Conclusive Executive Certificates in Australian Law

W.R. Edeson
Senior Lecturer in Law, Australian National University

There has been a marked tendency, in both the United Kingdom and Australia, to place on a statutory basis the issuing of certificates by an appropriate government department on certain matters relating to foreign relations. Thus, for example, in both countries the determination of diplomatic status, previously subject to conclusive executive certification, by virtue of the common law, is now subject to a statutory regime.[1] In such circumstances the status or evidentiary weight of the certificate will be primarily a matter of statutory interpretation, and few problems should arise in that regard in view of the fact that the statutes in question invariably indicate their intended effect. Where, however, a certificate is issued by an appropriate government department, whether on the initiative of the executive or at the request of a court, in circumstances where the common law treats such certificates or statements as conclusive, special problems arise. These result in part from uncertainty as to the juridical basis and scope of the common law doctrine in this field. The problem is additionally complicated in Australia because the Australian federal system has probably prevented the wholesale importation of the English common law doctrine regarding conclusive executive certification.

In this paper it is proposed to consider the main common law decisions relating to conclusive executive certificates, or statements, further, to consider the juridical basis and scope of the common law rule that accords conclusiveness to the executive in certain circumstances, and finally to consider some specifically Australian problems that might arise as a result of our federal system. It is not proposed to examine in detail those situations which are covered by a statutory regime. Nor is it intended to deal, except incidentally, with the question of conclusive executive certification in relation to matters of maritime delimitation. The former topic, although still awaiting a thorough consideration from a legal point of view, does not raise special problems so far as their conclusiveness (in Australia their non-conclusiveness!) is concerned. The latter topic is however particularly complex both as a matter of common law and as a matter of Australian constitutional law, and clearly merits separate consideration.[2]

1. Diplomatic Privileges Act, 1964 (UK); Diplomatic Privileges and Immunities Act, 1967 (Cth); Internationally Protected Persons Act, 1978 (UK).
2. For a discussion of the position in English Law, see Edeson 'The Prerogative of the

I THE MODERN COMMON LAW BACKGROUND

The historical origins of the modern practice whereby the executive certifies certain facts which the courts in certain circumstances treat as conclusive has been well documented by A.B. Lyons.[3] He has shown that during the eighteenth century the English courts were not concerned to ascertain the view of the Crown on the question whether a litigant was entitled to diplomatic immunity. Such a question was apparently dealt with in accordance with the normal rules of evidence employed by the courts of the time.

In regard to questions of recognition, the basis for the modern rule that the view of the Crown is conclusive can be found in English decisions of the early nineteenth century. The practice of seeking a certificate or statement from the Crown as to whether or not it recognised a particular State arose out of several decisions concerning the new entities which were established by revolution in Latin America.

The prevailing judicial attitude of the time was that, until a State was recognised, that State could not claim immunity from action in the local courts and that the courts could not judicially acknowledge its existence. Curiously, the motivation for this approach appears to have been largely political, and was inspired by Lord Eldon who was both a politician and a Chancery judge. His object was to discredit the new States of Latin America by not giving effect to their actions in English courts. This caused litigants to seek the view of the Crown on matters of recognition. The modern practice of seeking a statement had become well established by 1830.[4]

While it became the established practice to seek the view of the Crown, the juridical nature of the certificates or statements of the Crown issued for the purposes of litigation remained unclear. Between 1830 and 1924, there was clearly an uncertainty in the courts as to whether the certificate should be treated as conclusive.[5] In 1924, however, the House of Lords handed down judgment in *Duff Development Co v Kelantan*.[6] This decision established beyond doubt that when a certificate or statement by the Crown was submitted on a matter of recognition the view of the Crown as revealed by the certificate was conclusive. Their Lordships also discussed at length the reasons for so treating an executive certificate. Although they were unanimous in deciding that the certificate submitted was to be treated as conclusive, they were less unanimous in their reasons for this being so. Because the decision provides the basis for much of the

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Crown to Delimit Britain's Maritime Boundary' (1973) 89 LQR 364.

3. 'The Conclusiveness of the Foreign Office Certificate' (1946) BYBIL 240.
4. See generally, Lyons, op cit, pp 245-253.
5. See for example *The Charkieh* (1873) LR 8 QB 197; *McCartney v Garbutt* (1890) 24 QBD 368; *The Parlement Belge* (1879) 4 P D 129; *Mighell v Sultan of Johore* [1894] 1 QB 149; *Statham v Statham and the Gaekwar of Baroda* [1912] P 92; *In re Suarez* [1918] 1 Ch 176; *The Gagara* [1919] P 95; *The Annette* [1919] P 105; *Luther v Sagor* [1921] 1 KB 456 and [1921] 3 KB 532. For a discussion of these and other cases during this period, see Lyons, op cit pp 253-265.
6. [1924] AC 797.

subsequent case law, and because it is clearly an important landmark in the development of this area of the law, it is appropriate to consider it in some detail.

The presently relevant facts of the case are as follows: Kelantan was a state in Malaya. Its government had entered into an agreement with the plaintiffs, which provided *inter alia* that the parties would submit to arbitration in the event of disagreement. It having become necessary to submit certain matters to arbitration, it was determined by the arbitrator that the Kelantan government should pay the costs incurred. The company then attempted to enforce the award before the English courts. The Court requested and received an official letter from the Secretary of State for the Colonies, which stated that Kelantan was an independent state, its Sultan was the sovereign ruler there, and that the King did not claim or exercise any rights of sovereignty over Kelantan.

This view of the status of Kelantan and its sovereign should be seen in the light of the fact that there existed an agreement between Kelantan and Great Britain, one part of which allowed the Crown to appoint a resident to direct the Sultan in managing the affairs of his country, excepting matters of religion and custom. This clause is significant because it might suggest that the Sultan was not fully sovereign in international law; further, Lord Carson also questioned whether Kelantan could be regarded as genuinely independent in the light of these provisions in the agreement.[7] Nonetheless all of their Lordships thought that the view of the Secretary of State for Colonies should be regarded as conclusive as to the sovereign status of the Sultan. Their Lordships differed, however, on the reasons that they gave for this.

Viscount Cave stated that it was the practice of the Courts 'to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State, and when information is so obtained, the Court does not permit it to be questioned by the parties'.[8] Viscount Finlay thought that the information in the certificate 'is not in the nature of evidence; it is a statement by the Sovereign . . . upon a matter which is peculiarly within his cognizance'.[9] Further, he thought that the 'answer of the King through the appropriate department settles the matter whether it depends on fact or law'.[10] Significantly, therefore, he refused to interpret the statement made by the Secretary of State for the Colonies in the light of the agreement which seemingly contradicted it. Thus, although not put in quite this way, Viscount Cave regarded that statement as an act of the prerogative equivalent to that of negotiating or signing a treaty.

Lord Dunedin traced the immunity of a sovereign in the local courts to 'comity'. From this, he thought, it followed that the sovereign must have

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7. At 830.
8. At 805-806.
9. At 813.
10. At 815.

the power and right of recognition. This, he said, warranted treating the statement made by the executive as conclusive.[11]

Lord Sumner argued:[12]

> 'The status of foreign communities and the identity of the high personages who are the chiefs of foreign states, are matters of which the Courts of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge or, if necessary, obtain the requisite information for themselves. I take it that in so doing the Courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence and, if the question is whether some new State or some older State, whose sovereignty is not notorious, is a sovereign State or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English Court of Law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed.'

Finally, Lord Carson, whom it will be recalled had questioned whether Kelantan was in fact independent having regard to the terms of the agreement with Great Britain, considered that the Courts are 'bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown'.[13]

It can be seen that a wide range of reasons was put forward to justify the conclusion that the executive statement was to be treated as conclusive. In the circumstances of the case, this did not matter, for it was generally assumed at the time of the case that the view of the Crown was vital on matters of recognition of foreign states and governments. The diversity of reasons offered becomes significant when it is attempted to ascertain what other matters may be the subject of conclusive executive certification, and this question will be returned to later.

Four years after *Duff*, the House of Lords had to consider whether a statement by the Foreign Office that a person had diplomatic status was conclusive. The case was *Engelke v Musmann*.[14] The Court of Appeal, by a majority, had decided that the statement was not binding and that the diplomat's status would have to be ascertained in the normal way, including cross-examination of the person claiming that status. The

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11. At 820.
12. At 823-824.
13. At 830.
14. [1928] AC 433.

House of Lords re-affirmed its view in *Duff*, namely that the executive statement should be regarded as conclusive as to the facts stated in it. As in *Duff*, the judgments of their Lordships revealed a wide range of views as to why the statement should be treated as conclusive, though there was increasing support for the view that this characteristic was related to the fact that the subject matter of the statement came within the prerogative power of the Crown. The best statement of this view is to be found in Lord Phillimore's judgment. He said:[15]

> 'When therefore the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the Secretary of State on behalf of His Majesty had done, not what he was doing ad hoc, or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the executive to interfere with the judiciary of the country. The status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law.'

These two decisions of the House of Lords unquestionably provide the basis for much of the subsequent case law relating to conclusive executive statements both in England and Australia. Important as they are, they do not unequivocally establish a firm juridical basis for treating executive certificates as conclusive in certain circumstances; further, they do not rule out the possibity of the courts using alternative sources of evidence where a statement has not been made when it might have been appropriate. Lord Atkin, however, was later to assert in the *Arantzazu Mendi*[16] that obtaining an executive certificate was the *only* correct procedure to adopt for determining whether a party impleaded is a foreign sovereign state. The difficulty with such an approach is that it assumes that the executive is always prepared to express its view, or, when it does, that it will provide a complete or unambiguous answer to the question put to it.

The Victorian Supreme Court had to deal with a problem of this kind in *Anglo Czech and Prague Bank v Janssen.*[17] The Court had requested a certificate from the Department of External Affairs whether His Majesty's government for the Commonwealth of Australia recognised the German government as the government which exercised *de facto* administrative control over the whole or any part of Czechoslovakia at any time since 1939. The Department replied, but the reply was inconclusive, and said in part: 'As Australia has never entered into reciprocal diplomatic relations with the Czechoslovak Republic, its recognition of subsequent changes in Czechoslovakia is not capable of precise definition. In

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15. At 451.
16. [1939] AC 256 at 264.
17. [1943]VLR 185. For another Australian decision raising this kind of problem, see *Van Heyningen v Netherlands Indies Government* [1948] QWN 19, dealt with in this Yearbook, Vol 6, p 41. Note also *Chang v Registrar of Titles* (1976) 50 ALJR 404.

so far as consular recognition is any guide, the Commonwealth Government continued to recognise the Czechoslovak consul in Sydney, and did not regard the German Consul-General in Australia as in any way responsible for Czechoslovak interests.'[18]

The judge at first instance (O'Bryan J) regarded the executive statement as 'conclusive', and as a 'clear announcement that His Majesty's Government in the Commonwealth of Australia has not, either of its own motion, or functioning through His Majesty's Government of Great Britain, recognised the German government as having been, since March 1939, in effective administrative control of any part of the territory of Czechoslovakia.'[19]

When the case went to the Full Court (Mann CJ, Lowe and Martin JJ), the Court accepted than an executive certificate was the 'best' method of resolving doubts as to recognition where a civil war was in progress or where territory had been invaded. The Court however continued: 'But where no difficulties of this kind occur, *de facto* occupation in the required sense may be proved by other evidence or the fact may be notorious as a matter of common public knowledge.'[20]

Lord Atkin's statement in the *Arantzazu Mendi* that the *only* correct procedure is to seek the view of the Crown would be impractical to apply, and it must therefore be taken as stating the law too widely on this point.

In the same case, Lord Atkin expressed the view that executive certificates should be treated as conclusive on questions of recognition because 'our State cannot speak with two voices on such a matter.'[21] Whether or not this is an adequate juridical basis for treating an executive certificate as conclusive will be returned to later.

Since the second world war there have been several decisions in which executive certificates have been in issue. With the exception of *R v Bottrill; ex parte Kuechenmeister*,[22] it is possible to detect a marginal shift in judicial thinking away from regarding an executive certificate as conclusive. At any rate, the courts were presented with situations in which executive statements were sought, or might have been sought, and limits on the use of or the effect of executive certificates can be found. In

18. [1943] VLR at 188.
19. At 192.
20. At 197. And see *Sovracht (V/O) v Van Udens Scheepvart en Agentuur Maatschappij* [1943] AC 203 at 229 per Lord Wright: 'It might have been better if an application had been made for information to the Foreign Office, but the case proceeded up to this House on the footing of what was a matter of common notoriety. It was accepted that metropolitan Holland had been occupied by and was under the dominion of the Germans.' Note also *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318 at 340.
21. [1939] AC at 264.
22. [1947] KB 41. In this case, a Foreign Office certificate stated that in 1946 war with Germany was still continuing (peace not being declared until 1951). The Court of Appeal considered that the certificate was conclusive on this point, even though the argument was put that Germany had ceased to exist as a national entity by 1946. Two of the judges (Tucker LJ at 53, and Asquith LJ at 55) considered that a certificate would be for the purposes of municipal law conclusive both as to questions of fact and of law.

Bank voor Handel en Scheepvart NV v Slatford[23] the plaintiffs argued, *inter alia*, that the British Government had acquiesced in certain decrees of the Netherlands government. Devlin J, whose decision was overruled by the Court of Appeal for reasons not relevant to the present discussion, stated:[24]

> 'If the approval and acquiescence of the British Government is relevant, I do not think that it is a matter to be inferred from their conduct. The only way for the court to ascertain such a matter, when it is relevant, is by making inquiry of the appropriate Minister. There is no precedent for that course in a case of this sort, and neither side has invited me to take it; I think that it would be wrong and unnecessary.'

Again, in *Luigi Monta of Genoa v Cechofracht*,[25] a vessel flying the Italian flag was seized on the high seas and escorted to Formosa. The vessel at the time operated under a charterparty governed by English law, a clause of which provided that the vessel could comply with directions of the government of the flag state, or directions given 'by any other government'. The parties to the dispute obtained a statement from the Foreign Office that Her Majesty's government did not recognise the Formosa government. Sellers J took the view that the statement was not conclusive in this situation, nor was it the only evidence that the court could have regard to. The case turned on the interpretation of the charterparty, and the phrase 'any other government' was held not to refer only to those governments recognised by Her Majesty's government.

Probably the best known case in the post war period on executive certificates is the House of Lords decision in *Carl Zeiss Stiftung v Rayner and Keeler (No 2)*.[26] The Foreign Secretary had certified that it did not recognise *de jure* or *de facto* the East German government, and that it recognised the USSR as *de jure* entitled to exercise governing authority in respect of East Germany. The House of Lords nonetheless held that the acts of the East German government should be given effect to as acts of a subordinate body set up by the *de jure* authority, namely the USSR. All of their Lordships regarded statements of the Foreign Office as conclusive on matters of recognition, though the question why such statements should be considered conclusive was not discussed at any great length.[27]

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23. [1953] 1QB 248.
24. At 266.
25. [1956] 2 QB 552. See also *Kawasaki KKK of Kobe v Bantham Steamship Co* [1939] 2 KB 544, which is a decision on similar lines.
26. [1967] 1 AC 853.
27. Lord Reid (at 901): 'It is a firmly established principle that the question whether a foreign state ruler or government is or is not sovereign is one on which our courts accept as conclusive information provided by Her Majesty's government: no evidence is admissible to contradict that information.' He referred to the views of Lords Cave and Finlay in *Duff Development Co v Kelantan*. Lord Wilberforce (at 961): 'The principle is well established that the courts of Her Majesty do not speak with a different voice from that of Her Majesty's executive government.' Note also *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v Boguslawski* [1953] AC 11, where a certificate relating to recognition of the new Polish government as from a particular

What is significant is that the House of Lords was willing to draw its own conclusions of law from the facts as stated in the certificate.

Before turning to consider the most recent cases on executive certificates, brief reference should also be made to *Adams v Adams*,[28] for another limitation on the conclusive nature of an executive certificate is indicated. In this case, which concerned the validity of a Rhodesian divorce decree, a certificate was submitted by the Secretary of State for Foreign and Commonwealth Affairs regarding the status of (Southern) Rhodesia. In reference to this certificate, Sir Jocelyn Simon P said:[29]

> 'A certificate from Her Majesty's Secretary of State has not the same significance where the courts are concerned with questions of usurpation of sovereignty as it has where the courts are concerned with relations with foreign states. . . . But it is helpful in obviating the need for the court to embark on the generally impracticable task of determining on extrinsic evidence how far a regime is in effective control of any given territory . . . and in indicating how far Her Majesty's Government are still seeking to regain control of affairs in Rhodesia by ousting the usurping power.'

Equally relevant to this view of Sir Jocelyn Simon would be the fact that the situation before the Court was governed by the provisions of the Southern Rhodesia Act, 1965 (UK); the provisions of the executive certificate could not, of course, prevail over any clear statutory intent. In the cases which have been discussed so far, the question of recognition had arisen independently of any relevant statutory provisions.

Three recent decisions

It is proposed now to consider three decisions which provide the latest indications on judicial attitudes towards conclusive executive certificates. Each is important though for quite different reasons. The first, *Corporate Affairs Commission v Bradley*,[30] concerned the 'Rhodesian Information Centre' in Sydney which the Federal Labour Government at the time was anxious to have closed down. Leaving aside for the moment the effect of the certificate submitted by the Commonwealth Government on the status of Rhodesia, the case centred around the question whether the phrase 'Rhodesian Information Centre' contravened a direction made pursuant to the Business Names Act, 1962 (NSW), namely, that the Registrar for Companies should not accept for registration names which suggested 'connection with the government of . . . any other part of the Queen's dominions, possessions or territories' or names 'suggesting connection with the government of a foreign country.' Objection to the title on this

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date was issued by the Foreign Office. The certificate also stated that 'the retroactive effect of recognition . . . is a question of law for decision by the courts.' While treating the certificate as conclusive as to the facts stated in it regarding recognition, Lord Reid added (at 43): 'I need not consider whether our courts are always bound to accept every statement in a Foreign Office certificate no matter what it may be.'

28. [1971] P 188.
29. At 205-206.
30. [1974] 1 NSWLR 391.

ground was originally made in 1967 by the Registrar, but was withdrawn when a letter from the Rhodesian Minister of Information, Immigration and Tourism was produced authorising the use of that name.

In 1973, the Corporate Affairs Commission, successor in title to the Registrar of Companies, sought a declaration that the name was in conflict with the direction in the Business Names Act. The Commonwealth Government, which had been given leave to intervene in the proceedings, submitted a certificate signed by the Prime Minister and the Minister for Foreign Affairs which stated:

> 'I, EDWARD GOUGH WHITLAM, Prime Minister and Minister of State for Foreign Affairs HEREBY CERTIFY that the Executive Government of Australia—
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> 1. recognises that Southern Rhodesia has since 1923 been and continues to be a colony within Her Majesty's dominions;
> 2. recognises that the Government and Parliament of the United Kingdom have responsibility for and jurisdiction over Southern Rhodesia as and to the extent provided under Section 1 of the Southern Rhodesia Act 1965 of the United Kingdom;
> 3. does not recognise and has not at any time recognised Southern Rhodesia (or Rhodesia) as a State either de facto or de jure;
> 4. does not recognise and has not at any time since 11th November 1965 recognised any persons purporting to be Officer Administering the Government, President or Ministers of Rhodesia (or Southern Rhodesia) as constituting a Government in Southern Rhodesia either de facto or de jure.'

The defendant had argued, *inter alia*, that the direction made under the Business Names Act 1962 could not apply to a non-existent government.

The New South Wales Court of Appeal took the view that the certificate was 'the conclusive source of information available to the court as to the position of Rhodesia' and that the Court 'cannot pay any attention to the actual state of effective political power as between the United Kingdom Government and the Smith regime on the soil of Rhodesia, only to what is disclosed by the certificate. This says there is a government in Rhodesia and what that government is. As there is a government in Rhodesia the argument that the direction cannot apply to a nonexistent government falls to the ground.'[31] In other words, the Government was that of the United Kingdom.

It is of course arguable that the information in the certificate was unnecesary to the outcome of the case, because all the Court had to do was to construe the terms of the statute, and the direction in question, to ascertain whether the name 'Rhodesian Information Centre' contravened the statutory texts, or, alternatively, to ascertain whether the statutory text embraced both recognised and unrecognised governments, the mischief of the statutory text perhaps being to prevent commercial enterprises from misleading the public that they had government backing. This is not to say that the Court's decision in the outcome is wrong, merely

31. At 407.

that the facts referred to in the certificate may not have become central to the issue if the statutory text was interpreted at the outset. It is perhaps significant that the Court did not seek the information, rather that it was presented to it by the Commonwealth.

The use of an executive certificate when a statutory text bears upon the matter has been dealt with in other cases, and the general view seems to be that the statutory text should prevail.[32] An illustration of this point is to be found in the second of the three recent decisions to be discussed here. This is the English Court of Appeal's decision in *Re James*.[33] The question arose whether the Rhodesian High Court was a 'British' court for the purpose of the Bankruptcy Act, 1914 (UK). If it were, it would have been possible for the Rhodesian Court to address a request to the Registrar in Bankruptcy at the High Court in London for assistance in recovering some assets of a person declared insolvent by the Rhodesian Court. Certain of his assets were believed to be in the United Kingdom. When the case came to the Court of Appeal, the Court requested, and received, a certificate from the Secretary of State for Foreign and Commonwealth Affairs. This certificate stated *inter alia* that Southern Rhodesia was still a colony within Her Majesty's Dominions.[34]

The majority of the court (Scarman and Geoffrey Lane LJJ) took the view that the Rhodesian High Court, although a court, was not a British court within the meaning of section 122 of the Bankruptcy Act, 1914. The term could not embrace a court the judges of which exercised authority

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32. See *Re Al Fin Corp's Patent* [1970] Ch 160 where it was held that the phrase in s 124 of the Patents Act, 1949 (UK) 'any foreign state', was not limited to those states recognised by the UK government. A certificate had been issued in this case but it was inconclusive. Note also the analogous situation where construction of a commercial agreement is involved: above fn 25, and text. See also the House of Lords decision in *Schtraks v Government of Israel* [1962] 3 All ER 529. The question arose, *inter alia*, whether the Israeli Government could seek extradition in respect of an offence committed in that part of Jerusalem over which the UK government had recognised only *de facto* Israeli jurisdiction. Lord Reid said (at 532): 'I find nothing in the Extradition Acts or in [the Extradition Order, 1960] to indicate that territory is used in any sense which would exclude from the territory of Israel that part of Jerusalem in regard to which the British Government recognises the *de facto* authority of the government of Israel on the ground that that government is not recognised as sovereign there.' It may be asked whether the decision would have been the same if there had been no recognition granted at all.

33. [1977] Ch 41.

34. The full certificate read: '(a) Southern Rhodesia has since 1923 been, and continued to be, a colony within Her Majesty's Dominions, and the Government and Parliament of the United Kingdom have responsibility for and jurisdiction over it as and to the extent provided in section 1 of the Southern Rhodesia Act 1965. (b) Her Majesty's Government in the United Kingdom do not recognise, and have not at any time recognised, Southern Rhodesia (or Rhodesia) as a State either de facto or de jure. (c) Her Majesty's Government in the United Kingdom do not recognise, and have not at any time since November 11, 1965, recognised any persons purporting to be Officers Administering the Government, President or Ministers of Southern Rhodesia (or Rhodesia) as constituting a Government in Southern Rhodesia either de facto or de jure. June 30, 1976.'

pursuant to a constitutional document which defied the authority of the Queen in Parliament. With regard to the certificate, Scarman LJ said:[35]

> 'Of course, neither the Secretary of State's certificate, nor the Attorney-General's submissions, can compel the court to an interpretation of statutory words which it believes to be false: and it remains the duty of the court to construe the statute. But in a matter as political as the status of territories overseas our courts have always attached importance to information obtained from a Secretary of State or the Attorney-General: see for example, *Duff Development Co Ltd v Kelantan Government*. Such information is helpful and relevant in a case such as the present.'

The view that a certificate is not binding when a question of construction of a statute is involved is consistent with earlier decisions on this point, and it reflects the basic notion of parliamentary supremacy in the common law system. However, it is not entirely clear whether Scarman LJ was watering down the conclusiveness of executive certificates when he described them as having 'importance'. His reference to *Duff's* case, where the certificate was held to be conclusive, would suggest that he was not attempting to water down their effect in situations apart from statute. His statement that the information in a certificate 'is helpful and relevant' in a statutory context is important, for it would clearly be wrong to treat the statutory text and executive information as being always mutually exclusive. Exactly how far the information contained in a certificate should impinge upon the interpretation of the statutory text will, of course, depend on the terms of the statute, and its subject matter.

Of the remaining two judges in *James*, neither commented on the certificate as such. Geoffrey Lane LJ agreed with Scarman LJ that the Rhodesian court could not be 'British' for the purpose of the Bankruptcy Act; thus he implicitly did not find it to be conclusive in effect. Lord Denning MR dissented. He found that Rhodesia had remained in law a British colony, and, in consequence, the Rhodesian High Court was 'British' for the purpose of the Bankruptcy Act, 1914. He did not comment on the effect of the certificate, though its contents were consistent with the conclusion that he reached.

The final decision to be considered in this part is *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd.*[36] Here, an executive certificate was submitted which set out the views of the U.K. government regarding recognition of the 'Turkish Federated State of Cyprus'.

The factual background to the case was: in 1974 a large part of the island of Cyprus came under Turkish control as result of an invasion by Turkish forces. The plaintiffs were forced to abandon certain hotels in areas which came under Turkish control. Since that time, the hotels had been occupied by Turkish Cypriots; further, the 'Turkish Federated State of Cyprus' had advertised in England that holidays could be had at those hotels, and bookings had been accepted by the defendant travel company

35. [1977] Ch at 71-2.
36. [1978] QB 205 (Court of Appeal); [1978] 3 WLR 378 (House of Lords).

in London. A writ was issued against the company and one Mr Muftizade who claimed to be the London representative of the Turkish Federated State of Cyprus. The plaintiffs claimed damages and an injunction to restrain the defendants from conspiring to encourage people to commit trespass to the hotels, by circulating brochures and inviting tourists to book at the hotels. This claim was struck out by the Court of Appeal on the basis of the *Moçambique* rule,[37] namely that the action was in substance an action for relief against trespass to immovables situated outside England. This part of the decision has been upheld by the House of Lords though the plaintiffs were allowed to proceed in an action alleging trespass to chattels, consisting of the contents of the hotels.

The case, both in the Court of Appeal and in the House of Lords, centred predominantly upon the correctness of the *Moçambique* rule with which this paper is not concerned. As to the certificate, it had been requested by the judge at first instance (May J). It stated:[38]

> 'Her Majesty's Government in the United Kingdom do not recognise the administration established under the name of the "Turkish Federated State of Cyprus" . . . Her Majesty's Government do not recognise such administration as being the government of an independent de facto sovereign state. Her Majesty's Government do not recognise or accord to Mr Omer Faik Muftizade the "London representative of the Turkish Federated State of Cyprus" any privilege or immunity under the Diplomatic Immunities Act 1964.'

So far as the certificate dealt with Mr Muftizade's diplomatic status, it can be quickly dealt with. The Diplomatic Privileges Act, 1964 (UK), s 4, states that a certificate regarding a diplomat's status shall be 'conclusive evidence' of that fact, and hardly surprisingly, the question of diplomatic status was not raised after the certificate was submitted.

Roskill and Scarman LJJ appear to have accepted that the certificate was also conclusive on the question of recognition, though, as they found that the plaintiff's action failed by virtue of the *Moçambique* rule, it did not become necessary for either of them to consider this part of the certificate, or its effect, in detail.[39] Furthermore, there is no indication in this case that Scarman LJ was intending to break new ground in his comments in *Re James* that the certificate was not to be conclusive in its effect.

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37. *British South Africa Co v Companhia de Moçambique* [1893] AC 602.
38. [1978] QB at 216.
39. Roskill LJ at 223: 'Since no recognition is accorded to [the Turkish Federated State of Cyprus] . . . as the de jure goverment of any part of Cyprus or as the government of an independent de facto sovereign state . . . it follows that the second defendant is sued as a private individual. . . . '. Scarman L J at 229: '[The Turkish Federated State] is not recognised by the United Kingdom as an independent sovereign state'. Note also his comment at 232: 'An English court may sometimes have to make an order which to some would appear to be an unwarrantable intrusion by a municipal court into the world of international relations between foreign states: but if an English court is asked to intrude its order into this world, it should be very slow in such a case to grant interlocutory relief by way of injunction, bearing in mind the limitations of evidence and argument necessarily imposed by law on interlocutory proceedings.'

Lord Denning MR dismissed the action on the basis that the action was not justiciable in the English courts. He also thought that the *Moçambique* rule should be limited to cases where 'there is a genuine issue as to title'.[40]

Lord Denning also considered the certificate, though he seems to have accepted its contents (whether or not conclusively in regard to recognition he did not say) and directed his discussion to the consequences which might follow from non-recognition. He referred to those authorities which established that the courts would not give effect to acts or laws of an unrecognised state;[41] and then referred to those establishing the view that in certain circumstances, the internal laws of an unrecognised state could be given effect to in English courts.[42]

He concluded:[43]

> 'If it were necessary to make a choice between these conflicting doctrines, I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth: and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.'

On the role of an executive certificate in this situation, he was less explicit, though a clue to his thinking on this can be gained from the terms in which he described the authorities in favour of the conclusion that he reached. He thought that the doctrine supporting the opposite view, ie that the acts of an unrecognised state have no effect in English law, was based on 'the need for the executive and the courts to speak with one voice.'[44] He continued: 'But there are those who do not subscribe to that view. They say that there is no need for the executive and the judiciary to speak in unison. The executive is concerned with the *external* consequences of recognition, *vis-à-vis* other states. The courts are concerned with the *internal* consequences of it, *vis-à-vis* private individuals.'[45]

Lord Denning, in attempting to change the consequences flowing from non-recognition, is restricting the conclusive effect of the certificate to the bare issue: does the Crown recognise entity X? While this may be in theory all that a certificate achieves, the fact that Lord Denning would

40. [1978] QB at 221.
41. The authorities cited were: *Luther v Sagor* [1921] 1 KB 456 at 476 (Roche J); *Carl Zeiss Stiftung v Rayner & Keeler* (No 2) [1965] Ch 596 at 656 (Diplock LJ); Lauterpacht H, *Recognition in International Law* (1948), pp 145 et seq; *The Arantzazu Mendi* [1939] AC 256 at 264 (Lord Atkin).
42. These were: *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853 at 954 (Lord Wilberforce); Lipstein, K (1950) 35 Trans Grot Soc 157 at 188; *Re James* [1977] Ch 41 at 62 (Lord Denning MR), at 70 (Scarman LJ).
43. [1978] QB at 218.
44. At 217.
45. Ibid.

give effect to the laws of an unrecognised entity before English courts would entail the consequence that, even though a certificate had been submitted which stated that entity X was not recognised, evidence could still be adduced as to the real state of affairs; and this evidence might indicate a measure of control sufficient for English courts to give some effect to the laws and measures of the unrecognised entity.[46] In other words, the certificate would no longer be conclusive evidence as to the real state of affairs in the unrecognised country.

When the case came to the House of Lords, their Lordships unanimously upheld the correctness of the *Moçambique* rule. They struck out the claim to conspiracy to trespass because it contravened the *Moçambique* rule, though they allowed the claim with regard to chattels to proceed. This they did because, first, the rule did not apply to chattels, secondly, because the alleged 'laws' passed in the Turkish Federated State did not 'extend to the chattels . . . and . . . no local law' was relied on as 'justifying the interference'.[47] As a result of these views, the status or effect of the certificate was not brought directly into issue.

It is apparent from the cases that have been reviewed that the courts are willing to accept as conclusive certain statements made by the executive in certain limited situations. The three most recent decisions do not assist in clarifying important questions in relation to these certificates, namely in what circumstances will the courts accept the views of the executive as being conclusive, and further, why they should be treated as conclusive in these circumstances. It is now proposed to consider these two questions.

II MATTERS SUBJECT TO CONCLUSIVE CERTIFICATION

The cases discussed in the previous part have concerned, in the main, questions of recognition, or the status of an individual as a diplomat. The courts have, of course, accepted certificates as conclusive in other situations. These have been summarised by Oppenheim[48] as follows:

> '(a) the question whether a foreign State or Government has been recognised by the United Kingdom either *de facto* or *de jure*;
> (b) the question whether recognition has been granted to conquest by another State or to other changes of territorial title, and, generally, whether certain territory is under the sovereignty of one foreign State or another;
> (c) the sovereign status of a foreign State or its monarch;
> (d) the commencement and termination of a state of war against another country;
> (e) the question whether a state of war exists with a foreign country or between two foreign countries;
> (f) the existence of a case for reprisals in maritime war;

46. It should be noted that evidence relating to this issue was in fact admitted by the Court of Appeal.
47. [1978] 3 WLR at 386-387 per Lord Wilberforce. The other members of the House agreed on this point.
48. *International Law* 8th ed (1955) Vol I, pp 765-6.

(g) the question whether a person is entitled to diplomatic status; and
(h) the existence or extent of British jurisdiction in a foreign country.'

It should be noted that (g) and (h) are in fact based on statutory powers[49] while certain of the others have been subjected to minor qualifications in the case law.[50] Other instances which have received some recognition are:

1. The extent of territorial waters.[51]
2. The acquisition of territory.[52]
3. Whether or not a treaty is in operation, or existence.
4. Whether a ship is a warship or a public vessel of a State.[53]

Although the first two appear to have received judicial support as being subject to conclusive executive certification, it should be borne in mind that, in the Australian context, it may well be the case that the scope for conclusive certification is considerably restricted in these two instances. This will be considered later in this paper.

As to treaties, there is no clear relevant judicial decision on this point and there is little academic writing. Doeker has stated that 'a certificate of the Executive would be sufficient to show that [a] treaty . . . is in force.'[54] Vallat considers that it would be 'impossible or impolitic'[55] for the Foreign Secretary to state categorically the status of a treaty, the parties to it, etc, although he does not rule out the possibility of the Foreign Office providing information helpful to the parties, or assistance provided to the court by means of statements and submissions by the Attorney-General. In any event, the valid operation of a treaty is subject to international legal considerations which a court is eminently equipped to consider.

Finally it should, of course, be emphasised for the sake of completeness that there are several statutes which confer authority on the execu-

49. As to (g) see Diplomatic Privileges Act, 1964 (UK); and Diplomatic Privileges and Immunities Act, 1967 (Cth). As to (h) see the Foreign Jurisdiction Act, 1890 (UK).
50. As to (b) 'other changes in territorial title', note *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811 (Farwell J), criticised in *Duff Development Co v Kelantan* [1924] AC at 825-827 (Lord Sumner); (e) 'between two countries' see *Kawasaki KKK of Kobe v Bantham SS Co* [1939] 2 KB 544 at 554.
51. See *The Fagernes* [1927] P 311; *Post Office v Estuary Radio* [1968] 2 QB 740. Note also Marine, etc. Broadcasting (Offences) Act, 1967 (UK); Wireless Telegraphy Act, 1967 (UK). For a discussion on this question, see Edeson, 'The Prerogative of the Crown to Delimit the Maritime Boundary' (1973) 89 LQR 364. In the Australian context, note the Attorney-General's statement on Territorial Sea Baselines, HR Deb, vol 57, 2444-5; the Seas and Submerged Lands Act, 1973 (Cth); *NSW v Commonwealth* (1975) 8 ALR 1 esp at 28, (Gibbs J), 78 (Stephen J), 97-99, 103-111 (Jacobs J); The special problems regarding delimitation of the territorial sea, and possible conclusive certification by the executive, merit separate treatment and are not considered in this paper.
52. *Ffrost v Stevenson* (1937) 58 CLR 528 at 548 (Latham CJ); *Post Office v Estuary Radio; NSW v Commonwealth*. Note however, the special problem arising in connection with s 122 of the Constitution, discussed later.
53. *Chow Hung Ching v R* (1948) 77 CLR 449 at 467 (Latham CJ).
54. *The Treaty Making Power of the Commonwealth* (1966), p 181.
55. *International Law and the Practitioner* (1966), p 57. Note the discussion of this question by Lindell 'The Duty to Exercise Judicial Review' in Zines (ed) *Commentaries on the Australian Constitution*, pp 188-189.

tive to certify certain facts for the purpose of a particular litigation. Most certificates are issued by the Minister for Foreign Affairs,[56] though occasionally, the Secretary of the Department has been authorised to issue a certificate.[57] Where the matter is not governed by a statutory text, it would seem in principle appropriate for the relevant Minister whose Ministry is concerned with the matter subject to executive certification to issue it. Furthermore, though there is no authority directly in point, it would also seem acceptable for the Secretary of the appropriate department to issue the certificate. In this respect, there would be a chain of implied delegated authority from the Governor-General in Council to an appropriate Minister or the Secretary of his Department.[58]

III THE JURIDICAL BASIS FOR THE CONCLUSIVENESS OF EXECUTIVE CERTIFICATES

In the cases reviewed, the certificates, or statements, have been accepted as conclusive for a variety of reasons, and no one reason can be cited as having greater support than any other. However, unless the juridical basis for treating such certificates as conclusive in certain situations is established, it is difficult to state whether the instances referred to in Part II above are exhaustive of the circumstances in which they will be so treated, or indeed, to state precisely to what extent the information in a particular certificate should be treated as conclusive.

The justification for treating an executive statement as conclusive has been variously said to be: that the courts take judicial notice of the facts asserted in the certificate; that they act on the best evidence; comity; that there must be unity between the courts and the executive in regard to the matters covered by the certificate; or that the subject matter is one that is dependent on the attitude of the Crown as part of its prerogative power.

The common element running through the circumstances in which the courts have accepted certificates as conclusive is that they relate to the conduct of foreign relations and thus might be said to fall within the scope of the Crown's prerogative powers in foreign affairs. More specifically, the juridical basis for treating the certificate as conclusive could be said to be that the facts in the certificate pertain to the Crown's prerogative in foreign affairs in situations where the attitude of the Crown to those facts will determine their legal character or effect. A clear example of this approach can be found in the judgment of Lord Phillimore in *Engelke v Musmann* where he said: ' . . . when a question arises . . . as to whether a ruler is a Sovereign, and a proper Secretary of State is consulted, the right answer is not "A.B. is a Sovereign" but "A.B. is recognised by His Majesty as a Sovereign".'[59] This approach is not always apparent in the cases but it receives a measure of acceptance in *Engelke v Musmann* and, to a lesser extent, in *Duff Development Co v Kelantan.*

56. Diplomatic Privileges and Immunities Act, 1967 (Cth), s 14.
57. Public Order (Protection of Persons and Property) Act, 1971 (Cth), s 21.
58. In the UK context, the language of Lord Phillimore in *Engelke v Musmann* above fn 15 is consistent with the principle stated in the text above.
59. [1928] AC 433 at 455.

The approach suggested is more apt to support the conclusive aspect of executive certificates than are any of the other justifications that have been advanced.

To take 'judicial notice' and 'best evidence', while it may well be the case that the view of the Crown will often provide the best source of information available to the court in the areas subject to certification, and therefore, as a matter of *evidence*, the information might in a particular case have to be given a *conclusive* effect, it does not seem correct to justify treating a certificate as conclusive on this ground alone if the certificate contains a palpably false statement, eg that X is sovereign, when he is not. Indeed, given the doubt surrounding the status of Kelantan expressed by Lord Carson,[60] it is difficult in any event to understand how the decision in *Duff Development Co v Kelantan* itself could be justified on this approach. Likewise, it is difficult to see how 'comity' necessarily leads to the view that a certificate is to be treated as conclusive. A particular principle of comity might be relevant to the subject matter contained in a certificate, but that can hardly accord it a conclusive character.

The remaining approach to be considered is the view that the courts and the executive should speak in unison on certain matters. The leading exponent of this view is Lord Atkin in the *Arantzazu Mendi* where, in relation to recognition, he said: 'Our state cannot speak with two voices on such a matter.'[61] This is at best a broad policy consideration which a court might take into account in justifying a particular decision, but it would not seem to warrant attaching conclusiveness to every statement of the executive or to all aspects of the statement whenever it concerned matters such as recognition. As Sir Wilfrid Greene MR put it in *Kawasaki KKK of Kobe v Bantham SS Co*: 'I do not myself think that fear of embarrassing the executive is a very attractive ground on which to build a rule of the common law.'[62]

The view suggested that the source of conclusiveness stems from the prerogative power of the Crown assists in explaining the otherwise unpalatable fact that the information in the certificate may not be supported by other evidence. This could arise where it was certified that X was not recognised as a state when it clearly existed as such in reality. Of course, if the common law attributed consequences to the laws etc of an unrecognised state, in cases coming before national courts, and there are occasional suggestions that this development might occur,[63] the prerogative power to accord recognition would remain unchanged and hence an executive statement would be regarded as conclusive, even though the legal consequences flowing from recognition, or lack of it, would alter. The view that conclusiveness is related to prerogative power would

60. See above fn 7.
61. [1939] AC 256 at 264.
62. [1939] 2 KB 544 at 552.
63. See the discussion in *Re James* [1977] Ch 41, especially the judgment of Lord Denning MR.

explain also the fact that legal consequences can flow from the existence of a phoney state of war or non-declarations of peace long after hostilities had ceased.[64]

Equally, the same approach would cover the existence of war between two foreign countries, or where the boundaries between foreign states are in issue as a result of hostilities between nations. Executive certification would not, on the other hand, need to be treated as conclusive in a situation where the boundary in question was stable, and no problem of usurpation existed. Such a situation could be resolved by the normal processes of evidence, though a certificate, if submitted, would be very useful evidence, as the executive may well be in the best position to provide information. In this context, it must be remembered that a boundary problem will arise as often as not because it is difficult to locate geographically.[65]

Although the normal means by which the view of the executive is manifested is by means of executive certificate or statement for the purpose of a particular case, there is no reason why the executive should not be able to state its view in advance of litigation. This was in effect done by the United Kingdom in 1964, when the Territorial Waters Order in Council,[66] a prerogative Order, was issued. This Order adopted certain provisions of the Convention on the Territorial Sea and the Contiguous Zone, 1958, which defined the baselines from which the territorial sea was to be measured, and applied these provisions to the British coastline. No doubt this particular method of bringing parts of this Convention into effect was adopted in part because the Court of Appeal, by a majority, in the *Fagernes* had accepted as conclusive a certificate from the Home Office which stated that a spot in the Bristol Channel was 'not within the limits to which the territorial sovereignty of His Majesty extends.'[67] The prerogative order of 1964 was itself affirmed as valid by the Court of Appeal in *Post Office v Estuary Radio*.[68]

The subject matter which the courts have accepted as subject to executive certification may be described as mixed questions of fact and law. It might be said by way of strict analysis that the matters thus coming within the prerogative are matters of law. It is doubtful, however, whether such an approach, even if analytically correct, is a fruitful one to adopt. Distinctions between 'facts' and 'law' have proved to be notoriously elusive in the common law system, and such an analytical approach should be adopted only if it is necessary. It is sufficient to attribute to the prerogative the power to determine questions such as recognition, the existence of war, etc, irrespective of the question whether the matter determined in any particular instance is a 'fact' or 'law'. A certificate

64. *R v Bottrill; ex parte Kuechenmeister* [1947] KB 41 and see fn 22 above.
65. Note *Foster v Globe Venture Syndicate* [1900] 1 Ch 811; criticised by Lord Sumner in *Duff Development Co v Kelantan* [1924] AC at 825-7.
66. SI 6452A (1965).
67. [1927] P 311 at 319. But note the criticism of this case by McNair in (1928) 44 LQR 3.
68. [1968] 2 QB 740. See also *R v Kent Justices; ex parte Lye* [1967] 2 QB 153. For a criticism of these decisions, see Edeson, op cit.

regarding recognition, for example, might involve both elements at the same time. The statement that the executive does not recognise entity X is a statement of fact as to the attitude of the executive, while this attitude itself will have legal elements and legal effects both in international law and in the national law.

Two further points should be made regarding the juridical basis of executive certificates. First, if it is correct to assert that their conclusiveness in certain situations stems from the prerogative, the question whether the prerogative power has been modified or abrogated by a statute might raise difficulties. The traditional approach to prerogative powers and statutory provisions has been to assume that a prerogative power can be ousted only by express words or by necessary implication. *Barton v The Commonwealth*[69] is a particularly strong example of this approach.

Where, however, a question has arisen whether a statutory provision prevails over the view of the executive as expressed in a certificate submitted for the purpose of a particular case, the matter has usually been resolved in favour of the statutory provision.[70] This may be explained in part because the courts have sometimes regarded the executive certificate as being conclusive for unarticulated reasons of policy rather than because the subject matter relates to prerogative power.

Finally it should be noted that in one unreported Australian decision, *Haruo Kitaoka v The Commonwealth*,[71] the view was taken by Wells J that the Commonwealth could not submit a certificate, setting out the limits of territorial waters in the Northern Territory, because it was a party to the action. It is suggested that such a view is wrong. The Commonwealth, or the Crown, would have an interest in certain proceedings to which it is a party which is wider than that of a mere litigant. If the circumstances of the case are such that the view of the executive would normally be treated as conclusive because they relate to prerogative power, it should in principle remain so despite the double role of the executive in the case.

IV CONCLUSIVE EXECUTIVE CERTIFICATION AND THE AUSTRALIAN FEDERAL SYSTEM

Thus far in this paper, the question whether, and in what circumstances, executive certificates can operate with conclusive effect has been considered in a strictly common law context. It is now proposed to discuss briefly how the Australian federal system affects the application of the common law doctrine.

At the outset, it is necessary to make certain assumptions in order to confine the discussion to the central topic of this paper. First, it is

69. (1974) 3 ALR 70.
70. Compare *Corporate Affairs Commission v Bradley* [1974] NSW LR 391 with *Re James* [1977] Ch 41. See also *Schtraks v Government of Israel* [1962] 3 All ER 529. These cases were discussed in part I.
71. Case No 14, 1937, Northern Territory Supreme Court. The judgment is conveniently reproduced in Haultain, *Watch Off Arnhem Land* (1971) Appendix.

necessary to proceed on the basis that the Commonwealth has inherited certain prerogatives as part of its executive power. As Mason J put it in *Barton v The Commonwealth*:[72]

> 'By s 61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.'

Another assumption that it is necessary to make is that those prerogatives of the Crown which can be said to pertain to foreign affairs have devolved upon the Commonwealth, to the exclusion of the States. This seems to be the generally accepted view in the literature, and although the point has not been authoritatively decided in the case law, it appears unlikely that the High Court would decide the matter otherwise.[73] Thus it can be fairly safely assumed that the matters which are the subject of conclusive executive certification by virtue of the common law may also be so certified by the Commowealth executive, subject only to those limitations that derive from the Constitution itself.

The major factor which prevents the wholesale adoption of the common law principles is in fact the text of the Constitution itself, coupled with the fact that its interpretation is subject to judicial review. This point is well illustrated by the case of *Bonser v La Macchia*,[74] which is also one of the few High Court decisions dealing with the question of executive certificates. In *Bonser*, the presently relevant issue was whether a place six miles from the coast of New South Wales was for the purpose of s 51 (x) ('fisheries in Australian waters beyond territorial limits') in fact within Australian waters. During argument, counsel for the Commonwealth hinted strongly that a certificate could be obtained stating whether or not the point at which the offence occurred was in Australian waters. The Court did not take up the hint, and in certain of the judgments this means of determining the matter was specifically rejected. According to Barwick CJ:[75]

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72. (1974) 3 ALR 70 at 86. For a discussion of this issue, see Richardson 'The Executive Power of the Commonwealth', in Zines (ed) op cit, pp 50 et seq.
73. See in particular *NSW v The Commonwealth* (1975) 8 ALR 1 and *Barton v The Commonwealth*. Note Richardson, op cit; Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth', Zines (ed) op cit 1, esp p 37. Burmester, 'The Australian States and Participation in the Foreign Policy Process' Fed. L Rev (1978) 9 257. Kidwai 'International Personality and the British Dominions: Evolution and Accomplishment' (1975) 9 UQLJ 76. Note, however, the views of O'Connell, 'The Evolution of Australia's International Personality' in O'Connell (ed) *International Law in Australia* (1965) p 16; and Sawer, 'Australian Constitutional Law in Relation to International Relations and International Law' O'Connell (ed), op cit pp 35-37.
74. (1968) 122 CLR 177.
75. At 193.

> 'The matter to be decided in this connexion is the meaning of the words "Australian waters" in the constitutional provision s 51(x). Both the connotation and the denotation of "Australian waters" is thus a matter for this Court exclusively. It is not a matter which can be decided by the Executive. Consequently there is no room here for the tender or the acceptance of a certificate of the Executive as to the status of any waters surrounding Australia in relation to the constitutional power.'

Windeyer and Kitto JJ expressed similar views, the former saying:[76]

> 'The ambit of any description in the Constitution and the validity of anything purporting to be done in reliance upon it are in the last resort matters for this Court. A proclamation defining Australian waters for the purpose of the laws about fisheries is not like a formal statement, made to the Court on behalf of the Government as to whether a particular place is, or is not, within Her Majesty's dominions.'

While all three judges rejected the possibility of a certificate binding the court, in this particular case, all three also considered that the view of the executive was relevant. In *Bonser*, the view of the executive had already been expressed by another means, namely by a Proclamation made pursuant to s 7, Fisheries Act 1952-66 (Cth) which permitted the Governor-General to 'declare any Australian waters to be proclaimed waters for the purposes of this Act.' This view was thought to be 'not entirely irrelevant' (Barwick CJ),[77] 'by no means to be put aside as an irrelevant or unimportant circumstance' (Kitto J),[78] and 'although not decisive . . . a weighty matter in this case' (Windeyer J).[79] In the particular context of s 51 (x) an executive certificate might of course play a more decisive role in determining the scope of the term 'Australian waters' if the legislation in question had not already provided for executive proclamation, and if the facts of a particular case involved, for example, waters that might equally be described as Indonesian. In such a circumstance, the view of the executive, expressed in the form of a certificate, could legitimately be regarded as highly relevant, especially if the waters in question had been traditionally fished by Indonesians, and hardly ever by Australians. The important point, though, is that it could never be conclusive, for to so treat it would mean that the constitutional text could be reinterpreted by executive certification, and it was precisely this possibility that led the High Court to reject the Commonwealth's certificate in *Bonser*.

It should perhaps be added in passing that the problem raised as to the extent of Australian waters for the purpose of the federal fisheries power is not likely to arise in the future as to the outer limit of Australian waters. It may well be that the broad interpretation accorded to the 'external

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76. At 217. See also Kitto J at 207.
77. At 194.
78. At 207.
79. At 217.

affairs' power (s 51 (xxix)) by some of the judges in *NSW v The Commonwealth*[80] will permit federal fisheries legislation extending beyond 'Australian waters'.

Section 122 of the Constitution raises the same issue as s 51 (x) though perhaps in a more acute form.

Section 122 reads:

> 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.'

In several decisions, the view has been expressed that the Crown has power, by virtue of its prerogative, to acquire territory, and that the acquisition cannot be questioned in the Courts.[81] Thus, according to Latham CJ in *Ffrost v Stevenson* in any case of doubt, the matter 'should be conclusively determined by a formal statement made by a Minister of the Crown'.[82] The question arises whether this view is applicable to territories falling within Commonwealth control as a result of s 122. If a certificate was submitted stating that a particular territory was subject to Commonwealth control, would the High Court nonetheless be able to enquire whether the means by which the territory in question became subject to Commonwealth control satisfied the criteria laid down in s122? In particular, was it 'placed by the Queen under the authority of and *accepted* by the Commonwealth, or *otherwise acquired by* the Commonwealth'? In support of the view that the Commonwealth could conclusively certify on this matter, it should be borne in mind that the comments of Latham CJ were made in respect of the then Mandated Territory of New Guinea. Further, Sir Garfield Barwick, as Attorney-General, argued in *Fishwick v Cleland* that:[83]

> 'Whether any particular territory falls within s 122 is a question as to the relationship or status of the territory to the Commonwealth. The question is political to the extent that the view of the Executive should prevail, and the Court could ask for a certificate from the appropriate Minister in that regard.'

Such a possibility has led Lindell to speculate that:[84]

> 'If the certificate were to be conclusive, it could be implied that the

80. (1975) 8 ALR 1. See also the comments of Mason J in (1977) Fed L Rev 502 (book review).
81. *Ffrost v Stevenson* (1937) 58 CLR 528 at 549 (Latham CJ); *Post Office v Estuary Radio* [1968] 2 QB 740 at 756 (Diplock LJ); *NSW v Commonwealth* (1975) 8 ALR 1 at 28, 78, 97-99, 103-111. A quite different question might arise, of course, if cession of territory is in issue.
82. 58 CLR at 549. Note also Dixon J at 566, and Evatt J at 586.
83. (1960) 106 CLR 186 at 191-192.
84. 'The Duty to Exercise Judicial Review' in Zines (ed) op cit p 188. Note also Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases', (1970) 4 Fed L Rev 65.

> power to legislate under section 122 of the Constitution was not a power to pass laws in respect of those territories described in section 122, but was, instead, a power to pass laws in respect of those territories which in the opinion of the executive government of the Commonwealth came within that description.'

There is no ready answer to this. It could perhaps be argued that the open-ended phrase 'otherwise acquired by' does not exclude, and perhaps implicitly acknowledges, the prerogative power of the Crown to acquire additional territories. On such an approach, the view of the Commonwealth, expressed in the form of a certificate, could still be conclusive as to the status of the territory in question.

Such an approach is supported to some extent, too, by the consideration that section 122 merely confers law making powers on the Commonwealth with respect to certain classes of Territories.[85] It does not, it might be argued, condition, except incidentally, the prerogative power to acquire new territories, a power which has devolved upon the Commonwealth through s 61 of the Constitution.

One solution might be to regard the certificate in much the same way as the proclamation that was considered in *Bonser's* case (above), namely that it should be a 'weighty' but not a 'decisive' factor. This would allow the Court to enquire whether the territory in question comes within the ambit of s 122, ie that it meets one of the criteria laid down in that section for acquisition by the Commonwealth. In other respects, the certificate might be conclusive. Thus, if the Commonwealth acquired overseas territory contrary to international law, the Court might no doubt have to consider whether 'otherwise acquired by' encompassed such acquisitions, but if it did so decide, the Court may well treat the certificate as conclusive as to the fact of acquisition. At the very least, it is probable that the Court would not permit further enquiry into the correctness of the acquisition before the courts, on the ground that it was an Act of State.[86]

Another source of potential difficulty arises in connection with the 'external affairs' power (s 51 (xxix)) of the Constitution. It will be recalled that doubt was expressed earlier in this paper[87] whether the executive might be able to certify conclusively the existence or operation of a treaty. The position is by no means clear whether this is possible. On occasions, certificates have been submitted regarding the existence of an agreement, though whether it was intended to be conclusive or whether it was so regarded by the court is not clear.[88] Assuming for the moment that the common law does permit conclusive executive certification in

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85. Note *Paterson v O'Brien* (1978) 18 ALR 31 where ss 111 and 123 of the Constitution were considered.
86. As to the acquisition of Australia by Britain being an Act of State, see *Coe v The Commonwealth* (1979) 24 ALR 118, especially Gibbs J at 128, and Jacobs J at 132. Aickin J agreed with the judgment of Gibbs J.
87. Above p 15.
88. See *The Commonwealth v Thornthwaite* (1960) 34 ALJR 306. No reference is made to the certificate, though it is understood that one was in fact submitted.

respect of the existence, or operation of a treaty, a special problem could arise in the Australian context, because, on one view of the 'external affairs' power, legislative power is attracted to the Commonwealth by its participation in an international agreement.[89] Lindell has pointed out that if a certificate is accorded conclusive effect in regard to treaties this might lead to the situation where s 51 (xxix) 'authorises the enactment of laws to give effect to treaties and other international agreements which are, in the *opinion* of the executive government, thought to be in force or operation at any given time.'[90]

The treaty situation is a borderline category in the common law as being appropriate for conclusive certification, and it may be that the added constitutional complication rules out such a possibility in the Australian context. The present writer's preference is that the question of the operation, etc of treaties should be regarded as a matter for the courts to determine in appropriate cases, having regard to the rules of international law. The executive would, however, be able to provide evidence that might assist the court regarding the treaty's existence, whether Australia was a party, etc. An exception might have to be made with respect to an express renunciation of a treaty by the executive, even if contrary to international law, because the power to renounce would appear to come within the prerogative power with respect to foreign affairs. The fact of that renunciation could be subject to conclusive certification. The approach suggested does however overcome to a large extent the constitutional danger adverted to by Lindell.

In regard to declarations of war and peace, conclusive executive certification could raise similar problems in connection with the scope of the defence power (s 51(vi)), though it should of course be noted that the common law position is much more certain in this regard, for the right of the Crown to certify conclusively that a state of war exists between itself and another nation is well established.[91] It is beyond the scope of this paper to enter into a discussion of the *Australian Communist Party* case;[92] however, it should be mentioned in passing that certain members of the High Court considered that the Commonwealth could not attract to itself increased legislative power by reciting in a preamble that the Act in question (the Communist Party Dissolution Act, 1950 (Cth)) was necessary for the security and defence of Australia; nor could it make the Governor-General's opinion or belief conclusive in law that the existence of certain organisations would be prejudicial to the security and defence of the Commonwealth, or to the execution or maintenance of the Constitution or of the laws of the Commonwealth.

It is arguable that, in connection with declarations of war, etc, although a certificate submitted to the court might be conclusive as to the fact that a state of war did or did not exist between Australia and another country

89. See *Airlines of NSW v The State of NSW* (1964) 113 CLR 1.
90. Op cit, p 189.
91. See *R v Bottrill; ex parte Kuechenmeister* fn 64 above.
92. (1951) 53 CLR 1.

(as this would seem to be a prerogative power which has devolved on the Commonwealth), nonetheless it is doubtful if the certificate would be conclusive in determining whether certain Commonwealth legislation was within the defence power. This would need to be determined by the High Court in the normal way. Such a certificate could well be regarded, however, as a weighty, though not a conclusive, consideration.

A related matter was discussed briefly by Latham CJ in *Chow Hung Ching v R*[93] in the context of determining whether some Chinese nationals working on Manus Island (part of the then mandated territory of New Guinea), were part of a foreign military force, and therefore entitled to immunity from local jurisdiction. On the question as to how it was to be determined whether they were in fact members of an armed force, Latham CJ said:[94]

> 'The Executive Government of the Commonwealth cannot, by undertaking to treat as part of the military forces of a foreign country a body of men who are not in fact members of such forces, exclude the jurisdiction of Australian courts in relation either to foreigners or to members of the community of Australia. The Executive Government has, in my opinion, no authority to determine conclusively that certain persons are members of a foreign army and by such a determination to deprive the Australian people of resort to their own tribunals for the purpose of enforcing their claims or protecting their rights. If persons are members of such forces and if they are in Australia by governmental consent, then some principle of immunity applies, but the question of whether they *are* part of the military forces of another State is a question of fact which must be determined by the court before the question of jurisdiction arises. This, in my opinion, is not a question in relation to which a court will be bound by any statement of the Executive Government of the Commonwealth.'

This view is consistent with the approach adopted in the *Australian Communist Party* case, and it reaffirms the apparent reluctance of the High Court to allow its role of judicial review of the constitutionality of governmental activities to become weakened by a device such as conclusive executive certification.

In conclusion, as was pointed out at the beginning of this paper, there is a tendency to place certain questions, previously subject to conclusive certification in the common law, on a statutory basis. It is not possible to examine these provisions in detail; however, it is interesting that, in Australia, the legislative practice is firmly towards giving the executive powers of certification falling short of conclusiveness. The Diplomatic Privileges and Immunities Act, 1967, (Cth) s 14, for example, states:

> '(1) The Minister may give a certificate in writing certifying any fact relevant to the question whether a person is, or was at any time or in respect of any period, entitled to any privileges or immunities by

93. (1949) 77 CLR 449.
94. At 466.

virtue of this Act, of an Act repealed by this Act or of the regulations.
(2) In any proceedings, a certificate given under this section is evidence of the facts certified.'