

## A. LEGISLATIVE POWER: S 51(xxix) EXTERNAL AFFAIRS HYPOTHETICAL

### I. EXTERNAL AFFAIRS – S 51(xxix)

#### A. Dimensions of s51(xxix)

The first ground on which *Person X* could challenge the validity of *Act X* relates to whether *the Act* was properly enacted under section 51(xxix). This power is constituted by four independent limbs enabling the Commonwealth to make laws with respect to: treaty implementation;<sup>1</sup> Australia's relations with other countries;<sup>2</sup> and geographical externality.<sup>3</sup> The fourth limb, which has not been authoritatively decided upon in the High Court, is that the Commonwealth may make laws with respect to matters of international concern.<sup>4</sup>

*The Act X* deals with:

|| 'with matters, persons or things physically external to Australia'  
and is therefore not supported by s 51(xxix)'s geographical externality limb.

Nor does *the Act* affect Australia's relations with other countries,

*The Act* in this case must be supported by the treaty implementation limb, as it was enacted subsequent to the Commonwealth's ratification of *the Convention*. ||

#### B. Interpretation of the *Convention*

The external affairs power authorises the Commonwealth to domesticate any non-aspirational<sup>5</sup> and bona fide treaty.<sup>6</sup>

##### 1. Good faith

For the *Convention X* to be capable of implementation, it must have been entered into in good faith.<sup>7</sup> This notion of bona fide treaty ratification would be necessarily contravened if it was 'no more than a device to attract a domestic legislative power'.<sup>8</sup> In the present case, \_\_\_\_\_.

However, *the Convention* is unlikely to be invalidated on these grounds; the Court has expressed a desire to accept the decisions of the Executive government to enter treaties<sup>9</sup> and the requirement of bona fides is 'at best...a frail shield, and available in rare cases'.<sup>10</sup>

##### 2. Is the *Convention* aspirational?

A treaty must be practically capable of implementation and not merely an 'aspiration'.<sup>11</sup> Thus, it must define 'with sufficient specificity...the general course to be taken by the signatory states'.<sup>12</sup> However, a

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<sup>1</sup> *Industrial Relations; Tasmanian Dams; Burgess*.

<sup>2</sup> *Sharkey; XYZ*.

<sup>3</sup> *XYZ; Horta; Polyukhovich*.

<sup>4</sup> *Koowarta* (Stephen J); *Tasmanian Dam* 171–2 (Murphy J); cf *XYZ* 660 (Callinan and Heydon JJ).

<sup>5</sup> *IRA* 486–9 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>6</sup> *Tasmanian Dams* 122 (Mason J).

<sup>7</sup> *Tasmanian Dams* 122 (Mason J).

<sup>8</sup> *Tasmanian Dams* 259 (Deane J), 122 (Mason J).

<sup>9</sup> *Tasmanian Dam* 125 (Mason J), 100 (Gibbs CJ); *Koowarta* 229 (Mason J).

<sup>10</sup> *Koowarta* 200 (Gibbs CJ).

<sup>11</sup> *IRA* 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>12</sup> *IRA* 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

treaty is not required to be as precise as a 'legally enforceable agreement under the common law' and some degree of imprecision is acceptable.<sup>13</sup>

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## C. Conformity

### 1 Characterisation of *the Act*

#### 1. *What is the purpose?*

##### (a) *Convention — Text*

*The Convention X's* purpose is to \_\_\_\_\_.

##### (b) *Act X — Text*

*The Act's* purpose is to allow the Federal Court to make \_\_\_\_\_

#### 2 *Means Appropriate and Adapted*

The means chosen by the legislature to carry into effect a treaty under s 51(xxix) must be 'reasonably capable of being considered appropriate and adapted' to that end.<sup>14</sup>

Notwithstanding Mason J's suggestion that the Court should not 'substitute its judgment for that of the executive...and Parliament', the Court has shown a willingness to scrutinise the means chosen for treaty implementation in *Tasmanian Dam* and *IRA Case*.

|| In the present case, section 6(b)'s authorisation of.....

## B. CORPORATIONS POWER: S 51(xx) HYPOTHETICAL

### I. CORPORATIONS POWER – S 51(xx)

Section 51(xx) gives the Commonwealth Parliament power to legislate with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The *Act X* creates a right \_\_\_\_\_ // binds both \_\_\_\_\_

#### A. Is X a constitutional corporation?

It is first necessary to determine whether X is a constitutional corporation for the purposes of s 51(xx).

##### 1. *Corporations governed under s 51(xx)*

A 'foreign' corporation is an entity incorporated under the law of a foreign country. As X was incorporated in under State/Cth law, it is not a 'foreign' corporation.

The current activities test is the preferred 'guide' (over the 'purpose' test<sup>15</sup>) in determining whether a company is a constitutional corporation specified in s 51(xx).<sup>16</sup> The two classes — 'trading' and 'financial' — are not mutually exclusive and both are subject to the application of the current activities test.

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<sup>13</sup> *Tasmanian Dam* 261–2 (Deane J).

<sup>14</sup> *IRA Case* 487–8 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Tasmanian Dam* 259 (Deane J), 130–1 (Mason J), 172 (Murphy J), 232 (Brennan J).

<sup>15</sup> *State Superannuation* 303; *Adamson* 233 (Mason J),

<sup>16</sup> *WA Footfall* ('Adamson') 208 (Barwick CJ).

*(i) Breadth of 'trading'*

The court's willingness to define 'trading' broadly<sup>17</sup> is observed through Barwick CJ's recognition that 'trade for constitutional purposes cannot be confined to dealing in goods or commodities'<sup>18</sup> and Mason J's formulation that trade extends to 'business activities carried on with a view to earning revenue' (not limited to profit).<sup>19</sup> This question is essentially one of 'fact and degree'.<sup>20</sup>

**Questions to Ask**

***Is it commercial in nature?***

***Is it many factoids?***

In *Adamson*, although the Club and the League's primary activity was 'promotion of Australian Rules Football', it was found to be a 'commercial venture for profit' and an 'activity of trade'.<sup>21</sup> The essentially commercial nature of the Club and League's activities: promotion of matches, sale of advertising and television rights, release of players for large sums<sup>22</sup> distribution of proceeds to member clubs and gate receipts, led to the conclusion that they were trading corporations.<sup>23</sup>

***Size of the transactions***

The 'trading activities' of the League were 'so extensive'.....

**Purpose Test (only if it applies)**

The purpose test is necessary in regards to corporations have not yet or 'barely begun to carry on business'.<sup>24</sup>

*2. 'Formed within the limits of the Commonwealth'*

Following the passage of national corporations legislation and the States' referral of power to the Commonwealth, a corporation is considered to be 'formed within the limits of the Commonwealth' if it is incorporated under Australian law.

**Is X a law with respect to s 51(xx)?**

If X is found to be a constitutional corporation for the purposes of s 51(xx), it is necessary to determine whether the Commonwealth can regulate X's activities.

**Characterisation of s 51(xx)**

The majority in *WorkChoices* confirmed the broad scope of s 51(xx), endorsing Gaudron J's dicta in.....

***Pick the part of the Statement that you need for the hypo and link it to the laws.....***

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<sup>17</sup> *Adamson* 209 (Barwick CJ).

<sup>18</sup> *Adamson* 209 (Barwick CJ).

<sup>19</sup> *Adamson* 235 (Mason J); *Queensland Rail* 39.

<sup>20</sup> *Adamson* 234 (Mason J).

<sup>21</sup> *Adamson* 210–1 (Barwick CJ).

<sup>22</sup> *Adamson* 211 (Barwick CJ).

<sup>23</sup> *Adamson* 235 (Mason J).

<sup>24</sup> *State Superannuation* 304–5 (Mason, Murphy, Deane JJ)

### Covering the Field

A state law will be invalid if the Commonwealth meant to cover the field of regulation completely exhaustively or exclusively.<sup>25</sup> This inquiry involves a two-stage process: first, whether the two laws are in the same field; and second, whether the Commonwealth law intended to cover the same field.

#### Are the Commonwealth and State laws in the 'same field'?

This question turns on whether both laws operate within the same field. The general character and content of the instruments relate to \_\_\_\_\_.

- **Ex Parte McLean** → They **went towards the same contract**, requiring performance as an industrial duty proper to be imposed and enforced. Both requiring you to comply with your work contract. State law → breach of contract VERSUS Cth law → compliance with industrial awards.

**Noarlunga Meat** → both relating to the slaughter of meats.....

#### Was there an Intention to Cover the Field?

Intention of the Commonwealth law to cover the field can be ascertained by reference to the Act's text and its 'nature and content'.<sup>26</sup> An intention must produce a 'conscious competition' between legislatures not to keep within their own confines.<sup>27</sup>

#### Text

The text may reveal an intention to cover the field through 'implication or express declaration'.<sup>28</sup> There is nothing in the language of \_\_\_\_\_ to.....

## SECOND LIMB — COURTS ONLY EXERCISE CTH JUDICIAL POWER CONFERRAL OF POWER ON A FEDERAL COURT

### Power conferred on a Federal Court

Chapter III Courts are not permitted to discharge 'functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto'.<sup>29</sup> This principle was consolidated in *Wakim* which clarified that courts created under Chapter III are created for the 'express purpose of exercising *federal jurisdiction*' and that neither Commonwealth nor State Parliaments may 'give them any other jurisdiction'.<sup>30</sup> Thus, only federal courts may exercise the judicial power of the Commonwealth.

#### Who is conferring the Power?

Federal courts may only be invested with federal jurisdiction by the Commonwealth Parliament and State legislatures 'have no power...to invest State jurisdiction or judicial power in federal courts'.<sup>31</sup> Here, the Commonwealth Parliament passed *Act X* and therefore the conferral of power is not problematic in this regard.

#### Judicial Power

The case law suggests that there is a degree of imprecision in formulating a 'comprehensive definition of judicial power'.<sup>32</sup> Judicial power has been classically defined as the sovereign's power to 'give binding and authoritative decision' on controversies involving rights.....

### Permanent and Complete

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<sup>25</sup> *Ex Parte McLean* [483].

<sup>26</sup> *Noarlunga Meat* (Fullagar J [588]); *Native Title* [466].

<sup>27</sup> *Ansett* (Stephen J [250]).

<sup>28</sup> *Native Title* [466].

<sup>29</sup> *Boilermaker's* 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); reaffirmed in *Wakim* 528 (Gummow and Hayne JJ).

<sup>30</sup> *Wakim* 559 (McHugh J)

<sup>31</sup> *Wakim*; *Ex parte McNally* (1999) 198 CLR 511, 557 (McHugh J).

<sup>32</sup> *Brandy* 267 (Deane, Dawson, Gaudron and McHugh JJ).

First, incompatibility arises where the *judge's X* commitment to the non-judicial function is so permanent and complete that performance of their judicial functions are impracticable.

It might be argued in this case that the eligible judge's conferral with non-judicial functions make it *practically incompatible* with subsequently performing judicial functions, given how far removed it is from traditional judicial power, such as making 'binding and authoritative',<sup>33</sup> enforceable decisions between subjects.<sup>34</sup>

### **Capacity to perform**

Secondly, if the judge's capacity to perform her 'judicial functions with integrity is compromised or impaired' by the performance of non-judicial functions, the conferral will be incompatible. The intention behind this arm of incompatibility is to protect the 'independence of Ch III judges from the political branches of government'.<sup>35</sup>

*The Act X's* conferral of X functions on the eligible judge could be seen to threaten this independence and the capacity to perform their judicial functions with integrity, by requiring X to do Y.

### **Public Confidence**

Thirdly, the non-judicial functions must not compromise public confidence in the integrity of the judiciary as an institution or the capacity of the judge to perform their judicial functions — incompatibility has the 'effect of limiting legislative and executive power.'<sup>36</sup>

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<sup>33</sup> *Huddart Parket & Co v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

<sup>34</sup> *Brandy* 268 (Deane, Dawson, Gaudron and McHugh JJ).

<sup>35</sup> *Wilson* 14 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

<sup>36</sup> *Wilson* 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J).

## B. SECTION 96 – GRANTS POWER HYPOTHETICAL

### I. SECTION 96

Section 96 of the Constitution provides that the Commonwealth may ‘grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’ and is ‘susceptible of a very wide construction in which few if any restrictions can be implied’.<sup>37</sup>

#### A. Nature of the grant

The grant is provided on the condition that X do Y. **Then only do the points that apply.**

#### B. Is the grant constitutional? choose your topics wisely

##### 1. Object specifically defined

A s 96 grant may constitutionally define objects or conditions, and go beyond simply ‘supplementing the financial resources’ of a State Treasury — it may bind application of the funds to an identified object.<sup>38</sup> The Commonwealth may offer a grant as ‘inducement to the State Parliaments’ to refrain from exercising certain powers;<sup>39</sup> the Commonwealth may even go so far as to make it ‘politically impossible’<sup>40</sup>

However, the Court’s willingness to uphold the validity of the *Uniform Tax Cases* indicates that there will be a high threshold to find a grant is coercive. Latham CJ suggested that ‘temptation is not compulsion’, and a law would have to ‘command’ the State not to exercise its, a condition that was not met by the *Grants Act* in *First Uniform Tax Case*.<sup>41</sup> Furthermore, Dixon CJ found that the requirement of ‘State acceptance of the grant and...the accompanying term or condition’ suggests that ‘there is nothing coercive’ in section 96.<sup>42</sup>

##### (a) Creating a need

Latham CJ affirms in the *First Uniform Tax Case* that a section 96 grant will be valid even if a ‘Commonwealth law creates a “need”’ which the grant relieves.<sup>43</sup> In that case, the States’ ‘need for financial assistance’,

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#### C. Limitations

Despite the breadth of the grants power, the Commonwealth’s provision of grants under s 96 could be limited by two prohibitions of general application: section 51(xxxi) and section 116.

##### (a) Possible limitation: section 116

Although the Court rejected (6:1) the challenge based on section 116 in *DOGS Case*, the Court indicated that section 116’s prohibition ‘applies to all laws...without exception’, and could therefore limit Commonwealth power under section 96 where grants support or establish a religion.<sup>44</sup>

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<sup>37</sup> *Second Uniform Tax Case* 605 (Dixon CJ).

<sup>38</sup> *Second Uniform Tax Case* 606–7 (Dixon CJ).

<sup>39</sup> *First Uniform Tax Case* (1942) 65 CLR 373, 416–7 (Latham CJ); *Second Uniform Tax Case* (1957) 99 CLR 575.

<sup>40</sup> *First Uniform Tax Case*

<sup>41</sup> *First Uniform Tax Case* (1942) 65 CLR 373, 417 (Latham CJ)

<sup>42</sup> *Second Uniform Tax Case* (1957) 99 CLR 575, 605 (Dixon CJ).

<sup>43</sup> *First Uniform Tax Case* 413 (Latham CJ).

<sup>44</sup> *DOGS Case* (1981) 146 CLR 559, 576 (Barwick CJ).