THE EXTERNAL AFFAIRS POWER OF THE COMMONWEALTH

By COLIN HOWARD *

In this definitive study of section 51(29) of the Constitution, the author first points out the problems of delimiting the scope of the section in relation to other Commonwealth legislative powers. He proceeds to analyse two leading High Court decisions on the matter, R. v. Burgess *and the* Second New South Wales Airlines *case, and highlights the differences between the wide and the restricted judicial interpretations of it. His conclusion is best described as cautiously pessimistic.*

'It [looks] as though the Imperial Parliament intended . . . to divest itself of its authority over the external affairs of Australia and commit them to the Commonwealth Parliament . . .'[1] (1899)

'The power to legislate upon external affairs is a new departure of doubtful significance.'[2] (1900)

'It must be conceded that the expression "external affairs" is singularly vague. . . . It may hereafter prove to be a great constitutional battle-ground.'[3] (1901)

'This is perhaps of all the powers of the Commonwealth Parliament, that which is the least capable of definition.'[4] (1910)

'It is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs.'[5] (1921)

'It is not easy to interpret and apply the power to make laws with respect to external affairs.'[6] (1936)

'It is undeniable that in the long run the extent and content of this Commonwealth power can only be determined by that process of litigious trial and error which proves so profitable to the lawyers and so bewildering to the layman. Still there are drawbacks to the process.'[7] (1937)

'Australia has at the present time no Great Seal. The seal used on treaties is that in the custody of the Lord Chancellor of the United Kingdom.'[8] (1952)

* Ph.D.(Adel.), LL.M.(Lond. and Adel.), LL.M.; Barrister and Solicitor; Hearn Professor of Law in the University of Melbourne.

1 Lefroy, 'The Commonwealth of Australia Bill' (1899) 15 *Law Quarterly Review* 155 and 281, 291.

2 Brown, 'The Australian Commonwealth Bill' (1900) 16 *Law Quarterly Review* 24, 26.

3 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 631. The sentences quoted are in the opposite order in the original.

4 Moore, *Constitution of the Commonwealth of Australia* (2nd ed.) 460.

5 *Roche v. Kronheimer* (1921) 29 C.L.R. 329, 338-9 *per* Higgins J.

6 *R. v. Burgess* (1936) 55 C.L.R. 608, 668 *per* Dixon J.

7 Phillips, 'External Affairs and the Commonwealth' (1937) 1 *Res Judicatae* 200.

8 Nicholas, *Australian Constitution* (2nd ed., 1952) 101.

'What kind of a law is a law for the peace, order and good government of the Commonwealth under s. 51(29) of the Constitution is still very much an unknown quantity.'[9] (1970)

A INTRODUCTION

In section 51(29) of the Constitution the Commonwealth is given power to legislate with respect to '[e]xternal affairs'. This is not the only expressly mentioned source of legislative power on this subject but it is the only one in general terms. Three others are section 51(1), trade and commerce with other countries; section 51(10), fisheries in Australian waters beyond territorial limits; and section 51(30), relations of the Commonwealth with the islands of the Pacific. There are others which do not expressly refer to affairs external to Australia but by their wording necessarily imply contact with them. These include section 51(3), bounties on the export of goods; section 51(6), defence; section 51(9), quarantine; section 51(19), naturalization and aliens; possibly section 51(20), foreign corporations; section 51(27), immigration and emigration; and section 51(28), influx of criminals. There are yet others which in the conditions of the modern world inevitably involve the Commonwealth in external contacts. Examples are section 51(4), borrowing money on the public credit of the Commonwealth; section 51(5), postal, telegraphic, telephonic and other like services; section 51(8), astronomical and meteorological observations; and section 51(15), weights and measures.

At this point it becomes obvious that almost any, and perhaps all, of the subjects of Commonwealth legislative power are capable of having a connection with external affairs. A major power not mentioned in the previous paragraph is taxation under section 51(2). Taxation is a distinctively internal concern but nevertheless entails at the present day many such matters as double taxation conventions and selective taxation of foreign investment, the importance of which lies in their external connotation. The same can be said of section 51(21) and (22), the marriage and divorce powers, for they necessarily include the extent to which marriages, divorces and related changes of status under foreign laws receive recognition in this country. Further illustration would be superfluous.

[9] Student examination paper, University of Melbourne, 1970. Additional references not cited elsewhere: Garran, 'The Aviation Case' (1936) 10 *Australian Law Journal* 297; Starke, 'The Privy Council and the Competence of Federal Legislatures to Legislate Pursuant to International Obligations' (1937) 11 *Australian Law Journal* 45 and 87; Sawer, 'Execution of Treaties by Legislation in the Commonwealth of Australia' (1955) 2 *University of Queensland Law Journal* 297; Starke, 'The Commonwealth in International Affairs' in Else-Mitchell (ed.), *Essays on the Australian Constitution* (2nd ed. 1961) 343; Wynes, *Legislative, Executive and Judicial Powers in Australia* (4th ed. 1970) 281-95; Menzies, *Central Power in the Australian Commonwealth* (1967) 115-34. *Cf.* Richardson, 'Aviation Law in Australia' (1965) 1 *Federal Law Review* 242.

If it is the case, as it therefore appears to be, that the Commonwealth may legislate upon any subject within its powers in an external affairs context as much as in any other, the question arises, what can the general external affairs power of section 51(29) add to the other legislative powers. It has to be remembered that section 51(29) is not directly relevant to the actual conduct by the Commonwealth of Australia's external affairs. The conduct of those affairs is executive action,[10] not dependent upon legislative support except for the appropriation of money for expenses. Section 51(29) is a source of power to legislate internally, not to conduct affairs externally. It seems to follow that its function is to enable the Commonwealth to give internal effect to arrangements originally made as part of its conduct of external affairs. But since it is clearly unnecessary to supplement the other heads of Commonwealth legislative power in this way with respect to their own subject matter, the conclusion appears to follow that section 51(29) enables the Commonwealth to legislate on an indefinite number of subjects not otherwise within its powers provided that it is doing so pursuant to an external affair.

Obvious though this analysis appears to be, it gives rise to several consequential problems. They are of three kinds: what sort of connection is required between legislation under section 51(29) and external affairs, or, to put it differently, what amounts to an external affair for the purpose in hand; what is the relationship between section 51(29) and the other legislative powers of the Commonwealth; and whether, quite apart from the two previous questions, there is any limitation on the potential subject matter of section 51(29). At this stage these problems need be only briefly illustrated.

As to the first, a straightforward instance of a direct, and in itself unexceptionable, connection between domestic legislation and an external affair would be a statute giving effect to the terms of a trade treaty requiring certain commercial arrangements to be made within Australia for the benefit of the foreign interests concerned. At the other end of the scale in terms of formal definition of an external affair would be similar legislation passed not in pursuance of a treaty but in the hope of attracting foreign investment by creating and advertising favourable conditions.

The second problem, the relationship of section 51(29) with the other legislative powers of the Commonwealth, raises the question whether any subject matter can be legislated for under section 51(29) which might also be legislated for under another power. The importance of this is that many of the other legislative powers of the Commonwealth are subject to express limitations to which section 51(29) is not. For instance, the Commonwealth might legislate to give effect to an international labour convention in disregard of the limitations of section 51(35), which limits

[10] *A.-G. for Canada v. A.-G. for Ontario* [1937] A.C. 326, 347-8.

its power with respect to labour legislation to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State; or to acquire land for the use of an overseas interest in disregard of section 51(31), which requires the acquisition of property by the Commonwealth to be made on just terms. If such legislation is valid, the first question, what amounts to an acceptable connection with external affairs, becomes correspondingly more important, for when such a connection is established the Commonwealth acquires almost limitless domestic legislative power. But if such legislation is not valid beyond the limits to which it would be subject in a purely domestic context, the consequence follows that section 51(29) encompasses only such legislative subject matters as are not granted to the Commonwealth by the Constitution otherwise.

This is an odd result. It means that effect can be given to an agreement with New Zealand for a uniform code of criminal law, a subject matter not in itself within Commonwealth legislative competence, but not to an agreement with the U.S.A. to limit the production of certain articles under licence to particular areas of Australia, a matter of trade with other countries and therefore expressly within section 51(1); for by section 99 this is prohibited as the granting by a law of trade or commerce of a preference to the parts of the country in question. The oddity of a result is not necessarily evidence of its wrongness but it would certainly be a strange situation if a connection with external affairs made the major change in the federal balance of transferring to the Commonwealth whole areas of legislative competence originally left to the States but not the minor change of freeing the Commonwealth from a few relatively unimportant restrictions.

These possibilities that section 51(29) is a vast potential source of legislative power for the Commonwealth raise the third question, which is whether the content of the external affairs power is to be delimited in some other way. One logically possible interpretation is to go to the other extreme and read it as extending only to matters concerned with the actual process of diplomatic representation and intercourse, such as the status under Australian law of the representatives of other countries. This approach may be disregarded not only because in its few pronouncements on section 51(29) the High Court has rejected it but also for inherent improbability. It is inherently improbable because it would have the result of limiting the competence of the Commonwealth in external affairs, so far as they required implementation by domestic legislation, solely by reference to its legislative competence in internal affairs.

Whatever the constitutional difficulties of constructing a coherent theory of the inter-relation between the Commonwealth's freedom to act on the

national behalf in external affairs and its limited domestic legislative competence, it cannot be right to limit its external freedom of action by reference to such an irrelevant consideration. The source of the difficulty is that the internal limitations on Commonwealth legislative power find their origin and justification in internal factors collectively to be described as the balance of interest between national and regional considerations. By definition these have no relevance to matters affecting the standing of Australia in the international community or the advancement of its interests through its relations with that community. That being an affair of national and not regional concern, it is wholly within the proper sphere of Commonwealth competence, even if it finds its expression from time to time in such occurrences as commercial arrangements which in detail directly affect some parts of the country but not others.

No doubt some compromise position is to be reached between the widest and the narrowest possible interpretations of section 51(29), but what this position will ultimately prove to be is not easy to see. Since the external affairs power, in common with the rest of section 51, is expressed to be subject to the Constitution, it is restricted by such overriding limitations as section 92, preserving freedom of interstate trade, and section 116, forbidding the establishment by the Commonwealth of any religion, but what else it is restricted by is uncertain.

B EXTERNAL AFFAIRS AND DEFENCE

One particular problem, which appears to be entirely unexplored, is the relation of the external affairs power to the defence power. A contrast between them produces two immediate points of interest. The first is that external affairs may be regarded as a purpose power in the same sense as defence has been held to be a purpose power;[11] that is to say, that the criterion of legislative validity upon which it depends is the purpose of effectuating the conduct of external affairs, just as the ultimate criterion of validity under the defence power is the purpose of furthering defence. The contrast is with limitation by reference to a class of activities, transactions or subjects, such as trade and commerce, marriage or taxation, without regard to purpose.

As with defence, a law on almost any subject may in appropriate circumstances be a law with respect to external affairs. This similarity suggests that the process of reasoning which has been found appropriate to the defence power may be usefully applied to external affairs as well. The question in any particular case would then become whether the law was enacted pursuant to an external affair or, in light of its terms, with the object of assisting the conduct of external affairs. If so, it is a valid law under section 51(29) regardless whether the actual subject

[11] Howard, *Australian Federal Constitutional Law* (1970) 330.

matter of the law falls within the description of some other legislative power of the Commonwealth or not. Such an approach would give section 51(29) a wide scope, far wider no doubt than was originally intended, if indeed anything definite was originally intended at all, but this does no more than reflect the changed significance of external affairs to Australia since federation. Moreover, with the possible exception of defence, it solves the problem of the relation of external affairs to the other legislative powers.

The reason for making a possible exception of defence lies in the second similarity between the two powers. It is true of some other powers, section 51(30) for example, on relations with the islands of the Pacific, that their separate statement seems superfluous because their subject matter is necessarily included within the external affairs power unless that power is construed in an unrealistically narrow sense. This is true also of defence. Defence is by definition an external affair. Its internal counterpart is the preservation of internal order by police action or the suppression of insurrection. Therefore that part of section 51(6), the defence power, which refers to the naval and military defence of the Commonwealth may as a matter of logic be regarded as a superfluous restatement of a purpose included within the wider purpose specified in section 51(29). There are, however, difficulties in this view, the main one being that the High Court has developed a body of doctrine for the construction of section 51(6) which treats it as a separate power in no way dependent on section 51(29), which makes no reference to section 51(29), and which would be undermined in significant respects if the argument that section 51(29) encompasses *inter alia* defence were adopted.

The reason why established doctrine on the defence power would be undermined if defence were treated as merely an aspect of external affairs is that whereas the need to take active measures for defence varies, the need to take active measures for external affairs does not. There is no basis for an analysis of external affairs generally in a manner corresponding to the familiar quadripartite division of defence into war, postwar, peace and preparation for war. The conduct of external affairs is constant. The answer may be made that there is upon closer inspection no problem: that the proposition that defence is an external affair may be right in theory but has no practical content because any external affair classifiable as defence must be treated under the defence power and made subject to defence criteria of legislative validity. This is correct but conceals the difficulty instead of solving it. The problem is not the formal one of distinguishing defence from external affairs in the construction of section 51 but of preventing, if it be necessary to prevent it, the validation of a law under section 51(29) which is not valid under section 51(6); or, in other words, of developing a criterion of characterization for distinguishing a law pertaining to external affairs from a law pertaining to defence.

To take a simple example, in the *Communist Party* case[12] in 1951 it was held that legislation dissolving the Australian Communist Party was not in the circumstances of the time a valid measure of national defence. The question arises whether it would have been the valid implementation of an external affair if it executed a term of a treaty with the U.S.A. that the Commonwealth abolish the Australian Communist Party. It is not enough to dismiss the possibility on the ground that such a treaty would be a transparent device to acquire an internal legislative power which the Commonwealth otherwise does not have, a course of action which the High Court may well not countenance.[13] The treaty might not be a transparent device. It might be part of a larger treaty designed to increase trade with the U.S.A., one of the necessary conditions of which was to overcome a congressional embargo on trade with countries permitting the existence of a communist party.

It is true that in some circumstances the external affairs power could not even in theory come so easily to the aid of the defence power. A comprehensive food rationing scheme[14] going beyond the Commonwealth's normal legislative competence which could not be validated under the defence power, because the conditions of the day showed no acceptable need for such a scheme as a measure of defence, would not be aided by the external affairs power because there would be no tangible external affair to which it could be related. Equally there are many matters, such as the maintenance of the armed forces and their use in co-operation with other countries, which are at all times within the scope of the defence power without need to rely on an external affairs characterization. But these propositions, although they may ameliorate, do not overcome the problem that in some important circumstances the carefully worked out limitations on the defence power may be easily transcended by relying instead on the external affairs power.

This is not necessarily a bad thing. There is no reason why a body of doctrine developed to keep the defence power within reasonable bounds should have the incidental effect of limiting the utility of any other power. Why, in other words, a law which cannot be characterized as a law with respect to defence should not be characterized instead as a law with respect to external affairs if it otherwise satisfies the requirements of characterization under that power. Such a development does not render defence power doctrine by any means superfluous, although it certainly cuts down its present sphere of influence. That doctrine remains operative upon legislation which is enacted for defence but has no sufficient connection with an identifiable external affair. At the present time, however, it can be said only that the relationship between

[12] *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1.
[13] *Cf. R. v. Burgess* (1936) 55 C.L.R. 608, 642, 669, 687.
[14] *Cf. Morgan v. Commonwealth* (1947) 74 C.L.R. 421.

the defence and external affairs powers has not yet come before the High Court and that what will happen when it does is not predictable.

C JUDICIAL EXEGESIS

(i) R. v. Burgess

Section 51(29) has seldom engaged the attention of the High Court. Although its potential complexity has not been overlooked, the approach of the court so far has been cautious. There are two major decisions on the power, the first being *R. v. Burgess*[15] in 1936.

The defendant was convicted of a summary offence against regulations made under the Air Navigation Act 1920 (Cth), in that he flew an aeroplane within the Commonwealth without being licensed to do so. The flight had taken place over Sydney, wholly within New South Wales. The defendant appealed against his conviction on the ground that the Commonwealth had no power to forbid a flight which took place wholly within one State. The regulations had been made pursuant to section 4 of the Act, which purported to authorize their making for two main purposes: the carrying into effect of an international convention to which Australia was a party for the regulation of air navigation, and the control of air navigation in the Commonwealth generally. It was held by the whole court that that part of section 4 which authorized the making of regulations for giving effect to the convention was a valid exercise of the external affairs power but that that part which envisaged general control of aviation in the Commonwealth was beyond power. The power most nearly supporting the second part was interstate commerce under section 51(1) of the Constitution but it went beyond section 51(1) by purporting to authorize a degree of control of intrastate aviation exceeding what was properly incidental to interstate aviation.[16] It was further held by a majority of four to one[17] that the regulations were invalid because they went beyond the terms of the convention. The importance of the case in the present context is twofold: the general observations on the scope of the external affairs power and the criteria of validity adopted for the regulations.

As to the first, Latham C.J. began by rejecting two possibilities. The first was that section 51(29) 'should be construed as giving power to make laws only with respect to some external aspect of the other subjects mentioned in sec. 51'.[18] He regarded the limitation of any of the powers of section 51 in this way by reference to all the other powers as 'an unintelligible proposition'[19] and saw no reason why section 51(29)

[15] (1936) 55 C.L.R. 608, Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.
[16] This decision on the limitations of the interstate commerce power has since been modified by the *Second New South Wales Airlines* case (1965) 113 C.L.R. 54.
[17] Starke J. dissenting.
[18] (1936) 55 C.L.R. 608, 639.
[19] *Ibid.*

'should not be given its natural and proper meaning, whatever that may be, as an independent express legislative power'.[20] On this issue no-one has since disagreed with him. The second was the argument that section 51(29) 'is limited to matters which *in se* concern external relations or to matters which may properly be the subject matter of international agreement'.[21] This he rejected on the ground that 'the possible subjects of international agreement[22] are infinitely various', making it 'impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement'.[23] He also made the third preliminary point that whatever the content of section 51(29) might ultimately prove to be, it could not be used to legislate in disregard of overriding constitutional prohibitions. He cited section 116, prohibiting the establishment of religion, and section 113, preserving the application of State laws to intoxicating liquids, in support.[24] On this also there has been universal agreement.

Latham C.J. did not proceed from these statements of what section 51(29) is not to any more definite delimitation of what it is. The nearest he came was to say:[25]

> The regulation of relations between Australia and other countries, including other countries within the Empire, is the substantial subject matter of external affairs. Such regulation includes negotiations which may lead to an agreement binding the Commonwealth in relation to other countries, the actual making of such an agreement as a treaty or convention or in some other form, and the carrying out of such an agreement.

It is clear from these *dicta* that Latham C.J. took a wide view of the scope of section 51(29) in terms of domestic legislative power, but how wide is uncertain.

Starke J. expressed a view different in significant respects. He summarized his opinion in the following two passages:[26]

> The Constitution, in the legislative power to make laws with respect to external affairs, recognizes that the Commonwealth will have political relations with other Powers and States, and legislative power is conferred upon it in comprehensive terms, so that it may control those foreign or external relations, and implement obligations that may have been assumed in the course of those relations.
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> The power conferred by the Constitution upon the Commonwealth to make laws with respect to external affairs must be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which restrain generally the exercise of Federal powers. The

[20] *Ibid.*
[21] (1936) 55 C.L.R. 608, 640.
[22] Of which at 641 he cited many current examples.
[23] (1936) 55 C.L.R. 608, 641.
[24] (1936) 55 C.L.R. 608, 642.
[25] (1936) 55 C.L.R. 608, 643.
[26] (1936) 55 C.L.R. 608, 657-8.

> Commonwealth cannot do what the Constitution forbids. But otherwise the power is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States. It is impossible, I think, to define more accurately, at the present time, the precise limits of the power. It may be . . . that the laws will be within power only if the matter is 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement'.[27]

It will be seen that Starke J. agreed with Latham C.J. in treating section 51(29) as a distinct and considerable head of legislative power, not dependent on any of the other powers for its basic content. He differed in being more cautious about its limitations. First, he put limitations implied in the Constitution on the same level as those which are expressed. Latham C.J. said nothing about implied limitations. Second, he entertained the possibility, which Latham C.J. rejected, that section 51(29) might be restricted to a class of matters which could be legitimately regarded as proper subjects of international agreement. He did not attempt to meet the difficulty of evolving a criterion whereby to identify such matters.

Dixon J. exhibited similar caution but went a little further into the question.[28]

> It is not easy to interpret and apply the power to make laws with respect to external affairs. Although it may enable the Parliament to make laws operating outside the limits of the Commonwealth, it cannot be supposed that its primary purpose was to regulate conduct occurring abroad. Prima facie, legislation confers rights and imposes duties to be enjoyed and fulfilled within the territory. In the case of such a power as that at present under consideration the presumption cannot confine the legislation to the Commonwealth in the same way as in the case of other powers. But the presumption cannot be reversed so that the power prima facie does not affect conduct within the Commonwealth and only that outside. I think it is evident that its purpose was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of Commonwealth in reference to matters affecting the external relations of the Commonwealth. The Commonwealth might under this power legislate to ensure that its citizens did nothing inside the Commonwealth preparatory to or in aid of some action outside the Commonwealth which might be considered a violation of international comity, as, for instance, a failure on the part of private persons to behave as subjects of a neutral power during a war between foreign countries. If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby

[27] Quoting from Willoughby, *Constitutional Law of the United States* (2nd ed. 1929) 519.

[28] (1936) 55 C.L.R. 608, 668-9.

> obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs. The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example. We are here concerned with a convention adopted under the full authority of the Crown and internationally binding in relation to this country. The matters with which it deals include the international recognition of sovereignty over the air and the relations of governments to the aircraft of other governments. It is, perhaps, wise to leave less formal arrangements with other countries and international agreements relating only to matters otherwise only of internal concern until questions arise under them. For, in my opinion, air navigation cannot be regarded as of this description.

This passage appears to be a more refined statement of the views already expressed by Starke J. It is, if anything, even more reserved, for there is no mention of either express or implied limitations on section 51(29) but rather an emphasis on restrictive interpretation of the section quite apart from the effect of any overriding limitations. The contrast with the viewpoint of Latham C.J. is at once both marked and subtle. Dixon J. did not deny the proposition that the possible subjects of international agreement are infinitely various. He did deny Latham C.J.'s further, implied, proposition that, express constitutional prohibitions apart, the content of section 51(29) is coextensive with the possible subjects of international agreement. The reason clearly was awareness of the potential of section 51(29) for destruction of the federal balance of legislative power. It cannot be said, however, that Dixon J. was any more illuminating than Starke J. on the question how one distinguishes matters 'indisputably international in character' from matters 'of internal concern' in a context in which, by definition, the relations between the Commonwealth and at least one other country are involved.

There is the appearance of greater precision in the concluding reference to air navigation, an activity which in the modern world is as international in character as anything is likely to be, but the appearance is misleading. *R. v. Burgess*[29] was a suitable case in which to make pronouncements of this kind not because of the international character of air navigation but because air navigation was not present to the minds of the framers of the Constitution. Since it is therefore a subject matter not allotted to anyone, there is no objection, and considerable advantage, in allotting it to the Commonwealth except in the unimportant case of wholly intrastate flying. The external affairs power is as convenient a vehicle for accomplishing this end as any other. Indeed perhaps better than most, for as Latham C.J. pointed out,[30] the grant to the Commonwealth of the external affairs power did not in itself take anything away

[29] (1936) 55 C.L.R. 608.
[30] *Ibid.* 636.

from the States because it was not one of their pre-federation colonial powers.

The remaining judgment, the joint judgment of Evatt and McTiernan JJ., adopted the same standpoint as Latham C.J. and was distinctly more explicit in specifying its implications. They too rejected the idea which commended itself to Starke and Dixon JJ. that a distinction might be drawn between affairs international in character and affairs of internal concern. They therefore by implication rejected also the proposition that, express constitutional prohibitions apart, there was any difference between the subject matter of external affairs and the legislative scope of section 51(29). 'So long as a Commonwealth enactment truly relates to a matter specified in section 51 of the Constitution, it is nothing to the point that it relates also to matters not therein specified. Therefore the the real question is—what is comprehended by the expression "external affair".'[31] In answering this question Evatt and McTiernan JJ. went on to assign to section 51(29) a wide scope.

> It 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 or war. It may also include measures designed to promote friendly relations with all or any of the nations.[32]
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> It would seem clear, therefore, that the legislative power of the Commonwealth over 'external affairs' certainly includes the power to execute within the Commonwealth treaties and conventions entered into with foreign powers. . . . But it is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions; . . . the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organization or requests upon other subject matters of concern to Australia as a member of the family of nations. The power is a great and important one.[33]

There are two striking points about these passages. The first is the reference to relations with other countries in times of war as well as peace. It is to be regretted that the judgment did not pursue the implications of this statement in its application to the defence power. Possibly its importance was overlooked because most of the development of defence power doctrine which is now familiar took place later in consequence of the Second World War. The second is the clearly expressed view that legislative power under section 51(29) does not arise only pursuant to an agreement or document of the binding status of a treaty or convention. The references to measures designed to promote friendly relations,

[31] (1936) 55 C.L.R. 608, 684.

[32] *Ibid.*

[33] (1936) 55 C.L.R. 608, 687. At 682 Evatt and McTiernan JJ. disapproved of the Commonwealth practice of not ratifying draft conventions of the International Labour Organization, regarding it as resting on a mistaken understanding of the limits of the external affairs power. Nevertheless the practice continues.

to recommendations and to draft conventions indicate that Evatt and McTiernan JJ. did not accept the necessity for a binding international obligation as a prerequisite for legislative power under section 51(29).

Wide though these views are, they are limited in the judgment in three ways. First, in common with the other members of the Court and everyone since, Evatt and McTiernan JJ. accepted that section 51(29) is necessarily subject to overriding express constitutional prohibitions.[34] Second, also in common with the other members of the Court, they did not countenance the use by the Commonwealth of an international agreement as a device to acquire domestic legislative power, the agreement being entered into for the sole purpose of bringing section 51(29) into play,[35] although equally neither they nor their brethren explained how such a device could be detected or cognizable in a court of law. Third, they called it 'a necessary corollary'[36] of their analysis that a law enacted under section 51(29) pursuant to an international agreement should conform closely to the exact terms of that agreement. In this they appeared once again to be in agreement in principle at least with Latham C.J. and Dixon J.,[37] but the degree of agreement may have been less in fact than appears, for they went on to say:[38]

> Doubtless this requirement does not necessarily preclude the exercise of wide powers and discretions by the Parliament or the Executive of the Commonwealth, for the international convention may itself contemplate that such powers and discretions should be exercisable by the appropriate authority of each party to the convention.

The implications of this qualifying passage in terms of domestic constitutional power may be considerable, but they were not pursued.

R. v. Burgess[39] settled two basic points about section 51(29): that it is to be treated as an independent legislative power with its own content and not as a mere appendage to the other legislative powers of the Commonwealth; and that since it is 'subject to this Constitution', it is subject in common with the rest of section 51 to overriding prohibitions expressed elsewhere in the Constitution. On this basis the case revealed what may prove to be an important point of disagreement: the suggestion by Starke and Dixon JJ. that some limitation on the scope of section 51(29) may have to be found in a distinction between matters appropriate for international agreement and matters of primarily internal concern, and the contrary opinion of Latham C.J., Evatt and McTiernan JJ. that no such limitation is either justifiable or intelligible. This difference of approach in principle may

[34] (1936) 55 C.L.R. 608, 687. They cited ss. 6, 28, 41, 80, 92, 99, 100, 116 and 117 of the Constitution.
[35] *Supra* n. 13.
[36] (1936) 55 C.L.R. 608, 687.
[37] Starke J. did not adopt this principle. See *infra* n. 45.
[38] (1936) 55 C.L.R. 608, 688.
[39] (1936) 55 C.L.R. 608.

perhaps be reduced to the question whether section 51(29) is to be subject to implied as well as express constitutional limitations or not. From this standpoint the section raises in yet another context the question which has remained uncertain ever since the *Engineers'* case[40] of the character, scope and function of implied prohibitions on the use of Commonwealth legislative power.[41] Quite possibly the future development of doctrine under section 51(29) will be more affected by that wider problem than by anything particularly to do with the section itself.

This difference of approach in the court in principle, however, has to be read in light of the decision on the actual facts of the case, which seems to qualify it considerably. Since the whole court agreed that, whatever the full scope of section 51(29), it would certainly support legislation in the form of the first part of section 4 of the Act in fulfilment of the terms of the convention, and since section 4 simply authorized the making of regulations, the criteria of validity adopted for the regulations acquire corresponding importance. Clearly they would have been valid on any view if they had amounted to no more than a literal reproduction of the terms of the convention, provided that in so doing they did not infringe an overriding constitutional prohibition, which they did not. The question raised therefore was what scope would be given by the Court to the incidental power in relation to the external affairs power.

According to Latham C.J.[42] the governing principle was that the regulations 'must in substance be regulations for carrying out and giving effect to the convention'. Dixon J.[43] required 'a faithful pursuit of the purpose, namely, a carrying out of the external obligation', and Evatt and McTiernan JJ.[44] that the regulations 'should be in conformity with the convention which they profess to be executing'. These three general formulations led in each case to the result that the regulations were invalid. There was no question that the regulations taken as a whole did include many departures in detail from the exact terms of the convention, so many in fact that in the opinion of the majority they could not be regarded even with reasonable latitude as confined to giving effect to the convention. Some parts gave the impression, in the words of Evatt and McTiernan JJ.,[45]

> that those responsible for the Commonwealth regulations were not so much addressing their minds to the duty or obligation of performing and carrying out the terms of the convention . . . as adopting [it] merely as a working basis, reserving the right to make any modification or variation which was considered desirable.

[40] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
[41] For a survey to date see Howard, *Australian Federal Constitutional Law* (1970) 50-74.
[42] (1936) 55 C.L.R. 608, 646.
[43] (1936) 55 C.L.R. 608, 674.
[44] (1936) 55 C.L.R. 608, 688.
[45] (1936) 55 C.L.R. 608, 693.

This approach they described inelegantly and unkindly as 'incredibly fatuous'[46] except on the hypothesis that the Commonwealth had 'complete and unrestricted power to make general rules on the subject matter of civil aviation'.[47] There was some basis for this hypothesis, for it had apparently been expected that the States should refer power to deal with aviation to the Commonwealth, which could then have legislated under section 51(37), matters referred.[48] The expectation was disappointed but may have been anticipated in the regulations.

It must remain a matter of speculation whether the majority of the court were in any degree influenced by this circumstance. What is certain is that Starke J. was able to hold the regulations valid notwithstanding. His statement of principle makes clear why. Although he had been cautious in his general approach to section 51(29) he was prepared in relation to a matter which was clearly within its scope to give full range to the incidental power. In particular he saw no reason why such an undertaking as the convention should not be supplemented on related matters, or varied where desirable, at the discretion of the enacting legislature.

> All means which are appropriate, and are adapted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power. The power must be construed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention. For instance, general safety and other regulations may be necessary for supplementing the convention, and probably exemptions are legitimate where it appears unnecessary or undesirable that the provisions of the convention should apply. . . . A construction of the power that enables a ready application of the convention to various circumstances and conditions is preferable to one that insists upon an inflexible and rigid adherence to the stipulations of the convention. After all, we should remember that the power is conferred for the purpose of carrying out an international and not a mere local agreement.[49]

There is a real difference of approach here, not just a disagreement as to the effect of the regulations. The difference reappeared in the *Second New South Wales Airlines* case[50] in 1965, discussed in detail in the next section of the text, where the treatment of the relevant regulations by four members of the Court was substantially the same as that of Starke J. and their treatment by the other three substantially the same as that of the majority in *R. v. Burgess*.[51]

It is hard to resist the conclusion that the only two members of the Court in *R. v. Burgess*[52] who were entirely consistent in their views of

[46] *Ibid.*
[47] *Ibid.*
[48] (1936) 55 C.L.R. 608, 626.
[49] (1936) 55 C.L.R. 608, 659-60.
[50] (1965) 113 C.L.R. 54. See particularly Menzies J. at 141.
[51] (1936) 55 C.L.R. 608.
[52] *Ibid.*

section 51(29) were Dixon and Starke JJ. Dixon J. maintained a conservative position in relation to both the general scope of the power and the particular validity of legislation on a matter within it. The consistency of this approach lies in adherence to the belief that the character of the external affairs power requires it to be carefully confined under all circumstances. To date it is the most restrictive view of section 51(29) likely to command acceptance. Starke J. agreed that caution was desirable in delimiting the legislative potential of section 51(29) in general terms but evidently thought that once a matter was admitted to be within the section, legislative authority with respect to that matter should be given the usual full benefit of the incidental power. The consistency of this approach lies in adherence to the belief that if external affairs is to be treated as an independent legislative power in its own right, then within its scope it should be given the same incidental range of operation as any other enumerated power.

The judgments of Latham C.J., Evatt and McTiernan JJ., particularly the latter, leave the impression by contrast that what they gave with one hand they took away with the other. By confining the Commonwealth with some closeness to the literal terms of the convention they tended against the exercise of discretion on the best way of implementing its basic purpose under Australian conditions. This approach is in fundamental contradiction of the idea, which these judges espoused in their general pronouncements, that section 51(29) should be given an interpretation commensurate with the international role and responsibilities of the Commonwealth. The conclusion follows that notwithstanding the width of some of the general statements of principle on section 51(29), *R. v. Burgess*[53] was a cautious decision, not conducive to a robust use of the external affairs power.[54]

(ii) Second New South Wales Airlines *Case*

The scope of section 51(29) in a domestic civil aviation context came under consideration again in 1965 in the *Second New South Wales Airlines* case.[55] The question was once more whether certain Commonwealth regulations validly applied to wholly intrastate aviation. Again the High Court was concerned with the extent to which the regulations could be justified under the interstate and overseas trade and commerce power of section 51(1) quite apart from the external affairs power, but it is only the latter aspect which is relevant in the present context. And once again the justification under the external affairs power was sought in the terms of an international convention to which Australia was a party.

[53] *Ibid.*

[54] There was a sequel to *Burgess* in *R. v. Poole (No. 2)* (1939) 61 C.L.R. 634, but it adds nothing in terms of the external affairs power.

[55] *Airlines of New South Wales Pty Ltd v. New South Wales (No. 2)* (1965) 113 C.L.R. 54, Barwick C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ. The first stage of this litigation is at (1964) 113 C.L.R. 1. It adds nothing to the second case in terms of the external affairs power.

The first of the relevant regulations for the present purpose was numbered 198 and prohibited the use of aircraft in 'regular public transport operations' except under Commonwealth licence. In its application to wholly intrastate aviation regulation 198 was qualified by regulation 199, which in effect made the issue of such a licence mandatory except upon grounds of 'safety, regularity and efficiency of air navigation'. The external affairs question which arose under these two regulations taken in isolation was therefore whether the Commonwealth had power under section 51(29), pursuant to the convention, to prohibit intrastate aviation on the grounds specified. The third relevant regulation was numbered 200B and purported to make a licence issued under regulation 198 an authority to conduct the intrastate flight in respect of which it was issued irrespective of State law. The additional question posed by regulation 200B was therefore whether, assuming the validity of regulations 198 and 199, a commitment under the convention to legislate with respect to the safety, regularity and efficiency of air navigation was a sufficient basis for the Commonwealth to appoint itself the sole licensing authority for the conduct of regular public transport operations by way of civil aviation wholly within one State.

The court held with only one dissentient[56] that regulations 198 and 199 were valid. Three members of the Court, Barwick C.J., Menzies and Owen JJ., held them valid under both the external affairs and the trade and commerce powers. McTiernan J. held them valid under the external affairs power without reference to the trade and commerce power. Kitto and Windeyer JJ. held them valid under the trade and commerce power but not under the external affairs power. It seems to be a legitimate inference from the opinions of the four members of the Court who justified the regulations under the external affairs power that they adopted the position of Starke J. in *R. v. Burgess*[57] in relation to matters incidental to that power in preference to the more restrictive and literal approach of the majority in the earlier case. It has equally to be borne in mind, however, that no settled doctrine on the point can be regarded as having yet emerged, for in a full court of seven a bare minority of three adhered to the narrower view.

There was no disagreement on the general principles to be applied to the case where the Commonwealth legislates to implement a formal international undertaking. The fullest statement of these principles was made by Barwick C.J. In tone it repeats the note of caution particularly struck by Dixon J. in *R. v. Burgess*.[58]

> The mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth

[56] Taylor J.
[57] (1936) 55 C.L.R. 608.
[58] *Ibid.*

> Parliament. What treaties, conventions, or other international documents can attract the power given by s. 51(xxix) can best be worked out as occasion arises.
>
> Once it is decided, however, that some treaty or convention is, or brings into being, an external affair of Australia, there can be no question that the power under s. 51(xxix) of the Constitution thus attracted is a plenary power and that laws properly made under it may operate throughout Australia subject only to constitutional prohibitions express or implied. In particular, laws properly made under this power may operate throughout Australia without regard to the distinction between inter-State and intra-State trade and commerce to which observance must be paid in other connexions . . .
>
> But where a law is to be justified under the external affairs power by reference to the existence of a treaty or convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the legislative authority, it is for this Court to determine whether particular provisions, when challenged, are appropriate and adapted to that end. The Court will closely scrutinize the challenged provisions to ensure that what is proposed to be done substantially falls within the power.[59]

The only new point made in these passages is the reference to legislation for the purpose of securing the benefits as well as performing the obligations of an agreement. There is no mention at all of the view expressed by Evatt and McTiernan JJ. in *R. v. Burgess*[60] that section 51(29) extends well beyond the implementation of such formal undertakings as treaties and conventions and includes recommendations, draft conventions and the general promotion of friendly relations. But equally there is no express mention of the suggestion by Starke and Dixon JJ. that a distinction might have to be drawn between matters of external and matters of internal concern, although Barwick C.J. had earlier in his judgment[61] included 'subject matter' among the relevant but not necessarily decisive *indicia* of an external affair within section 51(29).

In the matter of general principles, therefore, the *Second New South Wales Airlines* case[62] adds virtually nothing to such discussion as took place in *R. v. Burgess,*[63] the rest of the court evidently agreeing with Barwick C.J. when he said[64] that he found 'no need in this case for any general discussion of the external affairs power' and with Windeyer J. when he said:[65]

[59] (1965) 113 C.L.R. 54, 85-6.
[60] (1936) 55 C.L.R. 608.
[61] (1965) 113 C.L.R. 54, 85.
[62] (1965) 113 C.L.R. 54.
[63] (1936) 55 C.L.R. 608.
[64] (1965) 113 C.L.R. 54, 85.
[65] (1965) 113 C.L.R. 54, 153.

> I wish to avoid entering upon the controversial question of whether the mere making of a treaty between the Commonwealth and some foreign country upon any subject can enlarge the constitutional powers of the Commonwealth Parliament. The question was alluded to by the Attorney-General in argument.[66] He suggested some criteria for its determination. I say nothing as to their correctness. . . . Neither the importance of the question nor the desirability of avoiding unnecessary generalization has been diminished by the developments of modern times in the forms and methods of international relationships and the nature and extent of international commitments.

All that can be inferred in a general way from the case is that while the High Court has by no means set its face against a wide interpretation of the external affairs power, it is unlikely to go out of its way to find an opportunity to adopt one.

The contrasting views on the proper scope of the incidental power in relation to regulations 198 and 199 are another matter. Here battle was less easily avoidable and was duly joined. Once more statements of principle from the earlier case were adopted without disagreement,[67] particularly Dixon J.'s observation that a law pursuant to an external obligation necessitated 'a faithful pursuit of the purpose'[68] of carrying out the external obligation, but Menzies J. appears to have been the only member of the court who perceived that there was in fact an important difference between Starke J. and his brethren on this issue in the earlier case.[69] It will be recalled that the criterion adopted by Starke J. of what is reasonably incidental to the performance of an international obligation was anything appropriate to that end which is not inconsistent with it. The point has been made already that this criterion of incidental validity is significantly wider than one which limits such validity to the necessary incidents of literal transcription, however described, and that *R.* v. *Burgess*[70] itself illustrates the practical difference.

The *Second New South Wales Airlines* case[71] illustrates the difference again. The obligation of the convention in that case, as expressed in the terms of the convention itself, was

> to collaborate in securing the highest practical degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.[72]

One of the specified matters upon which this obligation operated was the 'safety, regularity and efficiency of air navigation', wording adopted

[66] (1965) 113 C.L.R. 54, 63.
[67] (1965) 113 C.L.R. 54, 86, 102, 141.
[68] (1936) 55 C.L.R. 608, 674.
[69] (1965) 113 C.L.R. 54, 141.
[70] (1936) 55 C.L.R. 608.
[71] (1965) 113 C.L.R. 54.
[72] *Ibid.* 131.

precisely from the convention in regulation 199. The question under regulations 198 and 199 therefore became whether it was reasonably incidental to the achievement of uniformity in such matters in the international sphere for the Commonwealth to legislate with respect to the safety, regularity and efficiency of air navigation in its application to 'regular public transport operations' by way of civil aviation taking place wholly within one State.

If one tests this question by Starke J.'s criterion the answer has to be, as in effect concluded by four members of the Court, that such a measure is neither inappropriate to nor inconsistent with the international obligation. If one tests it by applying the literal terms of the convention the answer has to be, as in effect concluded by three members of the Court, that the international obligation says nothing about purely domestic civil aviation and does not necessarily imply its regulation except where it uses the same flight routes or facilities. There is one other factor which may be relevant for the future. Two of the minority on this issue nevertheless held regulations 198 and 199 valid under the trade and commerce power. It may be that the availability of the trade and commerce power influenced the two judges in question, Kitto and Windeyer JJ., against reading the external affairs power, with its far-reaching and uncertain constitutional potential, more widely than the context required. If so it reveals the possibility that some members of the court will be disposed to rely on that power only to the extent that they can rely on no other, with the consequence that a restrictive approach to it in a context in which there is an alternative basis of validity available is not necessarily a guide to the case where there is no such alternative.

There remains the fate of regulation 200B, the one which, in effect, attempted to make the Commonwealth the sole licensing authority for intrastate public transport aviation. The result of holding it valid would have been to prevent the State from prohibiting flights by an operator who satisfied Commonwealth requirements under regulations 198 and 199. Clearly, on the view of the minority this regulation was invalid so far as the external affairs power was concerned, for it was yet further removed from the terms of the convention than regulations 198 and 199. Almost equally clearly it was invalid also on the majority view, for although not inconsistent with the convention in the sense that it contradicted anything therein, it was not an appropriate means of carrying the convention into effect. Uniformity of safety and air navigation rules does not entail removal from a State of power which it otherwise has to prohibit flights on other grounds. It would indeed have been a blatant misuse of the external affairs power to uphold regulation 200B on this ground, for the genesis of the litigation was the political question, arising from Australia's two-airline policy, whether New South Wales could

prohibit intrastate flight route allocations made by the Commonwealth.[73] This dispute had nothing to do with external affairs.

(iii) *Other* Dicta

The other references made by the High Court to the external affairs power amount to little. In *R. v. Sharkey*[74] in 1949 Latham C.J., Dixon, McTiernan and Webb JJ. held that legislation making it a crime to utter seditious words in respect of Dominions other that Australia was within the power.[75] The case illustrates a context in which the implementation of a formal undertaking was not in question. To a limited extent therefore it supports the view of Evatt and McTiernan JJ. in *R. v. Burgess*[76] that section 51(29) goes beyond the implementation of such agreements, but the context was not a challenging one in terms of interpretation of the power and did not call forth discussion of its scope. In *McKelvey v. Meagher*[77] in 1906 the opinion was expressed by Griffith C.J. and Barton J.[78] that section 51(29) would support fugitive offenders legislation, and it was so held in *Ffrost v. Stevenson*[79] in 1937 by Latham C.J., Rich, and Evatt JJ.[80] In *Roche v. Kronheimer*[81] in 1921 Higgins J. made the solitary observation that it 'is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed'.[82]

D CONCLUSION

Some of the questions posed in the introduction to this paper have been answered by the High Court. Section 51(29) is firmly established as an independent legislative power on a par with the other powers of section 51. As far as overtly established principles of interpretation go, section 51(29) is in the usual way subject to express overriding constitutional prohibitions but is not to be restricted by reference to limitations on other powers. Beyond this, one is in the area of implied limitations and the scope of the external affairs power becomes correspondingly less certain. From a practical point of view the most pressing uncertainty at the present time is as to the width of the incidental power. There are two clearly competing judicial views, one wide and one narrow. The former would give the incidental power in this context the same scope

[73] For the background see Brogden, *Australia's Two-Airline Policy* (1968) 160-6. *Cf.* (1965) 113 C.L.R. 54, 168 *per* Owen J.
[74] (1949) 79 C.L.R. 121.
[75] *Ibid.* 136-7, 149, 157, 163.
[76] (1936) 55 C.L.R. 608. Dixon J. appears at 669 (quoted *supra* n. 28) to have envisaged exactly the *Sharkey* type of case.
[77] (1906) 4 C.L.R. 265.
[78] *Ibid.* 278-9, 286.
[79] (1937) 58 C.L.R. 528.
[80] *Ibid.* 557, 562, 579.
[81] (1921) 29 C.L.R. 329.
[82] *Ibid.* 338-9.

as it has in conjunction with such powers as tax and commerce. This would leave the Commonwealth considerable freedom in the implementation of international agreements. The narrower view, based no doubt upon an awareness of the vast potential of section 51(29) as a source of domestic legislative authority, would subordinate this consideration to the preservation of what is left of the federal balance. This approach to the incidental power may be tacitly linked with a tendency not to rely on section 51(29) if some other source of validity for legislation is available.

The analogy of external affairs with defence as a purpose power seems to have been accepted to the extent that it is a corollary of the view that an indefinite number of particular subject matters can properly fall within external affairs, but this view has not yet commanded complete acceptance. It is quite possible that some subject-matter limitation on section 51(29) will be worked out in future cases. If so, the character of external affairs will be to that extent qualified. A number of particular problems remain untouched. The most important is the relationship between external affairs and defence.[83] Another is the question how the use by the Commonwealth of section 51(29) as a mere device for acquiring domestic legislative power, if it should ever do such a thing, is to be detected in a court of law. The literal and legalistic approach of the High Court to constitutional interpretation throughout its history tends against the likelihood that it will look beyond the terms of the material before it in the present context, but if it does not do so it can hardly detect a device. There is strong precedent for its not doing so.[84]

Finally, there is nothing so far on the extent to which the Commonwealth can implement an agreement which leaves almost everything to the discretion of the contracting party. One can envisage for example an international agreement on drug trafficking, the conditions of which vary greatly across the world, embodying a number of particular provisions but consisting chiefly of an undertaking by the contracting parties to take such measures as they see fit to bring the traffic under control in the interests of humanity generally. On this and the other unsettled questions it would be good to be able to believe that the High Court is about to be prodded into action by a vigorous and optimistic governmental use of the external affairs power. It would also be naive.

[83] *Cf. R. v. Burgess* (1936) 55 C.L.R. 608, 641 *per* Latham C.J., 684 *per* Evatt and McTiernan JJ., 'peace and war'.

[84] In the *First Uniform Tax* case, *South Australia v. Commonwealth* (1942) 65 C.L.R. 373. On this and related cases on the point in the text see Howard, *Australian Federal Constitutional Law* (1970) 74-86.