

	<ul style="list-style-type: none"> <li>○ It is not a general power to make law to ‘any race’</li> <li>○ Para 27 – did not support general law prohibiting enactment of Racial Discrimination Act</li> </ul> <p>Only for the ‘benefit’ of the Aboriginal Race?</p>
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**Kartinyeri v Commonwealth [1998] HCA 2**

Facts:

- In 1994, a group of Ngarrindjeri women elders claimed that a proposed bridge could not be built over Hindmarsh Island because that site was sacred to them for reasons that could not be disclosed
- In 1997, the Howard Government passed the *Hindmarsh Island Bridge Act 1997* (Cth) (the Bridge Act) which authorised the building of the bridge
  - *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
    - Allows the Minister to make a declaration to preserve certain areas that are of important aboriginal traditions – included power to stop construction in relation to a designated area
  - Aboriginal people approached Ministers to protect the area
  - The Bridge Act contains ‘partial-repeal’ of the *Heritage Protection Act*
    - Preventing any application for protection under the original act (s 4 of the Bridge Act denies the Minister the authority)
- Dr Kartinyeri and Neville Golan appealed to the High Court, submitting that the Act was invalid
  - Section 51(xxvi) was restricted so as to only authorise laws for the benefit of ‘the people of any race’ generally, or, particularly, for members of ‘the aboriginal race’.

Issue:

- Was section 51(xxvi) was restricted so as to only authorise laws for the benefit of ‘the people of any race’ *generally*, or, *particularly*, for members of ‘the aboriginal race’?

Held: (5:1)

- Cth won
  - The Bridge Act is valid

Reasoning:

Brennan CJ and McHugh J	
Why was the Bridge Act valid?	Original Act fell within the power; Amending act will also fall within the power
Quotes:	<p>‘...it is clear that the power which supports a valid Act supports an Act repealing it.’ (356)</p> <p>‘To the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repeals unless there is some constitutional limitation on the power to effect the repeal in question...’ (356)</p>

	‘As the Bridge Act has no effect or operation other than reducing the ambit of the Heritage protection act, s 51(xxvi) supports it.’ (356)
NOTES:	They did not address the ‘scope of the Race Power’
<b>Gaudron J</b>	
Test	<p><b>‘deem necessary’</b></p> <ul style="list-style-type: none"> <li>- ‘...it is for the Parliament to deem it necessary to make a law of that kind’ (365)</li> <li>- ‘...whether the law in question is reasonably capable of being viewed as <i>appropriate and adapted</i> to a real and relevant difference which the Parliament might reasonably judge to exist.’ (367)</li> </ul>
Application	<p>The Bridge Act is appropriately adapted to the difference</p> <ul style="list-style-type: none"> <li>- s 51(xxvi) not only authorises the <i>Heritage Protection Act</i> and also the partial repeal</li> </ul>
NOTES:	‘...The test of constitutional validity is not whether it is a beneficial law’ (368) – rejected the beneficial test
<b>Gummow and Hayne JJ</b>	
Test	<p><b>‘constitutional description’</b> (378)</p> <ul style="list-style-type: none"> <li>- if it is ‘deemed necessary’ that</li> <li>- ‘special laws’ be made for</li> <li>- ‘the people of any race’</li> </ul>
Application	<p><b>Special Law</b></p> <ul style="list-style-type: none"> <li>- ‘The differential operation of the one law may, upon its obverse and reverse, withdraw or create benefits.’ (380)</li> <li>- ‘That which it to the advantage of some members of a race may be to the disadvantage of other members of that race or of another race.’ (380)</li> <li>- ‘...a valid law may operate differently b/w members of that race. That is the situation with the Bridge Act.’ (379)</li> </ul> <p><b>Deem necessary</b></p> <ul style="list-style-type: none"> <li>- Denied to a law enacted in ‘manifest abuse’ (378)</li> <li>- No manifest of abuse in this case</li> </ul>
Three Further Limits (suggested)	<p><b>Principle of legality</b></p> <ul style="list-style-type: none"> <li>- ‘...a legislative intention to interfere with fundamental common law rights, freedoms and immunities must be ‘clearly manifested by unmistakable and unambiguous language.’ (179)</li> </ul> <p><b>Constitutionality</b> – courts to decide how to interpret</p> <ul style="list-style-type: none"> <li>- The doctrine of <i>Marbury v Madison</i> ensures that courts exercising judicial power of the Commonwealth determine whether the legislature and the executive act within their constitutional powers (181)</li> </ul> <p><b>Separation of power</b></p> <ul style="list-style-type: none"> <li>- The Constitution ‘is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other function of government, others which are simply assumed.’ – Dixon J</li> </ul>

Kirby J (Dissenting)	
Test	'...does not extend to the enactment of laws <i>detrimental</i> to, or <i>discriminatory</i> against, the people of any race (including Aboriginal race) by reference to their race.' (411)
Application	The Bridge Act have detrimental effects to Aboriginal people Hence, should be invalid
NOTES	'by the time a stage of 'manifest abuse' and 'outrage' is reached, courts have generally lost the capacity to influence or check such laws' (416) – rejected the 'manifest abuse' test
Overall Assessment	
What limits on the race power were recognised by the HC?	<ul style="list-style-type: none"> <li>- 3/6 rejected 'beneficial requirement'</li> <li>- 2/6 don't decide</li> <li>- Kirby J requires the law for the benefit of a race or at least not to their detriment</li> <li>- Gaudron J 'appropriate and adapted'</li> <li>- Gummow Hayne 'manifest abuse test'</li> </ul>
Why does the case produce a difficult result?	Different opinions, difficult to accept any clear accepted tests for the limits of the power  But there are certainly some limits

# EXTERNAL AFFAIRS POWER

## The High Court’s interpretation of the ‘external affair’ power

External Affairs Power – s 51(xxix)

s 51(xxix) – The Cth Parliament shall have power to make laws with respect to ‘external affairs’

What meanings could be given to ‘external affairs’?	Idea: it is very broad <ul style="list-style-type: none"> <li>- Treaties</li> <li>- International Relations</li> <li>- Overseas Trade</li> </ul>
Why was the phrase ‘external affairs’ chosen at federation?	Australia’s status then being a dominion of an Empire → Can only be considered ‘external’ not ‘foreign’
Scope of the Power	The external affairs power can be used to make laws with respect to: <ul style="list-style-type: none"> <li>- Implementing treaties and other international agreements</li> <li>- Relations with governments and persons in to other countries</li> <li>- Matters external to Australia</li> </ul> It is unclear if the power can be used to make laws with respect to matters of ‘international concern to Australia’

## Treaty

What is a treaty?	Written agreement b/w two or more states or sovereign
In international law, which Australian government can make a treaty?	Only the common law <ul style="list-style-type: none"> <li>- It has international personality and the status of it being an independent nation</li> </ul> NOTE: States cannot make a treaty – they are constituent parts
What type of power is the treaty making power?	s 61 – Executive Power → Executives alone has the power on which treaties Australia enters into  Treaty creates international legal obligations, but it doesn't transform those obligations into legal domestic law
When do treaties become part of domestic law?	Legislation enactment  ‘provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our

	<p>municipal law by statute...A treaty which has not been incorporated into our municipal law by statute cannot operate as a direct source of individual rights and obligations under that law.’ – Mason CJ and Deane J; <i>Minister for Immigration and Ethnic Affairs v Teoh</i> (1995)</p>
<p>Why is treaty making controversial in the federal parliament?  [Nationalist vs. Federalist]</p>	<p><b>Federalist</b></p> <ul style="list-style-type: none"> <li>- EA power enables the Cth parliament to legislative matters that normally fall under State power <ul style="list-style-type: none"> <li>o Cth law making will erode the federal balance because they can legislate matters not included in the head of powers</li> </ul> </li> <li>- Favours: <ul style="list-style-type: none"> <li>o <i>Narrow</i> interpretation of the treaty making aspect of the EA power</li> </ul> </li> </ul> <p><b>Nationalist</b></p> <ul style="list-style-type: none"> <li>- Enables the Cth to implement international obligations to adjust them into domestic law and to act as a new independent nation or state of international affairs in Australia <ul style="list-style-type: none"> <li>o Take account developments</li> <li>o Interpreted in a contemporary context</li> </ul> </li> <li>- Favours <ul style="list-style-type: none"> <li>o <i>Broad</i> view of treaty making power – ordinary meaning of EA power interpreted in a contemporary context</li> </ul> </li> </ul>

*R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 640-687, 658, 699

Issue: Whether EA power is a dependent or independent head of power?

Held: Yes, it can enact law by itself (independently)

Class Discussions:

<p>What type of power is the external affairs power?</p>	<p>Cth can implement treaties without the need of another head of power</p>
<p>How broad is the scope of the external affairs Power?</p>	<p><b>The EA Power supports Cth legislation that:</b></p> <p>Latham CJ</p> <ul style="list-style-type: none"> <li>- Is properly the subject of an international agreement (640)</li> </ul> <p>Starke J</p> <ul style="list-style-type: none"> <li>- Is commensurate with the obligations that the Cth may properly assume in its relations with other Powers or States (658)</li> </ul> <p>Evatt and McTiernan JJ</p> <ul style="list-style-type: none"> <li>- Implements international treaties, recommendations of international organisations (like the ILO) or draft conventions formulated on topics of concern to Australia (687)</li> </ul> <p>Dixon J</p>

- |  |  |
|--|--|
|  | <ul style="list-style-type: none"> <li>- Implements a treaty obligation which was ‘indisputably international in character’ (699)</li> </ul> |
|--|--|

Overall Assessment:

- Latham CJ and Starke J → similar → international treaty
- Evatt and McTiernan JJ → broader → not just treaties but also recommendations (not only what to do but what one should do)
- Dixon J (federalist) → want to limit → can only affect AUS citizens if ‘indisputably international in character’

**Commonwealth v Tasmania (1983) 158 CLR 1 (Tasmanian Dams Case)**

Overview

- *The World Heritage Properties Conservation Act 1983* (Cth) – conservation of natural environment
  - o Seeks to implement the convention
    - Purpose of the convention: protect ‘cultural and natural heritage of the world’
- Could not use the power of ‘preservation of environment’
  - o Not under s 51, therefore had to rely on other heads of power
    - → corporation power, external affairs power
- *Koowarta*
- Drafters of the legislation
  - o Ordinary meanings of the head of powers
  - o Interpretations

*The World Heritage Properties Conservation Act 1983* (Cth)

Drafter’s intention

s 6(1)

- ‘property is NOT in any State’
  - o ‘we can make proclamation claims in any area’ – implying on territories

s 6(2)

- ‘property is in a State’
  - o Para (a) – property is suitable for inclusion in the World Heritage List provided in paragraph 2 of the Article of the Convention
    - ‘external affairs power’
  - o Para (b) – convention/international obligation
    - ‘or otherwise’ → i.e. customs (international customary law)
      - Stephen J from *Koowarta* – treaty and customs may both give rise to an international obligation
    - If treaty obligation fails, there is other options (saving power)
  - o Para (c) – ‘purpose of giving effect to a treaty’
  - o Para (d) – ‘matter of international concern’
    - Implication: treaty is not necessary, just need to be one of international concern
  - o Para (e) – national heritage/environmental protection (trying to develop the power more broadly)
    - Rely on the ‘nationhood’ power
      - s 61 and incidental legislative power of s 51(xxix)

## Views

### Narrow View (Gibbs CJ, Aickin and Wilson JJ)

What is it?	A treaty can be implemented within Australia if the subject matter was of international concern
‘international concern’	<p>‘...depends on the extent to which it is regarded by the nations of the world as a proper subject for international action, and on the extent to which it will affect Australia’s relations with other countries...’</p> <p>Requirements:</p> <ul style="list-style-type: none"> <li>- Directly affect Australia’s interest</li> <li>- Mutuality or Reciprocity b/w relations of Australia and Other countries</li> </ul>
Application – invalid	<p>The Act is concerned with ‘natural heritage’ that will not affect other countries</p> <p>Cultural heritage is not an international issue</p> <ul style="list-style-type: none"> <li>- It cannot affect Australia’s relations with other nations, unless of course pollutions extend beyond the borders</li> <li>- If one nation’s own natural heritage to be damaged, other nations is unlikely to be affected, neither will the peace and security of the world</li> </ul>

### Broad View (Brennan, Deane, Murphy and Mason JJ)

What is it?	<p>The EAP permitted the Cth Parliament to implement an obligation imposed on AU by any bona fide international agreement, treaty or convention</p> <p>NOTE: the ‘international concern’ test adopted by Stephen J in <i>Koowarta</i> was <b>rejected</b> by the majority</p> <p>Reasons: (Mason J)</p> <ul style="list-style-type: none"> <li>- International concern is established by AU entered into the treaty or convention</li> <li>- ‘Separation of power’ doctrine <ul style="list-style-type: none"> <li>o Questions of ‘international concern’ is not for judges to decide, but for the Parliament and the Executives</li> <li>o The court should <i>accept and act</i> upon the decision of the executive government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention</li> </ul> </li> </ul>
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### Deane J – ‘conformity/proportionality’ test

Conformity	‘[A] law would not properly be characterised as a law with respect to external affairs if it failed to carry into effect or to comply with the particular provisions of a treaty which it was said to execute.’; 259
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Proportionality	<p>‘...implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be a reasonable proportionality b/w <i>the designated purpose or object and the means which the law embodies for achieving it or procuring it.</i>’ ; 260</p>
Sheep Analogy	<p>260  ‘A law requiring that all sheep in Australia be slaughtered <i>would not be sustainable</i> as a law with respect to external affairs merely because Australia was a party to some international convention which required the taking of steps to safeguard against the spread of some obscure sheep disease which had been detected in sheep in a foreign country and which had not reached these shores.’</p> <p>261  There is an absence of any ‘reasonable proportionality b/w the law and the purpose of discharging the obligation under the convention would preclude characterisation as a law with respect to external affairs power</p> <p>‘The law must be seen, with ‘reasonable clearness’, upon consideration of its operation, to a be ‘really, and not fancifully, colourably, or ostensibly, referable’ to an explicable by the purpose or object which is said to provide its character.’</p> <p>i.e.</p> <ul style="list-style-type: none"> <li>- Nature/Notion of obligation (of treaty): <ul style="list-style-type: none"> <li>o Directed at ‘health’ not ‘slaughter’</li> </ul> </li> <li>- Measure that go beyond the terms specified in the treaty (disproportionate) will not fall under EAP</li> </ul> <p>NOTE: Doesn't apply generally to the law – only to the treaty</p>
‘purposive power’	<p>=proportionally test</p> <ul style="list-style-type: none"> <li>- Laws must be passed for the purpose of implementing international treaties</li> <li>- ONLY if they had a domestic operation, if NOT for that purpose, it won’t attract EAP</li> </ul> <p>c.f. ‘subject matter’ interpretation</p> <ul style="list-style-type: none"> <li>- Not concerned about the purpose of the law, but rather whether law is topic of power to a place, person, or thing</li> </ul>
Application	<p>s 9(1)(a)-(g): <b>INVALID</b>  →Specify a number of prohibited activities  →E.g. (a) – execration work  <b>REASONS:</b></p> <ul style="list-style-type: none"> <li>- Each applies automatically regardless of their appropriateness to the convention’s purpose and relationships to provisions in the convention</li> </ul>



## Summary – Treaty Implementation (under EAP)

### OUTLINE for HYPOs

- Is there a treaty?
- Is the treaty capable of being implemented?
  - o Not limited to matters of ‘international concern’; *Tasmanian Dams Case*
  - o Treaties must be made in good faith, not simply made to gain power for the Cth Parliament; *Tasmanian Dams Case* (easy to satisfy)
  - o ‘Specificity’
    - Aspirational →NO
    - Broad objective, contradictory measure →NO
    - Imprecise treaty →MAYBE
- Does the legislation conform to the Treaty?
  - o Treaty itself must be implemented into the law
  - o Practical matters – attention needed for terms of the treaty – statutory interpretation
    - Depends on the Act’s purpose and provisions implement the treaty
- Is the law reasonably capable of being considered appropriate and adapted to implementing the object of the treaty? (*IR Case*)
  - o Parliament chooses the means; courts assesses the means according to the ‘*appropriate and adapted test*’
  - o NOTE:
    - Draft treaties, recommendation relevant to the treaty, partial implementation may be included in the power

## Relations with Other Countries

The EA power extends to the making of laws with respect to:

- Relations of the Cth with all countries outside Australia
  - o See *R v Sharkey* (1949) 79 CLR 121 (Latham CJ)
    - Seditious statements (a form of political speech – implied freedom)
      - Statement that arouses dissatisfaction and rebellious actions against the government
      - About other dominion/government → affects relationship of Australia to those countries
- And possibly matters of international concern
  - o See *Koowarta* (Stephen J), *Tasmanian Dams* (Majority) – rejected ‘international concern’ as a limit on the treaty implementing power, *XYZ* (Majority) – matters of ‘international concern’ is but an iteration affecting international relations (i.e. it is another way of expressing international relations with other countries)

# THE SECOND-LIMB OF BOILERMAKER'S DOCTRINE

Recall: Chapter III courts shall exercise only the judicial power of the Commonwealth and power incidental thereto.

This principle raises the following questions:

- Is the Court a Ch III Court?
  - o Y – meets the requirement in Ch II
- Is the court exercising judicial or non-judicial power?
  - o Judicial power – VALID
  - o Non-judicial – INVALID; *Thomas, Wakim*
    - HOWEVER, a court or a judge may be permitted to exercise a non-judicial power if it falls within one of the *exceptions*; *Hilton, Wilson*

(Cases: *Re Wakim, Hillton v Wells, Wilson and Thomas*)

## The 'Judicial Power of the Commonwealth'

### Preliminary Matters

- Federal Courts exercising federal jurisdiction
  - o s 71:
    - The judicial power of the Cth shall be vested in the ...the HCA and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction
- State Courts exercising federal jurisdiction
  - o s 77(ii):
    - Federal parliament may make laws...investing any court of a State with federal jurisdiction
- Potential issue:
  - o State court can try federal criminal matter or federal constitution case
  - o Can federal court exercise state jurisdiction?
- History:
  - o Cth parliament enacted a number of cross-vesting jurisdiction schemes
    - How do they work? (civil litigation cross-vesting scheme)
      - Legislation in different states in almost identical terms
      - Each of the superior state and federal courts can deal with civil matters whether they are federal or state
      - In other words, a person could bring a case in a federal court if it also raised an issue in state jurisdiction
    - Another scheme (corporations cross-vesting schemes) 1987-1999
      - → Both schemes were successfully challenged by *Wakim*

*Re Wakim; Ex parte McNally* (1999) 198 CLR 511

Facts:

- *Jurisdiction of Courts (Cross-Vesting) Acts 1987* (Cth, State, ACT) conferred original jurisdiction with respect to **State matters** in federal courts (s 4)
- s 9(2) declared that Federal Courts may exercise this jurisdiction