Federal Constitution Law - Lecture 7; Implementing Treaties

We must ask: 1. Does the treaty enliven the power; 2. Does the law implement the treaty?

- Treaty obligations must be sufficiently specific and not aspirational (Industrial Relations Case);

Implementing Treaties: Deep Anxieties; Australia and the International Legal Order

- The power to commit Australia to international agreements lies with the federal executive as an aspect of its prerogative power. However, reforms in recent years have ensured that Parliament plays a role.
- In 1961 PM Menzies announced a commitment to table treaties in both houses of Parliament for at least 12 days.
- By the 1970s, treaties were tabled in bulk and for up to 6 months.
- In 1996, a Senate led inquiry produced the following recommendations:
  - 1. The tabling of treaty actions in Parliament for at least 15 days before action is taken;
  - 2. The preparation of a National Interest Analysis for each treaty;
  - 3. The establishment of a joint standing parliamentary committee on treaties (JSCOT);
  - 4. The establishment of a treaty council comprising of the PM, Premiers and Chief Ministers;
  - 5. The establishment of an Australian Treaties Library on the internet.
- In 2002, the Minister for foreign affairs announced that treaties for major political, economic or social significance are now tabled for 20 days, and other treaties tabled for 15 days.
- JSCOT has a duty to review the treaty during the tabling period, and look at the accompanying NIA, public submission and a public hearing on the treaty.
- In the Treaties Ratification Bill 2012, there was a proposition to prevent the GG from ratifying a treaty unless both houses of Parliament are satisfied and have approved, by resolution, the ratification of the treaty. However this failed as the sheer number of treaties signed would overwhelm the Parliamentary process.

First Approaches

- The most contested question is the extent to which Australia's entry into international treaties or conventions by the executive can trigger a constitutionally permissible exercise of Commonwealth legislative power.
- In Roche v Kronheimer, the HCA upheld the Treaty of Peace Act 1919 which implemented the Treaty of Versailles after WW1, where Higgins J concluded that this fell under the external affairs power (though other members noted it fell under the defence power).

R v Burgess; Ex Parte Henry

- Facts: Henry Goya Henry was a one legged pilot who used a biplane decorated with 'Jolly Ranger' to take members of the public for joyrides along the perimeter of Sydney Airport. His

license was suspended when new regulations came into effect under Air Navigation Act 1920. It is trying to implement a treaty, and the argument is that the treaty does not enliven the external affairs power because it is a matter of domestic concern.

- Held: **Act was valid insofar as it authorised the making of regulations 'for the purpose of carrying out and giving effect to' the treaty concerned**. Henry won the case when the actual regulations he supposedly breached were held invalid (Starke J dissenting). Law is valid but the regulations are not.
- Implementation of treaties under s 51(xxxix) is valid in quite unqualified terms.
- But there is, in our view, an undoubted capacity in His Majesty to enter into international conventions dealing with any of these subject matters and necessarily binding upon and in respect of the Commonwealth.
- **Limitation: the law cannot contravene constitutional guarantees when implementing a treaty AND has to be a bona fide treaty - not just a device for procuring the Commonwealth additional jurisdiction.**
- When discussing the limits of this power (Starke J speculating): The Commonwealth cannot do what the Constitution forbids. But otherwise the power is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States.
- **Established that the implementation within Australia of some international treaties was valid. The possible limitation suggested by Starke J (to matters of sufficient international significance, or to be a legitimate subject for international co-operation and agreement) did not need to resolved since, even if the test applied, the subject of international air navigation clearly satisfied it.**
- Dixon J: Must be indisputably international in character; not merely a matter of international concern.
- Evatt and McTiernan JJ: The laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing.
- Starke J's test: The power is wide in terms, but its limits cannot be transcended. All means which which are appropriate, and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power.

<u>The Expanding Power (Koowarta v Bjelke-Petersen)</u>

- Facts: HCA considered the Racial Discrimination Act and whether it was validly enacted under the races power in s 51(xxvi) or the external affairs power. It was argued that it may be validly enacted under the external affairs power because the purpose of the Act was to meet Australia's international Obligations under a treaty.

- Held: Whether the power to implement treaties is subject to the limitations of the kind suggested by R v Burgess ; Koowarta was still equivocal.
  - Mason Murphy and Breannan JJ held that there was no limitation.
  - Gibbs CJ, Aickin and Wilson JJ adopted the limitation proposed by Dixon J: that a treaty can be implemented within Australia only if its subject matter is indisputably international in character.
  - Stephen J thought that there was some limitation but thought that the test formulated by Dixon was too narrow. He held that what was really required was that the treaty be on a matter of international concern, a person of the test proposed by Starke J. Agreed with Murphy and Brennan JJ that RDA was valid as suppression of racial discrimination was of international concern.
- From the Judgment of Gibbs CJ: In no previous cases has it been decided whether or not Parliament has the power to give effect to a treaty which deals with a matter that is entirely domestic, and affects only Australians within Australia, and their relations to each other.
- If the Parliament were able to legislate and give effect to every international agreement which the executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power.
- No Single power should be construed in such a way as to give the Commonwealth Parliament universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament (Bank of NSW v Commonwealth).
- If the Parliament could legislate on any matter of International treaties, then any matter which expanded the scope of the legislative power would therefore be validly enacted under the external affairs power.
- Can only be valid if the agreement is with respect to a matter which itself can be described as an external affair.
- As to what constitutes a matter of external affairs: this question is still open.
- A matter does no become international in character simply because other nations are interested in Australia's policies and practices with regard to racial discrimination.

- From the Judgment of Murphy J: The RDA deals with external and internal affairs.
- If there were restrictions, Australia would be an international cripple unable to participate fully in the emerging world order.
- The Parliament, exercising the external affairs power is entitled to make laws for the peace, order and good government of the Commonwealth.
- The exercise of that power is not an intrusion upon the People of the States.

- From the Judgment of Stephen J: Two limitations recur in some judgements in this court:

    - to fall within power treaties must be bona fide agreements between States and not instances of a foreign government lending itself as an accommodating party so as to bring particular subject-matters within the other party's treaty power;
    - that to fall within power a treaty must deal with a matter of international concern rather than merely domestic concern.
- To determine what is a matter of international concern, we look at the subject matter, circumstances and parties.
- It will be open to the Court, in the case of a challenged law by reference to its connexion with international subject-matter and with the external affairs of nations.
- Stephen J's argument supports two premises:
    - 1. Power can be used to implement an international treaty at least when the treaty deals with an issue of international concern.
    - 2. Even in the absence of a treaty, an international concern to which Australia in its international regulations might consider it necessary or prudent to respond by appropriate legislation, such as because the concern is part of customary international law, might be enough to bring that legislation within the scope of s 51(xxix).

- **From Koowarta (lowest common denominator): The implementation of a treaty is a valid use of power under s 51(xxix) at least when the subject matter is of 'international concern'. However, even though the test of international concern may be the lowest common denominator, it should be remembered that it was relied on only by Stephen J, and thus Koowarta may stand for nothing more than its result.**

<u>Commonwealth v Tasmania (Tasmanian Dams Case)</u>

- Facts: The Hawke Labour Government had taken action under the World Heritage Properties Conservation Act 1983 to stop the damming got the Franklin River System in Tasmania.
- The legal issue in Commonwealth v Tasmania (Tasmanian Dams Case) largely turned on the problem of what had been decided in Koowarta.
- Mason, Murphy, Brennan and Deane JJ held that the power could be used to implement any treaty obligations assumed by Australia.
- A treaty on any subject matter enlivens the power.
- Dissenting Judges preferred the limitation proposed by Dixon J in R v Burgess.
    - Gibbs CJ and Wilson J also dissented in Koowarta.
    - All dissenting judges settle for the lowest common denominator of Koowarta, that the test proposed by Stephens J was adequate.

- From the Judgment of Gibbs CJ: Whether a matter is of international concern depends on the extent to which it is regarded by nations of the world as a proper subject for international action, and on the extent to which it will affect Australia's relations with other countries. However, I prefer a more precise test.
- However, unlike the defence power, the external affairs power depends upon facts, and those facts change so may its actual operation as a power enabling the legislature to make a particle law (Andrews v Howell).

- From the Judgment of Mason J: (Rejecting (or at least treating it as only one of the several criteria) international concern test as being too elusive and as yielding no acceptable criteria or guidelines); It is submitted that the suggested requirement that the subject-matter must be of international concern mean that it must be international in character in the sense tat there is a mutuality of interest or benefit in the observance of the provisions of the convention (seatbelt analogy; other nations don't derive a benefit if Australian wear their seat belt).
- (Asserting that the test is flawed): Whether the subject matter as dealt with by the convention is of international concern, whether it will yield, or is capable of yielding a benefit to Australia, or whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion.
- The fact that a subject becomes part of external affairs does not mean that the subject becomes, as it were, a separate plenary head of legislative power.

- Brennan J sympathised with the limits on treaty implementation and adhered to his view in Koowarta that this could be done by insisting on strictly controlled implementation of treaty obligations.
- Must implement an obligation not just a recommendation.
- **Deane J argued that the whole issue had been settled in R v Burgess. As long as it was bona fide, it is valid.**

- Held: Only Murphy J held that all four relevant paragraphs of s 6(2) were valid. Other majority (Mason, Brennan and Deane JJ) decided only s 6(2)(b) was valid, accepting the mere existence of an international obligation as being enough to invoke the external affairs power.
- International concern might still be a factor, but the international concern test is not something that has been upheld. For the purposes of enlivening the treaty, there merely must be a treaty.

- Dissenting: Gibbs CJ, Wilson and Dawson JJ held that s 6(2)(b) was invalid. Extracting from Koowarta the test of international concern, they held the Act did not pass the relevant test. Additionally, the Convention did not impose an obligation.

- From the Judgement of Deane J: A law would not properly be characterised as a law with respect to external affairs if it failed to carry into effect or to comply with the particular provisions of a treaty which it was said to execute; or if the treaty which the law was said to carry into effect was demonstrated to be no more than a device to attract domestic legislative power (Burgess case).
- While it is not for the court to decide the best way for the Parliament to achieve tis aim, the law must be capable of being reasonably considered to be appropriate and adaptable in a achieving what it is said to impress in relation to external affairs.
- The absence of reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterisation as a law with respect to external affairs.
- **On the other hand, if the relevant law partially implements the treaty in the sense that it contains provisions which are consistent with the terms of the treaty and also contains significant provisions which are inconsistent, it would be extremely unlikely that it would with respect to external affairs on the basis that it was *capable of being reasonably considered to be appropriate and adapted to giving effect to the treaty.***
- You can partially implement a law, bit if only bits of it are consistent and bits of it are inconsistent it may be too far a departure from the conformity test.
- ***The purpose of the law must be to implementing the treaty. The means of the law must be reasonably considered to be appropriate and adapted to the law.***

Sir Daryl Dawson: The Constitution - Major Overhaul or Simple Tune Up?

- As there is no theoretical limit to what the subject-matter of an international agreement may be,, the external affairs power may, as a matter of constitutional theory, be regarded as open-ended.
- No one can deny that international treaties create a broad base for legislative activity.
- The construction of the external affairs power which has now found favours offers to the Commonwealth new and independent heads of power on a potentially limitless range of subjects, whatever restrictions are imposed or latitude allowed in the implementation of a particular treaty.

The Powers Confirmed

- Although Wilson and Dawson JJ had dissented in the Tasmanian Dams Case, they accepted it as binding.

Richardson v Forestry Commission

- Facts: The Act had established a Commission to investigate whether the Lemonthyme and Southern Forest areas in Tasmania could be nominated to qualify as a world heritage area under the Convention for the Protection of the World Cultural National Heritage.
- Held: Wilson Dawson JJ joined Mason CJ, Brennan and Toohey JJ in holding that the Act was valid.
- From the Judgment of Dawson J: The majority took the view that this amounted to a valid exercise of the external affairs power under the Constitution.
- **That view was taken on the basis that subject to express Constitutional prohibitions, any matters covered by a bona fide international treaty are, by their very inclusion in the treaty brought within the scope of the external affairs power.**
- I am unable to accept that view.
- No doubt the activities involved in concluding an international agreement fall within the description of external affairs, but that does not to my mind bring the subject-matter of the agreement, if it is entirely domestic within that description.
- The fact that an agreement is international in character does not necessarily mean that the matters with which it deals cease to be domestic and become part of external affairs.
- The Tasmanian Dams Case did decide that the legislative implementation of an international treaty concluded in good faith is within the ambit of the external affairs power.
- From the majority, it is enough to attract legislative power if, even though there is no treaty, the subject matter is of sufficient international concern.
- The scope of mattes that falls within 'international concern' is growing ever wider.
- Deane and Gaudron JJ in dissent argued that the validity must be proportionate to the implementation of treaty obligations.

<u>Queensland v Commonwealth (Tropical Forest Case)</u>

- Facts: By proclamation under the World Heritage Properties Conservation Act, certain areas in north-east Queensland were declared to be property to which the protective provisions of s 9 of that Act applied.
- Held: In a joint judgment, Mason CJ, Brennan, Deane,Toohey, Gaudron and McHugh JJ rejected the outright idea that a court can decide for itself an issue of fact whether the Wet Tropical Rainforests are part of natural heritage. It was held that an inclusion of property on the list is conclusive of its status in the eyes of the international community.
- Dawson J delivered a separate judgment accepting the Tasmanian Dams Case as binding precedent while keeping open the possible limits from international concern and other tests.

<u>Industrial Relations Act Case</u>

- Facts: The Act provided minimum wages, equal pay, unfair dismissal and paternal leave rights for workers subject to the various conventions and recommendations adopted at the International Labour Organisation.
- Held: Claim to validity largely upheld by Brennan CJ, Toohey, Gaudron, MuHugh and Gummow JJ. However, Dawson in a separate judgment concurred in the result (the case reaffirmed the Tasmanian Dams Case).
- The phrase external affairs was adopted in comparison to foreign affairs to include British relations as well as those with other countries.
- As the field of international and external affairs was continually expanding, there is no justification to treat the phrase as crystallised in the time of federation.
- The legislative power was designed to authorise the implementation of treaty obligations which bound Australia.
- However, referring to the Tasmanian Dams Case, the treaty must embody the precise obligations rather than the mere vague aspirations, and the legislation must be 'appropriate and adapted' to the implementation of those obligations.
- There may be some treaties which do not enliven the legislative power conferred by the external affairs powers; such as treaties expressed in terms of aspiration (to promote full employment etc…). The law must prescribe a regime that the treaty has defined with sufficient specificity to direct the general course to be taken by the signatory states.
- **The legislative power is enlivened when the law prescribes a regime affecting a domestic subject matter where there is a connexion between the law and the treaty. The means in the law must be considered 'appropriate and adapted' for implementing the purpose of the treaty.**
  - **It has been said that a law cannot be seen as 'appropriate and adapted' unless there appears to be reasonably proportionate between the purpose of the treaty and law implementing it.**
- Quoting from Tasmanian Dams Case: Deficiency in implementation of a supporting convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of law, make it substantially inconsistent with the Convention.
- Dawson J did not dissent.

International Recommendations

- The issue here is whether international recommendations could validly fall under the external affairs power if enacted.

- In R v Burgess, the judgment of Evatt and McTiernan JJ was inconclusive. The recommendations relied on were relevant as signifying the particular measures thereby recommended would be an appropriate and adapted means of satisfying the convention.
- In the Industrial Relations Case, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ stated that the section refers separately to a measure being reasonably regarded as appropriate and adapted for giving effect to the Recommendations.
  - **While the question is left open, it appears to say that a mere recommendation, except insofar as it offers a guide to the suitable implementation of a treaty, will not be sufficient to support legislation under the external affairs power.**

<u>Paper v Commissioner of Taxation</u>

- Facts: The government and enacted legislation designed to minimise the effects of the GFC in 2008. It was argued that the GFC was a matter of international concern and that international cooperation was necessary. The Commonwealth advanced arguments stating that the measures had been taken on he recommendation of the international community and therefore enlivened the external affairs power.
- Held: All such arguments failed.
- In the judgement of Heydon J: The G-20 declaration is aspirational; it contains no details nor deterrents. That is because of the words 'as appropriate'.
- Citing Victoria v Commonwealth: 'external affairs did not exist where all that was stated was a broad objective with little precise content and permitting widely divergent policies by parties'.
- Treaties are significantly different from G-20 declarations; as G-20 declarations fall more in the genre of public relations rather than treaties.
- The better view is that it cannot [enliven the external affairs power from recommendations], because mere recommendations do not create international obligations. In any event, even if some recommendations could do so, the recommendation in this case is too vague.
- The recommendations imposed no obligation upon any nation.

1. **<u>What is the head of power? External affairs due to there being a treaty.</u>**
2. **<u>Does the international instrument enliven the external affairs power?</u>**
3. **<u>Is the law reasonably capable of being considered appropriate and adapted.</u>**

- Read the text, is it aspirational or is it a treaty.