

CONSTITUTIONAL LAW – role play template

I have been asked to advise of the constitutional validity of ss XX of the COMMONWEALTH ACT in relation to the action against NAME under these sections.

Because the COMMONWEALTH ACT concerns:

- The implementation of a treaty object into domestic law, it will be necessary to consider the **External Affairs Power s51(xxix)**
- A matter external to Australia, it will be necessary to consider the **External Affairs power s51(xxix)**
- A matter appropriate to national government, it will be necessary to consider the **Nationhood power**
- Trade and commerce with other countries, including importation and exportation of goods, it will be necessary to consider the **Trade and Commerce power s5(i)**
- The sale and movement of goods/services, it will be necessary to consider the **Trade and Commerce power s5(i)**
- The activities of a constitutional corporation (trading, financial, foreign), it will be necessary to consider the **Corporations power s51(xx)**
- An inconsistency between a Commonwealth law and a State law, it will be necessary to consider s109

The COMMONWEALTH ACT also creates a Commonwealth court to hear prosecutions under ss XX of the ACT. I will also be advising on whether this court has been validly created under CH III of the Constitution.

The COMMONWEALTH ACT also appears to confer non-judicial functions upon Federal Court judges/ confer judicial functions to a non-CH III court. I will be considering the validity of this assignment with reference to CH III of the Constitution and the principles of judicial power.

The ACT appears to confer functions on the State courts which may be seen as inconsistent with the exercise of Commonwealth judicial power. I will also be advising on this issue, with reference to *Kable* and other recent case law.

The STATE ACT is attempting to bind the Commonwealth by... I will also be considering this issue with reference to *Commonwealth v Cigamatic* and other relevant case law.

The COMMONWEALTH ACT also gives the Commonwealth power to acquire property. I will also be advising on the validity of this taking with reference to s51(xxxi) of the Constitution.

The COMMONWEALTH ACT appears to give rise to the issue of potentially interfering with the implied freedom of communication. I will also be advising on this matter.

Reading down legislation

It is recommended the Court read down this section of the Act under s15A(a) Acts Interpretation Act to guarantee its constitutional validity. Limits on the Court's ability to read down legislation—it is not the role of the Court to legislate; it must be reasonable. If the legislation shows an intention against reading down, it can't be done (*Railway Servants Case*).

Multiple characterisation

The law can have multiple characterisations (*Murphyores*). So long as the law is within one head of power, it does not matter that it impliedly falls outside another (*Strickland v Rola Concrete Pipes*).

However, if the Act falls within one power, but is expressly excluded by another power, it is invalid (i.e. freedom of political communication, acquisition of property) (*Wurridjal v Cth*).

Implied Incidental power

Attached to every express grant of power in the Constitution is an implied grant of power wide enough to make the express grant effective (*McCulloch v Maryland*). The section in question must be "reasonably appropriate and adapted to pursuit of an end with a substantial power" (*Nationwide News v Wills*) (*Davies v Commonwealth*). The proportionality of the penalty, including its quality and quantity, must be considered.

- 'Maximum' allows the Courts some discretion
- Penalty is incidental to the enforcement and efficacy of the Act
- 'Up to'

Limitations

- Acquisition property on just terms
- Prohibition on discrimination and preference (s99)
- Melbourne Corporation principle
- Implied freedom of political communication
- Freedom of association and movement
- Trial by jury
- Separation of powers
- Inconsistency

EXTERNAL AFFAIRS POWER (S51(XXIX))

Intro

The External affairs power (s51(xxix)) covers the three areas of power for the Commonwealth: geographic externality (*Seas and Submerged Lands* case), treaties (*Koowarta*) and matters of international concern (obiter in *Tasmanian Dams* case). We are concerned with...

Scope

1. Geographic externality

The Commonwealth may make laws with regards to persons, places, matters and things external to Australia (*Seas and Submerged Lands* case). It is uncertain whether a connection or nexus is required between Australia and the overseas issue, although this has never been held in a majority (*Polyhukhovic v Cth*).

2. Treaty implementation

Under this head of power, the Commonwealth may enact legislation to fulfil obligations recognised in the international instrument. The treaty must be entered into bona fide; it cannot be a mere device by the Commonwealth to obtain legislative power (*R v Burgess*). This is an issue for the Court to determine (*Horta v Commonwealth*). Meticulous adherence to the terms of a treaty is not necessary, so long as the purpose of the treaty is effected (*R v Poole*).

3. Matters of international concern

This was raised as a possible basis for enacting legislation in reliance of the external affairs power in the majority's obiter in *Tasmanian Dams*, but it has not been developed since. The majority recognised that a matter seen as one of concerns to the international community can be legislated upon in domestic law, even if it is not the purpose of a treaty.

Characterisation

1. Geographic externality—subject matter

The 'subject matter' test should be applied, but with qualification—it is only necessary to demonstrate that the law is 'with respect to' the subject matter (*Polyhukovich v Cth*). The question of whether there was a requirement for there to also be a sufficient connection between the law and the subject matter was left open in *Horta v Cth*.

2. Treaty implementation—proportionality

In applying a proportionality test, the Act must be reasonably capable of being considered appropriate and adapted to implementing the treaty (*Victoria v Cth*). The Act should operate to fulfil the purpose of the treaty. Provisions that are not regarded as being reasonably incidental to giving effect to the purpose of the treaty will be constitutionally invalid.

There is no limit as to the subject matter of the treaty—even if the subject matter falls outside the Commonwealth's express heads of power (*R v Burgess*). Although in *R v Burgess*, Dickson and Stark JJ preferred the narrow approach that the subject matter must be indisputably international in nature. The *Airlines Case (No 2)* confirms the majority decision in *R v Burgess* that there is no limit as to subject matter.

The Commonwealth may only implement part of a treaty. But if the implementation demonstrates a deficiency which is substantially inconsistent with the international instrument, the External Affairs power may not be used.

- Treaty leaves a fair amount of discretion
- Can be seen as a reasonable mechanism to enforce international standards and monitor compliance
- Beyond the scope of the treaty—no sufficient connection—too broad
- Domestic law must conform to the treaty