Nationhood, International Obligation and Federal Structure: An Historical Overview of the Australian Experience

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I. Introduction

Today the interest of Americans investing abroad in the Pacific Basin is rising at a rapid rate. Resource-rich Australia is a prime target for the investment dollar. Since World War II the United States and Australia have developed a close relationship based upon both military and economic cooperation. With the recent upturn in the economies of both countries, developments in the minerals, oil, gas and manufacturing industries make Australia attractive to investors. From a political perspective, as the most stable nation in the Asia-Pacific region and because of the common English language and heritage, Australia is the most familiar target for such investment.

Australia is a federal state, modeled in part on the United States of America. This article focuses on the interrelationship between the Commonwealth Government of Australia and the Australian state governments with regard to external affairs. Although the sources of law do not all arise out of the trade and investment area, it is in that sphere that these issues have their most frequent and significant impact. For example, a United States corporation may wish to conduct a minerals exploration venture in Australia. After making a successful find, it may wish to mine, process and export the minerals. This involves setting up mining and production facilities, as well as rail or road transportation to a port and port facilities (if those facilities are not already in existence). Each of these steps will necessitate government contracts with the Australian state government involved. Unless the foreign investors' specific plans are already permitted under existing legislation, in order to cooperate with the investors, the state government will need to pass an enabling statute. Also, not only will the investment need to be approved by the For-
eign Investment Review Board of the Australian Department of the Treasurer, but it will also have to comply with existing Commonwealth legislation or, if that is not possible, be exempted from compliance.

The foregoing cursory outline of the process encountered by the foreign investor in Australia serves to highlight the need for cooperation from both the Commonwealth Government and the relevant state government. If the two governments do not agree, is the proposed project to proceed? Seldom does this question not require the appraisal of the constitutional issues involved. This article seeks to present and analyze the relevant issues from an historical perspective. After introducing the Australian Constitutional framework, major judicial decisions will be discussed. The conclusion is reached that the present constitutional position of the Australian judiciary can now be stated with some clarity and precision so as to effectively guide the foreign investor and others upon whom the issues may impact. It is probably fair to say that Australia keenly invites foreign investment but through legislative, executive and judicial means ensures that domestic as well as foreign interests are protected in a carefully regulated environment.

The landmark decision of the High Court of Australia in the Commonwealth of Australia v. State of Tasmania (Franklin Dam Case) has been and will continue to be the subject of attention of lawyers and scholars interested in the internal and external aspects of Australian federalism. This decision's immediate effect was to stop the construction of a dam in the southwestern Tasmanian wilderness area. The court held the construction of the dam to be in violation of validly enacted Commonwealth law. Neither the government of the State of Tasmania nor its instrumentality, the Hydro-Electric Corporation, were constitutionally exempt from the application of that law. This law had been enacted to implement a multilateral treaty, The Convention for the Protection of the World Cul-

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1. This is now a fairly straightforward and cooperative process. For the statute applicable to the regulation of foreign investment, see Foreign Takeovers Act, AUSTL. C. AcTS (1975).
2. 46 AUSTL. L. R. 625 (1983), see infra text accompanying notes 148-203. [hereinafter cited as the Franklin Dam Case].
tural and Natural Heritage (UNESCO), and it effectively subjected the Australian federal compact to the obligations and benefits of the treaty.

On the jurisprudential plane, the decision's contribution is far reaching indeed. Australia's international personality, including her ability to undertake and to fulfill her role in world affairs, has been reinforced. The difficulties faced by a supreme municipal court in treaty interpretation and the application of public international law have been brought into full view by this decision. The court finely balanced the preservation of a federal structure and the need for unified action in matters with international repercussions. Seen in the light of history, the Franklin Dam Case is an evolutionary rather than revolutionary development in each of the above mentioned problem areas. This history may indeed provide useful guidance to other Australian federal structures.

II. The Constitution of the Commonwealth of Australia

The Commonwealth of Australia Constitution Act of 1900 (Constitution) provides for the federation of the British colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia. The Constitution is a Statute of the British Parliament sitting at Westminster and is not a formal declaration of independence by or on behalf of the people of the Commonwealth of Australia. Indeed, the Commonwealth is still "a self-governing colony" for the purposes of The Colonial Boundaries Act, 1895. Instead, the Act separates the legislative, executive and judicial powers of the Commonwealth. Its framework provides both an institutional separation of powers between the three branches of the Commonwealth Government and a federal division between the Commonwealth and the states. This framework bears many similarities to the United States Constitution which served as one of the major models for the draftsmen of the Australian Constitution.

The legislative branch of the Government of Australia is a bicameral parliament consisting of the House of Representatives and Senate. Section 51 of the Act provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the

6. Id. at § 8.
7. Id. at ch. I.
8. Id. at ch. II.
9. Id. at ch. III.
Commonwealth with respect to . . .
(i) Trade and commerce with other countries, and among the states . . .
(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth . . .

(xxix) External Affairs.

Subsections also allocate power to the Commonwealth to legislate with respect to defense, foreign corporations, immigration and emigration, relations with the islands of the Pacific, and matters incidental to the execution of any power of each of the arms of the Commonwealth Government. However, these enumerated powers are not exclusive of the powers of government exercised by each of the states. Instead, the enumerated powers are held concurrently by both systems of government. Unenumerated powers, being the residue, are exclusive to the states. Where concurrent laws on the books have been enacted by both State and Commonwealth Governments, any inconsistency is to be resolved in favor of the Commonwealth legislation.

A similar enumeration does not exist for the executive power of the Commonwealth. The chief executive, the Governor-General, is the sovereign head of state acting by and with the authority of the Crown. The position is not one that is elected. The Governor-General is appointed by the Crown, presently Queen Elizabeth II, on the recommendation of the Prime Minister of the Commonwealth of Australia. The Crown’s power, as exercised by the Governor-General in Council acting upon the advice of the elected Prime Minister and his or her Ministry, extends to the execution of all laws and the proper functioning of responsible government.

The pinnacle of judicial power is the High Court of Australia which is a federal supreme court. The High Court has original jurisdiction, inter alia,
In all matters -
(i) Arising under any treaty.
(ii) Affecting consuls or other representatives of other
countries . . . when the Commonwealth or its nominee
is a party in interstate suits.\textsuperscript{19}

Commonwealth legislative powers are limited by Section 92 of
the Act which guarantees the freedom of interstate trade, equal pro-
tection of the states in trade matters pursuant to Section 99, Section
100's protection of reasonable use of the waters of rivers for conser-
vation or irrigation by a State or its residents, Section 116 which
prohibits Commonwealth legislative involvement in matters of reli-
gion, and the implied doctrines of intergovernmental immunities and
the federal balance of powers. These powers and prohibitions have
made varying contributions to the interplay between Australian fed-
eralism and Australia's international legal position.

III. Traditions Die Hard — The Reserved Powers Doctrine

The Commonwealth of Australia has exclusive power over its
public servants, the site of the Parliament and other places acquired
by the Commonwealth for its public purposes\textsuperscript{20} and it alone can im-
pose customs and excise duties or grant bounties (subsidies) on pro-
duction or exports.\textsuperscript{21} The only other exclusive legislative powers lie
with the states. The conventional wisdom for the first twenty years of
Australian federation was that any power not enumerated in the
Constitution was reserved to the states.

In \textit{D'Emden v. Pedder}\textsuperscript{22} the High Court dealt with the reserved
powers doctrine by refusing to hold that one government, federal or
state, was supreme over the other. The Court in the \textit{D'Emden} case
rejected the notion that the Commonwealth was an agent of the gov-
ernments of the states. At issue in the case was a tax levied on gov-
ernment employees. The High Court decided that both the states
and the Commonwealth were to be viewed as sovereign in their own
right, and neither should be burdened or fettered by the other.
Neither government was subordinate to the other and neither could
impose a tax which suggested such subordination.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{19} Id. at § 75(i). This concept is commonly referred to as diversity jurisdiction.
  \item \textsuperscript{20} Id. at § 52.
  \item \textsuperscript{21} Id. at § 90.
  \item \textsuperscript{22} 1 C.L.R. 91 (Austl. 1904).
  \item \textsuperscript{23} The Court declined to draw a line between a reasonable tax and a burdensome one.
\end{itemize}
Under this early doctrine, even the mere attempt of one sovereign to burden another could not be condoned. Had this doctrine remained in favor, the Commonwealth Government would not have been able to interfere with the states' regulation of private industry, or vice versa. Thus, the High Court in *D'Emden* upheld the immunity of one component government in the federation from regulation by the laws of another component government. This doctrine came to be known as intergovernmental immunity of Commonwealth and State action.

In 1920, the powerful judgment in *Amalgamated Society of Engineers v. Adelaide Steamship Co. (Engineers' Case)*[^24^] stated what has since become accepted truth in Australian Constitutional Law. Intergovernmental immunities are not to be created by a:

vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution, and which when started, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the court on the opinions of judges as to hopes and expectations respecting vague external conditions. This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action, and must inevitably lead — and in fact has already led — to divergencies and inconsistencies more and more pronounced by the decisions accumulated.[^25^]

Therefore, intergovernmental immunities, if any exist at all, must be found in the explicit language of the Constitution.

It should be noted at this point that, in looking at the explicit language of any statute or Constitutional provision, the Westminster tradition of statutory interpretation forbids any reference to legislative history, including the Constitutional Convention Debates and the United Kingdom Parliamentary Debates over the Australian Constitution Bill. This tradition has the effect of removing from the process of statutory construction any inquiry into the reserved powers of the states, an issue that was well debated before the Constitutional Bill was passed. In addition, unlike most opinions from the

[^24^]: 28 C.L.R. 129 (Austl. 1920) [hereinafter cited as the Engineers' Case]. The immediate issue in the Engineers' Case, was whether the Parliament had power under Section 51(35) of the Constitution to make laws binding on the States. It was held that it did (Knox C.J.; Isaacs, Higgins, Rich and Starke J.J.; Gavan Duffy J., dissenting). The Amalgamated Society of Engineers claimed that it had an "industrial dispute" to which some 844 respondents were parties. These parties included government trading concerns. The engineers wanted the dispute arbitrated pursuant to Commonwealth Law. The respondents resisted this, claiming that the Commonwealth had no right to legislate for arbitration with respect to them.

[^25^]: Id. at 145.
United States Supreme Court where the majority of justices join in a common decision, consensus is seldom evident in Australian High Court judgments. It is therefore necessary to analyze each opinion in a significant case and “distill some honey from the pollen of the many flowers.” Ensuing sections of this article will perform just such an analysis with a view to guiding the American investor to a concise and practical distillation of the Australian legal position as it now stands.

The notion of reserved powers which was prevalent before the decision in the *Engineers' Case* and (set forth in the intergovernmental immunity doctrine of the *D'Emden* case), was attacked by Justice Higgins in his concurring opinion in *Engineers'*. Justice Higgins viewed the previous reserved powers concept as an attempt to read an explicit grant of power to the Commonwealth subject to an implied conception of the Commonwealth as a mere delegatee of states' powers. Under this interpretation, the power thus delegated can never be greater than the power held by the source and the “sovereignty” given up by the former colonies to the Commonwealth upon federation was to be construed restrictively. In other words, the states retained whatever they did not explicitly give up.

The approach adopted by the High Court in the *Engineers' Case*, however, was unique in that it was the first case to interpret initially the explicit and plenary powers granted the Commonwealth and only then allocate the resultant residue to the states. Given that the Constitution did not make explicit grants of power to the states, it was unacceptable to Justice Higgins and the other majority justices to circumscribe the explicit grants of Commonwealth power by initially determining the size of the residue.26

The opinions in the *Engineers' Case* were based on the fact that Section 107 of the Constitution does not support the reserved powers doctrine. Section 107 provides:

Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.27

This provision does not address the allocation of concurrent powers. Its function is only to preserve rather than reserve residual state au-

The United States Supreme Court case *NLRB v. Jones & Laughlin Steel Corp.* offers an interesting comparison. The Court in that case held that manufacturing is "commerce" as a matter of United States Constitutional Law, a proposition not hitherto accepted in Australia. Unlike the United States, the Commonwealth lacks the power to regulate nationwide employment conditions under the commerce clause. Whereas in *NLRB v. Jones & Laughlin Steel Corp.* regulation by the United States federal government of unfair labor practices was held to be appropriate because a disruption of manufacturing would affect interstate commerce, in the Australian *Engineers' Case*, federal power over labor arbitration was also at stake. The most vital similarity however is not so superficial. Both cases showed a judicial willingness to adjudicate questions of degree, namely, how far federal regulation may extend before state power and sovereignty effectively disappears. The earlier reluctance to tackle the question of degree exhibited in *McCulloch v. Maryland* and *D'Emden v. Pedder* in the United States Supreme Court and the High Court of Australia respectively, had disappeared. State sovereignty could be preserved without necessarily forcing the courts to allow state interests to take priority over federal laws.

Chapter Five of the Constitution, being sections 106 through 120, is entitled "The States," and preserves to the States whatever is not delegated to the Commonwealth. It also prohibits discrimination between states or their residents, provides for full faith and credit for the laws, public acts and records and judicial proceedings of each state, and requires the Commonwealth, upon request of the state involved, to provide for the defense of the states, including with respect to "domestic violence." Influences from the United States' federal structure are readily discernible. Section 109 of the Australian Constitution provides as follows: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." To read Commonwealth laws as subservient to state powers would belie the supremacy to be accorded to Commonwealth laws.

The Australian courts at first declined to decide the extent of the powers delegated to the Commonwealth by the Constitution.

32. Id. § 117.
33. Id. § 118.
34. Id. § 119.
They declared instead that each government was an independent sovereign entity. Beginning with the *Engineers’ Case* in 1920, the courts for the first time began to elucidate what powers had been granted to the Commonwealth and, implicitly, what powers had been preserved for the states. In making these determinations, the courts noted the importance of considering those provisions of the Constitution that specifically preserve certain rights for the states. This recognition that the federal powers and the preserved state powers could be defined by the courts without interfering with the very sovereignty of the states was only the first step. Through subsequent cases the scope of federal power became more concrete and the law grew in the conviction of the supremacy of Commonwealth power over state action.

IV. The Growth of Commonwealth Power Over State Action

The early decision of the High Court in the *State Banking Case*, held that the doctrine of intergovernmental immunities prevented Commonwealth law from substantially impeding the exercise of state legislative power. The issue in the *State Banking Case* arose as the result of a challenge to a Commonwealth requirement that states do their banking through the Commonwealth Bank (established by the Commonwealth Government) or a State-owned bank but not a private bank set up in competition with the Commonwealth Bank. The law placed a special disability on states qua states. Such a law could be characterized as a law “with respect to the States” and not with respect to a constitutionally valid subject matter. Of course, the Commonwealth was not and is not authorized to legislate “with respect to the States.” Enactments so characterized are invalid. However, in the *Payroll Tax Case* the states were held to be protected only against Commonwealth law which singled them out for special treatment or impaired their very capacity to function. Thus, the focus drifted from impairment of action to impairment of capacity to act, the former being a necessary side effect of Commonwealth legislation in areas previously regulated by states.

In the United States, a remarkably similar position was reached in *Hodel v. Virginia Surface Mining & Reclamation Association*,

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37. 28 C.L.R. 129 (Austl. 1920). See also *supra* text accompanying notes 24-31.
38. *See supra* text accompanying notes 32-36.
40. *Id.* at 75 (opinion by Starke, C.J.).
41. *Id.* at 61 (opinion by Latham, C.J.). *See infra* notes 200-02 and accompanying text.
42. Victoria v. Commonwealth, 122 C.L.R. 353 (1971). For further discussion, see 122 C.L.R. at 382 (opinion by Barwick, C.J.) and 122 C.L.R. at 424 (opinion by Gibbs, J.).
where the Supreme Court looked to the impairment of a state's ability to structure its integral operations in areas of traditional functions. The Court uphold federal regulation of surface mining notwithstanding the fact that it overrode concurrent state law because the federal regulations did not single out the states as their object.

The extant structure found in both Hodel and the Payroll Tax Case was a result of tradition rather than of constitutional allocation. The Payroll Tax Case decision offered the potential for expansion of Commonwealth function. As the body of international conventions grew, it was inevitable that the external affairs power would be utilized to fill this potential for growth. Recalling the Engineers' Case, Judge Windeyer in his opinion in the Payroll Tax Case rejected the states' argument for full intergovernmental immunity:

The Commonwealth of Australia became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the states has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the states, was from an early date seen as likely to occur. This was greatly aided after the decision in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (Engineers' Case) which diverted the flow of constitutional law into new channels. I have never thought it right to regard the discarding of the doctrine of the implied immunity of the states and other results of the Engineers' Case as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over 20 years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs. For lawyers the abandonment of old interpretations of the limits of constitutional powers was readily acceptable.

44. Hodel, 452 U.S. at 288-89. See also United Transportation Union v. Long Island Rail Road Co., 455 U.S. 678 (1982).
means only insistence on rules of statutory interpretation to which they were well accustomed. But reading the instrument in this light does not to my mind mean that the original judges of the High Court were wrong in their understanding of what, at the time of federation, was believed to be the effect of the Constitution and in reading it accordingly. As I see it the Engineers' Case, looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there."48

V. International Law in Australian Law

Unlike American and like British constitutional tradition, Australia does not have a doctrine of self-executing treaties. International law does not form part of Australian law, state or federal, without formal incorporation. But even though state and federal laws are to be accorded supremacy over international law in cases of conflict,49 statutes are to be interpreted so as not to be inconsistent with international law whenever possible.47 However, notwithstanding this preference, state acts as well as Commonwealth acts can validly express an intention to be inconsistent with international law.48

Throughout the Australian Commonwealth, then, international law is not a part of municipal law without formal incorporation, but international law will be given deference in resolving ambiguities of statutory construction49 or lacunae in the common law.50 Real difficulties have begun to arise, however, as international conventions are incorporated by legislation and additional strains are placed on the Australian federal-state balance.

VI. The Treaty Making Power

Prior to federation, the colonies developed very little independence from Great Britain, the mother country. In the 1870's, postal conventions with the United States of America were signed by the colonial postmasters of New South Wales51 and Queensland52 as duly authorized signatories. A limited independence in commercial matters was sought in the 1880's as each of the several Australian

45. 112 C.L.R. 353, 396 (1971).
47. Id. See also Blaxam v. Favre, 8 P.D. 101, 107 (1883).
51. 14 Hertslet's Com. T.S. 1234 (1874).
52. 15 Hertslet's Com. T.S. 460 (1876).
colonies experienced an expansion in international trade in the wake of the gold rush and ensuing expansion of new pastoral ventures in the mid to late nineteenth century. Distant regulation from London was seen as unresponsive to the needs of local traders, but, nonetheless, the negotiation of political treaties was left to the United Kingdom government.

It was believed that colonial freedom of action in the commercial sphere would strengthen imperial ties and quiet any discontent with centralized decision making emanating from London. Under this philosophy the colonies were allowed increasing freedom to enter into the process of negotiating international commercial treaties. There were three stages to this development. First, treaties signed by the United Kingdom were only extended to colonies which gave their consent to their application. Second, colonies were permitted to denounce the application of a commercial treaty to them. Third, a limited right of participation in the negotiation process was granted to colonies. This last step did not formally occur until after federation.

The question of treaty making was raised in the Australian constitutional convention debates. An attempt to provide an open-ended power and to make treaties the supreme law of the land, like Article Six of the United States Constitution, failed to gain support. The

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54. Some examples are the following treaties of commerce to which Great Britain is a signatory:

57. U.S. CONST. art. VI, § 2.
58. Official Records of the Debates of the Australian Federal Convention, 2d Sess., Sydney, Sept. 2-24, 1897, at 239-240 (1897); Thomson, A United States Guide to Constitu-
ultimately successful argument was that the potential to act inconsistently with England in the international sphere would create an unacceptable disunity within the Empire.\textsuperscript{59} Behind this argument lay the spectre of the \textit{Colonial Laws Validity Act of 1865}\textsuperscript{60} which permitted colonial legislation to deviate from the English Common Law, a mandate quite revolutionary for its time. However, the Validity Act specifically declared that colonial legislation inconsistent with imperial legislation would be invalid \textit{ab initio}. The desire to obtain commercial independence in the international sphere therefore remained subordinate to imperial unity as political doctrine. Indeed, when speaking in regard to the Commonwealth of Australia Constitution Bill in the United Kingdom Parliament, the Earl of Selborne expressed the opinion that the Commonwealth of Australia should not have any power of legation distinct from the mother country.\textsuperscript{61} Professor Starke summarized the position in 1900 as follows:

(a) It [the Commonwealth of Australia] possessed no general independent capacity in the field of foreign affairs;
(b) In regard to commercial treaties, it possessed a right of semi-independent negotiations, through the medium of the Imperial Government, with foreign countries, and an independent right of adherence to such commercial treaties concluded by Great Britain as were of benefit to it, coupled with an independent right of withdrawal should continued adherence prove advantageous;
(c) It could not negotiate on matters of defense or high policy with foreign countries;
(d) It would consult with and endeavor to press a policy or course of action upon the Imperial Government;
(e) It enjoyed a limited right of representation for trade purposes or technical matters.\textsuperscript{62}

During 1901, the United Kingdom's Colonial Office\textsuperscript{63} asked the Commonwealth Government which treaties ought to be communicated to it and which to state governments, in seeking adherence.

\textsuperscript{59} \textit{Id.} at 239 (theory espoused by Edmund Barton who later became Prime Minister of Australia). N.S.W. Commonwealth of Australia (draft constitution bill submitted on behalf of New South Wales by Mr. Barton). This draft was debated in the New South Wales Legislative Assembly and Legislative Council. These are the two houses of the New South Wales State Parliament and are roughly equivalent to the United States House of Representatives and Senate respectively. \textit{See id.}
\textsuperscript{60} 28 & 29 Vict., ch. 63 (1865).
\textsuperscript{61} 85 PARL. DEB. H.L. (4th ser.) 578-79 (1900).
\textsuperscript{63} The Colonial Office was the administrative arm of Her Majesty's Government of Great Britain which had responsibility for colonial matters and, in particular, colonial self-government. The Colonial Secretary was the functional head of the Colonial Office.
The reply of the Commonwealth, which was accepted by the Secretary of State for the Colonies, was that all such communications were to be addressed to the Commonwealth which would, where appropriate, consult with the states.\textsuperscript{64} When, in 1902, the Netherlands complained to Great Britain that the South Australian Government had declined to arrest the crew of the Dutch ship "Vondel" while the ship was in her waters, the Colonial Secretary asked the Commonwealth to obtain an explanation. The reply of the South Australian Government to the Commonwealth's inquiry was directed to the Secretary in London remonstrating that the Commonwealth had no business getting involved in the affair. Mr. Chamberlain, then the Secretary, informed the Lieutenant-Governor of South Australia that it supported the Commonwealth view that such claims were to be channelled through the Commonwealth.\textsuperscript{65} It is worth noting that the states' claim to jurisdiction over territorial waters was not judicially negated until 1975.\textsuperscript{66}

It was the opinion of the Crown Law Officers\textsuperscript{67} in 1907 that international obligations undertaken by the colonies before federation bound the Commonwealth after federation. Hence, even with respect to matters for which only the states had legislative competence the Commonwealth was internationally responsible.\textsuperscript{68}

Also in 1907, the Colonial Secretary declined a request to invite separately the States of New South Wales and Western Australia to the Colonial Conference of that year.\textsuperscript{69} Even within the Empire, the states were none too willing to cede to the Commonwealth the sole voice in external affairs. It was feared that once the Commonwealth was established as the exclusive communications link to London, its substantive powers would increase at the expense of the states. The colonies, upon becoming federated states, were reluctant to lose their traditional links in favor of a unified Commonwealth voice. The states were of the opinion that if the right to legislate was not exclusive, the right to communicate, especially with London ought not be

\textsuperscript{64} G. Doeker, The Treaty Making Power in the Commonwealth of Australia 40 (1966) [hereinafter cited as Doeker].
\textsuperscript{65} Id. at 41 (citing Commonwealth of Australia, Parliamentary papers No. 18 of 1903).
\textsuperscript{66} New South Wales v. Commonwealth, 135 C.L.R. 337 (Austl. 1975) [hereinafter cited as the Seas and Submerged Lands Case]; see also infra note 75 and accompanying text.
\textsuperscript{67} The Crown Law Officers were at that time the legal advisors to the new Government of the Commonwealth of Australia. Their position is similar to that of an Assistant Attorney General of the United States.
\textsuperscript{68} Letter from Crown Law Officers to the Colonial Office (Dec. 2, 1907), reprinted in A. McNair, Law of Treaties, 644-48 (1961). It seemed implicit in the opinion of the Crown Law Officers that the Commonwealth was not required to then seek approval from London. This exchange of letters with the Colonial Office however, was but one example of the continuing close consultations between London and the young Commonwealth on matters of international importance.
\textsuperscript{69} Doeker, supra note 64, at 42.
exclusive.

The acceptance by the states or for that matter, a large number of Commonwealth parliamentarians, of the doctrine set forth in the 1920 Engineers' Case70 was far from immediate or complete. For example, in considering whether the Commonwealth could implement International Labour Organization Conventions and Recommendations, the 1927 Royal Commission on the Federal Court concluded that it could not, because the power to legislate with respect to labour conditions was reserved to the states.71

The power to conclude such agreements was not however questioned. It was accepted that the Crown, as represented by the Commonwealth, had treaty making power as a prerogative of sovereignty. Even before the conclusion of World War I, the Imperial War Cabinet had resolved to decentralize the Empire's treaty making power "based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth."72 The Dominions had full representation at the Peace Conference of 191973 and separately signed the Treaty of Versailles.74 The Balfour Report of the Committee on Inter-Imperial Relations presented at the Imperial Conference of 1926 affirmed the equality of status of each Dominion with Great Britain with respect to the whole gamut of external and domestic affairs.75

A. The Maturation of Australia's International Personality

In the Seas and Submerged Lands Case76 the recognition that Australia had to adjust its federal structure as it matured into an international actor became firmly embedded in judicial policy. The Seas and Submerged Lands Act, 197377 declared the Commonwealth sole sovereign as regards the territorial sea, its airspace and seabed and as regards the continental shelf. In the face of a challenge by the states, the High Court unanimously upheld the validity

of the Commonwealth's claim over the continental shelf. A majority of the Court\textsuperscript{78} upheld the provisions of \textit{The Seas and Submerged Lands Act} relating to the territorial sea and its seabed. The external affairs power of the Commonwealth was held to extend to all things physically outside Australia, including the continental shelf.\textsuperscript{79} That the Commonwealth and not the states should have jurisdiction over the territorial sea stemmed in part from the states' lack of international personality.\textsuperscript{80} The states could not, and the Commonwealth did, enter into the \textit{Convention on the Territorial Sea and the Contiguous Zone}\textsuperscript{81} which the Act sought, in part, to implement.\textsuperscript{82}

\textbf{B. The Impact of Commonwealth-State Negotiations}

At the regular conference of State Premiers convened by the Commonwealth in October 1977,\textsuperscript{83} it was agreed that:

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 would consult with the states before implementing legislation was adopted in areas traditionally regulated by the states so that the states may have first option of passing implementing legislation. With respect to these matters State delegates may join Australian delegations to relevant international

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\item \textsuperscript{78} 135 C.L.R. 337. The majority consisted of Chief Justice Barwick, Justices McTiernan, Mason, Jacobs and Murphy; Justices Gibbs and Stephen dissented.
\item \textsuperscript{79} Id. at 360 (opinion by Barwick, C.J.); see id. at 470 (opinion by Mason, J.); id. at 497 (opinion by Jacobs, J.); id. at 502 (opinion by Murphy J.).
\item \textsuperscript{80} 135 C.L.R. at 373; cf. Bonser v. La Macchia, 122 C.L.R. 177, 185, 222 (Austl. 1969) (states could pass laws regulating fishing within the three mile limit (League Seas) but only the Commonwealth could regulate the territorial seas); Commonwealth v. Queensland, 135 C.L.R. 298, 325-37 (Austl. 1975); Koowarta v. Bjelke-Peterson, 39 Austl. L.R. 417, 469 (Austl. 1982). In \textit{Commonwealth v. Queensland}, the Court held that state legislation conferring jurisdiction on the Judicial Committee of the Privy Council in the United Kingdom was not invalid because it lacked sufficient territorial connection with the State. In 1973, the Queensland Government petitioned the Queen requesting her to refer to the Judicial Committee of the Privy Council in the United Kingdom was not invalid because it lacked sufficient territorial connection with the State. In 1973, the Queensland Government petitioned the Queen requesting her to refer to the Judicial Committee of the Privy Council for advice on a question relating to the seabed adjacent Queensland. The Australian Government advised the Queen not to refer it and it appears that the British Government gave her the same advice. Interestingly, the Governor-General was informed that the Queen, in refusing to refer the matter, had acted on the advice of the Australian Government. It appears however, that the State governments were informed that Her Majesty had acted on the advice of the British Government. The Queen's speech opening the Commonwealth Parliament indicated that she had received advice from her ministers both in Australia and in the United Kingdom. 88 H.R. Deb. 6 (1974).
\item \textsuperscript{81} The Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 appears in Schedule I to the Seas and Submerged Lands Act, 1973 (C'th.).
\item \textsuperscript{82} 135 C.L.R. at 351, 364-65, 377, 475-76 and 503.
\item \textsuperscript{83} The "Regular Conference of State Premiers" is an annual meeting of each of Premiers of the states of Australia. These states are: New South Wales, Victoria, Tasmania, South Australia, Western Australia, Queensland, and more recently, Northern Territory. The Premiers meet with the Prime Minister and Treasurer of the Commonwealth to thrash out budgetary and economic planning matters on an annual basis. The meetings also discuss other items of mutual concern to each of the governments. The conferences inevitably are the forum for discussion of problems of federalism. There is a never-ending tug of war between the states and the Commonwealth over the right to regulate local and national affairs.
\end{itemize}
AN HISTORICAL OVERVIEW

conferences. Federal clauses were to be included in treaties in appropriate cases.84

The agreement setting up Commonwealth-State consultations formalized a process which had been developing for some years. As to international conferences, a states' adviser was included in the Australian delegation to the Seventh Session of the Law of the Sea Conference.85 The states also continue to maintain overseas representatives for tourism and trade promotion.86 The agreed pattern appears to be one of federal dominance tempered with a benevolent, cooperative federalism.

VII. International Responsibility — A Federal Concern

In 1929, Australia, in reply to a League of Nations' questionnaire preparatory to the holding of a conference for the codification of international law, formally stated that the Commonwealth Government had sole responsibility for the making and implementation of treaties.87 In 1931, the Statute of Westminster88 permitted Dominions to legislate inconsistently with imperial legislation and rendered the Colonial Laws Validity Act of 1865 inapplicable to the Dominions.89 The Australian states were excepted under special provisions90 allowing them to remain subject to the Colonial Laws Validity Act. By preserving the rule preventing the states from enacting laws inconsistent with imperial legislation, the states had hoped to maintain a link with London which would counter the growth of Commonwealth power.

The assertion of independence by the Commonwealth was not given the wholehearted support of the states for whom the now decaying imperial unity was the only link to the international arena which was not dependent upon Commonwealth action. Federal tensions were highlighted at the Australian Legal Convention in Melbourne in 1935.91

85. See id.
86. All states have representatives in London. In Tokyo, all but Tasmania are represented. Only New South Wales is represented in New York. New South Wales and Victoria are represented in Bonn. Only South Australia maintains representatives in Hong Kong, Djakaria, Singapore and Kuala Lampur. See Burmeister, supra note 84, at 273.
89. 28 & 29 Vict. ch. 63 (1865).
90. Id. at § 9.
91. The Australian legal convention is an annual meeting of lawyers in Australia which is similar to an ABA convention. The significance of the 1935 Convention is that there was a heated discussion over the riots in Kalgoorlie.
A year earlier, riots had occurred in Kalgoorlie in the State of Western Australia and nationals of Italy, Yugoslavia and Greece suffered property damage. These countries' governments claimed indemnity against the Commonwealth Government which in turn suggested that matters of law and order involved the Western Australian Government. The state government then negotiated a settlement. As for Italy, the negotiations were held on the basis of the accession of the then Colony of Western Australia to the Anglo-Italian Commercial Treaty of 1883. Mr. Justice Evatt of the High Court opined that the matter was, in international law, a Commonwealth responsibility.\(^9\) Evatt believed that Western Australia's provision of reparations was inconsistent with establishing the Commonwealth as sole voice in international affairs.

Chief Justice Latham, who had conducted the negotiations on the part of Western Australia, noted that a pragmatic approach required both state and Commonwealth participation although in this matter the Commonwealth acted primarily as conduit for state actions in providing reparations.\(^9\)

VIII. The Initial Approach of the High Court

A. R v. Burgess; ex parte Henry - *An Initial Statement by the High Court of Australia*

In its first decision on the interplay of the Commonwealth's external independence and the position of the states in the federal structure, the High Court was divided in the extent to which it was willing to give the Commonwealth rein to legislate in pursuance of an international undertaking. In *R v. Burgess; ex parte Henry*,\(^9\) a Mr. Henry Goya Henry was convicted of flying an airplane without a federal license in violation of Commonwealth regulations passed pursuant to the *Air Navigation Act, 1920*.\(^9\) The Act purported to implement the Convention for The Regulation of Aerial Navigation signed in Paris on October 13, 1919.\(^9\) The validity of the Act and the regulations was challenged as being beyond the legislative power of the Commonwealth. The questions of law involved were issues of first impression and, as in the practice of the High Court of Australia, individual rather than consensus opinions were delivered.

Although there was no question that aircraft involved in inter-

\(^9\) Commonwealth Air Navigation Act, 1920 (appears in the 1920 volume of the Commonwealth statutes, see supra note 77).
state or international commerce could be regulated by the Commonwealth under Section 51(1) of the Constitution, the defendant in this case had been involved in purely intrastate aviation. At issue were a plethora of constitutional conundrums:

- Which government or governments had power to make treaties?
- Was Commonwealth power limited to subject matters otherwise enumerated in the Constitution as being within the central government's power?
- Was the power to make a treaty dependent upon the power to implement it or vice-versa or could the power to make and the power to implement be independently invoked?
- If the powers were found independent, was there an obligation upon the government making the treaty to consult and cooperate with the government charged with its implementation (if different)?
- Were there any limits upon implementation?
- Could there be deviation from the words of the treaty? If so, to what extent?
- Would the answer to the preceding question differ depending upon whether Commonwealth or state or a combination of governments were involved at the treaty making stage?

These latter issues have particular relevance to the investor seeking to predict the impact an international convention or treaty might have on a project. The body of treaty law covers a wide range of topics. For example, International Labour Organization conventions can affect labor conditions and impose costs on the investor. Shipping conventions impact upon the movement of equipment to the project site and sale of the ultimate product, and investment cooperation agreements direct and channel the flow of international moneys. In a federal structure, these questions must be approached from at least three legal perspectives: international law, the constitutional framework, and statutory plus case law (as appropriate). Each of the opinions in Burgess attempted but a partial resolution of the questions at hand and it is instructive to observe and compare the differing approaches.

Chief Justice Latham pointed out the difficulties of permitting different rules for interstate aviation and intrastate aviation when the same airports and flight paths are used. Expediency was not however a principle of Constitutional interpretation. His Honor held that there was no doubt that the Crown's power to make a treaty was not limited and that the Statute of Westminster but formalized the already established independent sovereignty of Austra-
Pursuant to Section 61 of the Constitution, the treaty-making power lay with the Executive Branch of the Australian Government formally headed by the Governor-General.100

The Executive acts on behalf of the Commonwealth as a nation, not on behalf of the states.101 Because of the intrastate nature of the defendant's activity in *Burgess*, for the legislation purporting to implement the Paris Convention to be constitutionally valid, it had to be supported by Section 51(29), the external affairs power. The Chief Justice rejected the argument that the external affairs power merely added an extraterritorial aspect to the internal heads of power elsewhere allocated to the Commonwealth, this being inherent in each such grant of power. Moreover, such an interpretation would have made Section 51(29) meaningless as a separate source of power.102 The Chief Justice therefore concluded that Section 51(29) did give the Commonwealth a separate and plenary power to implement treaty obligations.

The questions remaining in the Chief Justice's mind, however, were, what would constitute implementation and how precisely did the treaty have to be followed? The Chief Justice did not establish a complete rule but held that some of the Commonwealth regulations substantially conflicted with the stated fundamental principles of the Paris Convention. Since these were not severable from those Commonwealth regulations which were valid, all the regulations were held invalid and consequently the conviction of the defendant for violating them was overruled.103

Justices Evatt and McTiernan, writing a joint opinion, also rejected the argument that the inseverability of intrastate and interstate aviation meant that the Commonwealth's power to legislate with respect to interstate trade necessarily extended to all aircraft engaged solely in intrastate trade.104 Whereas the Chief Justice did not lay down general statements of principle, but confined his opinion to the precise issues at hand, the joint opinion took the opportunity to more broadly examine the content of "external affairs." Evatt and McTiernan rejected outright the view, until then followed by the Commonwealth Government with respect to implementation of International Labour Organization conventions, that some matters, the subject of international agreement or the recommendation of such an international organization, could only be legislated upon by the states. Australian participation in an international agreement makes

99. *Id.* See *supra* note 88.
100. *Id.* at 644.
101. *Id.* at 645.
102. *Id.* at 639-40.
103. *Id.* at 654-55.
104. *Id.* at 677.
the subject matter of that agreement an external affair and therefore within the legislative power of the Commonwealth regardless of whether that subject matter was otherwise allocated to the Commonwealth or part of the residue left to the states. The external affairs power is plenary and independent of the other powers. Evatt and McTiernan agreed with the Chief Justice regarding the fullness of the Executive’s power to enter into an international agreement, and held for invalidity on the same ground as the Chief Justice.

Justice Dixon rejected the Evatt-McTiernan conception of a plenary external affairs power. Not every treaty was “indisputably international in character” and 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 attains 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 warning was strictly *obiter dictum* since Justice Dixon expressly held aerial navigation to be international in character. Unlike the previous three opinions discussed above, Justice Dixon did not accept the idea that all treaty obligations were external affairs. In his view, only those treaties “indisputably international in character,” such as the one at hand, could be considered as relating to external affairs. His Honor concurred in holding the regulations invalid for inconsistency with the Convention.

To the dissenter, Justice Starke, whatever concerned Australia’s relations with other international actors was within the context of the external affairs power. Justice Starke considered the deviations from the Paris Convention justifiable and concordant with the spirit and purpose if not the terms of the Convention and declined to read an international agreement as rigidly as a statute. Upon this liberal view, only a statute repugnant to the Treaty’s object and purpose would have been invalid.

In sum, the Court accepted the proposition that the Commonwealth Executive had power to enter into treaties, that a treaty could not be part of the law of the land without implementing legislation

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105. *Id.* at 681-82, 686.
106. *Id.* at 683-84.
107. *Id.* at 696. *See supra* text accompanying note 103.
108. *Id.* at 669.
109. *Id.*
110. *Id.* at 658-60.
111. *Id.* at 662-65.
and that (under the opinions of the majority) all Treaties could be implemented. However no three judges agreed as to which Government, Commonwealth or State, could implement which treaties and how closely the treaty had to be followed by the implementing legislation.113

B. Airlines of N.S.W. Pty. Ltd. v. N.S.W. (No. 2) — Incorporation of a New World Order

In 1965, the full High Court once again considered Commonwealth regulation of intrastate aerial navigation. In Airlines of N.S.W. Pty. Ltd. v. N.S.W. (No. 2),114 just as in R v. Burgess; ex parte Henry,115 a lack of consensus was evident in the judgments delivered.

At issue in Airlines (No. 2) was an attempt on the part of the Commonwealth to control intrastate air navigation under its Air Navigation Regulations.116 Airlines had to obtain a license to use aircraft in public transport operations and the Director-General of Civil Aviation was to consider license applications having regard only to the “Safety, regularity and efficiency of air navigation.”117 The State of New South Wales challenged the Commonwealth law because it usurped state regulatory jurisdiction.

Again at issue were competing Commonwealth and state laws with respect to air navigation. The Commonwealth laws were argued to be supported by one or more paragraphs of Section 51 of the Constitution, namely paragraphs 1, 5, 6, 29 and 39.118 If the Commonwealth laws were held valid, the state laws, to the extent of any inconsistency, would be invalid pursuant to Section 109 of the Constitution.119

The Commonwealth Air Navigation Act, 1920-1963120 authorized the making of regulations for the purpose of carrying out and

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113. As to non-treaty matters, the High Court adopted an item by item approach a year later when it ruled that the extradition of fugitive offenders was an external affair to be dealt with by the Commonwealth government within section 51(29) of the Constitution. Ffrost v. Stevenson, 58 C.L.R. 528, 557 (opinion by Latham, C.J.), 601 (opinion by Evatt, J.) (Austl. 1937).
114. 113 C.L.R. 54 (Austl. 1965).
115. 55 C.L.R. 608 (Austl. 1936). See also supra text accompanying notes 94-113.
118. See generally Constitution, supra note 5, at § 51 (enumeration of Parliamentary powers).
119. “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.” Constitution, supra note 5, at § 109.
120. Commonwealth Air Navigation Act, 1920; see supra note 77.
giving effect to the Chicago Convention on International Civil Aviation.\textsuperscript{121} The regulations separately touched interstate and intrastate aviation.\textsuperscript{122} The latter were added only after Chief Justice Dixon had hinted at their validity in \textit{Airlines of N.S.W. Pty. Ltd. v. N.S.W.},\textsuperscript{123} an earlier case between the same parties. Like Justice Dixon in \textit{Burgess}, Chief Justice Barwick in \textit{Airlines of N.S.W. Pty. Ltd. v. N.S.W. (No. 2)} was not willing to hold all treaties to be within the external affairs jurisdiction of the Australian Commonwealth. Nevertheless, without establishing a general rule, Barwick held that the Chicago Convention was such an external affair.\textsuperscript{124}

This unpredictable case by case approach to which subject matters were sufficiently external to merit judicial approval, was particularly unhelpful to a Commonwealth Government seeking to expand its international activity. Still, some express limits on treaty implementation were established:

\begin{quote}
When a law is to be justified under the external affairs power by reference to the existence of a treaty or a 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.\textsuperscript{125}
\end{quote}

The Chicago Convention was aimed at creating uniform air navigation rules. The Commonwealth did not have to wait for other nations to pass implementing statutes or regulations, but having set uniform rules itself the Commonwealth could not rely upon the Convention to support further regulation since such regulation would go beyond the attainment of uniformity.\textsuperscript{126} The Commonwealth regulations at issue in \textit{Airlines of N.S.W. Pty. Ltd. (No. 2)} were expressly intended to conform to the Chicago Convention objectives. Only safety, regularity and efficiency of air navigation were to be considered in licensing decisions.

The Court found the legislation to be supported by Section 51(1) of the Constitution\textsuperscript{127} with respect to interstate trade and com-

\begin{flushright}
\textsuperscript{121} Chicago Convention, supra note 117. \\
\textsuperscript{122} Air Navigation Regulations; see supra note 116. \\
\textsuperscript{123} 113 C.L.R. 1, 27 (Austl. 1964). (Commonwealth could prevent an aircraft from carrying goods and passengers between two points within a state but could not authorize such carriage in the face of a State law prohibiting it.) \\
\textsuperscript{124} Id. at 85; see also id. at 153 (opinion by Windeyer, J.). \\
\textsuperscript{125} Id. at 87. \\
\textsuperscript{126} Id. \\
\textsuperscript{127} Section 51(1) of the Australian Constitution states: \\
The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: \\
(i) Trade and commerce with other countries, and among the States. \\
Constitution, supra note 5, at § 51(1).
\end{flushright}
merce. This holding in *Airlines of N.S.W. Pty. Ltd. (No. 2)* was based on the need for uniformity, an approach rejected by the Court in *Burgess.*\(^\text{128}\) Furthermore, the Court also found that no combination of plenary powers could support legislation not already supported by an explicit grant of power.\(^\text{129}\) Therefore, with regard to intrastate aviation, the external affairs power was distinctly relied upon within the limits set by the international convention, as quoted above.\(^\text{130}\) The Commonwealth, in legislating for uniformity, clearly sought to cover the field and preempt competing state regulations. This was true even though the state laws were consistent with, and additional to, the Commonwealth licensing requirements.\(^\text{131}\)

The opinion of the Chief Justice in *Airlines of N.S.W. Pty. Ltd. (No. 2)* appears to be broadly consistent with the views of the majority in the earlier *Burgess* case. The refinement of requiring either obligations or benefits that are international in character did not answer the question of how precisely any implementing legislation had to follow the terms of a Convention in order to be valid under the external affairs power. But it was clear that once an Act was found valid, state legislation inconsistent with the Commonwealth objective was wholly preempted.\(^\text{132}\)

Although they reached differing conclusions, to Justices Menzies, Kitto, Taylor and Owen in their opinions in the *Airlines (No. 2)* case, the difficulty with including intrastate air navigation within the external affairs power of the Commonwealth was that the regulations went beyond the physical protection of interstate and international air navigation.\(^\text{133}\) Regulation 200B,\(^\text{134}\) for example, purported to override any state law prohibiting what the Commonwealth had authorized. As a result, the uniform safety standards were transformed from a minimum requirement to an exclusive regulatory con-

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128. 55 C.L.R. 608, 628, 677 (Austl. 1936).
129. 113 C.L.R. at 97.
130. *See supra* text accompanying note 125.
131. 113 C.L.R. at 98-99.
132. The Chief Justice expressly stated, "In my opinion the Commonwealth can carry out this obligation in advance of uniformity being achieved by other Contracting States either within their own territories or with one another's territories." *See* 113 C.L.R. at 85-88. Compare the Chief Justice's opinion with that of the other Justices and, in particular, with that of Justice Menzies who wrote: "Nevertheless, the final question in a particular case is — what are the terms of the Convention to be carried out?" *Id.* at 146. The Chief Justice was clearly willing to accept the proposition that air navigation was developing at a rapid rate. In interpreting the Commonwealth's constitutional powers, the Chief Justice preferred a rule which was flexible enough to accommodate technological change and growth in the public air transport industries. Contrawise, the approach of Justices Menzies, Kitto, Taylor and Owen was to look closely at the words of the treaty and confine the Commonwealth to strict compliance with a literal interpretation of those words. These other justices arguably interpreted the law in a vacuum — an approach which the Chief Justice did not take.
133. *Id.* at 111 (opinion by Kitto, J.); *id.* at 126 (opinion by Taylor, J.); *id.* at 145 (opinion by Menzies, J.); *id.* at 167 (opinion by Owen, J.).
struct. The commerce clause alone could not be relied upon to support this exclusive regulation because its scope extended beyond the power granted under the clause. Turning to the external affairs power, Justice Kitto looked for an established international standard under which an international obligation to comply might exist. The annexes to the Chicago Convention were found to deal with the airworthiness and operation of aircraft and the licensing of personnel, but not the general regulation of public air transport for which international standards were yet to be developed. The Australian Constitution, Justice Kitto found, did not authorize the Commonwealth to set trends, only to follow them. This view was significantly narrower than that expressed by the Chief Justice.\textsuperscript{138}

Justices Menzies\textsuperscript{138} and Windeyer\textsuperscript{137} expressly rejected attempts by the states to resurrect the reserved powers doctrine in asserting their right to regulate intra-state air commerce in the \textit{Airlines (No. 2)} case. When Australia had entered into a specific treaty obligation, its execution by means of Commonwealth legislation could validly cover a field previously regulated by state laws. Justice Windeyer nevertheless was cautious. His Honor expressed the opinion that Constitutional validity was to be determined by whether the law was “necessary” to give effect to an international obligation.\textsuperscript{138}

Again disagreeing with the Chief Justice, Justices McTiernan,\textsuperscript{139} Kitto,\textsuperscript{140} Menzies,\textsuperscript{141} Windeyer,\textsuperscript{142} and Owen,\textsuperscript{143} the other majority judges, held that no inconsistency existed between the valid parts of the Commonwealth law and the state law at issue in the \textit{Airlines (No. 2)} case. The Commonwealth prohibited air navigation without a license which was dependent on compliance with a uniform safety standard. The state licensing scheme was directed towards economic regulation of air transport. The majority Justices therefore concluded that the differing purposes of the two schemes meant that each could operate without interfering with the other. Air service operators were therefore left with two bureaucracies to hurdle.

The majority in \textit{Airlines (No. 2)} did not seek to interpret the Chicago Convention in accordance with international law. Instead, it identified Australia’s “obligations” using common law standards of construction. As a result, a narrow function was accorded to the ex-

\textsuperscript{135} See supra text accompanying note 132.
\textsuperscript{136} 113 C.L.R. at 143.
\textsuperscript{137} Id. at 149.
\textsuperscript{138} Id. at 152.
\textsuperscript{139} Id. at 109-10.
\textsuperscript{140} Id. at 120-22.
\textsuperscript{141} Id. at 147-48.
\textsuperscript{142} Id. at 156.
\textsuperscript{143} Id. at 168.
ternal affairs power.\textsuperscript{144}

The Chief Justice did not follow this path. He alone was willing to allow Commonwealth legislation under the external affairs power to both benefit Australia's international standing under the cooperative regime of the Chicago Convention and preempt state action which might encroach on such benefit. The Commonwealth's reliance on more than one Constitutional source of power raised the problem of characterizing a law as being "with respect to" the subject matter of "external affairs" or "trade and commerce with other countries, and among the states." That the regulations operated on intrastate aerial commerce over which the Commonwealth lacked power would not be a disqualification if and only if they operated on a subject matter otherwise valid, such as compliance with an international obligation, regulating interstate trade, or matters incidental to the execution of such regulation. The Chief Justice found against the suggested disqualification on the facts before the Court.

None of the justices in the \textit{Airlines (No. 2)} case attempted to define generally "external affairs." Later cases have made clear, however, that legislative purpose is not relevant to classifying a matter as being within or without the "external affairs" power. For example, a law limiting exports of certain minerals was held to be valid under the commerce power notwithstanding that its objective was to prevent an unacceptable impact to the domestic environment as a result of the mining of the minerals.\textsuperscript{146} Air navigation was deemed an external affair by virtue of the Chicago Convention. It could therefore be regulated for reasons not related to commerce provided that what was regulated was contained in the subject matter of the Convention and was in "faithful pursuit" of the object of the Convention.\textsuperscript{146} Curiously, the incidental power was not subjected to close scrutiny in the \textit{Airlines (No. 2)} case.\textsuperscript{147}

\textsuperscript{144} International conventions are drafted with sufficient laxity to permit states to have differing interpretations of the same obligation without those states having to withdraw from or denounce a particular convention. On the other hand, the subjects of any particular state do not have such an option. They must take the law as the courts find it. Interpreting international conventions without allowing for a laxity of interpretation is myopic in assuming that international law can be construed and enforced much as any statute. It cannot be. Giving a narrow function to implementation of Australia's international obligations reduces the flexibility of the Australian Government in interpreting and helping to develop international law.


\textsuperscript{146} Comments obtained from Leslie Zines, Australian National University Faculty of Law (Professor Zines noted that the High Court will not uphold legislation whose nexus to the objects of an international convention is not readily discernable.).

\textsuperscript{147} Powers incidental to those powers expressly granted under the Australian Constitution operate differently from the incidental powers arising under the "necessary and proper" clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 18. The power in Section 51(39) of the Australian Constitution was distinguished from the United States Constitution's "necessary and proper" clause in Le Mesurier v. Conner, 42 C.L.R. 481, 497 (1929). Section 51(39) states:
In the *Airlines (No. 2)* case, the Commonwealth legislation was upheld but constricted to operate only within the literal terms of the Convention. Notwithstanding the High Court's decision, exclusive regulation of air transportation by the Commonwealth now has become the norm. As a practical matter, no airplane can reasonably be subject to multiple, potentially conflicting regulations. Air travel today is far too complex to be subject to more than one set of rules at any one time and place.

C. *The New Federal Balance and Treaty Implementation*

The impact of "nationhood" upon the federal structure of Australia received its strongest judicial test when two major multilateral conventions were implemented in Australian law. The Commonwealth Government passed the *Racial Discrimination Act, 1975*[^148] in order to implement the International Convention on the Elimination of All Forms of Racial Discrimination (Convention on Racial Discrimination).[^149] In 1983 the *Convention for the Protection of the World Cultural and Natural Heritage* (UNESCO)[^150] was implemented by the *World Heritage Properties Conservation Act, 1983*.[^151] The High Court upheld both pieces of legislation by four to three majorities. The circumstances under which the acts were challenged and the opinions of the justices reflect the present status of Australia's international personality and the importance of the Australian federal structure vis à vis external affairs.

Article 2(1) of the Convention on Racial Discrimination obliges the parties to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."[^152] Section 9 of

[^148]: Commonwealth Racial Discrimination Act, 1975 (see supra note 77).
[^150]: 27 U.S.T. 37; T.I.A.S. No. 8226 (ratified by Australia on August 22, 1974, becoming effective on December 17, 1975).
the *Racial Discrimination Act* outlawed racial discrimination generally and Section 12 of that same Act made unlawful racial discrimination in dealings or refusals to deal with land or housing.

The *Racial Discrimination Act* was tested in the case of *Koowarta v. Bjelke-Peterson*. John Koowarta, an aboriginal, was a prominent member of the Winychanam group of aborigines. The group asked the Aboriginal Land Fund Commission, a federal body, to buy certain farm land on the group's behalf. The Government of the State of Queensland did not view favorably the acquisition of land for development by aboriginal groups and blocked the purchase by the Commonwealth's Aboriginal Land Fund Commission for the use of the Winychanam group. The plaintiff, having been active in encouraging the purchase, relied on the *Racial Discrimination Act* in asserting the aboriginals' right to claim the land. The Queensland Government challenged the validity of that Act and thus the case went up to the High Court.

The *Koowarta* case focused on the question of whether Australian ratification of the Convention on Racial Discrimination was an external affair pursuant to which the Commonwealth could legislate under Section 51(29) of the Constitution, the Commonwealth not otherwise having power to pass human rights legislation. The minority justices (Chief Justice Gibbs and Justices Aickin and Wilson) rejected the view of Justices Evatt and McTiernan in the *Burgess* case that giving effect to an international agreement to which Australia is a party is always an external affair within Section 51(29). In the words of the Chief Justice: "Any subject matter may constitute an external affair, provided that the manner in which it is treated in some way involves a relationship with other countries or persons or things outside Australia." In other words, the Chief Justice conceded perhaps rather unintentionally, that almost anything could be found to involve a relationship with a foreign person or country. Under Justices Evatt's and McTiernan's test, then, any Commonwealth action would be deemed valid because it would fall within the external affairs power of the Constitution. However, Chief Justice Gibbs ruled that the exercise of Ministerial discretion over whether to consent to the transfer of a Crown lease was neither a violation of a human right nor involved an international relationship.

The minority justices, including the Chief Justice, concluded that it was within the Executive power of the Commonwealth to

154. Section 51(29) of the Constitution grants Parliament the power to legislate with respect to "External Affairs." Constitution, supra note 5, at § 51(29).
155. See supra text accompanying notes 100-105.
156. 39 AUSTL. L.R. at 441.
enter into the Convention but its implementation lay within that residue of powers which remained the exclusive province of the states. That there was an emerging rule of customary international law to eliminate racial discrimination did not, in their opinion, affect the entirely domestic operation of discrimination in the cases in which it occurred.157 This minority view in Koowarta follows and refined the view of Justice Dixon in the Burgess case.158 That more than one nation were acting in concert toward a particular end did not of itself remove into the international arena the subject matter of concern — in this case, racial equality.

One majority justice, Justice Stephen, also required the subject matter of international agreement to be of international concern. But Justice Stephen defined the requirement more broadly than the minority: “A subject-matter of international concern necessarily possesses the capacity to affect a country’s relations with other nations and this quality is itself enough to make a subject-matter a part of a nation’s ‘external affairs.’”159 To Justice Stephen, the content of “external affairs” was ever growing. Obiter, His Honor found non-discrimination on grounds of race to be part of customary international law. Opining that action in accordance with customary international law would be a valid exercise of the external affairs power, in Justice Stephen’s opinion, the Commonwealth legislation was valid even apart from the dictates of the Convention on Racial Discrimination.160

Justice Brennan, one of the other majority justices, was also concerned with discovering what factor(s) changed a matter from a completely domestic concern to an international one, thus bringing it within the ambit of the Commonwealth’s “external affairs.” Brennan adopted a formula akin to that of Justice Stephen’s.161 However, under Justice Brennan’s theory, the existence of a treaty obligation was to be treated as sufficient to cause a matter to fall within the international arena.162 The next step was to determine whether the Act was in conformance with that obligation. The test for conformity was whether a “material disconformity” existed.163

Justice Mason adopted a broader test than that adopted by Justices Stephen and Brennan. The existence of a benefit to more than one nation through international cooperation was sufficient to place a

157. 39 Austl. L.R. at 444 (opinion by Gibbs, C.J.); see also id. at 480 (opinion by Wilson, J.).
158. 55 C.L.R. 608, 669 (Austl. 1936).
160. Id. at 456.
161. Id. at 486. See supra text accompanying notes 158-59.
162. Id. at 487.
163. Id. at 488. Presumably, it was on this point that the Burgess decision was distinguishable.
matter within the sphere of "external affairs." The mere fact that the Commonwealth had entered into a treaty in a bona fide manner was sufficient to prove such a benefit.\footnote{164}

The broadest view in Koowarta was expressed by Justice Murphy. Murphy's opinion, expressly not shared by the other majority justices, was that an implied constitutional prohibition against the implementation of treaty obligations would make Australia an international cripple and was therefore unacceptable. To Justice Murphy the continued existence of the states was the only constraint on federalism and that existence was not endangered by Commonwealth implementation of international agreements.\footnote{166} Inherent in this view was the proposition that so long as the states continued to exist, even as lifeless entities, "the federal balance" would not impel invalidation of Commonwealth action.

On this intergovernmental immunity question, the other justices preferred the Payroll Tax Case formula.\footnote{166} Impairment of a state's very capacity to act would not have been acceptable. In the justices' opinions, the Racial Discrimination Act did not lead to such an impairment. It has since been held that the Commonwealth Racial Discrimination Act "covers the field" of racial discrimination law and preempts even consistent competing State enactments.\footnote{167}

Although the Racial Discrimination Act was held to be valid, a majority of the justices looked beyond the entry of Australia into a treaty to determine in addition if the matter was one of international concern. This additional factor of "international concern" was not however consistently defined. The minority judges looked for operation of the treaty upon Australia's relations with other international persons. Justices Stephen and Brennan were willing to admit potential effects without requiring proof of actual impacts upon such relationships. Justice Brennan considered the mere entering into the international obligation to be sufficient. This comes very close to the broader approaches of Justices Mason and Murphy who did not search for "international concern" as an essential element of validity. Not surprisingly, the views of learned academic commentators on the Koowarta case have thus far been as disparate as those of the

\footnote{164} Id. at 464.  
\footnote{165} Id. at 472-73.  
\footnote{166} The Payroll Tax Case held that the States were protected against Commonwealth laws that singled them out for special treatment or impaired their capacity to function. See id. at 433 (opinion by Gibbs, C.J.); see also id. at 459 (opinion by Mason, J.). See also supra note 42 and accompanying text.  
\footnote{167} Viskavskas v. Niland, 47 Austl. L.R. 32 (1983). (Both Section 13 of the Racial Discrimination Act, 1975 (C'th) and Section 17 of the Anti-Discrimination Act, 1977 (NSW) prohibited racial discrimination in the provision of goods and services to the public but differed with regard to enforcement. It did not avail the state to suggest that it was possible to obey both laws since the Commonwealth Act covered the field and preempted the State Act).
AN HISTORICAL OVERVIEW

judges who heard the case.168

Five of the justices (Chief Justice Gibbs and Justices Mason, Murphy, Wilson and Brennan) also heard the later case of Commonwealth v. Tasmania, known as the Franklin Dam case,169 along with Justices Deane and Dawson. The opinions traversed the breadth of the external affairs power and its interaction with the concept of federal balance. The decision had the important political consequence of stopping the construction of a dam in the South West Tasmania Wilderness area — a victory for conservationists over the Hydro Electric Corporation of Tasmania.

In 1982, a part of the Southwest Tasmania Wilderness had been placed on the World Heritage List as a site worthy of conservation from an international perspective. The list was and is maintained pursuant to the Convention for the Protection of the World Cultural and Natural Heritage of 1972.170 Australia ratified this Convention on August 22, 1974171 and on December 17, 1975 it entered into force. A function of the World Heritage List is to promote conservation. The Southwest Tasmania Wilderness area was listed with the support of the Government of the Commonwealth of Australia.

The Government of the State of Tasmania, however, favored commercial development of the Southwest Tasmania Wilderness, beginning with the construction of a dam. It desired to attract new industry through the provision of cheap electric power, a theme all too familiar to American states. Economic growth and employment opportunities were thereby expected to be promoted. When the Australian Labor Party returned to power in March 1983, it promptly set its own priorities for the wilderness and the archeological sites that had been unearthed there. These priorities favored conservation over the dam development. Flooding the wilderness and drowning the archaeological discoveries were events which the new Commonwealth government had made an election pledge to prevent. It passed regulations under the existing National Parks and Wildlife Act, 1975172 and shortly afterwards enhanced this action by enacting the


170. See Natural Heritage Convention, supra note 4.


172. Id.
World Heritage Properties Conservation Act, 1983\textsuperscript{173} to more fully implement the Natural Heritage Convention.

In resolving the legal issues presented in the Franklin Dam case, the High Court had to determine first the state of the law as the Koowarta decision had left it. Because the reasoning of the majority justices in Koowarta was not consistent, the applicable rules remained unsettled.

Dealing first with the views of the minority justices in the Franklin Dam case, Chief Justice Gibbs and Justice Wilson regretfully abandoned the minority view in the earlier Koowarta case.\textsuperscript{174} Instead, Chief Justice Gibbs and Justice Wilson adopted the test propounded by Justice Stephen.\textsuperscript{175} To make a matter which affected Australia's overseas relations an external affair pursuant to which legislation could be passed, the test required a judgment regarding the degree of, rather than the mere existence of, the international concern involved.\textsuperscript{176} Emphasis was placed upon the extent of the obligation expressed in the language of the convention, in this case the Natural Heritage Convention. An absolute "undertaking" was stronger than an "endeavor, insofar as possible and as appropriate for each country."\textsuperscript{177} Indeed the latter type suggested the absence of an international legal obligation because not only the modalities but the very taking of action to protect the natural and cultural heritage lay within the discretion of each party state.\textsuperscript{178}

In determining the degree of international concern, the Chief Justice in the Franklin Dam case acknowledged that the existence of an international convention is not necessary to activate the external affairs power.\textsuperscript{179} However, if a convention exists, it is relevant to discover whether any action by Australia within her own borders involves reciprocal or mutual response by other party states.\textsuperscript{180} Allowing one's natural heritage to be destroyed, he found, would not in all probability raise the ire of the world community as would the racial discrimination present in the Koowarta case.\textsuperscript{181}

Justice Wilson also referred to the significantly lesser number of signatories to the Natural Heritage Convention as opposed to the

\textsuperscript{173} Heritage Properties Conservation Act, 1983.
\textsuperscript{174} 46 AUST'L. L.R. 625 at 666 (opinion by Gibbs, C.J.), 742 (Wilson, J.).
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 670, 743-44.
\textsuperscript{177} See Natural Heritage Convention, supra note 4.
\textsuperscript{178} 46 AUST'L. L.R. at 658, 661-63 (opinion by Gibbs, C.J.) and 746-47 (opinion by Wilson, J.) and 847-48 (opinion by Dawson, J.).
\textsuperscript{179} Id. at 667 (opinion by Gibbs, C.J.) and 745 (opinion by Wilson, J.).
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 670-71. The Chief Justice distinguished Franklin Dam from Koowarta on this point: racial discrimination would instigate world-wide reaction, whereas alteration of the environment within a state's own borders would result in very few, if any sanctions from abroad.
Racial Discrimination Convention as an indicator of an insufficient degree of "international concern."\textsuperscript{182} If the external affairs power might be exercised in the absence of an obligation or a sufficient degree of international concern, there remained the question of how precisely the implementing legislation needed to follow the Convention in order to be valid. The view of Justice Dixon in \textit{Burgess}\textsuperscript{183} was adopted by Chief Justice Gibbs to hold that "the Commonwealth can do no more than endeavour to persuade the states to give effect to the recommendation [contained in the Convention] by exercising the legislative power which they possess and the Commonwealth does not."\textsuperscript{184} Based on this view, and in the absence of any relevant obligation in the Convention, the implementation of legislation by the Commonwealth would be merely hortatory.

A number of difficulties are brought to light by Chief Justice Gibbs' and Justice Wilson's application of Justice Stephen's \textit{Koowarta} formula. The emphasis placed upon the sufficient degree of "international concern" suggests that the Commonwealth's external affairs power is to be limited by the extent of the external obligations arising out of that international concern, at least with respect to subject matters physically internal to Australia. What is not admitted by these two minority justices is that international law includes both hard and soft obligations.\textsuperscript{185} Among the many defects in this view is that by refusing to uphold legislation giving effect to the soft obligation in the Natural Heritage Convention, the legislative practice of Australia would be restrained from contributing to the progressive development of international law. Gibbs and Wilson would not permit the diminution of State powers unless the Commonwealth was internationally obliged to act. This view fails to realize that Commonwealth legislation, once enacted and implemented, is part of the stuff of which international law is made. Fortunately the majority opinions expressly repudiated each of the bases of the minority opinions. The minority in the \textit{Franklin Dam} case sought to restrain Australia's contribution to the progressive development of international law by subjecting Commonwealth legislation to a so-called doctrine of "federal balance" which was and is nothing more than an attempt to revive the reserved powers doctrine.

The other minority justice in the \textit{Franklin Dam} case, Justice

\textsuperscript{182} \textit{Id.} at 750.
\textsuperscript{183} 55 C.L.R. at 674-75.
\textsuperscript{184} 46 AUSTL. L.R. at 674; \textit{see also} \textit{Id.} at 752 (opinion by Wilson, J.).
\textsuperscript{185} "Hard" obligations are those that are written in mandatory rather than permissive language in treaties or other international agreements and are therefore formally binding on state parties. A state has some discretion on the other hand, in determining how best to conform to a "soft" obligation. The difference between "hard" and "soft" obligations lies in the extent to which a nation has discretion over the modalities of implementation.
Dawson, broke from tradition and relied in part upon the omission of an express treaty making power in the drafting history of the Constitution. Dawson proceeded cautiously having primary regard to the maintenance of a federal balance.\textsuperscript{186} He was willing to assume, without so deciding, that the Convention did impose obligations upon Australia but not that it involved a relationship external to Australia.\textsuperscript{187} Justice Dawson therefore declined to accept the idea that the Commonwealth of Australia could agree with other nations to regulate internal conduct according to international standards. Effectively, this view can only be consistent with the approach of the minority in \textit{Koowarta}.\textsuperscript{188} It may safely be concluded that Justice Dawson was alone in holding to that rule following upon its abandonment by Chief Justice Gibbs and Justice Wilson in the present case.\textsuperscript{189}

All the majority justices in \textit{Franklin Dam} rejected the requirement of an international obligation.\textsuperscript{190} As in \textit{Koowarta}, Justice Murphy adopted the broader approach followed by Justices Evatt and McTiernan in \textit{Burgess}. As to the value of limiting the Commonwealth's power in order to maintain some federal balance, Justice Murphy stated: "The mere fact that the acts impair, undermine, make ineffective or supercede various State functions of State laws in an ordinary consequence of Federal Acts and does not affect their validity."\textsuperscript{191} The opinion went further and, roundly disavowing the minority opinions, suggested that if any extra-Constitutional notions of federal balance were to be implied, the electors rather than the courts should effect them.\textsuperscript{192} In adopting this approach, Justice Murphy continued to follow closely the Engineers' admonition against judicially remaking the federal compact. This was a task for the political process in a democracy.

In holding for the Evatt-McTiernan view, Justice Mason also declined to substitute his judgment for that of the Executive in deciding whether a matter was of sufficient international concern for Australia to join an international convention. The assumption was made that Australia would not have joined unless the Executive anticipated some benefit to Australia.\textsuperscript{188} The duty of Australia to fulfill

\begin{itemize}
\item 186. 46 \textit{Austl. L.R.} at 838-41.
\item 187. \textit{Id.} at 849.
\item 188. \textit{See supra} text accompanying notes 154-57.
\item 189. \textit{See supra} note 173 and accompanying text.
\item 190. 46 \textit{Austl. L.R.} at 691 (opinion of Mason, J.) and 729 (opinion of Murphy, J.) and 772 (opinion of Brennan, J.) and 806 (opinion of Deane, J.).
\item 191. \textit{Id.} at 728; \textit{cf. id.} at 703 (opinion of Mason, J.) and 772 (opinion of Brennan, J.) and 824 (opinion of Deane, J.).
\item 193. 46 \textit{Austl. L.R.} at 692.
\end{itemize}
its promise of international cooperation was a sufficient obligation, if
an obligation was necessary to invoke the external affairs power. Just-
tice Mason did not adopt this requirement.\textsuperscript{194} Because the means of
implementation were left open to each party state's discretion, Just-
tice Mason believed that no precision of conformity to the language
of the Convention was required. Nevertheless, legislation did need to
conform to the ultimate object of the Convention.\textsuperscript{195}

Justice Brennan analyzed the judgment of Justice Stephen in
\textit{Koowarta} and held that the existence of an obligation and interna-
tional concern were alternatives, either of which would suffice to ac-
tivate the external affairs power.\textsuperscript{196} Justice Brennan firmly repudi-
ated the minority opinions and ruled that failure to legislate for the
protection of Australia's heritage would harm Australia's relations
with the other party States.\textsuperscript{197}

Justice Deane, in his opinion in \textit{Franklin Dam}, advocated a test
for a "reasonable proportionality" between the legislation and the
Convention's "purpose or object."\textsuperscript{198} Noting that international agree-
ments are generally less precise than domestic common law docu-
ments, particularly where 70 parties and five authoritative languages
had to be accommodated, the language found non-obligatory by the
minority, i.e., "Endeavour, insofar as possible, and as appropriate for
each country"\textsuperscript{199} was to be considered obligatory.\textsuperscript{200} Justice Deane,
joined by Justice Brennan, did not find all the implementing regula-
tions wholly referable to the Natural Heritage Convention's purpose
and object but upheld those which satisfied this criterion and were
severable and saveable.

It is interesting to note that one minority judge in both the
\textit{Franklin Dam} and the \textit{Koowarta} cases, Justice Wilson, referred in
\textit{Koowarta} to the United States Supreme Court decision in \textit{National
League of Cities v. Usery},\textsuperscript{201} to support the protection of "traditional" state functions. In the American case it was ruled that applying
federal fair labor standards to employees of states and state sub-
divisions impermissibly interfered with a traditional state function.
\textit{Nation League of Cities v. Usery} presented the United States courts
with the unenviable task of identifying those state functions which
either were or were not "traditional." Just last year, in \textit{Garcia v. San

\textsuperscript{194} Id. at 698.
\textsuperscript{195} Id. at 703. At this point, the opinion drifted away from the line of Justices Evatt
and McTiernan to a position closer to the dissent of Justice Starke in \textit{Burgess}.
\textsuperscript{196} Id. at 772.
\textsuperscript{197} Id. at 777. Cf. the opinions of Chief Justice Gibbs and Justice Wilson noted at text
accompanying notes 180-81.
\textsuperscript{198} 46 AUSTL. L.R. at 806.
\textsuperscript{199} Natural Heritage Convention, \textit{supra} note 4; see 44 AUSTL. L.R. at 808.
\textsuperscript{200} Id. at 808.
\textsuperscript{201} 426 U.S. 833 (1976).
Antonio Metropolitan Transit Authority,\textsuperscript{202} Usery was expressly overruled. Justice Blackmun delivered the majority opinion and cited with approval the words of James Madison to members of the first Congress: “Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.”\textsuperscript{203} The strong dissent in Garcia parallels the dissents in Koowarta and the Franklin Dam case.

On both sides of the Pacific it is apparent that the issues of federal balance are not innately soluble. Federalism is a system of government, not a system of values. The judges, legislators and administrators who operate the system do so according to their own values and, as the personnel change, so do the values applied. At least from a judicial perspective, the majority values in both the United States and Australia are similar. States’ capacities to act are to be preserved. The exercise of that capacity remains subject to the valid exercise of federal powers, especially when the federal power is used to implement international law. When questions regarding the implementation of international agreements arise, not only national but international uniformity is at stake and this uniformity is particularly highly valued by the present day majority.

On a more practical plane, the result of Garcia was that the employees of a local transit authority would receive minimum guaranteed fair employment conditions; in Koowarta the denial of land rights on racial grounds was prohibited. Thus the promotion of uniform law had the very sort of effects its original creators intended. Persons from outside the local jurisdiction could predict their legal rights in the jurisdiction because the law in effect would be the same. In both Garcia and Koowarta uniformity promoted a higher common denominator for individual liberty than would be the case under divergent state by state regulation. Since protection of the individual was not the stated premise of the judicial reasoning, the decisions provide no long term solace for advocates of individual rights. They do, however, give comfort to advocates of legal and commercial certainty on the national and international level. Perhaps this is the lesson of the decision in the Franklin Dam case.

In the final analysis, and as a result of Australian case law development, a United States corporation conducting minerals exploration in Australia can work from international law down through national or Commonwealth law to local or state law and predict the

\textsuperscript{202} 105 S. Ct. 1005 (1985); see also United Transportation Union v. Long Island Rail Road Co., 455 U.S. 678 (1982).

\textsuperscript{203} 105 S. Ct. at 1017, citing 2 Annals of Cong. 1897 (1791).
legal consequences of its intended actions. Of key importance is the need to resist the temptation to dialogue only with the local authorities and ignore the impact of intergovernmental and international relations.

IX. Conclusion — The Rule as the Franklin Dam Case Left It

Importantly, the majority justices' reasons in the Franklin Dam case have enough in common to reach confidently the conclusion that the Evatt-McTiernan view has finally asserted itself as the rule applicable to the external affairs power. In sum, the Commonwealth may legislate with respect to:

— matters physically external to Australia;
— matters involving a legal obligation toward or a legal benefit derivable from Australia's international relations. The legal character is to be determined under the standards of international law rather than under those required by the common law. In addition, the conformity of implementing legislation must be sufficient to be "appropriate to the object and purpose" of its international source;
— Unless Commonwealth legislation discriminates against a state or states or the capacity of the state or states to function is impaired, any alteration of the federal balance is to be tolerated;
— The states themselves have no international personality and have no right of legation but may be granted analogous privileges by the Commonwealth itself. They may participate in Australia's international relations insofar as the Commonwealth will allow such participation, upon consideration of the state's interest involved, if any.

With regard to continuing judicial contributions to these developments, Professor Coper has written,

The Constitution does not itself effect any particular federal balance, that is achieved by judges making deliberate choices between competing interpretations . . . . The truth is that some justices read the Constitution as requiring the preservation of a limited concept of central power, whereas others read it as making provision for adaptation to changing circumstances. 204

The role of the High Court as arbiter between the state and Commonwealth governments in a federal system has both affected and been affected by the growth of Australia into a mature international actor and the expanded reliance of the Commonwealth on the external affairs power. The slow change of the states from a position of competing with the Commonwealth for international status to one

204. M. COPER, supra note 3, at 23-24.
of negotiating for greater consultation in the process of international decision making admits the ascendancy of the Commonwealth. The pattern has been evolutionary and has led to a federal structure with internal adaptability and external maturity.