

LAW2111

CONSTITUTIONAL LAW

EXAM NOTES

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ISSUE SPOTTING GUIDE

Commonwealth Law/ Act

- Head of power/ characterisation
 - s 51(29) External Affairs (including treaties, extra territoriality, relations with other countries, international concern)
 - s 51 (20) Corporations
 - s 96 Grants to the States
- Implied Limits/ Prohibitions
 - Separation of powers
 - Limits on Cth's ability to bind States
 - Implied Freedom of Political Communication ('IFPC')
 - Implied freedom to vote
- Express Limits
 - s 81 spending power
- **Cth but no Act:** Executive power or spending power s 81

State Law

- How State Law Made: Restrictive Procedures (manner and form provisions)
- Implied limits of States' ability to bind the Cth executive
- IFPC
- Separation of powers (Kable etc)

Both State & Cth laws

- All of the above
- S 109 Inconsistency

Victoria, s 16 Constitution Act 1975

“The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.”

Australia Act 1986 s 2(1)

“the legislative powers of the Parliament of each State include full powers to make laws for the peace, order and good government of that State”

EXTERNAL AFFAIRS POWER

S 51(29)/ s 51(xxix): “The Parliament shall, subject to this Constitution, have power to make laws . . . with respect to external affairs.” Extraterritorial power arises when Parliament legislates with respect to matters beyond its borders.

Introduction:

- The Cth will argue that [law] falls within its external affairs (‘EA’) power (s 51(xxix)) as it purports to validly:
 - Implement a treaty;
 - Enact an extra-territorial law;
 - Enact law dealing with relations with other countries; (potentially)
 - Deal with matters of international concern

(1) Implementation of Treaty:

➤ Introduction:

- The [Cth] will argue that [law] falls under its external affairs power (s 51(xxix)) because it is implementing [treaty] to which Australia is a party, and it has inherent prerogative power to ratify international treaties.
- s 51(29) empowers the Cth parlt. to implement such treaties into domestic law, regardless of subject matter (Richardson affirming the majority view in Dams).
- The domestic law is prima facie valid unless a limitation applies.
- As per ***Leask***, the treaty implementation aspect is a ‘purposive’ power for characterisation purposes. Thus, proportionality and reasonableness analysis (appropriate and adapted) is required

➤ **Identify the document signed** – is it a treaty or something lesser?

- Treaties and conventions are clearly covered under the EA power.
- Non-binding recommendations, charters, pacts, protocols and declarations may also be covered under the EA power (ILO; R v Burgess per Evatt and McTiernan JJ).

- HD NOTE: if **separate** treaties/conventions/recommendations/committees, consider all separately.

➤ **Do any limitations apply?**

1. Treaty ratification must be bona fide/in good faith

- Parliament cannot pass a law subject to a treaty that was signed merely to confer legislative power upon the Cth (*Koowarta per Brennan*)
- However, this limitation is a 'frail shield available in rare cases' as it is difficult to assess Cth's motives for signing a treaty (*Koowarta per Gibbs CJ*).
- NOTE: consider number of signees – more signees, the more likely it is bona fide

2. Treaty must contain obligatory language?

- The HC in *Tasmanian Dams* split 3:3 on whether obligatory language is required (Dawson J not deciding either way).
 - Furthermore, international agreements are rarely expressed with the same precision as formal domestic documents (Deane J in *Dams*).
 - The HC affirmed the implementation of non-binding documents in *ILO* without mention of the 'obligations' requirement.
 - Would create an 'arbitrary limitation' which might 'deprive Australia of the benefits which a treaty ... seeks to secure' (Mason J in *Dams*)
- It may be that that post *ILO* the 'obligatory language' requirement has become subsumed within the 'specificity' requirement.
- **IF the limitation does still apply:**
 - Look for obligatory language: e.g. 'duty' or even 'endeavour, in so far as possible' per *Dams*.

3. Treaty must be sufficiently specific

- The treaty must **prescribe a regime** or set standards that are **sufficiently specific** to direct the course of action to be taken by signatory states (*ILO*).
- Relevant factors:
 - How specific or aspirational the language of the treaty is;
 - Level of discretion over manner of implementation;
 - Degree of international consensus on how treaty should be implemented.
- 'take steps...including legislative measures' is unclear and too broad?
- 'Minimizing drug death' is not sufficiently specific □ could do this by criminalizing or decriminalizing
- Combatting AIDS: given level of common knowledge about containing the virus, might be specific enough

4. Law must conform to treaty requirements

- Law must be **appropriate and adapted** to implementing the treaty (*ILO*).
- i.e. the law must conform to the aims of the treaty, with the four corners of the treaty (Mason J in *Dams*)
- This means the law:
 - Must not **undermine the purpose of the treaty**;
 - Must not propose an **extremely hard penalty**
 - If the law **infringes on civil liberties** (property rights), conformity harder to demonstrate (**Richardson**)
 - If the law exists outside the treaty but is **reasonably incidental** to the treaty, then it conforms (**Richardson**)
 - In **Richardson**, Guadron and Deane (dissenting) held that there was a presumption that treaties don't intend to **curtail fundamental human rights**

(2) Extra-territoriality:

- Cth will argue that:
 - The [law] falls under its EA power (s 51(xxix)) because it relates to 'places, persons, matters or things' situated 'outside the geographical limits' of Australia (ILO Case).
 - The Cth has plenary extraterritorial power under **s 3** of the **Westminster Act**
 - There is no requirement to show a 'nexus' between the Cth and the [law] as the mere fact that the matter is external to Australia is sufficient (**XYZ**, confirming **Polyukhovich**).
- X may counter-argue that:
 - Merely relating the [law] to a matter external to Australia is insufficient, pointing to:
 - Callinan and Heydon JJ dissent in XYZ, who required a 'nexus'
 - 'External affairs' should be interpreted narrowly according to an originalist approach
 - In 1901, external affairs meant foreign affairs i.e. it's relation to other countries NOT the power to make laws to things outside of Australia
 - Brennan and Toohey JJ in Polyukhovich, who interpreted s 51(29) narrowly so as to only give the Commonwealth power over matters with a genuine connection to Australia
 - **Polyukhovich**: The *War Crimes Amendment Act* (1988) sought to retrospectively criminalise certain war atrocities. Toohey J found that on the facts there was a genuine nexus between this Act and Australia because of Australia's involvement in WW2.
 - Kirby J in XYZ who left the issue open.
 - X may raise a policy argument expressing similar concerns to Kirby J in XYZ who indicated that there's very much breadth outside of Australia that the Commonwealth could draw on to make any laws it wanted to.

- However, Cth may argue that, even if X is right, due to FACTS a nexus does exist between the Commonwealth and the matter being legislated on.
- Moreover, Gaudron J stated in *Polyukhovich* that whilst a nexus is necessary, the very decision of the Cth to legislate on a matter is conclusive evidence of such a nexus.

(3) Relations with Other Countries

- Cth will argue that [law] falls under its EA power (s 51(xxix)) because it concerns a relationship with another country.
- The Cth has the power to legislate on matters concerning relations with other nations as the preservation of friendly relations with other nations is an important part of management of external affairs power of Cth (anti-sedition laws) (Sharkey).
 - **XYZ: KIRBY J** confirmed the validity of Australia's child sex tourism laws because the laws affected Australia's relationship with Thailand (the country where the offence occurred) AND with the UN Committee on the Rights of the Child
 - **XYZ: CALLINAN and HEYDON JJ** found that Australia's child sex tourism laws did not come under the 'relations with other countries' subset of s 51(29) because
 - The provisions' link to other countries was tenuous
 - Even though the relevant minister had introduced the legislation by noting that Australia was gaining a bad reputation regarding child sex tourism, there was no evidence that the "conduct targeted ...had worsened Australia's relations with other nations"
 - The laws themselves could adversely affect Australia's foreign relations as they might constitute intrusion into the sovereign affairs of other nations
- Cth's power to legislate on matters concerning relations with other nations CAN ALSO BE EXTENDED TO matters concerning 'international persons' e.g. UN, WHO, World Bank, etc. – ***Brennan J in Koowarta***
- Professor Zines argues the law must only concern 'relations', there is no requirement for it to advance friendly relations (cf. Callinan and Heydon JJ in XYZ who suggest the laws have to enhance Australia's foreign relations

(4) Matters of International Concern

- It is unclear if this is a distinct aspect of the EA power (Stephen J recognised it in *Koowarta*, however, Callinan and Heydon denied it in *XYZ*).
- If it does exist, it would only apply to matters of 'burning' international concern – **Tasmanian Dams per Gibbs CJ**
 - **Gibbs, Wilson and Dawson JJ in dissent in Tasmanian Dams:** the protection of World Heritage sites is not a burning international issue (so was said in 1983) therefore the World Heritage Act was invalid.
- Relevant factors:
 - **Stephens J in Koowarta** - Degree of international activity relating to the issue
 - **Wilson J in Tasmanian Dams:** Number of countries that have implemented similar laws
- Other statements made:
 - **Wilson J in Tasmanian Dams:** The matter must be of concern to the majority of the world
 - **Murphy J in Tasmanian Dams:** ‘
 - **Mason J in Koowarta:** The matter must be a topic of international debate, discussion and negotiation.
 - A subject is one of international concern if it is the subject of international cooperation or a treaty
 - Not for a court to decide if international concern - the fact that Australia entered into and ratified a treaty is a judgment of the Executive and Parliament that the subject is international in character
 - **Stephen J in Koowarta:** the matter must possess the capacity to affect country's relations with other nations
 - **Koowarta:** given the existence of various UN declaration, treaties, resolutions, etc. racial discrimination IS a subject matter of international concern
 - **Kirby J in XYZ:** The doctrine is undeveloped
 - **Heydon and Callinan JJ in XYZ:** ‘immensely difficult’ doctrine to apply, has been applied sporadically and inconsistently

- **Brennan J in Polyukhovich:** if it's an international expectation, it's an international concern:
 - ***Polyukhovich*:** domestic prosecution of war criminals was not one of international concern as there was no expectation within the international community that such prosecutions would occur in nations having no direct connection with the crimes.
 - Nb: nowadays nations do exercise universal jurisdiction to charge criminals.