Chapter 4

Trick or Treaty? Commonwealth Power to Make and Implement Treaties

Chapter 4

Treaties and the Commonwealth Constitution

Constitutional powers to enter into and implement treaties

4.1 The Constitution deals with two different powers in relation to treaties. First, there is the power to enter into treaties, which is an executive power. Secondly, there is the power to implement treaties, which is a legislative power.

4.2 Historically, the power to enter into treaties was exercised by sovereigns. Treaties were entered into by English monarchs well before Parliament existed.[1] The power was characterised as one of the royal prerogatives. At the time of Australian federation the power was still exercised by the Queen of England, but on the advice of the Imperial Government. Gradually, as Australia became independent and gained control over its foreign policy,[2] this royal prerogative became subsumed under the general executive power of the Commonwealth Government in section 61 of the Constitution.[3]

4.3 Section 61 of the Constitution provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

4.4 The section does not specifically refer to treaties. This continues to be the source of some confusion, as the power to enter into treaties is often confused with the other constitutional power to legislate to implement treaties under s. 51(xxix) of the Constitution.[4]

4.5 Section 51(xxix) of the Constitution confers on the Commonwealth Parliament the power to legislate with respect to 'external affairs'. This has been interpreted by the High Court to me the Commonwealth Parliament may legislate, under s. 51(xxix) of the Constitution, to imple

domestic law a treaty which has been entered into by the Executive pursuant to its power under s. 61 of the Constitution. [5]

The evolution of the executive power to enter into treaties

4.6 While it is well settled by the High Court that the power to enter into treaties is an Executive power under s. 61 of the Constitution, it is difficult to determine the exact date at which this power transferred from the Imperial Government to the Commonwealth Government. The power, in fact, has evolved as Australia has moved towards nationhood.

4.7 At federation, in 1901, the power to enter into treaties was possessed by the Imperial Crown because the United Kingdom Government remained responsible for the conduct of Australia's foreign relations.

4.8 Even before federation, however, there was some consultation between the Imperial Government and the colonies on the subject of treaties. From the colonial perspective, the most important treaties concerned international trade and shipping. The colonies which had been granted responsible government[6] argued in the 1870s that they should be consulted before the Imperial Government entered into a commercial treaty which bound them, and that they should have powers of their own to negotiate commercial treaties.[7]

4.9 While the Imperial Government did not, at that time, grant the colonies power to enter into commercial treaties in their own right, the Secretary of State for Foreign Affairs did agree, in 1877, that commercial treaties entered into by the Imperial Government should not automatically apply to those colonies which had been granted responsible government. Instead, it was agreed that commercial treaties would thereafter contain a 'Colonial clause' which would give the responsible government colonies the option of adhering[8] to a commercial treaty within a certain period after the Imperial Government became a party to it, if they so chose.[9] This did not mean that the colonies had the power to enter into commercial treaties, as this could only be done by the Imperial Government. They did, however, have the relatively limited power not to be bound by commercial treaties to which Britain became a party.

4.10 The colonies were not given the same powers in relation to political treaties (such as treaties of alliance or extradition). This was the case even after federation. In 1912, one of the authoritative commentators on colonial affairs observed:

> In political matters proper there has been no attempt to obtain separate powers of adherence or withdrawal [in relation to treaties] for the Dominions, and it is clear that such an attempt would be meaningless. It is impossible as long as the Empire retains any unity, for one part to be treated in political questions differently from another part, and the separate adherence to and withdrawal from treaties is only possible as in commercial treaties, where a differentiation of treatment could be based upon a differentiation of locality.[10]

4.11 The limited powers granted to the colonies to adhere to or not to adhere to commercial treaties, prior to federation, resulted in difficult problems for the Commonwealth of Australia federation. Some of the States had adhered to commercial treaties when they were still colonies,

prior to federation, while others had not. For example, it was not clear whether a treaty with Japan that Queensland had adhered to, would be binding on the whole of the Commonwealth of Australia. The Attorney-General, Alfred Deakin, claimed that it was not binding on the Commonwealth, because it had been made by Queensland in its capacity as a separate colony, and it no longer existed in that capacity.[11] The British Foreign Office rejected this view, on the grounds that both before and after federation, treaties were made in the name of the monarch of Great Britain, and this had not changed. The Secretary of State for Foreign Affairs stated:

> A Treaty binding upon an Australian Colony, prior to Federation, was not from an international point of view between the particular colony and the particular foreign country concerned, but between the British Government and that power. The obligation of the Sovereign was in respect of a certain portion of his Dominions, viz. a certain Australian Colony, and that obligation was not based upon the particular character of the government in force in that Colony, nor can it be lessened by the entry of the Colony into a Federation, which is also part of his Dominions.[12]

4.12 During World War I, the significant contributions of the Dominions to the war effort resulted in them being invited to participate in the Imperial War Cabinet and the Imperial War Conference. The Imperial War Conference passed a resolution in 1917 that a subsequent Imperial Conference be convened which would consider the 'readjustment of the constitutional relations of the component parts of the Empire' and base any readjustment on the recognition of the Dominions as 'autonomous nations of an Imperial Commonwealth' with the right to 'an adequate voice in foreign policy and in foreign relations'.[13]

4.13 After the First World War, Australia was separately represented at the Peace Conference, and the Dominions began to exercise greater powers in the area of external affairs. Australia became an independent member of the League of Nations and the International Labour Organisation in 1919.[14] In both these fora, the Dominions were given separate votes and their representatives were accredited by, and responsible to, their own Dominion Governments, rather than the Imperial Government. They did not always vote in the same manner as Great Britain.[15] This admission to the League and the International Labour Organisation involved recognition by other countries that Australia was now a sovereign nation with the necessary 'international personality' to enter into international relations.[16]

4.14 At the Imperial Conference in 1923, it was recognised that the different Governments of the Empire had the right to make treaties with foreign powers, subject to a duty to consider any potential effect on other parts of the Empire, and a duty to inform other Empire Governments of their intentions. Bilateral treaties which imposed obligations on one part of the Empire only, could be signed by a representative of that part of the Empire. Treaties negotiated at international conferences were to be signed by representatives on behalf of all the governments of the Empire represented at the Conference.[17]

4.15 The Imperial Conference resolution of 1923 made the following statement about ratification of treaties:

(a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part;

(b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the governments of those parts of the empire concerned. It is for each government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government.[18]

4.16 At the Imperial Conference of 1926, these guidelines for entering into treaties were revised and reinforced in what is known as the *Balfour Declaration.*[19]

4.17 In his 1929 work, *Australia and the British Commonwealth*, the Attorney-General, John Latham, concluded that 'full powers of dealing with the subject of treaty making were conferred on the Commonwealth Parliament by the Constitution', and that after the *Engineer's* case, 'there can be little room for doubt... that under these powers the Commonwealth parliament could legislate in such a manner as to vary rights which exist under State law'.[20]

4.18 The right of the Commonwealth Government to enter into political treaties with foreign countries was also acknowledged by the Royal Commission on the Australian Constitution in 1929. The Commission noted, however, that the 'government of the Commonwealth has not as yet exercised this right'.[21]

4.19 The Royal Commission also noted that it had received evidence from Mr E.L. Piesse that 'the means adopted to keep Parliament and the electors informed on foreign affairs are inadequate, and that the establishment of a Parliamentary Committee on Foreign Relations, as in France and the United States was highly desirable'.[22]

4.20 The final step in Australia's progress towards controlling its own foreign affairs was the enactment and acceptance of the *Statute of Westminster 1931* (UK). The Statute declared that the Dominions (which included the Commonwealth of Australia) had full power to make laws having extra-territorial operation. It also released the Commonwealth (but not the States) from the application of the *Colonial Laws Validity Act 1865* (UK). This Act had previously invalidated laws passed by the Commonwealth Parliament which conflicted with certain British laws which applied to Australia.[23]

4.21 The *Statute of Westminster* was adopted by Australia in 1942 by the *Statute of Westminster Adoption Act 1942* (Cth), and given retrospective effect to 3 September 1939.

4.22 The development of Australia's status as an independent nation has, accordingly, resulted in the power to enter into treaties being transferred to Australia, and becoming exercisable under the Executive power conferred by section 61 of the Constitution. This power may be exercised by the Governor-General on the advice of his or her federal Ministers.[24]

4.23 Professor Winterton summarised the situation as follows:

> Thus, in 1901 'the executive power of the Commonwealth' included all the prerogatives appropriate to the Commonwealth's sphere of activity, and was 'exercisable by the Governor-General'. But, as has been seen, there was at that date a reluctance, if not refusal, to accept that the Commonwealth was completely 'independent' in foreign affairs and defence matters; it was thought that the British government retained some of the prerogatives relevant to these, such as the power to execute treaties or declare war....
>
> However, once it was accepted after 1926 that any powers exercisable by the King were, like those of the Governor-General, exercisable only on Australian advice, all executive power exercisable in respect of the Commonwealth was controlled by the Australian Cabinet... Now that all the executive power exercisable in respect of the Commonwealth was controlled by the Australian Cabinet, the original reason for denying s.61 its literal or 'correct' interpretation vanished....[25]

4.24 Other commentators have pointed to the general principle that in allocating the royal prerogatives to the Commonwealth and the States, this should be done to reflect the distribution of legislative powers in the Constitution. Hence, as the legislative power in relation to external affairs is granted to the Commonwealth under the Constitution, then the corresponding royal prerogative to enter into treaties must also be conferred on the Commonwealth Executive, rather than the States.[26]

The Framers' intention concerning treaties

4.25 The 1891 draft of the Constitution contained two main provisions relating to treaties. The first was covering clause 7[27] of the draft Bill, which provided:

The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and *all treaties* made by the Commonwealth shall, according to their tenor, be binding on the courts, judges, and people of every state and of every part of the Commonwealth anything in the laws of any state to the contrary notwithstanding.[28] [Emphasis added]

4.26 The second provision was contained in sub-clause 52(xxvi),[29] and granted the Commonwealth Parliament power to make laws with respect to 'External affairs *and treaties'*.

The Constitutional Convention Debates

4.27 In the 1890s, treaties did not cover as wide a number of subjects as they do today. Treaties primarily dealt with matters of trade and commerce, shipping, political alliances, the law of war, and extradition. On the whole, they did not cover the areas of human rights, the environment and industrial relations, which have a greater impact on domestic law. Accordingly, the subject of treaties was not as controversial in the 1890s. The consequence of this was that the references to treaties in these two main provisions in the draft Constitution, were not considered sufficiently controversial to be debated at the Sydney Convention of 1891 or the Adelaide Convention o

4.28 However, a concern was later raised that these provisions might allow the Commonwealth to enter into treaties on its own behalf, rather than leave this power exclusively to the Imperial Government.[30] At the next session of the Constitutional Convention in Sydney in 1897, it was proposed in a submission from the Legislative Council of New South Wales, that the words 'and treaties made by the Commonwealth' be omitted from covering clause 7.[31] This amendment was strongly supported by George Reid, who argued that these words would be more in place in the United States Constitution, than in the Constitution of a colony within an Empire.[32]

4.29 This amendment was adopted. An extract from the debate is at ***Figure 1.***

Figure 1*: Extract from the Official Record of the Debates of the Australasian Federal Convention*. Second Session, Sydney 2nd to 24th September 1897[33]

"Clause 7. The constitution established by this act, and all laws made by the parliament of the commonwealth in pursuance of the powers conferred by the constitution, and all treaties made by the commonwealth, shall according to their tenour, be binding on the courts, judges, and people, of every state, and of every part of the commonwealth, anything in the laws of any state to the contrary notwithstanding; and the laws and treaties of the commonwealth shall be in force on board of all British ships whose last port of clearance or whose port of destination is in the commonwealth.

Amendment suggested by the Legislative Council of New South Wales:

Omit "and all treaties made by the commonwealth," lines 4 and 5.

The Hon. E. BARTON (New South Wales) [12.4]: I think it is expected by the Legislative Council of New South Wales that I should explain what the meaning of this amendment is. In the first place, the desire of that body is that, inasmuch as the treaty-making power will be in the Imperial Government, we should omit any reference to the making of treaties by the commonwealth; in other words, while they concede that we should make certain trade arrangements, which would have force enough if ratified by the Imperial Government, the sole treaty-making power is in the Crown of the United Kingdom.

Mr. Higgins: Clause 52 refers to treaties!

The Hon. E. BARTON: And, in conformity with the amendment they suggest in this clause, they desire that the words "and treaties" should disappear from clause 52. There is a good deal of force in the contention, I think. I do not think the constitution will be in any way minimised or weakened by the omission of the words. As regards the remainder of their amendments, they propose to confine the clause to laws, and not to treaties..."

4.30 At the Melbourne session of the Convention in 1898, the submission of the Legislative Council of New South Wales was again discussed. It proposed that the words 'and treaties' be omitted from sub-clause 52(xxvi), in conformity with the amendment to covering clause 7.[34] The amendment was agreed to with very little discussion. An extract from the debate is contained in ***Figure 2***

Figure 2: Extract from the Official Record of the Debates of the Australasian Federal Convention, 20th January to 17th March 1898

"Sub-section (29) - External affairs and treaties.

Amendment suggested by the Legislative Council of New South Wales -

Omit "and treaties."

Mr BARTON - I propose to strike out the words "and treaties," in accordance with the suggestion of the Legislative Council of New South Wales.

Mr GLYNN, - I see an objection to striking out these words in reference to treaties. I am aware that similar words have been struck out in clause 7, but I doubt the policy of that. It may be wise to retain them

The CHAIRMAN, - We must be consistent.

Mr GLYNN, - I bow to your ruling, sir, but an opportunity for reconsidering the matter should be provided.

The amendment was agreed to.

....

Mr DEAKIN(Victoria) - I understand that the leader of the Convention will look at the words "and treaties," with the view to see how far, by omitting them, we would limit the powers of the Federal Parliament within the range of the powers that the Canadian Parliament already enjoys."

Comment on the significance of the removal of the word 'treaties' from parts of the Constitution

4.31 The removal of references to 'treaties' from both the external affairs power, and the covering clauses, has been considered by some as evidence that the Framers of the Constitution made a deliberate decision not to confer on the Commonwealth Parliament a power to implement treaties.

4.32 Mr Peter McDermott, from the University of Queensland, submitted to the Committee that the Framers of the Constitution had not envisaged that the external affairs clause of the Constitution would enable the Commonwealth to implement treaties.[35] In his review of the drafting of the external affairs provision, Mr McDermott concluded that:

> The fact that the Commonwealth possesses unlimited power to enter into treaties by virtue of Australia's evolution into an independent nation is one matter. The implementation of treaties in a Federation is, of course, quite another.... It may be, that on a future occasion, the High Court will take into account that the delegates to the Australian Federal Conventions did not intend to give the Commonwealth Parliament any legislative power over "treaties" in considering the extent of the external affairs power.[36]

4.33 On the other hand, the evidence in the Debates of the Constitutional Conventions, points to the conclusion that that the reference to 'treaties' was removed because it was believed that the inclusion of the term was inconsistent with the status of Australia as a Colony. The delegates to the Convention did not appear concerned about the relative legislative powers of the Commonwealth and the States in implementing treaties.[37] As Professor Zines put it:

> It is clear that the reason for deleting the reference to treaties in covering clause 5[38] did not necessitate the alteration made to what is now section 51 (xxix). The fact that a Colony has no power to enter into a treaty is not inconsistent with the legislature of the Colony having power to implement any treaty binding on Britain in respect of that Colony.... It is interesting, however, that no delegate raised any objection to the paragraph in its original form at any of the Conventions except in relation to the Imperial connection. Indeed the only members at the Conventions to speak on it, other than Barton, namely, Glynn and Deakin, would clearly have preferred the reference to treaties to remain and asked that an opportunity be given to reconsider the matter. On this occasion it was clearly Imperial, rather than States rights, issues that resulted in the change of wording.[39]

4.34 The Hon Dame Roma Mitchell has also attributed this change to concerns about the power to enter into a treaty, rather than an intention to limit the legislative power of the Commonwealth. She concluded:

> It may be that the Delegates to the Constitutional Convention were not clear as to the effect of clause 51 (xxix). It seems from the little that is recorded upon this matter that they were concerned with the power to enter into treaties rather than with any legislation passed in consequence of the entry into a treaty. As a treaty making power was not envisaged for the Commonwealth of Australia they probably did not apply their minds any further than to the question of trade arrangements to be approved by the Imperial Parliament.[40]

4.35 In evidence before the Committee, Mr Fred Gulson, from the New South Wales Farmers' Association, agreed that 'at the time the Constitution was framed it was never intended that the executive or, indeed, the Parliament of the Commonwealth would be armed with the powers to enter into international agreements or obligations'.[41] Dr Thomson, from the Western Australian Attorney-General's Department, also concluded 'that the words "and treaties" were deleted because it was thought that only England could make treaties'.[42]

4.36 It appears that the concern of the Framers of the Constitution was that a legislative power in relation to treaties might also include a legislative power to enter into treaties. This was confirmed in an opinion by Sir Isaac Isaacs when he was Attorney-General in 1906.[43]

Comments by the Framers and their contemporaries on the scope of the external affairs power

4.37 Commentators of the day did not seem to consider that the removal of the reference to treaties necessarily limited the broad scope of 'external affairs'. Indeed, at least one British commentator, Mr A.H.F. Lefroy, considered that the external affairs power, if conferred in th

'naked, absolute way' that it appeared in the draft Constitution, might lead to the conclusion that the Imperial Parliament intended 'to divest itself of its authority over the external affairs of Australia and commit them to the Commonwealth Parliament'.[44]

4.38 The scope of the external affairs power was acknowledged by Quick and Garran in 1901.[45] They commented that the external affairs power 'may hereafter prove to be a great constitutional battle ground'. However, they disagreed with Mr Lefroy's opinion of the extent of the power, observing:

> It must be conceded that the expression "external affairs" is singularly vague, but it is submitted that it cannot be construed in the wide and far-reaching manner suggested by the learned gentleman whose views are quoted.....
>
> The expression "External Affairs" is apparently a very comprehensive one but it has obvious limitations.... It must be restricted to matters in which political influence may be exercised, or negotiation and intercourse conducted, between the Government of the Commonwealth and the Governments of countries outside the limits of the Commonwealth. This power may therefore be fairly interpreted as applicable to (1) the external representation of the Commonwealth by accredited agents where required; (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries, and (3) the extradition of fugitive offenders from outside countries.[46]

4.39 Quick and Garran went on to note that the external affairs power may be used to provide for parliamentary approval of treaties. They stated that under the external affairs power the Commonwealth may:

> pass laws authorising the negotiation of commercial treaties - of course through the direct agency of the Imperial Government, assisted and advised by the representatives of the Commonwealth; and it may afterwards, like the Senate of the United States, either ratify or refuse to confirm them.[47]

4.40 Quick and Garran also considered that the external affairs power gave the Commonwealth Parliament the power to legislate to implement extradition treaties.[48]

4.41 In 1902, the breadth of the power was also acknowledge by Harrison Moore, Dean of the Faculty of Law in Melbourne, in his work*, The Constitution of the Commonwealth of Australia*. Moore commented:

> So far, however, as the conduct of external affairs may require the co-operation of the legislative power, the Parliament has authority to make provision. The *enactment of laws for the execution of treaties* made by the Imperial Government affecting the Commonwealth, or made by the Commonwealth itself under such powers as the Crown may confer upon it; of laws on extradition or neutrality, and the like; of laws giving effect to arrangements between the Commonwealth and other parts of the Empire - all these would clearly fall within article xxix.[49] [Emphasis a

4.42 In 1906, Sir Edmund Barton, a key figure in the drafting of the Constitution, remarked that it was 'probable' that the external affairs power 'includes power to legislate as to the observance of treaties between Great Britain and foreign nations.'[50]

4.43 While the framers appeared generally to agree that the external affairs power allowed the Commonwealth Parliament to implement treaties, there was no clear agreement as to the power of the Commonwealth Parliament where the subject matter of the treaty lay within the ordinary jurisdiction of the States. In 1902, the Attorney-General, Alfred Deakin, advised that there was a need to seek the concurrence of the States in the implementation of the *Venice International Sanitary Convention,*[51] because it may affect the laws of the States.

4.44 In contrast, in 1906, the Attorney-General, Isaac Isaacs, who had also been one of the Framers of the Constitution, provided an opinion to the Government that the external affairs power allowed the Commonwealth to legislate to implement a treaty, even in relation to subjects over which it would otherwise not have power. Isaacs noted that the Constitution does not reserve exclusive powers to the States. He considered that a law which implements a treaty is one relating to an external affair of the Commonwealth, because it deals with the relations between the Commonwealth and a foreign country, and that such a law is therefore within the competence of the Commonwealth Parliament.[52]

Current comment on the intentions of the Framers

4.45 More recent commentators have also accepted that the external affairs power includes the power to enact laws which implement treaties. Sir Anthony Mason, former Chief Justice of the High Court, has argued:

> There can be little doubt that the founders of the Constitution intended that the Parliament should have legislative power to carry into effect treaties and Conventions. Their vision may not have travelled beyond more traditional treaties such as, for example, extradition treaties. They probably did not foresee the vast expansion in international action and co-operation that has taken place since 1950. But the failure to foresee this development is not a reason for decreasing the content of the power by reference to vague and unmanageable criteria such as the need to preserve the "federal balance". Rather the power must be interpreted generously so that Australia is fully equipped to play its part on the international stage.[53]

Conclusion

4.46 At the time the Commonwealth Constitution was being drafted, the subject of treaties was not considered particularly important. The attention of the Framers was largely directed towards the financial relations between the two Houses of Parliament, and how to balance federalism with a system of responsible government. The power to enter into treaties was still held by the Crown, to be exercised on the advice of the Imperial Government, and although the Commonwealth Parliament was given power to implement these treaties for Australia by way of legislation, the type of treaties which existed at that time would have been unlikely to have a significant impact o traditional areas of State responsibility.

4.47 The various views described in this Chapter indicate that it is not possible to attribute a single view to all the Framers. Some viewed the Commonwealth's powers in relation to treaties quite narrowly, others viewed them broadly, and still others probably didn't consider them at all. Consideration of these views contributes a deeper understanding of the nature of the Commonwealth's constitutional powers in relation to treaties, but does not affect the nature of that power as interpreted by the High Court.

Endnotes:

1. de Smith's *Constitutional and Administrative Law*, 4th ed. by Harry Street and Rodney Brazier, Penguin Books, 1981: p 136.
2. This historical process is discussed in more detail below.
3. *Minister for Immigration v Teoh* (1995) 128 ALR 353 at 361; *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608; *Simsek v MacPhee* (1982) 148 CLR 636 at 642. Sir Maurice Byers QC, Submission No. 25, Vol 2, p 251.
4. Mr M. Goldstiver, Submission No. 50, Vol 2, p 431; Mr M. Goldstiver, Submission No. 104, Vol 6, p 1315; Mr A. Pitt, Submission No. 47, Vol 2, p 423; Mr T. King, Submission No. 53, Vol 3, p 443, Mr J. Pickering, Submission No. 54, Vol 3, p 448.
5. The High Court's interpretation of the external affairs power is discussed in detail in Chapter 5 of this report.
6. That is, those colonies with Parliaments where the Government was formed by the majority in the Lower House, and the members of the Lower House were elected by the people.
7. G. Doeker, *The Treaty-Making Power in the Commonwealth of Australia*, The Hague, Martinus Nijhoff, 1966: pp 26-29.
8. Adhering to a treaty means, in this context, agreeing to be bound by it.
9. A.B. Keith, *Responsible Government in the Dominions*, Clarendon Press, Oxford, 1912, Vol III, pp 1108-9; and G. Doeker, *The Treaty-Making Power in the Commonwealth of Australia*, The Hague, Martinus Nijhoff, 1966: p 28.
10. A.B. Keith, *Responsible Government in the Dominions*, Clarendon Press, Oxford, 1912, Vol III, p 1111.
11. Opinion dated 16 January 1902, Attorney-General's Department, *Opinions of the Attorneys-General of the Commonwealth of Australia*, Vol 1, AGPS, Canberra, 1981: p 47.
12. Quoted in: G. Doeker, *The Treaty-Making Power in the Commonwealth of Australia*, The Hague, Martinus Nijhoff, 1966: p 50.
13. G. Doeker, *The Treaty-Making Power in the Commonwealth of Australia*, The Hague, Martinus Nijhoff, 1966: p. 10.
14. For a discussion on the status of the Dominions in signing the Treaty of Versailles and becoming separate members of the League of Nations, see: A.B. Keith, *Responsible Government in the Dominions*, 2nd ed., Clarendon Press, Oxford, 1928: pp. 877-893; and P.J.N. Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, Green & Co., 1929: pp. 67-81.
15. M. Lewis, 'The International Status of the British Self-Governing Dominions' (1922-23) *British Year Book of International Law*, 21 at p. 33.

16. H.V. Evatt, *The Royal Prerogative*, Law Book Co., 1987: p. 151; J.G. Starke, 'The Commonwealth in International Affairs' in R. Else-Mitchell (ed.), *Essays on the Australian Constitution*, 2nd ed., Law Book Co., Sydney, 1961, 343, at 349. See also the statement made by the British Prime Minister, Mr Lloyd George, at the 1921 Conference of Prime Ministers, quoted in R. Stewart, *Treaty Relations of the British Commonwealth of Nations*, MacMillan Co., New York, 1939: pp. 152-3.
17. See copy of the Conference Resolution in: J.G. Latham, *Australia and the British Commonwealth*, MacMillan and Co. Ltd, London, 1929: pp 131-133.
18. J.G. Latham, *Australia and the British Commonwealth*, MacMillan and Co. Ltd, London, 1929: p 133.
19. J.G. Latham, *Australia and the British Commonwealth*, MacMillan and Co. Ltd, London, 1929: Appendix.
20. J.G. Latham, *Australia and the British Commonwealth*, MacMillan and Co. Ltd, London, 1929: pp 54-55.
21. Commonwealth of Australia, *Report of the Royal Commission on the Constitution*, Canberra, 1929: p 115.
22. Commonwealth of Australia, *Report of the Royal Commission on the Constitution*, Canberra, 1929: p 118. See also: Royal Commission on the Australian Constitution, *Report of Proceedings and Minutes of Evidence*,: p 1429.
23. The Australian States were released from the application of the *Colonial Laws Validity Act 1865* by the *Australia Acts 1986*.
24. M. Coper, *Encounters with the Australian Constitution*, CCH Australia, 1987: p 10.
25. G. Winterton, *Parliament, The Executive and the Governor-General; A Constitutional Analysis*, Melbourne University Press, 1983: p 24.
26. See Professor E. Campbell, Submission No. 8, Vol 1, p 82, citing Professor L. Zines, *The High Court and the Constitution*, 3rd ed., Butterworths, 1992: pp 214-219. See also: *Bonanza Creek Gold Mining Co. Ltd v Rex* [1916] 1 AC 566, at 587; and see generally: H. V. Evatt, *The Royal Prerogative*, Law Book Co., 1987.
27. The Constitution was eventually enacted as part of a British Act of Parliament, passed by the Westminster Parliament. The name of this Act is the *Commonwealth of Australia Constitution Act*. Clauses 1 to 8 of this Act set out preliminary and transitional provisions, including a provision stating that this Act is binding on the courts, judges and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State. These 8 clauses are known as the 'covering clauses'. Clause 9 of the *Commonwealth of Australia Constitution Act* contains the entire Constitution.
28. *Official Report of the National Australasian Convention Debates*, Sydney, 1891: Appendix.
29. Later to become s. 51(xxix) in the final version of the Constitution.
30. La Nauze, J.A., *The Making of the Australian Constitution*, Melbourne University Press, 1972, pp 172-4. This concern was raised by the British Government and was passed on to the Premier of New South Wales, George Reid.
31. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897: p
32. *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897: p
33. *Official Report of the National Australasian Convention Debates, Sydney*, 1891: pp 239

34. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898: p 30.
35. Mr P. McDermott, Submission No. 109, Vol 7, p 1401.
36. P. McDermott, 'External Affairs and Treaties - The Founding Fathers' Perspective', (1990) Vol 16(1) *University of Queensland Law Journal* 123, at 136. Mr McDermott also argued that the power under s.51(xxx) to make laws with respect to the 'relations of the Commonwealth with the islands of the Pacific' includes a power to implement treaties with Pacific island nations, in contrast to the external affairs power which does not include the power to implement treaties. He considered that s. 51(xxx) would not have been necessary if s. 51(xxix) contained the power to implement treaties. However, this point was also raised and dismissed at the Constitutional Conventions in the 1890s. It was generally considered that s. 51(xxx) fell within the broad scope of the external affairs power, but that it should be left there out of an abundance of caution. See: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898: pp 30-31.
37. Alfred Deakin may well be an exception, expressing his concern that the removal of the words 'and treaties' would 'limit the powers of the Federal Parliament within the range of the powers that the Canadian Parliament already enjoys': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898: p 31.
38. Covering clause 7, which is referred to in the extracts quoted from the *Official Record of the Debates of the Australasian Federal Convention* in the text above, became what is covering clause 5 in the current Constitution.
39. Zines L, 'The Federal Balance and the Position of the States', in G. Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, Legal Books, Sydney, 1986, p 85. See also: *Hansard*, SLCRC, 14 June 1995, p 695, per Mr H. Burmester.
40. Honourable Dame Roma Mitchell, 'The External Affairs Power in relation to United Nations Conventions; its effect upon the Balance of Power between Commonwealth and States', Blackburn Lecture, the Law Society of the ACT, Friday 26 May 1995.
41. *Hansard*, SLCRC, 14 June 1995, p 725.
42. *Hansard*, SLCRC, 15 May 1995, p 263.
43. Attorney-General's Department, *Opinions of the Attorneys-General of the Commonwealth of Australia*, Vol. 1, 1981, No. 244: p 293.
44. A.H.F. Lefroy, 'The Commonwealth of Australia Bill', (1899) 15 *Law Quarterly Review* 281, at 291.
45. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901: p 770.
46. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901: pp 631 -632.
47. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901: p 635.
48. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901: pp 636-67.
49. W.H. Moore, *The Constitution of the Commonwealth of Australia*, 1902: p 143.
50. *McKelvey v Meagher* (1906) 4 CLR 265, at 286 per Barton J. See generally references cit Professor Winterton in Submission No. 89, Vol 5, p 1070.

51. Attorney-General's Department, *Opinions of the Attorneys-General of the Commonwealth of Australia*, Vol. 1, 1981, No. 60: p 77. See generally discussion in: C. Saunders, 'Articles of Faith or Lucky Breaks?' (1995) 17 *Sydney Law Review* 150, at 158. This treaty concerned sanitation on ships, and was entered into by Her Majesty in 1897, on behalf of the British Empire.
52. Attorney-General's Department, *Opinions of the Attorneys-General of the Commonwealth of Australia*, Vol. 1, 1981, No. 244: p 293.
53. Sir Anthony Mason, 'The Australian Constitution 1901-1988', (1988) 62 *Australian Law Journal* 755. See similar comments in the *Commonwealth v Tasmania* (1983) 158 CLR 1, at 99-100.

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