Contents

Introduction: The Distribution of Powers in a Federation & Basics of Constitutional Interpretation

A. Constitutional Interpretation

- **Textualism**: Judges focus on the actual words used in the Constitution, understood in their ordinary or natural meaning (one method of interpretation).
- ***Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129**: Knox CJ, Isaacs, Rich and Starke JJ (delivered by Isaacs J):
    - **[152]** 'The one clear line of judicial enquiry as o the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute which preceded it, and then *lucet ipsa per se* [the thing reveals itself].'

B. External Affairs

- **Section 51(xxix)**: 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 external affairs.
- Section 51(xxix) enables the Cth Parliament to legislate so as to give effect to international legal norms that govern Australia (see ***Koowarta v Bjelke Petersen* (1982) 153 CLR 168**; ***Tasmanian Dam Case* (1983) 158 CLR 1**).

(i) International Relations & Geographical Externality

- The scope of the external affairs power is not confined to the implementation of treaties or other international norms.
- ***R v Sharkey* (1949) 79 CLR 121**: A sedition law which spoke of exciting "disaffection against the government or Constitution of any of the King's Dominions' was held to be a law with respect to external affairs.
    - Latham CJ at **[136]-[137]**: 'The relations of the Commonwealth with all countries outside Australia, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs.'
- ***XYZ v Commonwealth* (2006) 227 CLR 532**: (Externality principle) Concerned the validity of ss 50BA-C of the *Crimes Act 1914* (Cth), which rendered it an offence for an Australian citizen or resident, while outside Australia, to engage (or attempt to engage) in sexual intercourse with, or commit an act of indecency on, a person under

16 years of age. The HC was urged to overrule the geographical externality principle, but the challenge was dismissed by a majority of the Court.
Held: The laws were valid on the basis of the external affairs power.
Kirby J:

- **[148]** The laws were with respect to 'Australia's external relations with other nation states and with international organisations' and hence valid as an exercise of the external affairs power.

Callinan and Heydon JJ:

- Rejected externality principle.
- **[159]** 'A "relationship" in this sense means a dealing between Australia and another country. That dealing can be a treaty, but it need not be: any vast range of diplomatic relationships between Australia and other countries could, depending on the circumstances and subject to the Constitution, be a relevant dealing. On this view, what "external affairs" cannot include is something which is the subject of a unilateral act or desire on the part of Australia. That lacks the mutuality inherent in the conduct of "affairs" in the sense of a relationship or dealing with another nation or an international organisation.'

- ***Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501**: Concerned the validity of s 9 of the *War Crimes Act 1945* (Cth), which was primarily concerned with war crimes committed in Europe during WWII. It also provided for the trial and punishment of Australian citizens and residents who might have committed such crimes.
Held: Geographical externality is enough.
Toohey J:
    - **[654]** 'A matter does not qualify as an external affair simply because it exists outside Australia. It must be a matter which the Parliament recognises as touching or concerning Australia in some way. Indeed it might be thought more than passing strange that the Constitution solemnly conferred power on the Parliament to legislate with respect to a matter in which it had no interest.'

  Brennan J (dissenting):
    - **[550]-[551]** 'I do not understand the phrase "external affairs" to sweep into Commonwealth power every person who exists or every relationship, set of circumstances or field of activity which exists or occurs outside Australian territory. The "affairs" which are the subject matter of the power are, in my view, the external affairs of Australia; not the affairs which have nothing to do with Australia. Although affairs which exist or occur inside Australia may be described as "external" in a geographical sense, I would not hold that the Constitution confers power to enact laws affecting affairs which, though geographically external, have nothing to do with Australia. There must be some nexus, not necessarily substantial, between Australia and the "external affairs" which a law purports to affect before the law is supported by s 51(xxix).'
- ***Horta v Commonwealth* (1994) 181 CLR 183**: Concerned the validity of the *Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990* (Cth). The Act gave effect to a treaty entered into by Australia and Indonesia to permit and regulate the exploration for, and the exploitation of, petroleum resources in the Timor Gap.

- **[194]** 'Regardless of whether the mere fact that a matter or thing is territorially outside Australia is of itself sufficient to bring a matter or thing within the phrase "External affairs" for the purposes of s 51(xxix) or whether one or other of those additional factors is necessary, it is clear that the area of the Timor Gap and the exploration for, and the exploitation of, petroleum resources within that area all fall within that phrase. Each of those matters is geographically external to Australia. There is an obvious and substantial nexus between each of them and Australia. As the enactment of the Act demonstrates, they are all matters which the Parliament recognises as affecting or touching Australia. That being so, the enactment of a law with respect to one or all of those matters is prima facie within the legislative power conferred by s 51(xxxix).'
- **[195]** 'There can be circumstances in which a law which is prima facie within the legislative power conferred by s 51(xxix) is nonetheless outside the legislative power of the Parliament by reason of some other provision of the Constitution, express or implied, to which the legislative power conferred by s 51(xxix) is subject. However, no such circumstances exist in the present case.'
  - 'Neither s 51(xxix) itself nor any other provision of the Constitution confines the legislative power with respect to "External affairs" to the enactment of laws which are consistent with, or which relate to treaties or matters which are consistent with, the requirements of international law.'

- ***Plaintiff M46/2012 v Director General of Security* (2012) 251 CLR 1** per Gummow J: **[83]** 'A law dealing with the movement of persons between Australia and places physically external to Australia may be supported by the external affairs power (s 51(xxix)); this will be so independently of the implementation by that law of any treaty imposing obligations upon Australia respecting movement of non-citizens'.
- ***Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42**: Concerned a challenge to the validity of s 198AHA of the *Migration Act 1958* (Cth). This section empowers the Cth Gov to carry out the terms of certain agreements entered into in the course of arranging for non-citizens to be taken by Australian authorities to other countries. Such an agreement had been entered into with Nauru.
  Held: Law was valid.
  Gageler J:
  - **[182]** 'In so far as [s 198AHA] authorises the Executive Government to take action or cause action to be taken outside Australia in relation to an arrangement entered into by the Executive Government and the government of a foreign country, it is a law with respect to external affairs, within the scope of s 51(xxix) of the Constitution.'

(ii) ***Implementation of Treaties & Other International Norms***

- The making and ratification of treaties are executive acts performed by the government of the Cth, exercising its power under s 61 of the Constitution.
- A treaty's terms can only be implemented in the Australian domestic legal arena by legislation.
- ***Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273** per Mason CJ and Deane J: **[286]** 'It is well established that the provisions of an international treaty

to which Australia is a party do not form part of the Australian law unless those provisions have been validly incorporated into our municipal law by statute.'

- If the subject matter of the treaty corresponds with a head of federal power other than the external affairs power, then the external affairs power is not necessary to the validity of the legislation; the Cth Parliament could enact the law in question in any event.
- ***R v Burgess; ex parte Henry* (1936) 55 CLR 608**: Expressed a variety of views on the extent of the legislative power with respect to international legal norms.

  Latham CJ:
  - **Page 641** 'The subjects are so various that it is impossible to classify them. … It will be seen therefore that the possible subjects of international agreement are infinitely various. It is, in my opinion, impossible to say a priori that any subject is necessarily such that it could never properly be dealt with by international agreement.'

  Evatt and McTiernan JJ:
  - **Page 681** '[I]n our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement'.
  - **Page 687** 'It would seem clear, therefore, that the legislative power of the Commonwealth over "external affairs" certainly includes the power to execute within the Commonwealth treaties and conventions entered into with foreign powers.'
    - 'But it is not to be assumed that the legislative power over "external affairs" is limited to the execution of treaties or conventions'.

  Dixon J:
  - **Page 669** 'If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.'
- ***Koowarta v Bjelke-Petersen* (1982) 153 CLR 168**: Minister for Lands of QLD refused to grant consent or permission to the transfer of a lease for which the Aboriginal Land Fund Commission had sought to acquire. The Commission had, in 1976, entered into a written contract to buy the Crown leasehold pastoral property. However, under a term of the contract and the provisions of the *Land Act 1962* (Qld), the permission of the Queensland Minister for Lands was required to effect the transfer. The main reason for the Minister's refusal was that it was a policy of the QLD Gov not to view favourably 'proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines'. K sought to invoke that the *Racial Discrimination Act 1975* (Cth) had been breached. In 1965, the UN General Assembly had adopted the International Convention on the Elimination of All Forms of Racial Discrimination, which was signed and ratified by Australia. One right under the Convention was 'the right to own property alone as well as in association with others.' The RDA was passed