment to far-reaching economic and social reform in accordance with socialist principles (in practice now a form of democratic socialism along Western European lines), while the Liberal-National Party has been committed to the principles of free enterprise. Second, the Labor Party has been willing to diminish the importance of the states in the federal system, by abolishing them (pre-1971 platform), or by bypassing them (1972-75 practice), while the Liberal-National Party has been committed to cooperation with the states and preservation of their autonomy in many areas.¹⁵⁶ Third, the Labor Party has

154. Since 1949, competing factions have governed Australia; 1949-1972, Liberal/Country Party; 1972-75, Australian Labor Party; 1975-83, Liberal/National Country Party; 1983-Present, Australian Labor Party.

155. B. Head, *The Political Crisis of Australian Federalism*, in AUSTRALIAN FEDERALISM: FUTURE TENSE 75, 81-82 (A. Patience & J. Scott eds. 1983). See also Sawyer, *The United Nations*, in AUSTRALIA IN WORLD AFFAIRS 1956-60, at 157 (G. Greenwood & N. Harper eds. 1963); Maddox, *The Federal Environment of Australian politics*, in MAN AND THE AUSTRALIAN ENVIRONMENT 295-301 (W. Hanley & M. Cooper eds. 1982). For a general description of the policies and practices of the three parties, see essays by Jaensch, Lucy, and Cribb in THE PIECES OF POLITICS (R. Lucy 3d ed. 1983).

156. J. HOLMES & C. SHARMAN, THE AUSTRALIAN FEDERAL SYSTEM 19-21 (1977).

been committed to the international order and international standard-setting, and to a belief in the potential of the external affairs power to expand federal power, particularly in the area of human rights and social justice.¹⁵⁷ The Liberal-National coalition, in contrast, has shown a lesser commitment to the development of international human rights standards (especially those which aimed to protect interests other than those traditionally cherished by proponents of free enterprise) and a general lack of enthusiasm for using the external affairs power to override the states and accumulate more power in the federal government.

Generally, the Labor Party has been more adventurous than conservative governments in its use of the external affairs power. Indeed, it is the ALP that has experimented with a whole range of previously unexploited federal powers in order to implement its policies. As discussed earlier,¹⁵⁸ the emphasis in Australian federal constitutional law has been the continuing effort to find affirmative grants of power among those enumerated in the Constitution to support particular exercises of federal legislative power. Unlike the position in the United States, with one exception, negative restrictions on exercises of power have not proved to be of particularly great importance.¹⁵⁹ Interestingly, the Constitution, a creature of the 1890's, in its conception and allocation of powers, is inherently biased against socialist initiatives as well as radical and liberal reforms of a much more modest nature.¹⁶⁰ Labor Party governments have been prepared to rely on the external affairs power as a basis for implementing in its entirety a treaty that they support, as well as relying on it in cases where one or more articles of a treaty provide a convenient hook on which to hang a legislative provision that forms part of a larger policy and which can be supported by no other head of power.

On the other hand, the discussion which follows will show that the Labor Party, as well as the Liberal-National coalition, has also consistently engaged in consultation and cooperation with the states in relation to questions of treaties, although in cases where state cooperation has not been forthcoming and the Labor Party has been strongly committed to a particular policy, it has been prepared to act unilaterally.¹⁶¹

157. In relation to the attitude of the Labor Party when in power in the 1940s, see Bailey, *supra* note 14, at 291.

158. See *supra* text accompanying notes 9-13.

159. See generally M. COPER, FREEDOM OF INTERSTATE TRADE UNDER THE AUSTRALIAN CONSTITUTION (1983). The guarantee of freedom of interstate trade is one exception where a negative restriction on the exercise of power has proven significant. See AUSTRALIAN CONST. § 92.

160. See, e.g., Sawyer, *The Constitutional Crisis of Australian Federalism*, in AUSTRALIAN FEDERALISM: FUTURE TENSE 94, 101-03 (A. Patience & J. Scott eds. 1983); Patience, *Bypassing Liberalism: Constitutionalism in Australian Politics*, in CRITICAL ESSAYS IN AUSTRALIAN POLITICS 97, 104-10 (G. Duncan ed. 1978).

161. Since 1945 there have been four major High Court cases dealing with the external affairs power. See *Airlines of N.S.W. v. N.S.W.* (No. 2), (1965) 113 C.L.R. 54; *Seas and Submerged Lands case*, (1975) 135 C.L.R. 337; *Koowarta v. Bjelke-Petersen*, (1982) 56 Austl. L.J.R. 625; *Tasmanian Dams case*, (1983) 57 Austl. L.J.R. 450. All have been discussed *supra*. Of these cases, all but *Airlines of N.S.W.*

1. 1949-72: A Conservative Era

While many commentators considered that the *Burgess* decision¹⁶² had established beyond doubt that the federal government had full power to implement treaties,¹⁶³ the clear pronouncements of the Court in that case were diluted over time by political realities to the extent that, by 1972, it was difficult to assume confidently that federal legislation implementing a treaty would be upheld whatever the subject matter of the treaty. The outbreak of the Second World War shortly after *Burgess* had meant that the federal government's power over "naval and military defense"¹⁶⁴ had expanded during the war and the immediate post-war period to allow the Commonwealth to regulate many areas of activity that were beyond its power in peacetime.

With the election of 1949, a Liberal-Country Party coalition, which would rule the country for almost twenty-five years, came to power. During this coalition's tenure, there was little resort to the treaty power to enact either wide-ranging social reforms or even less ambitious measures which would have encroached upon areas traditionally regulated by the states. This attitude was the result of a lack of commitment to various social policies initiated by the United Nations and associated bodies, the coalition's desire to preserve states' rights from federal encroachment, and a general philosophy of minimal governmental regulation.¹⁶⁵ From 1949 until 1972, the federal government continued to adopt the practice that had been followed since the early days of Australia's independent participation in international fora:

[t]he Commonwealth was still reluctant to pass ancillary legislation for execution of treaties which fell within the sphere of the State legislative authority. For this it depended on the acquiescence of the States, and the States have thus pressed their claims that the Commonwealth recognizes [sic] the desirability of consultation with the States in respect of all Conventions, the extension of which or adherence to which involves the cooperation of the State Governments.¹⁶⁶

involved challenges to legislation that had been passed by a federal Labor government over opposition from all states or from the states most directly affected by the legislation.

162. (1936) 55 C.L.R. 608. See *supra* notes 36-44 and accompanying text.

163. See, e.g., 45 AUSTRALIAN L.J. 652 (letter by Evatt); Bailey, *supra* note 14, at 304-06; Sorensen, *supra* note 72, at 204; Looper, *Federal State Clauses in Multilateral Instruments*, 32 BRIT. Y.B. INT'L. L. 162, 163 (1955-56). The government of the day took a more restricted view. Bailey, *supra* note 14, at 291.

164. See AUSTRALIAN CONST., § 51(6).

165. See, e.g., Sawyer, *supra* note 155, at 157-58; Lane, *External Affairs Power*, 40 AUSTRALIAN L.J. 257 (1966); Howard, *The External Affairs Power of the Commonwealth*, 8 MELB. U.L. REV. 193, 213-14 (1971); V. WINDEYER, SOME ASPECTS OF AUSTRALIAN CONSTITUTIONAL LAW 48-49 (1972).

166. G. DOEKER, THE TREATY-MAKING POWER IN THE COMMONWEALTH OF AUSTRALIA 241 (1966). See also L. WILDHABER, TREATY MAKING POWER AND CONSTITUTION 301-02 (1971); Sawyer, *Australian Constitutional Law in Relation to International Relations and International Law*, in INTERNATIONAL LAW IN AUSTRALIA 45-47 (D.P. O'Connell ed. 1965); Bailey, *supra* note 14, at 297.

The attitude of the Liberal-Country Party government was captured in a response by the Prime

The process of consultation and cooperation with the states in areas other than labor matters and human rights instruments can be illustrated by reference to treaties dealing with ocean pollution, narcotic drugs and foreign arbitral awards. For example, in 1962, Australia ratified the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954.¹⁶⁷ Prior to ratification of this Convention, the Commonwealth and the states had consulted over a number of years to create a package of complementary federal and state laws regulating the matters eventually covered by the Convention. The state laws dealt with matters within traditional state competence; the federal laws regulated those activities which fell outside state legislative power.¹⁶⁸

A similar approach was adopted in relation to the Single Convention on Narcotic Drugs 1961.¹⁶⁹ The federal government had traditionally regulated the import and export of drugs while the states had traditionally regulated the sale, possession, and consumption of dangerous substances. The question of ratification of the Convention was referred to the states, all of which had agreed by 1962 to undertake the obligations imposed by the Convention.¹⁷⁰ It took until 1967 for a complementary scheme of federal and state legislation to be enacted in conformity with the provisions of the Convention, with importation and manufacture being subject to federal control, and other aspects being subject to state regulation.¹⁷¹

Another major instance of joint federal/state action in the area of foreign affairs was the scheme developed to regulate the exploitation of Australia's offshore resources. Rather than resolve the issue of which government owned the resources of the territorial sea, its subsoil, and the continental shelf, the Liberal-National federal government sponsored a complicated interlocking system of federal and state laws as a compromise.¹⁷² When Liberal Prime Minister

Minister, Sir Robert Menzies, when asked when Australia would ratify the Convention on the Political Rights of Women, 193 U.N.T.S. 135: "Some changes in Australian law and procedure would be necessary before Australia could become a party to the Convention. The position is complicated by the fact that many of the matters in question are within the competence of the State governments." 28 AUSTRALIAN PARLIAMENTARY DEB., H.R. 849-50 (1960). The convention was not ratified by Australia until 10 December 1974.

167. 327 U.N.T.S. 3.

168. G. DOEKER, *supra* note 166, at 227-31 (1966). Doeker's assumption, however, that the consultation was the result of a lack of federal power to legislate, is incorrect; administrative convenience appears to have been the real motivation. Connell, *International Agreements and the Australian Treaty Power*, 1968-69 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 83, 98.

169. 520 U.N.T.S. 151. Australia signed the Convention on March 30, 1961, and ratified it on December 1, 1967. Australia signed and ratified the 1972 Protocol Amending the Single Convention on November 22, 1972.

170. REPORT OF THE GOVERNMENT OF AUSTRALIA FOR THE CALENDAR YEAR 1962 ON THE WORKING OF THE INTERNATIONAL TREATIES ON NARCOTIC DRUGS.

171. REPORT OF THE GOVERNMENT OF AUSTRALIA FOR THE CALENDAR YEAR 1967 ON THE WORKING OF THE INTERNATIONAL TREATIES ON NARCOTIC DRUGS. The area of drugs is regulated by both state and federal authorities in close cooperation through permanent and ad hoc arrangements.

172. See Harders, *Australia's Offshore Petroleum Legislation: A Survey of Its Constitutional Background and*

John Gorton attempted to introduce legislation in 1970 that would vest overriding control over offshore resources in the federal government, his attempts were roundly defeated by the states' rights proponents in the Liberal Party.¹⁷³

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁷⁴ was another instance in which the federal government opted for cooperative rather than unilateral action. Although the Commonwealth would have had the power to legislate in relation to foreign arbitral awards, the federal government sought the cooperation of the states in implementing the Convention, as the related area of recognition and enforcement of foreign judgments had traditionally been the subject of state legislation. In 1969, it appeared that an agreement had been reached which would allow the federal government to ratify the Convention in advance of the enactment of state legislation on the basis of assurances from the states that the uniform implementing legislation would be passed.¹⁷⁵ In fact, the Convention was not ratified until 1973 on the basis of federal legislation; even by that time not all states had enacted implementing legislation.¹⁷⁶

Liberal-Country governments continued to follow the procedure of consultation that had been adopted previously in relation to International Labour Organisation (ILO) Conventions. From its earliest contacts with the ILO, the Australian federal government had adopted the practice of referring Conventions involving the states to the states for consideration. The federal government then would ratify a Convention only if all states agreed to ratification, and if it were satisfied that Australian law and practice in all jurisdictions was in conformity with the Convention.¹⁷⁷

In the period from 1949 to 1972, Australia ratified eighteen ILO Conventions, more than half of which were Conventions adopted prior to 1949.¹⁷⁸ Unratified

Its Federal Features, 6 MELB. U.L. REV. 415 (1968). See also Thompson, *Australian Petroleum Legislation and the Canadian Experience*, 6 MELB. U.L. REV. 370, 378 (1968) (comparing the success of the Australian solution with the problems of the U.S. attempts).

173. See, e.g., H.V. EMY, *THE POLITICS OF AUSTRALIAN DEMOCRACY* 47 (2d ed. 1978); Connell, *supra* note 119, at 84; Gorton, *Australian Federalism: A View from Canberra*, in AUSTRALIAN FEDERALISM: FUTURE TENSE 12, 23-24 (A. Patience & J. Scott eds. 1983). The proposed legislation was the Territorial Sea and Continental Shelf Bill 1970, which was subsequently taken over by the Labor government of 1972-75.

174. 330 U.N.T.S. 3.

175. Note, 43 AUSTRALIAN L.J. 344-45 (1969).

176. 92 AUSTRALIAN PARL. DEB., H.R., 4390-93 (1974).

177. Bailey, *supra* note 14. See also G. DOEKER, *supra* note 166, at 231; REVIEW OF AUSTRALIAN LAW AND PRACTICE RELATING TO CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE (1969), Parliamentary Paper No. 197, 1969, at 7.

178. See I.L.O. No. 2, 38 U.N.T.S. 41; No. 10, 38 U.N.T.S. 143; No. 11, 38 U.N.T.S. 153; No. 12, 38 U.N.T.S. 165; No. 18, 38 U.N.T.S. 243; No. 19, 38 U.N.T.S. 257; No. 42, 40 U.N.T.S. 19; No. 45, 40 U.N.T.S. 63; No. 85, 214 U.N.T.S. 33; No. 88, 70 U.N.T.S. 85; No. 93 (pre-1949). See also I.L.O. No. 99, 172 U.N.T.S. 159; No. 105, 320 U.N.T.S. 291; No. 112, 413 U.N.T.S. 147; No. 116, 423 U.N.T.S. 11; No. 122, 569 U.N.T.S. 65; No. 123, 610 U.N.T.S. 79 (post-1949). See generally International Labour Office, RATIFICATIONS OF CONVENTIONS, International Labour Conference, 68th Session 1982, Report III (pt. 5).

Conventions included the Convention on Freedom of Association and Protection 1948 (No. 87),¹⁷⁹ the Convention on the Right to Organize and Collective Bargaining 1949 (No. 98),¹⁸⁰ the Convention on Equal Remuneration 1951 (No. 100),¹⁸¹ and the Convention on Indigenous and Tribal Populations 1957 (No. 107).¹⁸²

The draft Covenants on Human Rights, and the Covenants as finally adopted, were also referred to the states with a view to ratification. The reaction of the states and the less than fervent commitment by the federal government to their ratification meant that by the end of 1972, Australia had neither signed nor ratified the Covenants.¹⁸³

One important result of the federal government's espousal of cooperative federalism was its support for the insertion of federal clauses in a number of multilateral instruments. Australia supported the insertion of federal clauses in the Convention on the Status of Refugees 1951 (Article 41),¹⁸⁴ the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others 1950,¹⁸⁵ and the Human Rights Covenants.¹⁸⁶

In sum, the period from 1949 to 1972 was relatively uneventful as far as federal use of the external affairs power was concerned. The prevalence of conservative social ideas, a commitment to the preservation of states' rights, and a reluctance to accommodate the domestic order to the changing demands of the international order were characteristic of Australian federal governments of the period. As a result, there was little incentive for the Liberal-Country Party governments to attempt to expand the ambit of the power, at the expense of the states, to implement its policies.

2. 1972-75: The Whitlam Labor Government

The election of the Whitlam Labor government in December 1972 initiated a period of commitment to widespread social reform, the centralization of power in Canberra in order to achieve this reform, and experimentation with a number of previously unexploited heads of federal legislative power. Inevitably, the government collided with the states and states' rights advocates on a number of occasions. The government saw Australia as a nation with domestic problems

179. 68 U.N.T.S. 17.

180. 96 U.N.T.S. 257.

181. 165 U.N.T.S. 303.

182. 328 U.N.T.S. 247. See 125 AUSTRALIAN PARLIAMENTARY DEB. 2927 (1981) (Reply of the Minister for Industrial Relations to Question on Notice No. 2713).

183. For a description of the consultation up to 1966, see G. DOEKER, *supra* note 166, at 223-27.

184. 189 U.N.T.S. 137. See also I. BERNIER, *supra* note 24, at 178.

185. 96 U.N.T.S. 271. See also Liang, *Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments*, 45 AM. J. INT'L L. 108, 122-23 (1951).

186. Looper, *supra* note 163, at 188. See also Sorensen, *supra* note 72, at 199; Liang, *supra* note 185, at 128.

which required resolution on a national scale, and it also believed that only one Australian voice, that of the federal government, should be heard abroad. It relied upon an expansive reading of the external affairs power to help it implement its policies. The comments of the then Attorney-General Murphy exemplify the government's approach: "If Australia is to fulfill its proper role in international affairs, the national Parliament must be able to give full effect to treaties and other international instruments without the need to seek legislation by the six State parliaments."¹⁸⁷ Among policies pursued by the federal government were: the assertion of overriding federal jurisdiction over the resources of the territorial sea, its subsoil, and the continental shelf; the attainment of an acceptable standard of human rights for all Australians, particularly in the area of racial discrimination; and the abolition of residual constitutional links with the United Kingdom.¹⁸⁸

The federal government took the view that, while in some cases cooperative action with the states was desirable, in those cases in which some or all of the states were unwilling to cooperate and the Commonwealth was firmly committed to a particular policy, the Commonwealth would move unilaterally to ratify and implement the relevant international convention.¹⁸⁹

The most notable example of the government's expansive use of the external affairs power to implement its policies was the action it took in relation to human rights. Australia had signed the International Covenant on Economic, Cultural and Social Rights 1966¹⁹⁰ in December 1972, and ratified it on December 10, 1975.¹⁹¹ The government also acceded to the Convention on the Political Rights of Women 1953,¹⁹² ratified the International Convention for the Elimination of All Forms of Racial Discrimination 1965,¹⁹³ and signed the International Covenant on Civil and Political Rights 1966 (ICCPR).¹⁹⁴ Legislation was introduced to

187. PROCEEDINGS OF THE AUSTRALIAN CONSTITUTIONAL CONVENTION 1973, 213 (Sydney, 1973). See generally Evans, *New Directions in Australian Race Relations Law*, 48 AUSTL. L.J. 479 (1974); EVANS, *Benign Discrimination and the Right to Equality*, 6 FED. L. REV. 26 (1974); Crommelin and Evans, *Explorations and Adventures with Commonwealth Powers*, in LABOR AND THE CONSTITUTION 1972-75, at 48-49 (G. Evans ed. 1977).

188. See generally Sawyer, *supra* note 160, at 95-98.

189. For example, the Whitlam government implemented the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1975, 330 U.N.T.S. 3, in view of the failure of the states to pass uniform state legislation. See Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) and Cumulative Supplement (No.4) to Australian Treaty List, AUSTL. T. SER. 1982, No. 10, at 43 (entry into force for Australia 24 June 1975).

190. 993 U.N.T.S. 3.

191. 993 U.N.T.S. 4. The Whitlam Government was dismissed from office on November 11, 1975, but the ratification of the ICECSR was presumably the result of efforts of the Whitlam government rather than a new initiative on the part of the Fraser government.

192. 193 U.N.T.S. 135. See Cumulative Supplement (No.4) to Australian Treaty List, AUSTL. T. SER. 1982, No.10 at 46 (entry into force for Australia 30 October 1975).

193. 660 U.N.T.S. 195.

194. 999 U.N.T.S. 171.

implement the ICCPR¹⁹⁵ and the Racial Discrimination Convention. The former, the Human Rights Bill 1973, eventually lapsed; the latter was passed into law as the Racial Discrimination Act 1975, which was the legislation that was upheld (in an amended form) in *Koowarta v. Bjelke-Petersen*.¹⁹⁶

The Whitlam Labor government repudiated the cooperative scheme adopted by the Liberal-Country government for regulating offshore resources, and passed the Seas and Submerged Lands Act 1973 (Cth) over opposition from all states, including those with Labor governments.¹⁹⁷

The other battles between the Commonwealth and states involved the abolition of residual links with the United Kingdom, and negotiations to establish a boundary in the Torres Strait between Australia and Papua New Guinea. All non-Labor states, and some Labor states, opposed unilateral attempts by the Commonwealth to sever the remaining legal links to the United Kingdom; the issue was unresolved when the government was dismissed in 1975.¹⁹⁸ In relation to the conclusion of a boundary treaty with Papua New Guinea, the Queensland government refused to cooperate with the federal government until 1978.¹⁹⁹

The Labor government was determined to have Australia enjoy its full international personality, and not be an "international cripple"²⁰⁰ as a result of the demands of the federal system. This attitude was shown by the apparent reversal of Australia's stance on federal clauses. For example, the Australian delegation to the Diplomatic Conference on Wills²⁰¹ in Washington, D.C. in 1974, stated that it was opposed to the insertion of any form of federal clause in the Draft Convention Providing a Uniform Law on the Form of an International Will²⁰² on

195. *Id.*

196. See *supra* text accompanying notes 74-92. An example of a resort to the external affairs power to help implement a general policy was the selection of Article 10(b) of the Paris Convention for the Protection of Industrial Property, as revised at Stockholm in 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923; 24 U.S.T. 2140, T.I.A.S. No. 7727, to support section 55 of the Trade Practices Act 1974 (Cth), which prohibited a person from engaging in misleading conduct in relation to "the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods." The provisions would certainly have been unconstitutional, at least in part, but for the Convention, and commentators were unclear as to whether the selection of an isolated provision of the Convention could justify the provision as the implementation of a treaty. Evans, *The Constitutional Validity and Scope of the Trade Practices Act 1974*, 49 *AUSTL. L.J.* 654, 668-69 (1975). See also G.Q. TAPERELL, R.B. VERMESCH & D.J. HARLAND, *TRADE PRACTICES AND CONSUMER PROTECTION* [1468]-[1470] (2d ed. 1978); J.J. GOLDRING & L.W. MAHER, *CONSUMER PROTECTION LAW IN AUSTRALIA* 213 (2d ed. 1983).

197. H.V. EMY, *supra* note 173, at 47-48, 87-88. This was the legislation that was challenged unsuccessfully in *New South Wales v. Commonwealth* (1975), 135 C.L.R. 337, discussed *supra* notes 50-61 and accompanying text. See also Head, *supra* note 155, at 82.

198. H.V. EMY, *supra* note 173, at 21, 88-89.

199. Boyce, *The Politics and Diplomacy of Torres Strait Negotiations*, in *THE TORRES STRAIT TREATY: A SYMPOSIUM* 5-14 (P.J. Boyce & M.D. White eds. 1981).

200. See *New South Wales v. Commonwealth*, (1975) 135 C.L.R. 337, 503 (Murphy, J.).

201. See generally 1974 I UNIFORM LAB. REV. 64.

202. *Id.*

the ground that "federal clauses were discriminatory in that they resulted in lesser obligations being imposed on federal States than on unitary States."²⁰³

The states were strongly opposed to such moves by the federal government. They won greater victories, however, on the political front than on the legal front with respect to the federal government's exploitation of the external affairs power. One interesting response to the federal action was the establishment of the Queensland Treaties Commission in November 1974.²⁰⁴ The purpose of establishing the Commission was to assert Queensland's interest in the implementation of treaties affecting Queensland, and that Queensland should have the right to pass the implementing legislation.²⁰⁵ Apart from the production of two reports (in 1976 and 1977)²⁰⁶ and the political flourish accompanying its establishment, the Commission has not had a significant impact.

In addition to these important and controversial developments in the area of foreign affairs, there were also advances that were achieved as a result of cooperation with the states. For example, the government ratified nine ILO Conventions in three years,²⁰⁷ including the Convention on Discrimination in Occupation and Employment (No. 111).²⁰⁸ There had been consultations between the federal and state authorities prior to Labor's coming to power in relation to this Convention. All the states agreed to ratify the Convention and to participate in a cooperative federal/state administrative scheme to implement it.²⁰⁹ This arrangement has worked relatively well in practice.²¹⁰

Thus, it can be seen that the Whitlam government was committed to an expansive view of the external affairs power where it was the most effective or appropriate way to achieve a desired policy, while continuing to pursue coopera-

203. REPORT OF THE AUSTRALIAN DELEGATION TO THE DIPLOMATIC CONFERENCE ON WILLS (1975), Parliamentary Paper No. 317, 1974, para. 53. See also Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will*, 22 AM. J. COMP. L. 365, 373-74 (1974). The Conference rejected this view and adopted the federal clause proposed by Canada.

204. Treaties Commission Act 1974 (Qld).

205. 1974-75 AUSTRALIAN Y.B. INT'L L. 341-43.

206. See Crawford & Edeson, *International Law and Australian Law*, in INTERNATIONAL LAW IN AUSTRALIA 101, 102 (K.W. Ryan 2d ed. 1984).

207. No. 81, 54 U.N.T.S. 3; No. 83, — U.N.T.S. —; No. 86, 161 U.N.T.S. 113; No. 87, 68 U.N.T.S. 17; No. 98, 96 U.N.T.S. 257; No. 100, 165 U.N.T.S. 303; No. 111, 362 U.N.T.S. 31; No. 131, 825 U.N.T.S. 77; No. 137, 976 U.N.T.S. No. 1-14156. 125 AUSTRALIAN PARL. DEB., H.R. 2927-31 (1981) (reply by the Minister for Industrial Relations to Question on Notice No. 2713).

208. 362 U.N.T.S. 31.

209. Statement by the Minister for Labour, Mr. Cameron, May 22, 1973, 84 AUSTRALIAN PARL. DEB., H.R., 2371-80. See also ANNUAL REPORT OF THE NATIONAL COMMITTEE ON DISCRIMINATION IN EMPLOYMENT AND OCCUPATION 1976-77, Parliamentary Paper No. 158 (1978).

210. There has, however, been concern that state anti-discrimination legislation introduced since 1975 is likely to lead to conflicting jurisdiction and uncertainty, and that the legislation may not be entirely consistent with the Convention. See National Committee on Discrimination in Employment and Occupation, FOURTH ANNUAL REPORT, Parliamentary Paper No. 158 (1978). This concern was not repeated in the Committee's EIGHTH ANNUAL REPORT 1980-81, Parliamentary Paper No. 5 (1982), but there have been jurisdictional conflicts, see *infra* text accompanying notes 233-238.

tion with the states in certain areas where cooperative action seemed both possible and desirable. At the same time, the external affairs power was the government's vehicle for the expression of a strong commitment to national policies of development, conservation, and human rights.

3. 1975-83: The Fraser Years

The defeat of the Labor government in the 1975 election brought about a reversion to the practice previously adopted in relation to treaty ratification and implementation. The Liberal-National Party government proved its commitment to cooperate with the states by returning some control over offshore areas to the states.²¹¹ This effectively reversed the outcome of the *Seas and Submerged Lands* case.²¹² The government took similar action in relation to the ratification of the International Covenant on Civil and Political Rights.²¹³ The issue of ratification was referred to the Meeting of Ministers on Human Rights, from which it emerged in 1980 accompanied by a number of interpretive declarations, reservations, and other statements, all of which raised real doubts about the strength of the Liberal-National Party government's commitment to the principles of the Covenant.²¹⁴

Perhaps the clearest indication of the Fraser government's attitude to the states in the area of foreign affairs was the agreement reached between the federal government and the states at the Premiers' Conference in October 1977. At the Conference, the parties agreed to five points: first, that the states must be told in all cases, and at an early stage, of any treaty discussion that Australia has decided to join; second, that the Commonwealth would be firmly committed to consultation with the states before deciding whether to adopt or implement a treaty which affects a legislative area traditionally regarded as being within the responsibility of the states; third, that the states would be given the first option of legislating to implement any treaty provisions if within an area of state power; fourth, that representatives of the states would be included in delegations to international conferences which deal with state subjects, so that the states could advise the Commonwealth negotiators of any impact a treaty might have upon the state; and fifth, that federal clauses would be included in treaties in appropriate cases.²¹⁵

The Fraser years were characterized by little assertion by the Commonwealth

211. Bjelke-Petersen, *A View from Queensland*, in *AUSTRALIAN FEDERALISM: FUTURE TENSE* 64 (A. Patience & J. Scott eds. 1983); Lumb, *Australian Coastal Jurisdiction*, in *INTERNATIONAL LAW IN AUSTRALIA* (K.W. Ryan 2d ed. 1984) 370, 370-74, 381-86.

212. (1975) 135 C.L.R. 337; see *supra* text accompanying notes 50-61.

213. 999 U.N.T.S. 171.

214. See generally Triggs, *Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?*, 31 *INT'L & COMP. L.Q.* 278 (1982).

215. See Burmester, *supra* note 27, at 281. Cf. Triggs, *supra* note 214, at 291.

of its external affairs power, and by a greater degree of cooperation with the states generally. One interesting result of the commitment to cooperating with the states was the Australian proposal to insert a federal clause in the U.N. Draft Convention on Torture.²¹⁶

Another result of the return to conservative government was the return to a state of quiescence with respect to the ratification of ILO conventions. In the period 1976-81 the International Labour Conference adopted thirteen new Conventions; the Australian delegation voted in favor of all but one of these. By 1983 only one of these had been ratified.²¹⁷ Other Conventions seemed to disappear into the quagmire of federal/state consultations, from which they still had not emerged almost a decade later.²¹⁸

4. 1983- : The Hawke Labor Government

The election of the Hawke Labor government in March 1983 has had important consequences for the use of the external affairs power. The new Labor government came to power with clear commitments to stop the construction of the Franklin Dam,²¹⁹ to enact an Australian Bill of Rights based on the International Covenant on Civil and Political Rights,²²⁰ and to implement the U.N. Convention on the Elimination of All Forms of Discrimination Against Women.²²¹

The Hawke government achieved its first success in stopping the construction of the Franklin Dam in the *Tasmanian Dams* case.²²² Its next success came when the Women's Discrimination Convention was ratified on July 28, 1983, and implementing legislation entered into force on August 1, 1984.²²³ The government prepared a draft Australian Bill of Rights based on the International Covenant on Civil and Political Rights, but this initiative has faltered somewhat in the face of political pressure from some states, and from a lack of a general commitment on the part of the Hawke government to enact a Bill of Rights.²²⁴

216. U.N. Doc. E/CN.4/1983/63.

217. Only the Tripartite Consultation (International Labour Standards) Convention 1976 (No. 144) had been ratified by the Fraser government between 1975 and 1983. 125 AUSTRALIAN PARLIAMENTARY DEB., H.R., 2927, at 2931 (1981) (reply by the Minister for Industrial Relations to Question on Notice 2713).

218. See, e.g., Workers' Representatives Convention 1971 (No. 135) 883 U.N.T.S. 111; Rural Workers' Organizations Convention 1975 (No. 141); 125 AUSTRALIAN PARLIAMENTARY DEB. H.R., 2932, November 17, 1981.

219. See *supra* notes 95-145 and accompanying text.

220. 999 U.N.T.S. 171.

221. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979 (entered into force Sept. 3, 1981), GA. RES. 34/180, U.N. Doc. A/RES/34/180 (1980).

222. (1983) 57 Austl. L.J.R. 450; see *supra* text accompanying notes 95-145.

223. Sex Discrimination Act 1984 (Cth). A number of reservations to the Women's Discrimination Convention were entered (concerning combat-related military duties and universal paid maternity leave). UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, SUPPLEMENT: ACTIONS FROM 1 JANUARY TO 31 DECEMBER 1983, U.N. Doc. ST/LEG/SER. E/2/ADD. 1, IV, 8-1.

224. A federal Bill of Rights was drafted by early 1984, but political pressure from Queensland and

On the international level, the Hawke government withdrew the Australian proposal²²⁵ to insert a federal clause in the U.N. Draft Convention on Torture²²⁶ and has withdrawn ten of the thirteen reservations and declarations attached to Australia's ratification of the International Covenant on Civil and Political Rights.²²⁷ It has also declared its reluctance to enter reservations when ratifying multilateral treaties,²²⁸ although at the same time it has included "statements" of

Tasmania succeeded in delaying the introduction of the legislation until after the federal election then anticipated for late 1984. Apparently, Labor Ministers were concerned that attacks by the states on the issue would be politically disadvantageous. *The Age* (Melbourne), Mar. 22, 1984, at 6. The Labor government was returned with a decreased majority in the election held in December 1984, but the Attorney-General, Senator Evans, who was strongly committed to the enactment of the Bill of Rights, was transferred to another portfolio and replaced by the Deputy Prime Minister, Lionel Bowen, who has expressed doubts as to whether the Bill should proceed. *The Sydney Morning Herald*, Dec. 10, 1983, at 3. Mr. Bowen announced in June 1985 that he would introduce a federal Human Rights Bill into Parliament in the session beginning in August 1985. The Bill will relate to the acts and practices of the federal government and its agencies and will not apply to the states.

225. Information supplied by the Australian Mission to the United Nations, July 1984.

226. See *supra* note 216.

227. By instrument dated Oct. 20, 1984, and subsequently deposited with the Secretary-General of the United Nations, Australia withdrew all of its reservations and declarations to the Covenant with three exceptions, namely, its reservations to Articles 10, 14, and 20. At the same time, a "statement" of Australia's Federal Constitutional System was also deposited, in identical terms to the statement described *infra* note 229.

228. Human Rights and International Law, Address by the Attorney-General, Senator Evans, to the International Law Association (Australian Branch), April 12, 1984, *reported in* [1984] *AUSTL. INT'L LAW NEWS* 133, 140.

The position adopted by the Hawke government in relation to federal clauses is set out in a document entitled *Principles and Procedures for Commonwealth-State Consultation on Treaties* endorsed by the Commonwealth and followed since 1983. The relevant section of that document provides:

FEDERAL STATE ASPECTS

- i) The Government does not favor the inclusion of federal clauses in treaties and does not intend to instruct Australian delegations to seek such inclusion. The pursuit of federal clauses in treaties is generally seen by the international community as an attempt by the Federal State to avoid the full obligations of a party to the treaty. Experience at a number of International Conferences has shown that such clauses are regarded with disfavor by almost the entire international community. Experience has also shown that a Federal clause tailored to the needs of one federation will be unacceptable to other federations. Instructing an Australian Delegation to press for a federal clause only diverts its resources from more important tasks.
- ii) The Government sees no objection to Australia making unilaterally a short 'Federal Statement' on signing or ratifying certain appropriate treaties, provided that such a statement clearly does not affect Australia's obligations as a party. An 'appropriate' treaty would be one where it is intended that the States will play a role in its implementation. An appropriate form for such a statement acceptable to most States and the Commonwealth, is attached.
- iii) The normal practice is that Australia does not become a party to a treaty containing a federal clause until the laws of all States are brought into line with the mandatory provisions of the treaty. However, where a suitable 'territorial units' federal clause is included in a treaty, the possibility of Australia acceding only in respect of those States which wish to adopt the treaty might be considered on a case by case basis where appropriate, perhaps in some private law treaties.
- iv) The Commonwealth will consider relying on State legislation where the treaty affects an area of particular concern to the States and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However the Government 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.

FEDERAL STATEMENT

Australia has a federal constitutional system in which legislative, executive and judicial

Australia's federal constitutional system in its instrument of ratification of a number of treaties in order to pacify state interests.²²⁹

The Hawke government's attitude toward the use of the external affairs power is at least outwardly more conciliatory than that of the Whitlam government towards the states, at least with respect to giving the states an opportunity to pursue the implementation of treaties at the state level. Nonetheless, the government is committed to attaining acceptable standards of human rights for all Australians. Because some states do not share this view, however, the government has been forced to enact federal legislation in the area of sex discrimination. At the same time, it realizes that efficient administration and political realities may make it more expedient for it not to attempt to occupy the whole field. The former Attorney-General, Senator Evans, recognizing this limitation, has stated:

There is ample scope for the States to enact human rights legislation, both in their own right and to reinforce or complement Commonwealth action. The Government's policy is that federal measures should not infringe upon constructive developments which have been taking place in some States in the human rights field and which are consistent with our international obligations; it is important for the Commonwealth — both as the national government and as Australia's international face — to be the standard bearer in human rights matters, to be able to fill in the vacuums in State law, where they exist, and to supplement the weaknesses in that law where these are manifest. But it is neither necessary nor desirable for the Commonwealth to try and cover the whole field itself.²³⁰

The discussion above indicates that the affirmation of a broad power of treaty

powers are shared or distributed between the Commonwealth and the constituent States.

The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

AUSTRALIAN PRACTICE IN INTERNATIONAL LAW 1981-1983 (J. Brown ed. 1985), unpublished mimeograph, 288-89.

229. Two recent examples are the Women's Discrimination Convention, *see supra* note 221, and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978.

UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, SUPPLEMENT: ACTIONS FROM 1 JANUARY TO 31 DECEMBER 1983, IV. 8-2 (1984). *See also* INTERNATIONAL MARITIME ORGANIZATION, STATUS OF MULTILATERAL CONVENTIONS AND INSTRUMENTS IN RESPECT OF WHICH THE INTERNATIONAL MARITIME ORGANIZATION OR ITS SECRETARY-GENERAL PERFORMS DEPOSITARY OR OTHER FUNCTIONS 189 (1984) (ratifications as of December 31, 1983). Australia ratified these conventions on July 28, 1983, and November 7, 1983, respectively. The federal statements were in terms identical to the statement referred to in note 228 *supra*.

230. Paper presented by the Attorney-General, Sen. Gareth Evans, to the Australian Legal Convention, Brisbane, July 7, 1983, at 16. The same commitment to working where possible with and through the states is also reflected in the speech of Prime Minister Hawke to the International Labour Conference, Geneva, June 10, 1983, *reprinted in* 54 AUSTL. FOREIGN AFF. REC. 262-65 (June 1983).

implementation in the *Dams* case is unlikely to produce a sharp break with previous practice. The Labor government will likely use its power in the area of human rights legislation and in other areas, such as environmental conservation, where it is strongly committed to a particular policy. On the other hand, the more conciliatory approach taken by the new government in relation to cooperation with the states, as well as the perceived efficiency of utilizing available state administrative resources to achieve effective implementation of particular treaties, will mean that consultation with the states about the entry into and ratification of treaties encroaching upon their traditional areas of power will continue to be important in many cases.

One other important result of the confirmation of a federal external affairs power is its increased value as a bargaining chip in federal/state relations. The implications of the existence of a federal power to implement the International Covenant on Civil and Political Rights (and other human rights instruments) are extremely important as virtually every area of life can be construed as being within the range of operation of these documents. The possibility of resort to the external affairs power may prove to be an important weapon in the Commonwealth's armory when negotiating with the states on any number of matters. The states, eager to preserve a certain amount of autonomy, may be more prepared to agree to implement a treaty by means of state laws if they realize that failure to do so would mean that the federal government will act on its own.

Another area in which this bargaining chip may have ramifications is the unification and harmonization of law throughout Australia. The track record of unification of law in Australia has been one of only limited success, with uniform hire-purchase statutes and uniform companies and securities laws being the major achievements.²³¹ The major body concerned with this issue at the political level is the Standing Committee of Commonwealth and State Attorneys-General.²³² This Standing Committee has been plagued in its attempts to pursue uniform laws by an unwillingness on the part of some of its members to take political risks or to surrender state sovereignty, as well as by the extremely slow progress of matters referred to it.

VI. THE INFLUENCE OF FEDERALISM ON AUSTRALIA'S TREATY PRACTICE

A. *Federal States and International Law*

The impact of federalism on the international order has been the subject of considerable literature.²³³ The performance of federal states in ratifying the

231. See generally Kirby, *Uniform Law Reform: Will We Live to See It?*, 8 SYDNEY L. REV. 1-14 (1977); Goldring, *Unification and Harmonization of the Rules of Law*, 9 FED. L. REV. 284 (1978).

232. The Standing Committee of Commonwealth and State Attorneys-General was founded in 1965.

233. See, e.g., I. BERNIER, *supra* note 24. For leading treatises on the subject, see L. WILDHABER, *supra* note 166, TREATY-MAKING POWER AND CONSTITUTION (1971); R. GHOSH, TREATIES AND FEDERAL CONSTITUTIONS (1961).

International Labour Organisation Conventions and other human rights instruments has received particular attention.²³⁴

Compared to unitary states, federal states such as Australia, Canada, and the United States have a poor track record in ratifying these types of instruments.²³⁵ Moreover, federal states in which the central government has a broad power to implement treaties do not necessarily ratify a greater number of such conventions than federal states with a more restricted central power.²³⁶ Finally, federal states have tended to appeal to the demands of federalism to justify their failure to ratify conventions, to excuse delays in ratifying, and to support their attempts to insert federal clauses in multilateral instruments.²³⁷

There are a number of grounds on which the behavior of these federal states has been extensively criticized. First, the central government may misrepresent the extent of its power to implement treaties, thereby concealing an unwillingness to assume a particular obligation or to submit generally to the requirements of the international order.²³⁸ Second, a federal state's reliance upon the insertion of federal clauses in multilateral treaties creates an inequality of obligation between federal and unitary states, because the federal state derives the benefit of appearing to undertake a substantial obligation while in fact not doing so.²³⁹ Third, the actual and alleged demands of federalism have a retarding effect on the development and implementation of international standards.²⁴⁰

One can identify at least two major strands in the critique of the role of federal states. The first is the moral condemnation of the duplicity involved in relying on the alleged demands of federalism to assume lesser commitments at the international level when the real reason is a lack of substantive agreement with the policies of a convention. The second major strand is the view that there is something inherent in a federal system (or at least in certain types of federal systems) that seriously impedes progress towards uniform standards at the international level.²⁴¹

234. *E.g.*, I. BERNIER, *supra* note 24 at 162-63, 175-77; Looper, *supra* note 163; Charlesworth, *supra* note 75, ch. 2.

235. *See supra* note 234.

236. I. BERNIER, *supra* note 24, at 152-71.

237. *Id.* at 152-71, 172-87.

238. *See, e.g.*, Looper, *supra* note 163, at 169; Charlesworth, *supra* note 75 at 21, 22, 61.

239. *See, e.g.*, Charlesworth, *supra* note 75, at 37-38; Looper, *supra* note 163, at 170, 173-75. This disparity may have more than a mere symbolic impact. Concern that federal states might gain a competitive advantage over unitary states due to the more onerous obligations imposed on unitary states was a contributing factor in the revision of the I.L.O. Constitution in 1946. Looper, *supra*, at 179.

240. *See, e.g.*, Sorensen, *supra* note 72, at 201; Charlesworth, *supra* note 75, at 76-77.

241. There is a third strand, somewhat opposed to the second, which asserts that the problems experienced by federal states in ratifying treaties are essentially political and that other states also experience political problems that differ only in degree; accordingly, no special concessions should be made to federal states. *See, e.g.*, Riesmann, *The American Constitution and International Labour Legislation*, 44 INT'L LAB. REV. 123, 192-93 (1941); Looper, *supra* note 163, at 202-03.

Previous discussion of federal state participation in ILO Conventions has tended to focus on the low number of ratifications by federal states in comparison with similarly situated unitary states, and on the advantage taken of the ILO federal clause to reduce the extent of obligations incurred. From these facts, it has been concluded that federalism is the primary culprit in explaining this unimpressive record.²⁴²

This conclusion, however, fails to take into account that factors other than those related to federalism may have just as great an influence on the behavior of federal states in this area. Moreover, one must be cautious in comparing "similarly situated" unitary states, as the social and political history of each such state may make such a comparison deceptive. This is not to say, however, that the conclusions reached by previous writers are not in large measure correct; rather, the concentration on federal factors may have merely obscured other influences that have been just as significant.

This emphasis on federal factors has resulted in the conflation of two possible avenues of attack on the performance of federal states. The first is criticism of the pretextual use of federalism and the institutional drawbacks of federalism for the international order; clearly this is available only against federal states. The second is criticism of a country for its failure to support symbolically and practically the development of international standards which, it is believed, will contribute to a greater level of social justice throughout the world; this argument can be made against any state. It is against this background that Australia's performance in the international forum will be discussed.

B. *Australia and the International Labour Organisation*

While the discussion above showed that governments of different political persuasions have had varying commitments to the use of the external affairs power and to the policies pursued by the ILO,²⁴³ there has been a relatively consistent procedural approach adopted by Australian governments in relation

242. In the Australian context little new analysis of I.L.O. ratifications has been done since the publication of the study by G. DOEKER, *supra* note 166, which deals with the question primarily from a descriptive point of view. The other major contributions have been Bailey, *Australia and the International Labour Conventions*, 54 INT'L LAB. REV. 285 (1946), and J.G. Starke, *Australia and the International Labour Organization*, in INTERNATIONAL LAW IN AUSTRALIA 115 (D.P. O'Connell ed. 1965). Examination of Australia's record from the 1960s until the present has been sporadic, due in large part to the lack of readily accessible comprehensive material. The last comprehensive review published by the Australian government was the REVIEW OF AUSTRALIAN LAW AND PRACTICE RELATING TO CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE (1969), Parliamentary Paper No. 197, 1969 [hereinafter cited as 1969 REVIEW]. As of August 1983, the new Labor government was undertaking a new review of Australia's position. See AUSTRALIAN PARL. DEB., H.R., WEEKLY HANSARD, August 23, 1983, at 92-93 (reply by the Minister for Industrial Relations to Question on Notice No. 94). As of June 1985 the report of the review had not yet been published.

243. See text accompanying notes 154-230.

to ratification of Conventions since the early days of the ILO.²⁴⁴ Even the Whitlam government of 1972-75, committed as it was to the ratification of ILO Conventions, chose to follow the well-trodden path of consultation with the states.²⁴⁵

The stated policy of the federal government has been to refer to the states' Conventions dealing with matters that affect areas of traditional state competence, and to ratify a Convention only if all states formally agree to ratification (and if law and practice in all Australian jurisdictions are in accordance with the provisions of the Convention).²⁴⁶ This practice has been justified by reference to the limited nature of the external affairs power, but a deference to state autonomy, disagreement with or indifference to the policies embodied in particular Conventions, political and bureaucratic inertia at both the federal and state level, and the organizational difficulties of coordinating the consultative process must be the real reasons behind Australia's record of delay and non-ratification.

Statistics tell part of the story. As of December 1981, the numbers of Conventions ratified by the following countries (out of a total of 158 Conventions adopted by the International Conference) were: (See Table I)²⁴⁷

TABLE I
NUMBER OF INTERNATIONAL LABOUR CONVENTIONS
RATIFIED BY SELECTED STATES
(AS OF DECEMBER 1981)

Federal State	Number of Conventions Ratified
United Kingdom	77
Federal Republic of Germany	64
New Zealand	54
Austria	50
Australia	43
Canada	26
United States of America	7

Delay, often inordinate, has characterized Australia's pattern of ratification (See Table II).²⁴⁸

244. See generally Bailey, *supra* note 242; G. DOEKER, *supra* note 166, at 231-41.

245. De Stoop, *Australia's Approach to International Treaties on Human Rights, 1970-73* AUSTRALIAN Y.B. INT'L L. 27, 35.

246. 1969 REVIEW, *supra* note 242, at 7.

247. These figures, contained in Table I, are based on information contained in the International Labour Office, LIST OF RATIFICATIONS OF CONVENTIONS (1982), International Labour Conference, 68th Session 1982, REPORT III (Pt. 5) [hereinafter cited as I.L.O. LIST 1982] (ratifications as of Dec. 31, 1981). The texts of 146 of the 158 Conventions adopted by the International Labour Conference up to 1983 appear in the collection of the International Labour Office, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981 (1982).

248. This delay is graphically displayed in Table II. See I.L.O. LIST 1982, *supra* note 247. See also 125 AUSTRALIAN PARL. DEB., H.R., 2927-31 (1981) (reply by the Minister for Industrial Relations to Question on Notice No. 2713).

TABLE II
PERIOD BETWEEN ADOPTION OF CONVENTION AND
RATIFICATION BY AUSTRALIA

Period Before Ratification	Number of Conventions
1-3 years	13
4-5 years	4
6-10 years	3
11-20 years	9
20-30 years	7
30-40 years	6
40 years	1

Recent experience shows that the pattern demonstrated by these figures is not distorted by the inclusion of Conventions of considerable age that have become obsolete. In the period 1972-81, the Australian delegation to the International Labour Conference voted in favor of eighteen of the twenty Conventions adopted by the Conference. By the end of 1984, only two of those eighteen Conventions had been ratified. No Australian state had agreed to the ratification of fifteen of the Conventions, all states but one (the Northern Territory) had agreed to the ratification of the Human Resources Development Convention 1975 (No. 142)²⁴⁹ and the Labour Administration Convention 1978 (No. 150),²⁵⁰ and Western Australia alone had agreed to the ratification of the Labour Relations (Public Service) Convention 1978 (No. 151).²⁵¹

The citation of statistics does not of itself explain all the reasons for Australia's performance; to do this it is necessary to examine the progress of individual conventions. In 1969, the Australian government produced a report summarizing the current Australian position in relation to the Conventions adopted up to 1968.²⁵² The report set forth six explanations for Australia's modest record of ratification:

(1) the inapplicability or limited relevance of some Conventions to Australian conditions (and the implicit position that the effort required to bring Australian law into line with the Convention would be too great and would serve no useful purpose);²⁵³ (2) the fact that a number of Conventions were no longer open to ratification, having been superseded by later Conventions which had come into force;²⁵⁴ (3) the non-conformity of law and practice in some jurisdictions with the

249. No. 142, 1050 U.N.T.S. I-1582.

250. No. 150, — U.N.T.S. —.

251. No. 151, — U.N.T.S. —. See 125 AUSTRALIAN PARLIAMENTARY DEB., H.R., 2827-28, 2927-31 (1981) (reply by the Minister for Industrial Relations to Questions on Notice Nos. 2714 and 2713, respectively). By the end of 1981, the United Kingdom had ratified eight of these Conventions; the Federal Republic of Germany, eight; Austria, three; and New Zealand, one. I.L.O. LIST 1982, *supra* note 247.

252. See generally 1969 REVIEW, *supra* note 242.

253. *Id.* at 9.

254. *Id.*

provisions of particular Conventions (and the implication that no steps would be taken to remedy the position);²⁵⁵ (4) the observance in Australia of standards equivalent to but different from those required by particular Conventions;²⁵⁶ (5) the failure of one or more states to agree to ratification;²⁵⁷ and (6) the opposition of the federal government or of state governments to important provisions of Conventions.²⁵⁸

In the case of many Conventions more than one of these excuses is proffered, and it is difficult to know what the relative influence of federal and non-federal factors has been. In a number of cases there is a relatively clear disagreement with the policies or coverage of a particular Convention and no concealment of this fact behind the excuse of lack of agreement by the states.²⁵⁹ A variation of this occurs where there is substantial conformity between the Australian position and the Convention, but particular aspects of the Convention are not acceptable or cannot be complied with without a great deal of trouble.²⁶⁰

The use of federalism as a smokescreen, and its effect as an institutional brake, can also be seen at work, although it can be difficult on occasion to disentangle it from indifference to or disagreement with the provisions of particular Conventions. For example, in the case of the Abolition of Penal Sanctions (Indigenous Workers) Convention 1955 (No. 104),²⁶¹ provisions in legislation contrary to the Convention were described as being no longer applicable in practice and "the possibility of removing them has been taken up with the States."²⁶² The Convention had still not been ratified fifteen years later in 1984. The ratification of the Accommodation of Crews Convention 1949 (Revised) (No. 92)²⁶³ required amendments to New South Wales legislation²⁶⁴ and the Imperial Merchant Shipping Act²⁶⁵ to permit ratification.²⁶⁶ A two to three year wait seemed likely in 1969, but by 1984 the Convention still had not been ratified.

The Report's analysis of the position of the Medical Examination of Young

255. *Id.* at 8.

256. *Id.*

257. *See, e.g., id.* at 17, 19, 21.

258. *See, e.g., id.* at 39, 51, 61.

259. *See, e.g.,* Holidays with Pay (Agriculture) Convention 1952 I.L.O. No. 101, 196 U.N.T.S. 183, 1969 REVIEW, *supra* note 242, at 91; Equality of Treatment (Social Security) Convention 1962 I.L.O. No. 118, 494 U.N.T.S. 271, 1969 REVIEW, *supra* note 242, at 105; Guarding of Machinery Convention 1963 I.L.O. No. 119, 532 U.N.T.S. 159, 1969 REVIEW, *supra* note 242, at 106; Hygiene (Commerce and Offices) Convention 1964 I.L.O. No. 120, 560 U.N.T.S. 201, 1969 REVIEW, *supra* note 242, at 107.

260. *E.g.,* Labour Inspection (Agriculture) Convention 1969 I.L.O. No. 129, 812 U.N.T.S. 87; 1969 REVIEW, *supra* note 242, at 109.

261. 305 U.N.T.S. 265.

262. 1969 REVIEW, *supra* note 242, at 94.

263. 160 U.N.T.S. 223.

264. Navigation Act 1901 (N.S.W.).

265. Merchant Shipping Act 1894 (U.K.).

266. 1969 REVIEW, *supra* note 242, at 83.

Persons (Underground Work) Convention 1964 (No. 124)²⁶⁷ is revealing. In 1969 the Convention was fully implemented only in the federal territories and Western Australia. In New South Wales, Queensland, and Tasmania some provision was made for medical examination of young workers but the program did not conform with the requirements of the Convention. In Victoria and South Australia, where the Convention was of limited applicability, no such provision was made. The report concluded that the "ratification of the Convention is not practicable but the possibility of giving full effect to it has been raised with the States."²⁶⁸

Particularly interesting was the fate of a number of Conventions the subject matter of which came within the exclusive jurisdiction of the federal government. Of the nine Conventions within Commonwealth jurisdiction that had not been ratified by 1969, only two had been ratified by the end of 1984.²⁶⁹ The progress of the other Conventions is quite revealing. For example, neither the Invalidity, Old-Age and Survivors' Benefits Convention 1967 (No. 128),²⁷⁰ nor the Seafarers' Identity Documents Convention 1958 (No. 108)²⁷¹ were ratified. The subject matter of both Conventions was described in 1969 as being within *exclusive* federal jurisdiction,²⁷² yet the responsible Minister in 1981 explained that the reason for non-ratification was simply that no state had agreed to it.²⁷³ In 1969, the government had stated that the Australian system of benefits was "substantially in accord with the provisions of the [Invalidity, Old-Age and Survivors' Benefits Convention],"²⁷⁴ and the possibility of ratifying the Convention was "under close examination."²⁷⁵ The explanation more than a decade later that, although the subject matter of the Convention is an exclusively federal matter, the states have not agreed to ratification and therefore the federal government is unable to ratify is hardly a convincing one.²⁷⁶ The answer must lie elsewhere, either in bureaucratic inertia, political indifference to the policies of the Convention, or in some other factor concealed behind the purported requirements of the federal compact.

The progress of the Social Policy (Non-Metropolitan Territories) Convention

267. 614 U.N.T.S. 239.

268. 1969 REVIEW, *supra* note 242, at 111.

269. The two Conventions that were ratified were the Unemployment Convention 1919, I.L.O. No. 2, 38 U.N.T.S. 41 (ratified June 15, 1972), and the Labour Standards (Non-Metropolitan Territories) Convention 1947 I.L.O. No. 83, 943 U.N.T.S. 104 (ratified June 15, 1973).

270. 699 U.N.T.S. 185.

271. 389 U.N.T.S. 277.

272. 1969 REVIEW, *supra* note 242, at 9.

273. 125 AUSTRALIAN PARLIAMENTARY DEB., H.R., 2927 (1981) (reply by the Minister for Industrial Relations to Question on Notice No. 2713). A similar explanation was offered in the case of the Migration for Employment Convention 1949 (Revised), I.L.O. No. 97, 120 U.N.T.S. 71, the subject matter of which was also described in 1969 as being within exclusive federal jurisdiction. *Id.*

274. 1969 REVIEW, *supra* note 242, at 115.

275. *Id.*

276. 125 AUSTRALIAN PARLIAMENTARY DEB., H.R., 2927, 2930-31 (1981).

1947 (No. 82)²⁷⁷ sheds some interesting light on the strength of Australia's commitment to that Convention. The 1969 Report declared that "Australian policies in its non-metropolitan territories are generally in line with the provisions of the Convention"²⁷⁸ — the major impediment to ratification was the position in Papua New Guinea.²⁷⁹ Papua New Guinea became independent in 1975, but the Convention had still not been ratified by 1984. The only explanation given in 1969 was the existence of "a possible difficulty in regard to the provision which requires the abolition of discriminatory wage rates by application of the principle of equal remuneration for work of equal value" to the same extent as in the metropolitan territory.²⁸⁰ The exact nature of this difficulty was not elaborated upon, nor was any further explanation given in 1981 for the continuing failure to ratify.

Apart from these cases, it is clear that on a number of occasions states have been extremely slow to respond to federal initiatives and that the federal government has been less than vigorous in pursuing the states. One recent example is the action taken in relation to the Labour Relations (Public Service) Convention 1978 (No. 151).²⁸¹ The Convention has fairly modest aims, namely to ensure the existence of independent industrial organizations of public employees, to protect union members and representatives against discrimination on the ground of their connection with the union, and to guarantee the rights of freedom of association of public employees. In 1978, the federal government requested detailed information from the states on the extent to which law and practice in each jurisdiction complied with the Convention.²⁸² This should have

277. No. 82, 214 U.N.T.S. 345.

278. 1969 REVIEW, *supra* note 242, at 75.

279. *Id.*

280. *Id.* The fate of neglect or disinterest also seems to have befallen the Social Security (Minimum Standards) Convention 1952 I.L.O. No. 102, 210 U.N.T.S. 131, which covers nine branches of social security, most of which are within exclusive federal jurisdiction. Ratification of the Convention is permissible in respect of any three or more branches. In 1969 the Commonwealth was "reexamining the possibility of ratification in respect of several of the branches," *id.* at 93, but the Convention was still unratified in 1984. The explanation given in 1981 was that no state had agreed to ratification. 125 AUSTRAL. PARL. DEB., H.R., 2927, 2929 (1981) (reply by the Minister for Industrial Relations to Question on Notice No. 2713).

The Equality of Treatment (Social Security) Convention 1962 I.L.O. No. 118, 494 U.N.T.S. 271, dealing with the same branches of social security, may be ratified in respect of any one or more branch, in order that the principle of equality of treatment be applied in as many countries as possible. International Labour Conference, Equality of Treatment (Social Security) 8-9 (1977), General Survey by the Committee of Experts on the Application of Conventions and Recommendations, 63d Session 1977. The Committee of Experts was of the view that Australian legislation would permit Australia to ratify the Convention in respect of four of the nine branches, *id.* at 68, 71, but the Convention remains unratified even in part, once again on the basis that not all states have agreed to ratification. 125 AUSTRAL. PARL. DEB., H.R., 2927 (1981) (reply by the Minister for Industrial Relations to Question on Notice No. 2713).

281. — U.N.T.S. —.

282. 125 AUSTRAL. PARL. DEB., H.R., 2932 (1981) (reply by the Minister for Industrial Relations to Question on Notice No. 2948).

been a relatively simple task, yet as of 1982 these responses had not been received (despite five occasions on which the Convention has been discussed at federal/state meetings).²⁸³

Similarly, in 1969, the only bar to the ratification of the Minimum Age (Sea) Convention 1936 (Revised) (No. 58)²⁸⁴ was that the law of New South Wales required the master of a ship to keep a list of only some young persons under the age of sixteen employed in their vessels, and not of all such persons (as was required by the Convention). At that time, New South Wales authorities were examining the state's legislation "with a view to making such amendments as are necessary to comply with the Convention."²⁸⁵ The Convention, however, is still unratified.

This brief examination of a number of unratified Conventions enables one to identify a number of factors that may be at work: disagreement with the policies embodied in a Convention (this may be associated with or concealed behind the excuse of lack of state agreement); the retarding effect of having to consult with the states even when the federal government is strongly committed to a particular Convention; bureaucratic inertia; or lack of resources at federal or state level. Australia's record of ratification of ILO Conventions may be summarized as follows:

1. The federal government has on a number of occasions explained its non-ratification of a Convention by reference to the necessity for unanimous state consent when there was no legal or practical necessity for waiting for the states to agree, as the subject matter of the Convention was within exclusive federal jurisdiction.²⁸⁶

2. Lack of agreement by the states has been used by the federal government to explain its failure to ratify a Convention in cases in which the real reason for that failure is the government's opposition or indifference to the content of a particular Convention (in many cases shared by state governments); generally in such cases, the federal government has failed to pursue the states diligently when their responses have been slow or not forthcoming, and has readily accepted minor inconsistencies between Australian law and the provisions of a Convention as sufficient to bar ratification.²⁸⁷

3. Non-ratification of a number of Conventions can be, and has been, explained justifiably on the ground that the approaches adopted by the Conventions are not readily adaptable to established

283. *Id.*

284. 40 U.N.T.S. 205.

285. 1969 REVIEW, *supra* note 242, at 57.

286. *E.g.*, Conventions No. 92, 160 U.N.T.S. 223; No. 102, 210 U.N.T.S. 131; No. 108, 389 U.N.T.S. 277; No. 118, 494 U.N.T.S. 271; No. 128, 699 U.N.T.S. 185.

287. *E.g.*, Conventions No. 58, 40 U.N.T.S. 205 and No. 151, — U.N.T.S. — and possibly also No. 142, 1050 U.N.T.S. I-15823 and No. 150, — U.N.T.S. —.

Australian institutions, and ratification would therefore not be possible without fundamental changes to the Australian system.²⁸⁸

4. Non-ratification of a number of Conventions has been justifiably explained on the ground that they have no application to Australian conditions.²⁸⁹

5. The federal government has on a number of occasions admitted that the reason for non-ratification of a number of conventions was its own opposition to the content of the Convention.²⁹⁰

6. The procedure of consultation with the states has been slow and cumbersome in most cases, resulting in inordinately long periods between the adoption of Conventions and their ratification, or effectively preventing ratification of Conventions in a number of cases.²⁹¹

7. The observance of equivalent standards in Australia to those required by particular Conventions has been advanced as a ground to explain Australia's non-ratification.²⁹²

Thus, both federal and non-federal factors have been at work in impeding Australian ratification of ILO Conventions. The blatant appeal to federalism as a pretext to disguise the real reasons for failure to ratify a Convention is, of course, a tactic unavailable to a unitary State. On the other hand, it has not been used particularly frequently by Australia as an excuse to justify failure to ratify particular Conventions. In this context it is more important to assess the role played by the established procedure of consultation with the states and its operation in particular cases. There are two questions which arise: first, whether the adoption of the procedure is itself a fraud on the international community; and second, whether utilization of the procedure in practice has been such a fraud.

In a federal state such as Canada, where the central government is legally hamstrung in its power to implement treaties on subjects within exclusive state competence,²⁹³ the accusation that the adoption of a procedure of consultation with the provinces was subterfuge cannot be made, although one might justifiably decry the potentially inhibiting effect that the division of powers may have on Canada's participation in international treaties. In the case of Australia,

288. *E.g.*, the social security conventions based on compulsory contributory schemes, as well as Conventions No. 46; No. 61; No. 67, 209 U.N.T.S. 39; No. 74, 94 U.N.T.S. 11; No. 89, 81 U.N.T.S. 147; and No. 141, — U.N.T.S. —.

289. *E.g.*, Conventions No. 95, 138 U.N.T.S. 225; No. 110, 348 U.N.T.S. 275; and No. 117, 494 U.N.T.S. 249.

290. *E.g.*, Conventions No. 55, 40 U.N.T.S. 169; No. 81, 54 U.N.T.S. 3; No. 89, 81 U.N.T.S. 147; No. 101, 196 U.N.T.S. 183; No. 108, 389 U.N.T.S. 277.

291. *See supra* text accompanying notes 252-59.

292. *E.g.*, Conventions No. 30, 39 U.N.T.S. 85; No. 53, 40 U.N.T.S. 153; No. 115, 431 U.N.T.S. 41; No. 120, 560 U.N.T.S. 201.

293. *See, e.g.*, *Attorney-General (Canada) v. Attorney-General (Ontario)*, [1937] A.C. 326; A. GOTLIEB, *CANADIAN TREATY-MAKING* 75-76 (1968).

the issue is not so clear, and one's judgment will depend to a large extent on one's reading of the history of the external affairs power. If one takes the view that *Burgess* definitively established the broad view,²⁹⁴ one will be inclined to condemn the reliance on a more restricted power to justify the necessity for consultation with the states as unnecessary. If one takes the view that the broad view of *Burgess* would not necessarily have been applied to uphold federal legislation implementing ILO Conventions during the 1950s and 1960s,²⁹⁵ one is less likely to pass such an adverse judgment, although one may be critical of the lack of political courage on the part of governments to test the limits of the power. On this second view, one is critical not of the use of the Australian federal system as a subterfuge to disguise a lack of commitment to particular international policies, but of the retarding effect that the internal division of power between federal and state governments has had on Australia's participation in international treaty regimes.²⁹⁶

It is at the structural level that Australian federalism makes its major contribution. Australia's support for the ILO federal clause and its practice of referring Conventions to the states are justified by the argument that it is more appropriate for state governments to implement many of these Conventions. This perception of propriety has been based in the past partly on the uncertainty of the limits of the external affairs power. It has also, and perhaps more importantly, been based on the history of regulation at the state level of the matters covered by the Conventions, as well as on the institutional and political problems that might have arisen had a course other than this been adopted.

The divided competence of the Australian federal system thus impedes the acceptance and implementation of international labor standards. If a federal government eschews a policy of unilateral implementation in favor of cooperative implementation, consultation with the states will be necessary to enable utilization of state structures and resources. Even given the case of a federal government committed to the implementation of ILO standards, experience has shown that the existence of eight separate governments (the seven states and the Northern Territory²⁹⁷), almost invariably of different political persuasions and jealous of their own autonomy, militates against the attainment of agreement. The nature of the consultative process and the requirement of unanimous consent means that such agreement, if reached at all, is inordinately delayed.

It is these factors which distinguish the position of the Australian federal

294. Connell, *supra* note 95, takes this approach.

295. D.P. O'CONNELL, *INTERNATIONAL LAW* 318 (1965), takes this approach.

296. This is not, however, to rule out the justifiability of criticism directed to the use of federalism as a pretext in those specific cases where the subject matter of a Convention is under the exclusive jurisdiction of the Commonwealth and failure to ratify is justified by reference to the purported necessity for consultation with the states.

297. The Northern Territory, a federal territory, was granted quasi-statehood in 1978 under the Northern Territory (Self-Government) Act 1978 (Cth).

system from that of a unitary state. Both federal and unitary states experience political struggles between various interest groups over ILO standards, but the inherent potential for intergovernmental conflict in a federal state is an additional and different sort of problem that has a retarding effect of its own quite apart from the conflict between the parties most directly concerned.

The retarding effect of federalism on Australia's participation in multilateral treaties has been evident in the case of the ILO over a long period of time, and its continuing impact has been ensured by the institutionalization of the process of consultation. In the next section, Australia's record in relation to human rights instruments and other multilateral instruments is analyzed in an attempt to ascertain the impact of the federal structure in the context of those conventions.

C. *Australia and Human Rights Instruments*²⁹⁸

Australia has been prepared to ratify without much hesitation such human rights instruments as the Genocide Convention²⁹⁹ and slavery conventions,³⁰⁰ primarily because they did not require domestic implementation, nor did they intrude upon matters traditionally reserved to the states. In cases involving more controversial topics, or subjects within traditional state competence, the behavior familiar in the ILO context has been evident: reliance on a restricted reading of the external affairs power, support for the insertion of federal clauses, and the adoption of the procedure of consultation with the states in order to obtain their agreement to ratification.³⁰¹

Nonetheless, non-federal factors also seem to have played an important role. As previously discussed,³⁰² a commitment to international human rights at the federal level has been greater in the case of Labor governments than in the case of conservative governments. As the lesser commitment of conservative governments to human rights has generally gone hand-in-hand with a belief in the preservation of states' rights, substantive disagreement with international standards as well as the federal system has contributed to a reluctance to ratify a number of Conventions. While the fragmentation of authority over a given subject and the possibility of political conflict between Canberra and the states would not be present in a unitary state, it is difficult to be confident that a conservative Australian federal government would have unequivocally ratified the International Covenant on Civil and Political Rights even if it had possessed

298. Australia's performance in relation to human rights instruments has been the subject of recent detailed analysis. *See, e.g.*, Charlesworth, *supra* note 75; Triggs, *supra* note 214. *See also* De Stoop, *supra* note 246. Accordingly, this article will not discuss the topic in any detail.

299. 78 U.N.T.S. 277 (ratified July 8, 1949).

300. Protocol Amending the Slavery Convention, *signed* Sept. 25, 1926, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51 (definitive signature Dec. 9, 1953); Supplementary Convention on the Abolition of Slavery 1956, 266 U.N.T.S. 3 (ratified Jan. 6, 1958).

301. *See generally* Charlesworth, *supra* note 75, 66-85.

302. *See supra* notes 146-230 and accompanying text.

an explicit power of treaty implementation. The advantage of the federal system is that it provides one more seemingly plausible excuse.

The 1980 Australian ratification of the International Covenant on Civil and Political Rights (prior to the withdrawal in 1984 of a number of declarations and statements)³⁰³ is an extreme example of the power of federalism and its utility as a shield behind which a lack of substantive commitment can be concealed.³⁰⁴ Despite the rejection of proposals to insert a federal clause in the Covenant when it was being drafted,³⁰⁵ Australia's ratification attempted to provide its own federal clause by advising that implementation of the Covenant would be in accordance with its federal system of divided competence. Of doubtful validity as a reservation under general international law rules,³⁰⁶ it was a clear example of an attempt to gain the benefits of ratification without assuming the full obligations imposed by the Covenant on all the nations party to the Covenant irrespective of their constitutional arrangements. It was a powerful indication of the impact that federal ideas and states' perceptions of their own autonomy can have when combined with a less than wholehearted commitment to a convention.

Even under the current Hawke Labor government, the forces of federalism appear to be taking their toll on the government's human rights program. While the government has implemented the Women's Discrimination Convention,³⁰⁷ the saga of the Human Rights Bill 1973 (Cth) demonstrates that lengthy delay can result, even in the context of a strong federal political commitment to human rights. The Human Rights Bill, dating originally from 1973, was temporarily shelved in 1984 because the government feared that it might suffer electoral damage from attacks by the states jealously attempting to preserve intact their traditional areas of legislative competence.³⁰⁸

Thus, the forces of federalism have been particularly strong in the area of human rights instruments (other than ILO Conventions). In addition, the federal system and its use as a subterfuge can be justly criticized when passing judgment on Australia's performance in this area.

D. *Australia and Other Multilateral Conventions*

An interesting comparison may be drawn between Australia's record in relation to the ILO and human rights conventions and its record of ratification of Conventions adopted by the International Maritime Organization (IMO).³⁰⁹ The

303. For the details of the withdrawal of certain reservations and declarations, see *supra* text accompanying notes 227-29.

304. See generally Charlesworth, *supra* note 75, at 75-79; Triggs, *supra* note 214.

305. Sorensen, *supra* note 72, at 199; Looper, *supra* note 163, at 188-200.

306. Triggs, *supra* note 214, at 290-94. See also Charlesworth, *supra* note 75, at 77-78.

307. See *supra* notes 219-223 and accompanying text.

308. *The Age* (Melbourne), Mar. 22, 1984, at 6. For further setbacks to the Bill of Rights and the current position, see *supra* note 224.

309. The IMO was formerly known as the Intergovernmental Maritime Consultative Organization.

objectives of the IMO, which was founded in 1948, are to provide machinery for cooperation between governments in the field of technical aspects of shipping, particularly maritime safety and efficiency of navigation, and to encourage the removal of discriminatory action and unnecessary restrictions on shipping engaged in international trade.³¹⁰

The following table lists the number of Conventions adopted by the IMO which have been ratified by the countries named as of December 31, 1983 (See Table III).

TABLE III
NUMBER OF IMO CONVENTIONS RATIFIED BY SELECTED STATES
(AS OF DECEMBER 31, 1983)³¹¹

Federal State	Number of Conventions Ratified
United Kingdom	47
Federal Republic of Germany	35
United States of America	31
Canada	29
Australia	26
New Zealand	17

An examination of the history of the Conventions which have not been ratified by Australia shows a somewhat curious side to Australian treaty practice. Under the Constitution, the federal government has legislative power over interstate and international trade and commerce (including shipping).³¹² The states have control over intrastate shipping and may legislate with respect to coastal waters to the extent that the Commonwealth has not passed preemptive federal legislation.

Most of the Conventions adopted by the IMO deal with matters that fall within federal power and that are already subject to a certain degree of federal regulation. A number of the Conventions deal with topics that are the subject of concurrent state regulatory power. Although on the whole Australia does not appear to have had any objections to the policies embodied in the Conventions,

For a more detailed discussion of Australia's participation in the various IMO Conventions (including recent Australian legislation), see Burmester, *Australia and the Law of the Sea — The Protection and Preservation of the Marine Environment*, in *INTERNATIONAL LAW IN AUSTRALIA* (K. W. Ryan 2d ed. 1984) 439, 444-55.

310. See Convention on the Intergovernmental Maritime Consultative Organization 1948, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48.

311. The figures in Table III, are based on information contained in International Maritime Organization, *STATUS OF MULTILATERAL TREATIES IN RESPECT OF WHICH THE INTERNATIONAL MARITIME ORGANIZATION OR ITS SECRETARY-GENERAL PERFORMS DEPOSITARY OR OTHER FUNCTIONS* [hereinafter cited as *IMO REPORT*] (1984) (ratifications as of Dec. 31, 1983).

312. AUSTL. CONST., §§ 51(1), 98.

the time required for Australia to ratify those which it has ratified has been long³¹³ and a large number of Conventions remain unratified.³¹⁴

A Commission of Inquiry into the Maritime Industry published a report in 1976 concerning the status of these IMO Conventions, together with recommendations for action by the federal government.³¹⁵ The Commission considered that it was important that Australia ratify a number of Conventions within federal competence as soon as possible, and it noted that the relevant departments were in most cases moving towards recommending ratification.³¹⁶ By 1981, however, only one of these Conventions had been ratified.³¹⁷

Certainly part of the explanation for Australia's record in this area must lie in the process of consultation with the states, a process apparently adopted in those cases in which the states already had relevant legislation. It is not clear from the Maritime Report how many of the Conventions had in fact been referred to the states, but Australia's prompt ratification of the Conventions relating to the International Maritime Satellite Organization³¹⁸ (a matter clearly within exclu-

313. Commission of Inquiry into the Maritime Industry, REPORT ON INTERNATIONAL MARITIME CONVENTIONS 9 (1976) [hereinafter cited as MARITIME REPORT].

314. The Australian record at the end of 1983 (see Table III) may be compared with the corresponding figures at the end of 1980:

NUMBER OF IMO CONVENTIONS RATIFIED BY SELECTED STATES
(AS OF DECEMBER 31, 1980)

<i>State</i>	<i>Number of IMO Conventions Ratified</i>
United Kingdom	47
United States of America	30
Federal Republic of Germany	27
Canada	26
New Zealand	16
Australia	15

IMO REPORT, *supra* note 311, (1981 ed.) (ratifications as of December 31, 1980). It is difficult to know whether the spurt of activity by Australia (eleven ratifications in three years, eight of those after the Labor Party's coming to power in March 1983) is the result of the Labor Party's commitment to an energetic use of its foreign affairs power, or whether it represents the fruition of a process of consultation and adjustment. The latter seems more likely. See note 318 *infra*.

315. MARITIME REPORT, *supra* note 313.

316. *Id.* at 25, 26, 33, 34. Included among these unratified Conventions were the Great Barrier Reef Amendments to the International Convention for the Prevention of the Pollution of the Sea by Oil 1954, 327 U.N.T.S. 3 which brought the Great Barrier Reef, off the Australian coast, within the category of prohibited discharge areas. Although these particular amendments were proposed by Australia, they were not ratified by Australia until November 13, 1981.

317. Convention on the International Regulations for Preventing Collisions at Sea 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587 (accessed to by Australia on Feb. 29, 1980).

318. Convention on the International Maritime Satellite Organization 1976, 31 U.S.T. 1, T.I.A.S. No. 9605 (ratified by Australia on Mar. 16, 1979); Operating Agreement on the International Maritime Satellite Organization 1976, 31 U.S.T. 135, T.I.A.S. No. 9605 (effective signature by Australia July 16, 1979). Information received in June 1985 from the Federal Department of Transport after the completion of this article gives some indication of the extent of continuing state involvement since the 1979 Offshore Constitutional Settlement (see generally notes 211 and 309 *supra*). It appears that the states

sive federal jurisdiction) would seem to indicate that bureaucratic delay, the difficulties of drafting implementing legislation, or the problems involved in consulting with the states must be the explanation for Australia's record of tardiness in ratification.

Another case in which the federal system has delayed accession to a multilateral convention was the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³¹⁹ As early as 1959 all states had indicated their willingness to agree to ratification, and by 1969 there was a firm agreement between the Commonwealth and states that Australia would ratify the Convention in advance of the passage of uniform state legislation throughout the country.³²⁰ Four years later only three states had passed the necessary legislation, and the Convention remained unratified.³²¹ Not until seventeen years after the Convention was opened for signature did Australia finally accede to it, and only then on the basis of a uniform federal statute. For that period, Australia was denied the benefits of the Convention, including the simplification of the enforcement of awards and arbitration agreements, as well as the strengthening of Australia's position as a trading nation.³²² This was a direct result of inaction on the part of three states and, it would seem, the federal government's failure to press them.³²³

One area in which the federal system does not seem to have been a significant impediment to the implementation of treaty obligations has been the area of narcotics control. All states had agreed by 1962 to the ratification of the Single Convention on Narcotic Drugs 1961,³²⁴ and the delay in ratification of it until 1967 was due to the need to amend a large amount of detailed legislation. This

are consulted during negotiations and after conclusion of the treaty in cases where the treaty infringes on state responsibilities. If the states do not approve of a convention which is substantially within their responsibilities, normally the federal government will not ratify it. The failure of the states to pass complementary legislation is the cause of Australia's failure to ratify at least one convention (1973/78 Marpol Convention). Delays in the implementation of other conventions have resulted from the necessity to draft complex secondary legislation and to consult with the states and maritime industry.

319. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. Traditionally, the states had regulated the enforcement of foreign judgments.

320. 92 AUSTRALIAN PARLIAMENTARY DEB., H.R., 4390-93 (1974) (second reading speech of the Minister for Manufacturing Industry on the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth)). See also 43 AUSTRALIAN L.J. 344-45 (1969).

321. The states which had passed the necessary legislation were New South Wales, Queensland and Tasmania. Yorston & Fortescue, AUSTRALIAN MERCANTILE LAW 529-30 (C. Turner 16 ed. 1981).

322. 43 AUSTRALIAN L.J. 344-45 (1969).

323. It would also appear that the failure by Australia to become a party to most of the Conventions of the Hague Conference on Private International Law is attributable to the divided competence of the Australian federal system. The Hague Conference on Private International Law, the statute of which appears at 220 U.N.T.S. 121, produces many conventions in the field of private international law. See 22 INT'L LEGAL MATERIALS 1417, 1418 (1983) for an indication of the number of conventions produced by the Conference. For Australia's record in comparison to other countries, see the table in 22 INT'L LEGAL MATERIALS 1417 (1983). See generally, Leal, *Federal State Clause and the Conventions of the Hague Conference on Private International Law*, 8 DALHOUSIE L.J. 257 (1984).

324. 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.

is, however, an atypical case — on few issues do state and federal governments agree more than on narcotics control, and this is one in which federal/state cooperation has been close.³²⁵

Thus, even outside the contentious areas of ILO Conventions and human rights instruments, the federal system seems to have had a retarding effect on Australia's participation in international treaties. Even where the federal government has undoubted power to legislate, the concurrent powers of the states and the political pressures wielded by them have led to delay in ratifying conventions, and in some cases, to failure to ratify them at all. In some instances, however, such as in the case of the unratified IMO Conventions, it is difficult to know whether other factors may have been just as important as the forces of the federal system.

E. *The Likely Impact of the Dams Case on Australian Treaty Practice*

The discussion above has shown that, while the role that the federal structure has played in influencing Australian treaty practice has been significant, there have been other factors at work as well. Nonetheless, the existence of the Australian federal system will continue to be an important factor in analyzing Australian participation in the international order and an obstacle to be negotiated by federal governments of any political color. This section discusses the options that are open to a federal government in the wake of the *Dams* case, and assesses these options from the point of view of the effective implementation of treaties.

Now that the federal government's power to implement treaties has been confirmed by the *Dams* case, the federal government must choose from among the following courses of action in relation to implementing treaties dealing with matters traditionally subject to state regulation: (1) act according to previous practice and not ratify conventions unless all states agree to ratification; (2) not consult with the states on the issue of ratification and implementation but simply pass uniform federal legislation which would preempt inconsistent state laws; or (3) if the process of consultation is excessively delayed or if some or all of the states refuse to agree to ratification and implementation, the federal government could enact legislation of its own, or coordinate its own efforts with those of the states which are prepared to cooperate.³²⁶

If the first course is possible, there would be no need for federal legislation that would apply nationwide, although in some cases the federal government

325. See generally REPORT OF THE AUSTRALIAN ROYAL COMMISSION OF INQUIRY INTO DRUGS (1980), bk. A, pt. V., A355-420; and bk. D, pt. XIV, chs. 2-3, D17-34.

326. Another alternative would be to involve the states at all stages of the treaty process, including negotiation and signature. Although there have been state representatives in Australian delegations to the Law of the Sea Conference and a number of other international bodies, a policy of representation as a regular matter seems unlikely to be adopted.

may consider that national uniformity is necessary or desirable. As discussed earlier, when treaties cover either controversial subject matter or matters viewed by states as within their own domain, there is likely to be opposition from one or more states.³²⁷ In the face of noncooperation from just one state, the federal government must, if committed to the implementation of the treaty, enact uniform national legislation with the accompanying legal and administrative problems that such a course may entail.

Recent Australian experience shows the difficulties that may arise in such a situation. In 1975, for example, the federal Labor government passed the Racial Discrimination Act 1975 (Cth), the legislation challenged in *Koowarta v. Bjelke-Petersen*.³²⁸ The Act outlawed racial discrimination and established a federal administrative office to deal with complaints made under it. In 1977, the State of New South Wales passed its Anti-Discrimination Act 1977 (N.S.W.), which outlawed discrimination on a number of grounds including race and which established an investigative board and a quasi-judicial tribunal to deal with complaints of discrimination.³²⁹ Thus, since 1977 in New South Wales, there have been apparently two avenues of legal redress open to a person complaining of racial discrimination.

In 1983, the inevitable happened. A defendant to an action under the New South Wales statute argued that the state provisions dealing with racial discrimination were preempted by the federal Act and were therefore invalid to the extent of the inconsistency, pursuant to section 109 of the Constitution. The High Court agreed with this argument.³³⁰ Ironically, the remedies available to the complainant under state law were superior to those available under federal law. This was because the doctrine of separation of powers, which operates at the federal level, prevents a federal body from exercising the administrative functions of investigation and conciliation in addition to the judicial functions of awarding damages and other remedies.³³¹ Thus, by attempting to ensure that all Australians enjoyed a minimum standard in the area of racial discrimination, the federal government unwittingly deprived persons in some states of a higher level of protection.³³²

327. See *supra* text accompanying notes 296-97.

328. (1982) 56 Austl. L.J.R. 625.

329. See *id.*

330. *Viskauskas v. Niland*, (1983) 47 Austl. L.R. 32.

331. See *R. v. Kirby ex parte The Boilermakers' Society of Australia* (1956), 94 C.L.R. 254. See generally L. Zines, *supra* note 30, at 137-45.

332. A similar situation arose in *Gerhardy v. Brown*, (1983) 49 Austl. L.R. 169, in which the Supreme Court of South Australia held that section 9 of the Racial Discrimination Act 1975 (Cth) preempted section 19(1) of the Pitjantjatjara Land Rights Act 1981 (S.A.), which made it an offense for a person who was not a member of the Pitjantjatjara tribe to enter the tribe's traditional lands without the permission of the body corporate in whom those lands had been vested (consisting of all members of the tribe). The case was removed to the High Court on the preemption issue. The Court held that the State law was not inconsistent with the Commonwealth law because the federal law specifically permitted the

An attempt was made to rectify the situation by declaring in an amendment to the Act that it was not intended to apply so as to limit the operation of a state act furthering the objects of the Racial Discrimination Convention and capable of operating concurrently with the federal Act.³³³ It is not clear whether this provision will effectively preserve the operation of the state law; if it does not, serious problems may arise in encouraging the states to provide for higher standards than the federal minimum standard (which would reflect the minimum standard required by international law).³³⁴ The outcome will be of vital importance in view of the present federal sex and race discrimination legislation and, ultimately perhaps, a Bill of Rights.

Part of the justification for the insistence of federal governments on consulting and cooperating with the states has been the very practical issue of the detailed implementation and enforcement of treaties. The states generally have legislative and administrative structures already in place in areas which have traditionally been regulated by them (for example, minimum wages and working conditions, safety of machinery, workers' compensation). If the agreement of a state government to the implementation of a convention can be obtained, it avoids the necessity of enacting federal legislation and of devoting federal resources to the establishment of a parallel administrative structure.

Cooperation with willing states can significantly advance the efficient implementation and oversight of international human rights standards in Australia; indeed, it may be the only way to make a coherent scheme accessible to the intended beneficiaries. For example, in the three Australian states which at present have human rights legislation, "a person with a human rights complaint already faces a bewildering miscellany of institutions which may be able to help, and the situation becomes more rather than less confusing as each new development in human rights law and practice occurs."³³⁵ Such a position involves

taking of special measures to secure the advancement of disadvantaged groups in accordance with Article 1(4) of the Racial Discrimination Convention and the State law was such a special measure: (1985) 57 Austl. L.R. 472.

333. Racial Discrimination Amendment Act 1983 (Cth), § 3. A similar provision appears in the Sex Discrimination Act 1984 (Cth). In *University of Wollongong v. Metwally*, (1984) 56 Austl. L.R. 1, the High Court held by a majority that the new section 6A of the Racial Discrimination Act 1975 (Cth) was ineffective in its attempt to validate retrospectively the New South Wales law making racial discrimination unlawful. It has not yet been decided whether the new section will save the operation of state laws as of the date of commencement of the section.

334. The unanimous decision of the High Court in *re Duncan ex parte Australian Iron & Steel Pty. Ltd.*, (1983) 49 Austl. L.R. 19 (upholding the joint federal/state Coal Industry Tribunal established in 1946 to regulate the coal industry) shows a readiness on the part of the Court to uphold such cooperative arrangements and to refrain from finding preemption of state laws when the federal government manifests an intention to regulate an area jointly with the states. *See id.* at 38 (Mason, J.), and 54 (Brennan, J.). Whether this means that the court will find that there is no inconsistency between federal and state legislation in the areas of race and sex discrimination is, however, somewhat doubtful in the absence of a joint federal state body in the area.

335. Speech by the then Attorney-General, Sen. Evans, to the Australian Legal Convention, July 7,

considerable duplication of effort and resources and is unsatisfactory from the point of view of the consumer, whose preference would be for "one stop shopping." One obvious method by which this problem can be partially overcome is to build on existing state machinery and to delegate functions under federal legislation to state officials or to joint federal/state bodies.³³⁶ Such a move would allow more federal resources to be concentrated in the states in which there is no legislation or administrative structure.

Thus, immediate unilateral action at the federal level in ratifying and implementing treaties may in many cases be a mixed blessing for the individuals intended to benefit from the action. From the perspective of the consumer, and to promote the efficient use of community resources, consultation and cooperation with the states in the implementation of such treaties may be clearly preferable to unilateral federal action.

It would be naive to assert that either unilateral federal implementation of a treaty or joint federal/state legal and administrative action will produce a totally unified and simple system. A policy of ensuring a minimum level of human rights guarantees at the federal level, without nullifying state initiatives to offer a higher level of protection, inevitably perpetuates a dual system of laws. Uniform federal implementation must be weighed against the available federal resources and the willingness of the states to make available their resources; joint action must be weighed against the national and international need for speedy and uniform national implementation.

The time has come for the Australian federal government to assume the responsibilities imposed upon it by the international order, and to ensure that the international policies for which it expresses support become reality within Australia. The federal government must stop taking refuge in self-doubts about its legal power and the propriety of action. The demands inherent in the federal system should be accommodated, but when that accommodation obstructs the achievement of desirable international policies that the federal government supports, the government should have the courage to exercise its undoubted legal power to surmount that obstruction.

F. *Australia and Federal Clauses — The Future?*

The *Dams* case apparently makes it unnecessary in almost all cases for Australia to insist on the insertion of federal clauses in multilateral instruments or to rely on such clauses. This does not mean, however, that Australia will be unable to continue to rely on the asserted demands of its federal system in order to

1983, at 30. Western Australians will be in the same positions when the Equal Opportunity Act 1984 (W.A.) commences operation in mid-1985.

336. *E.g.*, the arrangement between the federal Human Rights Commission and the Victorian Commissioner for Equal Opportunity, announced June 30, 1983, designating the latter the delegate of the former for certain purposes. *Id.* at 33.

assume lesser obligations than unitary states. This is the result of the different forms of federal clauses used in treaties and of the large number of treaties containing federal clauses to which Australia is already a party.

The federal clause in the UNESCO Convention on the Protection of the World Cultural and Natural Heritage³³⁷ is an example of the type of federal clause on which Australia would no longer be able to rely to excuse its non-performance of obligations under a treaty. The federal government can no longer maintain in good faith that it does not possess the legal jurisdiction to implement treaties.

Nonetheless, there are other instances of federal clauses on which Australia could still rely. The obvious example is Article 19(7) of the ILO Constitution,³³⁸ the self-judging federal clause inserted in the ILO Constitution in 1946 in the hope that it would increase the adherence of federal states to ILO conventions.³³⁹ The clause provides that in the case of Conventions which "the federal government regards as appropriate under its constitutional system for federal action," the obligations of federal states are to be the same as those of unitary states; in respect of those obligations which the federal government regards "as appropriate under its constitutional system, in whole or part, for action by the constituent states," the federal government is under lesser obligations of notification, consultation, and reporting.³⁴⁰

As ILO Conventions will continue to be important sources of international obligations for Australia, this clause is of particular interest. There is apparently nothing to prevent a federal government from continuing to follow the practice of referring Conventions to the states, at least with respect to Conventions not within exclusive federal jurisdiction, on the basis that past practice and administrative convenience make it more appropriate for the states to implement such Conventions.³⁴¹

It is unlikely that Australia will support the insertion in the multilateral treaties of the first type of federal clause on the ground that it is applicable to its own constitutional position, and it is improbable that such a step would be received kindly. Support for the insertion of the second type of federal clause in new multilateral instruments may well depend on the political commitment of the federal government to particular domestic and international policies. In sum, it

337. 27 U.S.T. 37, T.I.A.S. 8226, 1037 U.N.T.S. 151. For text of Article 34, see *supra* text accompanying note 139-40.

338. I.L.O. CONST., 15 U.N.T.S. 36, 76-80, art. 19(7).

339. Looper, *supra* note 163, at 179-86. See also I. BERNIER, *supra* note 24, at 175-77.

340. 15 U.N.T.S. 35, 68-80. The full text of Article 19 also appears in the collection, International Labour Organization, International Labour Conventions and Recommendations 1919-1981, at vii-x (1982).

341. For example, the Swiss federal government, which possesses the legal power to implement treaties, has not considered it appropriate in many cases for it, rather than the constituent cantons, to carry out the provisions of treaties. Looper, *supra* note 163, at 183-84.

would seem probable that a Labor government would be less keen than a conservative government to support the insertion of federal clauses or to rely on them.³⁴² The institutional and practical pressures discussed above, however, may make the differences in the respective approaches of the Labor and conservative governments negligible.

VII. CONCLUSION

The growth of the external affairs power in Australia is a development that was to be expected in light of the steady expansion of federal power that had taken place since federation. The changing nature of the international order has ruled out the possibility of classifying some subjects as "inherently international" and others as "inherently domestic" in character. Therefore, to attempt to distinguish between two sets of treaty obligations on the ground that one but not the other is of "genuine international concern" is an undertaking which involves the judiciary in an invidious and almost impossible task.

The examination of Australia's practice in relation to ILO Conventions, human rights instruments and other multilateral treaties has shown that the federal system has been used on a number of occasions as a smokescreen behind which a lack of commitment to a particular policy can conveniently be hidden. Apart from this extreme use of federalism as a pretext to excuse failure to ratify or to implement a treaty, Australia's support for the insertion of federal clauses in conventions, and its willingness to rely on them to excuse its non-performance, have had the effect of producing an inequality of obligation between Australia and unitary states, while allowing Australia to derive the benefits of being seen to endorse particular conventions.

There seems little doubt that federal factors have not been the only causes of Australia's poor record of ratifications and delay. The examination of the progress of a number of multilateral conventions dealing with different subjects shows the other factors that may be at work in any particular case, whether they be openly avowed disagreement with the content of a convention, the lack of resources to implement the treaty quickly and effectively, political or bureaucratic inertia, or an attitude of indifference to the demands of the international order. For most of these failings Australia may justly be criticized.

Nonetheless, one is forced to conclude that the federal system and the institutional and political difficulties that federalism engenders have been extremely important in retarding Australian participation in international treaty regimes. Not only has the politically desirable procedure of consulting with the states permitted the development of the one state veto, but the goal of obtaining the agreement of even a majority of states within a reasonable time has eluded every

342. The Hawke Government has made clear its unwillingness to seek the insertion of federal clauses in multinational treaties. See note 228 *supra*.

federal government. This may be partly attributed to the failure of the federal government to press the states when they do not respond to its initiatives with reasonable speed, but the existence of an additional tier of government creates organizational problems which would not be present in a unitary state. These problems have had a severely inhibiting effect on Australia's participation in international treaty regimes.

Despite all these criticisms, the Australian federal government will still have to cope with the continued existence of the federal system, albeit with one more weapon in its arsenal. However, because the states possess legal and administrative structures already in place in areas which are the subject of the contentious treaties, the efficient use of resources and the effective and unified implementation of a treaty may best be achieved by cooperation with the states, either by their performing functions as delegates of federal power, or by establishing joint federal/state bodies.

Despite the *Dams* decision and the differences in philosophy between the Labor and conservative parties in relation to the international order and the exploitation of the external affairs power, the realities of political life in Australia will continue to exert a considerable dampening effect on any desire a Labor government may have to exploit the power to the full. The federal government does now, however, possess a valuable bargaining chip which may push the states into being more cooperative than they have ever been previously.

In any event, the achievement of human rights standards that conform to the requirements of international law will be advanced further as a result of the *Dams* case. This is not to say that either the political or legal battle against expanding federal power is over. Rather, the political battle continues to rage, and the states' rights advocates have just fallen back to their next line of defense.