

FEDERAL CONSTITUTIONAL LAW

Principles of Constitutional Interpretation

- **Initial PQ Statement:** Characterising the law (*Tasmanian Dam; Fairfax*) it has <insert effect> and thus is a law with respect to <insert head of power> provided that it has a 'substantial connection'
 - Characterise by reference to *rights, duties, powers and privileges the law changes, regulates or abolishes (Fairfax – Kitto J)*; and its *practical and substantive effect (Grainpool)*
- **Approach:** A law may be characterised with respect to more than one of the heads of power in s 51. Heads of power are not subject to one another (*Work Choices*) Contra: Kirby dissent *the most relevant head of power* should be followed.

EXTERNAL AFFAIRS: s 51(xxix)

'External Affairs' power is central to Australia's ability to implement its treaty obligations. The GG, exercising the prerogative power of the Crown, may enter treaties on any subject matter – including subject matters which fall outside of the legislative power of the Cth.

- Provisions of these treaties don't form part of Australian law until and unless they are validly incorporated into municipal law by statute. Thus, ratified treaties only bind Australia *as a nation* externally and don't have any legal consequences on the *rights and duties* of the subject of the Crown (unless transformed) – *Dietrich v R*, Mason and McHugh JJ

1 Relations with other countries and mere geographic externality

- The scope of the power is not confined to the *implementation of treaties*. Includes laws affecting relations between Australia and other countries (*R v Sharkey*).
 - Extended by Brennan J in *Koowarta* to include relations with 'international persons' and organisations like the UN.
 - Examples: sedition (*R v Sharkey*), extradition laws, laws requiring judicial notice taken of foreign judgments of foreign evidence.
 - Zines – need not concern *friendly* relations, so long as they affect relations in some way (*Koowarta* per Mason J)
- *NSW v Commonwealth (the Seas and Submerged Lands Case)*, Barwick CJ held that the external affairs power extends to anything which is, in its nature, external to Australia.
 - Cth can legislate with respect to *anything outside of Australia* (e.g. prohibiting smoking on streets of Paris). Whether they are enforceable is a separate matter.
- *Polyukhovich v Commonwealth* – Commonwealth has plenary extraterritorial power and thus there is no need to establish a nexus between the law and Australia.
 - 'affairs' is imprecise but is wide enough to cover *places, persons, matters or things*. 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.'
- **International law obligations?** Even if entering into it/performance would be in breach of Australia's obligations at international law, the Act would still be characterised with respect to 'external affairs.' (*Horta v Commonwealth*)
- **Cases:**
 - Return of children abducted to/from Australia = external affairs as the movement of children between Australia and other places physically external to Australia (*De L*)
 - Regulating investment of money in US (*R v Hughes*)
 - Offence for Aus citizen or resident, outside of Aus, to engage, or attempt to engage, in sex with a minor (*XYZ v Commonwealth*) – Heydon, Callinan, Kirby expressed some doubt on the geographic externality principle, perhaps reflects some 'winding back' but still good law.

2 Treaty Obligations

Tasmanian Dam → McTiernan/Evatt prevails

- The *existence of an international obligation is sufficient* to bring it within external affairs power.
 - *Koowarta* → race relations
 - Ratio sub modo: Cth law implementing a treaty would only be valid where the subject-matter of the treaty was itself an external affair, that is, it concerned extraterritorial matters or relations with other states.

- **R v Burgess**
 - *McTiernan/Evatt view* – Cth can incorporate any treaty obligation into domestic law under the external affairs power, provided that the treaty is not ratified solely for the purpose of extending Commonwealth legislative power.
Treaty must be *genuine* or *bona fide*. Cth may well have power to enact laws *implementing recommendations* as well as *draft international conventions*.
 - *Dixon/Starke view* – Cth law implementing a treaty would only be valid where the subject matter of the treaty was of *sufficient international significance*; that is, not merely of domestic concern, but rather involves relations with other countries, or concerns extraterritorial matters. (Initially favoured in **Koowarta**).

2.1 Limitations

- 1) "Subject to this Constitution" (**Tasmanian Dams**)
 - A Cth law that attempts to implement the treaty validly under s 51(xxix) cannot breach other prohibitions (implied or express).
- 2) Bona fide treaties (**Burgess; Koowarta; Tasmanian Dams**)
 - A Cth law implementing a treaty entered into by the Cth for the purpose of extending Cth power will not fall under this power as it will not be a genuine treaty.
 - *Bona fide*: not a 'colourable' treaty just to attract domestic legislative power (**Koowarta**)
 - Stephen J (**Koowarta**) 'collusive arrangements' with another country = non-bona fide treaties.
 - Gibbs CJ (**Koowarta**) in practice this limitation was "at best a frail shield, and available in rare cases."
- 3) Conformity Principle and the Margin of Appreciation (**Industrial Relations Case; Richardson** affirmed)
 - The Cth law must conform to the treaty and carry its provisions into effect (**Tasmanian Dams**)
 - **Test**: Is the law capable of being reasonably considered to be appropriate and adapted to implementing the treaty?
 - There "is a need for there to be reasonable proportionality between the designated purpose or object [of the treaty] and the means which the law embodies for achieving or procuring it." – **Deane J, Tasmanian Dams**
 - Cth cannot legislate too broadly outside of the treaty; rather the law must conform to the treaty by *carrying its provisions into effect* – **Mason J; Tasmanian Dams**
 - This is a question of *fact and degree* – **Richardson**
- 4) Specificity per **Zines** (p. 250) but query whether this is putting too fine a point on the authorities. Considered by some of the judges (Heydon J, Hayne & Kiefel JJ) in **Pape (Victoria v Commonwealth)** – Impugned law must prescribe a regime that the treaty itself has defined with *sufficient specificity* to direct the course to be taken by signatory States (terms must be specific enough that Australia can implement in a clear way).
 - Not sufficient that the law prescribes *one of a variety of means* to achievement of an ideal (**Industrial Relations Act Case**)
 - Vague, aspirational international aims (e.g. 'to promote full employment') are insufficient – may lead to two *diametrically opposite ways* (e.g. Communism vs. Democracy) to implement a treaty (**Industrial Relations Act Case**)
- 5) Partial Implementation – manifestation of the conformity principle. Law will be held invalid if the deficiency in conformity is *so substantial* as to deny the law the *character* of a measure implementing the convention, or is a deficiency when, coupled with other provisions of the law make it *substantially inconsistent* with the convention. (**Victoria v Commonwealth**)
 - **Quantitative Partial Implementation** – Where the law doesn't implement all treaty obligations and only a certain number of them this remains valid unless:
 - Exception 1: Obligation being implemented is *linked* to another obligation in the treaty that has not been implemented.
 - Exception 2: The whole set of articles in the treaty were intended to be part of a *package* of provisions.
 - **Qualitative Partial Implementation** – The implementing law is *substantially inconsistent* with the terms of the treaty would likely be invalid.
 - E.g. where an article in treaty provides both a benefit and a burden, but Cth statute implements only the benefit, this would be invalid.
- 6) Recommendations and Draft Conventions – ILO/UN Conventions + specific recommendations **IR Case**
 - **Zines** – Ratio of **Tasmanian Dams** = customary law, obligation or treaty law obligation but not recommendations or draft conventions, or even treaties that have been signed but not ratified.
 - **TD**: Mason, Murphy and Deane JJ – full McT/E view = Recommendations + Draft conventions
 - **TD**: Brennan J – no view expressed
 - **TD**: Gibbs CJ, Wilson and Dawson JJ – absolutely not.

SECTION 51 (XX): CORPORATIONS POWER

Section 51(xx) – The Parliament shall, subject to this Constitution, have power to make laws for the *peace, order and good government* of the Commonwealth with respect to...

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth

- **Historical Statement:** Under s 51(xx) the Cth has the power to make laws with respect to constitutional corporations (foreign corporations and trading or financial corporations formed within limits of Cth), which includes the entity itself (*Huddart Parker*) as well as their activities (*Strickland*) defined under the broad view in *Workchoices Case*
- **Subject matter power** – over a particular type of *person* – a **constitutional corporation**: The Corporations power is not a purposive power, but a *persons power*, meaning it is irrelevant if the object of power is to attain some goal in a field lying outside the scope of s 51(xx) (*Tasmanian Dam Case*)

Question 1: Is it a constitutional corporation to attract s 51(xx)?

- **Current Activities Test:** By examining the current activities of the entity in question, and if you can say that a *substantial portion* of its activities are trading activities, then it is a *trading corporation* (*Adamson's Case*) (doesn't have to be the dominant characteristic – Gibbs CJ dissent in *State Superannuation Board*).
 - *State Superannuation Board* – extended the current activities test and extended it to financial corporations.
 - After an overview of all the corporation's current activities, is *trading or financial* activity a "substantial and not merely peripheral activity?" (Barwick CJ – *SSB*)
 - Is the *trading or financial activity* "not insubstantial"? (Murphy J – *SSB*)
 - The two classes are not mutually exclusive
 - A corporation's *purpose at incorporation* is *relevant* but *not decisive*
 - A trading corporation whose trading activities take place so that it may carry on some other *primary/dominant* undertaking (which is not trading) may nevertheless be a trading corporation (Applied in *Tasmanian Dam*)
- **Application:**
 - *Tasmanian Dam Case* – HEC body corporate constituted under Tas. legislation to fulfil both commercial and governmental functions, even though "its operations are largely conducted in the "public interest" these considerations do not exclude HEC from the category of TC.
 - *E v Australian Red Cross Society* – Scale of its trading activities (revenue of \$2m), despite they were operated not for private gain, but to earn revenue for charitable activities.
- A **foreign corporation** is obviously a corporation formed outside of the Cth (*Incorporation Case*)
- **Shelf Companies:**
 - Where a corporation has not begun, or has barely begun, to carry on business, its constitution, including its objects, assume particular significance as a guide for determining its character (*Fencott v Muller*)
 - Strong minority dissent (Gibbs CJ, Wilson and Dawson JJ): the *intended activities* but must criterion and the constitution or memorandum is an inadequate/misleading guide.
- **Singling out a constitutional corporation:** Could the Cth use the corporations power to legislate with respect to an *individual* foreign, trading or financial corporation? Dictum goes either way in *TD*.
 - Yes – Murphy J: "enabled parliament to make laws covering all internal and external relations of all or any"
 - No – Wilson J: "a **necessary generality** attending a law with respect to any of the corporations mentioned."
- **Holding and subsidiary companies** – not yet determined by the HC
 - *Fontana Films* – Murphy J considered it was probably within power, but Stephen, Mason and Aicken JJ thought it clearly outside of power.
 - Room for argument that the power to regulate H/S company involved in the trading activities of a constitutional corporation could be regulated under the incidental area of the power (*Fencott v Muller*)

Question 2: What is the scope of the activities that can be regulated under s 51(xx)

- The corporations power extends to not only the regulation of the *activities, functions, relationships* and the *business* of a constitutional corporation, the creation of rights and privileges belonging to such a

corporation, the imposition of obligations on it, and, in respect of those matters, to the regulation of the conduct of those through whom it acts (its employees, shareholders) but also to the regulation of “those whose conduct *is or is capable of affecting* its activities, functions, relationships or business – majority in **Work Choices Case**, view of Gaudron J who dissented in **Re Pacific Coal**

- Regulation of *activities, functions, relationships* and the *business* of a corporation (**Work Choices**)
- Imposition of *obligations* on a corporation
- Conduct of *those through whom it acts* (employees, shareholders)
- Actions of third parties whose conduct is or is capable of affecting its *activities, functions, relationships or business*
 - Includes non-corporations or natural persons
 - Includes regulation aimed at *preventing or damaging* the activities of a corporation (**Fontana Films**)
 - AE was an actor’s union (not a constitutional corporation) and engaged in activity against Fontana Films (a constitutional corporation, being a *trading* corporation).
- **Restriction** – Discriminatory operation test: Commonwealth cannot regulate activities that are simply ‘related to’ a corporation or applies to other person indifferently – the law must *discriminate* between them to either have a *beneficial* or *adverse* effect on the constitutional corporation, either by reference to the persons on whom it confers rights OR by reference to the persons whom it affects by its operation (**Re Dingjan** – Brennan J)
 - Equivalent to the *object of command test* that a constitutional corporation must be ‘an object of command of a law, permitting or prohibiting it from engaging in conduct or forming relationships’ (**Work Choices**)
- **Incidental power**: Where a law under s 51(xx) can govern the way the corporation conducts their trading activities, a law that deters a natural person from contravention must be supported by the same power (**Fencott v Muller**)
 - This means can impose duties on natural persons (CEOs) *incidental* to regulations enacted under s 51 (xx) as long as it is *reasonably adapted to secure obedience* of the legislation (**Fencott v Muller**)
 - Impugned law provided that any person who had suffered loss as a result of a corporation’s misleading or deceptive conduct could recover that loss from *any natural person* involved in the deception → piercing the corporate veil.
- **Incorporation**: the word ‘formed’ in s 51(xx) excludes the process of incorporation itself (**Incorporation Case**)
 - Contra: Deane J dicta that internal management of trading or financial corporations falls within corporations power.
 - Liquidation – better source of power is s 51 (xvii).