

Topic 2: The External Affairs Power (s 51(xxix))

Cth may argue the Act is valid under the external affairs (EA) HoP. This HoP allows the the Cth to implement any treaty, regardless of subject matter (**Tas Dams**; unanimous acceptance in **Richardson**).

- IF RELEVANT: Cth can also implement recommendations (**ILO**)
- CONCLUSION: accordingly, [insert treaty and/or recommendation] may be implemented, but this is subject to four limitations:

1st Branch: Extraterritorial power

The Cth has plenary extraterritorial power which falls under the EA HoP (**s 3 Statute of Westminster; Polyukovich**), giving it the power to legislate wrt to matters beyond Aus borders

- X may rely on Toohey and Brennan's dissent in **Polyukovich** and argue that there is no nexus between Australia and the matter being regulated.
- HOWEVER, no need for a nexus, geographic externality is by itself enough (**Polyukovich**)
 - o Reason? To require a nexus "denies completeness of Australia's legislative power, which is unacceptable in terms of Const theory and practice" (Gleeson CJ in **XYZ**)

2nd Branch: Relations with other nations

Laws which affect Australia's relationship with other countries fall under the External Affairs HoP (**Sharkey**)

- This branch may also extend to relationships with international organisations such as the UN (**XYZ** per Kirby J; **Koowarta** per Brennan J)
- Nb. it has been suggested that the relevant law must enhance Australia's relations with other nations to be valid (**XYZ** per Callinan & Heydon JJ in obiter)

3rd Branch: Laws implementing international law or treaties

1st limitation – Bona fide / good faith:

LOOK AT THE TREATY AS A WHOLE

- Treaties must not be entered as a way to confer power upon the Cth (**Koowarta** per Brennan J)
- However, this limitation would "at best be a frail shield available in rare cases" (**Koowarta** per Gibbs CJ)
 - o Examples of bad faith: if they are driving the treaty (esp. with only a few countries), timing

2nd limitation – Obligation

LOOK AT EACH SECTION OF THE TREATY SEPERATELY. DON'T ANALYSE RECOMMENDATIONS

There must be an obligation on the terms of the treaty (**Tas Dams**)

- However, while this treaty only obliges states to "endeavour", treaties may be implemented even if they are 'aspirational' (**Tas Dams**).
 - o REASON: international agreements not always expressed with same degree of precision as domestic law, need to apply a more relaxed view to whether an obligation exists

- The Cth can also implement recommendations which are directly referable to treaty obligations and possibly also “mere recommendations” (**ILO**)
- If a treaty confers a benefit to Aus, but is not binding on Aus, might be more likely that Cth can implement it (Mason J in **Tas Dams**)

CONCLUDE: in any event, it is not clear if there even is an obligation requirement (3:3 split in **Tas Dams**) and **ILO** certainly implicitly overruled it.

3rd limitation – Specificity

The treaty must define a regime with sufficient specificity to direct the general course to be taken (**ILO**)

- 4 things to look at:
 1. Language of treaty;
 2. Amount of discretion given to signatory states (greater choice, less specific);
 3. Number of ways to implement treaty (does it give specific examples?); and
 4. Whether there’s Int consensus on how to achieve obligation (states may take punitive approaches, others may take more preventative measures)

4th limitation – Conformity

- The Cth law must be reasonably capable of being considered appropriate and adapted to achieving the treaty’s objectives (**ILO**)
 - o See above in obligation re **Richardson**
- Does Cth law infringe on human rights? If so, may fail to conform (Deane and Gaudron JJ in **Richardson**)

4th Branch – Matters of international concern

Is “a matter of int concern”?

- “Concern” is something less than character, it necessarily possesses the capacity to affect a country’s relations with other nations (Stephen J in **Koowarta**);
- Has matter become the topic of int debate, discussion and negotiation? (Mason J in **Koowarta**)

Conclude:

- Cth will argue that the law is valid under the “matters of international concern” HoP (**Koowarta**) This is a possible 4th branch of the EA HoP, but it is still undeveloped (**XYZ**).

Topic 3: Corporations Power (s 51(xx))

X will only be bound to comply with (act) if the law is valid under the Corporations Power (CP) and his/her conduct is covered by its scope.

1. Is it a Constitutional Corporation (CC)?

For the HoP to be valid the Corp must be a CC.

- Foreign corporations: a corporation which has been incorporated under foreign country – it does not need to be a trading or financial corporation (***Incorporations case***)
- Trading corporations: if trading is a substantial or sufficiently significant proportion (not necessarily all) of its current activities (***Adamson***)
 - o Purpose for which corp established irrelevant
 - o Examples: business transactions, sales, revenue producing activities, renting out residences, goods and services etc.
- Financial corporation: if financial activities are a substantial or sufficiently significant proportion of its current activities (***State Super Board***)
 - o Examples: E.g. provision of loans, investments, entering into hire purchase agreements, borrowing or lending money
- Inactive/shelf corporations: look to purpose for which corp was formed – if set up to be a trading or financial corp, then it's covered. Purpose to be determined from the memorandum of association and articles of company. (***Fencott***)
- Yet to be formed corporations?
 - o The corps power cannot not be used to regulate the formation of corporations b/c the word 'formed' acts as a limitation in that sense (s 51(xx); ***Incorporation Case***)
- Note Callinan J in *Work Choices*: the 'object of command test' is not reconcilable with the majority's holdings in the ***Incorporation Case***. But case was not overruled.

2. Direct scope?

The test for direct scope is the broad view in ***Tas Dams*** reframed as the object of command test: if a law is directed at a CC, it can regulate any activities of the CC (***Work Choices*** applying Gaudron J dicta in ***Re Pacific Coal***)

- Here, (insert provision) is clearly valid under direct scope as it singles out CCs as the object of statutory command and this enables the Cth to regulate all of its activities including (insert what is being regulated)

X might try to argue the 'distinctive character test' ought to apply, which states that the law can only regulate activities which are somehow related to [trading/finance] if it is a [trading/finance] corp.

- HOWEVER, this test was rejected by the majority in ***Work Choices***, as it is premised on the need to preserve the balance of powers between Cth and State, and this line of reasoning was tantamount to the Reserve powers doctrine rejected in ***Engineers***.

3. Incidental scope?

A law will fall within the incidental scope if it regulates the conduct of those people whose conduct affects or is *capable* of affecting the business/activities of a CC. (***Work Choices*** applying Gaudron J dicta in ***Re Pacific Coal***)

Topic 6: Implied Intergovernmental Immunities

STATE IMMUNITY FROM CTH LAWS

___ will argue that the Cth law is invalid as it exceeds the implied limitations on the Cth's ability to regulate State activities. (**Engineers**)

- 'State' means State, States and/or State instrumentalities
 - o A State instrumentality is any authority brought into existence by a State to carry out public functions (**QEC**)

1. Is there a HoP?

2. Are there any implied limitations being breached?

a) **Discrimination**

Does the Cth law at issue discriminate against the governments or agencies of the States or a State, in form or effect (**QEC**)

- Direct discrimination is discrimination on the face of the law (**State Banking**)
- Indirect discrimination arises where a rule or law is applied neutrally but impacts disproportionately and detrimentally on a certain group (**QEC**)
 - o **QEC** – Cth Act applied to existing and future disputes in the electrical industry in Queensland. Because QEC generated 97% of QLD's electricity, it effectively related only to QEC.

HOWEVER: discrimination permissible where there is a rational non-discriminatory purpose (**QEC**). Examples:

- Law prescribed different procedures for the speedy settlement of different disputes. Procedures were imposed by reference to the nature of the dispute and not by reference to the Govtl character of the authorities. (dissentents in **QEC**)
- Protecting potential heritage sites which happened to be within Tasmania, not the purpose of singling out Tasmania, no similar sites in other states treated dif (**Richardson**)

b) **Impairment**

Discrimination in itself is insufficient to imperil the validity of Act. (**Austin**) The main consideration is whether the Cth act impairs the capacity of a State to function as a govt (**Austin**). Two circumstances where a law may impair State's capacity to function (**AEU**):

1. A Cth law cannot interfere with a State's right to choose:
 - who to hire; or
 - who to fire on the grounds of redundancy
 - o BUT can prescribe minimum wages and working conditions (do not impact on "capacity to function")
2. A Cth law cannot interfere with the terms & conditions of employment of higher level State employees (critical to states' "capacity to function")
 - In obiter, same distinction between high and low employees may also apply to their promotion and transfer
 - NOTE: Dawson J's dissent: it does not make sense to distinguish lower and higher level employees – regulating T&Cs of lower level employees can be just as harmful

Topic 7.2: State Separation of Judicial Power

APPLIES WHERE THE STATE PLT WISHES TO VEST NON-JUDICIAL POWER IN A COURT OR SINGLE JUDGE

X will argue that [State Law] is invalid for breaching the SoJP doctrine

- State constitutions do not mandate a separation of State JP in the same way as a Ch. III court mandates a separation of Cth JP. However, there is a modified version of the Cth SoJP doctrine which applies at the State level (*Kable*)

1. IS THE COURT CAPABLE OF BEING VESTED WITH FEDERAL JURISDICTION?

1. Supreme Court per s 71 Chapter III courts include “such other courts as [Cth Pmt] invests with federal jurisdiction”; s 77(iii) empowers Cth Pmt to invests the State SCs with fed jurisdiction). Affirmed in *Kable*.
2. Magistrates Court (*Totani*; s 77(iii))
3. Judge (*Wainohu*)
4. Territory level (*NAAJA*)

N.B. a _____ court judge is tantamount to a _____ court. (cite *Hilton* if SC judge)

2. INSTITUTIONAL INTEGRITY TEST – [ONLY APPLIES CH III COURTS]

TEST: State courts which are vested with federal jurisdiction, such as _____, cannot be vested with powers that might undermine the institutional integrity of the judiciary. (*Kable*)

- One e.g. is a law which undermines public confidence in the independence of the court (*Fardon*)
- REASON: under Chap III, State courts have a role that transcends their role as State courts. Ie they have a role vis-à-vis the exercise of fed jud power. (*Kable* per Gaudron J)

3. RELEVANT FACTORS

Factors which may undermine institutional integrity:

1. **If the law is *ad hominem*** (relates to a specific person) (*Kable*; cf. *Fardon*)
 - If directed at one person: “they are proceedings which the Act attempts to dress up as proceedings involving the judicial process. In so doing, the Act makes a mockery of that process and, inevitably, weakens public confidence in it.” (Gaudron J in *Kable*)
 - If directed at a class of people: apply *Fardon*, but note Kirby J’s dissent in *Fardon* that it is still a very limited group, and this should not matter
2. **If the law targets preventative detention** (*Kable*; *Fardon*)
 - Court is required to deprive a person of their liberty not on the basis that they have breached any law, but on the basis that they may do so
 - Note Kirby J’s dissent in *Fardon*: goes against principle of ‘double punishment’
3. **If the law removes discretion** (*Totani*; *IFT*)
 - *Fardon*: if court found there was an unacceptable risk, it had discretion regarding what type of order to make. In *Kable/Totani*, detention/control was the only option
 - *IFT*: court had no discretion whether application should be granted on *ex parte* basis

Topic 9: Freedom of Interstate Trade and Commerce – Section 92

P may challenge (the law) on the basis that it contravenes the freedom of interstate trade and commerce (s 92). The 4-step test in **Cole** must be applied.

1. There must be a burden on interstate trade or commerce:

Examples of burdens:

- **Cole**: the limitation on size “unquestionably burdened interstate trade and commerce in crayfish caught in SA waters and sold in Tas.”
- **Bath**: differential fee for interstate retailers
- **Tooheys**: increasing amount refundable for purchase of non-recyclable bottles
- **Betfair No 1**: prohibiting access to interstate betting exchanges

2. The burden must be discriminatory:

There will be discrimination if the law subjects interstate trade to a ‘disability or disadvantage’ vis-à-vis intrastate trade either in substance or form. (**Cole**) Examples:

- **Cole**: the prohibition related to crayfish caught in Tasmania and those imported alike. Tasmanian crayfish not larger than others = NO DISCRIMINATION
- **Bath**: retail licence fee differentiated and thus prima facie discriminated against sale of products from other states = DISCRIMINATION
- **Tooheys**: burden not discriminatory on its face, but in operation it disproportionately affected interstate traders because... = DISCRIMINATION
 - Look for evidence of disproportionate effect
- **Betfair No 1**: urges courts to look at the ‘national impact’: this law is prohibiting X from trading in the national market in a similar way to the Betfair law.

3. The discrimination must have a protectionist effect:

Protectionism may arise on conferral of competitive advantage on local industry or removal of competitive advantage from interstate industry (majority in **Bath**; minority said conferral of benefit only)

- **Cole**: as above
- **Bath**: in form, the Act selected the fact of tobacco purchased in Vic as the qualifying condition for exemption. In substance, it protected the local wholesaler from competition from an interstate wholesaler whose product might be cheaper (removal of advantage)
- **Tooheys**: retailers were less inclined to stock beer in non-refillable bottles. It was of course open to any brewer to use either kind of bottle, but in judging the impact of a law the Court must have regard to the way in which people actually do business – because of the costs of production it was not economical for BB to convert its plants into refillable bottles
- **Betfair No 1** A law that discrim against an interstate betting exchange protected the business of intrastate wagering operations.

4. EXCEPTION – legitimate, non-protectionist purpose:

The law may still be valid if it is appropriate and adapted to achieving a legitimate non-protectionist purpose. (**Cole**; **Castlemaine**) Can use parliamentary debates (**Tooheys**)