# International Agreements and the Australian Treaty Power

By H. B. Connell*

In Australia, whenever the Commonwealth government is faced with the need for legislation to implement municipally an international treaty, it must rely upon whatever powers it can under the Constitution. If there is no relevant specific power available to deal with the particular subject-matter and it is not a matter involving trade and commerce overseas or among the States, then the Commonwealth government must rely upon the external affairs power.[1] Difficulties have arisen,[2] and are as yet not completely resolved as to the legal ambit of this power.

In recent times, the Commonwealth has legislated pursuant to the external affairs power in respect of a number of matters; for example, diplomatic privilege and immunity,[3] narcotic drugs[4] and off-shore broadcasting.[5] Each of these enactments related to subject-matter contained in an international treaty.[6] In the latter case, however, other powers[7] could be called in aid and reliance, therefore, was not placed on s. 51 (xxix). Subsequent to these acts, legislation on off-shore resources relating to petroleum[8] and off-shore boundaries[9] has relied heavily on the external affairs power. Few would doubt the competence of the Commonwealth to legislate in the matter of diplomatic privilege and immunity, whether there existed a treaty or not, but, on the other hand, interesting questions arise when the Commonwealth legislates to control the manufacture of narcotic drugs within Australia. There is no other head of power under the Constitution available to support such a measure other than s. 51 (xxix) and the subject-matter is in a field where it may have been expected that the constituent states traditionally would have legislated. The legislation

---

* The Editor, Senior Lecturer in Law, Monash University.

1 Constitution, s. 51 (xxix): "The Parliament shall, subect to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: ... (xxix) external affairs;"

2 See *R. v. Burgess; Ex parte Henry*, [1936] A.L.R. 482; 55 C.L.R. 608.

3 Diplomatic Privileges and Immunities Act 1967 (Com.).

4 Narcotic Drugs Act 1967 (Com.).

5 Wireless Telegraphy Act 1967 (Com.).

6 Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95; Single Convention on Narcotic Drugs, 1961 520 U.N.T.S. 151; Continental Shelf Convention 499 U.N.T.S. 311.

7 Section 51 (v), (vi), s. 90.

8 Petroleum (Submerged Lands) Act 1967 (Com.).

9 Territorial Sea and Continental Shelf Bill 1970 (Com.).

to control manufacture was, furthermore, not limited to international or interstate trade, but purported to control the manufacture of drugs for domestic consumption even when the whole process from growth to sale took place within the confines of one State. This is not a new departure[10] so far as the use of the power is concerned, but is significant in that it could indicate that the Commonwealth, in appropriate cases, is prepared to use the external affairs power in other than the aviation field.

It may be that the Commonwealth now will look far more readily to the external affairs power to implement treaties. Australia's international commitments are forever increasing. The world has begun to accept more and more international legislation by way of convention.[11] Until recently, Australia has been internationally in something of a state of political isolation, with little active regional, political or economic organization, when comparison is made with, say, the American or European powers.

Whenever, in the past, a Federal state central government has had to face up to this situation it has resulted in an acute political disagreement with the constituent States of the Federation.[12] In Australia, so far, there has been little but murmurings and undercurrents of argument. A recent off-shore bill, however, which has not yet passed through the Parliament produced vigorous dissent among government ranks and seemed likely to provoke a full-scale constitutional case.[13] The reason, perhaps, for the scarcity of strong political debate so far, is not the reticence of the States, particularly Victoria, as much as the extreme political caution with which the Commonwealth has generally approached the issue. It is interesting to contemplate whether the pattern of future behaviour in Australia will resemble that of other Federal states.

This article attempts to show the extent of the Commonwealth external affairs power. It argues that the Commonwealth may effectively participate in, and municipally implement, international treaties to the extent that its policy dictates that it should. There is an implicit hope that the constituent states will not adopt a parochial role and will accept the position that the Commonwealth should be able to meet its international treaty commitments with the minimum of difficulty. This will mean, of course, that from time to time the Commonwealth may well find itself legislating in areas previously regarded as being the preserve of the constituent states.

---

10 See the *Burgess Case*.

11 A mere perusal of the Australian Treaty Series Post World War II would serve to confirm this statement especially when it is compared with the inter-war period.

12 J. Y. Morin, "La conclusion d'accords internationaux par les provinces Canadiennes à la lumière du droit comparé" (1965), 3 Can. Yearbook of Int. Law 126. Reference, *Re Ownership of Off-shore Mineral Rights* (1968), 65 D.L.R. (2d.) 353. A. E. Sutherland Jnr., *Restricting the Treaty Power*, 65 Harv. L.R. 1304.

13 Territorial Sea and Continental Shelf Bill 1970 (Com.).

## Some Historical Factors

In the 1891 Commonwealth of Australia Bill the Federal power with respect to external affairs was expressed as being one to legislate with respect to "external affairs and treaties". These words remained until the Melbourne Convention session in 1898 when Mr. Barton proposed that the words "and treaties" should be struck out.[14] This should be done, Barton said, to ensure consistency with clause 7 (later covering clause 5) as amended at the Convention session of 1897. Clause 7 had in its original form provided that: "The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all treaties made by the Commonwealth, shall, according to their tenor, be binding on the courts, judges, and people of every State, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding; and the laws and treaties of the Commonwealth shall be in force on board of all British ships whose last port of clearance or whose port of destination is in the Commonwealth." In 1897 it was successfully moved that the words "and all treaties made by the Commonwealth" and "and treaties" be deleted. Mr. Barton's amendment was passed.

There was little debate on Barton's amendment but one or two remarks are particularly significant. Barton suggested that "as treaty-making power will be in the Imperial government, we should omit any reference to the making of treaties by the Commonwealth; in other words while they conceded that we should make certain trade arrangements, which would have force enough if ratified by the Imperial government, the sole treaty-making power is in the Crown of the United Kingdom".[15] Following Barton, George Reid, with characteristic vigour, suggested that we should not follow the manner of concluding treaties as in the United States.[16] He was, of course, here adverting to the deleted words of the first part of the amendment to the original covering clause 7. He went on to say that treaties made by Her Majesty are not binding as laws of the United Kingdom and there is no penalty for disobeying them. "Legislation", he noted, "is sometimes passed to give effect to treaties, but the treaties themselves are not laws, and indeed nations sometimes find them inconvenient, as they neglect them very seriously without involving any important legal consequences."[17]

Having regard to the fact that under English law treaties did not of themselves create legal rights and duties in municipal law, the omission of the words "and all treaties made by the Commonwealth" in the covering clause was perfectly defensible. But it does not follow that consistency with clause 7 required deletion of the words "and treaties" in the present s. 51 (xxix). Mr. Deakin, for one, clearly

14 Convention Debates, Melbourne 1898, vol. 1, p. 30.
15 Convention Debates, Sydney 1897, p. 239.
16 Ibid., p. 240.
17 Ibid.

recognized that the amendment went to the question of the scope of Federal legislative power. "I understand", he said, "that the leader of the convention will look at the words 'and treaties' with a view to see how far, by omitting them, we would limit the powers of the Federal Parliament within the general scope of the powers that the Canadian Parliament already enjoys."[18] Subsequent events proved Deakin to be wrong in supposing that the amendment would limit Federal power in the same way as did the relevant section in the British North America Act, but if, as seems likely, he believed that the amendment would curtail the powers of the Federal Parliament, he was probably correct. It is submitted that if the words "and treaties" had remained, the Commonwealth's power to implement treaties under s. 51 (xxix) would have been much less controversial.

The early writers on the Constitution did not attach much significance to the external affairs power.[19] Harrison Moore regarded it as a power which would enable the Commonwealth to legislate extra-territorially and to provide for "matters of administration rather than legislation". He did think, however, that it might be possible under this head to make laws for the execution of treaties entered into by the Commonwealth but only in relation to matters which *in se* concern external relations.[20] What was incorporated in the term *in se* remains a matter of some conjecture.

The first World War and its aftermath brought about considerable change in that the Australian government, together with her sister dominions, was to insist that there could be independent dominion action on matters relating to peace and war. In a comparatively short period of time, 1919-1931, the dominions were to acquire a completely independent competence in foreign relations. The final act in the drama was the passing by the United Kingdom parliament of the Statute of Westminster. Although Australia appeared comparatively half-hearted in this exercise, the sister dominions were instrumental in achieving this constitutional change which flowed through to her. Australia did not see fit, however, to adopt the Statute of Westminster until 1942.[21]

## The Power of the Commonwealth to Conclude Treaties

The power to make and ratify treaties is to be found by implication in achieving this constitutional change which flowed through to her. Section 61 vests the executive power in the Queen and declares that the power is exerciseable by the Governor-General as the Queen's

---

18 Convention Debates, Melbourne 1898, vol. 1, p. 30.

19 Jethro Brown (1900) L.Q.R. 26; Harrison Moore (1900) L.Q.R. 39; Quick and Garran, *Annotated Constitution*, p. 631.

20 Harrison Moore, *Commonwealth of Australia*, 1902, p. 143; Harrison Moore, *Commonwealth of Australia*, (2nd ed.) (1910), pp. 461, 462. Professor Harrison Moore's views are getting, though dressed up in new language, something of a reconsideration. See P.H. Lane, 40 A.L.J. 265.

21 Statute of Westminster Adoption Act 1942 (Com.).

representative.[22] The power to enter into treaties is one of her royal prerogatives and s. 61 merely provides a statutory affirmation of the power and declares by whom, other than the sovereign, it is exercise-able. The *Canadian Radio Communications Case*[23] upheld the power of a dominion executive to conclude in the name of the central government international conventions. In this respect, Canada and Australia are in the same position and each has the same capacity as any other state under international law. But where does this place the constituent states of the Commonwealth?

In the immediate post-federation period, the States were unwilling to concede very much to the Commonwealth. In the famed *Vondel Case*[24] the then Premier of South Australia put forward a curious but rather widely held view that whilst the treaty power resided in Westminster its implementation and channel of communication was through the States. The Premier said that it would be an indignity to his government with whom, at present, at least, lies the duty of maintaining Imperial treaties within its borders, if it were compelled to approach His Majesty's ministers through the medium of any other government. The Premier of South Australia went on to say that, with regard to treaties, the Commonwealth has no more legislative power than the State, using here the argument of the exclusion of the words from the 1897 draft constitution "and treaties". He asks why the States should not be as good a "channel of communication" as the Commonwealth government. The answer, at this stage, was simply that the Imperial government accepted the contention of exclusivity of the Commonwealth government[25] and in fact, from an early stage, 1907, States did not attend Imperial conferences. Furthermore, it is clear from subsequent decisions of the High Court[26] that the Commonwealth in an appropriate case would be in a position to bind the actions of State officials though the reverse is not the case.

Has, however, the power to conclude treaties been entirely excluded from State competence? This is an issue of some delicacy amongst

---

22 *R. v. Kidman* (1915), 21 A.L.R. 405; 20 C.L.R. 425, at pp. 444-6. *The Commonwealth and the Central Wool Committee v. Colonial Spinning and Weaving Combing Co. Ltd.* (1923), 29 A.L.R. 138; (1922), 31 C.L.R. 421, at pp. 440-3.

23 [1932] A.C. 304.

24 *Vondel Case,* Commonwealth Parl. Papers (1903), vol. II, pp. 1149 *et seq.*

25 Interesting questions can arise as to the exclusivity of the Commonwealth government not based on the notion of concurrent powers but rather on the scope of the prerogative power. Consider the effect, for example, of the Dixonian argument in *Federal Commissioner of Taxation v. Official Liquidation of E. O. Farley Ltd.,* [1940] A.L.R. 216; 63 C.L.R. 278, at p. 312 ff. and *The Commonwealth v. Cigamatic Pty. Ltd. (in liquidation),* [1963] A.L.R. 304; (1962), 108 C.L.R. 372, at p. 376. The effect may well be that the States maintain certain prerogative powers in the field of external affairs, but that their ability to make use of them internationally will be curtailed if not rendered completely nugatory by international usage.

26 *Essendon Corporation v. Criterion Theatres Ltd.,* [1947] A.L.R. 270; 74 C.L.R. 1; *The Commonwealth v. Bogle,* [1953] A.L.R. 229; 89 C.L.R. 229, per Fullagar, J., at p. 259.

other Federations. Canada, for example, is seeking compromises and is meeting with some success with the so-called "umbrella" agreement in use for provincial-interest type treaties by which the Federal government specifies its commitments to the foreign government and additional broad terms are made in the agreement through which the foreign government works out its detailed arrangements with the provincial government.[27] This would prove an unnecessarily complex procedure in the Australian Federal system. Full prior consultation with the constituent states before international conferences on matters affecting their administration is a most necessary requirement, but in the give and take of negotiations, the Commonwealth should have a free hand to compromise without too much dog-snapping at its heels from the States. The umbrella-type agreement would be an administrative nightmare in the case where more than one state or province had an interest.

The Australian States have appeared to acquiesce in the fact that they have no *locus standi* in negotiations between international states. A practical factor leading towards this conclusion is that it takes two parties to enter an agreement. If a foreign state is aware that the central power will not support an agreement made with one of the constituent states, then it is extremely unlikely that the foreign state would persist with negotiations. This point should be made as it is undeniable that the external affairs power is a concurrent power. The argument, therefore, could be advanced that the States have power to conclude treaties with foreign states unless there is Commonwealth legislation prevailing over that of the States by way of s. 109, or some power vested in the Commonwealth which may have the effect of excluding State action, such as s. 105A of the Constitution.

A unit of a Federation is not prohibited at international law from concluding treaties.[28] Whatever may be the situation in the U.S.A. and Canada, it is clear that, in Australia, the practice has been to regard the States as not having *locus standi* internationally.[29] A state would be excluded from treaty negotiations by reason of the fact that it had not the imprimatur of the Federal government. This is logical as the Federal Government would be held responsible under international law for the delinquencies of any one component unit.

---

27 For example, Franco-Canadian Cultural Agreement (1965), 17 External Affairs (Canada) 513.

28 Draft Law of Treaties, Art. 5.2 (1967), 61 A.J.I.L. 263. State members of a Federal union may possess a capacity to conclude treaties if such capacity is admitted by the Federal constitution and within the limits there laid down. It is interesting to note that Australia and Canada took a leading role at Vienna in succeeding to delete this draft article. Australia strenuously argued that the Treaties Convention was concerned with relations between states and that there was no call for such an article. In obtaining the draft article's deletion, the Commonwealth eased the domestic pressure to accord some international treaty-making power to the constituent states.

29 Doeker, *The Treaty Making Power in the Commonwealth of Australia* (Nijhoff 1966) p. 213, makes some case for constituent state competence but the case is pretty thin.

In the result, it is most unlikely that the Federal government would look kindly upon constituent states attempting to assert treaty powers, either directly or in the special manner suggested in Canada.

The fact that the Commonwealth had the executive power to conclude treaties, however, did not mean, *ipso facto*, an enlargement of the legislative powers.[30] To make laws to give effect to treaties is dependent upon the power to make laws with respect to external affairs and any other specific enumerated power that may be called in aid, e.g. trade and commerce, defence, posts and telegraphs.

In 1913, the United States had, by an Act of Congress, without the benefit of a treaty, purported to control the killing of migratory birds within various States of the United States. The courts denied that Congress had such a power.[31] Later, in 1916, however, a bilateral treaty was concluded between the United States and Great Britain[32] to control the killing of migratory birds which were of great value as a source of food and as destroyers of insects injurious to vegetation. The treaty included provision for specified closed seasons and various means of protection. Pursuant to this treaty, Congress passed a Migratory Bird Treaty Act in 1908 in conformity with the treaty provisions and giving the non-self-executory provisions the force of law. The State of Missouri objected on the grounds that the statute was an unconstitutional interference with rights reserved to the States by the Tenth Amendment:—

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The gist of the State's argument was that a treaty cannot be valid if it infringes the Constitution and that the limit to the treaty-making power of the President is based on the proposition that what an Act of Congress could not do unaided, in derogation of the powers reserved to the States, the treaty cannot do. In the course of the judgment, upholding the validity of the Act, Holmes, J., made these remarks:—

> "We may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being, the development of which could not have been foreseen completely by the most gifted of its begetters, it was for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said 100 years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment

30 Doeker, ibid., p. 248 suggests that s. 61 might serve as a foundation of an incidental legislative power but this fundamentally, in my view, misconstrued the nature of Chapter II of the Constitution and that of s. 51 (see the *Boilermakers Case*, [1956] A.L.R. 163; 94 C.L.R. 254).

31 *U.S. v. McCullagh*, [1915] F. 288.

32 *Convention for the Protection of Migratory Birds* 1916, Malloy 2645, 39 Stat. 1702.

> . . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while the food supply is killed off and the protectors of our grasses and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld."[33]

Holmes, J., possibly exaggerated the importance of the subject-matter and the case may be particularized on account of the nature of the subject-matter. Generally speaking, however, it is considered the clearest possible statement of principle that a treaty entered into by the United States could be executed by legislation unless there were some very over-powering reasons to disallow.

About the same time, *Roche v. Kronheimer*[34] was decided in the High Court. The main question in this case was the validity of the Treaty of Peace Act 1919, the purpose of which was to give effect municipally to the Versailles Treaty. (It is not without interest that Owen Dixon, as counsel for the defendant, argued that the Act was invalid.) The Court generally upheld the Act as an exercise of the power conferred by s. 51 (vi) but in the course of his judgment, Higgins, J., stated that the Act could also be upheld under s. 51 (xxix):—

> "It is difficult to see what limits, if any, can be placed on the power to legislate as to external affairs. There are none expressed. No doubt, complications may arise should the Commonwealth Parliament exercise the power in such a way as to propose a conflict between the relations of the Commonwealth with foreign governments and the relations of the British government with foreign governments. It may be that the British Parliament preferred to take such a risk rather than curtail the self-governing powers of the Commonwealth; trusting with a well-founded confidence, in the desire of the Australian people to act in co-operation with the British people in regard to foreign governments."[35]

Higgins, J., was the first to suggest that the power to legislate with respect to external affairs is to a large extent unlimited.[36]

Both in Australia and Canada, the motivating force to consideration of powers in respect of treaties has been most sharply raised by a desire to exercise powers over civil aviation in conformity with international conventions. In the case of Australia, the High Court was called upon to consider the matter in *Burgess' Case*[37] subsequent to the decision of the Judicial Committee in the *Canadian Aeronautics Case*.[38]

---

33 *Missouri v. Holland* (1920), 252 U.S. 415, at pp. 434-5.
34 (1921), 27 A.L.R. 254; 29 C.L.R. 329.
35 Ibid., at p. 339.
36 Compare some tentative suggestions in *McKelvey v. Meagher* (1906), 12 A.L.R. 483; 4 C.L.R. 265.
37 *R. v. Burgess; Ex parte Henry*, [1936] A.L.R. 482; 55 C.L.R. 608.
38 [1932] A.C. 54.

One, Goya Henry, had flown an aircraft wholly within New South Wales without being licensed to fly in the manner prescribed by regulations made pursuant to s. 4 of the Air Navigation Act 1920 (Com.). Section 4 of the Act authorized the Governor-General to make regulations for two purposes; "for the purpose of carrying out and giving effect to the Convention ... and for the purpose of providing for the control of air navigation in the Commonwealth and the Territories". Henry had only flown intrastate and therefore reliance on the trade and commerce power,[39] which generally supported the latter purpose, was to no avail. Therefore, the High Court could not avoid deciding the issue whether or not the external affairs power was support for Commonwealth Acts giving effect to the Convention throughout the Commonwealth and thus regulating intrastate aviation. The Court was unanimous in deciding that the Commonwealth had this power.

Much has been made of the disagreements appearing in the reasoning of various members of the Court.[40] Although the merits and demerits of the various views are still subject to argument it is submitted that there is, in reality, little difference in substance between them.

An interesting side note was the subsequent case, *R. v. Poole; Ex parte Henry (No. 2)*[41] in which the Chief Justice, Sir John Latham, found himself in a minority of one. In this instance, the Court was prepared to accept the view expressed by Starke, J., in the earlier *Burgess' Case,* [42] to allow some flexibility in design and approach to the drafting of regulations provided, generally, they faithfully represented the intent of the Convention. This has made the Commonwealth's task much easier in translating into Australian practice some of the curious expressions found in international legislation. Latham, C.J.,[43] required a much narrower and tighter translation of the obligations cast by the Convention and its annexes.

*Burgess' Case* gives us the following guide-lines as to the extent of the external affairs power:—

1. Section 51 (xxix) should be given its natural and proper meaning as an independent and express legislative power.[44]

2. The Commonwealth's power is not restricted only to such matters as *in se* concern external relations.[45]

---

39 Section 51 (i).

40 The restrictive view was generally considered to have been held by Dixon and Starke, JJ., whilst the extensive view was delivered in the joint judgment of Evatt and McTiernan, JJ., Latham, C.J., in this sort of analysis, falls somewhere in between.

41 *R. v. Poole; Ex parte Henry (No. 2)*, [1939] A.L.R. 269; 61 C.L.R. 634.

42 *R. v. Burgess, supra,* at p. 663: "... compatible with the convention, and, if exercised bona fide and for the purpose of carrying out international obligations—as must be assumed—gives that flexibility in administration that is desirable and even necessary in relation to an international agreement."

43 *R. v. Poole, supra,* at p. 642, per Latham, C.J.

44 *R. v. Burgess, supra,* at p. 639, per Latham, C.J.

45 Ibid., at p. 640, per Latham, C.J.

3. The Commonwealth may implement treaties entered into with a foreign country (including a member of the British Commonwealth).[46]

4. The subject-matter of the treaty, however, must be one that is indisputably international in character but, *quaere*, how far this thought should be considered today as being unduly restrictive.[47]

5. In any case, the limits are only going to be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example.[48]

6. If the entry into a treaty is merely a colourable device to secure power then the court may consider the question of *mala fide*.[49]

7. A law made pursuant to s. 51 (xxix) must not contravene the constitutional prohibitions.[50]

In more recent times, the sequel to the Paris Convention, the Chicago Convention 1944, has been the subject of litigation. It is immaterial for present purposes how the litigation arose, but the cases are important as s. 51 (xxix) was considered. In the first case[51] the crucial issue really was the question of inconsistency. Section 51 (xxix) was considered only incidentally. However, Dixon, C.J., did suggest that the external affairs power would suffice to support laws made with a complete disregard of the distinction between interstate and intrastate trade.[52] This really does not take the matter any further than *Burgess' Case* except that it is a view forcibly expressed as to the effect of the power by a judge who was considered in *Burgess' Case*, probably without much reason, as advancing a somewhat restrictive view.

The second case[53] is important for two reasons. First, McTiernan, J., was the only remaining member on the Court from the *Burgess' Case* so that the views of the Court, perhaps, might have appeared as though they were open for recanvassing. Second, the Commonwealth itself intervened in the case and submissions were made by the then Attorney-General[54] with respect to s. 51 (xxix) with the object of restricting its use to what was regarded as desirably defined limits.[55] As to the first point, none of the judges[56] added to the *Burgess'* interpretation with the possible exception of the present

---

46 Ibid., at p. 658, per Starke, J.

47 Ibid., at p. 639, per Dixon, J., and ibid., at p. 641, per Latham, C.J.: "It is impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement."

48 Ibid., at p. 669, per Dixon, J.

49 Ibid., at p. 643, per Latham, C.J.

50 E.g. ss. 92, 113, 116. See *R. v. Burgess, supra*, at p. 642, per Latham, C.J., and at p. 687, per Evatt, J., and McTiernan, J.

51 *Airlines of N.S.W. v. N.S.W.*, [1964] A.L.R. 876; 113 C.L.R. 1.

52 Ibid., at p. 27.

53 *Airlines of N.S.W. v. N.S.W. (No. 2)*, [1965] A.L.R. 984; 113 C.L.R. 54.

54 The Hon. B. M. Snedden, Q.C.

55 *Airlines of N.S.W. (No. 2), supra*, at p. 63.

56 In fact Windeyer, J., expressly rejected the opportunity: *Airlines of N.S.W. v. N.S.W. (No. 2), supra*, at p. 153.

Chief Justice[57] who introduced a somewhat new terminology. He speaks of a treaty, being, or bringing into being, an "external affair" of Australia.[58] It it noteworthy, however, that no member of the bench saw fit to jump into the controversial arena left open to them by the Attorney-General.

The result in the Burgess Case produced amongst non-Labor politicians in Australia a reasonably predictable reaction that care should be exercised in the use made of the external affairs power lest the balance of power between the States and the Commonwealth is further upset and legislation be introduced by this means, particularly in the labour field, which they would prefer to see shelved.[59]

The fact that the power has never been considered as plenary (as, for example in the case of s. 122), but subject to the prohibitions, has not in itself been sufficient to contain this concern at its use. That the then Attorney-General should have made his submission on the extent of the power in a case hardly requiring arguments on limitation would seem to indicate that he was acting rather on direct Cabinet instruction to move the court in a certain direction than on the advice of his legal advisers. It is extraordinarily unusual, so say the least, for a Commonwealth Attorney-General forcefully submitting restrictive views of Commonwealth power to the court. This very fact could not have been lost on the court which clearly was not in the mood to accept the bait.

The Attorney-General argued for a narrow interpretation of subsection (xxix). For Federal legislation purporting to implement a treaty to be a valid exercise of the external affairs power, the legislation must, he contended, fulfil three requirements. First, the agreement must be, in the words of Dixon, C.J., "indisputably international" in character. Second, the agreement must bind a real proportion of those international states which have a comparable interest in the subject-matter. Third, the agreement must contain obligations and all the parties to the agreement must have assumed the same obligations. He added that these criteria were not necessarily exhaustive, but, in words not very consistent with the establishment of the criteria, he said it all pointed to the impossibility of any approach other than the

57 *Airlines Case* (*No.* 2), *supra*, at pp. 85-6.

58 The former Attorney-General in his submission also launches into this singular use. P. H. Lane, 40 A.L.J. 265, also seizes on the singular use to pose a new dichotomy the external-internal affair. In some ways, this may represent a return to Harrison Moore's *in se* argument.

59 See especially the very interesting debate in the House of Representatives on the U.N. Food and Agricultural Organization Bill in 1944 in which Percy Spender, R. G. Menzies, Harold Holt, and Dr. H. V. Evatt participated. Harold Holt, in particular expressed his grave concern at the possible extent of the power: H. of Rep. 1944 *Hansard* vol. 180, pp. 1860-1910. The tenor of Sir Robert Menzies' remarks on the External Affairs power, *Central Power in the Australian Commonwealth* (Cassell: 1967, ch. 8) is in keeping with his political fears enunciated in the above debate. The fact, that, at the end of the chapter, he is unable on his own admission to fashion criteria delimiting matters relating to external affairs, is, in itself, perhaps instructive of the view one should, in law, take of the power!

approach based upon an examination of the particular agreement and its subject-matter looked at in its own circumstances at that time.

Consider, however, the application of criteria two and three. The Attorney-General's submission was addressed to the Court not only with respect to multilateral conventions but to all forms of international agreements. If that is so, criterion two would seem to preclude the use of the external affairs power to support many bilateral agreements. Would not the bilateral air service agreements be in jeopardy? It could be argued that many countries with international airlines have a comparable interest in the arrangement between Australia and another power. This may hinge on the term "comparative interest". If this is to mean nothing more than an interest of the same comparability with that of the two states in the specific matter contained in that agreement, then, I suggest, the effect of such a criterion is comparatively slight and hardly worth the comment.

Criterion three could produce some odd results. Where international agreements such as those with the Asian Development Bank, or European Launcher Development Organization presuppose varying obligations on the parties then it would seem that these agreements would be excluded from the support of the external affairs power if the third criterion were to be accepted. The multilateral Continental Shelf Convention to which Australia is a party, grants rights to coastal states (Article 2) over the shelf but the article is not drafted in the form of an obligation. Would it now be suggested that the Commonwealth, dependent here on the external affairs power, would be placed *vis-à-vis* other international states and organizations in a different negotiating position? In this regard, the Commonwealth attempted to legislate in this respect in the Territorial Sea and Continental Shelf Bill 1970. The Bill, under political pressure from the States, was unfortunately not proceeded with and the conundrum of off-shore powers remains. How much more satisfactory it would have been to have gone ahead with the legislation and allowed for its testing in the High Court. In my view, the section dealing with the Continental Shelf provisions would undoubtedly have been upheld as valid by the Court as being within the terms of the Convention and the external affairs power.[60] I suspect, of course, that such a submission as was presented by the Commonwealth in the *Airlines Case* (*No.* 2) on the scope of the external affairs power would, of necessity, have been substantially recast had the Commonwealth been faced with litigating its Territorial Sea and Continental Shelf legislation. So much the more remarkable is the fact that such a submission was ever put forward. At a time when Australia's international commitments are growing apace and our own world is a much larger one, the hamstringing of the Commonwealth by this sort of submission is to be deplored descending, as it does, to an acceptance of policy that aims to curry favour with a view amounting to no more than rather petulant parochialism.

---

60 See also *Bonser v. La Macchia*, 43 A.L.J.R. 275.

To return, however, to the Attorney-General's first criterion, is it really so clear, as he argued, that a Convention on diplomatic immunity is indisputably international in character whilst one concerning night work in bakeries is not? The term "indisputably international" refers, it is submitted, to the nature of the instrument, and not to the detail embodied in the treaty or agreement. If, for example, under certain human rights clauses, a multilateral convention abolished capital punishment, the very nature of the instrument would render the matter "indisputably international". The fact that the constituent states of the Commonwealth, to date, in matters relating to crime, generally have legislated exclusively within their own territorial jurisdiction would not be cause for saying that the matter was not international in character once supported by an international norm embodied in a multi-State agreement, thus leaving the way open for the Commonwealth to legislate consistently with the Convention.

Section 51 (xxix) resembles the defence power and grants power in its purposive nature and is unlike other heads in s. 51 which appertain to a particular subject-matter. The full ambit of the power, therefore, may not be all that clear, though the tests propounded in this article for a valid exercise of the power should not leave great areas of doubt in regard to the Commonwealth position. Nevertheless, there will be need to litigate more cases before some finality may be reached on the limits of the power. Whether there will be a good cross-section of cases relating to the external affairs power will, in the end, primarily depend upon political considerations, namely, the extent of Commonwealth involvement in legislation backed by s. 51 (xxix), and the strength of State reaction to such legislation.

Whatever the event, the court will be moved very largely by its *Burgess* rules. It may be that, apart from the prohibitions, the court may use in a selected circumstance an argument based on the *Melbourne Corporation Case* for the purpose of restricting the use of the Commonwealth power in relation to s. 51 (xxix).[61] If the circumstances were that the Commonwealth legislation implementing an international treaty tended to abolish or destroy the States and their powers then the *Melbourne Corporation Case* could, no doubt, be called in aid.[62] For example, if, to implement a Unesco Convention raising the school leaving age to eighteen years of age, the Commonwealth found that it had to legislate to control state secondary education and the argument was advanced that this tended to destroy state executive authority to a significant degree, then the court might well consider such legislation *ultra vires*. But this result, by no means, would be assured.[63] At the same time, this sort of argument would not, I submit, meet with much success where, for example, the

61 *Melbourne Corporation v. The Commonwealth* (1947), 74 C.L.R. 31.

62 *Melbourne Corporation Case, supra,* at pp. 70, 82, 83.

63 In this regard the trend of decision in relation to the defence power s. 51 (vi) is pertinent. The defence power is a purposive power which by its very nature has effect upon State legislative and executive functions. Also instructive are the judgments in the *Payroll Tax Case* before the High Court (not yet reported).

Commonwealth merely legislated to exercise certain labour controls pursuant to an I.L.O. Convention which did not have the effect of prohibiting or preventing the exercise independently of State governmental functions.

What is the position of the Commonwealth in relation to the I.L.O. Conventions and Recommendations? To assist the Federal States, the Constitution of the I.L.O. in 1919 contained a so-called Federal clause[64] which, as one commentator put it, was merely a "compromise, necessary to save the life of the embryo organization, and nothing more".[65] A new Federal clause (Article 19 (7)), arrived at again by compromise, was introduced in the Montreal Amendments of 1948 to the I.L.O. Constitution.[66] Generally the Commonwealth

---

64 Article 19 (9).

65 R. B. Looper, *'Federal State' Clauses in Multilateral Instruments* (1955-6), XXXII B.Y.I.L. 162, 170.

66 "7. In the case of a Federal state, the following provisions shall apply:—
(a) in respect of Conventions and Recommendations which the Federal government regards as appropriate under its constitutional system for Federal action, the obligations of the Federal state shall be the same as those of Members which are not Federal states;
(b) in respect of Conventions and Recommendations which the Federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for Federal action, the Federal government shall:—
(i) make, in accordance with its Constitution and the Constitutions of of the States, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than 18 months from the closing of the session of the Conference to the appropriate Federal, State, provincial or cantonal authorities for the enactment of legislation or other action;
(ii) arrange, subject to the concurrence of the State, provincial or cantonal governments concerned, for periodical consultations between the Federal and the State, provincial or cantonal authorities with a view to promoting within the Federal state co-ordinated action to give effect to the provisions of such Conventions and Recommendations;
(iii) inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate Federal, State, provincial or cantonal authorities with particulars of the authorities regarded as appropriate and of the action taken by them;
(iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the governing body, the position of the law and practice of the Federation and its constituent states, provinces, or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Conventions by legislation, administrative action, collective agreement, or otherwise;
(v) in respect of each such Recommendation, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the governing body, the position of the law and practice of the Federation and its constituent states, provinces or cantons in regard to the Recommendations, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendations and such modifications of these provisions as have been found or may be found necessary in adopting or applying them."

has hidden far too long behind the Federal clause.[67] In relation to the I.L.O. the Commonwealth's power to ratify conventions is not subject, I suggest,, to legal limitations as should strain the use of the external affairs power. The Commonwealth has full power to enter a convention and once having done so may implement it, subject only to the prohibitions, and perhaps an argument such as is advanced in the previous paragraph concerning the *Melbourne Corporation Case*, but which I suggest is unlikely to succeed with respect to the I.L.O. Conventions.[68]

---

67 In 1956, the then Minister for Labour and National Service answered at some length upon notice a series of questions on the I.L.O. put by the present Leader of the Opposition (*Hansard*, H. of R., 13 pp. 1930-1936). *Inter alia* he said:—

"4. Of the 86 conventions which have not been ratified by Australia, six (Nos. 28, 33, 34, 41, 66 and 75) have been revised by subsequent conventions and are no longer open to ratification. There appear to be only 16 (Nos. 23, 24, 25, 35, 36, 37, 38, 40, 44, 48, 56, 82, 83, 84 and 97) of these unratified conventions which can be regarded as appropriate solely for Federal action. Of these, 11 (Nos. 24, 25, 35-40, 44, 48 and 50) relate to various aspects of social security based on the insurance principle while three more (Nos. 82, 83 and 84) are confined in their application to external territories. In addition, two conventions (Nos. 94 and 102), although concerning both Commonwealth and States, are in such terms that ratification could take place solely on the basis of Commonwealth law and practice. The remaining 62 unratified conventions primarily concern the States.

5. The Commonwealth government has been advised by the International Labour Office that the ratification of the eleven conventions relating to aspects of social security based on the insurance principle is not possible on the basis of the Australian social security system. The three conventions applying to our external territories have all been closely examined but as the provisions prescribed differ in some respects from the law and practice operating in the territories, ratification is not possible. It has been decided not to ratify one of the two remaining conventions (No. 97, *Migration Employment*), while the other (No. 32, *Repatriation for Seamen*) is currently being examined. The two unratified conventions which concern both the Commonwealth and the States, but could be ratified solely on the basis of Commonwealth law and practice, are being considered by the appropriate Commonwealth authorities at the present time. As regards the 62 unratified conventions which primarily concern the States, the statement which was presented to the House in October 1953, dealing with action taken or being taken on the conventions and recommendations adopted at the 34th (1951) session of the Conference indicates some of the problems. In many cases, provisions of the convention are in advance of the standards existing in one or more of the States, even if only in minor respects, and until these standards are amended by the States in question, ratification is not possible. Moreover, in some instances, the subject-matter of the conventions is the responsibility of various industrial tribunals and there can be no certainty that the standards which the tribunals may fix will be or remain consistent with the terms of the convention. However, continuous consultation takes place between the Commonwealth and the States on the possibility of ratifying further conventions, and currently six are being actively considered."

68 See A. C. Castles, *The Ratification of International Conventions and Covenants*, Justice No. 2, June 1969.

Looper, in the article previously mentioned,[69] is justifiably critical of the use made by Australia and the United States of the Federal-State Clause. He correctly asserts that under the guise of a legal weapon it is nothing other than a political tool, for, in constitutional law, there is no need for its use by either of these states. The criticisms by unitary states levelled at the stand taken by Australia and the United States in relation to the clause have some merit. With the result, federal clauses are far from being popular themes during the drafting stages of international conferences.

The result, so far, has been that the Commonwealth has often found the Federal clause argument to be a convenient escape route to avoid ratification of an I.L.O. Convention. If the Commonwealth were to ratify without receiving the concurrence of the States, it would prove administratively difficult for it would lead to a duplication of labour controls. This administrative factor, then, may prove decisive when a decision has to be made on whether or not any particular multilateral agreement should be ratified. For example, administrative control must have been a prime factor in the rather elaborate structure of Commonwealth-State Acts enacted to implement the convention on the Prevention of the Pollution of the Sea by Oil.[70] In his book on the treaty power of Australia, Doeker[71] painstakingly sets out the stages of negotiation between the States and the Commonwealth for the purpose of demonstrating that this was required owing to the absence of Commonwealth legal power to deal with the matter itself. This certainly is incorrect. There can be no doubt that the Commonwealth had the power by way of the Convention to legislate for territorial waters, internal waters, ports and harbours, but it was purely an administrative policy decision, aided by some political factors, which decided otherwise. In this respect, it is instructive to compare the administrative solution reached in the pollution situation with the rationale behind the decision to legislate with respect to narcotic drugs.[72] Here the policy decision went the other way to permit the Commonwealth Department of Customs full control over manufacture. In other words, administratively it was more desirable apparently to operate centrally. There was no query that the Commonwealth could not legislate in this case pursuant to the external affairs power.

Recommendations present a more difficult question. Whether the external affairs power will back such legislation depends a good deal,

---

69 Looper, op. cit.

70 327 U.N.T.S. 3.

71 Doeker, op. cit. He accepts far too readily the thoughts (I suspect this when reading his acknowledgments) to which he was exposed in the various State legal departments with the result that he tries to raise almost non-existent consultative procedures into the framework of constitutional conventions. He fails to grasp that the arguments are simply political and not legal. Further, the channel of communication to the States on multilateral instruments is not necessarily so rigid or so State-oriented as he seems to make out.

72 Narcotic Drugs Act 1967 (Com.).

I suggest, on the nature of the recommendations.[73] It seems, for example, that the Commonwealth could legislate to adopt a resolution of the Security Council under Article 37 of the United Nations Charter.[74] On the other hand, certain I.L.O. Recommendations possibly may not be implemented.[75]

The argument concerning the I.L.O. Convention may, at first, appear to be put too extravagantly, but let us return for a moment to the narcotics legislation. The 1961 Single Convention on Narcotic Drugs clearly indicated the desirability of international regulation to limit and regulate the manufacture of drugs. The very imposition of an international norm impresses the subject-matter with an international character. At the same time the imposition of the controls in Australia is a matter entirely internal. Is it logical then to distinguish between the narcotics example and that of internationally regulated labour controls through principles agreed to in conventions by a large number of international states? Should not these equally be implemented by the Commonwealth in domestic legislation? Why then, to turn to the classic illustration of the "restrictionists", is a convention on night work in bakeries any less "indisputably international" than the control of manufacture of narcotics? This argument, of course, leads back to Latham, C.J.'s list in *Burgess' Case*[76] of matters of international concern and his belief that they may be of infinite variety.

Another viewpoint on s. 51 (xxix) should be mentioned if only to indicate its shortcomings and lack of appreciation of the *Burgess Rules*.[77] Lane's thesis is that the external affairs power is limited and that the test to be applied is whether the matter is one of "mutual international interest". In deciding this, Lane suggests that the Court might be minded to categorise matters which were "internal" as distinct from those which were "external". If a matter was then considered "internal", and was not otherwise within the Common-

73 I do not believe that there is magic in the word obligation. The granting of rights under the Continental Shelf Convention (Article 2), is, in my view, as effective a conferring of power under which the Commonwealth may legislate pursuant to s. 51 (xxix) as any provision purporting to place the Commonwealth under a specific duty. "The Commonwealth will be limited to making laws to perform the obligation, or to secure the *benefits* which the treaty imposes or confers on Australia." (per Barwick, C.J., *Airlines of N.S.W. Case (No. 2)*, [1965] A.L.R. 984; 113 C.L.R. 54, at p. 86). The italicizing of "benefits" is mine.

74 Art. 37.
1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

75 On this point, see generally, the article by K. H. Bailey, *International Labour Review*, November-December 1946, p. 285 ff.

76 *R. v. Burgess, supra*, at p. 641.

77 40 A.L.J. 257, at p. 261.

wealth power, then it could not be supported by the external affairs power.

He argues that, if the Commonwealth Parliament were to pass legislation in conformity, say, with the Declaration of Human Rights or better a United Nations Human Rights Convention concerning freedom of association with the object of superseding state legislation on compulsory unionism, the High Court might well hold the legislation to be *ultra vires* on the ground that as the signatories to such a Convention are not mutually interested in the subject-matter but only severally in relation to each signatory's own territory, the matter is properly an "internal" affair, and, therefore, not a matter which could be supported by s. 51 (xxix).

His argument requires that for an "affair" to be "external" there should be some mutuality or reciprocity of international interest between Australia and another foreign state. If such an "affair" does not exhibit these characteristics it is not, according to Lane "external" but "internal". The singular use of the terms of the power is not unknown in the High Court[78] but the term is, I suggest, rather a composite one. There does not seem to be any good purpose served in making use of the singular. It does not assist in the determination of its meaning and, in fact, may well do violence to it. A matter either relates to external affairs or it does not.

Apart from the fact that there does not seem to be support in the High Court for the Lane analogies, there is a further difficulty. In a number of conventions, there are provisions which, to use his nomenclature, are specifically of an "internal" character although the convention itself may be classified as one relating to an "external affair". Is it necessary then, under Lane's analysis, that such a convention would have to split up its provisions into what are considered affairs "internal" and "external", and then attempt to obtain all states approval to the "internal" matters? Maybe Lane suggests you overcome this difficulty by deciding whether the international instrument itself is generally "external" or not, but this solution is not without its difficulties.

Such questions of characterization are not easy ones in constitutional law. In a regional economic agreement there could be considerable scope for argument as to its "internal" or "external" character. How would, for example, one characterize an agreement such as the European Convention on the Liability of Hotel-Keepers Concerning the Property of their Guests?[79] In essence this sort of analysis appears unnecessary and not required in the light of current constitutional modes of interpretation.

It is submitted once the Commonwealth has ratified a Convention that ,where there is no other head of power to support it, it may be supported, for the purpose of its implementation by the Commonwealth by s. 51 (xxix). This will be subject to these limitations:—

---

78 113 C.L.R. 85, per Barwick, C.J.

79 Cmnd. 1978.

(a) that the obligations were assumed bona fide;
(b) that ensuing legislation will not infringe the constitutional prohibitions; and
(c) that the legislation will not be destructive of the states or so impede the states in their governmental functions that it would effectually destroy them.

Acceptance of this means of interpreting the power bears the hallmarks of simplicity and ease of operation. More important, from the point of view of Australia's future international relationships, it will unable Australia to accept a fuller role and increase its capacity to enter more readily international commitments. It would not, thus, be hamstrung by subsequent state acceptance in a number of cases. Such a factor was not lost on the Supreme Court of Canada in the *Off-Shore Mineral Rights Case* where the Court paid heed to Canada's international status and obligations at international law.[80] With the increasing amount of international legislative activity, central governments become increasingly concerned in areas which must continue to overlap the internal constitutional arrangements of a Federal State. As one writer has put it, we need some enlightened political leadership possessed of common-sense and low blood-pressure.[81] Whether the subject-matter of an international conference is one that happens, within the constitutional framework, to fall within Commonwealth or State power, this should not prevent or, in itself stifle, Australian participation nor prevent or stifle prompt consideration and, perhaps, implementation of international accords. In this respect, would it be true to say that Australia has so far held back from active participation in the Hague Conferences on Private International Law through State disquiet or possible disquiet? It would certainly be a matter of some surprise if the Australian High Court, when called upon to adjudicate a matter calling for the interpretation of s. 51 (xxix), was any less appreciative of Australia's present role in the world or the need to meet its international obligations than the Canadian Supreme Court was in respect of Canada in the *Off-Shore Mineral Rights Case.*

80 Reference *Re Ownership of Off-shore Mineral Rights* (1968), 65 D.L.R. (2d.) 353, at pp. 376, 380.

81 Gerald L. Morris, *The Treaty Making Power: A Canadian Dilemma* XLV Can. Bar Rev. 478.