

EXTERNAL AFFAIRS POWER

Section 51(29): The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to [...] **External Affairs**

The HC has adopted a broad approach to the term external affairs

EXTRATERRITORIAL POWER

- The Commonwealth has power to legislate with regards to **matters beyond Australia's borders**
- HC decided that Cth have **plenary extraterritorial power** – no requirement for a nexus (*Polyukhovich*)

S 3 of the Statute of Westminster

"It is hereby declared and enacted that the parliament of a Dominion has full power to make laws having extra-territorial operation."

→ Made it clear that the commonwealth does have extraterritorial power

POLYUKHOVICH V COMMONWEALTH

FACTS: *War Crimes Amendment Act* (1988) (Cth) – **retrospectively** criminalized certain war crimes committed in Europe during WWII. Only Australian citizens or residents could be charged under the Act; **Neither victim nor perpetrator had to be Australian** at the time the act was committed. P was charged under the act for war crimes he allegedly committed in WWII. He challenged act on grounds that it was constitutionally invalid

ISSUE: was there a requirement for a nexus between Australia and the subject matter being connected?

HELD: confirmed that s 51(29) gives the Commonwealth Parliament **plenary power** to make legislation for matters external to Australia. **Dismissed the need for a nexus** between the legislating Parliament and the matter being regulated.

KLP: Court adopted a **literal approach** and took the view that the words external affairs refer to **all things external to Australian territory**. On this basis, **HC decided that the Cth has plenary extraterritorial power** – no requirement for a nexus

XYZ V CTH (2006)

FACTS: Prohibited sex crimes against children overseas. XYZ was charged with committing a sex crime against a child in Thailand. XYZ argued that the legislation prohibiting him from doing this was invalid – that Polyukhovitch was invalid and that the Cth needed a link

HELD: Endorsed *Polyukhovich*. Gleeson CJ, Gummow, Hayne and Crennan JJ: the Cth has **plenary extraterritorial power**; **geographic externality** is by itself enough to invoke the external affairs power.

Minority (Callinan & Heydon JJ): Adopted an originalist approach to constitutional interpretation. In 1900, external affairs meant the same thing as foreign affairs does now – relationships with other countries

RELATIONS WITH OTHER NATIONS

- The **relations of the Commonwealth with all countries outside Australia**, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs (*R v Sharkey*)
- The **preservation of friendly relations** with other dominions is an important part of the management of the external affairs of the Commonwealth (Latham CJ, *R v Sharkey*)
- *The prevention and punishment of the excitement of disaffection within the Commonwealth against the Government or Constitution of any other **Dominion may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions.***” (*R v Sharkey*)

R v SHARKEY (1949)

FACTS: Concerned s 24A of the *Crimes Act (Cth)* which made it a crime “to excite disaffection against the Government or the Constitution of **any of the King’s Dominions**” Prohibited sedition against the Australian government, or any other Commonwealth countries. Sharkey was a member of the communist party and very active in trade unions. He was convicted and sentenced to prison for 3 years. He challenged conviction before the high court – he claimed the provision was invalid because it couldn’t be characterised under a head of power

HELD: The HC said it could be characterised under the defence power and the external affairs power. The first part regarding disaffection towards Australia clearly falls under defence. But what about the other part referring to sedition against other countries? HC found it was still valid because it could be characterised under the external affairs power

KLP: HC held that laws that affect Australia’s relationships with other countries fall within external affairs power

XYZ v CTH

Kirby J: law valid as law regarding **Australia’s relationship with other nations** (in this case Thailand). Law regarding Australia’s relationship with the **United Nations Committee** on the Rights of the Child.

Doctrine may be extended to include Australia’s relationship with international organisations (see also Brennan J in *Koowarta v Bjelke-Petersen*)

Must the law **enhance** Australia’s relations with other nations to be valid?

- Callinan & Heydon JJ: Yes
- Professor Zines: No
- It is **unclear** whether enhancement is necessary → still to be resolved

TREATY IMPLEMENTATION

Only the Commonwealth can enter into international treaties on behalf of Australia. However, these treaties are not Australian law **unless incorporated by statute**

The external affairs power **can** support the implementation of treaty obligations **on any subject matter within the treaty** (Mason, Murphy and Brennan J, *Koowarta v Bjelke-Petersen*) (the broad view)

The majority of the HC in *Tasmanian Dam case* confirmed that the external affairs power granted the Cth the legislative power to incorporate **any treaty** into Australian law, **regardless of the subject matter**. (Unanimously confirmed in *Richardson's case*)

So, **broad view** is upheld

KOOWARTA V BJELKE-PETERSEN (1982)

FACTS: K was a member of the Wik community who planned to purchase the archer river cattle station which was stationed on the Wik peoples home land. QLD premier BP tried to block the sale of the land because he didn't believe that Aboriginal people shouldn't be able to own large areas of land. K made a complaint to Human rights equal opportunity commission

ISSUE: whether the External Affairs power could support the implementation of the *International Convention on the Elimination of all Forms of Racial Discrimination* (Treaty) in the form of the *Racial Discrimination Act* (Cth).

HELD: A majority of **4:3** found that the *Racial Discrimination Act* was constitutionally **valid**. **Mason, Murphy & Brennan JJ:** the Cth had the power to implement **any treaty**, which it had **ratified, regardless of the subject matter** of that treaty → because the Cth had ratified the treaty, it gave the Cth power to implement the treaty

Gibbs CJ, Aikin and Wilson JJ: the Cth could only implement a treaty under the external affairs power when the **subject matter of the treaty** was itself an **"external affair"** → if this approach was adopted, it would significantly narrow its treaty implementation power

Stephen J (casting vote): the Cth could implement a treaty under the external affairs power when it related to a **matter of international concern**.

TASMANIAN DAM CASE

FACTS: Environmentalists wanted to protect River from Dam that Tas government wanted to build. Cth supported to environmentalists and passed the legislation below. Tas government claimed legislation isn't constitutionally valid. Cth said it is valid as it can be classified under the external affairs power. Passing legislation falls under the world heritage convention.

KLP: A clear majority of the HC confirmed that s 51(xxix) granted the Cth the legislative power to incorporate **any treaty** into Australian law, **regardless of the subject matter**. (Unanimously confirmed in *Richardson's case*)

Mason J: "if the topic becomes the subject of international co-operation or an international convention it is necessarily international in character."

1 BONA FIDE/GOOD FAITH

- A treaty which is sought to be implemented under the external affairs power must be 'genuine' and in good faith (*Koowarta*)
- That is, the treaty **cannot merely be used as a means of conferring legislative power** upon the Commonwealth Parliament (Brennan J, *Koowarta*).
- However (and always mention), this constraint has been described as '**at best, a frail shield**' (Gibbs CJ, *Koowarta*)
- It would be very difficult to prove 'bad faith'

2 OBLIGATIONS

- Whether the treaty needs to impose an actual obligation or whether non obligations could be implemented saw no clear majority in the High Court in *Tas Dams*
- ___ P will argue that ___ (section/act) does not implement an obligation and is a mere recommendation/matter incidental to the treaty (*Tas Dams*)
- However, the Cth will argue that:
- If any obligation exists, it appears to be satisfied as the words ___ (shall/must/undertakes) import a duty.
- Go through **each article and determine** whether there is an obligation.
- After *Richardson*: the **Cth could implement treaty obligations** AND matters **reasonably incidental** to those treaty obligations.
- *ILO* confirmed *Richardson* and implies that the Cth could implement treaty provisions which are not obligations such as draft treaties and international recommendations (however this decision is ambiguous)
- Therefore, ___ (section or act) is valid
- After *ILO*: the Cth can implement treaty obligations, matters reasonably incidental to treaty obligations, **recommendations which are directly referable to treaty obligations and possibly also "mere recommendations"**.
- To determine obligations, **look to the language of the treaty itself** and determine whether the words are obligatory in nature ('must', 'shall', 'undertakes') or are merely aspirational/a mere recommendation

3 SPECIFICITY

- The treaty needs to describe, with sufficient specificity, the regime that the state needs to take in order to implement it.
- **Needs to be clear what the state actually needs to do**, otherwise it is unclear whether the Cth is actually implementing the treaty.
- "The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken " – *ILO case*
- The greater the global consensus regarding the course to be taken, the lesser the level of specificity required.

4 CONFORMITY

- This is a test of **proportionality**
- “To be a law with respect to ‘external affairs’, the law must be reasonably capable of being considered **appropriate and adapted** to implementing the treaty” – *ILO case*
- Cth Act cannot **undermine** the treaty – must be in sync
- Cth Act cannot use **disproportionate** means to achieve the object of the treaty – for example, if act said we are prohibiting racial discrimination and anyone who breaches will be subject to the death penalty → this would be disproportionate
- See *Richardson’s case* per Deane & Gaudron (in minority) → presumption against treaties being implemented in a way that contravenes fundamental human rights.

MATTERS OF INTERNATIONAL CONCERN

- Possible 4th branch of external affairs power - doubtful
- Because of **broad approach HC has adopted** to the treaty implementation branch, **this 4th category became unnecessary**

XYZ v Commonwealth:

Kirby J: found that the concept of “international concern” was underdeveloped.

Callinan & Heydon JJ: “There are immense difficulties facing any court wishing to recognise, as a matter of decision, the international concern doctrine. The arguments advanced in this case have not resolved those difficulties. In these circumstances, it would not be right to uphold the legislation impugned in this case by reliance on the doctrine.”

CORPORATIONS POWER

S 51(xx): “The Parliament shall, subject to this constitution, have power to make laws with respect to...**foreign** Corporations, and **trading** or **financial** Corporations, formed within the limits of the Commonwealth.”

STEP 1: IS THIS A LAW WRT A FOREIGN, TRADING OR FINANCIAL CORPORATION?

Usually easy to satisfy this step

FOREIGN CORPORATION: a corporation, which has been incorporated in another country (Heinz, Google...)

TRADING CORPORATION: current activities test (*Adamson's case*)

- **TEST:** When determining whether a corporation is a trading corporation, we look to the activities of that corporation. If a sufficiently significant proportion of the activities of that corporation are regarded as trading activities, it will be regarded as a trading corporation.
- Trading activity = production of revenue through activities

FINANCIAL CORPORATION: current activities test (*State Superannuation Board case*)

- **Essentially the same test as above** - If a sufficiently significant proportion of the activities of that corporation are regarded as financial activities, it will be regarded as a financial corporation.
- Borrowing or lending money, investments, higher purchase agreements, for example a bank

INACTIVE CORPORATIONS: purpose test (*Fencott v Muller*)

- Where we are dealing with an inactive corporation, we can't apply the current activities test. So, we look to the purpose of the corporation and whether it was formed with the purpose of conducting trading/financial opportunities.

STEP 2: DOES THIS LAW FALL WITHIN THE SCOPE OF THE CORPS POWER?

INCORPORATION:

- The corps power **could not be used** to regulate the formation of corporations (*Incorporation case*)
- HC held that the Cth couldn't regulate the creation of corporations - as s51(20) clearly states that the capacity is limited to once the corporations have already been 'formed'
- On that basis, Cth cannot regulate the process by which companies are created.

TASMANIAN DAM CASE:

Broad prohibition of activities: S 10(2) prohibited 'foreign and trading corps' from conducting certain activities on 'identified property'

- **Mason, Murphy, Deane JJ: valid** - the Cth can regulate **any** activities of a trading corporation: **broad view**
- **Gibbs CJ, Wilson and Dawson JJ: invalid** – the fact that a corp is a trading corp should be significant in the way in which the law relates to it: **narrow view**
- In other words, the commonwealth should only be able to legislate in regards to the trading activities of a corporation, not just anything

Narrower provision: S 10(4) prohibited a **trading corp** from carrying out those prohibited activities **if the activities were done 'for the purpose of trading activities'**

- **Mason, Murphy, Deane JJ: valid**
- **Gibbs CJ, Brennan J: valid** - under the **incidental scope** of the corps power the Cth could regulate activities conducted for the purpose of trade
- **Dawson, Wilson JJ: invalid**

3 APPROACHES:

- **Broad view:** Commonwealth can regulate **any** activities of a constitutional corp.
- **Narrow view:** Commonwealth can only regulate the **trading activities** of trading corps and the **financial activities** of financial corps.
- **Middle view:** Commonwealth can regulate trading activities as well as those activities carried out for the *purpose* of trade.

FENCOTT V MULLER

- **Trade Practices Act 1974 (Cth): 82. (1)** A person who suffers loss or damage by an act of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person.
- Permits any person who has suffered a loss **b/c of a corp's misleading or deceptive conduct to recover** that loss from any **natural person** involved in that deception – allowing you to claim money from the owner

KLP: Corporations are made up of people, so it doesn't make sense to prohibit the corporations from engaging in activities if the people are not also prohibited in engaging in that behavior.

RE DINGJAN

Industrial Relations Act 1988 (Cth): Industrial Relations Commission had power to review and vary contracts to which independent contractors were a party, if those contracts were unfair, harsh or contrary to public interest.

FACTS: Timber corp contracted with Wagners to harvest and transport timber. W then subcontracted some of the work to another couple, the Dingjans. D sought to have contract reviewed by industrial relations commission.

HELD: Question was whether the provision was valid being that neither of the parties were constitutional corp.

MAJORITY: In order for a law to be characterised under the incidental scope, it must have some actual effect on the constitutional corporations. Remedy was that the HC severed the provision

Minority: seemed to in principle agree with the majority, but disagreed in terms of the application of the test to the facts of the particular case. They felt that the section should be read down to only include situations where the constitutional corp would be affected.

WORK CHOICES CASE

The Industrial Disputes Power → Previous law that work choices overturned

S 51(xxxv) states that the Cth has power to legislate wrt “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”

→ So, government **passed the work choices act** and claimed **it fell under the Corporations power**

Does it fall within the scope of the corporation’s power?

DIRECT SCOPE:

- Only would fall in direct scope if broad view from Tassie dams was adopted. Covered areas such as rates of pay, maximum hours of work, which clearly don’t fall under trading activities

MAJORITY:

Prior to work choices, there were 2 views:

- 1) The ‘**distinctive character test**’ was said to be: ‘the fact that the corporation is a foreign, trading or financial corporation should be significant in the way in which the law relates to it’ if the law is to be valid. (**Narrow**)
- 2) The ‘**object of command test**’ was said to be: that a constitutional corporation is ‘an “object of command” [of a law], permitting or prohibiting a trading or financial corporation from engaging in conduct or forming relationships”. (**Broad**)

The HC adopted the broad view – object of command test

- As long as a Cth Act is **directed at a constitutional corp**, it can regulate **all activities, functions and relationships** of that corp (not only trading or financial activities)
- In other words, all that is necessary is for a foreign, trading, or financial corp to be the object to the legislations command.

INCIDENTAL SCOPE:

*"I have no doubt that the power conferred by s 51(xx) of the Constitution extends... to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is **capable of affecting** its activities, functions, relationships or business."* - Gaudron J *Re Pacific Coal*

- In DINGJIAN, law needed to have some **actual** effect (beneficial or detrimental) on a corporation
- But this test is much broader, as it can be **merely capable** to have an effect to fall within the incidental scope of power

DIRECT SCOPE:

There are two views:

- 1) **Narrow view** (distinctive character test): The fact that the corporation is a foreign, trading or financial corporation should be significant in the way in which the law relates to it
- 2) **Broad view** (The object of command test): that a constitutional corporation is 'an "object of command" [of a law], permitting or prohibiting a trading or financial corporation from engaging in conduct or forming relationships". [**current test**]

Broad view was approved by the majority in *Tasmanian Dams*

Work Choices: Subsequently, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ **endorsed the broad view** and **rejected the narrow view**: laws prescribing the industrial rights and obligations of constitutional corporations and their employees and the means by which they are to conduct their industrial relations are laws with respect to constitutional corporations

Broad View reframed as the **object of command test**: if a law is directed at a constitutional corporation, it can regulate **any activities** of that corporation → Broad view from *Tasmanian Dams* reframed

INCIDENTAL SCOPE

The scope of the corporations power may be extended through the use of the incidental scope of that power.

Dingjan's Case: for law to come within incidental scope must have some degree of connection or effect on the constitutional corporation

Work Choices: incidental scope of the power is **construed very broadly** so as to include:

1. Those **through whom the constitutional corporation acts** (employees and shareholders); and
2. Whose conduct **affects or is capable of affecting the business activities** of a constitutional corporation (3rd parties, subcontractors)

The fact that premises are 'occupied or otherwise controlled' by a constitutional corporation is a sufficient enough connection to the power (Work choices)

Incidental scope (natural persons): a law which regulates the conduct of those people whose conduct **affects or is capable of affecting** the business / activities of a constitutional corporation (Gaudron in *Re Pacific Coal*) – **extremely broad**