

External affairs

Purposive power and proportionality test

- We don't look at the purpose of the power on subject matter characterisation when looking at whether or not the Cth is valid
- It becomes relevant when looking at a purposive power. Some powers are purposive.
- Gives Cth power to make legislation for the purpose of a relevant matter
- Purposive powers carry a test called the proportionality test:
 - Whether the legislation that has been passed is appropriately adapted to the purpose proposed under the purposive power (*Murphy; Coleman*)
 - **Exception to this test:**
 - When looking at the validity

Incidental power

- Purpose should be considered in the incidental range of the power, as should proportionality of the proposed act
- The dominant test is if the law in question is a reasonable and appropriate means of furthering an object or purpose in the power (*R v Burgess*).
 - Other tests are the 'reasonably necessary' test or 'reasonable fulfilment of the purpose'.
 - Justice Mason preferred a 'proportionality' test that took into account the adverse effects of incidental laws.
 - 'Every legislative power carries with it authority to legislate in relation to ...matters ...the control of which is ...necessary to effectuate its main purpose, and thus carries with it power to make laws ...affecting many matters ...incidental ...to the subject matter': (*Grannall v Marrickville Margarine Pty Ltd*)
- If in incidental range, also consider:
 - Proportionality is not relevant to the characterisation except where the court is balancing between a head of power and a constitutional limitation on the power.

- Brennan CJ in this same case said that where there is a challenge to a non-purposive law on the ground that there is not a sufficient connection, proportionality is a concept used to ascertain whether an Act achieves an effect or purpose within power.

Relations with other countries

- External affairs power extends to relations with international organisations (*Koowarta v Bjelke-Petersen per Brennan J*)
- External affairs power has the ability to encompass assertion of sovereignty over territorial sea, even though international relations in this respect may be non-consensual (*Seas and Submerged Lands Case*)
- External affairs power doesn't only extend to consensual powers (*Seas and Submerged Lands Case*)
- External affairs isn't confined to good relations between nations; it just needs to affect relations between countries (*Seas and Submerged Lands Case*)
- Providing for control orders are a valid exercise of external affairs power since efforts to combat terrorism is connected to Australia's relations with other countries. This is because terrorism coerces and affects governments of other countries (*Thomas v Mowbray*)
- Relations with all countries outside of Australia fall within concept of external affairs – this includes keeping good relations (*R v Sharkey*)
- Law which prohibits above is reasonably capable of affecting relations with other countries and therefore external affairs power applied here (*R v Sharkey*)
- This power is broader than only applying to good relations (*R v Sharkey*)
- The Commonwealth is able to use the external affairs power to legislate with respect to 'relations with foreign nations'. In *R v Sharkey* – Latham CJ stated:
 - The preservation of friendly relations with other Dominions is an important part of the management of the external affairs of the Commonwealth. The prevention and punishment of the excitement of disaffection within the Commonwealth against the Government or Constitution of any other Dominion may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions (*R v Sharkey*)

Matters external to Australia

- If law is passed by the Cth in relation to or effects anything geographically outside of Australia, then it falls within external affairs power (*Seas and Submerged Lands Case; Polyukhovich v Cth*)

- **s 51 (xxix)** contains a sufficient grant of power to support such a law. This is because the war crimes that the legislation was being made in relation to fell physically outside of Australia i.e. Europe (*Polyukhovich v Cth*)
- Brennan J dissented in the aforementioned case – he argued that the external affairs being regulated must have some connection/nexus to Australia (*Polyukhovich v Cth*)
- Horta case proved the validity of Brennan’s point in the previous mentioned case (*Horta v Cth*)
- The mere externality approach (aka ignoring Brennan’s views) was confirmed in 5 judge joint judgement where it was agreed that the external affairs power extends to places, persons and matters of things physically external to Australia (*XYZ v Cth*)
- Callinan & Heydon J disagreed stating that you need a nexus (*XYZ v Cth*)
- Hayne and Kiefel stated that it is irrelevant that the cause of the GFC may be external; the stimulus package was directed at the Australian economy, and is therefore an internal matter (*Pape v Commissioner of Taxation*)

International law

- Brennan J stated that a law which vested in an Australian court a jurisdiction recognised by international law as a universal jurisdiction is a law with respect to Australia’s external affairs (*Polyukhovich v Cth*)
- Brennan accepted that external affairs power indeed extends to making laws with regards to prosecution of international crimes, but rejects argument in this instance because War Crimes Act define war crimes in a way that was significantly different from international law definition (*Polyukhovich v Cth*)
- Not yet a settled issue, although Kirby accepted the understanding of power in (*Thomas v Mowbray*)

Entering into treaties

- The power to commit Australia to international agreements lies with the federal executive as an aspect of its prerogative power. However, reforms in recent decades have ensured that Parliament does play a part in the deliberative process. The most controversial question concerning **s 51(xxix)** has been the extent to which Australia’s entry into international treaties or conventions can trigger a constitutionally permissible exercise under the paragraph of Cth legislative power.

Treaty implementation law and the limitations

- This aspect of the external affairs power allows the Commonwealth to alter federal laws in a manner that would be beyond power, were the Parliament to seek to use any other head of

power granted under the Constitution. The HC has considered the relationship between the executive and the Parliament, the nature and scope of the treaty, the implementation aspect of the power and the limitation of its use.

The relationship between the executive and the parliament

- The Cth executive, through the act of the Governor-General, has inherent power in relation to the making of international treaties and other similar instruments such as conventions, charters, covenants or pacts.
- The signing and ratification of such international instruments indicates to the world that Australia intends to be bound by international law and adhere to the treaties' provisions. But such a treaty does not become enforceable in Australian domestic law until expressly incorporated or implemented, by an Act of Parliament.
- **Section 51 (xxix)** empowers the Cth Parliament to incorporate provisions of international treaties to which Australia is a party into Cth legislation
- Unincorporated treaties have procedural effects in Australian law, but cannot alter substantive rights and duties until implemented in domestic law (*Minister for Immigration & Ethnic Affairs v Teoh 1995*)
- McHugh, Gummow & Callinan expressed their displeasure with the precedent in Teoh and suggested it was a vulnerable one should the issue come directly before the HC again (*Re Minister for Immigration & Ethnic Affairs v Lam 2003*)
- The rule in this case seemingly established that the Cth Parliament could legislate to give effect to any obligation or even non-binding recommendation contained in an international treaty once ratified control on Cth Parliament via 'back-end' requirement that law actually gives effect to the treaty (*R v Burgess; Ex parte Henry*)
- Mason, Murphy & Brennan saw no limitation on Cth legislative power to implement international agreements, provided law can be related to implementation of bona fide agreement; it will be valid, even if it addresses purely domestic issues. There was no majority view in this case (*Koowarta v Bjelke-Petersen*)
- Murphy J said that a narrow interpretation of clause would leave Australia an international cripple (*Koowarta v Bjelke-Petersen*)
- Gibbs, Aickin and Wilson JJ in dissent adopted qualified view that subject matter of agreement must itself be an external affair in sense that it 'in some way involves a relationship with other countries or with persons or things outside of Australia' (*Koowarta v Bjelke-Petersen*)

- The fact that many nations are concerned that other nations should eliminate racial discrimination within their own boundaries does not convert racial discrimination within the boundaries of one country into an international affair (*Koowarta v Bjelke-Petersen*)
- An Australian law, operating within Australia, regulating the relationship of Australians with other Australians is not international in character (*Koowarta v Bjelke-Petersen*)
- Gibbs CJ rejected the doctrine of bona fides as providing 'at its best, a frail shield available in rare cases' (*Koowarta v Bjelke-Petersen*)
- Stephen J applied Starke J's test of international concern (*Koowarta v Bjelke-Petersen*)
- Four judges held that external affairs power was *not* unqualified in sense that it did not extend to implementation of all treaties. At the very least, s51(xxix) will support a Cth law implementing a treaty where the subject matter is of international concern (*Koowarta v Bjelke-Petersen*)
- The power might be attracted not only by a formal agreement such as a treaty, but also by an informal agreement (*R v Burgess; Ex parte Henry*)
- In such a case, the Cth would be able to acquire an unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Cth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed. (*R v Burgess; Ex parte Henry*)
- Since Engineers' Case the reserve powers doctrine has been abolished. However, in determining the meaning and scope of a power conferred by s51 it is necessary to have regard to the federal nature of the Constitution. Accordingly, no single power should be construed in such a way as to give the Cth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament (*Bank of NSW v Cth*)

Tasmanian Dams case

- s6 of Act clearly drafted with prior cases in mind, seeking to defend legislative conferral of power to issue proclamation either as aspect of Australia's relationship with international organisation (World Heritage Committee); implementation of treaty (with or without obligation); fulfilment of an international law obligation (whether created by treaty or otherwise); or as addressing an issue of int concern (in absence of any treaty or obligation) (*Tasmanian Dams Case*)
- **Majority 4:3 (Mason, Murphy, Brennan & Deane JJ) adopt wide, unqualified view of external affairs power**
 - Mason J rejects 'international concern' test as being too 'elusive' (at 123) and yielding no 'acceptable criteria or guidelines' (at 125): (*Tasmanian Dams Case*)

- 'The existence of international character or international concern is established by entry by Australia into the convention or treaty' (at 125)
- Court cannot second-guess executive and legislative judgments of this sort
- Murphy J: International concern is one of several criteria which is sufficient to attract s51(xxix). Others are (non-exhaustively): *(Tasmanian Dams Case)*
 - Law that implements any international law
 - Law that implements any treaty or convention
 - Law that implements any request or recommendation of the UN or subsidiary world organisations (e.g. WHO)
 - Law that affect relationships between Aust or groups within Australia and other nations or groups external to Australia
 - Law that deals with domestic matters that are of international concern
 - If the only connection to s51(xxix) is a treaty, the Cth's power is confined to what is reasonably appropriate to implement the treaty – doesn't mean you have to implement all the provisions of the treaty and rigidly stick to the terms used
 - If the connection to external affairs is some other non-treaty criteria, the Cth's power extends to all that is reasonably appropriate for dealing with that criteria
- Brennan J adds qualification, viz. that law must implement obligation (not recommendation), failing which Stephen J's test for 'international concern' in *Koowarta* should be applied *(Tasmanian Dams Case)*
- **Minority (Gibbs CJ, Wilson and Dawson JJ) follow Stephen J's 'international concern' test as lowest common denominator ratio in *Koowarta* *(Tasmanian Dams Case)***
 - Gibbs CJ holds that '[t]he protection of the environment and the cultural heritage ... cannot be said to have become such a burning international issue that a failure by one nation to take protective measures is likely adversely to affect its relations with other nations...'
 - TODAY above argument wouldn't hold
 - The relevant aspects of UNESCO deal with matters entirely internal to Australia
 - No reciprocity in the action required within Australia
 - Doesn't directly affect the interests of other nation

- Convention doesn't impose an obligation on Cth to enact legislation to protect heritage
- Because of qualification in Brennan J's judgment, the ratio in *Tasmanian Dam Case* was restricted to implementation of international legal obligations (not recommendations)

Is an external affair involved?

- Executive power is vested in s61CC to 'deal' with other nations aka external affairs

What are external affairs?

- If law is passed by the Cth in relation to or effects anything geographically outside of Australia and is physically external, then it falls within external affairs power (*Seas and Submerged Lands Case; Polyukhovich v Cth; Victoria v Cth ILO Case*)

Has domestic legislation been affected?

- If yes, s 51(xxix) – international obligations to incorporate treaties

Extraterritorial power and territorial boundary

- If Parliament attempts to legislate for matters 'beyond its borders' – such an act is said to be an exercise of extraterritorial power s 51(xxix).
- The territorial boundary is matters or things geographically situated outside Australia (*NSW v Cth*)
- HC found that in international law, the territorial border of Australia was generally the low water mark
 - The territorial sea and the continental shelf would therefore be considered outside Australian borders
 - The entire HC found that s 51(xxix) permitted the Cth to exercise power with regard to 'matters of things geographically situated outside Australia' (Mason J at 471)

Is a nexus (binding) required?

- Majority found that s 51(xxix) gave the Cth plenary extraterritorial power and there was no nexus requirement (*Polyukovich v Cth*)
- This was revisited in *XYZ v Commonwealth* where it was suggested that the nexus requirement needs to be revisited.

- It was held that mere geographical externality is sufficient (XYZ v Cth)
- Callinan & Heydon dissented and rejected the mere externality test (XYZ v Cth)

What about with respect to other nations?

- Commonwealth has power to legislate with respect to other nations (R v Sharkey)

Are we required to recognize foreign laws?

- Yes, foreign judgments, evidence and extradition are supported under this aspect of the external affairs power (Vasiljkovic v Commonwealth)

Revolution against government?

- The creation of the offence of sedition which prohibited the excitement of disaffection against the governments of the UK was a valid exercise of power. (R v Sharkey)
- Urging another person to overthrow by force or violence is an offence under:
 - The Constitution
 - The Government of the Cth, a state or a territory
 - The lawful authority of the government of the Cth

Anti-terrorism?

- *Anti-terrorism* – Would probably also be encompassed within the ambit of the power as seen in *Thomas v Mowbray* [2007] HCA 33. This includes acts done within Australia or beyond its territory and against any member of the United Nations (Thomas v Mowbray)

What is the purpose of a treaty?

- Signals Australia's obligation to the world (Toonen v Australia)
- Ratification means must take into account in decision making (Minister for Immigration & Ethnic Affairs v Teoh)

What are the effects of international laws on Australia?

- When Australia becomes a party to a treaty, Australia is bound in international law to obey the terms of that treaty and is accountable to other nations.
- But a treaty is not enforceable in Australian domestic law unless it is specifically incorporated into law by an Act of Parliament.

What are the limitations on incorporating treaties?

- Cannot alter substantive rights until they are implemented in domestic law (*Minister for Immigration & Ethnic Affairs v Teoh*)

Can all treaties be incorporated into domestic law?

- Treaties that can be deemed competent to legislate for carrying out of recommendations as well as draft international obligations may be incorporated (*Re Burgess; Ex Parte Henry*)
- The treaties that are incorporated do not have to be confined to external aspects. Any topic is within scope of s51(xxix) if required.

Limits of incorporation of treaties into domestic law

- Treaty must be bona fide
- The need for a treaty 'obligation'
- The specificity principle
- The conformity principle

External affairs power not limited to topics of international concern

- Customary laws are laws accepted as binding by all nations
 - *XYZ v Cth* said that this matter would be revisited
- Implementing a treaty as a matter of international concern
 - Implementing is a valid exercise of external affairs power (*Koowarta v Bjelke-Petersen*). The tests are as follows:
 - Any treaty is okay
 - Subject matter must be external
 - International concern is acceptable
 - The external affairs power is not confined to 'external' aspects of the other heads of power enumerated in s51, nor is it limited to topics of 'international concern' or having 'international character'.
- In *Cth v Tasmania Dams*, it was granted that Cth had the power to incorporate all treaty obligations to Australia (*Cth v Tasmania Dams*)
- This was reconfirmed in *Richardson v Forestry Commission*, where it was stated that the Cth was allowed to legislate against matters reasonably incidental to treaty obligations (*Richardson v Forestry Commission*)