The Role of Government in the Conduct of Australia's Foreign Affairs

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I. Introduction

Sir Kenneth Wheare once observed that "federalism and a spirited foreign policy go ill together".[1] Whether or not one agrees with Wheare's conclusion, there is little doubt that his aphorism highlights a complexity faced by federal States in the conduct of their foreign relations, which is not shared by unitary States. In the case of Australia, these difficulties are exacerbated by the fact that the Federal Constitution is silent on many important aspects of the conduct of the country's foreign relations. The purpose of this article is to examine how responsibility for the conduct of Australia's foreign affairs is distributed by the Constitution and by constitutional practice between the various institutions of government. When one bears in mind the potential for that responsibility to be shared between the state and federal spheres, and between the three principal arms of government within each sphere (the executive, the legislature and the judicature), the picture is indeed a complex one. However, it is not intended to do more here than provide a conspectus of the issues, with particular emphasis on the making and implementation of treaties.

II. The Federal Executive

The Australian Constitution vests the executive power of the Commonwealth in the Queen (exercisable by the Governor-General as the Queen's representative), and states that the power "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".[2] Curiously, the Constitution does not enumerate the powers of the federal executive and makes no mention of the power of the federal executive to enter into treaties or conduct foreign affairs. In view of Australia's colonial history, this silence is perhaps not surprising. Prior to Federation in 1901, the United Kingdom had the power to conduct foreign relations and conclude treaties on behalf of the various Australian colonies, as part of the British Empire. After Federation it was

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1 Wheare KC, *Federal Government* (1946), p 196.

2 Section 61.

thought that the Imperial Government should continue to conduct the foreign policy of the Empire.

Only gradually did Australia develop an independent international personality.[3] The turning point appears to have been the Balfour Declaration of 1926, which formally recognised the autonomy of the British Dominions as communities "in no way subordinate one to another in any aspect of their domestic or external affairs".[4] This new status was given statutory recognition by an Act of the United Kingdom Parliament in 1931,[5] and this in turn was formally adopted by Australia in 1942.[6] As indicia of its gradual international awakening, Australia was an original signatory to the Covenant of the League of Nations in 1919;[7] created its first separate department of External Affairs in 1935; established its first diplomatic representation outside London in 1940;[8] and took special care when declaring war on Japan in 1941 to adopt a procedure consonant with its full status over its external relationships.[9]

Since Australia's coming of age in the international community, there is no doubt that the federal executive possesses full capacity to conduct Australia's relations with foreign countries. This power includes making, terminating, and performing treaties; declaring peace and war; annexing and ceding territory; seizing land or goods as conquest; appointing ambassadors; and so on. As one High Court judge has stated in relation to treaty-making, "the federal executive, through the Crown's representative, possesses exclusive and unfettered treaty-making power".[10] In short, the power conferred by the Constitution on the executive enables it to undertake all executive action appropriate to the spheres

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3 See generally, O'Connell and Crawford, "The Evolution of Australia's International Personality" in Ryan KW (ed), *International Law in Australia*, 2nd ed (1984), p 1; Lewis, "The International Status of the British Self-Governing Dominions" (1922–23) 3 *British Year Book of International Law* 21; Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth" in Zines L (ed), *Commentaries on the Australian Constitution* (1977), p 1. A vocal opponent of this view was Murphy J, who claimed that Federation in 1901 brought about a fundamental legal and political change in which the Commonwealth emerged as a new political entity with the status of a nation: *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 236–39.

4 Quoted in O'Connell and Crawford, n 3 above, p 17.

5 Statute of Westminster 1931 (UK).

6 Statute of Westminster Adoption Act 1942 (Cth). The Act was given retrospective operation to 3 September 1939, the date of the declaration of war on Germany. The classic history of these developments may be found in Wheare KC, *The Statute of Westminster and Dominion Status*, 5th ed (1953).

7 (1919) 13 *American Journal of International Law* (Supp) 128. The Covenant constituted Part I of the Treaty of Versailles, concluded on 28 June 1919.

8 Ravenhill, "Australia" in Michelmann HJ and Soldatos P (eds), *Federalism and International Relations: The Role of Subnational Units* (1990), p 76 at 116, n 3.

9 See O'Connell and Crawford, n 3 above, p 20. A different view had been taken of the declaration of war on Germany in 1939, when it was apparently assumed that the United Kingdom's declaration of war compelled the same response by Australia. See House of Representatives, *Debates*, vol 161 (1939), pp 28–29.

10 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 215 (Stephen J). See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 298–99 (Dawson J).

of responsibility vested in the Commonwealth, including the conduct of relations with other countries.[11]

Amongst the many types of foreign relations decisions made by the executive, the treaty-making power is of central importance and serves to explain the link between the federal executive and the democratic processes of government in Australia. As mentioned above, the federal executive power is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. Under the Westminster system of government,[12] the Governor-General acts only on the advice of his or her Ministers of State. These Ministers provide advice to the Governor-General through the Federal Executive Council, of which they are members.[13] By convention, a Minister of State must be an elected representative from either House of Parliament, drawn from the political party or coalition of parties that commands a majority in the House of Representatives. The effect of these customs and conventions is that Australia's foreign affairs are conducted in name by the Head of State, but on the advice of those elected parliamentary representatives who form part of the Government and who have been appointed as Ministers of State.

The procedures followed by the executive in creating a binding treaty obligation for Australia are relatively simple.[14] The conclusion of treaties between Australia and other States is the responsibility of the Department of Foreign Affairs and Trade. This responsibility is implemented by the Department's Legal Office, which is charged with drafting, negotiating, concluding, collecting, and publishing treaties. Once the text of the treaty has been settled, it is necessary to obtain executive approval at various levels. If the subject matter of the treaty falls within the scope of existing policy, it is necessary to obtain the approval of the Minister responsible for that area. If the treaty falls outside existing policy, it is necessary to obtain the federal Cabinet's endorsement of the final text of the proposed treaty. After these matters have been attended to, the approval of the Federal Executive Council must be obtained before any treaty action is taken whether by way of signature, ratification, or other step subsequent to signature.[15] In general, this approval will not be given unless all necessary preparations have been made to bring Australian law into conformity with the treaty by the time the treaty enters into force for Australia. If the proposed treaty action is approved, the Federal

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11 *Re Ditford; ex parte Deputy Commissioner of Taxation (NSW)* (1988) 83 ALR 265 at 285.

12 See generally Hood Phillips O and Jackson P, *O Hood Phillips' Constitutional and Administrative Law*, 6th ed (1978), pp 27–30, 697–99.

13 Sections 62 and 64 of the Constitution.

14 Department of Foreign Affairs and Trade, *The Conclusion of Treaties and Other International Arrangements* (1987). See also the answers submitted by the Australian Government to questions asked by the European Committee on Legal Co-operation in a survey of State practice on treaty-making, reprinted in (1991) 11 *Aust YBIL* 500–03.

15 Executive Council approval is not required for the signature of arrangements of less than treaty status. Such arrangements have moral and political force, but are not legally binding.

Executive Council will authorise the Minister for Foreign Affairs to prepare an instrument of full powers, ratification, or accession, as may be required. Although an instrument of full powers is generally required to authorise a person to sign a treaty on behalf of Australia, under current Australian treaty practice the Prime Minister and the Minister for Foreign Affairs may sign treaties without full powers being issued.[16]

The procedures outlined above suggest that foreign affairs decisions, at least in relation to treaty-making, receive close scrutiny at a high level before Australia's international obligations are engaged. Not only must the proposed action receive the approval of the relevant Minister or the Cabinet, but the matter must also be approved by the Federal Executive Council. Departmental guidelines require considerable information to be placed before the Federal Executive Council, including information on the subject matter and purpose of the treaty, its relationship to existing treaties, the effect of its principal provisions, other countries that are contemplating becoming parties to the treaty, and the rights and obligations of Australia under the treaty.[17] When these guidelines are followed, the executive branch of Federal Government will be well apprised of the consequences for Australia of the proposed treaty action.

III. The State Executives

Although s 61 of the Australian Constitution vests the federal executive power in the Queen, it does not expressly make executive power over foreign affairs exclusive to the federal sphere of government. The lack of express provision has provided fertile ground for claims by the Australian states that they possess some competence over foreign relations, independently of the federal executive. Prior to Federation there were signs of nascent international activity by the Australian colonies, acting on their own behalves. Towards the end of the 19th century several colonies negotiated postal agreements with foreign countries, and in 1894 the Colonial Conference authorised the colonies to negotiate their own commercial treaties.[18] After 1901 several states claimed that their emerging status in international affairs was unchanged by Federation. Even as late as 1974 Queensland established a Treaties Commission to advise on the benefit to Queensland of various international treaties and conventions.[19] The Act establishing the Commission did not itself suggest that Queensland was competent to enter into international treaties or conventions.[20] However, in its

16 This practice accords with the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, article 7.

17 Department of Foreign Affairs and Trade, n 14 above, pp 15–16.

18 O'Connell and Crawford, n 3 above, pp 2–8. Additionally, the Imperial Government ceased the practice of automatically applying its commercial treaties to the colonies, and instead granted the colonies freedom to adhere voluntarily to commercial treaties concluded between the Imperial Government and foreign governments.

19 Treaties Commission Act 1974 (Qld).

20 The terms of the Act confined the Commission to examining the effect in Queensland of treaties that had been entered into, or might be entered into, by the Government of the Commonwealth of Australia.

First Report to the Queensland Parliament, the Commission claimed that the Australian states could make agreements with foreign governments, governed by international law.[21]

Similar claims for state involvement in international affairs have been made by Canadian provinces, principally Quebec, in circumstances where the Canadian Constitution likewise fails to identify the location of executive power to conclude international agreements. In the United States, however, the matter is settled by the express constitutional prohibition on states entering into agreements or compacts with other states or foreign powers without congressional consent.[22]

In contrast to the broad claims by Australian states of executive competence in the field of foreign relations, the High Court of Australia has taken a robust line against that position. The jurisprudence of the Court contains many dicta emphasising the pre-eminent role of the Commonwealth in the conduct of foreign relations. As early as 1923 the High Court remarked that it was a fallacy to treat a state of Australia as a "sovereign State".[23] In the *Seas and Submerged Lands* case[24] Barwick CJ stated, when commenting on the federal legislative power over external affairs:

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

Perhaps the most emphatic statement to this effect is that of Murphy J who, in the same case, said:

> The States have no international personality, no capacity to negotiate or enter into treaties, no power to exchange or send representatives to other international persons and no right to deal with other countries, through agents or otherwise. Their claims to international personality or to sovereignty are groundless...[25]

Australian states have generally refrained from claiming separate international personality and, even if they had, the claims would be ineffectual in the absence of recognition of that separate status by other members of the international community.[26] Such recognition has not been forthcoming. The states have, however, been vocal in claiming *some* competence in international affairs. To this extent, Murphy J's denial of any international role for the states does not represent the reality of Australian practice. Two aspects of that practice must now be examined—the direct participation of state executives in foreign

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21 Burmester, "The Australian States and Participation in the Foreign Policy Process" (1978) 9 *Federal Law Review* 257 at 262–64.

22 United States Constitution, article 1, s 10.

23 *Commonwealth v New South Wales* (1923) 32 CLR 200 at 210.

24 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 373.

25 Ibid, at 506.

26 Bernier I, *International Legal Aspects of Federalism* (1973), pp 77–81. See also *Jolley v Mainka* (1933) 49 CLR 242 at 282 (Evatt J).

affairs and their mediated participation through cooperative federal-state arrangements.

(a) Direct participation in foreign affairs

It is possible to identify a number of international activities undertaken by states, which give them some profile in international affairs.[27] The three principal activities are the conclusion of international agreements, the maintenance of overseas representatives, and the intrusion of state political leaders into matters of foreign policy.[28]

(i) International agreements

State governments have asserted their competence to enter into agreements with foreign countries. In many cases these agreements are of a private contractual nature and are governed by the municipal law of one of the parties. Two examples are the agreements entered into between Western Australia and Libya, and between South Australia and Libya, for the provision of assistance in dry land farming techniques, which are subject to Libyan law.[29] Such agreements do not amount to international treaties because treaties are governed by international law.[30] It is strongly arguable that the Australian states are incapable of making inter-governmental agreements governed by international law, even if they have capacity to enter into other types of agreements or arrangements with foreign countries. The states do not possess international status under Australian constitutional law, nor does international law recognise them as having independent international legal status.

(ii) Overseas representation

The states have had a long history of maintaining permanent representatives in foreign countries. During Australia's colonial era, each colony appointed an Agent-General, resident in London, to safeguard its commercial and other interests. After Federation, respected commentators on the Constitution predicted that the appointment of a High Commissioner for Australia would necessarily absorb all the important work of the several Agents-General, and that the latter "would be denuded of their prestige and most of their duties, and there would be no necessity or justification for the continuance of the old system".[31] History belies their prediction. In all but recent years, each state has maintained an Agent-General in London, and some states have also established

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27 Sharman, "The Australian States and External Affairs: An Exploratory Note" (1973) 27 *Australian Outlook* 307; Burmester, n 21 above, at 262–75; Ravenhill, n 8 above, pp 95–104.

28 Additional international activities undertaken by states include the establishment of sister-state relationships with foreign governmental units; the granting of foreign aid; and official visits by state leaders to foreign countries.

29 Discussed in Burmester, n 21 above, at 264; and Ravenhill, n 8 above, pp 101–02.

30 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, article 2(1).

31 Quick J and Garran R, *The Annotated Constitution of the Australian Commonwealth* (1901), p 633.

permanent representatives in other centres such as Tokyo and Los Angeles.[32] The maintenance of overseas representation has been encouraged by a belief, stronger at some times in Australia's political history than at others, that the Federal Government cannot adequately represent an individual state's interests abroad, especially in commercial matters. In particular, the resource boom in the 1960s and 1970s encouraged states to promote their interests in world markets in order to attract investment and foster economic growth of the state. It is only recently that some states have announced the closure of these offices, primarily for budgetary or political reasons.[33] Although state representation overseas appears to be a significant intrusion into the conduct of Australia's foreign relations, the state representatives do not represent Australia, nor do they act on Australia's behalf.[34] Their principal function is to protect the interests of their sending state in matters of trade, commerce, tourism and immigration. In so doing they seldom present a unified policy, and often compete with each other to attract business to their state.

(iii) State intrusion into foreign policy

State governments have occasionally announced policies relevant to the conduct of Australia's foreign relations, which have been at odds with the policies of the Federal Government. For example, in 1982 the Victorian Labor Government announced its intention to ban nuclear warships from entering the state's ports. Such a policy might have jeopardised Australia's defence relations with the United States under the ANZUS Treaty.[35] After strong criticism from the United States, the conservative Federal Government repudiated the state's ban, as did the Federal Labor Government that succeeded it. The Victorian Government eventually retreated, acknowledging the Federal Government's authority on defence-related issues.[36] Other examples may be cited: the Queensland Government made protracted resistance to Australia's negotiations with Papua New Guinea over the maritime delimitation of Torres Strait, which

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32 Ravenhill, n 8 above, p 99, estimates that in 1988–89 the states employed nearly 120 people in 14 offices in London, Los Angeles, Tokyo and Frankfurt. It has been reported that overseas representation has grown marginally since Ravenhill's survey: see Harris, "Federalism and Australian Foreign Policy" in Hocking B (ed), *Foreign Relations and Federal States* (1993), p 98.

33 The vast improvement in communications since such offices were first established last century would also seem to make permanent foreign representation less essential.

34 Representatives of the Australian states generally have no diplomatic or consular status, with the exception of the Agents-General in London, who receive the privileges accorded to consular officers: see Commonwealth Countries and Republic of Ireland (Immunities and Privileges) Order 1985 (No 1983), made pursuant to s 12 of the Consular Relations Act 1968 (UK), as amended by s 4 of the Diplomatic and Other Privileges Act 1971 (UK).

35 (1952) Aust Treaty Series No 2. This security treaty entered into force between its three parties (Australia, New Zealand and the United States) on 29 April 1952.

36 Hocking, "Pluralism and Foreign Policy: The States and the Management of Australia's External Relations" (1984) *Yearbook of World Affairs* 137 at 143–44.

affected the boundaries of the state;[37] and New South Wales refused to cooperate with the Federal Government in closing down the Rhodesia Information Centre, which was established in Sydney by the Government of Rhodesia after its unilateral declaration of independence from Great Britain in 1965. In each case, the Federal Government was actually or potentially embarrassed in its conduct of foreign relations. However, such instances have been isolated and state intervention in diplomacy and defence has been relatively inconsequential.[38]

The separate voice of the Australian states in international relations poses a challenge to the conduct of Australia's foreign policy. It has been remarked that the pursuit of an effective foreign policy is compromised if foreign countries perceive discord or inconsistency between the official voice of central government and the less-official voice of state governments.[39] In a competitive world in which foreign countries may be eager to take advantage of differences in the policies of the various states, the national interest is best served if foreign policy is enunciated by the single voice of Federal Government.

(b) Participation through cooperative arrangements

Although the direct role of the state executives in the international arena has been controversial, there is another way in which the states have been involved in Australia's foreign policy process. Since 1977, the Federal Government has endeavoured to involve the states at an early stage in the treaty-making process by facilitating consultation between the federal and state executives on treaties to which Australia is contemplating becoming a party. The principles of consultation have varied over the years, but in their current form[40] they provide for substantial involvement of the state executives on matters of particular sensitivity or importance to the states. Of course it is ultimately a matter for the federal executive, not the states, to decide whether participation in a treaty is in Australia's national interest.[41] However, the principles on consultation

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37 Collins, "Federalism and Australia's External Relations" (1985) 39 *Australian Outlook* 123. Negotiation of the treaty between Australia and Papua New Guinea potentially required an alteration to Queensland's northern boundary, which could only be effected with the consent of the state: s 123 of the Constitution. From 1972 until 1978 (when Queensland's Premier made an abrupt reversal of policy), the state's attitude was one of absolute opposition to any territorial concession being made to Australia's nearest neighbour.

38 Ravenhill, n 8 above, at 103.

39 Boyce, "International Relations of Federal States: Responsibility and Control" in Wood M, Williams C and Sharman C (eds), *Governing Federations: Constitution, Politics, Resources* (1989), p 187 at 188.

40 *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1992).

41 For example, in 1991 the Commonwealth Attorney-General indicated to Parliament that the Standing Committee of Attorneys-General (a federal-state consultative body) was a valuable forum for discussing with the states and territories whether or not Australia should accede to the First Optional Protocol to the International Covenant on Civil and Political Rights 1966. However, he stressed that the view of that Committee did not determine the question whether

recognise that state cooperation can facilitate the implementation of international obligations, as well as ameliorate tensions in federal-state relations.

The consultative process essentially comprises three aspects. First, mechanisms have been established for the state executives to be informed at an early stage of the treaties to which Australia is considering becoming a party. To this end, a Treaties Schedule is circulated to the states twice a year, with information on forthcoming treaty negotiations over the next twelve months. This allows the states to identify treaties of special importance to them, bearing in mind their traditional areas of responsibility; to propose appropriate mechanisms for their involvement in the negotiation process; and to provide input relevant to the formulation of Australian policy.

Secondly, representatives of the states may be included in delegations to international conferences that deal with state subject matters. Their inclusion in the delegation does not entitle state representatives to speak for Australia, but is for the purpose of keeping them informed and allowing them to express their views. In general, it is for the states to initiate moves for inclusion in a delegation.

Thirdly, the consultative process extends to the stage of treaty implementation. It is Australia's normal practice not to become a party to a treaty until all Australian law is brought into line with the mandatory provisions of the treaty. Federal-state consultation allows both levels of government to agree on the manner in which the treaty obligations should be implemented, whether it be by complementary federal and state legislation or by state or federal legislation alone.

The consultative process described above operates between the executive branches of government at the federal and state levels. The process has been formalised by the establishment of a Standing Committee of federal and state officials, which meets twice a year and is charged with responsibility for overseeing the various stages of the process. This Standing Committee is not the only mechanism for consultation between the executive branches. The principles on consultation indicate that existing federal-state consultative bodies (such as the Standing Committee of Attorneys-General) may be used as forums for discussion. The procedures may also be complemented by direct communications between functional departments of the state and federal executives, as well as by direct communications between each state's Premier's department and the Federal Department of Prime Minister and Cabinet. In summary, the consultative procedures give the state executives considerable input into Australia's treaty process, although ultimate control remains with the federal executive.

Australia should accede to the Protocol, since the matter was one for decision of the Australian Government. See House of Representatives, *Debates*, 11 April 1991, p 2542; extracted in (1992) 13 *Aust YBIL* 381.

IV. The Federal Legislature

The pre-eminent role of the federal executive in concluding treaties between Australia and foreign countries leaves little room for scrutiny by the federal legislature. In the words of the Minister for Foreign Affairs and Trade, Senator Gareth Evans:

> The Constitutional power to enter into treaties is one that belongs to the Governor General in Council. The Commonwealth Parliament, in consequence, has no formal function to exercise by way of review or oversight of international Conventions, treaties and agreements which the Federal Government is considering signing.[42]

In principle Australia may become bound by international treaties or conventions as a result of decisions of the federal executive, without the matter having received any consideration by Parliament. In practice, however, there are two significant avenues for parliamentary scrutiny of executive decisions in relation to foreign affairs.[43]

(a) Tabling treaties in Parliament

It is the practice of the Australian Government to table treaties in both Houses of Parliament; a practice that derives from a commitment made by Prime Minister Menzies in 1961 to lay before both Houses of Parliament the text of treaties that would not otherwise be brought to the attention of Parliament.[44] This is usually done in each parliamentary session in batches, although treaties are sometimes tabled individually if they are of special importance. For those treaties that enter into force upon signature, the tabling and debating of such treaties in Parliament is of little practical importance since Australia's international obligations will already have been engaged as a result of the executive's prior action. For those treaties that enter into force by a step subsequent to signature, parliamentary debate may be more than a token gesture, provided the treaties are tabled sufficiently early. The Australian Government claims to make every effort to table such treaties before they are ratified in order to give Parliament the opportunity to express its views on the treaties.

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42 Senate, *Debates*, 23 May 1989, p 2525; extracted in (1992) 12 *Aust YBIL* 467–68.

43 Two further avenues for parliamentary scrutiny deserve mention. First, if implementation of a treaty requires financial outlay, and hence an appropriation of moneys from consolidated revenue, federal legislation will usually be required to make the appropriation. Secondly, at one time the executive used to seek the formal "approval" of Parliament for treaties of political significance. For example, the Charter of the United Nations Act 1945 (Cth) formally approves the Charter, reciting in the preamble that "it is desirable that the Charter of the United Nations should be approved by the Parliament". It has been noted that between 1919 and 1963 parliamentary approval has been sought prior to executive ratification in 55 cases: G Doeker, *The Treaty-Making Power in the Commonwealth of Australia* (1966), p 138 at 257–61.

44 Campbell, "Australian Treaty Practice and Procedure" in Ryan KW (ed), *International Law in Australia*, 2nd ed (1984), p 53 at 54.

It is clear, however, that many parliamentarians regard the tabling of treaties as an ineffective method of review. In a lively debate in the Senate in 1986, Senator Sanders remarked:

> Twelve treaties have been presented to parliament in this package—12 in one lump. Senators are given five minutes to deal with them all. This ludicrous situation was actually surpassed last session when over 50 treaties were presented to Parliament on one particular day to be discussed together. Treaties such as these are made by the Executive. They are then dumped in a bundle on the table here as a fait accompli. Yet some of them have profound implications...That all such agreements are beyond the reach of Parliament is a perversion of democracy...It is high time that this Senate demanded the right to control treaties which affect the lives of everyone in Australia. I hope, furthermore, that the next time we get a package of treaties we get them one by one so that we can study them and debate them as they deserve to be debated.[45]

The strengthening of parliamentary scrutiny of treaties has also been recommended by the Constitutional Commission. Reporting in 1988, a majority of the Commission recommended that there be a statutory requirement that all treaties be tabled in both Houses of Federal Parliament at the same time as their referral to a proposed Treaties Council.[46] It was thought that the adoption of this recommendation would increase the accountability of the executive to Parliament and assist the political processes in restraining abuse of the executive's treaty-making power. However, despite these suggestions, no changes have yet been made to existing practices.

(b) Implementing treaties in municipal law

In contrast to the position in some countries, Australia's international treaty obligations do not automatically have the force of law within the municipal legal system. The reason for this lies in the doctrine of the separation of legislative and executive power. If the executive were able to alter the law of the land merely by entering into a treaty with another country, it would usurp the authority of the legislature, which is vested with the responsibility of making laws for the "peace, order, and good government of the Commonwealth".[47] Consequently, although the federal executive may create valid legal obligations for Australia on an international plane by entering into a treaty, domestic law will not be affected by that action unless the treaty has been implemented by legislation. For example, in 1973 the High Court of Australia held that the termination of postal and telecommunication services to the Rhodesia Information Centre in Sydney was not justified by mandatory sanctions ordered

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45 Senate, *Debates,* 19 February 1986, p 626.

46 Constitutional Commission, *Final Report* (1988), vol 2, p 745. The Final Report followed the recommendations of an earlier Advisory Committee. See Constitutional Commission, Advisory Committee on the Distribution of Powers, *Report* (1987), pp 88–89.

47 Section 51 of the Constitution.

by the United Nations Security Council because the United Nations Charter had not been incorporated as the law of Australia.[48]

The implementation of a treaty by legislation provides elected parliamentary representatives with an opportunity to scrutinise the treaty. This is an important mechanism for review because it is the Australian Government's policy not to bind itself to a treaty unless existing state or federal law enables effect to be given to the treaty obligations.[49] As a practical matter, this means that Australia will not ratify or accede to a treaty until any necessary changes have been made to domestic law to ensure it conforms with the treaty. Not every treaty to which Australia becomes a party will require a change in municipal law, either because of the nature of the treaty obligations or because existing law conforms with those obligations. But where legislative changes are necessary, democratic principles are clearly at work in allowing parliamentary scrutiny of the implementing legislation before the treaty becomes binding on Australia. This principle was clearly expressed by the Minister for Foreign Affairs and Trade in answer to a question in the House of Representatives in 1988, when he said:

> The people of Australia, through their elected representatives, determine whether necessary legislation is enacted to give effect to the provision of particular treaties in Australia.[50]

The implementation of treaties in municipal law may be achieved through either state or federal legislation. Which of these alternatives is used depends both on the formal constitutional division of legislative power between the state and federal levels and on the principle of cooperative federalism, which creates practical divisions of responsibility between the two levels of government. The circumstances in which reliance is placed on state legislation are considered further in Section V below. In the present context it is necessary to make only brief observations on the role of the Federal Parliament in implementing treaties.

Section 51 of the Constitution gives the Federal Parliament power "to make laws for the peace, order, and good government of the Commonwealth with respect to...(xxix) External affairs". Prior to the 1980s, there was little judicial

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48 *Bradley v Commonwealth* (1973) 128 CLR 557. This rule is qualified only by the historic prerogative in respect of treaties of peace and war, and the cession of territory. The Charter of the United Nations Amendment Act 1993 (Cth) now allows the Governor-General to make regulations for giving effect to certain Security Council decisions.

49 Department of Foreign Affairs and Trade, n 14 above, pp 16–17. On rare occasions, as for example with ILO Convention (No 158) Concerning Termination of Employment at the Initiative of the Employer 1982, Australia has ratified international conventions in advance of the necessary implementing legislation. For further commentary see Creighton, "Industrial Regulation and Australia's International Obligations" in Ronfeldt P and McCallum R (eds), *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (1993), Australian Centre for Industrial Relations Research and Teaching, Monograph No 9, p 110.

50 House of Representatives, *Debates*, 1 December 1988, pp 3751–52; extracted in (1992) 12 *Aust YBIL* 467.

consideration of the ambit of this federal legislative power.[51] More recently, the federal executive has ratified international conventions covering subject matters that have traditionally been regarded as the province of the states, such as human rights and the environment. Attempts by the Federal Parliament to implement treaties in these areas have frequently inflamed the states, which have regarded the creeping expansion of federal legislation as undermining the balance of power between central and state governments.[52] In three key challenges to the power of the Federal Parliament to legislate in areas of traditional state concern, the High Court has upheld the relevant federal legislation as a valid exercise of the external affairs power. In *Koowarta v Bjelke-Petersen*[53] the High Court upheld the Racial Discrimination Act 1975 (Cth), implementing the International Convention on the Elimination of All Forms of Racial Discrimination 1966,[54] and in *Commonwealth v Tasmania* (the *Tasmanian Dam* case)[55] and *Richardson v Forestry Commission*[56] the Court upheld two federal Acts implementing the UNESCO Convention for the Protection of the World Cultural and Natural Heritage 1972.

A recurrent question in these cases has been whether the existence of an international treaty obligation is sufficient to enliven the Federal Parliament's power to make laws with respect to "external affairs" or whether the subject-matter of treaty must additionally be a matter of "international concern". The imposition of the additional requirement was thought necessary by some judges in order to prevent a gradual accretion of power by Federal Parliament, which might in time obliterate the traditional division of powers between the states and the centre.[57] However, a majority of the Court has held that there is no additional requirement that a treaty be of international concern. There must be real doubt whether the subject matter of an international treaty can fail to be of international concern, particularly when it is a multilateral standard-setting convention. Moreover, considerable deference should be accorded to the view

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51 Principal early cases were *R v Burgess: ex parte Henry* (1936) 55 CLR 608; *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54; and *New South Wales v Commonwealth* (1975) 135 CLR 337 (the *Seas and Submerged Lands* case). For a review of recent developments see Byrnes and Charlesworth, "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 *American Journal of International Law* 622; Byrnes, "The Implementation of Treaties in Australia after the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism" (1985) 8 *Boston College International and Comparative Law Review* 275; Crock, "Federalism and the External Affairs Power" (1983) 14 *Melbourne University Law Review* 238.

52 Chinkin, "The Conclusion and Implementation of Treaties in Federal and Unitary States" in Tay A (ed), *Australian Law and Legal Thinking Between the Decades* (1990), p 247.

53 (1982) 153 CLR 168.

54 660 UNTS 195.

55 (1983) 158 CLR 1.

56 (1988) 164 CLR 261.

57 *Tasmanian Dam* case (1983) 158 CLR 1 at 99–100 (Gibbs CJ), 197–98 (Wilson J), 302–03 (Dawson J).

of the executive in judging whether Australia's relations with foreign countries make it desirable to adhere to the convention in question.

The High Court's expansive interpretation of the power of the Federal Parliament to implement treaties does not mean, however, that this legislative power is without constraint. The legislation must conform with the treaty in that it must be appropriate for the achievement of the objectives of the convention. And the international obligation must be incurred *bona fide* and not as a colourable attempt to enhance the power of Federal Parliament over areas otherwise beyond its legislative competence. These limitations aside, the upshot of the High Court's interpretation of federal legislative power over external affairs is that the Federal Parliament does not lack power to implement treaties to which Australia is or intends to become a party, whatever their subject matter.

V. The State Legislatures

Notwithstanding the broad powers conferred on the federal legislature by the external affairs power, the state and territorial legislatures also play a significant role in the implementation of treaties in Australia. There are two reasons for this—one legal, the other political. The legal reason is that, with the exception of a few powers vested exclusively in the Federal Parliament, the state and Federal parliaments have concurrent legislative power.[58] If both levels of government enact laws in relation to a particular matter, they may be inconsistent, in which case the federal law prevails.[59] But in the absence of inconsistency state and federal laws have concurrent operation. A state law on a subject matter covered by a treaty to which Australia is party, such as environmental protection, may thus coexist with federal law on the same subject matter.

The political reason for the continued significance of state legislatures is that, although the Federal Parliament has constitutional power to implement treaties whatever their subject matter, in practice it chooses not to do so in relation to matters that fall within the traditional responsibility of the states. In these fields the Federal Government may rely on state legislation to enact such laws as are necessary to fulfil Australia's treaty obligations. This attitude of cooperation is reflected in the *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1992), which provide that:

> The Commonwealth will consider relying on State legislation where the treaty affects an area of particular concern to the States and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However, the Commonwealth does not accept that it is appropriate

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58 The Constitution defines federal legislative powers by reference to enumerated subject matters. The states, on the other hand, enjoy the plenary legislative powers formerly possessed by the Australian colonies, and preserved for the states by s 107 of the Constitution. Accordingly, with the exception of the few powers that the Constitution vests exclusively in the Federal Parliament, state and federal legislative powers are concurrent.

59 Section 109 of the Constitution.

> for the Commonwealth to commit itself in a general way not to legislate in areas that are constitutionally subject to Commonwealth power.

An interesting example of the constitutional and political significance of the states in implementing treaties may be found in the history of legislation implementing Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination 1966.[60] In 1975 the Federal Parliament enacted the Racial Discrimination Act 1975 (Cth) to give effect to the Convention. In 1982 the Act was upheld by the High Court as a valid exercise of the federal legislative power over external affairs.[61] In the following year, the question arose in *Viskauskas v Niland*[62] whether New South Wales legislation prohibiting discrimination on the ground of race[63] was consistent with the federal legislation, such that the two Acts could operate concurrently. The High Court held that the federal Act was intended to "cover the field" of racial discrimination in fulfilment of Australia's obligations under the Convention, and that it accordingly left no room for the operation of the state Act.

It soon became apparent, however, that the Federal Parliament had not intended to exclude the operation of state anti-discrimination law. Within a week of the High Court's judgment an amendment was introduced into the House of Representatives to reduce the coverage of the federal Act.[64] In the Second Reading Speech, the Minister for Trade specifically noted that federal measures should not impinge upon the constructive developments that have taken place in some states in the field of anti-discrimination law.[65] Accordingly, an additional section was inserted in the federal Racial Discrimination Act 1975, which provided that:

> 6A(1) This Act is not intended, and shall be deemed never to have intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

The effect of this provision was considered by the High Court in *University of Wollongong v Metwally*,[66] where it was held that the provision did not cure the inconsistency between the federal and state anti-discrimination laws prior to the commencement of s 6A of the federal Act. However, the prospective operation of s 6A was not expressly considered by the Court and it has generally been assumed that the federal Act and the New South Wales anti-discrimination legislation are now capable of standing side by side as cooperative

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60 660 UNTS 195; (1975) Aust Treaty Series No 40. The Convention entered into force for Australia on 30 October 1975.

61 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

62 (1983) 153 CLR 280.

63 Anti-Discrimination Act 1977 (NSW). The Act also proscribes discrimination on other grounds, but only the provisions relating to racial discrimination were impugned in the case.

64 The amendment was passed as the Racial Discrimination Amendment Act 1983 (Cth).

65 House of Representatives, *Debates*, 25 May 1983, pp 923–24.

66 (1984) 158 CLR 447.

implementation of Australia's obligations under the Convention.[67] Today most states have anti-discrimination legislation of the kind considered in *Viskauskas v Niland*, and the coexistence of federal and state legislation implementing international conventions has become commonplace in the field of human rights.[68]

The reliance on state legislation to implement Australia's treaty obligations was for many years reflected in Australia's practice of seeking the inclusion of "federal clauses" in international treaties.[69] One federal clause commonly advocated by Australia limited Australia's international obligations whenever the provisions of the relevant convention fell within the legislative jurisdiction of the constituent states of the Federation. In such a case, the Federal Government was obliged only to bring the convention provisions to the notice of the relevant state authorities with a recommendation that they be adopted. The pursuit of federal clauses in international negotiations was strongly advocated in 1976 by the newly elected conservative Federal Government. Pursuing a policy of "cooperative federalism", the federal *Guidelines on Treaty Consultation* (1977) provided that "federal clauses will be sought to be included in treaties in appropriate cases".[70] State governments strongly supported this policy because it was perceived as a commitment on the part of the Federal Government to rely on state legislation in areas of traditional state concern. With a change of Federal Government in 1983, the policy of seeking the inclusion of federal clauses was abandoned and this remains the position to date. The current *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1992) state that "the Commonwealth does not favour the inclusion of federal clauses in treaties and does not intend to instruct Australian delegations to seek such inclusion".

There were several reasons for this change in policy. First, the High Court's decision in the *Tasmanian Dam* case[71] in 1983 effectively deprived the Federal Government of the constitutional basis for pressing for the inclusion of federal clauses in international treaty negotiations. There was no longer any uncertainty about the competence of the Federal Parliament to implement treaty obligations, and any claim that provisions of a convention fell solely within the legislative jurisdiction of constituent states was thus disingenuous. Secondly, Australia met

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67 For a contrary view, see McCarry, "Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws" (1989) 63 *Australian Law Journal* 327.

68 For example, the preamble to the Queensland Anti-Discrimination Act 1991 states that the Queensland Parliament supports the Commonwealth's ratification of international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination. After acknowledging the existence of federal legislation in fulfilment of Australia's obligations under these instruments, the preamble stipulates that state legislation is necessary to extend the federal legislation, to apply it consistently throughout the state, and to ensure that determinations of unlawful conduct are enforceable in courts of law.

69 Burmester, "Federal Clauses: An Australian Perspective" (1985) 34 *International and Comparative Law Quarterly* 522.

70 Ibid, at 530.

71 (1983) 158 CLR 1.

with limited success in pursuing its claims for federal clauses during the period in which that was government policy (1976–83). The international community disliked such clauses because they detracted from the mutuality of treaty obligations; countries with a federal system of government were able to plead the deficiencies of their internal constitutional arrangements to lessen their obligations with other countries. Moreover, as many treaty negotiations demonstrated, Australia could not always rely on the support of other federations because each sought a federal clause in terms appropriate to its own domestic position. Thirdly, the negotiation of such clauses consumed a significant amount of time and effort and diverted resources from the pursuit of more substantive issues in treaty negotiation.[72]

Notwithstanding the disfavour with which the Federal Government currently regards federal clauses, a practice has developed in Australia of making a unilateral "federal statement" on signing or ratifying certain treaties. The statement is generally in the following terms:

> Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between its central, State and territory authorities. The implementation of the treaty throughout Australia will be effected by the Federal, State and Territory governments having regard to their respective constitutional powers and arrangements concerning their exercise.[73]

Such a statement is likely to be made where it is intended that the states will play a role in the legislative implementation of the treaty. One example of the use of the federal statement is Australia's ratification of the Convention on the Elimination of Discrimination Against Women,[74] which entered into force for Australia on 27 August 1983.

While there is no doubt that reliance on state legislation for the implementation of some of Australia's treaty obligations has been important in maintaining harmonious relations between state and federal governments, there is equally little doubt that it has given rise to considerable difficulties. First, cooperative legislation has caused delays in assuming or fulfilling international treaty obligations. It has been said, for example, that lack of agreement among states was the principal reason for the long delay in Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights,[75] which Australia acceded to in 1991, eleven years after it ratified the Covenant.[76]

Secondly, reliance on state legislation has often resulted in lack of uniformity in Australian laws implementing international conventions. For

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72 Burmester, n 69 above, at 536–37; *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1992).

73 *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1992).

74 (1983) Aust Treaty Series No 9, p 11.

75 999 UNTS 302. The Optional Protocol enables any individual who claims to be a victim of violations of any of the rights set forth in the Covenant to bring a complaint before the Human Rights Committee.

76 Whitlam, "Australia and the UN Commission on Human Rights" (1991) 45 *Australian Journal of International Affairs* 51. See also, House of Representatives, *Debates,* 18 February 1988, p 369.

example, state anti-discrimination laws, which partially implement several international human rights instruments, differ widely in their scope, complaint procedures and remedies.

Thirdly, the coordination of state and federal legislation has thrown up substantial legal problems, which the Commonwealth Solicitor-General has described as the "steps of a dance in the mine-field of constitutional law".[77] Amongst these difficulties are the issues of whether the external affairs power permits the Commonwealth to implement a treaty only partially and, if so, whether such legislation can validly leave room for the operation of state laws that conflict with the treaty obligations.

Finally, there is the danger that a state may put Australia in breach of its international obligations by legislating inconsistently with the relevant treaty. Under international law it is well accepted that a country may not invoke the provisions of its internal law as justification for its failure to perform a treaty,[78] and the actions of the state legislature would be attributable to Australia itself.[79] Although this problem may be righted by terminating the treaty or by enacting overriding federal legislation, the potential need for such executive or legislative action demonstrates the difficulties of cooperative federalism in implementing Australia's international treaty obligations.

VI. The Role of the Courts

In comparison with the role played by the executives and legislatures of the state and federal governments, the role of Australian courts in regulating or reviewing the conduct of Australia's foreign affairs is limited. The modest role of the judiciary arises principally from an attitude of self-restraint by which courts frequently defer to the decisions of other branches of government in the field of foreign affairs. In some respects this deferential attitude is checked by the function of the courts as interpreters of the Australian Constitution, which includes interpretation of the powers of the executive and legislative branches of Federal Government.

(a) Restrictive judicial doctrines

It has frequently been observed that matters arising out of the conduct of Australia's international relations are non-justiciable.[80] Thus, Australian courts will generally not review the judgment of the executive in exercising the treaty-making power because this would undermine the executive's effective control of

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77 Griffith, "Dancing Through the Minefield: Can Co-operative Federalism Work?" in Spender L (ed), *Human Rights: The Australian Debate* (1987), p 98 at 99. See also McCarry, n 67 above.

78 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, article 27.

79 International Law Commission, Draft Articles on State Responsibility, Part I, Draft article 6.

80 *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218 at 253. See also Cane, "Prerogative Acts, Acts of State and Justiciability" (1980) 29 *International and Comparative Law Quarterly* 680.

foreign policy.[81] This approach is similar to that taken by courts in the United Kingdom, where Lord Denning MR once remarked, in considering the executive's pending decision to become a party to the Treaty of Rome:[82]

> The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts.[83]

There are several methods by which Australian courts may similarly decline to review the actions of the executive branch of government in matters of foreign affairs. Amongst these are the political question doctrine, restrictions on a person's standing to sue, and deference to executive certificates.

(i) Political question doctrine

Under the Australian Constitution, courts exercising federal jurisdiction may only adjudicate "matters", as that term is understood in its constitutional setting.[84] Like the analogous term "cases and controversies" in the United States Constitution,[85] the notion of a "matter" has excluded the adjudication of overtly political questions that might take the court beyond its true function and into the province of other branches of government.[86] Although the political question doctrine has a wider ambit than that currently being considered, its most fertile application has been to the conduct of foreign relations, and it is through this means that Australian courts have occasionally expressed the view that executive action in respect of foreign relations lies beyond judicial review.

To give one example, in *Re Limbo*[87] the applicant sought a declaration from the High Court that certain federal Ministers were acting in breach of international human rights standards and in breach of the Australian Constitution in failing to impose an embargo on the sale of arms to "repressive" foreign governments. In the course of dismissing an allied claim, Brennan J stated:

> It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform

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81 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 229 (Mason J).

82 298 UNTS 3. This treaty established the European Economic Community.

83 *Blackburn v Attorney-General* [1971] 1 WLR 1037, at 1040.

84 The term is found in ss 75–77 of the Constitution.

85 Article III, s 2(1) of the United States Constitution.

86 *Gerhardy v Brown* (1985) 159 CLR 70 at 138–39 (Brennan J); Castles, "Justiciability: Political Questions" in Stein L (ed), *Locus Standi* (1979), p 202; Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee HP and Winterton G, *Australian Constitutional Perspectives* (1992), p 180. For a critique of the United States political question doctrine, see Henkin, "Is There a 'Political Question' Doctrine?" (1976) 85 *Yale Law Journal* 597; Henkin L, *Constitutionalism, Democracy, and Foreign Affairs* (1990), pp 79–91.

87 (1989) 64 ALJR 241.

> another...The proposed plaintiffs seem to have mistaken the branch of government to which their plea must be directed. However disappointing it may be to have their pleas directed to the political branches of government but rejected, their pleas are political pleas.[88]

(ii) Standing to sue

A second mechanism for limiting review of foreign affairs decisions stems from the common law rules relating to standing to sue.[89] The courts have been reluctant to allow a person to sue unless he or she has a sufficient interest in the outcome of the litigation to ensure that that person is not merely intermeddling. As Gibbs CJ stated in *Onus v Alcoa of Australia Ltd*,[90] the law relating to standing must ensure that legal processes are not abused by busybodies and cranks, and that other citizens, who are unrelated to the plaintiff and whose activities do not affect the plaintiff in any relevant way, are not put to the cost and inconvenience of defending the legality of their actions. Courts have generally distinguished between the requirement of standing and that of justiciability. Standing draws attention to the relationship between the plaintiff and the proceedings whereas justiciability is concerned with the issues raised in the proceedings themselves.[91] In some cases both screening devices may be available to the courts, although only one may be utilised. Thus it was that in *Re Limbo*[92] Brennan J was prepared to assume that the plaintiff had sufficient standing to sue in relation to the alleged breach of international human rights standards, but held that the matter was not justiciable because it was a political question.

Under the law relating to standing, an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to prevent the violation of a public right or to enforce the performance of a public duty.[93] A mere intellectual or emotional concern does not suffice to give a person standing to sue; rather, the person must have a "special interest in the subject matter of the action".[94] The requirement of a special interest imposes a flexible standard whose fulfilment will clearly vary from case to case.

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88 Ibid, at 242, 243.

89 See generally Stein, n 86 above; Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985); Burmester, "Locus Standi in Constitutional Litigation" in Lee and Winterton, n 86 above, p 148.

90 (1981) 149 CLR 27 at 35.

91 Australian Law Reform Commission, n 89 above, p 15.

92 (1989) 64 ALJR 241.

93 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Davis v Commonwealth* (1986) 61 ALJR 32.

94 In 1985 the Australian Law Reform Commission recommended that the law relating to standing be liberalised, and that any person should have standing to initiate public interest litigation unless a court finds that the person instituting proceedings is "merely meddling". See Australian Law Reform Commission, n 89 above, p xxi.

These rules have special bearing on the prospects for judicial review of foreign affairs decisions. In the absence of implementing legislation, dealings between Australia and foreign countries will not normally create rights for or impose obligations on individuals.[95] Accordingly, it may be difficult for a plaintiff to demonstrate the special interest that makes his or her claim rise above those of other ordinary members of the public. This was demonstrated in *Ingram v Commonwealth*.[96] In that case the plaintiff sought a declaration from the High Court to the effect that the Commonwealth of Australia and the Minister for Foreign Affairs were in breach of international law in supporting the SALT II Treaty[97] between the USA and the former USSR. The basis of the claim was the plaintiff's belief that the SALT II Treaty enhanced the danger of nuclear war and conflicted with the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons,[98] to which Australia is a party. In striking out the claim, Gibbs ACJ acknowledged the plaintiff's deep concern for the issues in question but denied that they amounted to a special interest because "an interest is not special if it is one which is shared with the public at large."[99] Accordingly, the alleged breach of international law was not a matter justiciable in Australian courts at the suit of a private citizen who could show neither a breach of his private rights nor a special interest in vindicating a public right.

(iii) Executive certification

Closely related to the political question doctrine considered above is the deference paid by the judiciary to certificates issued by the federal executive indicating its attitude to certain matters relating to Australia's foreign affairs. There are many matters about which the executive may issue certificates, including the existence or recognition of a foreign State, the recognition of a person as a diplomatic agent or consular officer, the existence of a state of war, and the extent of territorial claims.

At common law executive certificates are generally regarded as conclusive of the facts stated in them.[100] The expression "conclusive" is used not only in the sense that evidence is not admissible to contradict the certificates but also in the sense that the certificates cannot be questioned in proceedings for judicial

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95 *Ingram v Commonwealth* (1980) 54 ALJR 395; *Simsek v Macphee* (1982) 148 CLR 636; *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270 at 274 (Mason J).

96 (1980) 54 ALJR 395.

97 Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (1979) 18 ILM 1138, signed 18 June 1979.

98 729 UNTS 161; (1973) Aust Treaty Series No 3. The Treaty entered into force for Australia on 23 January 1973.

99 (1980) 54 ALJR 395 at 397.

100 Lyons, "The Conclusiveness of the Foreign Office Certificate" (1946) 23 *British Year Book of International Law* 240; Edeson, "Conclusive Executive Certificates in Australian Law" (1981) 7 *Aust YBIL* 1; Warbrick, "Executive Certificates in Foreign Affairs: Prospects for Review and Control" (1986) 35 *International and Comparative Law Quarterly* 138.

review.[101] It has not always been the case that judicial deference is paid to executive certificates and for some time in the 19th century the juridical nature of the executive certificate remained unclear. However, in a seminal judgment in 1924, the House of Lords held that a certificate or statement by the Crown on the recognition of a foreign State was conclusive of that issue.[102] Later cases extended the conclusiveness of executive certification to other matters such as the status of a diplomat,[103] and the existence of a state of war.[104]

Despite the broad consensus about the conclusiveness of executive certificates, there has been less agreement as to the juridical basis of judicial deference to executive certificates. One answer to this question is that the courts and the executive should not speak with different voices on certain matters such as the sovereign status of a foreign State.[105] A more convincing answer is that the subject matter of executive certificates generally relates to the conduct of foreign relations and thus falls within the scope of the Crown's prerogative powers over foreign affairs.[106] This rationale explains why, at common law, executive certificates are conclusive of the facts stated in them rather than merely strong evidence of those matters.

The importance of executive certification in the present context is that it clearly restricts the role of the courts in reviewing the conduct of Australia's foreign affairs. However, the importance of this issue is probably in decline. The Federal Parliament has increasingly given legislative foundation to executive certificates in terms that have undermined the conclusiveness of the certificates. For example, federal legislation provides that executive certificates may be issued indicating the status of foreign diplomatic agents and consular officers, but such certificates are only evidence of the facts stated in the certificate and are not conclusive.[107]

(b) Judicial review of constitutional questions

Notwithstanding the above mechanisms limiting the role of the courts in the foreign affairs arena, the Australian Constitution does preserve some room for judicial review of the conduct of foreign affairs. As the United States Supreme Court observed in *Baker v Carr*,[108] "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance". In

101 *Re Ditford; ex parte Deputy Commissioner of Taxation* (NSW) (1988) 83 ALR 265 at 285 (Gummow J).
102 *Duff Development Co v Kelantan Government* [1924] AC 797.
103 *Engelke v Musmann* [1928] AC 433.
104 *R v Bottrill; ex parte Kuechenmeister* [1947] KB 41.
105 *The Arantzazu Mendi* [1939] AC 256 at 264 (Lord Atkin).
106 Edeson, n 100 above at 16.
107 Diplomatic Privileges and Immunities Act 1967 (Cth), s 14; Consular Privileges and Immunities Act 1972 (Cth), s 12. See also International Organisations (Privileges and Immunities) Act 1963 (Cth), s 11; Crimes (Internationally Protected Persons) Act 1976 (Cth), s 14, and *Duff v R* (1979) 39 FLR 315 at 356. In contrast to these provisions, some recent federal legislation retains the common law practice of exclusive executive certification: see for example, Foreign State Immunities Act 1985 (Cth), s 40.
108 369 US 186 (1962), at 211.

particular, the High Court of Australia has been vigilant in maintaining its constitutional role as the final arbiter of the scope and meaning of the Australian Constitution.[109] Accordingly, courts may be willing to adjudicate matters that touch Australia's foreign relations where those matters involve the interpretation of the Constitution. Two examples suffice to illustrate this.

First, Australian courts may adjudicate the question of whether the actions of government in its relations with other countries fall within the scope of the federal executive power conferred by s 61 of the Constitution.[110] An allegation of lack of constitutional power is clearly one for the court to determine, although a question that goes merely to the propriety of the executive's action within the scope of its constitutional powers over foreign relations would not be justiciable. These issues were recently ventilated in *Horta v Commonwealth.*[111] In that case certain Australian residents from East Timor argued that the Timor Gap Treaty[112] entered into between Australia and Indonesia was not within the executive power of the Commonwealth because the treaty was illegal under international law. The basis of the claim was that, in concluding a treaty with Indonesia relating to the use of maritime areas adjacent to the coast of the disputed territory of East Timor, Australia had violated the right of the East Timorese people to self-determination and permanent sovereignty over their natural resources. Similar issues are currently under consideration in an action brought by Portugal against Australia in the International Court of Justice, although the domestic case raised constitutional issues not pertinent to the international action. In the result, the High Court went to some lengths to avoid having to decide whether the plaintiffs' allegations were justiciable, and rejected the claim on other grounds.

Secondly, Australian courts may review the constitutional validity of federal legislation that purports to implement international treaties in municipal law. In so doing, the courts are once again acting in their role as interpreters of the Constitution in passing upon the meaning of federal legislative power over external affairs conferred by s 51(xxix) of the Constitution.[113] In Section IV(b)

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109 The High Court has original (but not exclusive) jurisdiction in any matter arising under the Constitution or involving its interpretation: see s 76(i) of the Constitution and s 30 of the Judiciary Act 1903 (Cth). Moreover, any such matter pending in another court may be removed into the High Court for determination: s 40 of the Judiciary Act 1903 (Cth).

110 See, for example, *Barton v Commonwealth* (1974) 131 CLR 477; *Re Ditford; ex parte Deputy Commissioner of Taxation* (NSW) (1988) 83 ALR 265 at 285–86 (Gummow J).

111 (1994) 123 ALR 1.

112 Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, (1991) Aust Treaty Series No 9. The treaty entered into force on 9 January 1991.

113 Similar issues may arise in the interpretation of other sections of the Constitution. For example, in *Bonser v La Macchia* (1969) 122 CLR 177 at 193 (Barwick CJ), 207 (Kitto J), 217 (Windeyer J), several judges stated emphatically that it was for the High Court, and not the executive, to determine the extent of "Australian

we examined the role of the High Court in giving a broad interpretation to this power in a number of key decisions in the 1980s. Those cases demonstrate the important role of the courts in reviewing the domestic implementation of Australia's international obligations, even if the courts' power to review foreign affairs decisions themselves is far more circumscribed.

VII. Conclusion

The conduct and review of Australia's foreign affairs involves a complex matrix of interaction between all branches of government at both the state and federal levels. Within this matrix the federal executive has the pre-eminent role, since its authority extends to making treaties, declaring war and peace, annexing territory, appointing representatives of Australia, and conducting other aspects of Australia's foreign affairs. The state executives have only a consultative role in relation to the conclusion of treaties whose subject matter falls within an area of traditional state responsibility, although their occasional posturing on matters pertaining to Australia's international relations may suggest a desire for greater influence.

The legislature has a more circumscribed role in Australia's foreign affairs process because no formal legislative approval is required before Australia expresses its consent to be bound by a treaty. The principal function of the legislature is to ensure that Australian law conforms with the obligations imposed on Australia by treaties to which the federal executive has expressed or intends to express Australia's consent to be bound. Implementing legislation is most frequently enacted by the Federal Parliament pursuant to its power to make laws with respect to external affairs. However, in accordance with principles of cooperative federalism, state parliaments are sometimes called on to enact laws to implement treaties falling within areas of their traditional legislative responsibility. A delicate balance must be struck between the need to ensure that Australia is not placed in breach of its treaty obligations as a result of aberrant state laws, and the need to preserve an acceptable division of power between the federal and state legislatures.

Finally, the role of Australian courts in reviewing foreign affairs decisions is more limited still. In accordance with their common law heritage, Australian courts show considerable deference to decisions made by the executive in the conduct of the country's foreign relations. Such self-imposed limitations are evident in the courts' refusal to adjudicate upon foreign affairs questions that are regarded as political, to grant standing to individuals seeking to impugn foreign affairs decisions, and to inquire into certain facts certified by the executive as true. Yet, notwithstanding this attitude of deference, the High Court has maintained its position as the final arbiter of the meaning of the Constitution, and in this role it has played a valued part in reviewing the constitutional validity of executive and legislative action pertaining to Australia's foreign affairs.

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waters" for the purpose of interpreting federal legislative power over "fisheries in Australian waters beyond territorial limits" within s 51(x) of the Constitution.

In examining the role played by the various branches of government, it is clear that a continuing difficulty in the conduct of Australia's foreign affairs is the need to balance the national interest in pursuing a robust foreign policy with the political exigencies of the federal system. Although the Federal Government faces few formal impediments to the formulation and implementation of its desired foreign policy, the political need to involve the states in the foreign policy process when the subject matter of the policy involves state interests is potentially problematic. At the time of writing, the Tasmanian Government appeared set to maintain its intransigent attitude toward the Federal Government by refusing to bring the state's criminal laws into line with the international human rights standards established by the United Nations Human Rights Committee in the *Toonen* case.[114] It is a telling reminder that Sir Kenneth Wheare's observation that "federalism and a spirited foreign policy go ill together"[115] contains more than a modicum of truth in the Australian federal system.

114 Communication No 488/1992, decided 31 March 1994. However, the Commonwealth has now legislated to implement Australia's obligations under article 17 of the International Covenant on Civil and Political Rights. See Human Rights (Sexual Conduct) Act 1994 (Cth).

115 See n 1 above.