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Federal Parliament's Changing Role in Treaty Making and External Affairs



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Federal Parliament's Changing Role in Treaty Making and External Affairs

The Vision in Hindsight: Parliament and the Constitution: Paper No. 1

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the first.

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.



Centenary of Federation 1901-2001

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Major Issues

Today, as a sovereign nation, Australia enters into treaties and its Parliaments decide whether to implement them as law in Australia. This situation is vastly different from that which prevailed at the time the Commonwealth Constitution came into effect.

In 1901, the Australian Government had no power to enter into treaties in its own right. At most its powers extended to indicating to the British Government that it wished to adhere (or not to adhere) to certain commercial treaties.

Prior to federation, if the British Government entered into a treaty, even if it did not legislate to implement the treaty itself, it imposed a limitation on the legislative powers of the colonies. Legislation, which conflicted with British treaty obligations, was required, by letters patent, to be reserved by colonial Governors for the monarch's assent. Assent in these cases was generally not given, and the bill would lapse after a year. The implication was that treaties had an instant effect upon ratification and had to be obeyed by the colonies. In this context, it is less surprising that the first drafts of the Commonwealth Constitution provided for self-executing treaties (i.e. treaties which take effect domestically without the enactment of legislation to implement them). The reason for these provisions subsequently being excluded from the final draft of the Constitution was concern that they would permit Australia to enter into treaties in its own right, rather than any concern that this would allow the executive to bypass the role of the Parliament.

In 1901 the Constitution gave the Commonwealth Parliament legislative power in relation to external affairs, but there was still no direct power to enter into treaties. This power evolved not through constitutional amendment, but through decisions made by the Imperial Conference and the development of convention and international recognition. The role played by Australia in World War I was instrumental in the development of its international personality, prompting its representation at the Peace Conference and being a signatory to the Treaty of Versailles. The Imperial Conferences of the 1920s and 1930s recognised the evolving independence of the 'Dominions' (as they were then known) and the metamorphosis of the 'Empire' into the 'Commonwealth of Nations'. The changed position of the Dominions was given formal legal recognition in the Statute of Westminster 1931.

Throughout these developments, the Commonwealth Parliament remained informed and involved. It debated the ratification of the Treaty of Versailles and the Covenant of the League of Nations. Reports on each session of the League were tabled in the Parliament

and usually debated, as were reports on International Labour Organisation proceedings. Summaries of the proceedings of the Imperial Conferences were also tabled and debated in the Parliament. However, Australia appeared less willing than other Dominions to take up its full measure of independence. In 1929 the Royal Commission on the Constitution noted that Australia had the power to enter into political treaties as a separate nation, but had not done so. The Statute of Westminster was not adopted by Australia until 1942 because of fears about the possible consequences of reducing Imperial relations to words, and concerns that it would be 'un-British' to adopt it. In 1939, Australia merely assumed it was at war as a consequence of Britain being at war, while Canada and South Africa took independent decisions to declare war after parliamentary consideration of the issue. Once again, however, it was war which accelerated the development of Australia's independence. In 1940 Australia began to appoint its own diplomatic missions overseas and by 1942 Australia declared war on its own behalf.

The post-war era saw an explosion in the number of treaties and the variety of subjects covered by them. This expansion of treaties and the globalisation of matters that were previously domestic in nature, led to significant change in Australia. In the early 1970s, the Whitlam Government entered into a range of important treaties covering human rights, the environment, and industrial relations. Parliamentary approval was sought for Australia to enter into the treaties, as well as for the enactment of legislation implementing them. By the early 1980s, the meaning and extent of the external affairs power was a highly controversial issue. Questions were asked, such as could the Commonwealth enter into a treaty on an issue over which it otherwise did not have legislative power, and then legislate to implement the treaty? Could this be used to override State legislation? In the Tasmanian Dam case the High Court decided that the answer was 'Yes'. As long as it is a bona fide treaty, the Commonwealth can legislate to implement it, even if it impacts on matters previously within the exclusive domain of the States.

The increased importance and constitutional significance of treaties gave rise to concerns that there was insufficient scrutiny of the treaty making process. The practice of seeking parliamentary approval of significant treaties had waned and the practice of tabling treaties in the Parliament before they were ratified became the norm, with treaties being tabled in batches every six months or so. Calls for reform resulted in a major inquiry of the Senate Legal and Constitutional References Committee. As a result of this inquiry, a number of reforms were introduced, including a commitment to tabling treaties at least 15 sitting days before their ratification, the preparation and tabling of national interest analyses, the establishment of a joint parliamentary committee to scrutinise the making of treaties, increased availability to information about treaties on the internet, and the creation of the Treaties Council. The Joint Standing Committee on Treaties, in particular, has had a significant impact upon the way the Commonwealth negotiates, and decides to enter into, treaties.

Introduction

Treaties were originally agreements between sovereigns of independent states. They pre-date the existence of parliaments and democracy. In the United Kingdom, the rise of parliamentary and responsible government changed the nature of the sovereign power so that the monarch is now obliged to act on the advice of the Government with regard to entering into a treaty. The Government is, of course, formed by those holding majority support in the House of Commons. Hence, responsible government gives the Parliament an indirect role in the making of treaties because the power to decide whether to enter into a treaty is held by a government, which is formed by those elected to the Parliament who hold the confidence of the lower House, and which is responsible to the Parliament. The power to enter into treaties, however, remains a power of the executive which has only rarely been affected by direct parliamentary involvement in the United Kingdom.²

The role of Australian parliaments in treaty making has been more complex. It has ranged from the extremely limited role of colonial parliaments, which found themselves bound, often against their will, by treaties entered into by the United Kingdom, to the far more active role today of the Commonwealth Parliament in the scrutiny of treaties prior to the Commonwealth Government ratifying them. This paper records and discusses this changing role and makes an assessment of the recent reforms to the treaty making process which involve a much greater level of parliamentary involvement.

The Role of the Colonial Parliaments in Relation to Treaties

The power to enter into treaties is governed both by the domestic constitutional law of the jurisdiction concerned and by international law. A domestic power to enter into treaties is meaningless unless the entity is recognised internationally as having the capacity to enter into treaties.³ In the late nineteenth and early twentieth centuries, the recognition of international legal personality was confined to sovereign states.⁴ This posed particular problems for British colonies, as they grew in status to self-governing colonies and later 'Dominions'⁵ under the Crown.

The Australian colonies were not considered at international law to have the capacity to enter into treaties. Any domestic power to do so was only granted slowly and gradually by the British Government.

The first call by an Australian colony for the power to enter into treaties was made by Victoria in 1870.⁶ A Royal Commission on the possibility of Federal Union reported on 3 October 1870⁷ recommending that Victoria be given the power to enter into treaties so that, as a sovereign state, it could remain neutral in any war involving Great Britain. This recommendation was not accepted by the Imperial Government. Indeed, some fifty years later, Australia had still not obtained the power to remain neutral when Britain declared war, and one commentator described the 1870 recommendation as an 'impracticable suggestion' which 'was never seriously entertained in any of the Dominions'.⁸

Despite the failure of this bold claim for sovereignty, lesser proposals concerning commercial treaties were pressed upon the Imperial Government by the colonies. The main concern of the colonies was their involvement in trade and shipping treaties, which were of vital interest to them. In 1877, the British Secretary of State for Foreign Affairs agreed 'that commercial treaties should not be applicable to the responsible government Colonies automatically, but that those Colonies should be given an option of adherence usually within a period of two years'.⁹

Accordingly, British commercial treaties, such as the treaty with Montenegro of 1882¹⁰ and the treaty with Italy in 1883,¹¹ permitted the colonies which had responsible government to adhere to the treaty within one year. The power to separately withdraw from treaties was granted much later, in the late 1890s.¹²

The fact that a colony could agree or decline to adhere to a treaty into which the Imperial Government had entered, did not give it any power to enter into treaties on its own behalf, either before or immediately after federation.

The Australian colonies also entered into 'technical treaties', such as those relating to telegraphic and postal services, from at least 1874.¹³ At international law, however, they were considered to be mere 'agreements' between postal administrations, and not to be afforded recognition of international status.¹⁴

An important area of treaty making which has been neglected by commentators, is that relating to the immigration of workers. The impact of the Anglo-Japanese treaty¹⁵ of 1894 is a good case study to show the relationship between the colonial Parliament and executive and the British Government in relation to treaties.

In Queensland in the 1890s there was concern about the number of Japanese workers. This was given expression in July 1897, in the Queensland Legislative Assembly.¹⁶ Mr Browne raised the issue of Queensland reportedly adhering to the Anglo-Japanese treaty which would have allowed Japanese workers the liberty to enter, travel, or reside in any part of Queensland.¹⁷ The Acting Premier, Sir Horace Tozer, responded that concern about the influx of Japanese workers had led Queensland to raise this matter with the Imperial Government, resulting in the negotiation of the Anglo-Japanese treaty.¹⁸ He noted that 'the custom of Great Britain in making treaties is to leave her colonies a certain time within which to consider whether to accept the advantages or disadvantages resulting from such a

treaty'.¹⁹ The Australian colonies, upon receiving the despatch containing the treaty, regarded it as a federal matter and their Ministers met to discuss whether they would adhere to it. Sir Horace recorded that the Australian colonies did not want anything to do with it in its current form. It would be prepared to adhere to it, however, if a clause could be inserted similar to that in the treaty between Japan and the United States or Canada, allowing either party to legislate to regulate the immigration of labourers or artisans. The Japanese Government would not accept the word 'artisans' unless NSW and Victoria also joined the treaty. Sir Horace noted that NSW and Victoria refused and that, accordingly, Queensland had not yet adhered to the treaty.

Sir Horace also noted that Queensland had no legislative power to prevent the influx of Japanese labour because it could not legislate in a manner contrary to a treaty entered into by Great Britain.²⁰ He observed that NSW and Victoria had legislated to restrict Japanese immigration (by extending their laws restricting Chinese immigration), but that these laws had been refused assent by the British Government.²¹ Accordingly, the Queensland Government was pursuing its proposal to insert the US/Canada clause in the treaty, which would then give it the power to legislate effectively to limit the immigration of Japanese workers.

Despite this debate having taken place in July 1897, it appears that a Protocol had been entered into by Great Britain, on Queensland's behalf, on 13 March 1897 by which Queensland acceded to the Anglo-Japanese treaty.²² The Protocol included the condition that Articles I and III (which dealt with travel, immigration, and freedom of commerce and navigation) shall not affect the laws, ordinances and regulations with regard to trade, the immigration of labourers and artisans, police and public security, which are in force or may be hereafter enacted in Japan or Queensland.²³ The treaty itself, however, did not come into force until 17 July 1899.²⁴

This example is indicative of the relationship between the different branches and levels of government. While it was the subject of debate in the Queensland Parliament, it was the Queensland Government that was taking active measures with its adherence to the treaty. The Queensland Parliament was limited in its capacity to legislate in a manner contrary to the treaty (even without Queensland's adherence to it), because the Queen would not assent to colonial legislation which was contrary to treaty commitments of Great Britain. However, it appears that Queensland had sufficient international standing to be able to negotiate an agreement with Japan, even though it was formally entered into by Great Britain on Queensland's behalf, which allowed the Queensland Parliament to legislate in a way that was not inconsistent with the treaty obligations of Great Britain.

None of the other Australian colonies took the Queensland approach. They all declined to adhere to the treaty. In NSW the failure to achieve assent to its legislation concerning restrictions on Japanese workers led to the introduction of the Immigration Restriction Bill in November 1897.²⁵ Mr George Reid²⁶ (Free Trader), the NSW Colonial Treasurer and Premier, noted that the Bill which set a language test for all migrants, was based on an Act from Natal which had been assented to by the Queen, and that any movement away from

the principles of the Bill would risk a further failure to achieve assent. Mr Lyne²⁷ (Protectionist) noted that the inability to directly exclude certain races of worker was a price that the colonies paid for the protection and support of Great Britain.²⁸ Reid consoled the Parliament by noting that while the Parliament's law must comply with Britain's treaty obligations in order to obtain assent, as a matter of administrative practice officials would have the discretion to exclude the application of the language test to Europeans so that it only applied to the coloured races. This is because Great Britain has a role in assenting to legislation but no role in relation to administration within the colonies.²⁹ Accordingly, while treaties imposed a limit upon the parliament's legislation, flexibility in administration by the executive could be used to alleviate any consequential problems.

It should also be noted that, while treaties were entered into by the British Government (rather than the Parliament), colonial adherence was either achieved by notification by the colonial government, or where implementing legislation was necessary, by the passage of the legislation.³⁰ There was also the complication that the legislation could be enacted either by the British Parliament to apply to the colonies, or by the colonies themselves. For example, clause XVII of the Extradition Treaty between Chile and Great Britain of 26 January 1897 provided that the treaty shall be applicable to the colonies of Her Britannic Majesty so far as the laws in such colonies allow.³¹ The Extradition Act 1870 (UK) implemented extradition treaties both in Great Britain and the colonies. However, section 18 provided that, where extradition legislation was enacted by a colonial legislature, Her Majesty could, by Order in Council, suspend the operation of the Imperial Act to that colony, and direct that the local legislation would apply.³²

In conclusion, during the colonial era, treaties entered into by the United Kingdom Government had an immediate effect on the Australian colonies, regardless of whether or not the treaty was implemented by legislation of the United Kingdom government. This was because colonial governors were required to reserve any legislation which conflicted with a British treaty for the assent of Her Majesty.³³ And Her Majesty's assent was ordinarily not given. It was noted in *State Experiments in Australia and New Zealand* in 1902, however, that formal refusal was unnecessary:

When the Imperial Government does not wish a colonial Act to become law the King need not formally veto it. All that is needed after the Viceroy has reserved the measure for His Majesty's consideration is to do nothing at all. The Royal assent is not given, and after a year the Bill lapses. This was the fate of the Asiatic Restriction Bills of 1896.³⁴

If the Westminster Parliament did legislate to implement treaties, and that legislation applied of paramount force to Australia, there was an additional limitation on the colonial Parliaments' legislative powers.³⁵ To take the benefit of commercial treaties, however, or to incur obligations under commercial treaties (other than the obligation not to legislate inconsistently with the treaty), the colonies had either to agree to adhere to the treaty, or where individual rights were affected (such as intellectual property rights), the colonial Parliament had to legislate to implement the treaty. In some cases (such as the case of extradition) the Westminster Parliament would apply its legislation to the colonies unless

the colony itself legislated to implement the treaty obligation. This context is provided in order to better understand the intentions of the drafters of the Commonwealth Constitution and the debate in the Constitutional Conventions over treaty making and the external affairs power.

The Drafting of the Constitution and the Treaty Making Power

The 1891 draft of the Constitution contained two main provisions relating to treaties. The first was covering clause 7 of the Constitution.³⁶

The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and *all treaties made by the Commonwealth* shall, according to their tenor, be binding on the courts, judges, and people of every state and of every part of the Commonwealth anything in the laws of any state to the contrary notwithstanding.³⁷ [Emphasis added]

The second provision was contained in sub-clause 52(xxvi),³⁸ and was to grant the Commonwealth Parliament power to make laws with respect to 'External affairs *and treaties*'.

An ancillary provision was contained in proposed section 75. It would give the High Court original jurisdiction in relation to treaties 'made by the Commonwealth with another country'.

First, there is a question about what was intended by the reference to treaties being 'made by the Commonwealth' in both covering clause 7 and section 75. Debate upon these clauses, discussed below, indicates that it was not intended that the Commonwealth have sovereign power to enter into treaties, but rather it was recognition that the colonies already had a separate power to adhere to certain treaties entered into by Great Britain, and that this power may be expanded in the future.

The most remarkable aspect of these references to treaties, however, was that clause 7 would have made treaties, once entered into, self-executing, in the same manner as in the United States.³⁹ The reference was, in fact, taken from the United States Constitution, as was the reference to treaties in section 75,⁴⁰ which would have been necessary if treaties were to be self-executing without the necessity for implementing legislation.⁴¹ The reason for this approach, which today seems quite radical, appears in part to be the strong United States influence on the people who made the very first drafts of the Constitution⁴² and partly because of the colonial experience that treaties, when entered into, had the immediate effect of limiting the power of the colonial parliament to legislate inconsistently with the treaty, regardless of whether the British Parliament had legislated to implement the treaty. Once the power of the colonial parliaments was neutered in this way, it became a much smaller step to provide for the treaty taking effect without the necessity of legislation to implement it.

At the Constitutional Conventions, this move away from the dualist Westminster system to the United States system of self-executing treaties was so unremarkable that it was passed, without discussion at all, by the Sydney Convention of 1891 and the Adelaide Convention of 1897. However, the reference to the making of treaties between the Commonwealth and other countries, in section 75, was dropped before the draft Constitution was introduced at the Adelaide Convention, confining the reference in section 75 to 'any treaty'.

After the Adelaide session of the 1897 Convention, a copy of the draft Constitution was sent to the Colonial Office in London, where Mr John Anderson wrote a minute on the draft Constitution which raised objections to the treaty power. Professor La Nauze summarised these objections as follows:

The 'treaty' power of the Commonwealth Parliament could not be allowed to stand; the power belonged to the Sovereign and short of the Commonwealth's gaining independence its external relations must remain in the Queen's hands. It seemed to be intended to give the Commonwealth the right to make its own commercial treaties; this could not be conceded.⁴³

In a further minute, dated 7 July 1897, Anderson argued that the Imperial Parliament could not fund the defence of a State if it had no control over the State's foreign affairs, shipping and treaties. He concluded that, if the treaty power was seriously intended, the Commonwealth of Australia may as well assert its complete independence from the United Kingdom.⁴⁴

An additional concern expressed by the British Government was the classification of the power in relation to 'external affairs and treaties' as one which is an 'exclusive' power of the Commonwealth. The Colonial Office was concerned that the reference to 'exclusive power' may be interpreted as limiting the power of the Imperial Parliament. It recommended that it be rephrased, or moved, so that it was clear that the power was exclusive of the Australian States in relation to the Commonwealth.⁴⁵

Instead of confronting the Australian Constitutional Convention directly with these objections, they were secretly handed to the New South Wales Premier, Mr George Reid, on the grounds that 'there was reason to believe that the amendments desired would have a better chance of being accepted if they appeared to proceed spontaneously from a prominent member of the Convention than if they were put forward officially'.⁴⁶

There was extensive debate upon these clauses in the NSW Legislative Council, with members arguing that Australia could not enter into a treaty because it was not a sovereign state,⁴⁷ and that the British Parliament would not enact such a provision because it could not permit colonial courts to be bound by treaties that may be inconsistent with its own legislation or treaty obligations.⁴⁸ Others, however, defended the provision on the grounds that it recognised that the colonies had some rights to adhere to treaties and would accommodate any further rights conferred by the British Government on the colonies with respect to treaties.⁴⁹ The Legislative Council voted in favour of removing the references to

treaties in covering clause 7 and in section 52. Its recommendations were sent to the Convention.

At the next session of the Constitutional Convention in Sydney in September 1897, amendments proposed by the Legislative Council of New South Wales were proposed, including that the words 'and treaties made by the Commonwealth' be omitted from covering clause 7.⁵⁰ Edmund Barton (Protectionist, NSW) explained the reasons for the amendment as follows:

I think it is expected by the Legislative Council of New South Wales that I should explain what the meaning of this amendment is. In the first place, the desire of that body is that, inasmuch as the treaty making power will be in the Imperial Government, we should omit any reference to the making of treaties by the commonwealth; in other words, while they concede that we should make certain trade arrangements, which would have force enough if ratified by the Imperial Government, the sole treaty making power is in the Crown of the United Kingdom.⁵¹

This amendment was strongly supported by George Reid, who argued that such a provision would be more in keeping with the United States Constitution, than in the Constitution of a colony within an Empire.⁵²

At the Melbourne session of the Convention in 1898, a further amendment proposed by the Legislative Council of New South Wales was discussed. It provided that the words 'and treaties' be omitted from sub-clause 52(xxvi), in conformity with the amendment to covering clause 7.⁵³ The amendment was passed and the reference to treaties was removed, leaving the sole reference to treaties in the Constitution to the now largely redundant reference in section 75.

It appears that the Colonial Office and the Framers of the Constitution were concerned that a legislative power in relation to treaties might also include a legislative power to enter into treaties.⁵⁴ This concern was confirmed in an opinion by Sir Isaac Isaacs (Protectionist, Vic) when he was Attorney-General in 1906.⁵⁵ He observed that 'an express legislative power as to "treaties" would probably have enabled the Parliament to provide for the making of treaties by the Commonwealth'.⁵⁶ Nevertheless, he concluded that despite the removal of the reference to 'treaties' in section 51(xxix) of the Constitution, the external affairs power still gives the Commonwealth Parliament the power to 'make such provision as is necessary to enable the obligation to be fulfilled',⁵⁷ even if the legislation would not otherwise be within Commonwealth power, and would override State legislation.

Quick and Garran, who were both involved in the federation movement and had an intimate knowledge of the Constitutional Conventions, considered that the external affairs power included the power to make laws which give effect to treaties.⁵⁸ They noted that it was an existing power of colonial governments to make laws to implement the treaties which applied to them, and that the words 'external affairs' were 'wide enough to confer on the Federal Parliament the legislative power proper in respect of treaties'.⁵⁹

It appears reasonably clear, both from the Constitutional Conventions and from subsequent statements by those who were instrumental in drafting the Constitution, that the removal of the words 'and treaties' was intended to ensure that Australia did not obtain the power to enter into treaties itself. However, its more significant effect was to ensure that treaties were not self-executing and could only apply as part of the domestic law of Australia if they were implemented by the Commonwealth or State Parliaments. Accordingly, even though it does not appear to have been expressly recognised at the time, the role of the Parliament in relation to treaties was enhanced by the amendment of the Constitution during the Convention Debates.

The Historical Development of Australia's Power to Enter into Treaties

The Impact of Existing Colonial Treaties on the Powers of the Commonwealth Parliament

Federation did not affect the status of Australia as a colony. It was merely a change from six colonies to one colony.⁶⁰ It did, however, result in the conferral on the Commonwealth Parliament of powers to make laws in relation to matters that have an external or international aspect. These powers included: section 51(vi) defence; section 51(x) fisheries in Australian waters beyond territorial limits; section 51(xix) naturalisation and aliens; section 51(xxvii) immigration and emigration; section 51(xxviii) the influx of criminals; section 51(xxix) external affairs; and section 51(xxx) the relations of the Commonwealth with the islands of the South Pacific.

The former colonies, now States, lost most of their role in international affairs. While the constitutional powers mentioned above are 'concurrent' powers, rather than exclusive Commonwealth powers, section 109 of the Commonwealth Constitution provides that Commonwealth law will prevail over any inconsistent State law. Once the Commonwealth has legislated to 'cover the field' a State no longer has the ability to make effective legislation on that subject. There were additional limitations on the powers of the States in section 114 prohibiting them raising a military force, and through the determination of the British Government to deal with the Commonwealth directly on matters affecting Australia. Initially, the States maintained that they had a role to play in international affairs. However, in the case of the *Vondel*⁶¹, the British Government confirmed its view that the Commonwealth now replaced the States in all matters concerning external affairs, and that it would communicate directly with the Commonwealth, rather than the States, regarding matters relating to Australia. For this reason, representatives of the States were no longer invited to the Imperial Conferences. They were now represented by the Commonwealth. The States did, however, retain their separate links with the Crown, particularly in relation to the appointment of State Governors and matters relating to the State Constitutions.⁶²

Two of the early questions to face Australia after federation were whether the new Commonwealth Parliament could legislate in a manner that was contrary to British treaty obligations, and whether treaties adhered to formerly by the States still applied now that they were part of a federation. The best example of these dilemmas follows on from the discussion above about the application of the Anglo-Japanese treaty and Queensland's adherence to the treaty.

One of the very early laws enacted by the Commonwealth Parliament was the *Immigration Restriction Act* (Act No. 17 of 1901). It was based upon the principles of the Natal and the NSW Acts discussed above. It restricted immigration by introducing the notorious dictation test. The Parliament wanted to pass a law that was directly discriminatory against Japanese workers, but the Prime Minister, Edmund Barton, argued that the reason for taking the dictation test approach was that it was acceptable to the British Government.⁶³ The British Government had recently refused assent to a discriminatory Queensland law,⁶⁴ and there was concern that the same would happen to a directly discriminatory Commonwealth law.⁶⁵

The Immigration Restriction Act was eventually passed without Australia testing the resolve of the British Government. The question of its application to the treaty obligations of Queensland, however, remained. In 1902 the Attorney-General, Alfred Deakin (Protectionist, Vic) was asked to advise upon the extent to which the Anglo-Japanese treaty, to which Queensland had adhered subject to the protocol discussed above, binds the Commonwealth and whether it conflicts with the recently passed *Immigration Restriction Act* 1901 (Cwlth). Deakin advised that there was a potential conflict between the treaty and the Immigration Restriction Act, but that in his view the treaty no longer applied because the 'establishment of the Commonwealth may be deemed to have annulled the Treaty'.⁶⁶ Further opinions from subsequent Attorneys-General, Isaac Isaacs⁶⁷ (Protectionist, Vic) and Littleton Groom⁶⁸ (Protectionist, Qld) in 1906 and 1907 confirmed that view.

The British Law Officers responded in December 1907.⁶⁹ They rejected the reasoning of the Deakin and Groom opinions. It was noted that treaties were made 'by His Majesty on behalf of his dominions and the mere change of the internal administration of portions of those dominions could hardly be put forward as a valid reason for holding that a treaty entered into on behalf of part of those dominions terminated on confederation'.⁷⁰ They concluded that 'treaties to which States of the Commonwealth adhered before confederation are still binding on the Commonwealth in respect of the State concerned'.⁷¹

The despatch of the Colonial Secretary to Australia⁷² containing this advice also noted that Queensland could terminate the treaty with twelve months notice.⁷³ While the Commonwealth Attorney-General still objected to the British position, he agreed that the Commonwealth should acquiesce in the termination of the Treaty with regard to Queensland.⁷⁴ The Anglo-Japanese treaty was terminated with respect to Queensland by a note sent by Great Britain to Japan on 31 July 1908.⁷⁵

The above history of the Anglo-Japanese Treaty and the Immigration Restriction Act is not only indicative of uncertain legal status of colonial adherence to treaties, but shows that the Commonwealth Parliament was still unsure about its legislative power to enact laws which were contrary to British treaties. Given the colonial experience of assent being refused to laws which were contrary to British treaties, the Commonwealth Government was reluctant to provoke such a conflict and risk finding that its legislative power was so limited. Another example of the point is the Customs Tariff (British Preference) Bill which contained a clause concerning the employment of white labour on British ships, which was contrary to British treaty obligations. This Bill was reserved by the Governor-General for the King's assent under section 58 of the Constitution, and was later withdrawn by the Commonwealth Government⁷⁶ out of concern that consent would not be given.

The implied threat of refusal of royal assent to a bill which conflicted with treaty obligations remained even after federation. For example, in 1912, the Queensland Governor refused to give assent to the Leases of Aliens Restriction Bill on the ground that it was offensive to the obligations binding on Queensland by virtue of the Italian Treaty of 1883 to which it had adhered. It was not until the Bill was amended that the royal assent was given.⁷⁷ Accordingly, it was not surprising that, in the early years after federation, the Commonwealth Parliament was careful not to provoke such a confrontation and not to legislate in a manner which was inconsistent with British treaty obligations.

Australia's Continuing Treatment as a Colony after Federation

While federation affected Australia's internal relations and gave the Commonwealth Parliament additional extra-territorial powers, Australia remained a colony without the power to enter into treaties in its own right. The colonies had already achieved some liberty in relation to commercial and technical treaties, but this was not the case with 'political' treaties. Up until 1911, the colonies (now described as Dominions) did not even have a right to be consulted on political treaties which would bind them.⁷⁸

At the 1911 Colonial Conference, Australia objected to the 'London Declaration'⁷⁹ which was made by the Imperial Government without consulting the Dominions. Sir Edward Grey responded on behalf of the Imperial Government by stating that he was 'quite prepared that in future the Dominions should be consulted, and that representatives would take part in any interdepartmental Conference which might be held to discuss such questions'.⁸⁰ However, this did not happen in relation to all types of treaties. In relation to extradition treaties, for example, Britain was still making and renewing such treaties into the 1920s on behalf of the whole Empire without consultation. It has been observed that, as at 1939, the majority of extradition treaties binding on the Dominions were entered into by Britain without either consultation or the inclusion of separate rights for the Dominions to adhere or withdraw.⁸¹

As far as the international community was concerned, the Dominions were not sovereign and, as Professor Oppenheim⁸² wrote in 1912, 'have no international position whatever'.⁸³

World War I and the Growth in International Status of the Dominions

The importance of Dominion contributions to the war effort in World War I significantly advanced their progress towards independence. Professor Baker noted that having realised at last the full burdens of their nationhood, the Dominions were more disposed to claim its rights.⁸⁴

Representatives of the Dominions were invited to attend the Imperial War Cabinet and the Imperial War Conference, which dealt with wider Empire matters than the prosecution of the war. In 1917 the Imperial War Conference resolved that a future Imperial Conference be held to consider the 'readjustment of the constitutional relations of the component parts of the Empire'. This was to be done on the basis of 'full recognition of the Dominions as autonomous nations of an Imperial Commonwealth' and recognition of a right to 'an adequate voice in foreign policy, and in foreign relations'.⁸⁵

When the terms of the Armistice were first established in November 1918, conditions of peace were included without consultation with the Dominions. The Dominions objected strongly to this lack of involvement.⁸⁶ Separate representation of the Dominions at the Peace Conference,⁸⁷ as well as inclusion in the British Delegation, was finally achieved after campaigning by the Dominion representatives. As a concession to the other allies who argued that separate representation would give Britain too many votes, the Dominions were not given separate votes.⁸⁸

The manner in which the treaty should be signed was also a subject of debate. The Canadian Prime Minister, Sir Robert Borden, claimed in March 1919, on behalf of the Dominion Prime Ministers that:

[A]ll the treaties and conventions resulting from the Peace Conference should be so drafted as to enable the Dominions to become Parties and Signatories thereto. This procedure will give suitable recognition to the part played at the Peace Table by the British Commonwealth as a whole, and will, at the same time, record the status attained there by the Dominions. The procedure is in consonance with the principles of constitutional government that obtain throughout the Empire. The Crown is the Supreme Executive in the United Kingdom and in all the Dominions, but it acts on the advice of different Ministries within different constitutional units; and under Resolution IX of the Imperial War Conference, 1917, the organisation of the Empire is to be based upon equality of nationhood.⁸⁹

The Versailles Peace Treaty with Germany was consequently signed on behalf of the British Empire, and then separately by the representatives of Canada, Australia,⁹⁰ South Africa and New Zealand. The form of the signature pages reflected the uncertainty of the

status of the Dominions. Instead of each of the Dominions being listed in alphabetical order with other signing nations, the British Empire was listed, then indented beneath it were the names and signatures of the representatives of the Dominions.

Before the Peace Treaty was ratified by the King, consent to its ratification was given by the Parliaments of the Dominions.⁹¹ The British Government obviously took seriously the need for the Dominions to approve the ratification of the treaty before it would do so, because, on 17 September 1919, Prime Minister Hughes noted that the British Government had sent a message to the Australian Government asking it to speed up the approval process, as the whole of the Empire, except Australia, had now approved of the treaty, and it was matter of urgency that Great Britain be in a position to ratify the treaty.⁹²

In Australia there was extensive parliamentary debate over the proposed ratification of the treaty.⁹³ The topics covered included the reparations that Australia would receive and the mandate granted to Australia over former German possessions in the Pacific.⁹⁴ Prime Minister Hughes also noted that the Japanese delegation to the Peace Conference had argued that an 'equality of nations' clause be inserted to ensure that all members of the new League of Nations had to treat the nationals of other members of the League without discrimination based upon race.⁹⁵ This was apparently directed at Australia's 'White Australia' policy. Prime Minister Hughes claimed victory for Australia in the removal of this clause from the final draft of the treaty. He noted that the Peace Conference comprised many men of different races and with different views. He concluded:

I venture to say, therefore, that perhaps the greatest thing which we have achieved, under such circumstances and in such an assemblage, is the policy of a White Australia Remember that this is the only community in the Empire, if not, indeed, in the world, where there is so little admixture of race We are more British than the people of Great Britain, and we hold firmly to the great principle of White Australia.⁹⁶

Australia and the League of Nations

A further consequence of the treaty was that the Dominions became independent members of the League of Nations.⁹⁷ This time, the Dominions were given a separate vote and the ability to be selected as permanent or temporary members of the League's Council. Moreover, the representatives of the Dominions were not accredited by the Imperial Government, but by their own Dominion Governments, to which they were directly responsible.⁹⁸ The Dominions also became independent members of the International Labour Organisation (ILO) in 1919. The Commonwealth Parliament endorsed Australia becoming a member of the League of Nations and a party to the International Labor Organisation during the same debate in which it approved of the Peace Treaty. Some Members of Parliament saw the separate Australian signature to the Covenant of the League as recognition that Australia is a 'separate nation'⁹⁹ while others,

even within the same party, saw it as recognition of Australia's status as 'almost that of an independent nation'.¹⁰⁰

Again, the significance of Australia's membership of the League of Nations was unclear. Professor Baty has argued that it was not significant because article 1 of the League's Covenant permitted the admission of fully self-governing states, dominions or colonies. He considered that the separate signature of the Treaty of Versailles was 'ornamental only'.¹⁰¹ Professor A. B. Keith agreed, noting that article 1 of the Covenant 'recognises very explicitly that a Dominion or Colony is not identical with a State, and that it is possible to maintain that the rights of a Dominion within the League are not rights under international law in general, but are rights given by a distinct instrument by contract'.¹⁰² He noted in 1938 that the Dominions may yet have developed in such a way as to have achieved statehood at international law, but that this question cannot be decided on the basis of the Covenant alone.¹⁰³ In the United States, there was certainly scepticism about the true reason for the Dominions obtaining separate representation at the League of Nations. The United States Senate, in debating the Covenant of the League, sought a reservation that the United States would not consider itself bound by any League decision 'in which any member of the League and its self-governing Dominions, Colonies or parts of Empire cast more than one vote'.¹⁰⁴ It considered that giving Dominions such as Australia a separate vote, effectively meant giving multiple votes to Great Britain.

Great Britain itself was ambiguous about the status of its Dominions. While on the one hand supporting them being given a separate vote, on the other, the British Government argued that international law did not apply to relations between members of the British Empire. It accordingly objected when the Irish Free State attempted to have registered with the League, as a treaty, an agreement between the Irish Free State and the United Kingdom.¹⁰⁵ Nor did Great Britain recognise in 1919 the power of the Dominions to enter into treaties in their own right, rather than under the auspices of the Empire.

The Australian delegation to the League of Nations was usually led by a Commonwealth Minister¹⁰⁶ and the report of the delegation to each session of the League of Nations was usually tabled and debated in the Commonwealth Parliament, allowing foreign policy and the conduct of Australia at the League of Nations to be fully debated.¹⁰⁷

In the ILO, the Australian delegates did not always vote in the same manner as Great Britain.¹⁰⁸ In his 1939 work, Professor Stewart of Harvard University noted:

In exercising their separate membership in the International Labour Organisation and in their ratification of the draft conventions, the Dominions act directly and without even formal intervention of the Imperial Government or the King himself.¹⁰⁹

However, in a debate in the Commonwealth Parliament in 1929, it was suggested that the practice was for all parts of the Empire to vote as a bloc in the ILO. A former delegate to the ILO, Mr Beasley (ALP, NSW), explained the practice as follows:

Before the British Delegation leaves London for Geneva, a conference is held, to which the Australian delegate is invited. The matters to be discussed at the Conference of the ILO are considered, and an understanding is arrived at so that the representatives of the United Kingdom and the dominions may vote *en bloc* in accordance with the wishes of the British Government.¹¹⁰

Mr Beasley was critical of the Australian Government for supporting an ILO Convention which provided for lower standards for workers than already existed in Australia in order to please the British Government.¹¹¹ Mr Latham (Lib, Vic) responded by criticising Mr Beasley for using the ILO to attack the government of Italy, with which Australia was on friendly terms.¹¹² The debate showed Australia's uncertainty as to the degree of its independence in an international forum.

The Imperial Conferences and the Change in Status of the Dominions

After World War I, the Imperial Conference¹¹³ became the primary means of changing the status of the dominions and their role in the British Empire. The power to make treaties in their own right was pressed for by a number of Dominions, but Australia was reluctant to join them. The agenda for the 1923 Imperial Conference was debated in advance in the Commonwealth Parliament.¹¹⁴ The experience of World War I weighed heavily on the debate. Prime Minister Bruce stressed to the House of Representatives that, 'if one part of the Empire is involved in war, the whole of the Empire is involved'.¹¹⁵ He noted that if it was accepted that wars arise from foreign policy, and that Australia is inevitably involved whenever Britain is involved, then clearly Australia should insist upon having some proper voice in framing that foreign policy. However, he noted that 'if the Dominions, without consultation with other Dominions or with Britain, make treaties on their own behalf, which might, under certain circumstances, involve the Empire as a whole in war, there will be an intolerable position'.¹¹⁶

This fear that allowing Dominions to enter into treaties on their own behalf could embroil other parts of the Empire in war, was reflected in the ultimate resolutions of the Imperial Conference of 1923. The Conference recognised that the different Governments of the Empire had the right to make treaties with foreign powers, subject to a duty to consider any potential effect on other parts of the Empire, and a duty to inform other Empire Governments of their intentions. Bilateral treaties which imposed obligations on one part of the Empire only, could be signed by a representative of that part of the Empire. Treaties negotiated at international conferences were to be signed by representatives on behalf of all the governments of the Empire represented at the Conference. The Conference also noted that 'it is for each government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government'.¹¹⁷

At the Imperial Conference of 1926, these guidelines for entering into treaties were revised and reinforced in what is known as the Balfour Declaration.¹¹⁸ The Declaration recognised the Dominions as 'autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations'.

Despite the assertions of the Imperial Conference, the extent of the treaty making power conferred on the dominions nevertheless remained in dispute.¹¹⁹ While the Royal Commission on the Australian Constitution in 1929 recognised that the Commonwealth Government had the right to enter into political treaties with foreign countries it noted that the 'government of the Commonwealth has not as yet exercised this right'.¹²⁰

A summary of the proceedings of the 1926 Imperial Conference was tabled and debated in the Commonwealth Parliament on 3 March 1927.¹²¹ Some Members considered that the Conference merely recognised the existing independence of Australia; others noted that Imperial Conferences have no constitutional status and were not able to free Australia from legal constraints such as the *Colonial Laws Validity Act*.¹²² Members of the Commonwealth Parliament were particularly conscious at this time that the High Court had recently struck down part of the *Navigation Act 1912* (Cwlth) on the basis that it conflicted with the British Merchant Shipping Act 1894.¹²³

The 1926 Conference, however, had not ignored the fact that legislative change may be needed to implement the Conference's conclusion about equality of status. Accordingly, it recommended the establishment of a technical committee to consider what changes were needed. The Committee met in London from October to December 1929. The Australian representative was Professor Harrison Moore. The Committee's report was tabled in the Commonwealth Parliament on 25 June 1930.¹²⁴ In summary, the report recommended that:

- the removal of constitutional provisions concerning the disallowance of laws and reservation for royal assent, be an internal matter for Australia to resolve
- the United Kingdom Parliament legislate, with the consent of the Dominions, to declare that the Dominion Parliaments have full power to make laws of extra-territorial operation
- on the basis of the principle of equality accepted at the 1926 Imperial Conference, the Colonial Laws Validity Act be repealed in relation to the Dominions
- the United Kingdom Parliament not legislate with respect to a Dominion without the consent of the Dominion, and
- a constitutional convention be established that any change to the succession of the throne require the consent of the Dominions.

The Committee also considered the issue of nationality and whether there should be separate citizenship laws, but could not resolve the issue.

Debate upon the Committee's report showed that Australia was still fearful of formalising its relationship with the United Kingdom. Latham, for example, was critical of the report, warning against 'allowing the lawyer to overrule the statesman'.¹²⁵ He considered that Australia should be much more concerned with conserving and strengthening the unity of the British Empire 'than to insist upon any theoretical rights as a mark and symbol of an independence which would not be real outside the Empire'.¹²⁶

Former Prime Minister Hughes was also critical, stating: 'I am entirely opposed and always have been, to this futile, nay, dangerous, attempt, to state in writing the relations which exist between the various parts of the Empire'.¹²⁷ Mr Crouch (ALP, Vic), however, argued that the lawyers had already overruled the statesmen when the High Court ruled parts of the Navigation Act invalid because of the application of the Colonial Laws Validity Act, and that legislation was therefore essential to ensure that the 1926 Conference's 'equality' statement was implemented.¹²⁸

The Statute of Westminster

The 1930 Imperial Conference accepted the report of the Committee and endorsed draft clauses which were to become the Statute of Westminster. However, the Conference resolved that prior to the enactment of the Statute, approval to its enactment must be given by resolutions of both Houses of each Parliament of the Dominions.¹²⁹

The resolution for approval of the clauses was moved in the House of Representatives on 3 July 1931.¹³⁰ Mr Nairn (UAP, WA) moved an amendment that would have allowed any State to request the United Kingdom Parliament to legislate to allow its secession from Australia.¹³¹ This amendment was defeated. In contrast, Mr Crouch (ALP, Vic) moved an amendment that proposed that the Commonwealth Parliament be given full legislative power (beyond its existing legislative heads of power) so that Australia would become a unified country, rather than a federation.¹³² This amendment was also defeated. The successful motions included one that the United Kingdom only legislate with respect to Australia if it is requested by *both* the Government and the Parliament,¹³³ and that the United Kingdom Parliament should not enact a law at the request of the Commonwealth if it concerns any matter within the authority of the States, without the concurrence of the States concerned.¹³⁴ Mr Lyons¹³⁵ (UAP, Tas) also successfully moved a motion that certain provisions not extend to the Commonwealth of Australia unless adopted by the Parliament of the Commonwealth.¹³⁶

The Senate was quite critical of the proposal. Senator Sir George Pearce (UAP, WA) preferred the 'British Empire' to this 'newfangled idea of a "British Commonwealth of Nations"'.¹³⁷ He took up the 'if it's not broken, don't fix it' line, noting that while the

relations between the various parts of the Empire are 'illogical', the important thing is that they work smoothly and satisfactorily. He thought it ridiculous to suggest that the Parliament of the United Kingdom could be equal with the Parliament of Australia or Canada, because the latter are not independent nations.¹³⁸ However, the Senate was eventually swayed to support the proposal, on the basis that it was supported by Great Britain and the rest of the Empire.

The Statute of Westminster came into effect upon 11 December 1931. It picks up the amendments proposed by the House of Representatives. Section 9(3) especially provides in relation to Australia that the consent of a 'Dominion' to the enactment of a law by the United Kingdom Parliament, means the consent of the Parliament and Government of the Commonwealth. Sub-sections 9(1) and (2) ensure that this Act does not extend the power of the Commonwealth Parliament into the area of authority of the States. Similarly, Commonwealth consent to a United Kingdom law applying to State matters is not required unless it would have been required in accordance with constitutional practice prior to the enactment of the Statute of Westminster. Section 10 provides that sections 2–6 shall not extend to Australia unless the Commonwealth Parliament adopts them. As originally proposed, the Statute of Westminster gave full power to the Commonwealth Parliament to make laws having an extra-territorial operation. It also released the Commonwealth (but not the States) from the application of the *Colonial Laws Validity Act 1865* (UK).¹³⁹

Although enacted in 1931 by the Westminster Parliament, the adoption of the main provisions of the Statute of Westminster by Australia did not occur immediately. Concerns were expressed about the effect of the Statute upon the States,¹⁴⁰ and the wisdom of confining constitutional principles to words.¹⁴¹ On the whole, the Statute of Westminster was not seen to give Australia a much greater level of freedom than it already exercised in practice.¹⁴²

In 1936, the Attorney-General, Mr Robert Menzies (UAP, Vic), stated that he would introduce a Bill into the Commonwealth Parliament to adopt the Statute of Westminster, but that this should not be done in circumstances that might give rise to a suggestion of an 'anti-British movement'. He concluded that it 'should be adopted for the deliberate reason that we are simply prepared to fall into line with what appears to be a uniform feeling in the British Empire'.¹⁴³ The Statute of Westminster Adoption Bill 1937 was introduced on 23 June 1937¹⁴⁴ and the second reading speech was delivered by Menzies on 25 August 1937.¹⁴⁵ However, the Bill lapsed upon the dissolution of the Parliament on 21 September 1937, and despite promises that it would be reintroduced,¹⁴⁶ it was not. The closer the threat of war came, the more concern was raised in the Parliament that no action should be taken which might affect the strength of the Empire.¹⁴⁷

It was not until 1942 that the Statute of Westminster was adopted by Australia by the *Statute of Westminster Adoption Act 1942* (Cwlth), and given retrospective effect to 3 September 1939. Even then, it was the subject of suspicion and heated debate in the Parliament, and attempts to delay its passage were only defeated by four votes.¹⁴⁸ Mr Baker (ALP, Qld) noted in his speech that during the course of debate the Opposition

had hurled epithets such as 'un-British' across the Chamber, and that the Member for Wentworth 'threw out his arms like Sergeant Buz-fuz and asked in a sepulchral voice "What will the Axis powers think of it?".¹⁴⁹ Former Prime Minister Hughes stated that he was at a loss to understand why the Bill should be introduced 'at a moment when the enemy is literally at our gates', when it is a measure which 'would certainly tend to disrupt that unity upon which a maximum war effort depends'.¹⁵⁰ He believed that his 'fears that the adoption of this statute may imperil those relations [with Great Britain] are shared by many people in Australia'.¹⁵¹

Menzies, despite having introduced the Bill himself previously, was in favour of delaying its passage by referring it to a committee. He explained that he had not become reconciled to the new theory of the divisibility of the Crown:

I do not understand how the Crown can be the nexus between the Dominions of the British Empire unless it is one Crown. I do not understand the theory, which has had great currency in some Dominions, that there are six Kings and that the King of Australia is advised by his Australian Ministers and that the King of the United Kingdom is advised by his United Kingdom Ministers, and that in each of those capacities he is distinct ...¹⁵²

Mr Harrison (UAP, NSW) argued that there was no need to make any change, because Great Britain had not acted against Australia's will. He was concerned that change could lead to constitutional uncertainties.¹⁵³

Mr Blackburn (ALP, Vic) however, saw the Statute of Westminster as a further increment in the development of self-government for the Dominions. At an interjection suggesting that this was 'misgovernance', he responded:

If mis-government has occurred, the responsibility is our own. It is better to have freedom to make mistakes than not to have freedom at all.¹⁵⁴

The arguments made were in some ways very similar to those in the recent republic debate. There were those who wanted Australia to take responsibility for her own destiny and make her own mistakes. There were others who saw no need for change, feared the uncertainty that can result from change and feared the risk of abandonment in our region.

Australia and the Declaration of War

This reluctance to take up the extent of independence offered by the United Kingdom was reflected in Australia's attitude towards the other 'external power' to wage war and to make peace.

At the time of World War I, it had been accepted that the prerogative of declaring war was held by the British sovereign, and that the Dominions were included in any declaration of

war made by or against Britain.¹⁵⁵ While technically all Dominions were at war, it was still considered that it was a matter of choice for them as to whether they would actively participate in any war by sending troops.¹⁵⁶

Although the prerogative to declare war was recognised as being held by the King, Justice Isaacs noted in *Farey v Burvett*¹⁵⁷ that the executive power in section 61 of the Constitution includes the royal war prerogative. He continued:

The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the head of the Empire, but apart from that, the prerogative powers of the Crown are exercisable locally.¹⁵⁸

Despite the changes in the treaty making regime of the British Commonwealth which occurred in the 1920s and early 1930s, it was still assumed by Prime Minister Menzies, when Britain declared war against Germany in 1939, that Australia was also automatically at war with Germany, without Australia having to take any further act or make an independent decision. Prime Minister Menzies announced on 3 September 1939 that Great Britain was at war with Germany and 'as a result, Australia is also at war'.¹⁵⁹ On 6 September 1939 Menzies noted in the Parliament that Australians would support the war because 'we are all British citizens' and Opposition Leader Curtin responded by observing that Great Britain 'includes Australia' for the purposes of the declaration of war.¹⁶⁰ Even when Italy declared war against Britain on 10 June 1940, without making any reference to Australia or the Dominions, it was assumed by Prime Minister Menzies that this declaration included Australia.¹⁶¹ This assumption can be understood if one considers what Menzies later said in the debate on the adoption of the Statute of Westminster:

It is true, as has been pointed out by the Attorney-General, that the King makes war and peace. Let us suppose that the King makes war. I have never been able to understand how the King may make war as King of the United Kingdom and remain at peace as King of Australia. I do not begin to understand it.¹⁶²

Other Dominions had less trouble in accepting this distinction. In Canada, the Parliament was summoned on 7 September and the House of Commons agreed on 9 September to participate in the war. An Order in Council was then issued authorising the Prime Minister to petition the King to declare a state of war between Canada and Germany from 10 September. In South Africa, after a motion in favour of neutrality failed in the Parliament, the Governor-General issued a proclamation on 6 September declaring a state of war between the Union of South Africa and Germany.¹⁶³

The position in Australia changed after the election of the Labor Government in 1941. The Government considered that the 'equality' of status of the Dominions and Britain, as expressed by the Balfour Declaration of 1926, allowed Australia to make an independent declaration of war. In order to ensure that such a declaration could not be challenged,¹⁶⁴ however, Dr Evatt (ALP, NSW), who was both Minister for External Affairs and the Attorney-General, advised that it would be wise to seek a delegation of this power by the

King to the Governor-General under section 2 of the Constitution, in relation to a possible declaration of war against Finland, Romania or Hungary.¹⁶⁵ Japan was later added to this request.

The King issued an instrument on 8 December 1941 delegating the power to the Governor-General to make a declaration of war against Finland, Hungary and Romania, and a separate instrument delegating the power in relation to a declaration of war against Japan. Both instruments noted the existence of sections 2 and 61 of the Constitution, and that the King was acting on the advice of the Federal Executive Council of the Commonwealth of Australia.¹⁶⁶

The war also prompted Australia to start appointing its own diplomatic representatives. Previously, Australia had appointed trade commissioners and established Australia House in London to liaise with the British Foreign Office, but all formal diplomatic functions such as the negotiation of treaties were undertaken by British diplomats upon Australia's behalf.¹⁶⁷ It was not until 1940 that Australia established its own diplomatic missions, first to Washington and then to Japan. In contrast, Canada, South Africa and the Irish Free State all commenced appointing their own diplomatic representatives in the 1920s.¹⁶⁸ The power to appoint Australia's diplomatic representatives was assigned by the Queen to the Governor-General under section 2 of the Commonwealth Constitution in 1954. Further powers were assigned in 1973 with regard to the appointment and withdrawal of ambassadors and High Commissioners.¹⁶⁹

When Did the Commonwealth Obtain the Power to Enter into Treaties?

It is not possible to define the exact point of time at which Australia obtained the power to enter into treaties in its own right. A primary difficulty is that there are three different perspectives involved. First, there is the perspective of the international community, where international recognition was necessary before other countries would enter into treaties with Australia. Second, there is the perspective of the Imperial Government, which gradually allowed its colonies greater independence and autonomy. Third, there is the domestic Australian perspective, where new powers and opportunities were not seized and there was uncertainty as to the extent of these powers.

On the international plane, Australia was initially treated as a mere colony, even when it gained representation at technical conferences such as the Universal Postal Union, and entered into treaty arrangements of minor importance. In these circumstances, it was considered to be acting as a delegate of Great Britain, and not as a nation state in its own right.¹⁷⁰ The separate representation of Australia at the Peace Conference of 1919 and its signature of the Treaty of Versailles, gave Australia a degree of international recognition, as did its admission as an independent member of the League of Nations. Oppenheim concluded in 1935 that the Dominions 'have acquired a position in International Law and in the Family of Nations'¹⁷¹ but was equivocal about the nature of

that position, noting that the distinctions between the political and legal status of the Dominions, and the distinctions between theory and practice, 'are baffling to the foreign observer desiring to understand the relations between the mother country and the Dominions'.¹⁷²

From the British point of view, the Dominions were first given a degree of autonomy in relation to external affairs in the 1920s. The Imperial Conference of 1923 gave them the power to enter into bilateral treaties, subject to conditions concerning consultation, and the Imperial Conference of 1926 made the vital change to the source of advice to the Crown on matters concerning external affairs.¹⁷³ The only legal step taken was the Statute of Westminster, which recognised the limitation on the power of the Westminster Parliament to legislate for the Dominions, and gave the Dominions the power to legislate extra-territorially and contrary to British laws of paramount force.

Domestically, the power to enter into treaties may have been officially recognised,¹⁷⁴ but the Commonwealth was reluctant to use it, until World War II changed its perspective of the Empire. Before that time, the Commonwealth tended to enter into international 'agreements', rather than treaties. Similarly, the Statute of Westminster was not adopted by Australia until 1942, and Australia did not establish its own overseas diplomatic missions until 1940.¹⁷⁵ Doubt about Australia's ability to separately declare war in 1942 is also indicative of Australian uncertainty about the extent of its external affairs powers.

In summary, although one cannot give a precise date upon which Australia obtained the power to enter into treaties, one can discount the two extremes of 1901 and 1942, and narrow down the field to the period from 1919 to 1931. This covers the most important years of Australia's development to nationhood in domestic, Imperial and international eyes: independent membership of the League of Nations, the Imperial Conferences of 1923, 1926 and 1930, and the Statute of Westminster.

It should also be noted that even once Australia had obtained the right to enter into treaties, this did not necessarily mean that Australia was a fully sovereign nation. The High Court considered this issue as recently as 1999 in *Sue v Hill*.¹⁷⁶ The issue in question was whether the United Kingdom is a 'foreign power' for the purposes of section 44(i) of the Commonwealth Constitution (which provides that citizens of a foreign power are incapable of being chosen as a Member of Parliament). The High Court noted that this raised questions of 'international and domestic sovereignty'.¹⁷⁷ The Court used as one of its tests the question of whether the Court would be bound to recognise and give effect to the exercise of legislative, executive or judicial power by the institutions of government of the United Kingdom.¹⁷⁸ On this basis, the majority held that at least since the passage of the Australia Acts 1986, Australia has been a sovereign nation.¹⁷⁹

Prior to the passage of the Australia Acts, the States remained subject to certain laws of the United Kingdom, Her Majesty was still advised by the United Kingdom Government concerning the exercise of her powers in relation to the States, and appeals could still be made to the Privy Council from State Supreme Courts. This left Australia in the peculiar

position that at the Commonwealth level it was independent, but at the State level it was not, leading to questions about Australia's sovereignty.¹⁸⁰ The majority of the Court was not able to identify any particular date or event by virtue of which Australia became a sovereign nation. This failure was criticised by Callinan J who did not support the 'evolutionary' theory of constitutional interpretation which was adopted by the majority.¹⁸¹

Role of the Commonwealth Parliament in the Approval of Treaties

From an early stage the Commonwealth Parliament was involved in the approval of treaties before their ratification. In some cases the actual treaty itself, as negotiated by the British Government, required this form of approval. An example is the Anglo-French Treaty of 1919, which was intended to provide assistance to France in the event of German aggression.¹⁸² Article V provided:

The present Treaty shall impose no obligation upon any of the Dominions of the British Empire unless and until it is approved by the *Parliament* of the Dominion concerned.¹⁸³
[Emphasis added]

In contrast, however, in the Locarno Pact of 1925,¹⁸⁴ a similar clause was included, but it referred to Dominion *Governments* rather than Parliaments.¹⁸⁵ The difference was explained in Oppenheim's *International Law* as 'a concession to the less democratic atmosphere then prevailing'.¹⁸⁶ Similarly, in the Balfour Declaration of 1926, it was left up to each *Government* to decide if *parliamentary* approval is needed in all or any cases.

The Treaty of Versailles was not only signed separately by Australia, but it was also approved by the Dominion Parliaments before it was ratified by His Majesty.¹⁸⁷ Even when parliamentary approval was given, however, notification of consent to ratification was given to the monarch by way of an 'Order in Council', which formally advised the monarch to ratify the treaty.¹⁸⁸ The Commonwealth Parliament later passed the *Treaty of Peace Act* 1919 which gave the Governor-General the power to make regulations concerning the economic provisions of the treaty (such as reparations and dealings with German property) but this Act did not deal with 'approval' of the treaty, as this had already occurred by way of resolution.

In practice, the Commonwealth Parliament was frequently involved in giving approval to treaties.¹⁸⁹ H. S. Nicholas (former Chief Judge in Equity of the NSW Supreme Court) made the following comments on the practice in relation to inter-governmental agreements and treaties:

The practice is to present the agreement to Parliament as a schedule to an Act of which Parliament approves. The agreement is concluded in exercise of the powers conferred on the Governor-General by section 61, as head of the Executive. It is approved by Parliament in exercise of the power conferred by section 51(xxix). Among trade agreements of this character are those with Brazil, 1939; Greece, 1940;

Southern Rhodesia, 1941; India, 1951; Western Germany, 1951... Since the conclusion of the war, Parliament has approved of treaties with Italy, Romania, Finland, Bulgaria and Hungary, 1947.¹⁹⁰

K. H. Bailey¹⁹¹ (Professor of Public Law at Melbourne University) also noted in 1935 that there was a growing tendency, 'in British countries at any rate', to ensure Parliamentary approval of a treaty before ratifying it.¹⁹²

Up until the mid-1970s, it was still a common practice to seek parliamentary approval of treaties where Commonwealth legislation was needed to implement them. Approval was normally included in the statute which gave effect to the treaty, and the treaty would be ratified after the statute was enacted but before it came into force. However, this practice began to lapse in the late 1970s.

The External Affairs Power

As originally envisaged in the 1891 draft of the Commonwealth Constitution, treaties would have been self-executing, giving rights and interests to individuals without the need for legislation. The amendment of covering clause 5 (as it later became) during the Convention process enhanced the role of the Parliament and the importance of the external affairs power, because it meant that treaties would only be binding at international law and would not give individual rights or obligations unless implemented by the Parliament.¹⁹³

Section 51(xxix) of the Commonwealth Constitution gives the Commonwealth Parliament the power to make laws for the peace, order and good government of the Commonwealth with respect to 'external affairs'. As discussed above, the Constitutional Conventions of the 1890s provide little debate upon this subject of legislation, concentrating mainly on the fact that the Commonwealth itself did not have the power to make treaties on its own behalf.

While it was clear that the power was intended to be used to implement treaties which are binding on Australia, such as commercial treaties and extradition treaties,¹⁹⁴ it was less evident whether this power was intended to allow Commonwealth legislation to cover subjects that were not otherwise within its legislative powers. It is not surprising, however, that this matter was not directly addressed, because most treaties at the time related to external matters that clearly fell within the Commonwealth's jurisdiction.

In the first forty years of federation, the treaties approved and/or implemented by the Commonwealth Parliament largely fell within the following categories, which were clearly covered by the Commonwealth's jurisdiction:

- Treaties relating to defence, war and peace—for example: *Naval Agreement Act 1903*; *Defence Act 1903*; *Treaty of Peace Act 1919*, *Treaties of Peace (Austria and Bulgaria) Act*

1920, the *Treaties of Peace (Hungary) Act* 1921, the *Treaties of Washington Act* 1922 (which dealt with disarmament and submarine warfare), *Geneva Conventions Act* 1938

- Commercial and financial treaties—for example: *Sanctions Act* 1935 (which applied trade-sanctions to Italy in accordance with a resolution of the League of Nations); *Trade Agreement (Czechoslovakia) Act* 1936; *Trade Agreement (Belgium) Act* 1936; *Trade Agreement (France) Act* 1936; *Trade Agreement (South Africa) Act* 1936; *Trade Agreement (Switzerland) Act* 1938; *Trade Agreement (Brazil) Act* 1939; *Trade Agreement (Newfoundland) Act* 1939; *Trade Agreement (Greece) Act* 1940; *Trade Agreement (Southern Rhodesia) Act* 1941
- Extradition treaties—for example: *Extradition Act* 1903
- Shipping and other international transportation—for example: *Air Navigation Act* 1920 (and subsequent Acts implementing air transportation conventions); *Navigation (Marine Conventions) Act* 1934; *Whaling Act* 1935
- Intellectual Property—for example: *Patents Act* 1903; *Trade Marks Act* 1905; *Copyright Act* 1905, and
- Immigration—for example: *Immigration Restriction Act* 1901; *Pacific Island Labourers Act* 1901.

In many cases the Act would just approve the treaty and allow the Governor-General to make regulations implementing the treaty. Parliament's involvement, therefore, was often quite limited.

Controversy over the application of the external affairs power first arose in a substantive way over the regulations made under the *Air Navigation Act* 1920. While the *Convention for the Regulation of Aerial Navigation*, which the Act implemented, applied to international air transport, the regulations extended to internal air transport. The High Court held in *R v Burgess; Ex parte Henry*¹⁹⁵ that the regulations were invalid because they did not give effect to the Convention and were neither supported by the external affairs power nor another constitutional head of power. It was argued that the external affairs power should be restricted to matters concerning external relations, and not cover domestic matters such as air navigation within Australia. The Chief Justice, Sir John Latham, rejected this approach, noting that there is no clear criterion by which matters can be designated as concerning external relations and by which all other matters can be excluded from such a class. He noted that it is difficult to say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement.¹⁹⁶

Justices Evatt and McTiernan took the broad view that once a treaty was entered into, legislation to give effect to that treaty comes within the external affairs power.¹⁹⁷ Justices Starke and Dixon took a slightly narrower approach, concluding that the subject

of the treaty had to be of 'sufficient international significance'¹⁹⁸ or 'indisputably international in character'¹⁹⁹ to justify the making of the treaty, before the external affairs power could be invoked.

The Air Navigation Act was amended in 1936 so that it only applied domestically to the extent that it was supported by the trade and commerce power and the territories power.

Professor Keith, in commenting on this case, noted the importance of the decision for the future of the federation, and the potential problems for the Commonwealth in using the external affairs power in the way permitted by Evatt and McTiernan JJ:

Firstly, it is probable that treaties may not accord wholly with Australian conditions, so that the treaty power may prove unsuited as a basis of legislation. Secondly, there are serious dangers in the use of a power of this sort to interfere in the conduct of any subject matter by the States. The division of authority over subjects may be inevitable, but there is always difficulty in one authority stepping in partially and imperfectly without having complete responsibility. One of the genuine defects of federal government is the loss of efficiency through the inability of any Government to adopt a coherent plan for the whole of governmental activities, and another is the friction engendered by the duplication of authority.²⁰⁰

After World War II, the creation of the United Nations and the proliferation of international organisations covering a far broader range of subjects, resulted in a vast increase in the volume of new treaties and a change in the nature of those treaties. Prior to World War II, for example, human rights treaties were largely limited to the subjects of industrial labour (through the ILO), the abolition of slavery and the treatment of soldiers and civilians in the course of war, through the *Geneva Conventions*. The horrors of World War II led to the development of a treaty on genocide. The Commonwealth Parliament approved the ratification of the genocide treaty by the *Genocide Convention Act 1949*.²⁰¹ The Universal Declaration of Human Rights, developed by the United Nations, later spawned a number of specific human rights treaties such as the *International Covenant on Civil and Political Rights*; the *International Covenant on Economic Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention on the Rights of the Child*, and other conventions on torture, statelessness and refugees.

During the early 1970s, the Whitlam Government became active both in ratifying human rights and international labour conventions²⁰² on behalf of Australia, and in implementing them by legislation. While its attempt to approve and implement the *International Covenant on Civil and Political Rights* by way of the *Human Rights Bill* failed, it succeeded in passing the *Racial Discrimination Act 1975*, based on the exercise of the external affairs power.

The constitutional validity of the Racial Discrimination Act was challenged by the Queensland Government in *Koowarta v Bjelke-Petersen*.²⁰³ It was argued that the Act was

not supported by the external affairs power because it applied to domestic matters. The High Court upheld the validity of the Act on the grounds that it implemented a treaty to which Australia is a party. Justices Mason, Murphy and Brennan held that the external affairs power may be used to implement a 'bona fide' treaty to which Australia is a party, regardless of whether the subject matter of the treaty concerns the internal affairs of Australia.²⁰⁴ Justice Stephen formed part of the majority, but considered that the subject matter of the treaty must be a matter of 'international concern'.²⁰⁵ The Chief Justice, Sir Harry Gibbs and Justices Aickin and Wilson dissented, arguing that a matter would only be supported by the external affairs power if it involved a relationship with other countries or persons or things outside of Australia.²⁰⁶

Environmental treaties also grew in number and importance after World War II. Previously there had been limited consideration of environmental matters, such as restrictions on the killing of whales (implemented by the Commonwealth Parliament in the *Whaling Act 1935*). Australia ratified the *World Heritage Convention* in 1974 and in 1983 the Commonwealth Parliament enacted the *World Heritage Properties Conservation Act 1983* which was used to stop the construction of a dam on the Franklin River in Tasmania. There was extensive parliamentary debate on the Bill with concern expressed about the expanded use of the external affairs power.²⁰⁷ Members of the Opposition argued that the Bill was 'an attempt by the Government to bypass totally the Australian Constitutional Convention or the referendum process as a means of changing the Australian Constitution'.²⁰⁸ Mr Connolly (Lib, NSW), put the position thus:

The issues which have been raised in this legislation are of profound importance, not just because they are related to questions of world heritage but because we would be placing on the statute books, if endorsed by the High Court, a set of principles which would erode the basis of the structure of continuing Federal–State relationships. The coalition parties do not stand in the way of constitutional change. What we do stand in the way of is a naked grab for power and constitutional change through the back door by the use of this kind of legislation.²⁰⁹

The Act and regulations made under it in relation to Tasmania, were challenged in the High Court in *Commonwealth v Tasmania*.²¹⁰ This time a clear majority of the High Court held that as long as there is a bona fide treaty, the Commonwealth Parliament has the legislative power to implement that treaty, regardless of whether implementation affects internal matters.²¹¹ It was no longer necessary to apply the Stephen J test of whether a matter is the subject of 'international concern'.²¹²

As the subject-matter of treaties continues to widen, section 51(xxix) has proved to be a much more significant power than originally envisaged. There are, however, limitations on the way the power can be exercised. First, the treaty must be entered into bona fide. It would not be sufficient for Australia to enter into a bilateral treaty with a friendly country which has no bearing on relations between them, solely for the purpose of attracting legislative power under section 51(xxix). Secondly, to the extent that legislation relies on the external affairs power, it must be reasonably capable of being considered appropriate

and adapted to implementing the treaty, or part of the treaty.²¹³ Merely legislating about the subject matter of the treaty is insufficient to attract the application of section 51(xxix) if it does not implement part or all of the treaty.²¹⁴ In *Victoria v Commonwealth* the High Court noted that treaties which are 'aspirational' in nature may not be able to support legislation because the 'law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states'.²¹⁵ This may well develop into a significant fetter on the external affairs power, as many treaties are merely aspirational in their terms, or as Professor Keith noted in 1935, the regime they prescribe will not be suited to Australian conditions.²¹⁶

Thirdly, the external affairs power cannot be used to avoid other express or implied constitutional restrictions on the Commonwealth's legislative power.²¹⁷ However, where an express legislative power in the Constitution (e.g. section 51(xxxv)), is stated to be subject to an express limitation (e.g. that the power to legislate concerning conciliation and arbitration only extends to industrial disputes extending beyond the limits of a State) this has not been seen by the Court as sufficient grounds to limit the application of the external affairs power so that it does not thwart the express limitation (e.g. by providing a power to legislate for industrial disputes within a State). Dawson J noted in *Victoria v Commonwealth* that the Commonwealth tried on a number of occasions to amend the Constitution to allow itself more extensive industrial relations powers. These were rejected by the people at referenda. He concluded:

It is ironical, to say the least, that the Commonwealth should seek and, upon the view adopted by the majority in these cases, find in the external affairs power a way to disregard the restrictions imposed upon it by section 51(xxxv) and to legislate in a manner denied to it by the continued refusal of the electors to amend the Constitution.²¹⁸

As noted above, the importance of legislation in the implementation of treaties is that without domestic legislation, the treaty does not give individual rights or obligations. A development in this regard arose in the case of *Minister for Immigration and Ethnic Affairs v Teoh*.²¹⁹ There the High Court held that in the absence of any statutory or executive indications to the contrary, a treaty may give rise to a 'legitimate expectation' by a person affected by an administrative decision, that the decision will be made in conformity with the terms of the treaty. If the decision-maker proposes to depart from the treaty, the person affected must be given notice and the opportunity to put contrary arguments. In response, the Commonwealth Government issued 'executive' statements on 10 May 1995 and 25 February 1997 to the effect that the ratification of treaties by Australia should not give rise to an expectation that the Commonwealth will comply with its treaty obligations.²²⁰ The Commonwealth also introduced the Administrative Decisions (Effect of International Instruments) Bill in 1995, 1997 and 1999 to the same effect, but as at March 2000 the Bill has not been passed by the Parliament.

Impact of the External Affairs Power on the States

The impact of the external affairs power on the States was a significant undercurrent in the Tasmanian Dam case. The legislation in question was enacted by the Commonwealth Parliament with the express aim of preventing a State from damming a river to increase its own hydro-electricity generation. This was a matter that related directly to land and water management, which is one of the primary functions of the States. The Chief Justice, Sir Harry Gibbs, in his dissenting judgment observed:

[T]here is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power. Whether Australia enters into any particular international agreement is entirely a matter for decision by the executive. The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity.²²¹

Treaties have had a significant impact on the States, particularly in relation to environmental matters. Once the Commonwealth uses the external affairs power to enact legislation, section 109 of the Commonwealth Constitution provides that the Commonwealth legislation prevails and any inconsistent State legislation is ineffective. It is hard to make a true assessment of the impact of the external affairs power, however, as it is often used as part of a cocktail of heads of power, including the corporations power, the trade and commerce power and the territories power, to achieve the Commonwealth's aim. It is also often the case that the States voluntarily legislate to implement treaties, and have approved and supported the Commonwealth's ratification of treaties. It should not be assumed that the States always object to the Commonwealth entering into treaties or even to the use of the external affairs power. Sometimes it is sensible that a matter be dealt with nationally.

It should also be remembered that the use of the external affairs power is not the only, or even the most significant, strain on federal relations. As former Attorney-General, Peter Durack QC (Lib, WA), has noted:

It is interesting to contrast the impact of the external affairs power on the operation of the federal structure in Australia with the impact on it of the financial powers of the Commonwealth. Since the uniform taxation scheme in 1942 at least, the Commonwealth has been slowly widening its influence on a whole range of State responsibilities such as health, education, housing and roads by the power of the purse. The combined effect of its taxation power and its power to make grants to the States on any terms it thinks fit (section 96) has totally changed the way our federal system operates. No such claim can yet be made about the external affairs power.²²²

The 'race power' in section 51(xxvi) of the Constitution has also proved to have an immense impact on the States with the *Native Title Act 1993* (Cwlth) now limiting the

power of the States to legislate (or dictating the measures which must be included in State legislation) in all areas of land and water management, from farming to mining to fishing to irrigation to flood management to environmental and planning laws to laws governing the use of National Parks and State Forests.

Tabling of Treaties in the Parliament

In 1961, Prime Minister Menzies announced that although his Government had 'been at pains' to ensure that Parliament had been given the opportunity to discuss any treaty of major significance for Australia before Australia became a party to it, he intended to take further measures to keep the Parliament more informed about treaty matters. He committed the Government to a general rule that it would lay on the tables of both Houses the text of treaties signed for Australia, or to which Australia contemplated accession.²²³ He further promised:

Unless there be particular circumstances which require that urgent attention be given to the matter—for example, at a time when Parliament is not in session—the Government will moreover as a general rule not proceed to ratify or accede to a treaty until it has lain on the table of both Houses for at least twelve sitting days.²²⁴

This general rule was gradually eroded. While in the 1960s and early 1970s treaties were tabled individually or in small groups to comply with this commitment, by the late 1970s treaties began to be tabled in bulk after periods of about six months. For example, on 11 August 1980 there were 46 treaties tabled, including treaties signed or ratified in 1979 and early 1980.²²⁵

This method of bulk tabling was indicative of the fact that many of the treaties had already been ratified by Australia before they were tabled. For example, on 30 November 1994, out of the 11 bilateral treaties tabled, seven had already come into force. On the same date, out of the 25 multilateral treaties tabled, 16 had already been ratified or acceded to, and only nine required further action before coming into effect. Accordingly, in the case of approximately two-thirds of the treaties tabled, Australia was already obliged by international law to comply with them before they were tabled, denying any meaningful Parliamentary scrutiny or input.²²⁶

Little attention, however, was initially paid to the abrogation of the Menzies rule about tabling of treaties. In fact, Odgers' *Australian Senate Practice*²²⁷ still asserted in 1991 that 'the Government lays on the Table of both Houses the texts of treaties signed for Australia, whether they require ratification or not, as well as texts of treaties to which the Government is contemplating accession, and allows, as a general rule, 12 sitting days to elapse before proceedings for ratification or accession are taken'.²²⁸ However, controversy concerning the ratification of particular treaties,²²⁹ the broader subject matter of treaties, and the consequential expansion of the scope of the external affairs power, led to growing

public scrutiny of the treaty making process and recognition that the role played by Parliament was inadequate.

On 21 October 1994, the Minister for Foreign Affairs and Trade, Senator Evans (ALP, Vic), and the Attorney-General, Mr Lavarch (ALP, Qld), announced that the Government would 'take further steps to strengthen the flow of information to Parliament' on treaties. They stated that the Government would supplement the information flow from the twice yearly tabling of treaties, 'by now tabling, wherever possible, all treaties, other than sensitive bilateral ones, before action is taken to adhere to them'.²³⁰

However, in a subsequent Estimates hearing, the then Minister for Foreign Affairs and Trade, Senator Evans, stated that it was the intention of the Government to continue the practice of tabling treaties in twice yearly batches, regardless of whether this practice allows a treaty to be tabled before ratification. Senator Evans also declined to re-commit the Government to the rule of tabling treaties at least 12 sitting days before their ratification, stating, 'I am not proposing to make a commitment that the Government will wait for any specified period of time following the tabling ... [T]abling treaties is not intended to be an exercise in ascertaining Parliament's views about whether or not Australia should become a party'.²³¹

The Australian practice of tabling treaties in batches has been the subject of criticism in the Westminster Parliament. Baroness Chalker of Wallasey, when British Minister for Overseas Development, compared it unfavourably with the 'Ponsonby rule', which requires that treaties be tabled at least 21 sitting days prior to ratification. She stated:

Your lordships would be right and, indeed, would have every reason to complain had we followed such a practice of tabling treaties in bulk. We have not done that. If our Australian friends had used something like the Ponsonby rule on treaties effectively one by one they would not be in the situation in which they now find themselves. We are very different from the Australian Government in this. We are committed to a policy of open government.²³²

Another problem with the practice of tabling large numbers of treaties every six months was that there was very little parliamentary time to give them any detailed scrutiny. In the House of Representatives, no time was allocated to debate treaties in the Chamber.²³³ In the Senate the time allocated to debate treaties was often as little as half an hour for over one hundred treaties.²³⁴

Reform of the Treaty Making Process

There have been a number of proposals to reform the treaty making system in Australia.²³⁵ They indicate a growing concern that the treaty making system does not involve adequate consultation with the public and that the process is not sufficiently accountable. Australians are not alone with these concerns. The growth of both the range and

importance of treaties has led to a reassessment of the treaty making process and the role of treaties in a number of other countries.²³⁶

In Australia, concern has been expressed about the following:

- a perceived loss of sovereignty, especially where international committees can make judgments (or give 'views') on Australian matters
- a democratic deficit, through the lack of parliamentary scrutiny of treaty making
- the absence of accountability and sufficient information for the public to assess the impact of particular treaties, and
- the impact of treaties and the use of the external affairs power on the federation.

Pressure for reform grew quickly in the early 1990s, and the Senate Legal and Constitutional References Committee report on the treaty making process led to significant changes.²³⁷

Tabling of Treaties in the Parliament

The Senate Legal and Constitutional References Committee recommended that the system of tabling treaties be formalised in legislation, and that there be a requirement that all treaties be tabled in both Houses of the Parliament at least 15 sitting days before they are entered into, except in the case of urgent or sensitive treaties. Even urgent and sensitive treaties would still have to be tabled, although this could occur after ratification if this were necessary in the national interest.²³⁸

The Committee also recommended that the Government be required, by legislation, to prepare treaty impact statements on each treaty tabled in Parliament. These would cover the reasons for Australia being a party to the treaty, any advantages and disadvantages of becoming a party, any obligations which would accrue, any economic, social, cultural and environmental effects of the treaty, the costs of compliance with the treaty, and other matters.²³⁹ The intention of this recommendation was not only to ensure that Parliament and the public had sufficient information to assess whether Australia should enter into the treaty, but also to apply the discipline to Commonwealth officials of analysing and reporting on the potential effects of treaties before they are ratified. If Commonwealth officials could not find sufficient evidence to support entering into a treaty, this may change their recommendations to the Government.

The newly elected Howard Government accepted the Committee's recommendation about the tabling of treaties in the Parliament. It also accepted the recommendation that it provide treaty impact statements (which it described as national interest analyses).

However, the Government Response stated that the Government would implement these recommendations by way of administrative procedures rather than by enactment in legislation. The reason the Committee had strongly recommended legislation was that previous commitments to such administrative procedures, in both Australia and the United Kingdom, have gradually been neglected or abandoned without any formal recognition or official policy to change the system. Legislation would prevent this from happening again, as a formal amendment would have to be proposed and justified in order to change the system.

This time, however, it will be more difficult for the Commonwealth to let this reform slip into desuetude, because its implementation is being actively monitored as a consequence of the additional reform of establishing a joint parliamentary committee on treaties.

Parliamentary Committee to Scrutinise Treaties

The absence of scrutiny of treaties by a parliamentary committee was also seen as a failing of the treaties system in the 1980s and early 1990s. While treaties could be referred to existing Senate Standing Committees, attempts to do so had failed for political reasons.²⁴⁰ Senator Brian Harradine (Ind, Tas) proposed the creation of a Senate Standing Committee on Treaties on a number of occasions, but his notice of motion was not debated.²⁴¹

The Senate Legal and Constitutional References Committee recommended that a joint parliamentary committee be established to scrutinise treaties and the treaty making process.²⁴² It considered that such a committee 'could play an invaluable role in keeping the Parliament informed about the implications of treaties and allowing members of the public and other interested groups an opportunity to express their views on treaties'.²⁴³ It recommended that the committee be given the function of inquiring into, and reporting on, any proposals by Australia to enter into a treaty. It also recommended that the committee be able to inquire into, and report on, existing treaties to which Australia is a party, including their method of implementation and how they should be dealt with in the future. It was also intended that the committee monitor the tabling of treaties in the Parliament and scrutinise treaty impact statements.

The Government agreed to establish a Joint Parliamentary Committee to scrutinise treaties. That committee was established on 30 May 1996. Once again, legislation was not used. It was established by way of resolution. The resolution gave the Joint Standing Committee on Treaties the power to inquire into and report upon:

- (a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
- (b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

- (i) either House of the Parliament, or
- (ii) a Minister; and
- (c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.²⁴⁴

From May 1996 to August 1998, the Committee presented 17 reports covering more than 118 treaty actions. Most of its reports scrutinise treaties that have been tabled under the new procedures and have not yet been ratified by Australia. However, it has also considered the effect of existing treaties, such as the *Convention on the Rights of the Child*,²⁴⁵ and the possible consequences of treaties that have not yet been finally drafted, such as the proposed *Multilateral Agreement on Investment*.²⁴⁶

Despite the Committee having a majority of Government members, its reports have frequently been critical of Government actions in relation to treaties. Most criticism has been levelled at inadequate consultation by the lead Commonwealth Department²⁴⁷ and insufficient information being provided to the Committee.²⁴⁸ The Committee has also scrutinised National Interest Analyses (NIA's) and criticised them when they fail to meet the required standards. For example, in the case of the proposed *Double Taxation Agreement with Vietnam*, the Committee noted that while the NIA 'conformed technically to the guidelines for the preparation of such documents ... [i]t did not, however, provide the information which was needed to enable [the Committee] to assess the Agreement'.²⁴⁹

The 'urgency' exception for the tabling of documents at least 15 sitting days before they are ratified, has been rarely used. Where it has been used, however, the Committee has made recommendations to ensure that the same urgent situation does not arise in the future. For example, in relation to the annual subsidiary agreements on long-line tuna fishing with Japan, the Committee has recommended that these be made for a period of at least two years, to avoid the necessity of using the 'urgency' exception.²⁵⁰

In some cases the Committee has recommended that ratification not take place until some other action has been completed, such as the passage of legislation to implement the treaty. An example is the *Comprehensive Nuclear Test-Ban Treaty*, which the Committee recommended be ratified once the *Comprehensive Nuclear Test-Ban Treaty Bill 1998* is enacted.²⁵¹ In the case of the proposed *Investment Protection and Promotion Agreement with Pakistan*, the Committee noted that ratification would undermine the credibility of Australia's protests to Pakistan over its nuclear tests. It therefore recommended that the treaty not be ratified until the Australian Government announces publicly the resumption of Ministerial and senior official contacts with Pakistan.²⁵²

The Committee's report on the proposed *Agreement on Economic and Commercial Cooperation with Kazakhstan* is a good example of the overall approach taken by the Committee. It noted that the NIA and information given to the Committee at the first

public hearing, were 'seriously deficient'.²⁵³ There was insufficient information about the commercial environment in Kazakhstan and the serious problems Telstra had had in Kazakhstan. The Committee also queried why an economic and commercial cooperation agreement was signed with a nation where the two-way trade flow is only \$A2.11 million.²⁵⁴

The Committee was critical of the consultation with the States through the Commonwealth–State Standing Committee on Treaties (SCOT) and reiterated its 'belief that provision of material on a treaty to the States and Territories through the SCOT process is not "consultation" as we define it'.²⁵⁵ The Committee further noted that there was 'no evidence that any organisation or individual, outside Government agencies, with an actual or potential interest in Kazakhstan was contacted about this Agreement'. The Committee concluded that this is quite contrary to the Minister for Foreign Affairs' statement on 2 May 1996 about the role of consultation in the treaty making process, and that it is 'unacceptable to this Committee'.²⁵⁶

The Committee recommended that Australia *not* ratify the proposed Agreement with Kazakhstan at this time and that the proposed Agreement not be reconsidered for ratification unless and until Kazakhstan has demonstrated good faith in its trade and investment relations with Australia, and in particular appropriate compensation for Telstra. Finally, the Committee recommended that before any decision is made to ratify the Agreement, on the above basis, a revised NIA should be tabled in both Houses of the Parliament including the reasons for the new circumstances.

The Committee has also made recommendations to the Government about the future negotiation of treaties. For example, in its report on 'Restrictions on the use of Blinding Laser Weapons and Landmines', the Committee noted weaknesses in the existing Protocols to the *Inhumane Weapons Convention*, and recommended that the Australian Government take every opportunity during periodic reviews to ensure that the weaknesses in Protocol IV are corrected, with a view to ensuring it becomes more effective in preventing the use of blinding laser weapons.²⁵⁷ The Committee went even further, recommending that Australia destroy its stockpile of anti-personnel landmines, except for a small number to be retained for training purposes to ensure that the Australian Defence Force retains its skills.²⁵⁸ In the case of the proposed Multilateral Agreement on Investment, the Committee also extended its recommendations to propose that Treasury be removed as the lead agency in the negotiation of the treaty and be replaced by the Department of the Prime Minister and Cabinet.²⁵⁹ This type of recommendation goes to the heart of the prerogative of Government to arrange its affairs, and shows the confidence of the Committee in its role and power to achieve its recommendations.

Parliamentary Approval of Treaties Bill

In 1994, the Australian Democrats introduced the Parliamentary Approval of Treaties Bill 1994 into the Senate. The Bill was reintroduced in a revised form in 1995, but lapsed due to the calling of the 1996 election. Clause 4 of the Bill provided that 'Action taken by which a treaty would enter into force in respect of Australia must not be taken before the treaty is approved in accordance with this Act'.

The Bill established a mechanism similar to the disallowance of regulations, so that a treaty will be deemed to be approved without the taking of further action, if it has lain on the table in each House of the Parliament for 15 sitting days without a notice of motion having been made which opposes it. If a notice of motion were given, no action could be taken by the executive to bring the treaty into effect until the treaty has been approved by the relevant House of the Parliament. If the treaty was not approved, then the executive would not have the power to enter into the treaty.²⁶⁰

Had it been passed by the Parliament, the effect of this Bill would have been to constrain the power of the executive to enter into treaties, by requiring it first to table the treaty and seek parliamentary approval. The executive could then be prohibited from entering into any treaty of which the Parliament actively disapproved. Approval of a treaty by the Parliament, on the other hand, would not have forced the executive to enter into that treaty. It would still have been within the executive's prerogative to decide whether to enter into a treaty of which the Parliament approved. This is important because of the role of the separation of powers within the Constitution. The legislature, the executive and the judiciary are all given separate roles by the Constitution. While there is some crossover between the legislature and the executive, because governments are formed by members of Parliament, there is still some doubt as to whether the Parliament could take over the role of the executive in entering into treaties.

This Bill, if passed, would not have given the Parliament the power to enter into treaties, but would have enabled it to prohibit the executive from entering into a treaty, because to do so contrary to the will of parliament would be a breach of Australian law. However, Australia could still be bound by a treaty under international law even if it were entered into by the Australian Government in breach of Australian law. Article 46 of the Vienna Convention on the Law of Treaties provides that a country cannot claim that it is not bound by a treaty because its consent to the treaty was made in violation of a provision of its domestic law, unless that violation was manifest and concerned a law of fundamental importance. While a constitutional provision would be considered as being of 'fundamental importance' to a country's domestic law, it is questionable whether a breach of mere legislation would be a sufficient ground for a country to claim that a treaty entered into by its executive was not binding upon it.

The Senate Legal and Constitutional References Committee considered the question of whether the Parliament could legislate to regulate the executive's exercise of the treaty making power, in a manner similar to that submitted by the Australian Democrats' in the

Parliamentary Approval of Treaties Bill 1995. The Committee received evidence from a number of expert witnesses about the constitutional validity of such legislation. While some, such as Sir Maurice Byers, considered that such legislation may be in breach of the constitutional separation of powers because the Parliament would be assuming the exercise of the executive's power, most considered that such legislation would be permissible regulation of the exercise of the royal prerogative by the legislature, and that it could not be considered to amount to the usurpation of the role of the executive.²⁶¹

The Committee did not recommend a system of parliamentary approval of treaties at that stage, preferring to leave this issue for further consideration by the proposed treaties committee. The Committee noted that the need for introducing such a measure would depend upon the extent to which its other recommendations were implemented.

The Department of Foreign Affairs and Trade has recently conducted a review of the treaty reforms to consider, among other things, whether there should be a procedure for the parliamentary approval of treaties. The report, published in August 1999, concludes that the recent reforms are operating well and there is no need for further changes.²⁶²

Conclusion

Of all the subjects contained in the Constitution, the Commonwealth Parliament's relationship with treaty making has probably gone through the greatest change from what was envisioned in 1901 to today. In 1901, Australia was a colony with no power to enter into treaties. Treaties were still imposed upon Australia by Great Britain, often without consultation, and the ability of the Parliament to legislate contrary to a British treaty was in question. Treaties themselves, however, dealt with a limited range of subjects which were truly 'international' in nature. Today, Australia is a sovereign nation which enters into treaties in its own right and which can legislate to implement or breach treaties, if it so chooses. The external affairs power allows the Commonwealth Parliament to legislate to implement treaties on subjects traditionally within the jurisdiction of the States, vastly expanding the scope of Commonwealth legislative power.

The reforms to the treaty process implemented in the 1990s have significantly improved the Commonwealth Parliament's involvement in the treaty making process. The Parliament is now being given time to consider treaties, information upon which it can debate treaties in an informed manner, and the mechanism, of a parliamentary committee, to actively scrutinise the process and ensure that the reforms do not gradually slip away as has previously occurred. The Treaties Committee is very active, willing to criticise government, and willing to make wide ranging recommendations. So far, the Government has respected the recommendations of the Committee and there has been no open defiance or conflict.

The value of these reforms has been recognised internationally. In a recent debate in the House of Lords, Lord Lester of Herne Hill noted that Australia is well ahead of the United Kingdom in the scrutiny of the treaty making process because the 'Australian Senate has a well developed treaty scrutiny committee'.²⁶³

If such significant reforms had not been made in Australia at that stage, the public pressure for more parliamentary involvement in treaty making may well have led to the enactment of legislation requiring parliamentary approval of treaties. At the moment there no longer appears to be necessity for such legislation. If, however, the Commonwealth Government were to become more assertive in relation to treaties, by abusing the 'urgency' exception to tabling treaties before they are ratified, or by ratifying treaties contrary to recommendations of the Treaties Committee and contrary to the wishes of the public, then it is likely that the pressure will build again for the legislative enactment of a veto power for the Commonwealth Parliament against the ratification of treaties.

Endnotes

1. See also: A. Twomey, 'International Law and the Executive' in B. Opeskin and D. Rothwel, eds, *International Law and Australian Federalism*, Melbourne University Press, Melbourne, 1997, from which part of this paper is derived.
2. There is a rule of procedure in the United Kingdom Parliament, known as the 'Ponsonby rule' which requires certain treaties to be tabled in the Parliament before their ratification. On at least one occasion, the United Kingdom Parliament has placed a limitation on the power of the Executive to enter into treaties without the Parliament's approval: European Parliamentary Elections Act 1978, section 6. There was also a recent bill seeking parliamentary approval of treaties, but it was not passed: Treaties (Parliamentary Approval) Bill 1996 (UK).
3. *Wheaton's Elements of International Law*, 5th ed., Steves & Sons Ltd, London, 1916, p. 37.
4. L. Oppenheim, *International Law*, 2nd edn, Longmans, Green & Co., 1912, vol. 1, p. 107.
5. The Colonies which were self-governing and had responsible government were given the description 'Dominions' at the Colonial Conference in 1907, J. G. Starke, 'The Commonwealth in International Affairs', in R. Else-Mitchell ed., *Essays on the Australian Constitution*, 2nd edn, Law Book Co., Sydney, 1961, pp. 343, 347.
6. A. B. Keith, *Responsible Government in the Dominions*, 2nd edn, Clarendon Press, Oxford, 1928, p. 867. However, the Victorian Legislative Assembly had previously proposed that Victoria should be permitted to remain neutral when England is at war and that the Westminster Parliament should not legislate for Victoria except at the request of the colony. This view was rejected in legal advice to the Colonial Office dated 25 April 1870: D. P. O'Connell and A. Riordan, eds, *Opinions on Imperial Constitutional Law*, Law Book Co., Sydney, 1971, p. 5.

7. *First Report of the Royal Commission on Federal Union*, Victorian Parliamentary Papers, 2nd Session, 1870, no. 10, p. 463.
8. M. Lewis, 'The International Status of the British Self-governing Dominions', (1922–23) 3 *British Year Book of International Law* 21, p. 25.
9. A. B. Keith, *Responsible Government in the Dominions*, Clarendon Press, Oxford, 1912, vol. III, p. 1108. See also A. Todd, *Parliamentary Government in the British Colonies*, 2nd edn, Longmans, Green & Co., 1894, pp. 266–7.
10. Treaty of Friendship, Commerce and Navigation between Great Britain and Montenegro (1882) Hertslet, *Commercial Treaties*, vol. XV, p. 240.
11. Treaty of Commerce between Great Britain and Italy (1883) Hertslet, *Commercial Treaties*, vol. XV, p. 776.
12. D. P. O'Connell and James Crawford, 'The Evolution of Australia's International Personality', in K. W. Ryan ed., *International Law in Australia*, 2nd edn, Law Book Co. Ltd, 1984, pp. 6–7; and M. H. M. Kidwai, 'International Personality and the British Dominions: Evolution and Accomplishment' 9(1) *University of Queensland Law Journal* 76, pp. 86–9.
13. See the Postal Convention between the United States and NSW tabled in the NSW Legislative Assembly on 13 March 1874. See also the amendment to this Convention which was tabled in the NSW Legislative Assembly on 13 January 1876.
14. R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, pp. 117–8.
15. The *Anglo-Japanese Treaty* was ratified by Great Britain and Japan on 25 August 1894. See Hertslet, *Commercial Treaties*, vol. XIX, p. 691.
16. Queensland, Legislative Assembly, *Parliamentary Debates*, vol. LXXVII, 1897, 20 July 1897, p. 343.
17. *ibid.*, pp. 343–5.
18. *ibid.*, p. 345.
19. *ibid.*, pp. 345–6.
20. *ibid.*, p. 347.
21. *ibid.*, p. 349.
22. Hertslet, *Commercial Treaties*, vol. XXIV, p. 694; Parry, ed., *The Consolidated Treaty Series*, vol. 184, p. 258.
23. Parry, ed., *The Consolidated Treaty Series*, vol. 184, p. 258. See also: P. Brazil ed., *Opinions of the Attorneys-General of the Commonwealth of Australia*, vol. 1, AGPS, Canberra, 1981, No. 37, p. 47 and Opinions No. 239, 276 and 301 which deal with differences of opinion as to whether the treaty continued to bind Queensland after federation.
24. Clause XXI of the treaty provided that it would not take effect until at least 5 years after its signature and upon 12 months notice from the Japanese Government: Hertslet *Commercial*

- Treaties*, vol. XIX, p. 691. Notification was given by Japan on 17 July 1898: Hertslet, *Commercial Treaties*, vol. XXI, p. 674.
25. New South Wales, Legislative Assembly, *Parliamentary Debates*, vol. XC, 1897, 24 November 1897, p. 5068ff.
 26. Later Sir George Reid. Premier of NSW 1894–99. Prime Minister 1904–05. Member of the British House of Commons 1916–18.
 27. Later Sir William Lyne. Premier of NSW 1899–1901. He almost became Australia's first Prime Minister when Lord Hopetoun, the Governor-General, called upon him to form the first government. He was unable to form a Government. Edmund Barton was then invited to form the first federal government and became Australia's first Prime Minister.
 28. New South Wales, Legislative Assembly, *Parliamentary Debates*, vol. XC, 1897, 24 November 1897, p. 5070.
 29. *ibid.*, p. 5076.
 30. See the debate on the *International Patents and Trademarks Arrangements Bill 1897* (NSW): New South Wales, Legislative Assembly, *Parliamentary Debates*, vol. XC, 1897, 26 October 1897, p. 4175.
 31. Parry, ed., *The Consolidated Treaty Series*, vol. 184, p. 126.
 32. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, pp. 635–6. An Order in Council was used to suspend the operation of the *Extradition Act* in relation to Canada, which had enacted its own extradition legislation.
 33. See for example, Letters Patent to the Governor of NSW, 8 September 1855 which required the Governor, when a bill is presented to him for assent, to reserve it for the monarch's pleasure if it falls within categories including 'any bill, the provisions of which shall appear inconsistent with obligations imposed upon us by treaty': C.M.H. Clark, ed., *Select Documents in Australian History 1851–1900*, Angus & Robertson, 1955, pp. 362–5.
 34. William P. Reeves, *State Experiments in Australia & New Zealand*, Grant Richards, London, 1902, vol. II, p. 342.
 35. The Colonial Laws Validity Act 1865 prevented the colonial parliaments from legislating in a manner that was 'repugnant' to British legislation which applied as of paramount force. Legislation applied as of 'paramount force' if it was expressly applied to Australia, or if it applied by necessary intendment. Laws which applied as of 'paramount force' included laws relating to merchant shipping and offences at sea, laws relating to the taking of evidence in foreign countries, laws prescribing manner and form requirements for the passage of constitutional amendments, and laws providing for appeals to the Privy Council, R. D. Lumb, *The Constitutions of the Australian States*, 5th edn, 1992, University of Queensland Press, p. 98.
 36. Later to become covering clause 5 in the Commonwealth of Australia Constitution Act.
 37. *Official Report of the National Australasian Convention Debates*, Sydney, 1891, Appendix.
 38. Later to become section 51(xxix) in the final version of the Constitution.

39. For discussion of the self-executing nature of covering clause 7, see: B. K. de Garis, 'The Colonial Office and the Commonwealth Constitutional Bill', in A.W. Martin, ed., *Essays in Federation*, Melbourne University Press, 1969, pp. 94, 100–1; P. McDermott, 'External Affairs and Treaties—The Founding Fathers' Perspective' (1990) 16(1) *University of Queensland Law Journal* 123, 125; and C. Saunders, 'Articles of Faith or Lucky Breaks' (1995) 17 *Sydney Law Review* 150, 154.
40. Constitution of the United States of America: Art. III, section 2.
41. For a discussion of an alternative rationale for the jurisdiction of the High Court in relation to treaties conferred by section 75, see: M. Leeming, 'Federal Treaty Jurisdiction' (1999) 10 *Public Law Review* 173.
42. See, for example: J Reynolds, 'A. I. Clark's American Sympathies and his Influence on Australian Federation' (1958) 32 ALJ 62.
43. J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, p. 172.
44. *ibid.*, p. 173.
45. B. K. de Garis, 'The Colonial Office and the Commonwealth Constitutional Bill', in A. W. Martin ed., *Essays in Federation*, Melbourne University Press, 1969, pp. 94, 102.
46. D. P O'Connell and A. Riordan, eds, *Opinions on Imperial Constitutional Law*, Law Book Co. Sydney, 1971, p. 396 (Opinion No. 243, 21 December 1899).
47. New South Wales, Legislative Assembly, *Parliamentary Debates*, vol. LXXXIX, 17 August 1897, p. 3007 per Dr MacLaurin.
48. *ibid.*, p. 3007 per Sir Julian Salomons.
49. *ibid.*, p. 3007, per Mr McCreed and p. 3010 per Dr Cullen.
50. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, p. 239.
51. *ibid.*
52. *ibid.*, p. 240.
53. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, p. 30.
54. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p. 770. Even once the reference to treaties was removed from section 51(xxix), the British Crown Law officers considered that 'external affairs' was not a 'suitable subject for legislation by the Parliament of the Commonwealth': D. P. O'Connell and A. Riordan eds, *Opinions on Imperial Constitutional Law*, Law Book Co. Sydney, 1971, p. 399 (Opinion No. 243, 21 December 1899).
55. P. Brazil, ed., *Opinions of the Attorneys-General of the Commonwealth of Australia*, vol. 1, AGPS, Canberra, 1981, No. 244, p. 293.
56. *ibid.*

57. *ibid.*, pp. 293–4. See further in support of this view, opinion no. 2 by Alfred Deakin in 1902, p. 2; and opinion no. 312 by Littleton Groom in 1908, p. 386 (which, however, also refers to doubt expressed by the Imperial Government about the extent of the operation of section 51(xxix)).
58. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p. 770. For similar contemporary views see W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, 1902, p. 143; and *McKelvey v Meagher* (1906) 4 CLR 265, per Barton J at 286.
59. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p. 770. See further: C. Saunders, 'Articles of Faith or Lucky Breaks' (1995) 17 *Sydney Law Review* 150, 154.
60. At the time of federation, the Northern Territory was part of South Australia.
61. The *Vondel* was a Dutch ship. Representations were made by the Dutch to the British Government criticising the Government of South Australia for refusing to arrest the crew of this ship, as they were obliged to do under a treaty between Holland and Britain concerning the arrest of deserters from merchant vessels. The British Government sought a report from the Commonwealth Government, which in turn sought advice from the South Australian Government. The South Australian Government rejected the suggestion that it must communicate through the Commonwealth, and sought to deal directly with the British Government. Both the Commonwealth and British Governments rejected this approach, and the British Government made it clear that in relation to external matters, it was the Commonwealth which represented the whole of Australia. The States no longer had a role to play in the world of nations. See A. B. Keith, *Responsible Government in the Dominions*, vol. II, Clarendon Press, Oxford, 1912, pp. 796–804 and W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd edn, 1910, reprinted by Legal Books, Sydney, 1997, p. 349.
62. While the Commonwealth was later liberated by the Statute of Westminster from restraints upon it, the States fought for and won exclusion from the application of the Statute. Accordingly, until the enactment of the Australia Acts 1986, the State Governors were appointed upon the advice of the British Government, rather than the State Government.
63. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. III, 7 August 1901, p. 3500.
64. See despatch from the Colonial Secretary in relation to the Sugar Works Guarantee Bill in: G. Greenwood and C. Grimshaw, eds, *Documents on Australian International Affairs 1901–1918*, Nelson, 1977 at pp. 388–9. In addition, the Colonial Secretary sent a secret despatch to the Queensland Governor which explained that 'owing to the position of affairs in the Far East it is above all things undesirable to persist in any policy which may disturb the good relations existing between His Majesty's Government and Japan', *ibid.*, p. 389. The Japanese Government did indeed object to the use of the dictation test, which it described as a means of discriminating against Japanese people, *ibid.*, pp. 390–1.

65. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. III, 7 August 1901, p. 3502. See also: House of Representatives, vol. IV, 6 September 1901, p. 4637 and p. 4647.
66. P. Brazil ed., *Opinions of the Attorneys-General of the Commonwealth of Australia*, op. cit., no. 37, p. 48. This is in contrast to his earlier opinion dated 29 October 1901, where Deakin advised that while the Commonwealth itself had not adhered to the International Telegraphic Convention of St Petersburg, it inherited the adherence of each State which was a 'current obligation of the State in respect to the [post and telegraph] department transferred' to the Commonwealth at federation: *ibid.*, no. 25, p. 36.
67. *ibid.*, no 239, p. 286. Note, however, that in the following month, on 1 May 1906, the Prime Minister wrote to the Governor-General seeking the trade benefits of the Anglo-Japanese treaty for all of Australia. He noted that Queensland goods continue to receive the benefit of reductions in duty. He also noted that the Japanese Government does not seem to be pressing the immigration side to the treaty: G. Greenwood and C. Grimshaw, eds, *Documents on Australian International Affairs 1901–1918*, Nelson, 1977, p. 287.
68. P. Brazil, ed., *Opinions of the Attorneys-General of the Commonwealth of Australia*, op. cit., no. 276, p. 332.
69. D. P. O'Connell and A. Riordan, eds., *Opinions on Imperial Constitutional Law*, op. cit., Opinion No. 89, 2 December 1907, p. 378.
70. *ibid.*, p. 379.
71. *ibid.*, p. 380.
72. G. Greenwood and C. Grimshaw, eds, *Documents on Australian International Affairs 1901–1918*, Nelson, 1977, p. 288, extract from a despatch from the Secretary of State for the Colonies (The Earl of Elgin) to the Governor-General, 17 January 1908.
73. P. Brazil, ed., *Opinions of the Attorneys-General of the Commonwealth of Australia*, op. cit., no. 301, 5 March 1908, p. 371.
74. *ibid.*
75. Hertslet, *Commercial Treaties*, vol. XXVI, p. 730. The Japanese Government denounced the treaty on 30 July 1910.
76. G. Sawyer, *Australian Federal Politics and Law 1901–1929*, Melbourne University Press, 1956, p. 44.
77. D. P. O'Connell ed., *International Law in Australia*, Law Book Co., 1965, p. 15.
78. A. B. Keith, *Responsible Government in the Dominions*, Clarendon Press, Oxford, 1912, vol. III, p. 1111.
79. The 'London Declaration' of 1909 concerned rules as to contraband during war: J. G. Starke, 'The Commonwealth in International Affairs', in R. Else-Mitchell, ed., *Essays on the Australian Constitution*, 2nd edn, Law Book Co., Sydney, 1961, vol. 343, p. 347.
80. Quoted in: A. B. Keith, *Responsible Government in the Dominions*, Clarendon Press, Oxford, 1912, vol. III, p. 1515. The Conference also allowed the Dominions a separate right

- of withdrawal from existing commercial treaties.. See also: R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, p. 129.
81. H. Harvey, *Consultation and Co-Operation in the Commonwealth*, Oxford University Press, 1952, p. 340.
 82. Professor of International Law, University of Cambridge.
 83. L. Oppenheim, *International Law*, 2nd ed., Longmans, Green & Co., 1912, vol. I, p. 110. Oppenheim noted that should the Colonial States ever acquire the right to conclude treaties directly with foreign States without the consent of the mother-country, they would become internationally part-sovereign and thereby obtain a certain international position.
 84. P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929, p. 53.
 85. Resolution IX on the constitution of the Empire adopted at the Imperial War Conference, 16 April 1917, extracted in: G. Greenwood and C. Grimshaw, eds, *Documents on Australian International Affairs 1901–1918*, Nelson, 1977, p. 723.
 86. See for example Garran's contemporary record of Prime Minister Hughes' reaction in: Sir R. Garran, *Prosper the Commonwealth*, Angus and Robertson, Sydney, 1958, p. 250. See also the account given by Prime Minister Hughes: Commonwealth, *Parliamentary Debates*, House of Representatives, vol. 89, 10 September 1919, pp. 12168–9.
 87. Professor Baker has claimed that the admission of the separate Dominion delegations to the Peace Conference was the 'decisive step' in the development of the international status of the Dominions: P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929, p. 56. Sir Robert Garran has also argued that by virtue of this separate representation at the peace conference, the Dominions acquired the international status of independent nations: Sir R. Garran, *Prosper the Commonwealth*, Angus and Robertson, Sydney, 1958, p. 299. See also H. S. Nicholas, *The Australian Constitution*, 2nd ed., Law Book Co., 1952, p. 99.
 88. Sir R. Garran, *Prosper the Commonwealth*, op. cit., p. 299.
 89. M. Lewis, 'The International Status of the British Self-Governing Dominions', (1922–23) 3 *British Year Book of International Law* 21, p. 32; R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, p. 143; and H. V. Evatt, *The Royal Prerogative*, Law Book Co., 1987, p. 151. For a contemporary discussion of the meaning of 'absolute equality of status' see: H. D. Hall, 'The Imperial Crown and the Foreign Relations of the Dominions' (1920) II *Journal of Comparative Legislation* 3d at 196.
 90. The Treaty was signed on behalf of Australia by the Prime Minister, Mr W. Hughes.
 91. For a discussion of the details of the signature and ratification of the Peace Treaties and the Covenant of the League of Nations, and the disputes as to the significance of these acts, see: P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929, pp. 67–81.
 92. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 89, 17 September 1919, p. 12384.

93. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 89, 10 September 1919, pp. 12163–78; 17 September 1919 pp. 12393–440; 18 September 1919 pp. 12532–81; and 19 September 1919, pp. 12585–612; Senate, 17 September 1919, pp. 12330–41; 24 September 1919 pp. 12619–64; 26 September 1919, pp. 12722–12746; and 1 October, pp. 12783–815. See also: *Treaty of Peace Act 1919* (Cwlth).
94. Australia obtained a mandate over New Guinea (as opposed to Papua, which was already British Territory governed by Australia).
95. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 89, 10 September 1919, pp. 12175–6. See also Senator Millen, Senate, 17 September 1919 at pp. 12335–6.
96. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 89, 10 September 1919, pp. 12174–5.
97. This occurred despite objections from countries such as the United States that this would effectively give Britain six votes: R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, p. 150; A. B. Keith, *Responsible Government in the Dominions*, 2nd ed., Clarendon Press, Oxford, 1928, p. 880.
98. A. B. Keith, *Responsible Government in the Dominions*, 2nd edn, Clarendon Press, Oxford, 1928, p. 886.
99. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 89, 10 September 1919, p. 12171 per Prime Minister Hughes (Nationalist, Vic).
100. Commonwealth, Senate, *Parliamentary Debates*, vol. 89, 17 September 1919, p. 12331 per Senator Millen (Nationalist, NSW).
101. T. Baty, 'Sovereign Colonies' [1921] *Canadian Law Times* 677, 684–5.
102. A. B. Keith, *The Dominions as Sovereign States*, McMillan & Co, London, 1938, p. 40.
103. *ibid.*, pp. 40–1.
104. H. Harvey, *Consultation and Co-Operation in the Commonwealth*, Oxford University Press, 1952, p. 280.
105. *ibid.*, p. 283.
106. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 120, 8 February 1929, p. 139.
107. See, for example: Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 106, 3 April 1924, p. 309 re delegation to the 4th Assembly; vol. 111, 14 August 1925, p. 1450 and 11 September 1925, p. 2425 re delegation to the 5th Assembly; Senate, vol. 112, 3 March 1926, p. 1202 and 12 March 1926, p. 1574 re delegation to the 6th Assembly; House of Representatives, vol. 115, 15 March 1927, p. 411 and vol. 118, 26 April 1928, p. 4413 re report of the 7th Assembly; vol. 117, 30 November 1927, p. 2300 and vol. 118, 26 April 1928, p. 4404 re the delegation to the 8th Assembly; vol. 120, 8 February 1929, p. 139 re the delegation to the 9th Assembly.

108. M. Lewis, 'The International Status of the British Self-governing Dominions', (1922–23) 3 *British Year Book of International Law* 21, p. 33. However, see the debate in the House of Representatives in 1927 on whether Australian delegates to the ILO should act consistently with the general policy of the United Kingdom: Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 120 at pp. 139 and 1749 and vol. 121 at 291.
109. R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, p. 156. See also K. H. Bailey, 'Australia and the International Labour Conventions', (1935) 1 *Proceedings of the Australian and New Zealand Society of International Law*, 100, at 103; and Department of External Affairs, *Current Notes*, vol. 1, 1936, pp. 16–18.
110. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 120, 22 March 1929, p. 1751.
111. *ibid.*
112. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 120, 22 March 1929, p. 1753.
113. The Imperial Conference was held intermittently between 1887 and 1937. It was a meeting of the heads of Government of the self-governing colonies, Dominions and the United Kingdom. It initially met during Jubilee or Coronation celebrations but was later formalised and met regularly every 3–4 years. It addressed the reform of relations between members of the Empire and established constitutional conventions. It is now, in part, replaced by Commonwealth Heads of Government Meetings.
114. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 104, 24 July 1923, p. 1478; 25 July 1923, p. 1539.
115. *ibid.*, p. 1481.
116. *ibid.*, p. 1483.
117. See copy of the Conference Resolution in: J. G. Latham, *Australia and the British Commonwealth*, MacMillan and Co. Ltd, London, 1929, pp. 131–3. See also 'Negotiation and Conclusion of Treaties Affecting any Part of the Empire' (1924) 5 *British Year Book of International Law* 193.
118. J. G. Latham, *Australia and the British Commonwealth*, MacMillan and Co. Ltd, London, 1929, Appendix. Arthur James Balfour, 1st Earl Balfour, was British Prime Minister 1902–05 and Foreign Secretary 1916–19. He was Chair of the Committee on Inter-Imperial Relations set up by the Imperial Conference.
119. A. B. Keith, *Responsible Government in the Dominions*, 2nd edn, Clarendon Press, Oxford, 1928, p. 840. For a different view see: P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929, p. 199; and R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, p. 149.
120. Commonwealth, *Report of the Royal Commission on the Constitution*, Canberra, 1929, p. 115. See also J. G. Latham, *Australia and the British Commonwealth*, MacMillan and Co.

- Ltd, London, 1929, pp. 54–5. Australia had, however, entered into international 'agreements' on its own behalf, which were not seen as 'treaties' as they were not between 'heads of state'.
121. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 115, 3 March 1927, p. 62 and 22 March 1927, p. 851.
 122. *ibid.*, 22 March 1927, p. 875 per Mr Brennan. The *Colonial Laws Validity Act* provided that a law of a colony which is repugnant (i.e. contradictory or inconsistent) to a law enacted by the Westminster Parliament which extends to the colony, shall be absolutely void and inoperative. It also provided that a colony could not amend its own constitution except by way of any manner and form prescribed (e.g. a special majority or a referendum).
 123. *Union Steamship Co. v. The Commonwealth* (1925) 36 CLR 130.
 124. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 125, 25 June 1930, p. 3205; Senate, vol. 125, 25 June 1930, p. 3144.
 125. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 126, 1 August 1930, p. 5143. John Latham, later Sir John Latham, was both lawyer and statesman. He was deputy Prime Minister from 1931–34 and Chief Justice of the High Court from 1935–52.
 126. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 126, 1 August 1930, p. 5145.
 127. *ibid.*, p. 5150.
 128. *ibid.*, p. 5145.
 129. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 130, 3 July 1931, p. 3409 per Prime Minister Scullin.
 130. *ibid.*, p. 3415. See the continuation of the debate: vol. 131, 17 July 1931, p. 4061; 28 July 1931, p. 4478; Senate, Vol. 131, 29 July 1931, p. 4500.
 131. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 131, 28 July 1931, p. 4488. The same amendment was moved by Senator Johnston in the Senate and defeated: Senate, vol. 131, 29 July 1931, pp. 4508–4516. In 1933, however, the Western Australian Government (after holding a referendum) petitioned the Westminster Parliament to allow it to secede from Australia. A joint select committee of the Westminster Parliament reported that it was not proper to receive the petition. The Commonwealth Constitution did not provide for secession, and this was a matter upon which the initiative must rest with the Commonwealth. Accordingly, Western Australia remained a part of the federation.
 132. *ibid.*, p. 4490.
 133. *ibid.*, p. 4489.
 134. *ibid.*, p. 4490, per Mr Lyons.
 135. Joseph Lyons was Prime Minister from 1931 until his death in 1939.
 136. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 131, 28 July 1931, p. 4493.

137. Commonwealth, Senate, *Parliamentary Debates*, vol. 131, 29 July 1931, p. 4505.
138. Commonwealth, Senate, *Parliamentary Debates*, vol. 131, 29 July 1931, 4505–6. Menzies, as Attorney-General later expressed similar views in the 2nd reading speech on the Statute of Westminster Adoption Bill, expressing doubt as to the virtue of this bold declaration of equality 'when we know perfectly well that the completely independent conduct of foreign policy by each individual member of the British Commonwealth of Nations would lead to nothing but chaos and disaster': Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 154, 25 August 1937, p. 93.
139. The Australian States were released from the application of the *Colonial Laws Validity Act 1865* by the *Australia Acts 1986*.
140. Justice Owen Dixon, 'The Statute of Westminster 1931', (1936) 10 ALJ (Supp.) 96, 101. See also The Hon. Dame Roma Mitchell, AC, DBE, 'Blackburn Lecture' 26 May 1995, Law Society of the ACT, pp. 14–5.
141. (1936) 10 ALJ (Supp.) 96, per Professor A. L. Campbell at 109.
142. Justice Evatt considered that the Statute merely assimilated legal relationships to existing political relationships: (1936) 10 ALJ (Supp.) 96 at 107. In contrast, Mr Hannan considered at p. 110 that the Statute was 'a very obscure and uncertain piece of legislation', the adoption of which 'will certainly add a new terror to life'.
143. (1936) 10 ALJ (Supp.) 96 at 108.
144. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 153, 23 June 1937, p. 251.
145. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 154, 25 August 1937, p. 83.
146. Commonwealth, Senate, *Parliamentary Debates*, vol. 155, 30 November 1937, p. 8 (in the Governor-General's speech for the opening of Parliament). See also House of Representatives, vol. 155, 11 May 1938, p. 1068; vol. 156, 20 October 1938, p. 998.
147. Commonwealth, Senate, *Parliamentary Debates*, vol. 155, 31 May 1938, p. 1539 per Senator Duncan Hughes; and p. 1532 per Senator Abbot.
148. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 172, 7 October 1942, pp. 1424–78.
149. *ibid.*, p. 1455.
150. *ibid.*, p. 1424.
151. *ibid.*
152. *ibid.*, p. 1436.
153. *ibid.*, p. 1456.
154. *ibid.*, p. 1450.
155. J. G. Starke, 'The Commonwealth in International Affairs', in R. Else-Mitchell, ed., *Essays on the Australian Constitution*, 2nd edn, Law Book Co., Sydney, 1961, p. 348; and

- M. H. M. Kidwai, 'International Personality and the British Dominions: Evolution and Accomplishment' (1975) 9(1) *University of Queensland Law Journal* 76, 95.
156. This was stressed by Sir Wilfred Laurier at the 1907 Imperial Conference. See: P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929, p. 48.
157. (1916) 21 CLR 433.
158. (1916) 21 CLR 433, 452. See also *Welsbach Light Co. of Australasia Ltd v The Commonwealth* (1916) 22 CLR 268, 278; and *Zachariassen v The Commonwealth* (1917) 24 CLR 166, 187.
159. See announcement by Prime Minister Menzies that Great Britain was at war with Germany and 'as a result, Australia is also at war', radio broadcast, 3 September 1939, 9.15pm. This was not only a domestic assumption, but one also made by international jurists. See: L. Oppenheim, *International Law*, 5th edn. (edited by H. Lauterpacht), Longmans, Green & Co., (1935) vol. 1, p. 182, where it is stated that it is impossible for Great Britain to be at war without the whole of the Empire, self-governing or not, being at war too', and that 'only the King can legally make a declaration of war'.
160. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 161, 6 September 1939, p. 36.
161. G. Doeker, *The Treaty making Power in the Commonwealth of Australia*, The Hague, Martinus Nijhoff, 1966, p. 89.
162. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 172, 7 October 1942, p. 1436.
163. H. J. Harvey, *Consultation and Co-Operation in the Commonwealth*, Oxford University Press, 1952, pp. 41–2.
164. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 169, 16 December 1941, p. 1088.
165. 'Declaration of Existence of State of War with Finland, Hungary, Romania and Japan – Documents relating to the procedure of His Majesty's Government in the Commonwealth of Australia', *Parliamentary Papers*, General, vol. II, Session 1940–43, p. 349. See also: G. Doeker, *The Treaty making Power in the Commonwealth of Australia*, The Hague, Martinus Nijhoff, 1966, p. 91.
166. 'Declaration of Existence of State of War with Finland, Hungary, Romania and Japan – Documents relating to the procedure of His Majesty's Government in the Commonwealth of Australia' *Parliamentary Papers*, General, vol. II, Session 1940–3, p. 349, p. 355.
167. Australia, Department of External Affairs, *Annual Report 1936*, p. 8.
168. J. G. Starke, 'The Commonwealth in International Affairs', in R. Else-Mitchell, ed., *Essays on the Australian Constitution*, 2nd edn, Law Book Co., Sydney, 1961, vol. 343, p. 351.
169. L. Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in L. Zines, ed., *Commentaries on the Australian Constitution*, Butterworths, Sydney, 1977, p. 31.

170. L. Oppenheim, *International Law*, 5th edn. (edited by H. Lauterpacht), Longmans, Green & Co., 1935, vol. 1, p. 175.
171. *ibid.*, p. 181.
172. *ibid.*, p. 175.
173. It is easier to establish British recognition of the international personality of Canada because of a number of Privy Council decisions recognising Canada's independent power to enter into treaties.. See, for example: *In re the Regulation and Control of Radio Communication in Canada* [1932] AC 304, 312; and *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 349.
174. J. G. Latham, *Australia and the British Commonwealth*, MacMillan and Co. Ltd, London, 1929, pp. 54–55; and Commonwealth of Australia, *Report of the Royal Commission on the Constitution*, Canberra, 1929, p. 115.
175. J. G. Starke, 'The Commonwealth in International Affairs', in R. Else-Mitchell, ed., *Essays on the Australian Constitution*, 2nd ed., Law Book Co., Sydney, 1961, p. 351. Ireland and Canada had established overseas legations in 1926, and South Africa in 1929.
176. (1999) 163 ALR 648.
177. (1999) 163 ALR 648, per Gleeson CJ, Gummow and Hayne JJ at 662. See also Gaudron J at 692.
178. (1999) 163 ALR 648, per Gleeson CJ, Gummow and Hayne JJ at 665–6.
179. (1999) 163 ALR 648, per Gleeson CJ, Gummow and Hayne JJ at 665 and Gaudron J at 695. For an alternative view on sovereignty and *Sue v Hill* see A. Twomey, *Sue v Hill: The Evolution of Australian Independence* in A. Stone and G. Williams eds, *The High Court in Transition: Essays in Constitutional Law*, Federation Press, 2000 (forthcoming).
180. Professor Zines has concluded that the quasi-colonial status of the States did not affect Australia's position as a sovereign state: L. Zines, *The High Court and the Constitution*, 4th edn, Butterworths, 1997, p. 303.
181. (1999) 163 ALR 648, 730–2. Justices McHugh and Kirby did not need to decide the point.
182. The treaty never came into force, because the United Kingdom failed to ratify it, on the grounds that the United States had failed to ratify its parallel treaty: P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929, p. 57.
183. Quoted in: M. Lewis, 'The International Status of the British Self-governing Dominions', (1922–23) 3 *British Year Book of International Law* 21, p. 37. See also: R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, p. 173.
184. The Locarno Pact was an international agreement guaranteeing the post-1919 borders between France, Belgium and Germany and the demilitarisation of the Rhineland. It was signed by Belgium, France and Germany, and guaranteed by Great Britain and Italy.

185. R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939, p. 174.
186. L. Oppenheim, *International Law*, 5th edn, (Edited by H. Lauterpacht) Longmans, Green & Co., 1935, vol. 1, p. 176.
187. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 89, 10 September 1919, p. 12163 and p. 12612. See also Australian approval of the Treaty of Lausanne: Commonwealth, *Parliamentary Debates*, vol. 106 at pp. 334 and 353.
188. P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929, pp. 177–8.
189. Examples of Commonwealth legislation approving the ratification of treaties include: *Naval Agreement Act 1903*; *Air Navigation Act 1920*: section 3A; *Genocide Convention Act 1949*: section 4; *Security Treaty (Australia, New Zealand and the United States of America) Act 1952*: section 2; *Civil Aviation (Carriers' Liability) Act 1959*: section 8; *Civil Aviation (Damage by Aircraft) Act 1958*: section 7; *Crimes (Protection of Aircraft) Act 1973*: section 6; *Crimes (Protection of Aircraft) Act 1973*: section 6; *International Arbitration Act 1974*: section 4; *Racial Discrimination Act 1975*: section 7; *Psychotropic Substances Act 1976*: section 5; *Crimes (Internationally Protected Persons) Act 1976*: section 8; *Crimes (Biological Weapons) Act 1976*: section 7; *Navigation Amendment Act 1979*: section 105.
190. H. S. Nicholas, *The Australian Constitution*, 2nd edn, Law Book Co., 1952, p. 101. He also listed at p. 107 the following Acts by which the Commonwealth Parliament approved of Australia's entry into certain international organisations: Act No. 40 of 1944; Act No. 42 of 1944; Act No. 32 of 1945; Act No. 23 of 1946; Act No. 5 of 1947; Act No. 6 of 1947; Act No. 24 of 1947; Acts Nos 80–83 of 1947; Act No. 91 of 1947; and Act No. 93 of 1947.
191. Professor of Public Law at Melbourne University. Later Sir Kenneth Bailey and Commonwealth Solicitor-General from 1946.
192. K. H. Bailey, 'Australia and the International Labour Conventions', 1 *Proceedings of the Australian and New Zealand Society of International Law*, 100, at 104.
193. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, per Mason CJ and Deane J, pp. 286–7. Note that a treaty which has not been implemented by the Parliament may still be used for the interpretation of statutes or to develop the common law, or become a source for a 'legitimate expectation' that the executive will act in conformity with the treaty.
194. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, pp. 631–7.
195. (1936) 55 CLR 608.
196. (1936) 55 CLR 608, 640.
197. (1936) 55 CLR 608, 681.
198. (1936) 55 CLR 608, 658 per Starke J.
199. (1936) 55 CLR 608, 669 per Dixon J.

200. A. B. Keith, *The Dominions as Sovereign States*, McMillan & Co, London, 1938, p. 444.
201. Despite enacting legislation approving of the treaty, this did not implement it. See *Kruger v Commonwealth of Australia* (1997) 190 CLR 1.
202. The Whitlam Government ratified the following ILO Conventions: No. 81 (Labour Inspection); No. 83 (Labour Standards (Non-Metropolitan Territories)); No. 86 (Contracts of Employment (Indigenous Workers)); No. 87 (Freedom of Association and Protection of the Right to Organise); No. 98 (Right to Organise and Collective Bargaining); No. 100 (Equal Remuneration); No. 111 (Discrimination (Employment and Occupation)); No. 131 (Minimum Wage Fixing); and No. 137 (Dock Work).
203. (1982) 153 CLR 168.
204. (1982) 153 CLR 168, at 224 per Mason J, at 241 per Murphy J and at 259 per Brennan J.
205. (1982) 153 CLR 168, 218.
206. (1982) 153 CLR 168, at 201 per Gibbs CJ (with whom Aicken J agreed), and at 251 per Wilson J.
207. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 131, pp. 45, 212, 246, 268, 295; Senate, vol. 98, pp. 318, 375, 415, 431, 469 and 552.
208. Commonwealth, House of Representatives, *Parliamentary Debates*, vol. 131, 4 May 1983, p. 210, per Mr Connolly.
209. *ibid.*, p. 211.
210. (1983) 158 CLR 1.
211. (1983) 158 CLR 1, at 125 per Mason J, at 171 per Murphy J, at 219 per Brennan J and at 258 per Deane J.
212. This was confirmed by the High Court in *Victoria v. The Commonwealth* (1996) 187 CLR 416, at 484.
213. See, for example, *Victoria v The Commonwealth* (1996) 187 CLR 416, where the High Court held that certain provisions of the *Industrial Relations Act* concerning termination of employment were invalid because they did not implement the *Termination of Employment Convention* and were not supported by another head of legislative power.
214. Note, however, that the external affairs power also extends to other matters external to Australia, regardless of whether or not there is a treaty. For example, in *Horta v The Commonwealth* (1994) 181 CLR 183, the High Court upheld the validity of the *Petroleum (Australia–Indonesia Zone of Cooperation) Act 1990* because it related to the establishment of a zone of co-operation that was external to Australia. It did not matter, therefore, whether the treaty was valid.
215. (1996) 187 CLR 416, per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 486.
216. See the quotation above. A. B. Keith, *The Dominions as Sovereign States*, McMillan & Co, London, 1938, p. 444.
217. *Horta v. The Commonwealth* (1994) 181 CLR 183, 194–5.

218. (1996) 187 CLR 416, 565.
219. (1995) 183 CLR 273.
220. The effectiveness of such statements has been doubted by the courts: *Department of Immigration and Ethnic Affairs v Ram* (1995) 69 FCR 431, 437; *Tien v Minister for Immigration and Ethnic Affairs* (1998) 159 ALR 405, 427.
221. (1983) 158 CLR 1, at 100.
222. P. Durack, *The External Affairs Power*, Institute of Public Affairs, Perth, 1994, p. 7.
223. This was not a particularly radical plan. As far back as 1935, it was considered standard practice that all treaties entered into in respect of Australia would be brought to the notice of the Commonwealth Parliament by being tabled before both Houses. In some cases, however, the tabling of the treaty could take place after it was signed or ratified, depending on the nature and subject matter of the treaty. See Department of External Affairs, 'List of International Agreements and prefatory note', p. 240.
224. Commonwealth, House of Representatives, *Parliamentary Debates*, 10 May 1961, at 1693. The Opposition Leader, Mr Whitlam, responded at p. 1694 that this is a 'very wholesome' procedure, which will remedy some of the deficiencies of the past, such as the raising of loans overseas without informing the Parliament.
225. For a more detailed discussion of the bulk tabling process, see: A. Twomey, 'Procedure and Practice of Entering and Implementing International Treaties', *Background Paper* no. 27, Department of the Parliamentary Library, 1995.
226. A. Twomey, 'Procedure and Practice of Entering and Implementing International Treaties', *Background Paper* no. 27, Department of the Parliamentary Library, 1995, p. 8.
227. J. R. Odgers, *Australian Senate Practice*, 6th edn, RAIPA, Canberra, 1991.
228. *ibid.*, p. 929.
229. For example, the ratification of the Convention on the Rights of the Child by Australia on 17 December 1990 and Australia's accession to the First Optional Protocol of the *International Covenant on Civil and Political Rights* (the instrument of accession was deposited on 25 September 1991, prior to it being tabled in the Commonwealth Parliament on 26 November 1991).
230. 'Government Slams Opposition Hypocrisy on Treaties', *Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch*, 21 October 1994.
231. Commonwealth, Senate, *Estimates Committee Hansard*, (Department of Foreign Affairs and Trade), 29 November 1994, p. 158.
232. United Kingdom, House of Lords, *Parliamentary Debates*, vol. 569, No. 51, 28 February 1996, pp. 1560–1.
233. Commonwealth, House of Representatives, *Parliamentary Debates*, 23 October 1995, vol. 204, p. 269, per Mr D. Williams QC MP.

234. Commonwealth, Senate, *Parliamentary Debates*, 18 October 1995, vol. 174, p. 2081 per Senator C. Ellison and, p. 2082 per Senator R. Kemp.
235. See, for example: *Proceedings of the Australian Constitutional Convention, Brisbane 29 July – 1 August 1985*, vol. II, Report of the External Affairs Sub-Committee, September 1984, pp. 9–10; Constitutional Commission, *Final Report of the Constitutional Commission*, vol. 2, Australian Government Publishing Services, Canberra, 1988, p. 731; Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, The Senate, Canberra, November 1995.
236. See generally S. Riesenfeld and F. Abbott, eds, *Parliamentary Participation in the Making and Operation of Treaties—A Comparative Study*. See also the second reading debate on the Treaties (Parliamentary Approval) Bill (UK): United Kingdom, House of Lords, *Parliamentary Debates*, vol. 569, No. 51, 28 February 1996, pp. 1530–64.
237. See the Government's response to the Committee's report: Commonwealth, Senate, *Parliamentary Debates*, vol. 177, 2 May 1996, p. 217.
238. Commonwealth, Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, op. cit., recommendation 8, p. 266.
239. *ibid.*, recommendation 10, p. 268.
240. See, for example, the debate upon the referral of the Desertification treaty to a Senate Standing Committee: Commonwealth, Senate, *Parliamentary Debates*, vol. 166, 1 September 1994, p. 757, per Senator Chapman and 22 September 1994, p. 1188, per Senator Coulter.
241. Commonwealth, Senate, *Parliamentary Debates*, vol. 99, 23 August 1983, p. 3. See further Commonwealth, Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, op. cit., p. 254.
242. *ibid.*, recommendation 9, p. 267.
243. *ibid.*, p. 266.
244. Commonwealth, Senate, *Parliamentary Debates*, vol. 178, 29 May 1996, pp. 1324–36; House of Representatives, vol. 207, 30 May 1996, pp. 1903–6.
245. Commonwealth, Joint Standing Committee on Treaties, 'United Nations Convention on the Rights of the Child', 17th report, August 1998.
246. Commonwealth, Joint Standing Committee on Treaties, 'Multilateral Agreement on Investment: Interim Report', 14th report, May 1998; and 'Multilateral Agreement on Investment: Final Report', 18th report, March 1999.
247. See for example, Commonwealth, Joint Standing Committee on Treaties, 'Fifteenth Report', June 1998, para. 2.57 re the Hague Convention on Inter-Country Adoption; para. 3.34 re the proposed denunciation of ILO Convention No. 9; and 'Multilateral Agreement on Investment: Interim Report', 14th report, May 1998, paras 1.21–1.42.
248. Commonwealth, Joint Standing Committee on Treaties, 'Multilateral Agreement on Investment: Interim Report', 14th report, May 1998, paras 1.54–8.

249. Commonwealth, Joint Standing Committee on Treaties, 'Australia's Withdrawal from UNIDO & Treaties Tabled on 11 February 1997', 7th Report, para. 3.49. Cf the Committee's praise for a NIA in 'Eleventh Report', November 1997, para 4.166.
250. Commonwealth, Joint Standing Committee on Treaties, 'Two International Agreements on Tuna', 3rd report, November 1996, paras 2.60–68. See also 'Australia's Withdrawal from UNIDO & Treaties Tabled on 11 February 1997', 7th Report, March 1997, where the Committee noted at para 2.36 that even though the 'urgency' exception was used, consultation with affected parties ought still to have been undertaken before the decision was announced.
251. Commonwealth, Joint Standing Committee on Treaties, 'Fifteenth Report', June 1998, para 4.55.
252. *ibid.*, paras 6.43–4.
253. Commonwealth, Joint Standing Committee on Treaties, 'Eleventh Report', November 1997, para. 2.47.
254. *ibid.*, para. 2.45.
255. *ibid.*, para. 2.50.
256. *ibid.*, paras. 2.52–3.
257. Commonwealth, Joint Standing Committee on Treaties, 'Restrictions on the use of Blinding Laser Weapons and Landmines', Fifth Report, February 1997, para. 2.36.
258. *ibid.*, para 3.137.
259. Commonwealth, Joint Standing Committee on Treaties, 'Multilateral Agreement on Investment: Final Report' Eighteenth Report, March 1999, para 8.47.
260. For further detail on Bill and an analysis of its terms, see Commonwealth, Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, *op. cit.*, pp. 273–99.
261. *ibid.*, pp. 275–8.
262. Department of Foreign Affairs and Trade, *Review of the Treaty making Process*, August 1999.
263. United Kingdom, House of Lords, *Parliamentary Debates vol. 596*, 12 January 1999, column 131.