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How to Answer External Affairs Power Problem Question

How to answer an External Affairs Problem Question

Question 1: Is the Commonwealth Act in front of you with respect to one of the four aspects of external affairs power?

Question 2 : Characterisation

Section 51(29) of the Cth Constitution gives the Cth power to legislate with respect to external affairs

1. Geographic externality: legislate on matters/affairs which are physically external to Australia (non-purposive power)
2. Relations with other states/bodies: (purposive power)
3. Implement agreements and treaties: (purposive power)
4. Matters of international concern: (purposive power)

* In Exams do not review all 4 unless relevant on the fact – waste of time

Geographical Externality

- Geographic externality: legislate on matters/affairs which are physically external to Australia

→ Cth has plenary ET power - **no nexus requirement** -- (*Polyukhovich* confirmed in *ILO case* and by Gleeson CJ and Gummow, Hayne & Crennan in *XYZ*).

Characterisation

- non-purposive power
 - 'Can the law properly be described as a law "with respect to" the external affairs power (geographical externality)?
 - Is the law sufficiently connected or incidental to the power invoked to support it?
 - The characterisation of a law will be determined by the nature of the obligation, right or privilege the law regulates, changes or abolishes.
 - *Fairfax v FCT* (1965)

Alternatively: *Does it fall within the incidental head of power?*

- every legislative power carry with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter.
- (*Grannall v Marrickville Margarine Pty Ltd*)
- Incidental: *there must be a "sufficient" connection with the subject matter of the powers and be "reasonably necessary"*

Dual Characterisation – Is okay – provided one head of power covered (*Fairfax v FCT* 1965)

Once there is a *sufficient connection* between the Act and the head of power, proportionality is irrelevant for non-purposive powers. Whether or not there is a sufficient connection does not rely on the desirability of the legislation. (*Leask v Commonwealth* (1996) 187 CLR 579)

Relations with Other States/Bodies

Power to legislate with Relations with other states/bodies: (*R v Sharkey*)

- Eg sedition laws (*R v Sharkey*); extradition laws (*Vasiljkovic*); anti-terrorism laws (*Thomas v Mowbray*), judicial notice of foreign judgments.
- May also cover laws re: relations with other 'international persons' eg UN, WHO (*Koowarta* per J Brennan)
- Kirby in *XYZ*: law valid on basis of Aust's r'ship with Thailand and with int'l orgs such as the UN (CROC).

Purposive Power:

To determine the validity of a law said to be supported by a purposive power, a court must ask whether it is **a law for the specified purpose**, and the court may have to inquire into whether the law goes further than is necessary to achieve that purpose. That is an exercise in proportionality.

→ Reasonable Balance (*Leask v Commonwealth (1996) 187 CLR 579*)

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Implementation of Treaties

Power to implement treaties into domestic law

- Executive has inherent prerogative power to enter into treaties on behalf of Oz
 - Legislature has the power to incorporate a Treaty/Convention into domestic law (*R v Burgess*)
 - The subject matter ('topic') of the treaty is irrelevant – Parltm can incorporate any treaty under the EA power. [*Tas Dam's case* (treaty re: protection of world heritage sites) as unanimously confirmed in *Richardson*]
 - The power to legislate under the EA power probably includes the power to implement intl docs which are not treaties eg recommendations, draft treaties (*ILO case, Tas Dams case*)

Limits to the Commonwealth's Power under s 51(29)?

1. Treaty must be bone fide
2. Does the treaty need to contain an obligation?
3. The terms of the treaty must be reasonably specific
4. The Commonwealth Act must conform to the treaty-- the proportionality test.

Good faith 'bona fides' requirement:

- ▶ **Good faith 'bona fides' requirement:** Cth cannot enter into treaty as a mechanism for gaining legislative power over an otherwise unavailable topic (*Koowarta*) BUT this is a 'frail shield' (*Tas Dams* per Gibbs CJ), b/c the HCA will not inquire into the motives of the exec.

Obligation requirement:

- ▶ **Obligation requirement:** The Cth can legislate with regard to **any treaty obligation** (*Tas Dams*) and any matter **reasonably incidental to a treaty obligation** (*Richardson*).
- ▶ **Note Deane J in *Tas Dams* suggested weaker language is often used in International treaties.**

Specificity test:

- ▶ Is the treaty reasonably specific as to what the treaty parties are required to do in order to meet the treaty standards? (*ILO case*).
- ▶ **ASK:** can you point to the provisions that are 'specific' instructions for implementing the Treaty? Are they too vague, thus not showing 'sufficient specificity'?

Conformity Test:

- ▶ **ASK:** does the law implementing the treaty conform to the treaty or does it go further than what is required to implement the treaty?
- ▶ Is the law **'appropriate and adapted'** to implementing the treaty? (*R v Burgess, ILO case*).
- ▶ **ASK:** Can you identify the Cth provisions that conform to the Treaty requirements? Which ones go too far?

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Power to Legislate with Regard to Matters of International Concern:

- ▶ The identification of international obligations is a question of fact for the court alone to decide.
Commonwealth v Tasmania (the Tasmanian Dams case)
- ▶ It can often be difficult to identify other sources if the obligation is said to only rest on a matter of international concern, or on customary law principles

Koowarta (1982)

- Concern|| is something less than character (Stephen J);
- It necessarily possesses the capacity to affect a country's relations with other nations (Stephen J)
- Look at history of matter, terms of negotiation or recommendations, and the acts of other countries (Stephen J).
- Has matter become the topic of int debate, discussion and negotiation (Mason J)?
- On facts, per Stephen J, racial discrimination is a matter of int concern (in support, cites various international actions – CERD, human rights treaties, General Assembly Resolutions, UN Declarations, and judgments of Int Court of Justice).

Tasmanian Dams Case (1983)

- All Justices agreed that Cth has power to implement legislation wrt matters of int concern;
- Joseph and Castan conclude that after ILO case (1996) it is likely that matters of int concern can include recommendations of respected int organisations (e.g. UN, ILO), where those recommendations have sizeable int support.

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How to Answer Implied Rights Problem Question

How to do an Implied rights problem?

Not a Personal or Individual Right:

- In *Lange v ABC* 1997 the High Court established that the Implied Freedom of Political Communication is **not a personal or individual right**.
- So there is no right to political communication under the Federal constitution.
- Instead, the nature of the freedom was confined to that of a **limitation upon legislative power**.
- It is conceptualised as a **shield and not a sword**.

Not a personal right!

- The freedom of political communication is not a personal or individual guarantee capable of conferring private rights!!!!!!

NO PERSONAL RIGHTS IN:

- s 7: Senators to be chosen by the people
- s 24: members of House of Reps to be chosen by the people

What is political speech?

The Constitution requires “the people” to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government.” (*Lange v ABC* at 571):

Coleman v Power – Insults can be political speech

McHugh J

- “The conduct of state police officers is relevant to the system of representative and responsible government set up by the Constitution.” (at 203)
- “Insults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism. Many of the most biting and offensive political insults are as witty as they are insulting” (at 204)

Other examples of political speech studied:

- Indigenous Affairs (*Wotton v Qld* (2012))
- Offensive Letters (*Monis v Queen* 2013)
- Political donations and electoral funding (*Unions NSW v NSW* 2013; *McCloy v NSW* 2015)

MAIN TEST - USE THIS FORMULA AND CITE THESE CASES FOR PQ. Applied unanimously by the court in *Comcare v Banerji* (2019). First developed in *Lange v Australian Broadcasting Commission* (1997), slightly altered in *Coleman v Power* (2004); and amended once more in *Brown v Tasmania* (2017).

1. Does the law effectively burdens the implied freedom of political communication?
2. If the answer to the above is yes- is the purpose of the law legitimate?
3. If the purpose of the law is legitimate, is the law reasonably appropriate and adapted to advance that legitimate purpose in a manner that is compatible with the maintenance of the Constitutionally prescribed system of representative and responsible government? **(This is a proportionality test** → Below

**To follow from Test Q3. reasonably appropriate and adapted to advance that legitimate purpose -
From above - Proportionality test” from *McCloy v NSW* 2015**

- This is a 3-step test which requires the court to determine whether the law is justified as suitable, necessary and adequate in its balance.
- Only if the law meets all 3 of these stages will it be regarded as proportional.
 1. *suitable* — as having a rational connection to the purpose of the provision;
 2. *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
 3. *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

Voting and Electoral Rights

- Implied right to vote based on
 - s 7: Senators to be chosen by the people
 - s 24: members of House of Reps to be chosen by the people
- Of the constitution. : *Roach v Electoral Commissioner* (2007).
Implied right to vote is at issue any time a law determinately affects a person’s entitlement to vote, whther the law be procedural or substantive *Rowe v Electoral Commissioner NSW* (2010)

Limits on the Right to Vote

- Right to vote is not absolute and may be modified *Murphy v Electoral Commission* (2016)
- there must first be some kind of burden on the right to vote. *Murphy v Electoral Commission* (2016)
- even if there is a burden on the right to vote, the right to vote does not require that Parliament ensure that the maximum number of people are able to vote. The court cannot dictate that Parliament maximise the franchise. It can simply require that it not substantially limit it. *Murphy v Electoral Commission* (2016)