

# **Constitutional Law: State v Cth Notes**

## Table of Contents

<b>High Level Course Summary</b> .....	<b>3</b>
<b>Commonwealth flow chart</b> .....	<b>5</b>
Corporations power s51(21).....	7
Spending powers.....	8
Intergovernmental immunities.....	8
Separation of powers.....	10
Implied freedom of political communication.....	11
<b>State flow chart</b> .....	<b>15</b>
Restrictive procedures.....	15
Intergovernmental immunities.....	16
Separation of powers.....	17
Implied freedom of political communication.....	17
S92- Freedoms of interstate trade and commerce.....	18
S109 – Inconsistency with state legislation.....	18

# High Level Course Summary

## *Issue Spotting Guide;*

### **Assessing validity of Commonwealth legislation**

1. Is there a Head of Power?
  - a. External affairs s51(29)
  - b. Corporations power s51(20)
  - c. Spending powers (grants, appropriation and expenditure) includes nationhood power in relation to spending
2. Is the legislation subject to any implied limits on Commonwealth legislative power?
  - a. Intergovernmental immunities
  - b. Separation of powers
  - c. Implied freedom of political communication
3. Is the legislation subject to any express limits on Commonwealth legislative power?
  - a. S92 – Freedom of interstate trade and commerce
  - b. S109 inconsistency with state legislation
4. Reach an overall conclusion

### **Assessing validity of State legislation**

1. Note that states have plenary legislative power
2. Are there limits on plenary legislative power?
  - a. Restrictive procedures?
  - b. Is this an area of Commonwealth exclusive legislative power? (Include power to impose customs and exercise duties in s90; prohibition on states from raising naval or military forces s114).
3. Is the legislation subject to any implied limits on state legislative power?
  - a. Intergovernmental immunities
  - b. Separation of powers
  - c. Implied freedom of political communication
4. Express limits
  - a. S92
  - b. S109
5. Reach an overall conclusion

# Commonwealth Notes

# Commonwealth flow chart

## *ASK: Does the Act have a Head of Power?*

The Commonwealth has enumerated powers, so to be valid the Act must fall within a HOP.

### **External Affairs s51(29)**

#### **Step 1: Statement of rule**

The Cth has the power to legislate with respect to external affairs under **s51(29)**. This includes the power to legislate with regard to extra-territorial matters, relations with other nations and to give domestic legal effect to treaties and customary international law.

#### **Step 2: Identify which of the external affairs may bring the legislation within the scope of s51(29).**

What is the subject matter upon which this law operates? (Per Kitto K in *Fairfax*).

- Extraterritorial law ('geographical externality principle/requirement') (non-purposive)
- Australia's relationships or relations with other countries (purposive)
- Treaty implementation? (purposive)
  - o The Cth may argue the Act is valid under 51(29). 51(29) allows the Cth to implement any treaty, regardless of subject matter (Dams; unanimous acceptance in Richardson). Because a 'convention' is a treaty, the Act is prima facie valid subject to the restrictions expressed by the HCA:
- Customary international law (purposive)

#### **Step 3: Characterisation**

Only analyse the external affair that is relevant on the facts.

##### **(i) Extraterritorial law**

[X legislation] may be valid if it has a sufficient connection with the HOP (i.e. non-purposive power). This will be the case where it relates to matters that are geographically external to Australia.

- **Core**; physically external to Australia
- **Incidental**; can include intangible connection (Joseph and Castan suggest that is written incidental scope)
  - o Criminalising conduct involving a state of connection with conduct abroad, can satisfy geographical externality requirement.

The Cth has plenary power to enact extraterritorial laws. No nexus is required within Australia (*Polyukhovich* [majority]), confirmed in the *ILO* case and in *XYZ* per Gleeson CJ, Gummow, Hayne and Crennan JJ.

- a. Characterise the legislation, identifying the specific operation and legal effect of the provision.
- b. Does the legislation, so characterised, have a sufficient connection to **s51(29)?**

## (ii) Australia's relationships/relations with other countries

[X legislation] may be valid if it is reasonably appropriate and adapted to achieving the ends of maintaining Australia's relations or relationships with other countries (i.e. purposive).

- a. Includes relations with 'international persons', the UN and non-governmental organisation (*Koowarta* per Brennan J).
- b. Examples include judicial notice of foreign judgments.
  - i. Characterise the legislation, identifying the specific operation and legal effect of the provisions.
  - ii. Is the legislation, so characterised, reasonably and appropriately adapted to achieving the ends of maintaining Australia's relations or relationships with other countries?

## (iii) Treaty implementation

Statement of the rule: the executive has inherent power under s61 of the Constitution to enter into treaties on behalf of Australia s61 (*Koowarta* per Mason J).

It is now established that the Commonwealth has the power to legislate to implement treaties regardless of whether it relates to a matter of international concern or significance ultimately an endorsement of the broad view in *Richardson*, endorsing the majority in *Tasmanian Dams* and Mason, Murphy and Brennan JJ in *Koowarta*.

**Liz's suggestion;** the structure of the answer is a bit different here... start with a brief discussion of the treaty and the type of treat necessary to bring the legislation within the scope of s51(29). However, the bulk of your discussion should be organised around point 5, characterising the legislation.

### Analysis of the treaty

- **Bona fide;** the Cth can only implement treaties which they have entered in good faith (*Koowarta*), though this is difficult to establish and a 'frail shield available in rare cases' (Gibbs CJ; *Koowarta*).
- **Obligation;** It is unclear whether the Cth may only implement treaty obligations or whether it may also implement recommendations.
  - o No obligatory words needed (Mason, Deane and Murphy JJ in *Tasmanian Dams*).
  - o Can only implement treaty obligations (Gibbs CJ in *Tasmanian Dams*; arguably Hayne and Kiefel JJ in *Pape*).
  - o Needs to be a link between the recommendation and the treaty (*ILO case*)
    - In an exam, if there is a recommendation see if you can characterise the recommendation as reasonably incidental to the implementation of the treaty obligation (e.g. majority position in *Richardson*); scope will extend to reasonably apprehended obligations (Mason CJ and Brennan J; *Richardson*).
    - EXAM ANSWER SAMPLE:

G may argue the treaty imposes no obligation, as it only says States should "undertake to take steps". Firstly, treaties are usually written in language of aspiration, this doesn't suggest any 'absence of obligation' (Deane in *Dams*; Wilson in *Richardson*). The Court won't