

Constitutional Law Notes

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TOPIC 6: EXTERNAL AFFAIRS POWER → S 51(XXIX)

The Cth will argue that [law] falls within its external affairs (EA) power (s51(xxix)) as it purports to:

- Enact an extra territorial law
- Enact law dealing w relation w other countries or;
- Validly implement a treaty
- Potentially deal w matters of international concern.

LIMB 1: Treaty Implementations

- Cth may validly pass laws for the purpose of implementing treaties Australia has ratified

NB: purposive power. Proportionality analysis required when characterising the law (Leask)

- "To be a law with respect to 'external affairs', the law must be reasonably capable of being considered **appropriate and adapted to the implementing the treaty.**" (ILO majority)

Step 1: Is there a 'treaty' or lesser document capable of being implemented?

Given the nature of the dualist system, treaties must be incorporated via legislation into domestic law. [TREATY] is an international/treaty that is capable of being implemented by Parliament via domestic law.

- Non-binding recommendations: charters, pacts, protocols international declarations, requests form un/world or, draft international conventions –declaration unclear as to extent: *ILO; Tas Dams, Murphy J*

Step 2: What is the scope of the treaty document?

- Core
 - o Cth Exec has inherent prerogative power under s 61 to ratify any international treaty/covenant regardless of subject matter: *Tas Dams, ILO*
 - o To implement treaty (to be enforceable domestically), must be passed by Act
 - Executive ratifies treaties, binding Australia under international law.
 - Parliament incorporates treaties, binding Australia under domestic law.
- Incidental
 - o S 51(xxix) also extends to matter reasonably incidental to treaty obligations: *Richardson*

Step 3: Do any limitations apply?

Treaty ratification must be bona fide → be in good faith

- Must be ratified in good faith i.e not merely to increase legislative power: *Brennan J in Koowarata*
- BUT: "would at best be a frail shield available in rare case": *Tas Dams*

Specificity of the obligation * treaty *

- Treaty must be "reasonably specific" as to what States are expected to do in upholding the treaty : *ILO Case*
- If only in general terms, legislation not specific enough to implement obligations

The ratified treaty must impose an obligation * treaty *

- Look at inclusion of mandatory words – at, shall, must, undertake
- After *Tassie Dams*:
 - o *Gibbs CJ* → treaty need to impose an obligation not 'merely a recommendation'
 - o *Mason, Murphy and Deane JJ* → no obligation required should be preferred given international instruments aim to achieve consensus (per Deane J).
- After *Richardson*:
 - o Cth could implement treaty obligations AND matters reasonably incidental to those treaty obligations. (incidental scope)
- After *ILO*:
 - o Cth can implement treaty obligations, matters reasonably incidental to treaty obligations, recommendations which are directly referable to treaty obligations and possibly also "mere recommendations".
 - Not directly referable to treaty obligations but may be necessary to follow these obligations

Cases:

Koowarta v Bjelke-Petersen (1982) 153 CLR	
Facts:	Aboriginal man, Koowarta, wanted to purchase cattle station which covered Wiks' peoples' traditional homeland using funds provided by Aboriginal Land Fund Commission. Bjelke-Peterson, premier of QLD at the time, not approve sale as did not believe Aboriginal people should be able to acquire large areas of land and reflected in official cabinet policy.
Issue:	Could EAP support implementation of <i>International Convention on Elimination of all Forms of Racial Discrimin</i> in Cth, <i>Racial Discrimin Act</i> ?
Held:	Majority of 4:3 found that the <i>Racial Discrimination Act</i> was valid. Majority: <i>Mason, Murphy & Brennan JJ</i> : Cth had power to implement any treaty which it had ratified, regardless of the subject matter. <i>Stephen J</i> : Cth could implement a treaty under the EAP when it related to a matter of international concern. Minority: <i>Gibbs CJ, Aikin and Wilson JJ</i> : Cth only implement a treaty under the EAP when the subject matter of the treaty was itself an "external affair". Ratio: Cth Parliament to implement only those treaties that dealt with matters of international concern.

Commonwealth v Tasmania (Tasmanian Dam Case) - 1983	
Facts:	Legislation enacted to prevent State from damming river to increase hydro-electricity generation arguably directly related to land which was a State power. Cth claimed legislation not about the environment but about external affairs to implement international law obligations under UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 1972. (World Heritage Convention)
Issue:	Was the Cth law valid under EAP?
Held:	Law valid, Cth authorised to enact law to implement UNESCO World Heritage Convention. → rejected Stephen J qualification in <i>Koorwarta</i> Ratio: Cth can implement all of its treaty obligations regardless of their subject matter under s 51(xxix). (affirmed in <i>ILO Case</i>)

Richardson v Forestry Commission ("Lemonthyme case") (1988)	
Facts:	Cth Act established a Commission of inquiry to determine whether 2 areas of Tasmanian forests qualified for inclusion on the World Heritage list as protected sites (relying on UNESCO Convention) → different in Tas Dam case, as dam already passed and protected on Heritage list.
Issue:	Could the Cth legislate to protect land that may be heritage listed in the future?
Held:	Convention did impose obligation to identify such areas, so the establishment of an Inquiry was a valid exercise of power under s 51(xxix) to implement treaty obligations. <ul style="list-style-type: none"> - The Cth didn't impose specific obligations to make inquiries, there was only a question of general commitment to preserve the World Heritage → always be a question for the Court to determine whether the law is appropriate and adapted - Treaty itself not discuss obligations to establish a Commission, however, is incidental for characterisation which was reasonably apprehended to exist Ratio: Cth can legislate to implement treaty obligations as well as matters reasonably incidental to those obligations. → incidental scope

Victoria and Ors v Cth (the ILO case) (1996)	
Facts:	In 1993, Federal Labour Gov enacted the 1993 <i>Industrial Relations Reform Act</i> which implemented recommendations of the ILO . Objective was to provide a framework for prevention and settlement of industrial disputes which promoted economic prosperity and welfare of Australians. States argued that the EAP did not extend to the implementation of treaty obligations unless the subject matter of the treaty was one of international concern .
Issue:	Could the Cth implement recommendations?
Held:	Yes, law held to be valid Ratio: Cth can implement recom. which give effect to treaty obligations and may be able to implement "mere recom." – still TBD

Conformity * Cth legislation *

- Cth legislation must conform with international agreement: **ILO Case**
- Law must be reasonably capable of being considered **appropriate** and **adapted** or proportionate to achieving treaty's objectives (includes incidental): **Richardson**

LIMB 2: Extraterritoriality

- The Cth has plenary extraterritorial power: **s 3, Statute of Westminster Act**
- **If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs': ILO**
- No **nexus** element needed → merely being external to Australia is sufficient: **XYZ, Polyukhovich**

Cases:

Polyukhovich: Cth upheld validity of law which allowed prosecution for war crimes committed in Europe

- **Toohey J:** nexus requirement met because Aus fought in WW2 (would've decided differently re war crimes in a conflict which Aus did not participate in)
- **Brennan J (diss):** found legislation invalid as lacked sufficient connection

XYZ: Cth upheld validity of sex tourism laws, domestic law, which is able to be enforced extraterritorially.

LIMB 3: A [LAW] which affects relations with other countries

- Valid law if affects relations between Australia and other countries: **Sharkey**
- Extends to laws relating to "international persons" (UN, WHO, World Bank): **Koorwarta**
- Unsettled debate whether limb requires **improvement** of relations or whether relations must merely be affects: **XYZ**

Cases:

Sharkey: Law prohibited excitement of disaffection against govts of the UK or any of the King's Dominions.

XYZ: Sex tourism.

- Kirby J saw sex tourism impacting Australia's relations w Thailand & United Nations Committee on the Rights of the Child → didn't want Australian citizens going to Thailand and engaging in sex crimes.

Koorwarta: Validity of the *Racial Discrimination Act 1975* (Cth). The statute sought to incorporate some provisions of the *International Convention on the Elimination of all Forms of Racial Discrimination 1966* (CERD – UN body)

LIMB 4: Deals with matters of “international concern” *possible limb*

- Cth will argue that law valid as on a matter of international concern: Koowarta, Stephen J
- Policy based area and must look to individual judgments from cases – no majority acceptance

Cases:

Koowarta (1982): Cth could implement a treaty under the EAP when it related to a **matter of international concern** (Stephen J)

Tas Dams (1983): EAP extends to execution of treaties by discharging obligations or obtaining benefits **but** not restricted to treaty obligations.

- May be situations where Australia’s relationship with persons or groups who are not nation States, is part of external affairs.
- Existence of a treaty on a subject matter is enough to establish that the matter is one of international concern
- On facts, Gibbs CJ thought that **environmental and cultural heritage** was increasing in interest but it **cannot be said to have become such a —burning int issue** that failure to take protective measures was likely to adversely affect its relations with other nations.
- **Wilson J:** the extent and intensity of int concern reflected in World Heritage Convention **was not** comparable to racial discrimination.
- Rejected Stephen J qualification in *Koowarta*

XYZ (2006):

- **Kirby J:** found that the concept of “international concern” was underdeveloped and potential to be too broad.
- **Callinan & Heydon JJ:** “There are immense difficulties facing any court wishing to recognise, as a matter of decision, the international concern doctrine. The arguments advanced in this case have not resolved those difficulties. In these circumstances it would not be right to uphold the legislation impugned in this case by reliance on the doctrine.”