

Defence Power

S51(6) permits the Cth to make laws for the defence of, and the maintenance of laws in the Cth and the States.

While s51(6)'s primary aspect is the maintenance of the armed forces, it is not confined to this: Fullagar J, *Communist Party Case*.

To enliven the secondary aspect of s51(6) there must be a state of war or national emergency (Fullagar J, *Communist Party Case*)

[discuss facts eg. Armed conflict in Korea not considered sufficient in *CP Case*; mere contribution of force does not change the country's situation from peace to war]

External/internal threat

'Defence' in s51(6) refers to defence against external enemies, but s51(6) includes a power to make laws for protection against domestic attack: Fullagar J, *Communist Party Case*

Preambles to an Act

The Cth cannot use the recitals in the preamble to an Act to declare that something is the case and then use that to connect the legislation to a head of power (McTiernan J, *Communist Party Case*)

-eg by stating in the recitals that communists pose a threat to the defence of Australia, activate the defence power.

-Recitals do not even afford prima face evidence (Fullagar J, *Communist Party Case*)

Exceeding the scope of s51(6)

Parliament cannot rise above the Constitution by controlling the limits of its power (Fullagar J, *Communist Party Case*)

-A law may operate upon the opinion of a designated person, but that person cannot also be the law-maker

Proportionality of the law

S51(6) is a purposive power and its breadth is determined by the circumstances the country finds itself in (Dixon J, *Andrews*).

-The court will take note of matters of general public knowledge: Dixon J, *Stenhouse*

During war/national emergency

The power 'extends to an infinite variety of matters' (Fullagar J, *Communist Party Case*).

Examples:

Farey v Burvett — price of bread regulated

Foster — petrol rationing

Δ *Farey v Burvett* Griffith CJ test: does the law conduce to the efficiency of the nation's forces?

Δ But the court is not concerned with the actual effectiveness of the measure: *Marcus Clark*

After war/national emergency

After the war is over, the defence power does not immediately stop supporting laws (*Stenhouse*).

-S51(6) extends to disestablishment and disposal of war-fighting arrangements and the restoration of the country to peace.

-Laws that continue on for too long will be struck down on because they are no longer supported by the power: *Foster*

[FURTHER CONTENT OMITTED]

External Affairs Power

International obligations or treaties

If treaty is unincorporated into domestic law: there is a legitimate expectation that judges will interpret statutes consistently with Australia's international obligations (*Teoh*), although the strength of this argument is doubtful after it was called into question in *Lam* and *WZARH*.

Where mere recommendations or declarations (not treaties or obligations) are relied on for the basis of a statute: Murphy J in *Tas Dams* considered that s51(29) covers implementing recommendations. *Industrial Relations Case* may also be read to support this position (at 483). However, in the later case of *Pape* Heydon J noted that recommendations by international agencies cannot support the validity of statute. *Alqudsi* also rejected reliance on international recommendations.

Treaty is incorporated

The Cth under (s61) can enter into the [Treaty]. However, treaties do not create rights/obligations unless incorporated into domestic law (*Teoh*, McHugh J *Al-Kateb*). S51(29) permits the Cth to implement any treaty regardless of subject matter (*Tas Dams*; *Richardson*). The issue is whether s51(29) supports [hypothetical act].

1. Good Faith

The treaty must have been made in good faith (*Tas Dams*).

- does the subject matter imply it is made bona fide
- what do the circumstances indicate (eg dates, political motives)

Notwithstanding, it is difficult to prove an ulterior Cth motive (Gibbs CJ, *Koowarta*) so arguing the treaty was not made bona fide should not be relied on.

2. Implementation

The law must implement in whole or in part the treaty.

- Partial implementation is permissible (*Tas Dams*; *Industrial Relations Case*)

3. Obligation

There must be a treaty obligation which is 'reasonably apprehended to exist' (*Richardson*).

- Analyse the language, is the treaty obligatory or not

Nonetheless, the language of treaties is usually aspirational and less precise than formal domestic documents (Deane J, *Tas Dams*). Moreover, the 3:3 split in *Tas Dams* left open the question whether obligations are needed at all. Regardless, if these words are not obligatory (assuming it were a decisive factor) the treaty may fall under the incidental scope of EA (*Industrial Relations Case*; *Richardson*).

4. Specificity

In *Industrial Relations Case* five judges emphasised (496-7) that statute must prescribe a regime that the treaty itself has defined with sufficient specificity (also Hayne, Kiefel JJ *Pape*).

- Is the course of action to be taken by signatories clear enough or is the treaty too vague and aspirational

5. Proportionality

According to *Industrial Relations Case* (487-8) there is a proportionality requirement demonstrating conformity with the aims of the treaty.

- Is there proportionality between the purpose of treaty and the means adapted to pursue it
- Or are the provisions broader than required (*Richardson*)
- Cannot be peculiar or drastic (Deane J *Tas Dams*)

Thus it is/is not appropriate and adapted for implementing the treaty.

[FURTHER CONTENT OMITTED]

Spending Power

Appropriation is a necessary requirement (ss81, 83 Const.; *Pape*; *Wilkie*) but not itself a substantive source of power to spend public money: *Pape* confirmed in *Williams (No1 and 2)*; does not enliven s51(39). The source of power to spend must be found elsewhere (*Williams No 1*).

SS53-56 detail how public funds are raised and spent (*Wilkie*).

1. Does legislation under a head of power support the spending

Spending may be authorised by legislation (*Williams No 1*) but that legislation must come under a valid head of s51 power (*Williams No 2* — Chaplaincy programme not said to fall under a head of power, hence, even with legislation, funding would be unconstitutional, if justified on this ground).
-External Affairs power: If legislation is enacted pursuant to the [treaty] under s51(29), then spending is valid.

2. Does the nationhood power support the spending

Spending may be justified as an incident of nationhood power under s61; s51(39): *Pape* per French CJ. From *Pape* it seems no legislation is needed (cf French CJ, *Williams No 1*).

- No general power to manage national economy
- BUT short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole may be a valid exercise of nationhood power — where such measures are prima facie peculiarly within the capacity and resources of the Cth: French CJ, *Pape*
- Gummow, Crennan, Bell JJ: took a broader view that a 'national emergency/crisis' may suffice to invoke nationhood power for spending
- NB Heydon J was concerned about a broad understanding of 'emergency'
- Spending 'for the benefit of the nation' is not a valid reason: *Williams No 2*

cf exam scenario with facts of key cases (*Williams No1 and 2*; *Pape*)

3. Is this ordinary department spending under s64

Authority to spend 'in the ordinary administration of the functions of government' was conceded in *Williams (No 1)*.

- Bardolph* — HCA held NSW Tourism Board could contract for advertising NSW Tourism without statutory authority on the basis it was a 'recognised and regular activity of the government'.
- They can't originate in the Senate (s53) but can be amended by it
- loosely described category — involving some combination of operating expenses of government departments and agencies; and/or activities engaged in by those agencies which are 'recognised and regular activities' or 'ordinary annual services'

-*Wilkie* 2017 para 125: 'the ordinary annual services of the Government' is a non-justiciable constitutional conception

Prerogative power

One could try to reinterpret the existing prerogative power with regard to self-protection from internal violence or insurrection so that it also applied to self-protection from a financial crisis. Existing prerogatives may be adapted and applied to new circumstances: *BBC v Johns*.