

MANNER AND FORM

Intro 1: For [s. ...] of the [the first Act] to be binding on the current Parliament, its RP must be doubly entrenched and mandatory (**McCawley; Trethowan**). Furthermore, the RP cannot be too onerous a restraint on law making power (**West Lakes, King CJ**). Otherwise, the current Parliament can simply repeal the section by standard procedure.

Intro 2: [The plaintiff] may also argue [the State] is in breach of the restrictive procedure (RP) in [s. ...]. [S. ...] of [the Act] provides the Act cannot be amended without a [requisite components of RP].

Is [the first law] double entrenched and mandatory?

Mandatory:

- The RP is mandatory, as evidenced by the words [...] (eg. 'Shall not', 'must not' – as opposed to 'may' or 'can') (**Trethowan**); OR
- The language of [s. ...] does not import any optional language, like 'may' or 'can'. It directly prohibits, suggesting the RP is mandatory (**Trethowan**)

Doubly entrenched

- The words 'any alteration of **this** Act' suggests both [s. ...] and the RP found elsewhere in the Act are covered by the RP, thus denoting double entrenchment (**Trethowan**); OR
- The inclusion in [s. ...] of the words 'including this section' makes the RP doubly entrenched, preventing Parliament from repealing the Act in a standard fashion (**Trethowan**).

Does [the first law] prescribe a permissible manner and form restriction?

- If the provision is too onerous so as to offend the principle of parliamentary sovereignty, it will be invalid.
- However, the more important the subject matter of the Act, the more likely a special majority requirement will be valid (**West Lakes, King CJ**).
- Consent from an extra-parliamentary body is prima facie invalid. However, this may not be fatal if the body is representative (**West Lakes, King CJ**).

Here –

- While the [first Act] deals with [...], these matters may not be regarded as sufficiently important per **Trethowan & Taylor**.
- Considering authority has held that a 2/3rds majority in a joint sitting of Parliament was too onerous, an arguably more important matter, the RP provision is likely to be too onerous here (**West Lakes, King CJ**)

OR –

- A [majority requirement] is required, along with [...]. This may be too onerous, as [majority requirement] is required at both readings. Having said that, if it is possible to obtain a [majority requirement] at the 2nd reading, it is not outrageous to expect the same would be obtained at the 3rd reading.

Furthermore –

- The conferment of a further majority requirement on the [extra-parliamentary body] may be an abdication of sovereignty, as it confers power on an extra-parliamentary body (**West Lakes**).
- Despite the [party's] attempt to make the panel 'representative', it is still not 'of the people' and will be therefore not be satisfied.

However, assuming the RP is valid -

OR –

- [RP] requires majority approval of local governments, which are extra Parliamentary bodies.
- However, local government is arguably representative as it is elected by the people; indeed, the same people who elect Parliament.
- However, this may depend on whether the people entitled to vote for local government are the same as those voting for the Victorian and Federal Parliaments (*Roach; Rowe*).
- In any case, a provision requiring the consent of a non-legislative body amounts to a renunciation and abdication of law making power (*West Lakes, King CJ*).

Thus, the RP is too onerous. However, assuming it was not –

Is [the second law] re the constitution, powers or procedures of Parliament?

The [second law] must concern the constitution, powers and procedures of Parliament (i.e. be a CPP law). On the facts:

EG 1:

- The Act may be considered to regulate Parliament’s law making power, expanding their scope of influence.
- However, this seems unlikely, as it appears to solely concern the Victorian Supreme Court’s power.

EG 2:

- At most, the Victorian legislation relates Parliament’s power to make laws regarding water trade.
- Therefore, any subsequent Act would only change Parliament’s ability to regulate water, which would not amount to a CPP law.

Conclusion:

It is likely the provision of the Victorian Act can be repealed using the standard procedure. This would be either (a) because the RP is too onerous, or (b) the repealing Act would unlikely be a CPP law.

THE EXTERNAL AFFAIRS POWER (S. 51(29))

Intro 1: The Cth would argue [the Treaty] was validly implemented by [the Cth law] under the external affairs power, making the [prescribed changes/rules] enforceable. The [State] would argue the external affairs power was invalidly exercised, making the Cth law ultra vires and of no effect.

Is the treaty capable of implementation?

The treaty is [...]. The subject matter of the treaty does not match an enumerated HoP, but the Cth is able to use s. 51(29) to ratify it. The Cth has the prerogative power as per s. 61 to implement any provision of a treaty, regardless of its subject matter or whether it is of international concern (**Mason J, Tasmania Dams – 4:3 majority; Richardson, 6:1**). The Cth is also allowed to act on the recommendations of the [international body] (**ILO**).

Therefore, implementing the treaty is prima facie valid. However, 4 limitations apply to implementation.

Do any of the limitations on treaty implementation apply?

Good faith –

On the facts –

There is nothing to suggest the treaty is not bona fide or a ‘coloured attempt to gain power’ (**Tasmania Dams; Koowarta, Brennan J**).

EG 1:

- In fact, the [body] appears to have the best interests of signatory nations at heart by suggesting precautionary arrangements and warning of [...]; OR
- The Cth simply wishes to ... in implementing the goals of the treaty

EG 2:

- The treaty appears to be bona fides as it is on an important subject matter, and has been widely ratified by [...] nations.
- However, the Cth clearly wants to exert more power than it has over a specific area, and may have entered into in order to confer such power.
- In saying that, the Court will not usually second guess the intentions of the executive, so it is likely the Cth will be found to have acted in good faith.

In any event, the Court is typically reluctant to question the motives of the legislature, meaning the good faith requirement would be at best a frail shield (**Tasmania Dams, Gibbs CJ**), and unlikely to apply.

Obligatory language –

Here –

ANALYSIS

However, even if the words did not import a compulsion to perform, the words of a treaty are usually aspirational and flexible and flexibly allowing for broad interpretation across nations (**Tasmania Dams, Deane J**).

Regardless, even if these words were not obligatory, there is debate as to whether ‘obligation’ is even a requirement. As the cases of **ILO** and **Richardson** show, there is considerable authority to suggest even mere recommendations incidental to the treaty are sufficient.

Specificity –

The case of *ILO* seemed to replace the obligation requirement with the need for sufficiently specific directing the course of action member States should take.

Here -

****ANALYSIS****

Where not specific enough

Although this treaty claims the Cth must [‘take steps’ / ‘endeavour’], there is nothing specific like a course of action or actual steps, conferring seemingly broad discretion. However, as [majority of nations] are signatories to the treaty, there appears to be a majority/almost absolute consensus on the sort of steps which need to be taken to [...] (*Tasmania Dams, Deane J*).

Assuming the treaty is reasonably specific -

Conformity –

The Cth Act must be reasonably appropriate and adapted to achieving the treaty’s obligations (*ILO; Richardson*).

Here –

ANALYSIS

Where disproportionate

However, the acts of [...] seem extreme and go beyond what is required by the treaty; they may even undermine it, serving to infringe human rights. Given there is a presumption in treaties against this (*Richardson*), the Act likely fails for lack of conformity; OR

Arguably, the Cth Act goes too far. The restrictions on [...] are too much, undermining basic rights. International documents such as treaties are not intended to violate human rights (*Deane; Gaudron JJ, Richardson*).

Where proportional

While the Act is [...], it arguably is proportional to the treaty’s objectives of [...].

CONCLUSION:

EG 1 - Satisfies:

On the whole, the Cth law appears reasonably adapted and appropriate to implementing the treaty (*ILO; Richardson*). As the above 4 limitations are arguably sufficed, it is likely the treaty implementation limb has been satisfied.

The Cth could also argue the law satisfies the other limbs of s. 51(29):

- a) **Extra-territorial power** – the fact that [...] may be irrelevant. The Cth is allowed to make laws whose effect go beyond its geographical borders, including laws [...] (*ILO; Polyukovich*).
- b) **Relations with other Nations** – this limb includes Australia’s relations with international organisations, including [...] (*Koowarta, Kirby & Brennan JJ*).
- c) **Matters of international concern** – as the Treaty has presumably been ratified by a large number of signatory nations, this limb may be satisfied (*Koowarta, Stephen J*). However, authority has not definitively determined that this limb exists (*XYZ, Kirby, Callinan & Heydon JJ*).

In any event, it appears the law is valid under the external affairs HoP.

EG 2 – Fails to Satisfy:

Due to the arguable lack of specificity, and seemingly poor and disproportionate conformity with the treaty by the Act, [the plaintiff] may argue the Cth did not validly exercise their EA HoP, and the Act will be invalid.

The Cth could argue that [...] is a matter of concern to the majority of the world, as is evidenced by the [number of signatories] (***Koowarta, Stephen J; Tasmania Dams, Wilson J; Polyukhovich, Brennan J***). However, as the matter of international concern limb is an unsettled area of law, and is unlikely to vindicate the Act.
