

EXTERNAL AFFAIRS POWER s51(xxix)

- Treaty Implementation
 - Scope
 - Limitation: Bona fide
 - Limitation: Obligation
 - Limitation: Specificity
 - Limitation: Conformity
- Extraterritorial Power
- Relations with other nations
- Matters of International Concern

s51(29): *The Parliament shall, subject to this constitution, have power to make laws... with respect to external affairs*

The Commonwealth's power to enter into [TREATY] arises from the prerogative power (or executive power sourced in S 61, KOOWARTA). The Cth will argue that [LAW] falls within its external affairs ('EA') power (s 51(xxix)) as it purports to validly...

1. implement a treaty to which Australia is a party
2. enact an extra-territorial law
3. enact law dealing with relations with other countries
4. deal with matters of international concern

TREATY IMPLEMENTATION

Scope

TREATY

Clearly international treaties and conventions are capable of being implemented by Parliament.

- **Murphy J** in *TAS DAMS* as endorsed by *ILO*: some non-treaties **may** be incorporated under EA power:
 - Non-binding recommendations; charters; pacts; protocols; international declarations; requests from UN/world organisation; draft international conventions (*ILO*)

ILO – Cth legislation integrated recommendations of the International Labour Organisation. Court held Cth could implement **non-binding international instruments**)

LAW

The Cth will argue that the Executive has an inherent prerogative power to ratify (via passing an Act) any international treaty or covenant, regardless of the subject matter (*TAS DAMS*; *KOOWARTA*)

- **CF:** Minority in *TAS DAMS* endorsed Stephen J's **narrow view** in *KOOWARTA* where obligation needed to be of **international concern**. *Protecting World Heritage Sites* not a "burning issue"
- Debate settled in favour of **broad view** in *Richardson* (legislation for commission to investigate potential world heritage sites was **incidental and valid**)

Limitations

However, the Cth may not implement a treaty if one of the limitations applies...

BONA FIDE

[X] will argue that treaties must be implemented in good faith, and not simply to increase the Cth's legislative power (KOOWARTA)

- The bona fide limitation “would at best be a frail shield available in rare cases” (TAS DAMS)

OBLIGATION

- **BROAD VIEW**: can implement treaty provisions even if ‘aspirational’ and not imposing obligation per se (Mason, Murphy, Deane JJ).
 - **Deane J**: treaties often expressed in broad terms to encourage signature by parties (TAS DAMS)
- **NARROW VIEW**: can only implement obligations (Gibbs CJ, Brennan & Wilson JJ, TAS DAMS)
 - Courts will not read pedantically (**Wilson J RICHARDSON**)
“with best endeavours” sufficient for obligation in TAS DAMS

On the facts, treaty [DOES/DOES NOT] contain an obligation. Lack of obligation may not be fatal though as post ILO, there may not be a need for obligations. This split decision is yet to be resolved.

SPECIFICITY

[The Treaty] must be reasonably specific and clear as to how signatories must meet obligations (ILO, replacing obligation test)

- “The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states”
- Vague and broad objectives with little precise content fail
- **Advisory notices** (not originally part of treaty) can be incorporated

TAS DAMS – rejected argument ‘enviro protection is an area of general consensus’, could be different now

CONFORMITY

[Cth] will argue that [SECTION] conforms with the requirement of the treaty and is reasonably capable of being considered appropriate and adapted to achieving treaty objectives (TAS DAMS, ILO)

- Law that does not implement all obligations does not indicate non-conformity (ILO)
- Law that exists outside treaty but is reasonably incidental to it can conform
RICHARDSON commission for potential World Heritage Sites, invalid to restrict freedom of movement.

- If Court finds [X]’s arguments convincing, then [LAW] will be ultra vires as the [Treaty is insufficient/Law does not conform].
- If Court finds [Cth]’s arguments convincing, [LAW] will enliven s 51(xxix) and thus be a valid exercise of Cth legislative power

CORPORATIONS POWER s51(xx)

- Constitutional Corporation
- Direct Scope
- Incidental Scope

S51(xx): *The Parliament shall, subject to this constitution, have power to make laws... with respect to foreign corporations, trading corporations, or financial corporations formed within the limits of the Commonwealth*

CONSTITUTIONAL CORPORATIONS

Type

INTRODUCTION

[P] may argue that [LAW] is invalid for want of an enumerated head of power. [Cth] will argue that [LAW] is a law with respect to [foreign, trading or financial] constitutional corporations and, as such, enlivens s 51(xx).

- Any legislation that purports to encapsulate all corporations, as opposed to just constitutional corporations will be rendered ultra vires (**CONCRETE PIPES**)
- Just because a corporation is **quasi-governmental** does not mean it can't be CC
TAS DAMS – electric commission
- Cannot regulate the formation of corporations/unincorporated entities (**INCORPORATIONS CASE**)

FOREIGN

*[Cth] will argue that it is a foreign corporation as it is an entity formed under the law of another country and given a corporate legal personality either by the foreign or Australian law (**INCORPORATIONS CASE**)*

TRADING

*[Cth] will apply the current activities test, and argue that it is a trading corporation as a "substantial" and "sufficiently significant proportion" of its activities constitute trade (**ADAMSON, TAS DAMS**)*

- **Trade:** Business activities carried out with a view to earning revenue (Mason J **ADAMSON**)
 - Purpose is irrelevant and irrelevant if distribution of profits is limited or prohibited
- Label in Act saying not a Corporation is irrelevant (**QUEENSLAND RAIL CASE** – labor hire company)

*X may argue that it is not a TC as the trading activities are so slight and so incidental to some other principal activity (**ADAMSON**)*

ADAMSON – corporation was a football club and it was still a trading corporation even though its profits were fed back into the company. They **sold merchandise, TV rights, rented premises**)

TAS DAMS – Hydroelectric commission was a TC because the **future trade in electricity** would be a **significant proportion** of its activities. Other activities of setting up the dam were in the lead up to trade

FINANCIAL

[Cth] will apply the current activities test, and argue that it is a financial corporation as a “substantial” and “sufficiently significant proportion” of its activities constitute financial activities
(STATE SUPERANNUATION BOARD)

- Doesn't have to be the “predominant activity”
- **Financial:** when the subject of the transaction is finances (loans **cf.** groceries where finance is incidental)

SHELF COMPANIES

- Companies that have fully incorporated but have not yet begun trading
- Apply the **purpose test**
 - Assess the purpose of corporation against indicia such as its constitution and objects
 - Enquire into the *subjective intention of the directors*

FENCOTT V MILLER – documents that set up company referred to engaging in trading and financial activities

SCOPE

Core

OBJECT OF COMMAND TEST

[SECTION X] of [LAW] directs itself to a CC. Therefore, applying the object of command test, the Cth will argue [Section/Law] is valid under the core scope of s 51(xx), no matter what activities of CC the law is directed towards. (WORK CHOICES applying Gaudron in RE PACIFIC COAL)

- This power will extend to:
 - **regulation** of the activities, functions, relationships and the business of a corporation;
 - the **creation of rights**, and privileges belonging to such a corporation, the **imposition of obligations on it;** (WORKCHOICES)
- Does not extend to natural persons
 - Is **ACTORS EQUITY** relevant?
 - Where regulates activity of a natural person, but does so by conferring a right onto the CC
- The commonwealth **motive is irrelevant** per **FAIRFAX** characterization (WORKCHOICES)
- **WORKCHOICES** rejected ‘distinctive character test’ in which the Cth could only regulate the trading activities of trading corporations & the financial activities of FCs (**minority – TAS DAMS**)

WORKCHOICES – “laws prescribing the industrial rights and obligations of constitutional corporations and their employees, and laws which prescribe the manner by which they are to conduct industrial relations... are laws with respect to constitutional corporations”

- Act regulated relations b/n CC and employees by dictating min wages, leave rights & work hours