External Affairs Power

Introduction

- EA power based on s 51(xxix)
- Authority to legislate w/ respect to EA. Scope has been interpreted **broadly**, and in recent times, power has played significant role in national/international contexts
- 4 aspects
- It is a power to:
    1. Extra-territorial laws - Legislate on matters/affairs which are physically external to Australia – Geographic externality (a this is a non-purposive power)
    2. Relationships w/ other countries - Legislate re Aust relationship with other nation states – international comity (this is a purposive power) → implementing UN recommendations
    3. Treaty implementation - Change domestic law so as to implement international obligations/agreements/treaties that Aust is subject to or a party to (this is a purposive power)
    4. International concerns - Change Aust law so as to address matters of an international concern (this is a purposive power)

External affairs power and Federalism

- *Commonwealth v Tasmania (the Tasmanian Dam case)* (1983)
- *Koowarta v Bjelke-Petersen* (1982)
- *Richardson v Forestry Commission (NSW)* (1988)
- International relations, states have minimal role. No requirement that the Cth have to consider limited state power b4 exercising its powers → up to court to determine whether it is reasonable intrusion into state responsibility. Subject to express/implied limitations such as Melb Corp.

1. External affairs – geographic externality

Persons, Places, Matters and Things External to Australia

- s 51(29) empowers Parl to legislate with regard to matters or things geographically located outside of Aus (New South Wales & Ors v The Commonwealth - *Seas and Submerged Lands* (1975)
- should mention

***New South Wales & Ors v The Commonwealth* (the *Seas and Submerged Lands* case) (1975)**

- Cth entered into 2 diff conventions
- Passed the Act. Sovereignty of continental seas is vested into Cth. Argument was Cth has no power to legislate with respect to the sovereignty over inland waters and the Continental shelf.
- The *Federal Seas and Submerged Lands Act* 1973 (Cth) had the effect of vesting sovereign rights over the territorial sea and continental shelf in the Crown inn rght of the Cth. The Act was purported to be made due to an international treaty. The States argued that they had the power over their own soil and territorial waters extending beyond the low watermark.
- The Court held that power supported the legislation as the external affairs power enabled the Cth to legislate as to things, matters and events external to Australia.
- Majority all found the legislation was valid exercise of external affairs power.
- Low-watermark out. Barwick/Mason said even though this is valid exercise of EA power, w/ respect to international agreements. Obiter by Barwick/Mason

Barwick J: The external affairs power extends to anything 'which in its nature is external to… Australia'

Mason J: The external affairs power covers things situated geographically outside Australia. The 'power is expressed in its widest terms' 'affairs which are external to Austrlaia'. Should be construed with all the

generality that the words admit. Effectively argued that the external affairs power was plenary.

Jacobs J: 'the words EA must be given their ordinary meaning' must relate to things external to Aus + must relate to affairs (relationships). If there was no GEP, legislative gap in Aus. if they cant legislate for things external to Aus, and states cant do it, there would be gap in Constitutional framework.

- Does there need to be a nexus?
- *Polyukhovich* (1991):
  - No (5:2);
  - Broad view (5): plenary power ("If a place, person, matter or thing lies outside the geographical limits of a country, then it is external to it and falls within the meaning of the phrase external affairs", per Dawson J);
  - Narrower view (Toohey J): It is not a plenary power, need nexus. External affair must be a matter which Pmt recognises as touching or concerning Aus in some way. On facts, sufficient nexus since Aus was directly involved in and affected by WWII;
  - Narrow view (Brennan J): Again, not a plenary power, need nexus. On facts, no nexus, because P was not a citizen or resident of Aus and subsequent acquisition of Aus citizenship did not supply sufficient nexus.
  - Facts: *War Crimes Act* prohibited certain acts committed in Europe during WWII, regardless of the nationality of victim or perpetrator. P was tried under leg as a war criminal. He was a non-Aus at the time the crimes were committed.
- *ILO* case or *Industrial Relations Act* case (1996):
  - Broad view accepted (6:1)[1];
  - Hence no nexus required;
  - Called "geographical externality principle".
- *XYZ v Cth* (2006):
  - In obiter, upheld GEP (4:3);
  - Really 4:1 – given that 2 of min (Kirby and Callinan JJ) have retired from HC;
  - But there remains "a seed of doubt" about GEP given varying opinions;
  - Majority:
    - Gleeson CJ: to require a nexus "denies completeness of Australia's legislative power, which is unacceptable in terms of Const theory and practice";
    - Joint judgment (Gummow, Hayne and Crennan JJ): accept previous jurisprudence. Externality is enough to bring laws within the EA power.
  - Minority:
    - Kirby J: avoided issue – but he had a "seed of doubt planted in his mind" about reach of GEP;
    - Callinan and Heydon JJ (dissent): rejected GEP.
  - Facts: *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) made it a criminal offence, punishable by Aus law, for Aus citizen or resident while overseas to engage in certain sexual activities involving children. Here there is a nexus (perpetrator). On facts, XYZ is an Aus citizen committed for trial in Vic for acts committed in Thailand in 2001.

***Polyhukhovich v The Commonwealth* (the *War Crimes* case) (1991)**

[1] Really unanimous, since Dawson J (min) indicated his acceptance in *Polyukhovich* and didn't discuss it again.

- Concerned amendment to Cth War Crimes Act
- Offence for certain Acts in Europe during WWII
- Polyhukhovich alleged to be Ukrainian citizen, alleged had been collaborating with Nazis. Action brought against him under the War Crimes Act
- Validity of War Crimes Act cannot go ahead, bcos power of Cth does not extend to making a law that occurs outside Australia. Was it outside legislative power of Aus?
- Majority held it was valid exercise of EA power. Picked up on obiter.

The Cth passed legislation allowing for the trial of Australian citizens accused of committing war crimes in Europe during the Second World War. One of the people to be charged under the legislation contested its validity, as when the offence was committed, the accused had no connection to Australia.

Mason CJ, Deane, Dawson, Gaudron and McHugh JJ all held that a law with respect to a matter which is territorially outside Australia is a law with respect to "external affairs" for the purposes of s 51(xxix) of the Constitution:

- Mason, Deane, Dawson, McHugh JJ: The external affairs power is plenary and therefore no nexus is required.
- Deane: external means outside.
- Dawson: 'affairs is imprecise' wide enough to cover people, matter, thing
- Gaudron J: A nexus is required, but that a law has been made is evidence enough in itself that such a nexus exists.
- Q of geographic externality alone was sufficient to enable Cth to invoke EA power. McHugh took similar view. One Q about whether or not there was a nexus. All that was required, physically outside of Aus. rejected argument that there should be some more narrow reading. Brennan/Toohey who argued that there had to be some other connection to Aus besides externality.
- Brennan – Aus citizenship would be sufficient
- Toohey – external is an adjective qualifying affairs. It is a matter of concern to Australia. Not only had to be external, had to be a connection that would concern Aus that would cause Aus to invoke this power
- Ultimately, majority ofund valid. Legislation was limited in its application to offences commiteted in Europe that would have been offences in Australia at the same time. questionable of whether it was a requirement.

The majority <u>did not</u> say there had to be a connection with the issue and Australia and the majority position was confirmed in ***Victoria v Commonwealth*** **(the *Industrial Relations* case) (1996)**.

In the minority, **Brennan and Toohey JJ** considered that some additional factor (a nexus) was necessary:

- Toohey J: A nexus is required. It suffices that Australia was involved in WWII. Even though geographically external to Australia, a "matter does not qualify as an external affair" for the purposes of s 51(xxix) unless it be one "which the Parliament recognizes as touching or concerning Australia in some was."
- Brennan J: Held the Act invalid. A nexus is required, though it need not be large. He was of the view that s 51(xxix) confers power to enact "laws affecting affairs" that are geographically external to Australia only if there "be some nexus, not necessarily substantial, between Australia and the 'external affairs' which the law purports to affect".

- In answering a question based on the external affairs power, when referring to *Polyukhovich* mention the minority idea of sufficient connection.
    - state that *Horta* ignored this issue;
    - the 6 judges in that case referred to connection but did not decide on it;
    - therefore, the only good authority for connection is *Polyukhovich* and this arose in the minority.

XYZ v Commonwealth **[2006]**

- Legislation that made penal child sex offences committed overseas was challenged.
- S 50B(a)
- Illegal to commit act of indecency to someone under 15. Only applied to residents of Australia. P was Aus citizen
- Offences committed in Thailand in 2001. Q in Court was whether it was a law that was with respect to external affairs. Extremely narrow view. Parl's power to make laws with respect to EA. Relations with Aus and other countries. Bcos in 1901, those other countries included Great Britain

Gleeson, Gummow, Hayne and Crennan JJ adopted the broader view of *Polyukhovich*, finding the legislation valid based on geographical externality. They stated that the broad view was necessary to prevent any gap in the legislative powers of Australian Parliaments, and that such an approach did not pose any danger to the legislative powers of the States. All found to be valid. Regulating an Act that occurred outside of Aus. conduct of Australians who went overseas minors. Provisions valid exercising, regulating conduct that geographically external to Aus. judgment echoed the reasoning of majority view in Polyukhovich.

Kirby J, whilst upholding the legislation in this case, expressed doubt over the geographical externality principle. He felt legislation could only be valid where the matter affects Australia's foreign relations with countries or international organisations. Did not need to decide on the matter of geographic externality. Valid exercise in that it regulated conduct of which was an international concern. All countries are concerned with sexual abuse of children. Therefore abuse of international concern.

Callinan and Heydon JJ dissented, rejecting the geographical externality principle. GEP only found in 1985. Not authoritively estb. In *Poly* and they got it wrong. EA only concerned Aus's relationship. There had to be mutuality inherent in the conduct of Australian gov. and whoever was subject to the agreement with Australia. Very narrow view of EA. Not persuaded of legislative gap. Saw that there was sufficient depth for Cth to validly exercise that power with respect that it would be necessary for the Cth to act. Want to use majority decision but you will probs be including the dissenting J of Callinan, and Heydon. No requirement of connectional nexus of Aus and subject matter of the law

Note the 4:3 majority.

- *Horta v Commonwealth* (1994):
  - Cth legislation implemented a treaty with Indonesia to exploit petroleum resources in the Timor Gap. This was challenged on the basis that the treaty was void – the treaty in question, it was submitted, belonged to East Timor.
  - However the court held that this was irrelevant – the fact of geographical externality brought this law within the external affairs power.
  - 1970s Aus gov was only nation + Indonesia that recognised Indonesia's claim to sovereignty over East Timor. Aus entered into discussion about petroleum reserves. Area btwn Aus/East Timor
  - Mining rights, under ET's territorial seats.
  - Implemented 2 pieces of legislation. Cooperation w/ Indonesia
  - Horta challenged, on one ground I was beyond scope of EA power.
  - Court held mere fact that what was being regulated, was geographically external was sufficient for Cth to pass this legislation.
- Victoria v Commonwealth
  - In considering Q of externality, Court held that modern doctrine of scope of EA power was adopted in Polyklaskdlsadksa. 'matters physically external to Australia'
  - Court has conceded is all that is necessary is geographic externality.
- *The Queen v Hughes* (2000):
  - This case involved the use of the external affairs power to support legislation regulating financial transactions between an Australian business and a foreign party.

Characterisation

Note: *the tests of characterisation applicable to the external affairs power differ, depending on which aspect of the 'external affairs power' is being emphasized. That is, characterization is different for geographic externality (subject matter power) and the implementation of international obligations (purposive power).*

Geographic Externality

- Generally, subject matter powers are subject to the sufficient connection test. However if a law is purportedly covered by the external affairs power on the basis that it concerns something geographically external to Australia, it is only necessary to demonstrate that the law is 'with respect to' that matter or thing: *Polyhukovich v The Commonwealth* (1991).
- *Polyhukovich v The Commonwealth* (1991) 172 CLR 501,
    - **Mason CJ, Dawson, Gaudron and McHugh JJ** shared the view that, subject to express and implied constitutional limitations it was not necessary for the Federal Parliament to establish a 'connection' between a matter outside Australia and Australian concerns in order to regulate the matter in question.
    - To require a connection would be inconsistent with the plenary grant of power for the 'peace, order and good government' of the Commonwealth with respect to external affairs.
    - At any rate, any requirement of a connection would be satisfied by the Federal Parliament's selection of the matter as an appropriate matter to regulate: per **Gaudron J.**
    - However, Brennan and Toohey JJ required more – they said that it would be necessary to demonstrate some sort of connection between the external affair and Australian concerns.
- The question of whether there is a requirement of a connection or nexus was left open in *Horta v The Commonwealth* (1994).
    - The court delivered a unanimous judgment approving *Polyukhovich* and upheld the legislation in question on the basis that it dealt with a place that was geographically external to Australia.
    - However, the court was equivocal in its treatment of the need for a connection, as suggested by **Brennan and Toohey JJ** in *Polyukhovich*.
    - While the court acknowledged that five of its members had required no such connection as the matter or thing was territorially outside Australia, a connection was established on the basis that 'there is an obvious and substantial nexus between each of them [the Timor gap and the exploration of petroleum resources].'
- In R *v Hughes* (2000), the majority applied *Horta* saying that the regulation of foreign investments by Australian corporations 'relate to matters territorially outside Australia, but touching and concerning Australia, and so would attract s 51(xxix)'.

2. Laws dealing with relations with other countries or Int organisations

Australia's International Relations and Obligations

The executive power to conduct external affairs

- *Barton v Commonwealth* (1974)
    - Barton had a successful company, saw corporation watchdog. Escaped to Argentina. No extradition btwn Aus and Argentina. Aus gov. entered into agreement with Argentina for extradition. Bartons challenged validity of Act. argued **executive did not have power to enter into one-off agreement of fugitives**. Held executives had power even in absence of treaty.
- *Commonwealth v Tasmania* (1983) (The Tasmanian Dams Case)
    - Aus ratified Convention for Protection of Natural Heritage, and legislation enacted to implement. Legislation prohibited destruction or dmg of property suitable for inclusion in World Heritage List. Regulations made to prohibit construction of Dam + associated works.
    - Issue whether EA can be exercised to prevent construction of Dam.
    - Act was authorised by EA HoP as the existence of an international treaty was sufficient to attract the power. Regulations were invalid as went beyond reasonable/appropriate measures to implement convention there is need to be 'reasonable proportionality btwn the designated purpose or object and the means which the law embodies for achieving or procuring it'
    - Corps power extended to regulate construction of Dam, as Hydro-Electric Commission was a trading corp, engaged in work undertaken for the purposes of its trading activities.
- *Farey v Burvett* (1916)

- Authority case that executive alone who determines war or peace. Can declare war.

- **Sources of international obligations**
  - International treaties or conventions
  - The recommendations of international organisations
  - The general principles of international law or customary international law

- s 51(29) empowers the Cth to legislate with respect to foreign relations;
- Relations of the Cth with all other countries outside Aus are matters which fall directly within the scope of EA (*R v Sharkey*). This includes matters like preservation of friendly relations, prevention and punishment of incitements against other governments, and extradition and judicial notice of foreign judgments;
- Concept extends to relationships with other international persons (e.g. UN; *Koowarta*).

***R v Sharkey* (1949)**

- Sharkey was charged with uttering seditious words against the Queen. It was a crime for it to occur within 'any of the **King's dominions** (including Australia). Sharkey argued that it was an invalid provision as it concerned something that was outside of Australia.
- Public talk, discussed views on potential war btwn USSR and West. It would be justifiable. Would be result of nations of UK/US
- Court found regulating seditions in the King's dominions did form part of international relations of Aus.

The Court held by majority that the external affairs power supported the legislation. Latham CJ stated that any matter that regarded something that was outside of Australia, including other Dominions of the Crown, fell within external affairs (at 136).

- The protection of comity between nations is an aspect of external affairs: *R v Sharkey* (1949). Therefore, the external affairs power provides for the enactment of laws that punish act done within Australia that are in violation of international comity.

***Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) (repealing Imperial legislation operating in the Australian states)**

- confirmed power to implement Aus obligations extended to implementation of treaties
- Australia Act → Imperial Act was repealed. Q of whether this was valid exercise of cth power as it was implementing an Int agreement btwn Australia and the UK.
- Kirmani was injured on a cruise run by Captain Cook. She argued that Captain Cook Cruises was negligent and claimed damages.
- Captain Cook Cruises argued that their liability for damages was limited under an Imperial Act *(Merchant Shipping Act)* However, there was a Commonwealth Act *(Navigation Act)* that was contrary to the Imperial Act Did the Commonwealth have the right to pass the Navigation Act?

Under s 109 could the Commonwealth Act invalidate the Imperial Act.

The external affairs power could authorise Federal legislation to repeal Imperial legislation that operated within the states.

3. Treaty Implementation Implementing International Obligations

1. Is there a treaty OR non-binding document?

- Treaty = Charter, Protocol, Covenant, Convention etc.;

- IN ADDITION, non-binding documents may be incorporated (*ILO* case, 5:2);
- Non-binding documents = Draft treaties, Recommendations or Declarations. E.g. in *ILO* case, HC held that Cth could impose industrial laws on Vic, SA and WA referable to s 51(29) based on ILO Recommendations. Maj said "It is no longer possible to assert that there is any sm which must necessarily be excluded from the list of possible subjects of int negotiations, dispute or agreements."

2. Treaty implementation

- Does sm of treaty match an enumerated HoP?
- If yes, use that HoP;
- If no, use s 51(29):
- Lawfulness of treaty under Int law is irrelevant (*Horta v Cth*);
- Any treaty can be implemented, regardless of subject matter. This so called 'broad view' was accepted by a clear majority (6:1) in *Richardson*. It had previous only been supported by a bare majority (4:3) in *Tas Dams* and a minority (3:4 against) in *Koowarta*. The main criticism of the broad view is that it will destroy the "federal balance achieved by the Constn" (*Koowarta* per Gibbs CJ, however after *Workchoices* we know the HC isn't concerned with this anymore);
- This is consistent with the view of literalism from *Engineers* – do not imply in limitations.

3. Limitations on implementation

i. Treaty must be bona fides;

- May not be a limitation (hasn't attracted maj support);
- In *Koowarta*, Brennan and Stephen JJ thought Exe must enter into treaty in good faith and not merely as a means of conferring legislative power upon Pmt;
- Is there evidence of Cth grabbing for power?

  Look at:
  - Subject matter (serious issue?);
  - Past failed attempts to legislate on that sm; and
  - Hidden motives.
- Very difficult to establish bad faith (limitation would "at best be a frail shield available in rare cases", per Gibbs CJ in *Koowarta*).

ii. Treaty must impose an obligation;

- Q1: Does it contain an obligation?
  - Remember: treaties can be phrased in non-precise language, so words which may not supply an obligation in domestic law *will* be sufficient to supply an obligation in Int law (e.g. "duty of ensuring" and "shall endeavour", per Deane J in *Tas Dams*);
  - Cth can implement obligations (*Tas Dams*);
  - And matters reasonably incidental to obligations (e.g. protecting property pending outcome of an inquiry as to whether it should be protected is incidental to the obligations to identify world heritage areas and preserve natural heritage; *Richardson*).
- Q2: Can Cth implement non-obligatory/ aspirational treaties?
  - Uncertain:
    - In *Tas Dams*, no clear majority (3:3);

        - Not an issue in *Richardson*;
        - However, in *ILO* case, the implementation of non-obligatory treaties is impliedly supported by the maj's decision that Cth can implement provisions of non-binding documents (in that case, recommendations from the ILO). That is, if Cth can implement recommendations then why shouldn't they be able to implement non-obligatory treaties?
    - If a treaty confers a benefit to Aus, but is not binding on Aus, might be more likely that Cth can implement it (Mason J in *Tas Dams* used this as an example of why s 51(29) should not be limited to implementation of an obligation; Gibbs CJ expressly "put aside" this situation).

iii. Specificity principle;

- Terms of treaty must be sufficiently specific (*ILO* case, 5 judges);
- Treaty has to direct the general course to be taken by signatory states;
- But see also Deane J's comments in *Tas Dams* about non-precise language;
- 4 things to look at:
    1. Language of treaty;
    2. Amount of discretion given to signatory states (greater choice, less specific);
    3. Number of ways to implement treaty (vast ways, less specific); and
    4. Whether there's Int consensus on how to achieve obligation (the greater the general knowledge on how to deal with issue, the less specific treaty needs to be; J&C).
- Policy: the more specific a treaty is the less plenary power the Cth acquires. Hence concept of specificity is an attempt to reduce the discretionary power of Cth. This requirement was adopted to regulate balance of powers. Might have replaced Obligation requirement.

iv. Conformity principle.

- Well-established limitation;[2]
- **Test:**
    - "Cth law must be reasonably capable of being considered appropriate and adapted to implementing the treaty" (maj in *ILO* case and *Richardson* and Deane J in *Tas Dams* all articulate essentially the same test);
    - Need "reasonable proportionality b/w the designated purpose/object [in T] and the means which the law embodies for achieving or procuring it" (Deane J in *Tas Dams* – however, maj in *ILO* case said this may not be helpful, it simply restates basic question);
    - Not looking for best way to implement treaty, just a reasonable way (maj in *Richardson*);
    - Cth Act can go further than treaty obligations to achieve purposes of treaty (*Tas Dams*);
    - Cth need not comply with all of the obligations under treaty (maj in *ILO* case; but there is a point where deficiency is "so substantial" that Cth Act is either (1) not within s 51(29) (i.e. the law can no longer be characterized as a law implementing a treaty) or (2) the law is inconsistent with the treaty).
- Look at each individual provision of Cth Act;
- Additional things to consider:

[2] It was rejected by Dawson J in *ILO* case because his Honour said s 51(29) is a non-purposive power. But he's the only judge to do so and no longer on HC, so this view is unlikely to command a majority.

- Does Cth law infringe on human rights? If so, may fail to conform (assumption that Int law documents are not to be implemented in a way that violates human rights. Deane and Gaudron JJ in *Richardson* thought law freezing land was disproportionate to interests of the freehold landowners);
- Who has the power to make decisions? In *Tas Dams*, GG was empowered to make declarations that s 9 applied to land, cf. in *Richardson*, a Commission of Inquiry was established. Both held acceptable.

- Ultimately, a subjective test – e.g. in *Richardson*, two different conclusions on the same facts. Here, the maj said law was reas proportionate (protection period was limited and realistic in terms of assessing value of forests, priority of Commission was to identify and recommend release of all parts definitely not part of the heritage, compensation was to be provided if part of heritage and Minister could allow certain activities), whereas the minority (Deane J (with Gaudron J)) thought law was not (blanket prohibition throughout the whole of the area of inquiry was without cause or justification – minor beneficial activities, such as maintaining fire breaks, were not even allowed).

- Watch out for **policy considerations** that may influence court's decision (judges may use their assessment of facts to further policy ideals). E.g. in *Tas Dams* the maj who thought the balance of powers between Cth and States will never be static saw cultural and natural heritage as being of int concern. Cf. with min, who thought bop ought to be static, who did not think that heritage was such a "burning issue".

Implementing international obligations

- Where s 51(xxix) is invoked to support laws implementing international obligations, the power is said to have a purposive aspect.
- **Basic Process:**
  - Determine what the treaty (or other international obligation) says.
  - Determine what the legislation says.
  - Look at s.51(xxix)
  - Consider if the legislation was made correctly.
- The following principles may be gleaned from the joint judgment of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v Commonwealth* (1996).

***Victoria v Commonwealth* (1996)**

Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ:

- The test of conformity is whether the Federal law is reasonably capable of being considered appropriate and adapted to implementing the treaty, including Australia's reasonably apprehended treaty obligations.
- That is, whether the legislation operated in fulfilment of the purpose of the treaty. Provisions that may not be regarded as being reasonably incidental to the effecting of the purpose will be constitutionally invalid.
- The Commonwealth may choose to implement only part of a treaty, and this choice is non-justiciable.
- However, if the implementation demonstrates a deficiency which is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, makes it substantially inconsistent with the Convention, then the law may not be characterized as a law with respect to external affairs.

Treaty Process

- This typically involves a number of steps: *adoption* of the treaty text by the participating States, *signature* and *ratification* (which signifies acceptance or approval of the treaty).
- A party may accede to a treaty that is already in force (accession), assuming the obligations and rights of member States.

- Parties may make *reservations*, which indicate that they will implement the relevant treaty obligation in a certain way or in a way which modifies its effect in that State.
- In Australian treaty practice the Cth commonly enters a 'Federal reservation' when it negotiates and signs a treaty, indicating the Commonwealth may be limited in its power to implement some matters because it shares power with the States.
- However, given the HC generous approach to the external affairs power; Federal concerns are rarely a source of limitation on the Cth's power to ensure adherence to international obligations (e.g. *Victoria v Cth* (1996)).

External Affairs Power and the Executive

- Treaties are entered into by the Governor General on the advice of the Federal Executive Council: *Barton v Commonwealth* (1974) 131 CLR 477

***Barton v Commonwealth* (1974)**

Cth wished to extradite Barton from Argentina; however Australia did not have an extradition agreement/treaty with Argentina. The executive sought to come to an agreement, without the Parliament, with Argentina. The Barton's challenged this.

The Court held that the executive have the power to do this. It is up to the executive and the executive alone to determine what treaties we enter into.

This was supported by the ***Tasmanian Dams*** case.

- Ratification is an Executive act – Crown is Constitutionally autonomous in treaty making.
- Treaties are not 'self-executing':
    - A treaty will not form part of Australian domestic law until it has been implemented in a valid Federal law: See *Walker v Baird* (1982); *Victoria v Cth* (1996).
    - There is no requirement that the Parliament implement international treaty obligations that are negotiated and settled by the Executive.
    - However, this does not mean that treaty obligations which have not yet been implemented in Federal legislation are irrelevant to Australian law. It has been held that where Australia is a party to a treaty the text of that treaty may assist in the interpretation of domestic law or in the exercise of statutory discretion: *Chu Kheng Lim v Minister for Immigration* (1992).
- **But treaties entered into may be influential in statutory interpretation or in administrative decision making**
    - *Polites v Commonwealth (1945) 70 CLR 60*
    - *Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 (particualrly see p.38)*
    - *Teoh v Minister for Immigration and Ethnic Affairs (1995) 183 CLR 273*
    - *But this 'legitimate expectation' can be removed by Executive decree*

Ratification is an Executive act – Crown is constitutionally autonomous in treaty making

- There is no limit as to subject matter:
    - *R v Burgess; Ex parte Henry* (1936):
        - The majority held that there was no restriction as to subject matter, even where the subject matter was purely domestic in nature.
        - Dickson and Stark JJ, in the minority, held that the subject power must be indisputably international in nature.
        - HELD: EA not found to be valid exercise of EA power. Not seen as giving effect as to purpose/object of treaty.
        - The decision was supported in *Airlines of New South Wales Pty Ltd v New South Wales (Airlines Case) (No 2)* (1965).
        - Minority said subject matter must be international in character. Majority said power **broad** and not so limited.
        - *Koowarta* → Power extended to any treaty that dealt with any matter as per Mason, Murphy, Brennan

- Cth v Tasmania → Broader view subsequently affirmed. Gibbs sticks to his belief of narrow.

Treaty implementation – scope of power's history

- *Koowarta* 1982
  - Facts: CERD incorporated domestically under *RDA 1975 (Cth)*. ss 9 and 12 together provide that a person cannot discriminate when doing dealings with land. Qld Act under Bjelke-Petersen did not give indigenous people land, conflicting with *RDA*.
    Issue: Is Cth law valid?
  - Held:
    Narrow view (3:4)
    BUT *RDA* valid (4:3)
  - Broad view (Mason J (Murphy J)):
    - Cth has power to implement any treaty obligation, regardless of subject matter;
    - Grants of leg power should be construed liberally and not pedantically;
    - A realistic and objective view of balance of power must commit ext affairs to Cth because it's the only entity with Int legal personality;
    - At federation, a policy decision was made that a wide and general power over ext affairs should be given to the Cth Pmt and Exe;
    - Framers did not foresee the extent of the expansion of ext affairs. The meaning of ext affairs should not be read down simply because of a change in circumstance.
  - Less broad (Brennan J).
  - Middle (Stephen J):
    - Ratio;
    - s 51(29) is a power to implement by legislation such treaties on matters international in concern and hence legitimately the subject of agreement between nations;
    - Treaty must (1) affect int relations or (2) be of general int concern;
    - On facts, racial discrimination had become a matter of int concern.
  - Narrow (Gibbs CJ (Aickin and Wilson JJ)):
    - Concerned about balance of powers. If s 51(29) is given the broad interpretation, Cth Exe can determine the scope of powers of Cth Pmt simply by entering into whatever formal or informal int agreement it chooses – i.e. Exe dictates HoPs of Pmt. Thereby the Cth can acquire unlimited power, rendering meaningless the division of powers that our entire Const was designed to effect;
    - Test = international character;
    - Subject matter of treaty will be of int character if it involves the relationship of Aus with other countries;
    - If not of int character, "it is immaterial that the agreement resulted from much int discussion and negotiation, that many nations are parties to it, and that there is int interest in it";
    - Hence similar to middle view of Stephen J;
    - On facts, their Honours thought racial discrimination had not become a matter of int concern. An Aus law designed to forbid racial discrimination by Australians within Aus territory does not become int in character, or a law with respect to ext affairs, simply because other nations are interested in Aus policies and practices with regard to race discrimination. In their view, Aborigines are of domestic concern, even though discrimination might be of int concern;
    - Fulfilment of int obligations under CERD could be done through cooperative measures between Cth and State under the Race power (s 51(26)).

- *Tas Dams* case 1983
  - Facts: Treaty = World Heritage Convention; Art 4: States have a duty to ensure protection, conservation and preservation of cultural and natural heritage, Art 5: States have a duty to take effective and active measures to achieve this, and Art 34: Fed clause –legal obligations of state party are the same whether unitary or Fed state.

    Cth Act = *World Heritage Properties Conservation Act*; s 6(2) proclamations can be made identifying certain property, the protection or conservation of which is an Int obligation or necessary or desirable to give effect to treaty, s 6(3) where GG is satisfied that such property is likely to be damaged or destroyed they may declare s 9 applies, and s 9 makes it unlawful to do various acts to declared property without consent of Minister.

    Issue: Tas Gov wanted to construct a dam, but ss 6 and 9 declarations applied to that area. Cth Act is challenged by Tas Gov.
  - Held:

    Broad view (4:3)
  - Mason J:
    - Virtually *no limits* to the topics which may hereafter become the subject of int cooperation and int Treaties or Conventions;
    - The existence of int character is established by entry by Aus into the Convention;
    - Construes s 51(29) will all the generality the words permit.
- *Richardson* 1988
  - Facts: Cth Act (*Lemonthyme and Southern Forest (Commission of Inquiry Act) 1987* (Cth)) is referenced back to World Heritage Convention.

    280,000 hectares of forest, of which 300 acres were to be logged.

    Act set up a Commission of Inquiry in relation to forest area. This Commission was to ascertain whether the two forests should be protected under WHC. HC unanimously upheld that setting up of Commission was valid (since WHC imposed an obligation to identify world heritage areas).

    Problem was with s 16 of Act and regulations under s 16 (*Holding Regulations* (Cth)). s 16 prohibited certain acts which would diminish the heritage value of the site whilst the Commission of Inquiry was being held. Whilst inquiry, land was frozen for 1 year and 42 days. Issue: Can we pre-list property pending a thorough inquiry under *World Heritage Properties Conservation Act* (Cth)?
  - Held:

    Broad view (6:1)

***Koowarta v Bjelke-Petersen* (1982)**

Qld government restricted the rights of indigenous people to own property. Plantiff argued this was in conflict with the Cth Racial Discrimination Act. Cth argued that two heads of power covered the RDA – the race power and the external affairs power (implementing an international treaty).

Court rejected the race power argument, as RDA was a law of general application. However, as it was implementing Aust international obligations, it was valid under the external affairs power.

Three judges preferred Dickson J's narrow view from *Burgess*: subject matter must be indisputably international in nature.

Three judges: implementing any treaty.

Stephen J: there was a need for some limitation, but wouldn't accept the narrow view.

Gibbs J's narrow view was repeated by him in *Tasmanian Dams* (in minority).

- *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983):
  - There was an issue as to whether the Cth could enact legislation under a treaty that did not impose obligations? Court held that the Cth could do so.
  - Mason J questioned why would the power not extend to the benefits under a treaty. Rejected view that there needed to be some sort of obligation.

- The power to arrange for extradition of fugitives from foreign countries to Australia, even in the absence of a treaty with those nations: *Barton v Commonwealth* (1974).
- The power to regulate Australian Waters: *Ruddock v Vadarlis* (2001).
- The power to declare war and peace: *Farey v Burvett* (1916).

Identifying International Obligations

- Sources include, but are not limited to:
  - International treaties or conventions;
  - The recommendations of international organisations;
  - Matters of international concern;
  - The general principles of international law or customary international law.
- *Commonwealth v Tasmania* (the *Tasmanian Dams* case): **The identification of international obligations is a question of fact for the court alone to decide.** This is supported by *Victoria v Commonwealth* (1996).
- 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.
- Even where the international obligation is included in a text of some sort, the language of the text may be imprecise or its meaning may be contested.
  - *Victoria v the Cth* (1996) approved comments made by Deane J in *Commonwealth v Tasmania (the Tasmanian Dams case*) 91983) 158 CLR 1 at 261-2.
    - 'Absence of precision does not, however, mean any absence of international obligation. In that regard, it would be contrary to both the theory and practice of international law to adopt the approach which was advocated by Tasmania and deny the existence of international obligations unless they can be defined with a degree of precision necessary to establish a legally enforceable agreement under the common law.'

Queensland v Commonwealth **(the *Daintree Rainforest* case) (1989)**

The Cth submitted an area of Qld rainforest for listing in the World Heritage List. The World Heritage committee accepted this. The Cth proclaimed the area's protection under a Federal statute implementing the Word Heritage Convention. Qld argued that the proclamation was invalid and that the area was not properly part of the list.

The Court held that as the World Heritage Committee included the area on the list, then this was evidence of its status in the eyes of the international community. There was therefore an obligation on Australia to protect and conserve the area.

This case confirmed the principle that the HC has the ultimate power to determine the facts upon which conclusions relating to international obligations are based.

This is consistent with the basic principle of judicial review that only the HC has the ultimate power to determine the facts and the law in the Australian legal system.

Implementation of International Obligations Throughout Australia

- The external affairs power also gives the Commonwealth exclusive power to implement international rights, duties, obligations or immunities into domestic law. While these matters may be broadly referred to as 'obligations', international treaties and other international sources of law may also confer benefits, or make provision for a non-obligatory regime: Airlines of NSW v NSW (No 2) (1965) per Barwick CJ; *Commonwealth v Tasmania* (the *Tasmanian Dams* case) (1983)
- Throughout Australia: (states/territories):
    - The external affairs power can authorise the implementation of international obligations within the States: *Commonwealth v Tasmania* (1983)
        - This also applies in the Territories: *Newcrest Mining (WA) Limited v Commonwealth* (1997).

Domestic Law Must Conform to the Treaty

- **This is the purposive part of the EA power.**
    - The test: is the law reasonably appropriate and adapted to the purpose of the treaty.
- The power extends to any provision appropriate or adapted to the international obligation, including anything reasonably incidental to its achievement: *R v Burgess; Ex parte Henry* (1936).
- Meticulous adherence to the terms of the treaty is not required, so long as the purpose of the treaty is effected: R *v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634
    - The laws and regulations were seen as being a valid exercise of EA power as they did give effect to the purpose of the treaty.
    - There can be sum discretion in the way Aus implements the object/purpose into domestic law.
    - Notion of proportion shows comparing of magnitude, competency and degree. Selects means which are reasonably appropriate and adapted to giving effect to the treaty.

- The treaty implementation aspect of the power will not support the implementation of a treaty that was entered into as a mere device to obtain legislative power: *R v Burgess; Ex parte Henry* (1936).
- Q is whether Cth is reasonably appropriate and adapted to the implementation of the international agreement. Domestic law did not have to mirror Int agreement. All that was necessary was that the purpose of the treaty was effected.
- Can the Cth make a law that says
    - All power stations must be licenced
    - What is purpose of agreement? To make greenhouse gases
    - Do all power stations do this though? NO hydro and solar don't.
    - Cth can't regulate all power stations. Bcos not all power generations releases greenhouse gases.
    - Law such as that would not be reasonably appropriate/adapted. No achieving purpose under Int agreement

***R v Burgess; Ex parte Henry* (1936)**

The *Air Navigation Act 1902* (Cth) was enacted from obligations arising from the Paris Convention for the Regulation of Air Navigation. It aimed to regulate aerial navigation, including prohibiting flying below a certain height near a landing strip. However, the legislation extended past the operation of the treaty to prohibit the low-flying of planes in any area. Henry was charged for contravening the regulation. In Court he argued that because the Commonwealth Act extended past the operation of the treaty, it was not made in respect to s 51(xxix).

Latham CJ said that domestic law must in substance must give effect to the agreement

Stark all means which are appropriate and are adapted to the enforcement of the convention and are not inconsistent with Cons, or repugnant with Cons are in power

Dixon slightly stricter view. Faithful pursuit of purpose was necessary .

It was held that the law went beyond the treaty and what was reasonably incidental to the treaty. However, it was found that **meticulous adherence to purpose of treaty is NOT required**.

- Meticulous adherence to the terms of the treaty is not required, so long as the purpose of the treaty is affected: R *v Poole; Ex parte Henry (No 2)* (1939).

***R v Poole; Ex parte Henry (No 2)* (1939)**

Cth amended legislation as a result of R v Burgess.

Court held that the amendments made the regulations come into conformity with the treaty. It was found that meticulous adherence to the terms of the treaty is not required, so long as the purpose of the treaty is affected.

- To be a law with respect to 'external affairs', the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty: *Commonwealth v Tasmania* (1983); *Victoria v Commonwealth* (1996).
- Partial implementation of a treaty is not in itself an objection to validity, but the law may be beyond power if the deficiency in implementation is so substantial to deny the law the character of the treaty: *Victoria v Commonwealth* (1996).

4. Matters of International Concern

- Ground of last resort (very sparse case law, no uniformity);
- *Koowarta* (1982):
  - What is "a matter of int concern"?
  - "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).
- *Tas Dams* case (1983):
  - All Justices agreed that Cth has power to implement legislation wrt matters of int concern;
  - Existence of a treaty on a sm is enough to establish that m as one of int concern (maj). And as Brennan J said in *Polyukhovich*, there is an expectation within the international community that legislation implementing the treaty will be passed;
  - On facts, Gibbs CJ thought that environmental and cultural heritage was increasing in interest but it cannot be said to have become such a "burning int issue" that failure to take protective measures was likely to adversely effect its relations with other nations. Similarly, Wilson J said the extent and intensity of int concern reflected in World Heritage Convention was not comparable to racial discrimination.
- 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.
- *XYZ v Cth* (2006):

- HC position unclear;
- Comments in obiter:
  - Gleeson CJ: extending EA power beyond treaty obligations to matters that could be subject of treaty is beyond uncontroversial aspects of s 51(29);
  - Joint judgment (Gummow, Hayne and Crennan JJ): avoided issue;
  - Kirby J: pondered whether it is too broad – an obvious difficulty with matters of int concern is that at its widest it could refer to a diverse multitude of topics lacking any precise definitional meaning (no outer limits as to what int concern could be). On facts, evidence showed sexual offences by foreign nationals against children was a matter of int concern. But he avoids issue.
- Cth's alternative argument: prohibition of conduct involving sexual abuse and exploitation of children is a matter of int concern.
- Application of XYZ preventing abuse of children went beyond int agreements. Was for all Australians and for all the world

Customary international law

- **Customary international laws** are binding international norms arising from the "general and consistent practice of states followed by them from a sense of legal obligation."
- Australia is bound by most if not all of these norms;
- CIL norms would clearly be classified as "matters of int concern" (they must necessarily be accepted as legally binding by a large number of nations who generally conduct themselves in compliance with those norms) (see Gibbs CJ in *Tas Dams* and Stephen J in *Koowarta*, p 131 J&C).

Limitations

- The External Affairs power is subject to the usual limitations in the Constitution
  - *Victoria v Commonwealth* (1996):
    - The court upheld a challenge under the Melbourne Corporation Rule. To satisfy the Melbourne Corporation implications the Federal provisions were read down so that State power to regulate these matters was preserved.
- Limited by implied freedom of communication

- The scope of the external affairs power is not restricted by s 51(i) - trade and commerce: *Airlines of New South Wales v New South Wales (No 2)* (*Airlines (No 2)*) (1965).
  - Airlines NSW refused licence to operate Dubbo and NSW. Q of inconsistency of Cth and State laws. Can regulate intrastate/interstate commerce.
  - So for example, where u have valid treaty that regulates air traffic, the Cth can rely on EA power to regulate all air traffic, including intrastate traffic.

- Domestic legislation that is based on treaty obligations that are void or unlawful under international law is not invalid as a result: *Horta v The Commonwealth* (1994).
  - Aus enter agreement to divvy up resources. Agreement void under Int law. Also not recognised. Only Aus recognised claim to sovereignty.
  - The power is one to implement int agreements that Aus has entered into → The Q of whether void or unlawful under Int law is irrelevant.

- The Commonwealth may not cite an international obligation as a *'sham or circuitous device to attract legislative power'*: *Koowarta v Bjelke-Petersen* (1982); *R v Burgess; Ex parte Henry* (1936); *Horta v The Commonwealth* (1994).
  - What about in situations where treaty is just a sham?
  - When entered into just to expand power of Cth
  - Ultimately the court has said it I sup to them to determine whether a treaty is bona fide. Gibbs J as pointed out in Tas dams. Cases where it would be glaringly obvious. Legislative power of the Cth

- *Horta v The Commonwealth* (1994): it is a matter for the Court to decide whether a citation to an international obligation is a sham as it is a decision of fact.