Speech to be delivered by  
Her Excellency  
The Honourable Dame Roma Mitchell, AC, DBE  

BLACKBURN LECTURE  
THE LAW SOCIETY OF THE ACT  
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The External Affairs Power in relation to United Nations Conventions; its effect upon the Balance of Power between Commonwealth and States.

Sir Richard Blackburn was clearly elated by the honour bestowed upon him by the Law Society of the Australian Capital Territory when it established an annual lecture to be named the Sir Richard Blackburn Lecture. In the first such lecture, which he delivered on 21st May, 1986, he said: "I am unrepentant as a supporter of the old-fashioned lecture". He added "A lecture is not a means of imparting information; it is, or should be, a means of stimulating the minds of those who already have enough information to make the lecture worthwhile". While I cannot disagree with that proposition I find it a somewhat daunting requirement. Not only do I doubt whether I am capable of stimulating the minds of my audience but I appreciate that I am to deliver this prestigious address more than eleven years after my retirement from the Bench, years in which there have been notable developments in the law. Apart from the period of my Chairmanship of the Human Rights Commission my interest in those developments has been mainly academic rather than practical.
Nevertheless I had no hesitation in accepting the invitation to deliver the Tenth Sir Richard Blackburn Lecture. The eight eminent speakers who followed Sir Richard and in whose distinguished company I am honoured to find myself, all had known Sir Richard and appreciated his sterling qualities both of intellect and character. But I believe that I knew him for a longer period than any of them and for that reason, if for no other, I felt that I was entitled to accept the invitation.

I preceded Dick as an undergraduate in the law school at the University of Adelaide but was sufficiently near his time to know him as a student and a Rhodes Scholar. I knew his father, Arthur Blackburn, VC as a legal practitioner in Adelaide and, indeed, I opposed Arthur Blackburn in my first case - a rather traumatic experience for a counsel newly admitted to the Bar. I knew also Dick's charming and cultivated mother and his sisters and brother.

When Dick returned to Adelaide after war service and his subsequent studies at Magdalene College, Oxford where he took the degrees of BA and BCL and after his admission to the Bar of the Inner Temple, he was appointed Bonython Professor of Law at the University of Adelaide. I saw him then, not infrequently, during his time at the University and after he left academic life and entered legal practice until he took an appointment as a Judge of the Northern Territory in October 1966. By that time I was a judge of the Supreme Court of South Australia and so we continued our association as judges and later also as Chancellors of our respective universities. I like to remember that I retained his friendship and that of his wife Helen whom I, in company with her many friends, affectionately call Chibs, for the rest of his life. I remember him as a man of great intellectual stature, of complete rectitude leavened by compassion and by a sense of humour. He was a good friend.
In the original lecture Sir Richard suggested that the lectures might alternate between the fields of public interest and of technical professional interest. I have kept this suggestion in mind in choosing a topic for this address. Perhaps I have attempted to cross from one stool to another. I can but hope that I shall not fall between them. My decision is to discuss some of the ramifications of the external affairs power ceded to the Parliament of the Commonwealth of Australia by s.51(xxix) of the Constitution and its impact in the light of United Nations Conventions ratified or acceded to by Australia. I shall proceed to a brief consideration of the High Court decision in *Mabo v. Queensland* and of the legislation which has followed. My address is primarily concerned with the balance of power between the Commonwealth and the States of Australia. At this time, when serious consideration is being given to possible amendments to the Australian Constitution, it behoves all interested persons to be apprised of the present division of power between the Commonwealth and the States respectively and of the effect of recent Commonwealth legislation and of High Court decisions which have followed the enactments of Parliament. It is not my aim to advocate whether the status quo should be maintained or whether there should be any amendment of the Constitution designed to alter the balance of power between the Parliaments of the Commonwealth and of the States.

My choice of a topic for my address is influenced further by the fact that this year the theme of Law Week in the Australian Capital Territory is “Tolerance”, 1995 having been designated by the United Nations as the International Year for Tolerance. The Charter of the United Nations is based upon four aims which may be encapsulated under the headings Prevention of War, Preservation of Human Rights, Provision of Justice and Promotion of Freedom and Better Living Standards. The first prescription for the attainment of those aims set forth in the Charter is the practice of tolerance. In its Press
Release announcing the International Year of Tolerance the United Nations Information Centre, at Sydney referred to the principle of tolerance enunciated in the United Nations Charter and added:

“Tolerance, human rights, democracy and peace are closely related. Without tolerance, the foundations for democracy and respect for human rights cannot be strengthened, and the achievement of peace will remain elusive.”

It seemed to me therefore that, this being the International Year of Tolerance, the achievement of tolerance in the world being a primary aim of the United Nations, and “tolerance” being the theme of Law Week, it is appropriate that I give attention to some aspects of human rights legislation in Australia.

It is twenty years since the Australian Parliament first embarked upon such legislation when it passed the Racial Discrimination Act 1975 in reliance upon the power given to it under s51(xxix) of the Constitution. That statute was designed to ensure compliance within Australia of the obligations which Australia had undertaken when it signed the International Convention on the Elimination of All Forms of Racial Discrimination on 13th October 1966 and later when it deposited its instrument of ratification on 30th September 1975. Until 1982, when the High Court, by a majority, decided in Koowarta v Bjelke Petersen and others that challenged sections of the Racial Discrimination Act were a valid exercise of the external affairs power by the Commonwealth Parliament, there was doubt as to whether the Racial Discrimination Act, as a whole, was capable of enforcement. Koowarta’s case, like that of Mabo, related to land, but in quite a different context. The plaintiff Koowarta was a member of a group of Aborigines, resident in Queensland, who had sought through the Aboriginal Land Fund Commission to acquire a Crown lease of the
Archer River Pastoral Holding for their use. The Minister, acting under powers given to
him by Queensland legislation, refused his consent which, under that legislation, was
necessary to enable the transaction to proceed. His refusal was expressed to be based
upon the ground that the Government of Queensland did not view favourably acquisition
of large areas of land by Aborigines or Aboriginal groups. S. 9 of the Racial Discrimination
Act renders unlawful discriminatory acts based on race which impair recognition or
enjoyment, on an equal footing, of human rights or fundamental freedoms in public life. It
was conceded by the Queensland Government that s.9 and s.12, both of which were
claimed by the defendant to be outside the legislative power of the Commonwealth
Parliament, were in conformity with the provisions of the Convention on the Elimination of
All Forms of Racial Discrimination to which, as I have already said, Australia was a party
when it passed the Racial Discrimination Act. The members of the High Court were in
agreement that the Governor General, exercising the prerogative power of the Crown,
could properly enter into the Convention. The majority held that ss. 9 and 12 were laws
with respect to “external affairs” within the meaning of s.51(xxix). I do not know whether
Mr. Koowarta’s group ever secured title to the Archer River Pastoral Holding. I believe
that they have not. Mr. Koowarta died some time ago, as did Mr. Mabo. Each gave his
name to a leading case but received no personal benefit from a favourable judgment.

In the meantime the Australian Parliament had passed the Human Rights Commission Act
1981 which stated in its Preamble that it was “desirable that the laws of the
Commonwealth and the conduct of persons administering those laws should conform with
the provisions of the International Covenant on Civil and Political Rights” and with certain
Declarations and other international instruments. The International Covenant on Civil and
Political Rights had been signed for Australia on 18th December 1972 and it entered into
force for Australia on 13th November 1980. I was the Chairman of the Human Rights
Commission set up under the Human Rights Commission Act. That Commission had the duty of administering the Racial Discrimination Act and so we, as a Commission, had a direct interest in the judgement in Koowarta, as well as an indirect interest in so far as Koowarta impacted upon the duties imposed upon us under the other provisions of the Human Rights Commission Act. I remained the Chairman of the Human Rights Commission until 1986 when that Commission was superseded by the Human Rights and Equal Opportunity Commission set up under the Human Rights and Equal Opportunity Act 1986.

During my term of office the Tasmanian Dam Case\(^3\) was decided by the High Court. Again the Court was divided. The decision of the majority upheld the validity of the World Heritage Properties Conservation Act 1983 (Cth.) and of regulations made under the National Parks and Wildlife Conservation Act 1975 (Cth.). The provisions of the regulations and the Act were held by the majority of the High Court to be enforceable within Tasmania as a valid exercise of the power of the Commonwealth under s.51(xxix) of the Constitution. The opinion of the majority was that the Convention for the Protection of the World Cultural and Natural Heritage which Australia had ratified on 22nd August 1972 imposed duties upon States parties to it which Australia addressed in the legislation and regulations to which I have just referred.

The two decisions of the High Court were gratifying to those who were promoting human rights within Australia. Certainly some of the States had passed legislation which complemented the Commonwealth statutes but not all States had done so. The Human Rights Commission worked co-operatively with similar Commissions set up in the States which had legislated to promote human rights. The capacity of the States to legislate for the purpose of promoting and protecting human rights was undoubted and State
legislation was valid unless it conflicted with Commonwealth legislation which would prevail in the event of conflict. One of the important functions of the Human Rights Commission was:

"to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories."

That function included, as I understood it, the duty to promote the values of tolerance among all who lived in Australia and its external Territories. The Human Rights and Equal Opportunity Commission has a similar function, and that particular function is especially relevant in the International Year of Tolerance. As Chairman of the Human Rights Commission I did not find tolerance predominant among the attitudes towards the High Court decisions which I have mentioned. The decisions were greeted with acclamation by those who had welcomed the entry of the Commonwealth into the field of human rights legislation and with dismay by those who regarded such legislation as an unwarranted inroad into the province of the States. Neither side was tolerant of the attitude of the other. Whether this year will mark an escalation of tolerance in this area remains to be seen.

Although the High Court decisions as to the validity of the Commonwealth legislation assisted those who worked in the field of human rights in Australia, they did therefore complicate State-Federal relations.

In his dissenting judgement in *Koowarta* Gibbs CJ said:-
"The Federal nature of the Constitution requires that some limits be imposed on the power to implement international obligations conferred by par. (xxix). .......... (T)here is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power. Whether Australia enters into any particular international agreement is entirely a matter for decision by the Executive. The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely as a device for the purpose of attracting legislative power. Section 51(xxix) should be given a construction that will, as far as possible, avoid the consequence that the Federal balance of the Constitution can be destroyed at the will of the Executive."^6

They are strong words of warning for those concerned by the erosion of what are seen as States' rights.

I have wondered whether the Australian States had any appreciation of the extent of the power which they gave to the Australian Parliament under s.51(xxix) when the Constitution was drafted. I thought probably not. Treaties were the primary concern of the Imperial Parliament. The States would have thought of most treaties as no business of theirs. But they did intend not unduly to limit their individual powers during the course of the Convention Debates which preceded Federation and so I decided to ascertain to what extent the External Affairs power was discussed at the Conventions held in Sydney in
1891, in Adelaide and Sydney in 1897 and in Melbourne in 1898. At the Sydney Convention a draft Constitutional Bill was presented by Sir Samuel Griffith. It provided that the Commonwealth Parliament's powers to legislate should include legislation as to "external affairs and treaties". The clause, as originally drafted, was submitted to the Adelaide Convention and accepted without discussion. It remained in its original form at the second Sydney convention but reference to "treaties of the Commonwealth" in clause 7 of the draft Bill was struck out on the grounds explained by Mr. (later Sir) Edmund Barton in the following words:-

"(I)nasmuch as the treaty making power will be in the Imperial Parliament, we should omit any reference to the making of treaties by the Commonwealth;"

The treaty making power did not reside in the Imperial Parliament but in the Queen upon the advice of her Ministers. It was true, however, that neither the Australian States nor the intended Commonwealth of Australia could enter into treaties without the consent of the Imperial ministry. The reference to "external affairs" in clause 51 (xxix) appears to have been accepted as a power to make trade agreements which, again in the words of Edmund Barton, "would have force enough if ratified by the Imperial Government." He added "(T)he sole treaty making power is in the Crown of the United Kingdom". In that statement he put the position accurately. The earlier reference to the treaty making power residing in the Imperial Parliament may have been a slip of the tongue. Treaty making power was not an issue between the about to be formed Commonwealth of Australia and the individual States. It was the concern of neither. That was to be left to the Imperial Government.
At the Melbourne Convention Mr. Barton suggested that the words "and treaties" be omitted from clause 51(xxiv). Mr. Patrick Glynn, the South Australian representative, suggested that this required further consideration but did not persist in that submission. The words were dropped and clause (xxix) became, as it has remained, "external affairs". The Founding Fathers could not have foreseen that the Australian Governor General would, some eight decades later, ratify Conventions with a body not in the contemplation of any nation in the 1890s and would thus engender within Australia disputes concerning the power given to the Commonwealth Parliament under clause 51 (xxix). It is interesting to speculate whether that clause would have been included without modification had they foreseen the situation which arose, the likelihood that the Commonwealth Parliament would pass legislation like the Racial Discrimination Act and the National Parks and Wildlife Conservation Act and that such legislation would be upheld by the High Court as a proper exercise of power under s.51(xxiv).

The proceedings of the pre-Federation Conventions as reported give no assistance in answering that speculation. In the Tasmanian Dam Case Mason J (as he then was) referred to the great increase in recent times in the content and nature of international conventions and said:

"It is, of course, possible that the framers of the Constitution thought or assumed that the external affairs power would have a less extensive operation than this development has brought about and that the Commonwealth legislation by way of implementation of treaty obligations would be infrequent and limited in scope. The framers of the Constitution would not have foreseen with any degree of precision, if at all, the expansion of international and regional affairs that has occurred since the turn of the century, in particular the cooperation between nations that has resulted in
the formation of international and regional Conventions. But it is not, and could not be, suggested that by reason of this circumstance the power should now be given an operation which conforms to expectations held in 1900. For one thing it is impossible to ascertain what those expectations may have been. For another the difference between those expectations and subsequent events as they have fallen out seems to have been a difference in the frequency and volume of external affairs rather than a difference in kind.7

I am inclined to the view that some at least of the United Nations Conventions to which Australia has become a party are different in kind from the agreements in relation to external affairs which could have been in contemplation of the Founding Fathers when the Constitution was drafted. Could they have imagined that Australia would enter into an agreement with an international body not to practise racial discrimination within Australia, a country committed to the White Australia policy and a country in which Aborigines were not to be counted among the population after Federation, notwithstanding that South Australia had given them recognition as competent electors prior to Federation? Be that as it may, to attempt to define the limits of the external affairs power by reference to what may have been the expectation of those who drafted the Constitution had they been in a position to foresee future developments leads to unprofitable speculation.

Dr. John Quick and Mr. (later Sir) Robert Garran had their Annotated Constitution of the Australian Commonwealth ready for publication at the end of 1900 and it was published in the following year - a remarkable achievement and one which would be unlikely to be equalled nowadays, even in an era of so many technological advances in printing and production of books. When I was a law student this weighty tome was a valued text book upon Constitutional Law and is, nowadays, an important reference book for researchers
upon the Constitution and the events which led to Federation. May I digress at this stage to say that when I was a very young barrister I appeared as second junior to Sir Robert Garran, then an elderly Queen's Counsel. That was a good many years before the Commonwealth Government had enacted the legislation which has led to the detailed examination by the High Court of the scope of s.51(xxix) of the Constitution and also before Australia became party to the Conventions which prompted the passage of that legislation. It was too early to compliment the joint author, even if I had had the temerity to do so, upon the prognostication in the text of his and Dr. Quick's book that the external affairs power "may hereafter prove to be a great constitutional battle-ground."\(^8\) That forecast was certainly apt. The learned authors concluded that the external affairs power "must be restricted to matters in which political influence may be exercised or negotiations and intercourse conducted between the Government of the Commonwealth and the Governments of countries outside the limits of the Commonwealth." They added "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."\(^9\)

That view was, as it eventuated, much too restrictive but Dr. Quick and Mr. Garran could not have anticipated the types of international agreements which would be forged under the aegis of the United Nations which came into existence forty five years after they completed their work on the Annotated Constitution. Two world wars would intervene before the phrase "human rights" was heard and before nations combined, as was stated in the Charter of the United Nations,
"to save succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom".

To achieve those ends various Conventions, Declarations and Agreements have been prepared and Australia has become a signatory to or has ratified many of them.

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 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.

The position of the Commonwealth of Australia and the other British Dominions vis-à-vis the British Parliament changed after that Parliament passed the Statute of Westminster in 1931 and the Statute was ratified by the individual Dominions. The enactment of the Statute of Westminster followed Conferences held in 1926 and 1929 between
representatives of the British and of the Dominion Governments. At the first of those Conferences the following Declaration was made as to the status of the Dominions:

"They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations".

The Statute of Westminster, passed by the British Parliament in 1931, was designed to embody in legislation that and other decisions reached at the Conventions regarding the status of the countries of the British Commonwealth of Nations inter se. It was for the individual members of the British Commonwealth each to determine whether it would ratify the Statute. The Statute of Westminster provided, inter alia, that the Colonial Laws Validity Act 1865 should not apply to any future law passed by the Parliament of a Dominion and that future legislation by such Parliaments should not be rendered invalid by reason of inconsistency with the law of England or existing or future British statute law. It is difficult to realize today that such provisions would arouse hostility, I might almost say horror, among leading lawyers in Australia and other parts of the British Commonwealth.

As a young legal practitioner, recently out of law school, I was present at a session of the Second Legal Convention of the Law Council of Australia held in Adelaide in 1936 at which the topic was "The Statute of Westminster 1931". The paper had been prepared by Dixon J. (as he then was). In it that eminent judge inferentially deplored the passing of the Statute of Westminster. He clearly did not regard it as necessary for good government. He also emphasized that the Statute in some respects ignored the legislative rights of the Australian States and concentrated only upon the Commonwealth Parliament. That last
statement appears to me to be factually correct and is one to which heed should be given in today’s debates upon the Australian Constitution.

However Evatt J., who was one of the speakers to the paper was definite in his opinion that the adoption of the Statute of Westminster by Australia could not in any way derogate from the existing legal or constitutional rights of the States. He welcomed what he called “the two great functional achievements of the Statute”, namely “the removal of any attack upon the validity of Dominion Legislation by reason of the argument that its Parliament has no extra-territorial jurisdiction and the destruction of the argument of invalidity so far as it is based upon repugnancy to Imperial legislation.”

Nearly sixty years on it is almost impossible to appreciate any force in an argument to the contrary of the position taken up by Evatt J. as to the achievements of the Statute. Certainly Dixon J. pointed out in his paper that it was very rarely that the provisions of the Colonial Laws Validity Act were relied upon to render invalid any colonial law repugnant to any Act of the British Parliament extending to a colony. Nevertheless it requires a giant step back in history to return to an era when such a great jurist as Dixon J. found it acceptable that the laws of Australia were invalid if repugnant to either the common law or the statute law of Great Britain.

Mr. (later Sir) Robert Menzies was present at the session as Attorney General of the Commonwealth. He was invited by the President of the Law Council, Mr. F. Villeneuve Smith K.C. to speak on the “political aspect, without committing himself politically”. The President, in his own inimitable manner, also said:-
"As regards the Statute of Westminster, if there is a state of nescience which belongs to the Plutonian sphere it belongs to me. Now that I have heard the paper I am aware that I know less than I did before - not, indeed, because the lamp of learning has been withheld from me, on the contrary, its very wealth confuses me." Remarks made, probably tongue in cheek, but illustrating a reluctance on the part of the legal profession to accept change!

The Attorney-General said in the course of his remarks:-

“I have had some very interesting opportunities for observing the state of mind which lies behind, not only the decisions of the Privy Council, but also the Statute of Westminster. There is a common element to be found in Whitehall; it is a remarkable tenderness about the feelings of the Dominions and a disposition to say that at all costs Great Britain must avoid getting into conflict with the Dominion as to its rights and privileges. In the case of Australia this is largely unnecessary. We have many faults, but this inflamed self-consciousness internationally is not one of them.”

Today we might refer to “national consciousness” but I do not think that anyone would confuse a national consciousness with self consciousness, inflamed or otherwise.

Nevertheless the Attorney General said that there was no doubt that the Statute of Westminster would be adopted in Australia and he proposed to introduce legislation for this purpose. He added:-
"If it is to be adopted by the Commonwealth it should be adopted in circumstances of calm consideration and in circumstances which do not give rise to any suggestion that this is an anti-British movement." I believe that this very reasonable requirement was met when the Statute of Westminster was ratified in Australia.

Before the passing of the Statute of Westminster Australia had already played a part in the ratification of international treaties and had legislated to comply with its obligations under such treaties. For example, in 1920 the Commonwealth Parliament passed the Air Navigation Act whose purpose was to effect compliance with the Air Navigation Convention of 1919. The legality of the Act was challenged in *The King v Burgess; ex parte Henry* where it was argued that the regulation of air traffic within Australia in compliance with the recommendations contained in the Convention was not an exercise of the external affairs power of the Commonwealth but was legislation upon a domestic matter which was not within the competence of the Commonwealth Parliament. The majority of the Court was of the opinion that the Commonwealth Parliament was entitled to legislate to give effect to the Convention although the regulations made under the Act and part of one section were struck down as not being in terms sanctioned by the Convention. Dixon, McTiernan and Evatt J.J. were in agreement in the decision of the Court. However, Dixon J. on the one hand and Evatt and McTiernan J.J. in their joint judgement, on the other hand, disclosed different opinions as to limitations upon the legislative power of the Commonwealth Parliament under s.51(xxix).

Dixon J. said:-

"If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of
its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.”

Evatt and McTiernan J.J. were forthright in their opinion that:-

“The Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenor even though the subject matter of such agreements is not otherwise within Commonwealth legislative jurisdiction”.

And there lies the nub of the dispute, Evatt and McTiernan J.J. forecasting what has become the majority view in the High Court and Dixon J. the view of the minority.

Burgess’ case was decided in 1936, the year in which, at the Legal Convention in Adelaide, Dixon J. had sounded a note of caution, perhaps of disapproval, concerning the Statute of Westminster, whereas Evatt J. had welcomed the proposed legislative changes. Those changes, when they came, removed any legislative right of the British Parliament to override Australian legislation.

Sir Robert Garran entered into the debate upon the powers of the Commonwealth as suggested by Evatt and McTiernan J.J. in Burgess’ case in an article in the Australian Law
Journal. That learned co-author of the seminal work on The Australian Constitution referred to the dictum by Evatt and McTiernan JJ. to the effect that the Commonwealth power could extend to making international agreements on such matters as suppression of traffic in drugs, control of armaments and regulation of labour conditions. Sir Robert said:-

"If - and it is hard to controvert - there is no constitutional objection to the Commonwealth entering into such agreements and making laws to give effect to them it follows that the Commonwealth is not (in the words of Article 405 of the Treaty of Versailles) "a federal State, the power of which to enter into conventions on labour matters is subject to limitations", and the field opened up for possible Commonwealth control is almost unlimited."

In saying that the field opened up for possible Commonwealth control was almost unlimited Sir Robert Garran disclosed considerable prescience. Nevertheless it was forty six years before the extent of permissible Commonwealth control was tested in the High Court in Koowarta. Until then most members of the legal profession remained in the state of nescience regarding the extent of the Commonwealth's external affairs power which Frank Villeneuve Smith attributed to himself in relation to the Statute of Westminster. The courts were not immersed in discussions concerning that power. I doubt if any lawyer today could avoid a knowledge of the ambit of Commonwealth legislation the justification for which is the Commonwealth's duty to achieve domestic compliance with the terms of international treaties entered into by Australia.

When Blackburn J. heard the landmark claim of Aborigines of the Rikratjingu clan to
certain areas of land in Arnhem land Australia had already become a party to the International Convention on the Elimination of All Forms of Racial Discrimination but had not legislated to introduce into Australian law its obligations under that Convention. And so Blackburn J. was not called upon to decide any issue of discrimination. The judgment in *Milirrpum v Nabalco Pty. Ltd.* will remain a mine of information for historians as well as for students of various areas of the law, including the law of evidence. The learned judge's reasons for his rulings on the admissibility of the expert evidence tendered at the hearing are a copybook exposition of the law in relation to that evidence. His review of the evidence of anthropologists concerning Aboriginal "clans" and their territorial rights will continue to be a valuable source for the historian and for those dealing with claims under the Native Title Act. Re-reading the judgment, as I did recently, I was amazed again at the sheer volume of research on the part of the learned judge which it disclosed, realizing, as I did, that although he had the assistance of argument by outstanding counsel he had little other assistance and doubtless had to attend to other matters of importance to the Supreme Court of the Northern Territory while he was hearing the case and preparing his judgement. The Australian Law Journal referred to it as a "wide-ranging and scholarly judgment" and, although parts of the decision cannot stand in the light of the judgment of the majority of the High Court in *Mabo.* I do not think that anyone would dispute the applicability of those adjectives to Blackburn J's judgment.

The point at which the judgments of the majority in *Mabo* disagree with the judgment of *Milirrpum* relates to the recognition within Australian law of common law native title. Blackburn J. held that there was no basis for the acceptance of such a title in the absence of any express statutory provision. Mason C.J. and McHugh J., however, said in their joint reasons for judgment in *Mabo:*
"(T)he common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands ........."23

Deane and Gaudron JJ, who also disagreed with the finding of Blackburn J. concerning native title, said:-

"Nevertheless, it must be acknowledged that Blackburn J's ultimate conclusion that the doctrine of common law native title had never formed part of the law of any part of Australia derives support from some general statements of great authority in earlier Australian cases."24

The judgment of the High Court contained a declaration that the Meriam people, that is the people of the Murray Islands, of which the plaintiff Mabo was one, were entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands (excluding a portion of those islands immaterial for the purposes of this address).

One declaration which followed indicated problems which might arise in relation to a claim for native title. It reads:-

"(3) declare that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of their powers is not inconsistent with the laws of the Commonwealth."25
That proviso covers legislation already passed by the Commonwealth or by Queensland as well as legislation not yet enacted but which the Parliaments of the Commonwealth and of Queensland have power to enact. Those parts of the Murray Islands covered by the declaration of native title had never been alienated from the Crown but claims for native title are made and are likely to continue to be made in relation to land which has been alienated at some time. In *Mabo* attention was drawn in three of the judgments to the provisions of the Racial Discrimination Act in so far as they “represent an important restraint upon State or Territory power to extinguish or diminish common law native title.”

Toohey J. said:-

“Ordinarily, land is only acquired for a public purpose on payment of just terms whatever may be the precise statutory language employed ........ If the defendant sought to interfere with the Meriam people’s enjoyment of the Islands which their traditional title gives them and failed to do so on just terms, a question arises whether that action would be in contravention of ss. 9 or 10 of the Racial Discrimination Act.”

Among the questions which arose following *Mabo* were:

How should native title and native title rights and interests be determined at law?

Should native title and native title rights and interests be capable of extinguishment and, if so, how?
Should some and, if so what, acts done before and since the Racial Discrimination Act came into operation in derogation of native title and of native title rights and interests be validated and, if so, by what means?

The Australian Parliament's attempt to answer these and other pertinent questions arising in consequence of *Mabo* is embodied in the Native Title Act 1993 which sets up the National Native Title Tribunal. That Tribunal is to hear applications to determine native title, to hold mediation conferences designed to settle disputes as to native title and to make inquiries relevant to the determination of claims to native title. If no agreement is reached on an opposed application the Tribunal must refer the application to the Federal Court for determination.

The validity of the Act was challenged in the High Court by the State of Western Australia. In 1993 the Western Australian Parliament had passed the Land (Titles and Traditional Usage) Act, the validity of which was in turn challenged by the Commonwealth. Questions were reserved for consideration by the Full Bench and in the result the Commonwealth Act (with the exception of s.12) was found to constitute a valid exercise of the power given to the Commonwealth Parliament under s.51(xxvi) of the Constitution to make laws with respect to

"The people of any race for which it is deemed necessary to make special laws".

The Court did not find it necessary to answer questions directed to the external affairs power. As the provisions of the Western Australian Act were inconsistent with the provisions of the Commonwealth Act then, pursuant to s.109 of the Constitution,
provisions of the Native Title Act were found to prevail and the provisions of the Land (Titles and Traditional Usage) to be invalid.

It is probably not cynical to predict that the issue of native title claims will strain the tolerance of all parties to be involved. At the conclusion of his long reasons for judgment in *Milirrpum* Blackburn J. said that he knew that "this heavy case" was "of great importance to all parties." He added "I cannot help being specially conscious that for the plaintiffs it is a matter in which their personal feelings are involved." There spoke the truly compassionate Judge. His decision was made upon the evidence which had been led and upon his judicial interpretation of the law and the evidence. But he did not fail to be moved by the blight of the hopes of the Aboriginal plaintiffs.

The prosecution of future claims to native title will result in disappointment for claimants or for those opposing the claim, sometimes for both. Will they have learned anything in the International Year of Tolerance? Will they appreciate the "give and take" that must be inherent in any settlement of a human rights dispute? Will they have learned that while we are all entitled to our human rights we all have human responsibilities, that in fulfilling our human responsibilities we may have to cede a little and in that according others their human rights we may have to allow ours to diminish a little? If the International Year of Tolerance leads us to look at a dispute from the point of view of our opponent as well as our own there is reason to anticipate success for mediation conferences held by the Native Title Tribunal.

It seems to me undoubted that no-one, with the possible exception of Dr. Quick and Mr. Garran, contemplated, when the Australian Constitution came into being, that s.51(xxix) would have the substantial effect upon the balance of power between the Commonwealth
and the States which it has produced. Whether the greater intrusion of the Commonwealth into what have been regarded as State legislative preserves is beneficial to Australia or otherwise is a matter upon which opinions are divided. Whether it leads to greater or to less tolerance within Australia in this International Year of Tolerance is a moot point.

It must be borne in mind that the entry into international conventions and agreements is the province of the Executive. But the signing or ratification of an international agreement does not make the terms of the agreement enforceable within the countries parties to it. It has not been the policy of Australia merely to become a party to an international agreement and to leave its domestic laws in conflict with the agreement. It is for Parliament to pass any legislation which may be necessary to comply with the terms of an international agreement. Opinions are sharply divided as to whether the High Court’s interpretation of s.51(xxix) of the Constitution has been of any benefit to Australia. At the Constitutional Convention held in Adelaide in April 1983 a sub-committee was set up to consider mechanisms by which what were described as the “traditional balance” of legislative, executive and judicial powers in Australia should be maintained. The report made by this sub-committee to the next meeting of the Constitutional Convention held in Brisbane in July 1985 did not result in any consensus among the delegates to the Convention.

In 1984 Senator Peter Durack, QC (as he then was) introduced a Bill into the Senate which, in his own words:-
“sought to ensure that the (external affairs) power does not authorize the Federal Parliament to make laws regulating ‘persons, matters or things in the Commonwealth’ except to the extent that

(a) those persons, matters or things have ‘a substantial relationship to other countries or to persons, matters or things outside the Commonwealth; or

(b) the laws relate to the movement of persons, matters or things out of the Commonwealth”.”

The Bill lapsed.

The External Affairs sub-committee of the Constitutional Convention recommended the setting up of a Treaties Council. This proposal was endorsed by the Constitutional Convention presided over by Sir Maurice Byers, QC. It has also been proposed that ratification of international treaties should require an Act of Parliament or that ratification should be capable of reversal by Act of Parliament. These last two proposals are clearly directed against what is thought by some to be an excess of executive power and do not affect the Commonwealth-State balance of power. Consultation with States before ratification gives the States an opportunity to express views as to the advisability of ratification but does not impose any obligation on the Executive. But if States’ assent to ratification were required it may seem to the more realistic among us probable that fewer international agreements would be entered into in the future.
Although, as I have said earlier, the terms of an international treaty into which it has entered do not become part of the domestic law of Australia until incorporated into its statute law the judgment of the majority of the High Court in a recent appeal gives to a treaty ratified but not incorporated into legislation a greater significance than hitherto stated by the Court. In Minister for Immigration and Ethnic Affairs v Ah Hin Teoh the Court considered the effect of the ratification by Australia of the Convention on the Rights of the Child upon the application for the grant of residential status under the provisions of the Migration Act by a father of children who were Australian citizens. The majority of the Judges (Mason C.J., Deane, Toohey and Gaudron JJ) expressed the view that ratification of the Convention gave rise to a legislative expectation that the agent of the executive government would exercise a discretion granted to her under the Migration Act in conformity with the provisions of the Convention. Gaudron J. however expressed a caveat. She said: “(T)hat may not be so in the case of a treaty or convention that is not in harmony with community values and expectations”. McHugh J dissented. His opinion was that “the ratification of the Convention did not give rise to any legitimate expectation that an application for resident status would be decided in accordance with Art 3”.

In these last years of the 20th century there is considerable discussion about changing the Australian Constitution. Unfortunately only a limited number of Australians have any real knowledge of the contents of the Constitution. The Civics Expert Group was set up in 1994 under the chairmanship of Professor Stuart Macintyre:-

“to provide the (Australian) Government with a strategic plan for a non-partisan program of public education and information on the Australian system of government, the Australian Constitution, Australian citizenship, and other civics issues.”
It reported that only 18 per cent of the community had some degree of understanding of the contents of the Constitution and that only 41 per cent knew how the Constitution could be changed. The Group has made a number of recommendations for improvements in Civics Education, both in schools and in the wider community. I was pleased, last year, to be given the opportunity of opening a Seminar on the Constitution for year 11 students from South Australian schools. Such seminars will assist students to prepare themselves for decisions on proposed changes to the Constitution.

It seems that s.51(xxix) is appropriate for informed debate. It is not helpful for those who deplore the encroachment upon States’ rights or the enlargement of Commonwealth power or who disapprove of human rights legislation generally to rail against decisions of the High Court, decisions which were predicted nearly fifty years ago, or against Commonwealth legislation which has been declared valid. If they believe that the external affairs power should be entrusted elsewhere than to the Executive of the Commonwealth or that there should be a restraint upon the powers of the Commonwealth Parliament to legislate in order to ensure compliance with Australia’s treaty obligations, then they should have an opportunity of putting forward concrete proposals for change. Those proposals will be capable of being understood by the voting community only if the community itself understands the terms of the Australian Constitution and it seems that only an effective education programme will enable it to do this.

For tonight I would conclude by saying that I am among many for whom the memory of Sir Richard Blackburn remains evergreen. I am grateful for the opportunity to pay this inadequate tribute to his scholarship and legal knowledge.
Footnotes


3 Commonwealth of Australia and Anor. v State of Tasmania and Ors.
   (1983) 158 C.L.R.1

4 Human Rights Commission Act 1981 (Cth.) sec. 9(1)(f)

5 Human Rights and Equal Opportunity Commission Act 1986 (Cth.)
   sec. 11(1)(g)

6 (1983) 158 C.L.R.1 at 99-100

7 ibid at 126

8 The Annotated Constitution of the Australian Commonwealth -
   Quick and Garran p. 631

9 ibid p. 632

10 10 A.L.J. (Supplement) at 107

11 ibid at 97

12 ibid at 106

13 ibid at 106

14 ibid at 108

15 ibid at 108

16 (1936) 55C.L.R. 608

17 ibid at 669

18 ibid at 696

19 (1936) 10 A.L.J. 297 at 299

20 See footnote 2


ibid at 15
ibid at 102
ibid at 217
ibid per Deane and Gaudron J.J. at 112
ibid at 214
17 F.L.R. 245 at 291
judgment delivered 11th April, 1995