THE AUSTRALIAN STATES AND PARTICIPATION IN THE FOREIGN POLICY PROCESS

BY H. BURMESTER*

Recent assertions by the Australian States of a right to participate in the foreign policy process, in particular by the conclusion of international agreements and by the establishment of relations with foreign governments, are examined in the light of constitutional and international law. Some reference is made to Canadian and United States precedents.

The author concludes that the Federal Government has, to a large extent, an exclusive executive and legislative competence in matters of foreign relations. However, the States also have certain legitimate concerns and aspirations in such matters. The way in which these State interests can be met, while maintaining a unified Australian voice, is discussed, with particular reference to the new arrangements for co-operation between the Commonwealth and the States in treaty-making, agreed to at the Premiers' Conference in 1977. The way in which the Commonwealth uses its constitutional powers, as well as the responsibility which the States show in the exercise of their powers in relation to treaty implementation, is likely to determine the course of future constitutional development in this area.

The extent to which the Australian States can participate in and affect the conduct of Australia's foreign relations is an issue which has begun to receive attention from constitutional scholars and others.[1] Recent developments suggest that it could develop into an issue of major constitutional significance in the future. Any consideration of the subject soon indicates the wide range of issues that are involved. These include the extent of the legislative and executive powers of the States in the field of foreign affairs, the rights of the States to communicate and to conclude agreements with foreign entities, and their right to play a significant role in the formulation of foreign policy and the domestic implementation of decisions on matters of international concern.

Certain activities by the States in the field of foreign relations are familiar: for instance, overseas trips by State Premiers for the purpose of attracting trade and foreign investment and the institution

* B.A., LL.B. (Hons) (A.N.U.), LL.M. (Virg.); Principal Legal Officer, International and Constitutional Branch, Attorney-General's Department, Canberra. The views expressed are the personal views of the author and do not necessarily represent the views of the Attorney-General's Department.

[1] Sharman, "The Australian States and External Affairs: An Exploratory Note" (1973) 27 Australian Outlook 307; Albinski, "Australian External Policy, Federation and the States" (1976) 28 Political Science 1.

of separate Agents-General in London representing individual State interests. More recent efforts by the States to enter the field of foreign relations have included attempts to secure representation on Australian delegations to international conferences, such as the Law of the Sea Conference, and assertion of a right to participate more fully in the making and implementation of treaties by Australia. As well, the States have, on occasion, used their domestic executive and legislative powers to affect foreign relations, such as by the denial of access to their ports of foreign nuclear powered vessels. Under the period of the Labor Government, the States became concerned at what seemed to be a determined policy by the Federal Government to exercise its constitutional power over external affairs so as to conclude, and implement at a federal level, treaties dealing with matters that were traditionally of State concern. This led in the period since 1975 to pressure from the States on the new coalition Government to come to some arrangement whereby treaty negotiations on matters traditionally within the responsibility of the States would only occur after adequate consultation with them, and implementation of any treaty or agreement involving such matters would remain a matter for State legislation. At the Premiers' Conference held in Canberra on 21 October 1977 new arrangements designed to meet these State concerns were agreed upon. These are discussed in more detail below.[2] They point to a new era of co-operation between the State and Federal Governments in matters of foreign relations. It is necessary, however, to consider these new arrangements in the light of the constitutional position and of existing practice in this area.

Efforts by the States to enter the foreign relations area can be expected to continue. Areas where one can envisage such efforts include maritime boundary negotiations, such as those concerning Torres Strait where the attitude of Queensland has already had an impact on Australian policy, regulation of foreign fishing in an extended zone of fisheries jurisdiction, and foreign investment and control of the activities of multinational corporations, where State interests may not coincide with national or international concerns.

Any consideration of the issue of State participation in the foreign policy process clearly raises constitutional and international legal issues. It also raises more fundamental issues as to the appropriate respective roles and functions of the Federal and State Governments in the conduct of foreign relations having regard to the history and present stage of development of the Australian federal system. It is the basic premise of this article that Australia is essentially a homogeneous nation in which it is appropriate that matters of international concern should be perceived and dealt with from a unified national perspective.

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[2] *Infra* pp. 280-282.

In seeking to devise functional solutions which take account of the particular needs and interests of the States, the maintenance of the basic national unity of Australia should be regarded as the fundamental aim. In Australia, distance, rather than cultural diversity, is the major divider.[3] Yet one of the historic reasons for federation in the first place was a strong feeling that, for defence and national security reasons in general, it was important that the continent be able to speak as one. These historic reasons seem as powerful today in an increasingly complex world as they did in 1901. This article, in examining the legal and other issues involved, seeks to suggest solutions which would enable national unity to be maintained in the field of foreign relations while at the same time recognising the legitimate interests of the individual States. While comparisons with other Federations may be helpful, their solutions cannot be regarded as applicable to the circumstances in Australia. For instance, the behaviour of Canada, with its much greater cultural diversity, should not be too readily seen as appropriate for Australia. Some mention of practice in the United States and Canada, will, however, be made.

The article will first concentrate on problems associated with the conduct of foreign relations, such as executive competence to conclude international agreements, and the extent of State legislative and executive competence in matters of foreign affairs in general. The article will then look in more detail at the questions of State representation abroad and the conclusion by States of agreements with foreign entities. Finally, the article will review the new arrangements for consultation with the States with respect to treaty-making.

I EXECUTIVE POWER IN THE FIELD OF FOREIGN RELATIONS

The power to conduct foreign relations is, in general, part of the executive power or prerogative, the exercise of which, under the British system of government, is not subject to prior legislative approval or concurrence.[4] It includes the power to enter into international agreements and to establish relations with foreign states. It is these two aspects of executive power with which this article will, for the most part, deal.

The historical evolution of Australia to a stage where it came to exercise the powers of treaty making and establishment of diplomatic relations has been examined many times.[5] While no specific date can

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[3] Blainey, *The Tyranny of Distance* (1966).

[4] *Halsbury's Laws of England* (4th ed. 1974) Vol. 8, paras 984-985; Hood Phillips, *Constitutional and Administrative Law* (5th ed. 1974) 241-252.

[5] Kidwai, "International Personality and the British Dominions: Evolution and Accomplishment" (1975) 9 University of Queensland Law Journal 76; Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth" in Zines (ed.), *Commentaries on the Australian Constitution* (1977);

be pointed to at which Australia became a full international person, it is generally agreed that by World War II the process of evolution had reached a stage where Australia possessed all the attributes of an independent sovereign state. Some statements suggest that at least certain of these attributes were achieved at the time of Federation itself. For instance, Mason J. in *Barton* v. *Commonwealth* said:

> The Constitution established the Commonwealth of Australia as a political entity and brought it into existence as a member of the community of nations. The Constitution conferred upon the Commonwealth power with respect to external affairs and, subject perhaps to the *Statute of Westminster* 1931 and the Balfour Declaration, entrusted to it the responsibility for the conduct of the relationships between Australia and other members of the community of nations, including the conduct of diplomatic negotiations between Australia and other countries.[6]

More recently, Murphy J. has suggested that "Australia's independence and freedom from United Kingdom legislative authority should be taken as dating from 1901".[7] As early as 1902, the Colonial Secretary Joseph Chamberlain talked of a "new state or nation" having been created by the Constitution Act.[8]

But it is no surprise that the Constitution itself is silent on the question of the executive power over foreign relations, for at the time the Constitution was drawn up it was not envisaged, having regard to relations between the components of the Empire at that time, that Australia would be an international actor in her own name. Express mention of a legislative power over treaties was, in fact, dropped from earlier drafts of the Constitution at the 1898 Session of the Constitutional Convention.[9]

Certain writers, including Professor Sawer, have suggested that the Australian States continue to have at least some concurrent competence in foreign affairs. Professor Sawer reaches this conclusion by relying, in part, on the absence of "any provisions in the Constitution on

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Starke, "The Commonwealth in International Affairs" in Else-Mitchell (ed.), *Essays on the Constitution* (2nd ed. 1961); O'Connell, "The Evolution of Australia's International Personality" in O'Connell (ed.), *International Law in Australia* (1965).

[6] (1974) 48 A.L.J.R. 161, 169.

[7] *Bistricic* v. *Rokov* (1977) 51 A.L.J.R. 163, 169. For a comment on the judgment by Murphy J. see Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 F.L. Rev. 460, 465-470.

[8] Despatch from Secretary of State of the Colonies to the Officer Administering the Government of South Australia, 25 November 1902. Reproduced in Greenwood and Grimshaw, *Documents on Australian International Affairs 1901-1918* (1977) 132.

[9] Thompson, "A United States Guide to Constitutional Limitations upon Treaties as a Source of Australian Municipal Law" (1977) 13 University of Western Australia Law Review 110, 123.

executive power which specifically contemplates any transfer of power as to external affairs in general from the States . . .". He also concludes that the colonies, in 1900, had "the beginnings of an external affairs power".[10] In an earlier article, however, he recognised that, at least in respect of certain matters, the executive power is far from concurrent. He wrote:

> It may be that even as a matter of formal law the State Governors have received no share of the Crown prerogative powers of negotiating and ratifying international agreements which form the legal basis of international competence within the British Commonwealth, such prerogative being vested solely in the Federal Governor-General. Hence, the authority of the Federal Government in this sphere is both unrestricted and virtually exclusive.[11]

It is suggested that this earlier view of Sawer is more correct in the light of the historical evolution of Australia.

It no longer seems appropriate to consider the extent of executive power over foreign relations by reference to the extent of Commonwealth legislative powers. While the executive power contained in section 61 of the Constitution extends to "the execution and maintenance of this Constitution, and of the laws of the Commonwealth", it is now clearly an independent power which embraces action in exercise of those attributes that Australia possesses as an independent nation state.[12] That section 61 of the Constitution provides a basis for exclusive Commonwealth executive power over foreign relations appropriate to its status as a nation has recently been affirmed by a number of High Court Justices. The statement by Latham C.J. in the *Burgess* case[13] in 1936 that "other countries deal with Australia and not with the States of the Commonwealth and this practice follows the evident intention of the Constitution" has been reasserted in judgments in the *Seas and Submerged Lands* case.[14] The significance of section 61 as the basis for the conduct of foreign relations is also indicated by Mason J. in *Barton's* case, where he said that the section "enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown".[15]

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[10] Sawer, "Australian Constitutional Law in Relation to International Relations and International Law" in O'Connell, *supra* n. 5, 35-37.

[11] Sawer, "Execution of Treaties by Legislation in the Commonwealth of Australia" (1955) 2 University of Queensland Law Journal 297, 298.

[12] Richardson, "The Executive Power of the Commonwealth" in Zines, *supra* n. 5, 50.

[13] *R.* v. *Burgess; ex parte Henry* (1936) 55 C.L.R. 608, 645.

[14] *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1, 16 *per* Barwick C.J., 19 *per* McTiernan J., 119 *per* Murphy J.

[15] *Barton* v. *Commonwealth* (1974) 48 A.L.J.R. 161; see also *Victoria* v. *Commonwealth* (1975) 7 A.L.R. 277, 333-334 *per* Jacobs J.

It now seems clear that any suggestion that the States retain executive competence in matters coming within the exercise of the prerogative in relation to foreign affairs is unlikely to be accepted by the High Court. But exactly what matters come within any such exclusive Commonwealth executive power is, however, a matter on which there may be room for dispute. A broad view is taken by Murphy J. who has said: "The States have no international personality, no capacity to negotiate or enter into treaties, no power to exchange or send representatives to other international persons and no right to deal with other countries, through agents or otherwise."[16] More generally, Barwick C.J. has stated: "The Crown is the appropriate repository of international rights and obligations. In right of the Commonwealth the Crown represents Australia internationally. Its conduct in that connexion is determined by the advice of the Executive Council."[17]

This view is not accepted by the States, either in theory or in practice, as will be indicated below. Professor Zines has indicated, however, in a wide-ranging survey, that whatever potential capacity the States may have had in 1900 over matters within the "Imperial prerogatives", including those in relation to external affairs, Commonwealth power over these matters must now be taken to be exclusive. These prerogatives must be regarded as having "been transferred by the Imperial authority to the Commonwealth and . . . not granted to the States".[18] This seems the correct view on the subject. The "Imperial prerogatives" would include the power to conclude international agreements and to accredit and receive diplomats. Nevertheless, the States have sought to argue that they retain at least certain powers in relation to, for instance, the conclusion of international agreements. In support of such an argument, the States rely not only on constitutional law, but also on international law. In this, they emulate many of the arguments used by the Canadian Provinces.

(1) *The Conclusion of International Agreements by the Australian States*

While the public and political outcry that has followed attempts by the Canadian Provinces to conclude certain agreements with foreign states has not yet occurred in Australia, there have been several assertions by the States of a capacity to conclude international agreements. The First Report of the Queensland Treaties Commission[19] represents an attempt to argue for such a capacity. The Report argues that the executive power is not exclusive. It says, in part:

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[16] *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1, 119.
[17] *Id.* 9.
[18] Zines, *supra* n. 5, 37.
[19] Dated 1 December 1976. The Report was presented to the Queensland Parliament in accordance with s. 6(b) of the Treaties Commission Act 1974 (Qld).

When one turns to the executive power in Australia, it is found that there is nothing in the Constitution which ousts the State executive authority, and nothing which reverses what that authority was capable of in external relations in 1900. Section 61 of the Constitution, relating to the executive power of the Commonwealth, does not invest the Governor-General exclusively with the power to enter into foreign commitments. Nor does section 70 refer to anything relevant in listing the powers and functions vested in the Colonial Governors which were to pass on federation to the Governor-General. Section 75 gives the High Court original jurisdiction in all matters arising under any treaty or affecting consuls or other representatives of other countries, but this relates only to the exercise of judicial functions and does not bear upon the question of the making of treaties.

The primary consideration is that the power to conduct foreign relations devolved from the United Kingdom Government upon Australia as part of the process of constitutional maturescence. When exactly this occurred is difficult to say, because only inferential directions are to be found in the texts of the Commonwealth conferences, and the decisive shifts occurred in the course of the routine conduct of foreign affairs. But while there was a devolution of foreign relations power upon Australia there seems little to suggest that this devolution was exclusive to the Federal Government. In *Bonser* v. *La Macchia* (1968-69) 122 C.L.R. 177 Barwick C.J. assumed that it was exclusive, but he did not set out to prove rather than to adumbrate the point. The States were certainly equipped for an expansion into the field of foreign affairs, within the limited areas of State powers, as was the Federal Government, provided that international law and general constitutional implications did not preclude this.

. . .

There is no question that the Royal Prerogative of Foreign Affairs has not been delegated to the State Governors, but it is not clear that the power to make binding arrangements with other governments is coincidental with the formal delegation by Her Majesty of Her Royal Prerogative of Foreign Affairs.

. . .

There is no question that Australian States may make intergovernmental agreements which are legally binding even if they are non-justiciable in domestic courts (*South Australia* v. *The Commonwealth* (1961) 108 C.L.R. 130). If such agreements are made with foreign governments and not with the Commonwealth or other Australian States, there is no reason to suppose that they may be any less a legal matter. The proper law may be municipal law or it may be international law. If it is the latter, the line between mere contract and a treaty becomes thin, and the distinction a formality.[20]

[20] *Id.* 26-27.

In making these arguments the Report relies heavily on Canadian practice, but, as indicated below, its interpretation of this practice is not universally shared by Canadian commentators.

A more ambiguous assertion of capacity to conclude international agreements was made in argument during the *Seas and Submerged Lands* case by Mr R. Wilson Q.C., the Solicitor-General for Western Australia. He said:

> We do not suggest that the states are recognised as international persons by other international persons. We do not impute to them international status. We do not deny to them a competence in appropriate matters to engage in discussions with foreign governments and to negotiate and execute agreements, which might be another way of speaking of treaties with foreign governments.[21]

He referred to the conclusion by Western Australia of a formal agreement with the Government of Libya in relation to matters of mutual concern as an example.[22]

One may readily concede that many agreements of a private contractual nature will be entered into by State Governments and instrumentalities with foreign governments and state trading corporations. Such agreements can be seen as similar to agreements concluded between a private company and a foreign state where the applicable domestic system of law would be determined by normal private international law rules. The assertions by several of the States, however, suggest that certain agreements that they enter into with foreign entities are international agreements governed by public international law. For instance, in the Report of the Queensland Treaties Commission, it is stated that "if Queensland makes a contract with a foreign government in which (the governing law) is not specified, the governing law is international law".[23] Such an assertion must be regarded as incorrect on both constitutional and international law grounds. International law is only directly applicable to states or bodies with international capacity. This the States do not possess. Certain arbitral decisions involving concession agreements between a state and private concern, such as a multinational corporation, have recognised the relevance of international law as an aid in the interpretation of such agreements,[24] but such decisions do not detract from the basic proposition.

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[21] *New South Wales* v. *Commonwealth*, Transcript of Argument, 15 April 1975.

[22] See the report on conclusion of a five year agreement on agricultural development between Libya and Western Australia, *Australian* 22 June 1974. A report of a similar agreement between Libya and South Australia appeared in *Canberra Times* 17 June 1974.

[23] Report of Queensland Treaties Commission, *supra* n. 19, 28.

[24] *Saudi Arabia* v. *Arabian American Oil Company* (Aramco arbitration) (1958) 27 Int. L. Rep. 117.

The States, however, seek to make a distinction between international agreements concluded in exercise of the prerogative power and those concluded, for instance, at a ministerial or departmental level. While there is some acceptance that the State Governors may not possess the power to conclude the first type of agreement, it is argued that there is nothing which prevents the States from concluding agreements of the latter type which may be subject to international law. This appears to reflect a failure to understand the process by which international agreements are concluded. International agreements take many forms and have many different names, including treaties, conventions, memorandums of understanding, and exchanges of notes. Their legal effect is, however, the same in international law.[25] Under the Australian constitutional framework, if an agreement is intended to be an international agreement subject to international law, Executive Council approval is sought for the appropriate Minister or official to conclude the agreement.[26] This reflects the fact that conclusion of an international agreement intended to give rise to international obligations is, whatever its form, an exercise of the prerogative in relation to foreign affairs. Ministerial or departmental agreements that purport to create international obligations subject to international law are, therefore, just as much an exercise of the prerogative power in relation to foreign affairs as is the conclusion of a head of state treaty. In this respect, such agreements differ from contracts concluded by a minister or department and subject to a domestic system of law. Such agreements do not involve an exercise of the prerogative in relation to foreign affairs.[27] To accept the contention of the States outlined above one would have to reject the view of the law expressed above, namely, that the States possess none of the executive power in relation to matters coming within the "Imperial prerogatives", including the power to conclude international agreements. It follows, therefore, that the States do not, for constitutional reasons, possess the power to conclude agreements subject to international law.

It is recognised, however, that whether an agreement is subject to international law may not always be easy to determine. In the case of an agreement between two international persons, whether international law or some other system of law should apply will usually depend on the intention of the parties.[28] In the case of "political" agreements, international law will normally be the proper law to apply. Writers, such as O'Connell, suggest that mere "inter-departmental agreements" between corresponding government departments of two countries will

[25] Vienna Convention on Treaties, Art. 2.

[26] "Australia's Treaty Practice" (1976) Vol. 47, No. 4 Australian Foreign Affairs Record 183.

[27] Campbell, "Commonwealth Contracts" (1970) 44 A.L.J. 14, 17.

[28] Mann, *Studies in International Law* (1973) 203.

ordinarily be subject to private law.[29] On this view, an agreement between, for instance, the Australian Overseas Trade Department and the equivalent Department of a foreign government would not be subject to international law. However, other writers take the view that such an interdepartmental agreement is just as capable of being an international agreement as a more formal bilateral treaty.[30] Some writers also suggest that certain "international agreements" involve no legal obligation, but rest merely on humanitarian impulse, goodwill or reciprocal benefit.[31] It is, however, difficult to accept such an approach in the case of an agreement clearly claimed to give rise to legal obligations. There also exist certain informal arrangements whereby certain rights are granted on a reciprocal basis, for instance those relating to the reciprocal enforcement of judgments. These arrangements are not generally regarded as treaties or international agreements, but are usually covered merely by an informal understanding.[32] This brief indication of possible agreements not subject to international law suggests that even if the States are excluded from the conclusion of agreements subject to international law, they may not be precluded constitutionally from concluding certain other types of agreements or arrangements with foreign government bodies or instrumentalities.

Quite apart from the constitutional limitations on the States with respect to the conclusion of agreements subject to international law, international law itself does not recognise such a capacity in the Australian States. Whatever view is taken of the constitutional position, the requirement that the States point to some international recognition of their capacity to conclude agreements subject to international law is a major obstacle that they cannot overcome. In this regard, it is dangerous to point to the position of components of other federal states, where a certain competence in matters of foreign relations may have been exercised.

The position at international law of components of federal states was considered by the International Law Commission in its work on the law of treaties. A draft article adopted by the Commission provided that:

> 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.[33]

At the first session of the Vienna Conference on the Law of Treaties in 1968 this provision was adopted; at the second session in 1969 it was,

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[29] O'Connell, *International Law* (2nd ed. 1970) 206.

[30] Starke, *An Introduction to International Law* (8th ed. 1977) 461.

[31] Gotlieb, *Canadian Treaty Making* (1968) 24; McWhinney, "Canadian Federalism, and the Foreign Affairs and Treaty Power: The Impact of Quebec's 'Quiet Revolution' " (1969) 7 Canadian Yearbook of International Law 3, 17.

[32] Gotlieb, *loc. cit.*

[33] (1966) II Yearbook of the International Law Commission 191.

however, deleted and no provision on the treaty-making capacity of components of federal states now appears in the Vienna Convention on Treaties. Its deletion reflected, in part, the concern of federal states at possible intrusion of third states into domestic constitutional arrangements in an effort to determine the capacity of component units under the federal constitution. One commentator who attended the Conference has suggested that deletion of the provision should be interpreted as negating "any general idea that members of federal unions can be assimilated to States for the purposes of international law" and "the clearest disapproval of any interference by third States by seeking to deal with a component part of a federal state in a way that involves them in internal constitutional questions concerning the treaty-making capacity, or lack of it, of that component part".[34]

What the draft article, however, does not make clear, but which the Conference debates and earlier discussions in the International Law Commission do, is the need for recognition at the international level of a capacity in component units.[35] Even if the constitution of a state may appear to admit a certain capacity in its components to conclude treaties, one cannot ignore the additional need for some international recognition of the capacity of the particular component units.[36] Thus, for instance, the 50 component States of the United States are not regarded by the international community as possessing international personality or capacity. Yet the Constitution might, at first glance, suggest that some limited international capacity was intended to be possessed by them.

(a) *United States Experience*

Unlike the Australian and Canadian Constitutions, the United States Constitution expressly provides that "No State shall enter into any Treaty, Alliance or Confederation. . . . No State shall, without the Consent of Congress . . . enter into any agreement or compact with another State or with a foreign power. . . ."[37] Despite this limited power conferred on the States to enter into agreements, those agreements into which they have entered have consisted largely of facilitative agreements with Canada or its Provinces on such matters as reciprocal recognition of drivers' licences, arrangements for co-operation on forest fire control and construction of bridges. So far as compacts with foreign entities are concerned, the consent of Congress has only been sought in limited instances, although its consent has been given informally in certain other cases. In those cases where the Congress has

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[34] Brazil, "Some Reflections on the Vienna Convention on the Law of Treaties" (1975) 6 F.L. Rev. 223, 229.

[35] Bernier, *International Legal Aspects of Federalism* (1973) 82.

[36] Bernier, *op. cit.* 35; Wildhaber, *Treaty-Making Power and Constitution* (1971) 261-265.

[37] Art. 1, s. 10.

given its consent it usually has reserved to itself the right to alter or repeal the Act and it might therefore be considered as in effect the real party to the agreement.[38] There is no suggestion that any of the agreements entered into by the States are international agreements giving rise to international obligations under international law.

Whatever the precise status of interstate compacts, it is clear that under the United States Constitution the power of the central Government in matters of foreign relations remains supreme and exclusive.[39] Any attempt by the States to enter into agreements having international status that seek to add to the power of a State must be regarded as invalid unless they obtain Congressional approval. Such approval would seem, however, to in effect convert the obligation into one undertaken by the United States itself. The position in relation to the Canadian Provinces is not, however, as clear, although the primacy of the Federal Government is again apparent.

(b) *Canadian Experience*

The Canadian Provinces, in the absence of express constitutional provision as to the location of the executive power to conclude international agreements, argue that they also retain a treaty-making capacity. Among the arguments they use are: the absence of an exclusive federal treaty-making power spelled out in the Constitution; the position in other federal systems; the practice of the international community, in particular the work of the International Law Commission; and political necessity.[40]

The Canadian Government has argued strongly that, whatever the constitutional position with regard to implementation of treaties, only the Federal Government can conclude treaties. This view is supported by the remarks of Duff C.J. in the *Labour Conventions* case where he said:

> As regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion Executive and the Provincial Executives that this authority (to enter into international agreements) resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a Province represent the Crown in respect to relations with foreign Governments. The Canadian Executive, again, constitutionally acts under responsibility to the Parliament of Canada and it is that

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[38] Bernier, *op. cit.* n. 35, 50. For a discussion of agreements made by the American States, see Henkin, *Foreign Affairs and the Constitution* (1972) 228-234; Wildhaber, *op. cit.* n. 36, 332-334.

[39] See Butler, *The Treaty Making Power of the United States* (1902) 35-39; *U.S. v. Curtiss Wright* (1936) 299 U.S. 304.

[40] Atkey, "The Role of the Provinces in International Affairs" (1970-1971) 26 International Affairs 249, 261-264; Morris, "The Treaty Making Power: A Canadian Dilemma" (1967) 45 Canadian Bar Review 478, 481.

> Parliament alone which can constitutionally control its conduct of external affairs.[41]

Quebec has provided the strongest challenge to the view of the central Government that the Provinces possess no international status or capacity. In 1968, for instance, Quebec entered into a cultural agreement with France, which the central Government felt it was necessary to subsume under an umbrella agreement.[42] A strong case can be made that such an agreement by Quebec had no binding force or international status and that the umbrella agreement elevated the status of an otherwise unenforceable agreement.[43] The numerous other examples of Provincial agreements with foreign entities do not support the view that any international personality or agreement-making power belong to the Provinces. In the case of many such agreements the Canadian Government was involved and approved of the agreement prior to its actual signature by a Province. In other instances, all that was involved were informal administrative arrangements whereby reciprocal recognition of a legislative or administrative act of the other was informally agreed upon. Other agreements between a local administration official and his counterpart in, for instance, an adjoining State of the United States can hardly be regarded as having the status of an international agreement.[44]

Yet, despite the strong efforts of the central Canadian Government to maintain its monopoly of treaty-making, this has not stopped Quebec and the other Provinces from further forays into the foreign relations field. It has been reported, for instance, that Ontario has representatives in 16 foreign cities. The other Provinces also have overseas representatives and new offices are planned.[45] Quebec has gone a step further and sought to put its relations with foreign entities and organisations on a more formal level. In 1974 it passed the Intergovernmental Affairs Department Act.[46] A more limited Act, along similar lines, had earlier been passed by Alberta in 1972.[47] Under the Quebec Act, the Minister for Intergovernmental Affairs is given responsibility for establishing and maintaining "such relations with other governments and their departments as the government of Quebec considers it expedient to have with them".[48] His other responsibilities include official communications between the Government of Quebec, other governments and

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[41] [1936] S.C.R. 461, 488. See also Martin, *Federation and International Relations* (1968).

[42] See McWhinney, *supra* n. 31, for details.

[43] *Ibid.*

[44] See Rand, "International Agreements between Canadian Provinces and Foreign States" (1967) 25 Faculty of Law Review (University of Toronto) 75 for examples of Provincial agreements.

[45] Jacomy-Millette, *Treaty Law in Canada* (1975) 77.

[46] Intergovernmental Affairs Department Act, 1974 Ch. 15.

[47] The Department of Federal and Intergovernmental Affairs Act, 1972 Ch. 33.

[48] S. 10.

international organisations; recommending the ratification of international treaties or agreements to the Lieutenant Governor in Council in fields within the constitutional jurisdiction of Quebec; and over-sight of the negotiation of all intergovernmental agreements and their implementation. The Act also seeks to restrict the power of subordinate government bodies such as school boards or municipal corporations or regional communities to enter into agreements with the Government of Canada, other provinces or foreign governments or agencies. The Act provides for the formal representation of Quebec abroad, providing for the appointment of a Delegate-General to represent Quebec in a foreign country in the sectors of activity within the constitutional jurisdiction of Quebec. The Act envisages arrangements to be made with Canada which would permit Quebec representatives to act within Canadian diplomatic or consular missions established in countries where Quebec has no delegate, in relation to those sectors of activities where Quebec shares its constitutional jurisdiction with Canada.

The Act appears to be a largely symbolic assertion of a quasi-independent capacity of Quebec to engage in foreign relations with respect to matters within its constitutional jurisdiction. The carrying into effect of such declarations of intent as those contained in the Act is another matter. It has not been possible to ascertain the extent to which the Act has led to formal arrangements or agreements on the basis of its provisions. Any attempt by Quebec, or any other federal state component, to exercise an independent voice in foreign relations is likely, however, to be strongly resisted by the central Government. One should not, in this regard, underestimate the power of the central Government, by virtue of its relations with other countries, to bring pressure to bear on other countries not to accord recognition to Provincial authorities. This in fact is one of the strongest ways in which central Government supremacy can be maintained.

(c) *Appraisal*

The foregoing has sought to indicate the existing legal position of the Australian States with regard to the conclusion of international agreements. Apart from the legal position, it is suggested that considerations of policy support the continuance of the existing exclusive capacity in the Federal Government to conclude international agreements.

An examination of those commentators who have studied the Canadian situation reveals little inclination to recognise any independent treaty-making capacity in the Provinces. It is recognised, however, that what is at issue is not merely a legal problem. For instance, Atkey suggests that a purely legal solution is not likely and suggests a functional solution, which, while recognising a certain competence in the Provinces, would ensure that if there were a clear conflict with national foreign policy the Federal Government would have executive

power under the Constitution to prohibit, modify, nullify or veto the Provincial activity.[49] He suggests a presumption of validity for Provincial activity until declared invalid by the Federal Government by positive executive action. He recognises, however, that:

> International activities of the provinces which are deliberately calculated to provoke or embarrass the federal government, or to thwart the conduct of Canada's foreign policy would be a fundamental breach of federal comity, and would be illegal from the outset.[50]

The problem with a suggestion such as that outlined is that it assumes a desire on the part of the component units to co-operate with the central Government. However, the basic reason for component units seeking their own authority largely arises because they do not consider their interests are being adequately represented by the policies of the central Government. It does not seem likely, in these circumstances, that the States or Provinces would regard as satisfactory a situation where their international actions were subject to federal veto.

The need for federal authority, whether as a right of veto or of exclusivity in foreign relations, is recognised by other studies of the problem.[51] As Gotlieb indicates:

> There appear to be no examples of federal constitutions which allow the members to make international agreements freely and independently of the federal power and without a right of approval or supervision on the part of the central power.[52]

Such a conclusion is supported by the law on state responsibility which continues to place international responsibility on a federal state like Australia for the acts of its component units. The subject has recently been considered by the International Law Commission. In its report in 1974 the Commission was concerned to re-emphasise the well established proposition that federal states can be responsible internationally for acts and omissions of their component organs.[53] The Commission did recognise that in a limited number of cases the components of federal states retain an international personality of their own. These cases, "comparatively rare nowadays", could, in the case of breach of an international obligation incumbent on the component state, give rise to an attribution of responsibility to the component. The more usual situation recognised by the Commission, however, was that:

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[49] Atkey, *supra* n. 40, 269-270.

[50] *Ibid.*

[51] "Canadian Federalism and International Law" in Macdonald, Morris and Johnston (eds.), *Canadian Perspectives on International Law* (1974) 66-67.

[52] Gotlieb, *supra* n. 31.

[53] (1974) II Yearbook of the International Law Commission (Pt I) 279.

> if the component states of a particular federal State do not possess a separate international personality, even within narrow limits, and if, therefore, they do not at any time have international rights and obligations, there can be no doubt that they are no different, so far as the problem considered here is concerned, from the other territorial governmental entities dealt with in this article. The actions or omissions of organs of component states are then simply to be regarded under international law as acts of the federal State.[54]

In debate on the Report of the International Law Commission at the Sixth Committee of the General Assembly in 1974, Australia reaffirmed its clear understanding that it is internationally responsible for the breach of any international obligations that were or might be committed by a component State.[55]

Ever since the early days of federation, Australian Governments have only become parties to treaties applicable throughout Australia. It has not been sought by use of federal clauses or otherwise to apply treaties to only some of the Australian States. Treaties have not been ratified until all State legislation has been brought into conformity with the treaty in those cases where the treaty is to be implemented by legislation at a State level. This policy can be expected to continue, even if a new approach to federal clauses is taken.[56] It is suggested that, in order to maintain the position where Australia speaks with one voice internationally, its exclusive capacity to enter into international agreements should be maintained. This is not to say that the States should not be consulted or participate as representatives of Australia in the drawing up of treaties or the negotiation of international agreements. As indicated below, new arrangements in this regard have recently been established. These should ensure the necessary opportunity for State interests to be protected. While maintaining a unified voice in respect of matters involving the establishment of international obligations, such co-operative arrangements should remove any need for the States to act unilaterally and in conflict with the Federal Government. The question of the representation of the States overseas may not so readily be capable of a solution. To this question the article now turns.

(2) *Overseas Representation of the Australian States*

In recent years, the Australian States have pursued foreign investment and trade vigorously. Regular overseas visits have been made by State Premiers to attract such trade and investment and generally to

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[54] *Id.* 280.

[55] United Nations General Assembly, *Official Records* 29th Session A/C. 6/SR. 1494 (Mr Coles) 7 November 1974.

[56] *Infra* pp. 281-282.

promote their State. At the same time, permanent State representatives have been located in overseas cities to represent the State and to carry out promotional activities. In some cases businessmen have been used; in others, State public servants. Information available indicates that, apart from London, there are representatives (either government officials or businessmen specially appointed to represent the Government) in Tokyo (New South Wales, Victoria, Western Australia, South Australia and Queensland), New York (New South Wales), Bonn (New South Wales and Victoria), Hong Kong (South Australia), Djakarta (South Australia), Singapore and Kuala Lumpur (South Australia).[57] There may well be others.

In addition, all States have Agents-General in London, who, apart from dealing with the Government of the United Kingdom, are mostly engaged in trade promotion, encouragement of tourism and migration. All States, with the exception of New South Wales, have established the office on a statutory basis.[58] A recent survey of overseas representation by the States concluded that:

> the states have many reasons for wishing to retain their own international lines of communication. The historical, constitutional and tourist links with Britain may provide an emotional justification for state representation overseas, but the dominant reason for the persistence and growth of state links with the international community is a commercial one.[59]

It is essentially as commercial representatives that the State officials have operated. Apart from the Agents-General in London, who receive the privileges accorded to consular officers,[60] the State representatives receive no diplomatic or consular privileges or immunities, nor are they accorded any international representative status. The Federal Government has acquiesced in the establishment of such offices on the understanding that the offices have no international status. Yet such offices are likely to deal directly with the government and its agencies in the country where they are located. It would seem possible for the Federal Government, on the basis of its exclusive executive power, to require all communications with foreign governments to take place through its own diplomatic representatives. Federal Government

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[57] Information obtained from *Yearbooks* of the various States. The Queensland Premier recently announced his intention to establish an Agents-General Office in Japan. *Courier Mail* 25 March 1978.

[58] Qld: Agent-General for Queensland Act 1975; S.A.: Agent-General Act 1901-1975; Vic.: Agent-General's Act 1958; W.A.: Agent-General Act 1895-1975; Tas.: Agent-General Act 1911. Doeker, *The Treaty-Making Power in the Commonwealth of Australia* (1966) 213-215.

[59] Sharman, *supra* n. 1, 316; 310-318 for a general discussion of State representation overseas.

[60] Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 and Commonwealth Countries and Republic of Ireland Diplomatic Immunities Order in Council, 1971 No. 1237.

acquiescence must, however, be taken as based on an understanding that the States will not seek to engage in the conduct of international relations. As indicated above, this right is possessed exclusively by the Federal Government. Yet, international trade is today closely linked with the conduct of international relations. The conclusion or re-negotiation of a trade deal with a foreign country can have major repercussions on bilateral relations between states. The recent negotiations with Japan and Malaysia on the long term sugar contracts with those countries and the impact of such negotiations on bilateral relations with Australia reflects the close connection between trade and bilateral relations. Where to draw the line between the legitimate representation by the States of their interests overseas and their illegitimate intrusion into government to government matters directly affecting bilateral relations may often be a difficult matter to decide.

On several occasions the States have sought directly to become involved in aspects of foreign relations. The Queensland Premier has, on occasion, sought to make direct contact with Japanese Government personnel to convey views on the resolution of certain trade difficulties between Australia and Japan. Such action has been disapproved of by the Federal Government. Nor can one doubt that the State Premiers have dealt directly with diplomatic missions in Australia with a view to arranging trade deals, or agreeing on the provision of certain aid or assistance. The extent of such contact is, however, difficult to determine.

If the States confine their activities overseas to matters over which they have concurrent power with the Commonwealth, such as overseas trade, foreign investment, immigration and the promotion of tourism, it can be argued that there is no reason to complain of such activities. The Commonwealth will be in a strong position to limit the role of the States in these areas by its ability to override by its own legislation any State actions of which it disapproves. Thus, it can restrain the export of any item or the entry of any person not being an Australian citizen. But, as indicated, many of those activities carried on by the States will have a direct impact on Australia's foreign relations. For this reason, it is suggested that the Federal Government should only allow a low level of overseas activity by the States. Where their activities cease to be related to promotion of State interests among the private sector of a foreign country, or the purely trading sectors of the state-run economies, then it seems the Federal Government has legitimate cause for complaint. Through its existing diplomatic relations with countries, Australia can make clear that communications on matters affecting governmental relations should take place only through the official Australian representatives abroad, or with Federal Government authorities in Australia. In these days when a large range of matters impact on diplomacy, it seems important that Australia continue to speak with one voice on, for

instance, matters of foreign investment, immigration policy, overseas aid and trade policies. This position can only be maintained if the Federal Government asserts its exclusive executive power under the Constitution to enter into relations with foreign states. This need to assert its exclusive power is equally applicable in the field of legislative capacity, to which the article now turns.

II LEGISLATIVE COMPETENCE OVER MATTERS OF FOREIGN RELATIONS

Apart from questions as to the extent of State executive power in the foreign relations field, questions also arise as to the extent of State legislative power in this area. It will be argued in this article that State legislative competence over matters which *directly* intrude into the field of foreign relations is precluded constitutionally by an exclusive Federal competence in this area. While indirect or incidental intrusion into the area by State legislation may not be precluded, in these cases Federal legislation could override State action. It is also suggested that legislation by a State which is contrary to international law may be invalid.

The States can only legislate for the peace, order and good government of their territory. While this does not prevent extra-territorial legislation from being valid, it is necessary for the States to show some nexus between the State and the activity the subject of the legislation. Recent decisions by the High Court indicate that the instances in which extra-territorial State legislation will be valid may be limited.[61] Under the Commonwealth Constitution, section 107 provides for the continuation of State legislative power "unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State". At the same time, there is no express provision in the Constitution which confers exclusive legislative power over foreign relations on the Commonwealth Parliament, the external affairs power not being expressed to be exclusive. But the power to legislate with respect to external affairs includes much more in its scope than matters directly affecting the foreign relations of Australia. It has most recently been interpreted to extend to legislation on any activity or area external to Australia.[62] It also authorises the domestic implementation of treaty obligations, at least if these are contained in a treaty of international significance.[63]

It is not suggested that the States cannot legislate on certain of these matters embraced in the external affairs power. In fact, in the past the Federal Government has looked, and in the future will continue to

[61] *Pearce* v. *Florenca* (1976) 9 A.L.R. 289; *Robinson* v. *The Western Australian Museum* (1977) 51 A.L.J.R. 806.
[62] *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1.
[63] *R.* v. *Burgess; ex parte Henry* (1936) 55 C.L.R. 608.

look, to the States to assist in the implementation of treaties by their own legislation.[64] Rather, it is suggested that a State legislative enactment which purported to deal with, for instance, matters relating to the executive power to conduct foreign relations, would be beyond State competence. Barwick C.J., in the *Seas and Submerged Lands* case, clearly stated:

> whilst the power with respect to external affairs is not expressed to be a power exclusively vested in the Commonwealth, it must necessarily of its nature be so as to international relations and affairs. Only the Commonwealth has international status. The colonies never were and the States are not international persons.[65]

If this view as to exclusive federal legislative power over foreign relations is correct, then it is suggested, for instance, that a statute passed by an Australian State along the lines of that by Quebec outlined above,[66] which authorised the conclusion by the Province of international obligations and its entry into relations with foreign states, would be invalid. By contrast, an Act such as the Queensland Treaties Commission Act 1974, which merely creates a body to advise the Government, does not claim any competence for the State actually to enter into agreements with foreign states. Similarly, the various Agents-General Acts of the States,[67] while asserting a right for the Agents-General to represent the interests of the respective States, relate largely to matters of overseas trade, immigration or employment. The provisions relating to communication with the British Government can be seen in their historical context, and not as a claim to participate directly in foreign relations.

The Federal Government can, of course, by legislation made in reliance on the external affairs power or another of its powers, "cover the field" and render State laws inconsistent and thus, invalid.[68] In the area of external affairs, courts might more readily find such an intention to cover the field. This has been the experience in the United States. For instance, in *Hines* v. *Davidowitz*,[69] the federal Alien Registration Act and other laws regulating immigration and naturalisation were held to provide a comprehensive legal framework which precluded a State statute from imposing additional requirements. The Court said:

> Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State,

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[64] See the Prevention of Pollution by Oil Acts passed by the Commonwealth and the States to give effect to the 1954 IMCO Convention on Prevention of Pollution by Oil.

[65] *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1, 16.

[66] *Supra* n. 46.

[67] *Supra* n. 58.

[68] S. 109, Commonwealth Constitution.

[69] (1941) 312 U.S. 52.

> though enacted in the exercise of powers not controverted, must yield to it'. And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. . . .[70]

Later cases have emphasised the inability of State laws to interfere with overriding national policy in the area of alienage.[71]

Even in the absence of Federal legislative action, the United States courts have recognised an exclusion of State competence in matters that impinge on foreign relations. The leading case in this regard is *Zschernig* v. *Miller*.[72] In that case a State statute restricted the inheritance rights of non-resident aliens unless three requirements could be established. These included the existence of a reciprocal right of United States citizens to inherit, and proof of the right of the foreign beneficiaries to "the benefit, use or control of the estate without confiscation". The statute was one of a number of "Iron Curtain" statutes that had been passed by many of the American States. The Court found "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress".[73] Evidence showed that State courts had not merely embarked on a routine reading of applicable foreign law but that they had, in application of the statutes, launched inquiries into the types of government which existed in certain countries, questioned the good faith of consuls and representatives of foreign governments and made gratuitous comments which reflected on the States involved. The minute inquiries by State courts into the actual administration of foreign law and into the credibility of foreign diplomatic statements were held to amount to more than some "incidental or indirect effect in foreign countries". The Court took this view despite arguments by the Federal Government that the State laws did not amount to an invasion of the exclusive power over foreign relations.[74] The Court on this basis also distinguished its earlier decision in *Clark* v. *Allen*,[75] which upheld a similar State reciprocity statute, as in that case the facts indicated merely a routine reading of foreign law.

While an Australian court presented with similar facts to those in *Zschernig's* case might not necessarily come to the same decision, it is suggested that the basic principle enunciated in that case is appropriate for incorporation into Australian constitutional jurisprudence. The case recognises that State legislative action that directly intrudes into

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[70] *Ibid.*
[71] See *Graham* v. *Richardson* (1971) 403 U.S. 365.
[72] (1968) 389 U.S. 429.
[73] *Ibid.*
[74] See Brief for the United States: 19 L.Ed. 2d 1500.
[75] (1946) 331 U.S. 503.

the field of foreign relations is inconsistent with exclusive federal executive and legislative power in that field. An Australian court could, in reaching a similar conclusion, rely on both the limited historical extent of State power in this area and also on the inherent exclusive federal power over matters of foreign relations. An early statement which recognised certain limitations on State power, and that it was subject to Commonwealth control, occurs in the judgment of O'Connor J. in the *Steel Rails* case in 1908. He said:

> Wherever it is necessary for the effective exercise of a Commonwealth power that a State power should be restricted, it must be taken that the Constitution intended that it was to be reserved to the State in that restricted form. In such case the general words conferring the Commonwealth power will be interpreted in the wider and not in the narrower sense. It is therefore essential at the outset to see what is necessary for the effective exercise of the Commonwealth power to impose Customs duties and to regulate trade and commerce with foreign countries. In this connection the other powers expressly conferred on the Commonwealth may be considered, and, taken as a whole, they vest in the Commonwealth the power of controlling in every respect Australia's relations with other countries. The manifold and varied activities which are recognised as functions of the State in Australia were well known to the framers of the Constitution, and it cannot be supposed that it was intended that the Commonwealth control of Australia's relations with other countries should be subject to the exception that it should have no operation in so far as State Governments in the exercise of their governmental functions were concerned.[76]

This statement could still be relevant today to a claim that State legislation intruded illegitimately into an area of federal responsibility.[77]

An instance of a State law which directly intruded into matters of foreign relations would be a law which sought to impose a discriminatory trade boycott on a particular nation, in a manner inconsistent with federal policy or a particular legal enactment. Such a law could be seen, in appropriate circumstances, as not merely a law relating to overseas trade that indirectly affected foreign relations, but as a law that directly impinged on foreign relations to the embarrassment of the Federal Government. In such circumstances, it is suggested that the State legislation might be considered as invalid and an improper intrusion into the foreign relations field.[78] Similarly, a State law which

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[76] *Attorney-General of N.S.W.* v. *Collector of Customs for N.S.W.* (1908) 5 C.L.R. 818, 842-843.

[77] See the recent judgment by Murphy J. in *Australian Broadcasting Commission* v. *Industrial Court of South Australia* (1978) 52 A.L.J.R. 31, 39 where the test of "dominant federal interest" is suggested.

[78] For a statute that one might expect to be held to be an invalid intrusion see the Maryland *Foreign Trade Boycott Act* (1976) 15 International Legal Materials 662.

approved an international agreement between the State and an international person, and which purported to be subject to international law and to give rise to international obligations would seem to be invalid. It could be claimed to represent an intrusion into an area of exclusive federal competence and to claim a competence for the State which it did not constitutionally possess. On the same basis, a State law which was contrary to international law might be held invalid as giving rise to embarrassment and international responsibility on the part of the Federal Government, and to be inconsistent with the responsibility of the Federal Government in the foreign relations area. Gibbs J. in *Pearce* v. *Florenca* recognised that Commonwealth legislation might override State law: He said:

> If in the opinion of the Commonwealth Parliament a State law infringed a rule of international law relating to the off-shore waters, the Parliament could by appropriate legislation inconsistent with the State law render the latter invalid.[79]

Certainly, if a treaty violation was involved where Federal legislation had been enacted to give effect to the treaty, no difficulty in enjoining the State could be envisaged. The State legislation would be invalid, as being inconsistent with Commonwealth legislation. But even in the absence of inconsistent Commonwealth legislation, the State law might, in the writer's opinion, be regarded as invalid.

As one writer has said, the "determination and application of international law are integral to the conduct of foreign relations and are the responsibility of the federal government".[80] While the extent to which customary international law is incorporated into and forms part of common law is still very much subject to theoretical debate,[81] if a State law were to purport directly to contravene customary law that would otherwise be held to have been incorporated, it would seem possible to argue that the law was invalid on the basis that it went beyond the power of the State by attempting to legislate inconsistently with an international obligation of Australia. This, it is argued, would involve an invalid intrusion by the States directly into a matter of foreign affairs. Additionally, certain writers have advanced the view that such legislation would not be a law for the "peace, order and good government of the State".[82] Certainly the restriction on the legislative capacity of the colonies to legislate extra-territorially was developed, at least in part, in order to prevent violation of international law by the colonies.[83] A much stronger argument, however, could be made on

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[79] (1976) 9 A.L.R. 289, 298.

[80] Henkin, *Foreign Affairs and The Constitution* (1972) 223.

[81] See the recent case *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] 2 W.L.R. 356.

[82] La Forest, "May the Provinces Legislate in Violation of International Law?" (1961) 39 Canadian Bar Review 78.

[83] O'Connell, "The Doctrine of Colonial Extra-Territorial Incompetence" (1959) 75 L.Q.R. 318, 320-321.

the basis that legislation inconsistent with international law is invalid by virtue of an exclusive federal responsibility, rather than by reference to arguments of colonial incapacity. Whether a State could be prevented from altering legislation which it had previously passed to implement a treaty subsequently ratified by Australia, where the result of such alteration would be to give rise to international responsibility for a breach of a treaty, is another difficult question. Such action may be able to be restrained judicially. Even if judicial action did not succeed, the power of the Commonwealth to legislate to restrain such action cannot be doubted.

While the argument that State legislation in areas of foreign affairs should be held invalid is attractive to those who support the objective of a unified national policy in such matters, one must also acknowledge the dangers of such an approach. As an American commentator has recently warned,

> insofar as power sharing in general, and in foreign affairs in particular, continues to be a basic value of the Republic, it would be a mistake to insist upon an absolute prohibition of state legislation in the domain of foreign affairs or international matters. Given the interpenetration of international and national systems, effective prohibition could paralyze state and local decisions.[84]

That particular writer suggests that a "secondary" competence should be recognised in the States, with the arbiter, in true American fashion, being the courts. While such an approach may not be appropriate in the Australian federal context, one cannot deny that the division of legislative power over matters of international concern is part of the overall problem of the allocation of power and responsibility in the federal system. The recent agreement on new Federal/State co-operation in treaty matters reflects the recognition by the present Government that, in the Australian federal system, whatever the strict constitutional position, some arrangement for the sharing of responsibility and power in the foreign relations field is as necessary as in the fields of taxation or environmental protection. It is to these new arrangements that the article will now turn.

III RECENT CO-OPERATIVE COMMONWEALTH/STATE ARRANGEMENTS IN THE FIELD OF TREATY-MAKING

At the conclusion of the Premiers' Conference held in Canberra in October 1977 the Prime Minister announced that agreement had been reached on certain aspects related to the conclusion of treaties. The points agreed to were as follows:

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[84] Reisman, "Foreign Affairs and the Several States: Outline of a Theory for Decision" (1977) 71 Proceedings of the American Society of International Law 182, 183.

- The States are to be told in all cases and at an early stage of any treaty discussions that Australia has decided to join.
- The Commonwealth has given a firm undertaking to consult the States before deciding whether or not to legislate to adopt or implement a treaty that affects a legislative area traditionally regarded as being within the responsibility of the States.
- The States will be given the first option of legislating to implement any treaty provisions if within an area of State power.
- Representatives of the States will be included in delegations to international conferences which deal with State subjects. The purpose of that would not be to share in and make policy decisions, but so that the impact of any treaty so far as it affects the States will be known to the Commonwealth negotiators.
- Federal clauses will be sought to be included in treaties in appropriate cases.[85]

As a result of these decisions, a much greater degree of consultation with the States on treaty-making and implementation has begun. It would be misleading, however, to regard consultation as something that has just begun to occur. For many years, consultations at official and ministerial level have taken place in a number of forums. Writing in 1966, Doeker indicated that "Australian practice with respect to consultation of its component States of the federation is rather vague and informal. There is no established rule which explains and determines the established practice".[86] The recent Premiers' Conference may have put the matter of consultation on a more formal and clearly defined basis.

Among the forums that have been used in the past and that will continue to be used for consultation are the Standing Committee of Attorneys-General; the Marine and Ports Council of Australia in relation to shipping and certain marine environment matters; the Council of Nature Conservation Ministers, in relation to nature conservation; the Conference of Labour Ministers in relation to International Labour Organisation Conventions. If properly applied, the arrangements will ensure the States an opportunity to provide comments on a much wider range of treaty matters than in the past. It will also ensure that the external affairs power is not used, at the expense of State legislation, in order to implement treaties, at least until the States have had an opportunity to implement particular treaties under their own legislation. While federal clauses will be sought in treaties in appropriate cases, it has at the same time been reaffirmed that treaties will not be applied piecemeal to part only of Australia. This is in accord with policy and practice dating from the early years

[85] Transcript, Press Conference by Prime Minister, 21 October 1977.
[86] Doeker, *supra* n. 58, 109.

of Federation, and will ensure Australia accepts international obligations for the nation as a whole and not in respect of separate component units.

It is too early yet to tell what effect the new arrangements will have in practice. Their implementation will depend largely on the political commitment of any Federal Government to maintain close consultations. As indicated, consultations have occurred for many years. In the area of international conferences, the States for the first time have had a representative attached as an adviser to the Australian delegation to the Seventh Session of the Law of the Sea Conference. State representatives have been included in the past, however, on delegations to conferences such as the International Sugar Conference or the Conference on Trade in Endangered Species of Wildlife. In the area of legislative implementation of treaties, it remains to be seen whether separate State and Commonwealth legislation to implement treaties will work effectively, particularly in those areas involving major Commonwealth responsibilities, such as the area of the marine environment. Certainly the arrangements can only be expected to work properly and to be lasting if the States are prepared to recognise the wider national interests involved in the conclusion of particular treaties. If the States allow narrow interests of their own to stand in the way of Australian implementation and membership of treaties with major national significance, difficulties with the arrangements can be expected to arise. While an appraisal of the new arrangements may be premature, the article will conclude with an appraisal of the more general situation of State participation in the foreign policy process within the Australian federation.

CONCLUSION

This article has sought to examine in the light of the constitutional position the attempts and endeavours by the Australian States to enter the foreign policy process. Such an examination indicates an exclusive federal executive competence over matters involving the prerogative to enter into international agreements and to establish diplomatic or consular relations with foreign governments. In the legislative area, it has been suggested that the Commonwealth can assert an exclusive competence over matters which impact directly on the foreign policy process itself and that State legislation contrary to treaties or customary international law may well be invalid.

Yet, the situation remains that the States, increasingly, do have contacts with other actors in the international arena, whether through the use of State representatives in foreign cities or by the conclusion of agreements with foreign governments or state instrumentalities. While in the legislative area there has, so far, been no direct challenge to

Commonwealth exclusivity in matters which relate directly to the conduct of foreign relations, such challenge could occur.

The recent Premiers' Conference in 1977 suggests greater co-operation will occur between the two levels of government in respect of treaty matters. Such arrangements will not, however, control other State activities in the international arena. Nevertheless, it is suggested that if Australia is to retain a unified voice in the foreign policy councils of the world, it is necessary for participation by the Australian States in the international arena to be confined to a low level of activity. This would mean that no claim to international personality of their own would be asserted by the States. Nor would the States seek to conclude "international agreements" or establish their overseas representation on a government to government basis.

It is the view of this writer that legitimate State interests and concerns can be met, and adequate links with the international arena maintained, without any need for the States to intrude into areas which are properly the constitutional preserve of the Commonwealth. At the same time, the Commonwealth needs to acknowledge the interests and concerns of the States and take them into account in making its decisions in relation to foreign policy. Whether in order to achieve this it is necessary to establish formal machinery may be doubted, having regard to the many diverse situations and interests that are involved. What does seem clear, however, is that the degree to which the States seek an independent role in the foreign policy process will be directly related to the degree to which they feel their interests and concerns are taken into account. Whether a potential constitutional struggle develops between the Commonwealth and the States will largely depend on the actions of the Federal Government. The form of such actions will be closely linked to the way in which successive Federal Governments perceive their role in the allocation of power and responsibility in the total constitutional structure. Even if one accepts as one's policy objective the maintenance of a unified national voice in matters relating to the foreign policy process, it is still necessary to recognise the legitimate interests of the States and to attempt to meet them within the constitutional structure which exists. The wisdom with which the Commonwealth uses its constitutional powers, as well as the responsibility which the States show in the exercise of their powers, particularly in the area of treaty implementation, is likely to determine the course constitutional development in this area will take in the next few decades.