

## LLAW2212 – THE CONSTITUTION AND THE AUSTRALIAN FEDERATION

### Exam Format

| Column A (all problems)      | Column B                           |
|------------------------------|------------------------------------|
| External affairs power       | Inconsistency (problem)            |
| Defence power                | Fiscal federalism (essay)          |
| Intergovernmental immunities | Implied nationhood power (problem) |
| Judicial power               | Changing the Constitution (essay)  |

**Question 1 (35%):** Problem question on ONE sub-topic from Column A (no choice)

**Questions 2 and 3 (35%):** Choose one. Each covers ONE sub-topic from Column A

**Questions 4 and 5 (30%):** Choose one. Each covers ONE sub-topic from Column B

## **EXTERNAL AFFAIRS POWER (Section 51(xxix) – Purposive power)**

A problem question is likely to be an external affairs power issue if it deals with a treaty, or mentions matters or things external to Australia, including issues that occur in the sea surrounding Australia, and issues important to other countries.

### **1. Does the legislation relate to?**

Mention how it might satisfy externality and/or relations with other countries, then continue with treaties and the headings underneath in relation to treaties as it most likely involves a treaty

#### ➤ Externality

- Is it external to Australia?
- Mere externality is enough – Sea and submerged lands case
- Is there a sufficient connection with Australia? – Polyukhovich

#### **Sea and Submerged Land Case**

- The rule in this case states that the external affairs power extends to all matters or things situated outside of Australia
- In this case, the sea surrounding Australia was considered external, and within the power

#### **Polyukhovich v Cth**

- The rule in this case states that mere externality without sufficient connection is still good enough for external affairs power
- i.e. if it occurred outside of Australia, the power will extend to it
- The majority held there was no need for sufficient connection to Australia

#### ➤ Relations with other countries

- Does the legislation relate to the Commonwealth's relations with other countries?

#### **R v Sharkey**

- Commonwealth relations with all countries, including other Dominions of the Commonwealth, are matters which fall directly within the subject of external affairs

#### **Koowarta v Bjelke-Peterson**

- Commonwealth relations with other international persons, such as the UN, are matters within the subject of external affairs

#### **Thomas v Mowbray**

- Terrorism are matters which affect Australia's relations with other countries

## Sea and Submerged Lands Case

- Asserting sovereign rights over the continental shelf has been distinctly a product of international relations since WWII.
- Implementation of international obligations (i.e. treaties, conventions)
- Declarations, Recommendations, Aspirational treaties and Resolutions are not international obligations
- If international obligations not ratified, does not matter – *R v Burgess*

## Tasmanian Dams Case

- In this case, Cth had an international obligation to protect world heritage sites, and legislation within Australia, which carries out that obligation would be valid under s 51(xxix).
- The rule in this case is that the mere existence of an international obligation is enough to attract external affairs power

### 2. Bad Faith

- Is there an indication on the facts that bad faith may have occurred?
- If the issue relates to a treaty, look at why the Cth entered the treaty – if it is multilateral, and entered into well before the time the legislation in question was enacted, it is unlikely to have been entered into on bad faith.
- *'If the treaty was demonstrated to be no more than a device to attract domestic legislative power [it will be entered into on bad faith]'* – Justice Deane in **Tasmanian Dam's Case**
- **R v Burgess; Ex parte Henry** - the treaties must be made bona fide (as opposed to being a mere excuse to engage the power)
- Does it appear that the legislation was enacted in attempt to control the people affected by the legislation?

### 3. International Character

- Is the matter of international concern?
- If the issues affects other countries, or involves them, it is likely to be of international character
- What is the purpose of the convention? E.g. if the purpose of the convention is to protect environmental health, this is likely to be of international concern as it concerns everyone on Earth

### 4. Aspirational

- Is the treaty aspirational?

- Words and obligations that are not precise may be considered aspirational
- This test is based on obiter but generally accepted.

### **Industrial Relations Case**

- If the law is trying to implement a treaty, then the treaty must embody precise obligations rather than mere vague aspirations
- The treaty must be described with sufficient specificity, rather than recommendations

### **Pape v Commissioner of Taxation**

- An international recommendation must give rise to an obligation or at least have the kind of precise and specific focus that has been required for treaty obligations, before they can be implemented by legislation under this head of power.
- Specific language and precise obligations must be imposed

### **5. Conformity**

- Does the legislation conform to the protocols of the treaty and effectively carry out the purpose? (**Industrial Relations Case**)
- If the treaty is not specific enough, the Cth may be exceeding its lawful domain
- What is the purpose of the treaty? If the legislation enacted does not work towards fulfilling the treaty's purpose, then it is potentially non-conforming

### **6. Appropriate and Adapted**

- Is the legislation appropriate and adapted to the purpose of the treaty?

### **Industrial Relations Case**

- If the law is reasonably capable of being considered appropriate and adapted to give effect to the treaty's obligations, then the law is an aspect of external affairs.
- If it is not appropriate and adapted, this is insufficient to support legislation enacted under the external affairs power and will be found invalid
- Partial implementation of a treaty is okay

### **Tasmanian Dam's Case**

- The rule in this case states there must be reasonable proportionality

between the purpose of the treaty and the means by which the legislation attempts to achieve it.

- If an Act goes beyond the treaty, then the Act will be invalid to that extent.
- Must look at the purpose of the treaty – if the best way to deter people from doing what the treaty deems to be wrong is substantial, then perhaps the treaty is appropriate and adapted.
- However, if the consequences are substantial but would be a poor deterrent, perhaps it is not appropriate and adapted