

## THE HIGH COURT AND THE EXTERNAL AFFAIRS POWER: A CONSIDERATION OF ITS OUTER AND INNER LIMITS

Considerable speculation has been already indulged in by constitutional writers as to the meaning and possible consequences of this grant of power over external affairs. It may hereafter prove to be a great constitutional battleground.<sup>1</sup>

**D**URING the past ten years the High Court has, through a series of decisions, broadened the scope of the Commonwealth's power over external affairs as provided for in s51(XXIX) of the Constitution. While the decisions in *Koowarta v Bjelke-Peterson* (*Koowarta*)<sup>2</sup> and *Commonwealth v Tasmania (Tasmanian Dams)*<sup>3</sup> were perhaps the most significant in terms of finally establishing the Commonwealth's power to implement international treaties into domestic legislation, neither decision completely resolved all the questions over the

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1 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901) p631.

2 *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; hereinafter *Koowarta*. For comment see "Current Topics: The Plentitude of the External Affairs Power" (1982) 56 *ALJ* 381; Lane "The Federal Parliament's External Affairs Power: *Koowarta's Case*" (1982) 56 *ALJ* 519.

3 *Commonwealth v Tasmania* (1983) 158 CLR 1; hereinafter *Tasmanian Dam*. This decision has attracted considerable academic comment, see Goldring, "Initial Reactions to the Dam Case: Dams or Floodgates ?" (1983) 8 *Leg Ser Bull* 156; Lane "The Federal Parliament's External Affairs Power: The Tasmanian Dam Case" (1983) 57 *ALJ* 554; Coper, *The Franklin Dam Case* (Butterworths, Sydney 1983); Crock, "Federalism and the External Affairs Power" (1983) 14 *MULR* 238 at 256-263; Byrnes & Charlesworth, "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 *AJIL* 622; McNamara, "The Implementation of Treaties in Australia" (1986) 24 *Archiv des Volkerrechts* 41; Tighe, "Environmental Values, Legalism and Judicial Rationality: The Tasmanian Dam Case and Its Broader Political Significance" (1987) 4 *EPLJ* 134.

extent of the external affairs power. The later decisions in *Richardson v Forestry Commission of Tasmania (Richardson)*<sup>4</sup> and *Queensland v Commonwealth (Daintree Rainforest)*<sup>5</sup> filled in further gaps in the understanding of the power, especially as to the extent that an international treaty may be relied upon to enact domestic legislation and protect specific areas of certain States from environmental damage.

The common thread in all of these cases was that they specifically dealt with treaties.<sup>6</sup> Three of the cases dealt with domestic legislation based on the same treaty - the 1972 Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention)<sup>7</sup> and occurred during a time of great political debate over the Commonwealth's use of the external affairs power to protect the environment and intrude into areas traditionally the subject of exclusive State control.<sup>8</sup> During this time little attention was given to other aspects of the Commonwealth's external affairs power - especially the power over matters which are physically external to Australia. This aspect of s51(XXIX) had been considered in 1975 by the High Court in *New South Wales v Commonwealth (Seas and Submerged Lands)*,<sup>9</sup> when Commonwealth legislation dealing with Australia's territorial sea and

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4 *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261; hereinafter *Richardson*. For discussion see Starke, "A Major Extension of the Commonwealth Parliament's External Affairs Power" (1988) 62 *ALJ* 319; Tsamenyi & Bedding "The World Heritage Convention in the High Court: A Commentary on the Tasmanian Forests Case" (1988) 5 *EPLJ* 232; Rothwell "Dams, Forests and More External Affairs: A Case Note on *Richardson v Forestry Commission (Tas)*" (1988) 18 *QLSJ* 507.

5 *Queensland v Commonwealth* (1989) 167 CLR 232; hereinafter *Daintree Rainforest*. For comment see Rothwell, "The Daintree Rainforest Decision and its Implications" (1990) 20 *QLSJ* 19; Christie, "The Daintree Rainforest Decision and its Implications: Comment" (1990) 20 *QLSJ* 223.

6 Throughout this article, with the exception of where the term 'Convention' is used in the title of an international legal instrument, reference will be made to 'treaty' or 'treaties' rather than 'convention' or 'conventions'.

7 Adopted by 17th session of UNESCO General Conference at Paris on 16 November 1972 and entered into force in 1975, reprinted in (1972) 11 *ILM* 1358; for a review of these cases see Boer, "World Heritage Disputes in Australia" (1992) 7 *J of Environmental Law & Litigation* 247.

8 See the discussion in Lee, "The High Court and the External Affairs Power" in Lee & Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, Sydney 1992) pp84-91; Lumb, "The External Affairs Power and Constitutional Reform" (1988) 62 *ALJ* 679 at 682-689; Aust, Constitutional Commission, Advisory Committee on the Distribution of Powers, *Report* (AGPS, Canberra 1987) pp74-76.

9 *New South Wales v Commonwealth* (1975) 135 CLR 337; hereinafter *Seas and Submerged Lands*.

continental shelf had been challenged by the States. However, despite some of the majority judges accepting that this aspect of the power was extensive enough to apply to "any affair which in its nature is external to the continent of Australia and the island of Tasmania",<sup>10</sup> few commentators have focussed on this aspect of the external affairs power and the potential scope for legislative action that it confers upon the Commonwealth. As noted above, this no doubt was a consequence of the fact that the treaty implementation aspect of the power was unresolved till the 1980s and that as the Commonwealth increasingly began to seek to rely upon international treaties as a basis for domestic legislation it was the issues surrounding that aspect of the power which became the most contentious and discussed.

In 1991 the High Court reconsidered this aspect of the external affairs power in *Polyukhovich v Commonwealth (Polyukhovich)*.<sup>11</sup> In upholding the constitutional validity of the *War Crimes Amendment Act 1988* (Cth) by a 4-3 majority on the basis of the Commonwealth's ability to regulate matters physically external to Australia under s51(XXIX),<sup>12</sup> some of the judges also give consideration to aspects of the external affairs power which have never been fully comprehended or realised by the Court or the Commonwealth. In this respect, the judgments of Brennan and Toohey JJ are valuable insights into the close relationship which exists between international law and potential Commonwealth power under s51(XXIX).

The decision in *Polyukhovich* can be seen as a reminder that not all aspects of the operation of the Commonwealth's external affairs power have yet been fully determined by the Court. Some of the individual judgments also demonstrate that a variety of concerns still exist within the Court over how the power operates. More recently, questions have been raised over the Commonwealth's ability to rely upon the external affairs power to implement industrial relations reforms. Commonwealth commitments following the 1993 Federal election to implement minimum working standards for all Australian workers and introduce unpaid parental leave have been queried on the basis that the Commonwealth can not rely upon

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10 *Seas and Submerged Lands* at 360, per Barwick CJ.

11 *Polyukhovich v Commonwealth* (1991) 172 CLR 501; hereinafter *Polyukhovich*. For an analysis see Lee, "The High Court and the Constitution" in Lee and Winterton (ed), *Australian Constitutional Perspectives* pp84-89; Thompson, "Is It a Mess? The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and the Australian Constitution" (1992) 22 *UWALR* 197.

12 Mason CJ, Dawson, Toohey, McHugh JJ; Deane, Brennan, Gaudron JJ contra.

certain International Labour Organisation (ILO) Conventions.<sup>13</sup> These debates over Commonwealth reliance on ILO Conventions not only illustrate how the external affairs power may be used to regulate subjects that other Commonwealth heads of power can not, but also that the Commonwealth's power is limited by the terms of those Conventions. Contrary then to the fears of some commentators, who following the decision in *Tasmanian Dam* foresaw the end of federalism in Australia, there do remain a significant number of limitations on the operation of s51(XXIX) and questions as to what are the outer limits of the power.

This article will focus on what exactly is the current extent of the external affairs power following the developments in constitutional jurisprudence during the 1980s and the decision in *Polyukhovich*. With the ever growing trend of international fora to consider matters of international significance to states, the potential ambit of the treaty implementation aspect of s51(XXIX) continues to expand each year. However, as the cases have demonstrated, there is no absolute need for the Commonwealth to rely upon a treaty to implement into domestic legislation international law. A review of the High Court's jurisprudence concerning the external affairs power indicates that there are seven branches. That is, the Commonwealth can potentially seek to rely upon s51(XXIX) as the basis for a legislative act when the relevant Commonwealth law:

- (1) Is with respect to a matter external to Australia.
- (2) Is based on an international treaty to which Australia is a party.
- (3) Is with respect to a matter the subject of international concern.
- (4) Is with respect to a matter which Australia is under an international obligation to regulate.
- (5) Is one which is generally regulated and subject to international law under either customary international law or under general principles of international law.
- (6) Has been subject to recommendations by international bodies, agencies or organisations.

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13 Lewis, "Govt Stalls Promise to Parents" in *Sydney Morning Herald*, 29 April 1993, p5; Lewis, "Most States Oppose Brereton's Work Plan" in *Sydney Morning Herald*, 1 May 1993, p5.

- (7) Relates to matters which deal with Australia's relations with other states.

Each one of these branches of s51(XXIX) will now be considered.

## MATTERS EXTERNAL TO AUSTRALIA

Because of the attention given to the treaty implementing aspect of s51(XXIX), the Commonwealth's ability to legislate for events, matters, things or conduct which occur physically external to Australia has been much neglected. Despite the decision in *Seas and Submerged Lands*, equivocation by the High Court as to the Commonwealth's powers over the territorial sea plus the existence of a treaty as an alternative basis for the Act resulted in some uncertainty as to what exactly was the full extent of this aspect of the power. The decision in *Polyukhovich* has done much to refocus attention on this aspect of s51(XXIX) and to confirm conclusively the potential breadth of its reach. Nevertheless, there was some division within the Court as to how far the Commonwealth could go in legislating for matters or events which occurred physically beyond Australia.

Relying upon *Seas and Submerged Lands*, most of the judges in *Polyukhovich* were of the view that the power extended to matters, things and relationships which were external to Australia.<sup>14</sup> While not particularly deciding to whom and to what the power may extend, both Brennan and Toohey JJ were also of the view that the power had an expansive operation in regard to various matters beyond Australia.<sup>15</sup> Some of their Honours were also prepared to acknowledge that the power could extend to persons.<sup>16</sup> The major area of contention amongst the members of Court was whether there existed a need for the Commonwealth to prove the existence of a connexion with the external matter and Australia. Mason CJ, Deane, Dawson and Toohey JJ, were of the view that there was no need to demonstrate such a connexion.<sup>17</sup> Of the three judges who spoke of the

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14 *Polyukhovich* at 528-529, per Mason CJ; at 549-550, per Brennan J; at 599, per Deane J; at 632, per Dawson J; at 696, per Gaudron J; at 712, 714, per McHugh J.

15 At 549-550, per Brennan J; at 653, per Toohey J.

16 At 528-529, per Mason CJ; at 552, per Brennan J; at 632, per Dawson J.

17 Mason CJ noted that the extraterritorial competence of the Commonwealth, as demonstrated in decisions such as *R v Foster, ex parte Eastern and Australian Steamship* (1959) 103 CLR 256, meant that there was no need to prove a demonstrable Australian interest or concern in the external subject matter as the fact that Parliament has legislated for the subject was sufficient proof (at 529-530). Of the other judges Deane J saw no need for there to be "some identified

need for a connexion, Gaudron J was the most imprecise as to what degree of connexion or relationship was required. In any event, her Honour was of the view that once Parliament had selected an external act, matter or thing as the subject matter of legislation then any need for an 'interest or concern' had been satisfied.<sup>18</sup> Brennan and Toohey JJ were the most demanding of all the judges in requiring the existence of some connexion between the Commonwealth and the subject matter legislated upon. Brennan J was of the view that the 'affairs' which could be legislated upon must be those of Australia.<sup>19</sup> His Honour noted that a consequence of this view was that matters may fall in and out of the scope of this aspect of the external affairs power depending on whether there was a necessary connexion at any particular time.<sup>20</sup> Applying this view to the facts of the case, Brennan J was of the opinion that there existed no power with the Commonwealth to prohibit conduct outside Australia of persons who were not a citizen or resident of Australia at the time when the activity was engaged in.<sup>21</sup> While taking a similar view on this matter as Brennan J, Toohey J saw that a connexion could be established if there existed a "national interest in some person, thing or matter that enables one to say that the subject of legislation concerns Australia".<sup>22</sup> On this basis, his Honour was prepared to accept that this was a matter which Parliament would determine, noting in an aside that it would be strange for Parliament to legislate with respect to a matter in which it had no interest.<sup>23</sup>

The decision in *Polyukhovich* then accepts that the Commonwealth does have irrefutable powers over events, matters, and things which occur physically beyond Australia. By a combination of express acceptance and implication - because of the reach of events, matters and things - *Polyukhovich* is also authority for the application of the power to persons. As for the need for there to be a close connexion between Australia and the subject matter legislated for, a majority did not consider this to be a significant limitation upon the power once Parliament had made a legislative

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connexion with Australia" (at 599); while McHugh J relied upon the prefatory words "peace, order and good government" of s51 as being wide enough in their scope so as to not require a law to have a recognizable connexion with Australia in order for it to be valid (at 714); see also Dawson J at 634.

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At 695-696.

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At 550-551; His Honour considered that while the words 'peace, order and good government' contain no territorial limitation they do not have the effect of expanding the connotation of 'external affairs'.

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At 554-555.

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At 555.

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At 653.

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At 654.

judgment on the question. This case does not, however, resolve all the questions concerning the ambit of this aspect of s51(XXIX). Significantly, the Court did not address the issue of geographical externality. For an event, matter, thing or person to be an external affair where must it be located? Obviously if the subject matter of the law is in another country - as occurred in *Polyukhovich* - that is sufficient. But where is the dividing line? In *Seas and Submerged Lands*, Barwick CJ expressed the following view:

The power extends ... to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole. For this purpose, the continent of Australia and the island of Tasmania are ... bounded by the low-water mark on the coasts.<sup>24</sup>

From both an international and domestic law perspective, this would seem to be a readily accepted legal definition of the domestic boundaries of Australia.<sup>25</sup> However, one complication is that since the decision in *Seas and Submerged Lands* the Commonwealth has drawn extensive baselines around the Australian coastline and also entered into the 1979-1980 Offshore Constitutional Settlement with the six States and Northern Territory.<sup>26</sup> Both of these recent features relating to Australia's offshore may have an impact upon a consideration of what is an external affair.

The effect of the baselines is to create an artificial line from which Australia's territorial sea is delimited. Consequently, the traditional delimitation point for determining the territorial sea - the low-water mark - is not relied upon in instances where the coastline is deeply indented, or where there are bays and river mouths which depart from the normal direction of

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24. *Seas and Submerged Lands* at 360; His Honour agreed with a similar position taken by the United States Supreme Court in *United States v Texas* (1950) 339 US 707 at 719.
  25. For international purposes, as the sovereignty of a state is accepted as extending to the outer limits of its territorial sea, it could be argued that the boundary between the internal and external limit is the outer edge of the territorial sea - which in the case of Australia is now 12 nautical miles. As to the boundaries of the States, see McLelland, "Colonial and State Boundaries in Australia" (1971) 45 *ALJ* 671.
  26. For a review of both these issues see Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Federation Press, Annandale, NSW 1990) pp11-18, 104-129; Opeskin & Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *ODIL* 395 at 408-410, 417-418.

the coast.<sup>27</sup> The effect of the baselines is to make waters which are on the landward side of such lines 'internal waters' of Australia over which, in international law terms, Australia has unquestioned sovereignty as the littoral state. What is the consequence then of the baselines?<sup>28</sup> If Barwick~CJ intentionally referred to the low-water mark as being the geographical dividing line between an internal and external affair then irrespective of the change in the legal position the geographical limit will remain the determining limit for the purposes of s51(XXIX).<sup>29</sup> If, however, the low-water line was expressly referred to as representing the legal limit of Australia, it could be argued that since the drawing of Australia's baselines the legal definition of that limit has now altered.<sup>30</sup>

With respect to the 1979-1980 Offshore Constitutional Settlement (OCS), this political agreement between the Commonwealth and the States found legal expression in 1980 with the enactment of the *Coastal Waters (State Powers) Act 1980* (Cth) and the *Coastal Waters (State Title) Act 1980* (Cth).<sup>31</sup> The effect of this legislative package was to vest to the States and Northern Territory title and power over the 'coastal waters' adjacent to their coastlines. For the purposes of the OCS 'coastal waters' extend out to a 3 nautical mile territorial sea limit.<sup>32</sup> The OCS, which sought to overturn part of the effect of the decision in *Seas and Submerged Lands*, is also unique in that, rather than being based on s51(XXIX), the Commonwealth's

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27. For more details see, Aust, Department of Attorney-General, *Australia's Territorial Sea Baseline* (AGPS, Canberra 1988).
28. For a review of the relationship between the baselines, Australia's territorial sea, and the outer limits of the State boundaries see Lumb, *The Law of the Sea and Australian Off-Shore Areas* (University of Queensland Press, St Lucia, 2nd ed 1978) pp54-75.
29. As to the limit being geographical, see also the comments by Mason J in *Seas and Submerged Lands* at 471.
30. New baselines for the Australian coast were proclaimed in 1983. See *Cth of Aust Gazette*, No S29, 9 February 1983, pp4-8; on the position prior to 1983 see Lumb, "Australian Coastal Jurisdiction" in Ryan (ed), *International Law in Australia* (Law Book Co, Sydney, 2nd ed 1984) pp374-376.
31. Equivalent legislation enacted with respect to the Northern Territory was the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) and the *Coastal Waters (Northern Territory Title) Act 1980* (Cth).
32. One consequence of this is that with the extension of Australia's territorial sea to 12 nautical miles in 1990, the States and Northern Territory retain title and power over the first 3 nautical miles of the territorial sea while the Commonwealth has power and title beyond that point to the 12 nautical mile limit, see Opeskin and Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" 22 *ODIL* 395 at 406-410, 419-420.



constitutional grounding for the legislative package is s51(XXXVIII).<sup>33</sup> The question that the OCS raises in relation to the extent of the Commonwealth's power over matters physically external to Australia is whether, by conferring power and title to the States over the offshore out to the three mile limit the Commonwealth fettered itself from legislating with respect to that area. Is the effect of the OCS to redefine the internal/external limits of Australia for the purposes of Commonwealth legislative power?<sup>34</sup> One response to this proposition is that the Commonwealth can never fetter itself and that any attempt to limit the potential operation of s51(XXIX) in this manner would be an amendment of the Constitution. Another argument is that while the OCS is an important political agreement which has found legislative expression conferring certain Commonwealth powers and title to the States, the Commonwealth, nevertheless, retains the right to override the OCS by way of inconsistent legislative acts.<sup>35</sup> While the Commonwealth then retains the power to legislate for the 3 mile offshore area, it has not since the implementation of the OCS relied upon this aspect of s51(XXIX) to legislate for that area, relying instead upon the treaty-implementation aspect of s51(XXIX).<sup>36</sup>

A further unresolved question is how extensively this aspect of s51(XXIX) can operate domestically within Australia.<sup>37</sup> *Polyukhovich* demonstrates the potential of this issue. The *War Crimes Act* 1945 (Cth) and its 1988 amendments sought to deal with war crimes committed in another country by conferring upon Australian courts jurisdiction to try Australian citizens and residents for such crimes. Therefore, while the legislation focussed on an external matter, operationally it had a substantial internal aspect. None of the six judges who upheld the law on this aspect were troubled by this internal operation of the law. Yet if in some instances s51(XXIX) may have the effect of regulating internal conduct, are there any limitations to the reach

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33 Both the States and Northern Territory enacted complementary legislation requesting the Commonwealth to enact the OCS legislation, see Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* pp112-117.

34 See Crawford, "The Constitution and the Environment" (1991) 13 *Syd LR* 11 at 21-22.

35 Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* p122.

36 An example is the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth). For discussion see Butler & Duncan, *Maritime Law in Australia* (Legal Books, Redfern, NSW 1992) pp302-304, 315-321.

37 See Burmester, "A Legal Perspective" in Galligan (ed), *Australian Federalism* (Longman Cheshire, Melbourne 1989) pp198-199. This was a matter of concern for the minority judges in both *Koowarta* and *Tasmanian Dam* in regard to the treaty-implementing aspect of s51(xxix).

of such a law? Certainly in *Polyukhovich*, Deane J accepted that there was the potential for the Commonwealth law to interact with State law so that double jeopardy may occur and that this could result in a need to either read down the Commonwealth law or consider whether a conflict existed under s109 of the Constitution.<sup>38</sup> This concern was also raised by Dawson J, who argued that in construing s51(XXIX) it was necessary to consider the division of legislative powers between the Commonwealth and the States. However, his Honour did concede that in the case of a matter dealing with a circumstance external to Australia

although the sovereignty of the Australian nation is divided internally between the Commonwealth and the States, there is no division with respect to matters which lie outside Australia. There the sovereignty of the nation is the sovereignty of the Commonwealth which may act as if it were a unitary state without regard to the "conceptual duality" within Australia.<sup>39</sup>

Whether a law based on s51(XXIX) would be struck down on the basis of excessive interference with internal matters could be determined by a process of characterisation.<sup>40</sup> This is best demonstrated by contrasting a law dealing with an external matter but which has a significant internal operation, and another law which deals with an internal matter but which has a significant external operation. In the first example, a law which sought to comprehensively protect Australia's coastal marine environment out to the 200 mile limit from the effects of land-based pollution by imposing stringent regulations on the emission of pollutants into Australia's coastal rivers and harbours could be upheld under s51(XXIX). It could also be struck down on the basis that when properly characterised the law dealt with internal matters over which the Commonwealth had no comprehensive powers.<sup>41</sup> In the second case, if a Commonwealth law sought to protect Australia's shoreline, estuaries and harbours from the effects of ship-based pollution a law could be enacted imposing stringent limitations on both Australian and foreign shipping within waters adjacent to Australia. In this instance it could be queried whether the Commonwealth law sought to

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38 *Polyukhovich* at 604.

39 At 638, referring to *Seas and Submerged Lands* at 458, per Stephen J.

40 This is an element which even the more liberal judges on the High Court have readily accepted, see *Richardson* at 309-310, per Deane J.

41 It is conceded that such a law may be valid under the combined powers of s51(i) and s51(xx), but would a law enacted on this basis cover the activities of non-trading corporations not engaged in inter-state trade?

regulate external conduct in order to regulate an internal effect. Both examples raise the question as to how far a law based on an external affair can extend. Are there limits as to the connexion between the internal matter which is being regulated and the external affair? How far distant can certain external matters be regulated in order to deal with purely internal matters? While *Polyukhovich* does answer some of these questions, the exact limits are still unknown.

## LEGISLATION BASED ON A TREATY

It is perhaps this aspect of the external affairs power which has been the subject of greatest debate. Prior to 1983 there was only one instance where some judges were prepared to accept that the mere existence of a treaty was a sufficient basis for the use of the s51(XXIX) power.<sup>42</sup> However, at a minimum it can be said that the majority judgments of Mason, Murphy, Brennan and Deane JJ in *Tasmanian Dam* accepted that any international obligation imposed upon Australia by a bona fide international treaty could form the basis for legislation enacted in reliance on s51(XXIX).<sup>43</sup> Some judges, however, were prepared to take a much wider view of the ambit of this aspect of the power. Mason J believed that the mere entry into an international treaty by Australia demonstrated the judgment of the executive and of Parliament that the subject matter of the instrument was of international concern and that its implementation would benefit Australia. As such, "the Court should accept and act upon the decision of the executive government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention".<sup>44</sup> Of the majority only Brennan J believed that the mere existence of a treaty was not a sufficient basis for domestic legislation. The treaty had also to be one which imposed an international obligation upon states to take action or deal with a subject matter of international concern.<sup>45</sup> Nevertheless, Brennan J did concede that

it is difficult to imagine a case where a failure by Australia to fulfil an express obligation owed to other countries to deal with the subject-matter of a treaty in accordance with the terms of the treaty would not be a matter of international

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42 *R v Burgess, ex parte Henry* (1936) 55 CLR 608 at 681-682, per Evatt and McTiernan JJ.

43 Hanks, *Constitutional Law In Australia* (Butterworths, Sydney 1991) p344.

44 *Tasmanian Dam* at 125-126; also 170-171, per Murphy J.

45 At 219-220, in which reference was made to the test adopted in *Koowarta* by Stephen J.

concern, a matter capable of affecting Australia's external relations.<sup>46</sup>

In subsequent cases, both the minority judges in *Tasmanian Dam* and those appointed to the court after that decision have been prepared to accept this expansive view of the external affairs' treaty implementing power.<sup>47</sup> Accordingly, the position is that irrespective of whether an international treaty is representative of international concern or that it contains an international obligation upon state parties to that treaty, the mere acceptance of the treaty by Australia is a sufficient basis for the Commonwealth to rely upon the terms of the treaty to implement domestic legislation.<sup>48</sup>

Despite these decisions regarding the width of the treaty-implementing aspect of s51(XXIX) the High Court has consistently held that the Commonwealth does not, by entering into a treaty relationship with other states acquire a plenary power over the general subject matter of the treaty.<sup>49</sup> Rather, any domestic legislation based on a treaty must be 'appropriate and adapted' to the terms of the treaty.<sup>50</sup> This was a vital question in *Richardson* when the Commonwealth sought to establish a Commission of Inquiry to ascertain the suitability of certain areas in Tasmania for World Heritage listing, and, until such time as the Commission had handed down its findings, to protect those areas on an interim basis. While the Court unanimously upheld the creation of the Commission as a legitimate exercise of the Commonwealth's power to implement the World Heritage Convention, the validity of the interim protection measures caused some division. Deane and Gaudron JJ wrote

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46 *Tasmanian Dam* at 219; see Sawyer, "The External Affairs Power" (1984) 14 *Fed LR* 199 at 213 where it was noted that the "liberal view of what constitutes an international obligation" adopted by Brennan J would result in few occasions in which he would disagree with the other majority judges in *Tasmanian Dam*.

47 See *Richardson* at 321, per Dawson J, also *Daintree Rainforest* at 245-249, per Dawson J; *Richardson* at 343, per Gaudron J and at 332-333, per Toohey J. McHugh J, the other additional judge appointed to the High Court since the decision in *Tasmanian Dam* has not had an opportunity to express an opinion on this question yet, although he was a member of the unanimous court in *Daintree Rainforest*.

48 Crawford, "The Constitution and the Environment" (1991) 13 *Syd LR* 11 at 23; cf Lumb, "The External Affairs Power and Constitutional Reform" (1988) 62 *ALJ* 679 at 681.

49 *Tasmanian Dam* at 131, per Mason J; at 172, per Murphy J.

50 *Airlines of NSW Pty Ltd v New South Wales* (No 2) (1965) 113 *CLR* 54 at 87, per Barwick CJ; accepted in later cases, see *Tasmanian Dam* at 130, per Mason J; at 259, per Deane J; *Richardson* at 289, per Mason CJ and Brennan J; at 303, per Wilson J.

strong dissents against the majority view<sup>51</sup> that the measures adopted under the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth) were consistent with Australia's international obligations under the treaty. Both judges believed that on the facts the Commonwealth's legislation went beyond what the Convention prescribed. Deane J argued that the test in these cases should be whether there exists "a 'reasonable proportionality' between that purpose or object and the means which the law adopts to pursue it".<sup>52</sup> In this instance, his Honour was of the view that the Commonwealth had failed to demonstrate such a relationship because the protective measures implemented in reliance on the World Heritage Convention prohibited a range of activities beyond the commercial exploitation of the forests.<sup>53</sup> Gaudron J made a similar point, noting that the Commonwealth law prohibited activities which posed no threat to those qualities of the identified property that were integral to its potential as a World Heritage area.<sup>54</sup> These strong dissents then are a warning to the Commonwealth that even though the test for implementing domestic legislation based on a treaty is settled, each case will depend on its facts so that unless legislation implements word for word the terms of an treaty,<sup>55</sup> there is always the potential for a finding of invalidity.<sup>56</sup>

One issue which follows from the need for there to be an appropriate relationship between domestic legislation and a treaty is whether the Commonwealth must implement all provisions of the treaty. This was a

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- 51 *Richardson* at 291, per Mason CJ and Brennan J; at 304, per Wilson J; at 327, per Dawson J; at 336, per Toohey J.
- 52 At 311-312. The view adopted by Gaudron J on this question was that a Commonwealth law will be "reasonably capable of being viewed as conducive to the purpose of the treaty if it is also reasonably capable of being viewed as appropriate, or adapted to, the circumstance which engages the power" (at 342).
- 53 At 317-318.
- 54 At 346.
- 55 This is a most unlikely scenario because treaties are drafted to accommodate the interests of the various states which participate at a diplomatic conference, as a result, the terminology of treaties seeks to achieve objects and purposes rather than being regulatory; cf Zines, *The High Court and the Constitution* (Butterworths, Sydney, 3rd ed 1992) pp247-249.
- 56 In recent years the relationship between certain Commonwealth legislation touching on industrial affairs and the provisions of ILO Conventions have been questioned from the perspective of whether the legislation appropriately implements the ILO standards or whether they are in variance of such standards. See Creighton, "Enforcement in the Federal Industrial Relations System: an Australian Paradox" (1991) 4 *AJLL* 197 at 199-206; see more generally Taylor et al, "Strike Bill May Spark Constitutional Brawl" in *Australian*, 8 June 1988, p3; Millett & Lewis, "Mega-union Law to be Repealed" in *Sydney Morning Herald*, 27 April 1993, p3.

matter which initially came before the Court in *R v Burgess; ex parte Henry (Burgess)*.<sup>57</sup> In that case Evatt and McTiernan JJ, who had adopted a wide view of the Commonwealth's ability under s51(XXIX) to implement treaties into domestic law, commented on the need for a proper relationship between the legislation and the treaty. It was argued that

it must be possible to assert of any law ... passed solely in pursuance of ... the "external affairs" power, that it represents the fulfilment, so far as that is possible in the case of laws operating locally, of all the obligations assumed under the convention. Any departure from such a requirement would be completely destructive of the general scheme of the Commonwealth Constitution.<sup>58</sup>

While this strict view of the need to implement the terms of the treaty imposes limitations on the Commonwealth's ability to select what measures are most appropriate, it was conceded by their Honours that much will depend upon the terms of the treaty and the rights and duties that it confers or imposes.<sup>59</sup> Not all the judges in *Burgess*, though, adopted such a strict view of this limitation upon the Commonwealth, with Dixon J in particular referring more to the need for there to be a "faithful pursuit of the purpose" of the treaty rather than a strict implementation of its terms.<sup>60</sup>

On the next occasion in which this issue was considered, the Court indicated in *R v Poole; ex parte Henry* <sup>61</sup> that the question was not whether the legislation implemented "word for word" the terms of the treaty but rather whether there had been a proper implementation of the treaty. Accordingly, in the view of the majority the Air Navigation Regulations implemented under the *Air Navigation Act 1920* (Cth) were a faithful implementation of the Paris Convention for the Regulation of Air Navigation (1919) under Australian conditions. Members of the court emphasised that it was at the discretion of the Parliament to determine the

57 *R v Burgess, ex parte Henry* (1936) 55 CLR 608; hereinafter *Burgess*.

58 At 688.

59 As above. See for comment Blackshield, "The Development of Commonwealth Powers: From Goya Henry to the Queensland Power Dispute" in Spender (ed), *Human Rights: The Australian Debate* (Redfern Legal Centre, Redfern, NSW 1987) pp92-93.

60 At 674. However it was warned that "wide departure from the purpose is not permissible, because under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates" (at 674-675).

61 (1939) 61 CLR 634.

best methods of implementing the Convention.<sup>62</sup> It was accepted, however, that the degree of discretion which the Parliament will have in these instances will very much depend upon the language of the treaty.<sup>63</sup>

This approach has been confirmed in recent cases where the High Court has concentrated more on the exact relationship between the terms of the treaty and the domestic legislation, than on questions of whether there has been a complete implementation of the treaty into Australian law. In squarely addressing this point in *Tasmanian Dam*,<sup>64</sup> Brennan J noted:

Where a treaty obligation gives rise to legislative power in the Commonwealth to perform the obligation fully and the Commonwealth chooses to exercise the power only to a limited extent, the validity of the law it chooses to make is not affected by its failure to exercise its powers and to perform Australia's obligation more fully.<sup>65</sup>

The only question, therefore, is whether the domestic legislation seeks to carry out the purpose of the treaty in a manner which can be classified as appropriate and adapted to Australian conditions. Given that Deane J has described the width of the Commonwealth's obligation as being to observe the 'spirit' of the treaty,<sup>66</sup> there is accordingly no need for a strict word for word relationship between the treaty and s51(XXIX) law.<sup>67</sup>

Another matter for consideration is whether the Commonwealth's ability to rely upon a treaty depends on the status of that treaty. Obviously if Australia is a party to a treaty, in that it has fulfilled all the requirements under the treaty so as to be bound by the treaty, and the treaty has entered into force, there will be no question about it being a suitable treaty to rely upon for the purposes of s51(XXIX). It is common in Australia, however,

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62 At 647, per Starke J.

63 At 644, per Rich J; on this point see Chinkin, "The Conclusion and Implementation of Treaties in Federal and Unitary States" in Tay (ed), *Australian Law and Legal Thinking Between the Decades* (Faculty of Law, University of Sydney, Sydney 1990) p249.

64 At 233, where it was accepted that the World Heritage (Western Tasmania Wilderness) Regulations under the *World Heritage Properties Conservation Act* 1983 (Cth) only implemented part of the World Heritage Convention.

65 At 234.

66 At 258-259.

67 Blackshield, "The Development of Commonwealth Powers: From Goya Henry to the Queensland Power Dispute" in Spender (ed), *Human Rights: The Australian Debate* p93.

for the Commonwealth to initially sign multilateral treaties and then deliberate for some time over whether they should be ratified. This is a practice which has come in for some criticism, but the Commonwealth often responds by arguing that the delay is usually a result of the desire to consult with the States before a treaty is fully accepted.<sup>68</sup> Delays can also occur due to the legislative process.<sup>69</sup> Is it possible then for the Commonwealth to rely upon s51(xxix) to implement a treaty that it has signed but which it has not ratified?<sup>70</sup> States are under an obligation in international law to refrain from acting in a manner that would defeat the object or purpose of a treaty to which they are a signatory.<sup>71</sup> However, this is not an obligation which actively requires states to implement the treaty before it is ratified; rather, it is one not to derogate from the fundamental terms of the treaty. To circumvent the difficulty which could arise in implementing a treaty by way of domestic legislation prior to the Commonwealth being bound by the treaty, or, in having ratified a treaty without having in place legislation to implement the obligations of the treaty into Australian law, the Commonwealth will often delay the proclamation of legislation implementing a treaty until such time as Australia has ratified the treaty.<sup>72</sup> Accordingly, on the day the implementing legislation becomes operative the

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68 The Commonwealth now consults with the States over the terms of treaties which Australia is considering becoming a party to, see "Principles and procedures for Commonwealth-State consultation on treaties - adopted at Premiers Conference - June, 1982, as subsequently endorsed by the Commonwealth in October 1983" reprinted in B Galligan (ed), *Australian Federalism* pp212-215.

69 Burmester, "A Legal Perspective" in Galligan (ed), *Australian Federalism* pp204-210.

70 This matter briefly arose in December 1992 when the Federal Government announced that it would introduce legislation based on an ILO Convention in an effort to override laws introduced by the then recently elected Liberal government in Victoria, yet at the time Australia had not ratified the Convention. See Grattan & Middleton, "Awards: Keating Steps In" in *The (Melbourne) Age*, 3 December 1992, pp1, 6; Kingston, "International Treaties Give Canberra Extra Clout" in *The (Melbourne) Age*, 3 December 1992, p6.

71 Article 18, Vienna Convention on the Law of Treaties, 1155 *UNTS* 331.

72 See *R v Australian Industrial Court; ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235 at 242-243 where Mason J referred to s55 of the *Trade Practices Act* 1974 (Cth), the entry into force of which was delayed by the operation of s2(2) till such time as the Paris Convention for the Protection of Industrial Property had entered into force for Australia, the constitutional basis for this practice being upheld in reliance on the combined operation of s51 (xxix) and s51 (xxxix).



Commonwealth fulfils both its international obligations and the requirements of s51(xxix).<sup>73</sup>

A further difficulty may arise in cases where the treaty the Commonwealth seeks to rely upon has not yet entered into force under its own terms. In such cases, apart from the obligation of acting in good faith under article 18 of the Vienna Convention on the Law of Treaties, states are not legally bound by the terms of the treaty until it has entered into force.<sup>74</sup> Accordingly, unless the Commonwealth could argue that the treaty, despite not having yet entered into force, represents an expression of international concern, or customary international law, it would be difficult for the Commonwealth to rely upon the terms of a treaty to which it is not legally bound. Given the length of time that it takes for some large multilateral treaties to enter into force this presents a considerable difficulty for the Commonwealth. If Australia is to show initiative and support for the development and implementation of international treaties it is important for the treaty to be ratified and implemented into domestic law. However, without the treaty's entry into force the Commonwealth's constitutional basis for enacting domestic legislation is missing. An example of the problem can be seen in Australia's gradual move towards implementing the terms of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>75</sup> Despite being a strong supporter of the Convention during its negotiation, it was only in 1990 that Australia took the first step of proclaiming a 12 nautical mile territorial sea in conformity with the terms of

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73 See reference to the *Ozone Protection Act* 1989 (Cth) in Campbell, "Implementation of International Environmental Law in Australia" (Paper presented at 'Seminars on International Environmental Law', International Law Section, Law Council of Australia, November 1991) at 3. See also the *Hazardous Waste (Regulation of Exports and Imports) Act* 1989 (Cth) which implemented the terms of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) 28 *ILM* 657, prior to Australia being a party to the Convention. However, the entry into force of the Act in 1990 prior to Australia's accession to the Convention in 1992 could most probably be justified under the s51 (i) trade and commerce power and that aspect of s51 (xxix) dealing with matters physically external to Australia.

74 For a discussion of the extent of this obligation see Rogoff, "The International Legal Obligations of Signatories to an Unratified Treaty" (1980) 32 *Maine L Rev* 263; McDade, "The Interim Obligation Between Signature and Ratification of a Treaty" (1985) 32 *Neth Int'l L Rev* 5.

75 Done at Montego Bay, Jamaica on 10 December 1982, UN Doc A/CONF 62/122, reprinted in (1982) 21 *ILM* 1261; the Convention has yet to enter into force having received only 55 of the necessary 60 ratifications or instruments of accession to date.

the Convention.<sup>76</sup> Currently there is legislation in preparation for the declaration of an Australian Exclusive Economic Zone which will also implement certain terms of UNCLOS.<sup>77</sup> While the implementation of these terms of the Convention would be upheld under that aspect of s51(XXIX) dealing with matters physically external to Australia, the decision in *Seas and Submerged Lands* confirming such an approach, other aspects of UNCLOS will have an internal aspect and cannot be supported on any basis other than the Convention.<sup>78</sup> While Australia is seeking to ratify the Convention in the near future, the actual implementation of all the terms, duties and obligations of the Convention into Australian law will more than likely have to await its international entry into force.

If the Commonwealth is unable to rely upon the terms of a treaty which has yet to enter into force, it will also be prevented from relying upon a treaty which has been suspended or terminated. However, in some instances the legal regime created by a treaty may have a continuing effect through customary international law or continue to be a matter of international concern. While the express terms of the treaty may therefore be no longer specifically relied upon, the matters of international conduct dealt with by the treaty may still fall under another aspect of s51(XXIX).

Finally, some reference should be made to where the Commonwealth ratifies a treaty or other form of international legal instrument but does not implement it by way of domestic legislation. This unusual situation occurred in *Dietrich v R*,<sup>79</sup> where an application was made to the High Court raising questions of a miscarriage of justice resulting from the appellant being unrepresented by counsel at trial. It was argued that the right to a "fair trial" and legal representation existed under the International Covenant on Civil and Political Rights<sup>80</sup> to which Australia is a party.<sup>81</sup> However, as was noted by various members of the Court, the Covenant had no domestic effect because it had not been implemented by way of

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76 See the discussion in Opeskin & Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22*ODIL* 395 at 395-399.

77 Such a maritime zone will in effect encompass Australia's present continental shelf and the existing Australian Fishery Zone.

78 See UNCLOS, Parts XIII (Marine Scientific Research) and XIV (Development and Transfer of Marine Technology).

79 (1992) 67 ALJR 1; hereinafter *Dietrich*.

80 Article 14 (3), International Covenant on Civil and Political Rights, 999 UNTS 171.

81 Australia signed the Covenant on 18 December 1972 and ratified it on 13 August 1980.

legislation.<sup>82</sup> Therefore, despite the potential sanction Australia could face due to this fact,<sup>83</sup> the Court held that the Covenant had no status in Australian domestic law.<sup>84</sup> This is consistent with earlier decisions regarding the status of treaties that had not been given effect by way of domestic legislation.<sup>85</sup>

## MATTERS SUBJECT TO INTERNATIONAL CONCERN

In *Koowarta*, it was the judgement of Stephen J which proved pivotal. His Honour was not prepared to accept that the Commonwealth possessed under s51(XXIX) a power to implement into domestic law all international treaties to which it was a party. He was prepared, however, to accept that treaties which demonstrated that they dealt with a matter of international concern would fall within the ambit of s51(XXIX).<sup>86</sup> In dealing with the validity of the *Racial Discrimination Act* 1975 (Cth), which the Commonwealth argued had been enacted in reliance upon the International Convention for the Elimination of All Forms of Racial Discrimination, Stephen J considered the history since 1945 of international action prohibiting racial discrimination. He concluded that despite the effect of the Commonwealth's legislation in this instance being purely domestic, it was in furtherance of addressing a matter dealt with in a treaty which truly was an issue of international concern. It was also conceded that irrespective of the treaty the elimination of all forms of racial discrimination had become a matter of such international concern that independently this was an aspect of Australia's external affairs.<sup>87</sup> In the same case, Mason J also recognised the existence of such an independent power when he noted that "it seems to me that a matter which is of external concern to Australia having become the

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82 *Dietrich* at 6, per Mason CJ and McHugh J; at 37, per Toohey J.

83 At 15, per Brennan J.

84 At 6, per Mason CJ and McHugh, where it was noted:

Ratification of the ICCPR (the Covenant) as an executive act has no direct legal effect upon domestic law; the rights contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions. No such legislation has been passed.

However Brennan J also accepted that the Covenant could have "a legitimate influence on the development of the common law" (at 15).

85 *Bradley v Commonwealth* (1973) 128 CLR 557 at 582, per Barwick CJ and Gibbs J; *Simsek v McPhee* (1982) 148 CLR 636 at 641-644, per Stephen J; *Kioa v West* (1985) 159 CLR 550 at 570, per Gibbs CJ.

86 *Koowarta* at 216.

87 At 220.

topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it".<sup>88</sup>

Despite the majority in *Tasmanian Dam* rejecting the Stephen J *Koowarta* test of "international concern", some judges were still of the view that international concern on its own - without the need for a treaty - could form the basis for a legitimate s51(XXIX) based law. Murphy J took up this point when he noted that for there to be international concern it was not necessary to only look at matters of concern to states; concern expressed by a significant portion of the international scientific community may also suffice on occasion.<sup>89</sup>

*Polyukhovich* is an example of where some judges actually attempted to apply this test. Both Brennan and Toohey JJ expressly referred to international concern as a separate aspect of s51(XXIX).<sup>90</sup> In the opinion of Brennan J, for a matter to be of international concern it was necessary to show the existence of a "concern" that was broadly adhered to in international practice.<sup>91</sup> It was noted, however, that the term carried no precise meaning and may in fact cover many topics. As such it was necessary to ensure that such matters could be dealt with in terms which "clearly state the expectation of the community of nations" rather than a vague belief or expression on a certain topic.<sup>92</sup> Applying this test to the facts in *Polyukhovich*, it was necessary to show that the apprehension and prosecution of war criminals from the Second World War was a matter of international concern in the years following the War. While it was accepted that this was a matter of concern in those countries where the crimes had been committed, there was insufficient material to demonstrate such a similar concern in regard to persons being brought to trial in countries in which the crimes were not alleged to have been committed.<sup>93</sup> Toohey J agreed with the conclusion of Brennan J on this question.<sup>94</sup>

One problem that can arise under this aspect of s51 (XXIX) is where the Commonwealth seeks to legislate on a topic before it has become the subject of an international treaty. In reliance on the expressed international concern the Commonwealth may then, providing the concern is one which can be

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88 *Koowarta* at 234.

89 *Tasmanian Dam* at 171.

90 *Polyukhovich* at 561-562, per Brennan J; at 657-658, per Toohey J.

91 At 561.

92 At 561. See also Crawford, "The Constitution and the Environment" (1991) 13 *Syd LR* 11 at 23.

93 At 562.

94 At 657.

specifically expressed, enact legislation dealing with the matter. However, a subsequent treaty on the subject may narrow the concern as a result of negotiation and discussion of the question amongst states at an international forum. Could the Commonwealth still then seek to rely on the original issue of international concern as a basis of a s51(XXIX) law, or would the Commonwealth be required to enact legislation in conformity with the treaty? In addressing this question in *Tasmanian Dam*, Mason J noted:

The law must conform to the treaty and carry its provisions into effect. The fact that the power may extend to the subject-matter of the treaty before it is made or adopted by Australia, because the subject-matter has become a matter of international concern, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enacts legislation which goes beyond the treaty or is inconsistent with it.<sup>95</sup>

This comment has resulted in some debate as to what occurs when matters of international concern become subsumed under a treaty so that the broader, perhaps original, power over the matter of international concern is lost.<sup>96</sup> Zines has interpreted this view of Mason J as suggesting that where a diplomatic conference is convened to discuss a matter of international concern and a treaty is subsequently negotiated on that topic, it is the treaty which becomes the principal source of the international law on the topic and is representative of whatever international concern on the subject there may be.<sup>97</sup> This analysis, however, fails to accept the realities of many diplomatic conferences called to negotiate treaties. A common feature of these large multilateral gatherings is that to achieve consensus amongst the delegates of many states and produce an acceptable and workable international treaty, the resulting legal instrument may not always address every matter of existing genuine international concern on the topic. It cannot always be said, therefore, that international treaties truly represent existing international concern on certain subject matters.

Another problem is the evidentiary requirement for demonstrating that international concern exists. Would it be sufficient for two states to issue a Joint Declaration expressing concern over an international issue, or would it

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95 *Polyukhovich* at 131-132. In *Richardson Dawson* J noted that this aspect of s51 (xxix) was liable to "expand, and at least theoretically, contract from time to time" (at 327).

96 See *Richardson* at 325, per Dawson J.

97 Zines, *The High Court and the Constitution* p253.

be necessary for an international organisation to do so? If recommendations of international organisations or other international gatherings were accepted, would it be necessary to have something equivalent to the full United Nations membership present, or would a smaller number be acceptable? This could be a particular issue if there was an attempt to rely on communiques or declarations issued by bodies such as the South Pacific Forum or the Commonwealth.<sup>98</sup> There will undoubtedly be a need for some limitations here, but what they are at present is uncertain.<sup>99</sup>

## MATTERS SUBJECT TO AN INTERNATIONAL OBLIGATION

In the *Koowarta* and *Tasmanian Dam* decisions some High Court judges were of the view that for the Commonwealth to rely upon the terms of a treaty to implement domestic legislation it was necessary to demonstrate that the treaty imposed international obligations upon the Commonwealth to do so. The decision in *Tasmanian Dam* seems to have removed the need for such an obligation, however, there still remain some international obligations which are not found in treaties but rather are sourced in general principles of international law and customary international law.<sup>100</sup>

The recognition that such obligations, independent of treaties, form a continuing basis of power under s51(XXIX) comes from various dicta. In *Tasmanian Dam*, Deane J accepted that the discharge of "obligations under both treaties and customary international law lie at the centre of a nation's external affairs" to which s51(XXIX) could be directed to fulfilling.<sup>101</sup> Both Brennan and Toohey JJ also considered this argument in *Polyukhovich*.<sup>102</sup>

While the authorities therefore support the existence of this aspect of s51(XXIX) there has to date been no instance of where an international obligation, separate from a treaty, has been successfully relied upon to

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98 A similar question is raised below under the heading of matters subject to international recommendations by international organizations.

99 *Polyukhovich* at 561, per Brennan J, where it was noted that "not every subject of international dialogue or even of widespread international aspiration has the capacity to affect Australia's relations" and so be of international concern.

100 The best examples here are the principles of state responsibility which have their current source in customary international law and general principles of international law. Despite having been codified in a draft Convention prepared by the International Law Commission, the Convention has never been formally considered at an international diplomatic conference.

101 *Tasmanian Dam* at 258.

102 *Polyukhovich* at 560, per Brennan J; at 657, per Toohey J.

support a s51(XXIX) law. Part of the difficulty with such an argument is demonstrating the existence of an obligation. The review conducted by Brennan J in *Polyukhovich* of the relevant international law on prosecuting war criminals shows the difficulties in conclusively demonstrating the existence of such obligations.<sup>103</sup> Some areas of customary international law which impose obligations upon states have increasingly become the subject of international treaties. One example is the accepted right in international law of foreign-flagged ships to sail through a coastal state's territorial sea. This right of 'innocent passage' was long recognised in international law prior to becoming the subject of an international treaty in both the Convention on the Territorial Sea and Contiguous Zone (1958) and by UNCLOS.<sup>104</sup> It may well be that because of examples such as this that there are few independent international obligations which now are not the subject of treaties. Nevertheless, this can prove an important source in instances of developing obligations not previously known to international law.<sup>105</sup>

## MATTERS REGULATED BY INTERNATIONAL LAW

In conjunction with their consideration of matters subject to international concern, or an international obligation, the High Court has also referred to general principles of international law and customary international law as being a basis for a s51(XXIX) law.<sup>106</sup> In *Koowarta*, Stephen J was particularly impressed by the widespread state practice seeking to eliminate racial discrimination. In response to a submission made on behalf of the Commonwealth that Australia had an obligation under customary international law to suppress all forms of racial discrimination, it was noted:

There is ... much to be said for this submission and for the conclusion that, the Convention apart, the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs. ... As with slavery and genocide, the failure of a nation to take steps to suppress

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103 *Polyukhovich* at 556-560.

104 Article 16(4), Geneva Convention on the Territorial Sea and Contiguous Zone, done in Geneva on 29 April 1958, 516 *UNTS* 205; Articles 17-19, UNCLOS.

105 An example of a category of emerging obligations are those dealing with the protection of the environment and the responsibility upon states not to cause damage to a neighbouring state's environment, see as an example the *Trial Smelter Arbitration (US v Canada)* (1931-1941) 3 *RIAA* 1905.

106 *Zines, The High Court and the Constitution* p245. Both of these are considered 'sources of international law' under Article 38(1) of the Statute of the International Court of Justice.

racial discrimination has become of immediate relevance to its relations with the international community.<sup>107</sup>

Further support for general international law forming a basis of a s51(XXIX) external affair is found in *Richardson*, where Deane J,<sup>108</sup> in the context of a comment in which he saw the power as having a wide ranging operation, expressly referred to comments by Evatt and McTiernan JJ on this question in *Burgess*.<sup>109</sup> In that case, their Honours had noted that the term 'external affairs'"is an expression of wide import. It is frequently used to denote the whole series of relationships which may exist between States in times of peace and war."<sup>110</sup>

Despite there being occasional support for this basis of a s51(XXIX) law, until *Polyukhovich* there had been no actual decision in which the court had expressly sought to rely upon this power to validate Commonwealth legislation. In that case both Brennan and Toohey JJ gave the matter considerable attention in the context of whether amendments to the *War Crimes Act 1945* (Cth) properly sought to confer universal jurisdiction upon Australian courts to try persons suspected of committing war crimes. Both judges were of the view that such an ambit did exist to the external affairs power, but differed on the question of whether the *War Crimes Act 1945* (Cth) properly conferred such jurisdiction upon Australian courts. Brennan J readily accepted that an Australian court could exercise such universal jurisdiction and that a law conferring such jurisdiction on an Australian court would be with respect to Australia's external affairs. Commenting on the nature of this jurisdiction, Brennan J warned:

Australia's international personality would be incomplete if it were unable to exercise a jurisdiction to try and punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order.<sup>111</sup>

As to how the exercise of universal jurisdiction represented an implementation of s51(XXIX), it was noted:

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107 *Koowarta* at 220

108 *Richardson* at 309

109 *Burgess* at 608.

110 At 684, per Evatt and McTiernan JJ.

111 *Polyukhovich* at 562-563.



[I]nternational law recognises a State to have universal jurisdiction to try suspected war criminals whether or not that State is under an obligation to do so and whether or not there is an international concern that the State should do so.<sup>112</sup>

As such, the conferral of such universal jurisdiction upon an Australian court was a law with respect to external affairs.<sup>113</sup> Toohey J adopted a similar view, though placed more emphasis on the exercise of such jurisdiction being an incident of Australian sovereignty.<sup>114</sup>

The more difficult question for both Brennan and Toohey JJ was whether the Commonwealth's exercise of such jurisdiction in this case via the amendments to the *War Crimes Act* 1945 (Cth) was appropriate. Here the central issue was the definition accorded to 'war crime'. Brennan J looked in particular at whether the statutory offence created by the Act corresponded with the international law definition of international crimes as they existed during Second World War.<sup>115</sup> It was concluded that the Act exposed to prosecution persons who would not have fallen within the definition of such a crime in the international law sense at the time when the act was done. Consequently, there was such a disconformity between the municipal and international law that s51(XXIX) could not be relied upon to validate the law.<sup>116</sup> Toohey J did not insist on as strict a conformity between international law and domestic law as Brennan J.<sup>117</sup> Despite being of the view that war crimes as defined in the Act did go beyond the accepted notions of the crime in international law, and, also doubting the existence of the defence of 'superior orders', Toohey J concluded that these discrepancies did not warrant the conclusion that the Act as a whole was not in conformity with international law.<sup>118</sup>

*Polyukhovich* can therefore stand as an authority, admittedly not terribly strong given that only two judges considered the point, that general principles of international law and customary international law can form the basis of a s51(XXIX) law. While there will on many occasions be an overlap between this category and those of international concern and

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112 *Polyukhovich* at 563

113 At 562-563

114 At 661.

115 At 576.

116 At 588-589.

117 At 677.

118 At 682-684.

international obligation, in instances where a state is exercising an aspect of its sovereign rights, such as its universal jurisdiction, this aspect of s51(XXIX) becomes an independent head of power. However, as is shown from the judgment of Brennan J in *Polyukhovich*, there will remain a need for any legislation enacted on this basis to conform with the existing international law.

## MATTERS SUBJECT TO INTERNATIONAL RECOMMENDATIONS

In line with the High Court's exploration of whether s51(XXIX) can extend to legislation dealing with matters of international concern, international obligation or even general international law, some members of the Court have occasionally expressed the view that recommendations made by international bodies could form the basis for a s51(XXIX) law. So it was in *Burgess* that Evatt and McTiernan JJ speculated that the power could extend to legislating for

the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.<sup>119</sup>

In the pre-United Nations years this interpretation of the external affairs power would not have had a far reaching impact because of the relatively small number of international organisations of which Australia was a member. The judges may also have had in mind that as Australia was at that time beginning to assert a more active role in international affairs, Australia's position in such organisations would have been weakened if appropriate recommendations of the organization could not be implemented into Australian law. Since *Burgess* there has been a considerable growth in international organisations and various international fora at which Australia participates. Despite the impact this development could have upon the application of this aspect of the power, modern High Court judges also support the existence of this branch of s51(XXIX). In *Tasmanian Dam*, Murphy J referred to the recommendations of the United Nations and its subsidiary bodies such as the World Health Organisation, UNESCO, the FAO and the ILO as being a basis for a law dealing with external affairs.<sup>120</sup> Deane J, in the same case, also noted that "compliance with

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119 *Burgess* at 687

120 *Tasmanian Dam* at 171-172.

recommendations of international agencies" would fall within the conduct of Australia's external affairs.<sup>121</sup> While not finding that there were sufficient grounds to rely upon such resolutions and recommendations of international bodies with respect to the prosecution of persons for war crimes, Brennan J also considered this aspect of external affairs in *Polyukhovich*.<sup>122</sup>

An important question that may need to be asked before the recommendations of such bodies can be considered a basis for a s51(XXIX) law is whether the recommendations and resolutions are legally binding upon states. In some instances the terms of a treaty setting up such international organisations may confer some legal effect upon resolutions or recommendations made by the body and place member states under an obligation to take appropriate action.<sup>123</sup> However, while there are examples where legislation has been enacted dealing with international organisations to which Australia is a party, there has been no attempt to give the recommendations or resolutions of those bodies the force of law within Australia without those resolutions having first been independently implemented by way of legislation.<sup>124</sup> With the United Nations increasingly becoming more active in a variety of international affairs and the Security Council adopting a more interventionist approach in resolving international conflicts, this aspect of s51(XXIX) may be relied upon in the future to give greater operation to United Nations recommendations.<sup>125</sup>

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121 *Tasmanian Dam* at 258-259.

122 *Polyukhovich* at 591

123 In *Bradley v Commonwealth* (1972) 128 CLR 557 the High Court addressed the status of United Nations Security Council resolutions in Australian law following the adoption of the *Charter of the United Nations Act 1945* (Cth). It was noted by the Court that the effect of the Act was not to make the Charter binding upon individuals and that separate legislation was required to that end (at 582-583, per Barwick CJ and Gibbs J).

124 With respect to Australia's past implementation of International Labour Organisation standards see Starke, "Australia and the International Labour Organisation" in O'Connell (ed), *International Law in Australia* (Law Book, Sydney 1965). In regard to Australia's acceptance of recommendations made under the 1959 Antarctic Treaty see *Antarctic Treaty Act 1960* (Cth) and comments in Triggs, *International Law and Australian Sovereignty in Antarctica* (Legal Books, Sydney 1986) p255-262.

125 In May 1993 Federal Cabinet approved legislation to allow Australia to more speedily give effect to United Nations calls for sanctions, see "Law Eases UN Help" in *Sydney Morning Herald*, 4 May 1993, p4.

## MATTERS THE SUBJECT OF RELATIONS WITH OTHER STATES

One of the longest standing, and least disputed, aspects of the external affairs power is that it confers upon the Commonwealth the power to implement legislation with respect to Australia's relations with other countries, irrespective of whether there is in existence an international treaty, concern or obligation as part of that relationship.<sup>126</sup> In effect, this aspect of the power gives to the Commonwealth the ability to deal with legislative aspects of Australia's international relations. A specific example of this aspect of s51(XXIX) occurred in *R v Sharkey*.<sup>127</sup> In that case the High Court concluded that s24A(1)(c) of the *Crimes Act 1919* (Cth) dealing with the offence of sedition with respect to the publication of material intended to 'excite disaffection against the Commonwealth or Constitution of any of the King's Dominions' was supported by s51(XXIX). Speaking in regard to this aspect of s51(XXIX), Latham CJ noted:

The relations of the Commonwealth with all countries outside Australia, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs. ... The preservation of friendly relations with other Dominions is an important part of the management of external affairs of the Commonwealth. The prevention and punishment of the excitement of disaffection within the Commonwealth against the Government or Constitution of any other Dominion may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions.<sup>128</sup>

The Court has from time to time made note of the fact that s51(XXIX) deals with 'external affairs' and not 'foreign affairs'<sup>129</sup> and that this was initially thought to infer that Parliament could only independently engage in international relations with other parts of the British Empire. However, following Australia's emergence from the Empire as a state with full international personality, there is no reason for assuming that the authority

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126 *McKelvey v Meagher* (1906) 4 CLR 265; *Roche v Kronheimer* (1921) 29 CLR 329; *Burgess* at 684, per Evatt and McTiernan JJ.

127 *R v Sharkey* (1949) 79 CLR 121.

128 At 136-137; also see at 149, per Dixon J; at 157, per McTiernan J; at 163, per Webb J.

129 See *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 379, per Mason J.

of *R v Sharkey* would confine this aspect of s51(XXIX) to relations with states of the former British Empire.<sup>130</sup> For a law to be valid under this aspect of s51(XXIX) it will be necessary to be able to characterise the law as properly dealing with Australia's relations with certain named countries or with states in the international community in general. Consequently, laws dealing with diplomatic rights and immunities for the representatives of foreign states, extradition of foreign criminals, the recruitment and training in Australia of mercenaries with the aim of removing a foreign power, or laws regulating the rights and duties of foreign nationals within Australia may all fall under this aspect of s 51 (XXIX).<sup>131</sup> However, it is not necessary for such laws to promote Australia's relations with other states, they may, as in the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth), intentionally seek to prohibit the jurisdictional reach of a foreign state's laws into Australia.<sup>132</sup>

## THE FUTURE FOR EXTERNAL AFFAIRS

The above review has shown that there are various aspects to the Commonwealth's power over external affairs and that when these are combined s51(XXIX) is now truly one of the most extensive legislative powers available to the Commonwealth. The power has extensive application in regard to matters, things, events, or persons physically external to Australia, and with respect to treaties which the Commonwealth seeks to implement by way of domestic legislation. Matters which are of international concern, or relate to an international obligation, may also form the basis of an 'external affair'. However, with no majority of the Court having ever relied upon these grounds to uphold a Commonwealth law some uncertainty still remains as to the true extent of these bases. Much the same comment can be made in regard to reliance upon customary international law, general principles of international law, and matters which have been the subject of international recommendations. The individual judgments of Brennan and Toohey JJ in *Polyukhovich* do go some way to confirming the existence of general international law as a separate head of the 'external affairs' power. Laws expressly dealing with Australia's relations with other states are also without question accepted as another aspect of s51(XXIX). It should not be thought however that the external affairs power is a plenary one. Substantial internal limitations still remain which can place barriers in the way of legislation based on treaties, and matters subject to international obligations or recommendations,

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130 Zines, *The High Court and the Constitution* pp251-252.

131 At p252.

132 For support see *Kirmani* at 371, per Gibbs CJ.

international concern or general principles of international law.<sup>133</sup> Treaties that have not been implemented by way of domestic legislation still have no legal effect.<sup>134</sup> Other general limitations expressly and impliedly found in the Constitution also apply.<sup>135</sup> Yet while these limitations do place some checks on s51(XXIX), they do not deny the Commonwealth a potent head of constitutional power.

Throughout the 1980s the Commonwealth's reliance upon the external affairs power to regulate matters previously only within the domain of the States resulted in considerable attention being given to the extent of the s51(XXIX) power and its potential impact upon the 'federal balance'. In *Tasmanian Dam*, however, Murphy J noted that while in that case and at that time reliance upon s51(XXIX) may have been considered exceptional:

Increasingly, use of the external affairs power will not be exceptional or extraordinary but a regular way in which Australia will harmonize its internal order with the world order.<sup>136</sup>

This comment is especially true today in the area of environmental protection. With the ever increasing attention that has been given at international fora to the environment it comes as no surprise to learn that at least 15 Commonwealth statutes since 1975 have been based on an international treaty.<sup>137</sup> Increasing international concern over the need to protect the environment was another matter which Murphy J saw as being inevitable.<sup>138</sup> In *Tasmanian Dam*, his Honour specifically gave an example of where the United Nations asked member states to preserve existing forests. The response as to whether there would exist Commonwealth power to react to such a call was:

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133 See Lee, "The High Court and the External Affairs Power" in Lee & Winterton (eds), *Australian Constitutional Perspectives* pp81-89.

134 *Dietrich* at 6, per Mason CJ and McHugh J.

135 A common argument against the excessive use of s51 (xxix) is the principle of *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; see Rothwell, "The Daintree Rainforest Decision and its Implications" (1990) 20 *QLSJ* 19 at 27-28.

136 *Tasmanian Dam* at 170.

137 Crawford, "The Constitution and the Environment" (1991) 13 *Syd LR* 11 at 21; Bates, *Environmental Law in Australia* (Butterworths, Sydney, 3rd ed 1992) p56-57.

138 *Tasmanian Dam* at 170-171.

I would have no doubt that the Australian Parliament, could, under the external affairs power, comply with that request by legislating to prevent the destruction of any forest, including any State forest.<sup>139</sup>

Certainly in the view of Murphy J it should not then be surprising that the growth in the reliance upon and expansion of the High Court's interpretation of the external affairs power should have come in cases concerning protection of the environment.

This review has discussed some of the unresolved questions concerning the potential reach of the external affairs power. The recent 1992 United Nations Conference on Environment and Development (UNCED) provides two further examples of the potential outer limits of the power. At that Conference two major international treaties were signed by Australia: the Convention on Biological Diversity<sup>140</sup> and the United Nations Framework Convention on Climate Change.<sup>141</sup> Both Conventions impose substantial obligations upon states to protect aspects of the local and international environment. The Biological Diversity Convention has as an objective "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources".<sup>142</sup> The Convention goes on to impose obligations upon state parties in regard to in-situ and ex-situ conservation and the sustainable use of components of biological diversity. The Climate Change Convention has as its ultimate objective "the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".<sup>143</sup> To that end it imposes a series of commitments upon state parties to reach a series of defined goals so as to stabilize climate change. Both of these Conventions represent the latest attempts at international environmental regulation and even without having entered into force, could well be argued to represent international concern over their specific subject matters. Accordingly, it could be argued that even though neither Convention has yet entered into force, the Commonwealth would be on strong constitutional grounds if it

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139 *Tasmanian Dam* at 171.

140 Done at Rio de Janeiro, 5 June 1992, reprinted in (1992) 31 *ILM* 818.

141 Done at New York, 9 May 1992, reprinted in (1992) 31 *ILM* 849; this Convention was finalised prior to UNCED but opened for signature during the Conference.

142 Article 1.

143 Article 2.

introduced legislation dealing with the topics of the two Conventions. This is an example of the cutting-edge of the external affairs power.

The external affairs power has come a long way since Federation when it was thought to have a relatively minor role to play in the Commonwealth's list of powers. Quick and Garran did foresee that the potential existed for a substantial power but it was not till the 1980s that this potential was realised. While the High Court's decisions on s51(XXIX) during the past decade have considerably expanded the scope of the power, this review has shown that questions do remain on various aspects of its operation. Some of these questions may be answered as the Commonwealth takes advantage of the opportunity which the High Court has now presented it with. *Polyukhovich* has shown that the Commonwealth can extensively regulate matters beyond Australia and suggests that internal matters can also be subject to control if they have an external impact. However, with an ever increasing range of matters now under scrutiny at international diplomatic conferences and in international organisations such as the United Nations, it will be that aspect of s51(XXIX) connected with international law which will continue to expand the scope of the external affairs power in the future. As the reach of international law continues to expand, there may also be a direct relationship with the expansion of the Commonwealth's powers under the Constitution.