

TOPIC 6: EXTERNAL AFFAIRS POWER

1) Introduction

- The [Act] is valid enacted as it falls under a head of power (s 51(29)).
- **Section 51(29)** gives the Cth the power to make laws in relation to external affairs.
- Under **s 61, Cth Con** Cth has an inherent prerogative power to ratify treaties.
- Although there has been contention for whether the treaties must have 'international significance' (*minority in R v Burgess; ex parte Henry; Koowarta v Bjelke-Petersen*), the HC has adopted a broad approach.
 - Cth can implement any treaty **regardless of subject matter or importance** (*Dams; Richardson; ILO*)

2) Power to implement treaties

Identify [Convention, Declaration', 'Treaty', 'Article']

2.1 Bona fide

- Cth can only implement treaties, entered into with good faith
- OTF Cth depicts **genuine belief in subject matter** and nothing to suggest is a means of expanding power (*Koowarta per Brennan J*)

2.2 Obligation

Obligation – impliedly

- [X] will argue that the treaty doesn't impose an obligation [*evidence*]
- However, the language in international treaties is usually not as precise as common law contracts and can be aspirational.
 - Lack of explicit characterisation of [action] as obligation does not detract from the existence of an obligation (*Deane in Dams; Wilson in Richardson*).
- Unclear obligation requirement: **never been explicitly confirmed** by HC majority + since Richardson courts indicate necessary

Non-obligation: Non-obligatory words?

- Even though [quote] uses non-obligatory language, it may fall under the incidental scope
- Can implement matter if it is reasonably necessary to fulfill a treaty obligation (Richardson)

2.3 Specificity

- The treaty **is sufficiently specific in** outlining what states are required to do (*ILO Case*)
 - [explain]

Considerations:

- **Must be some direction in treaty on how to achieve aims of treaty.**
 - **Language** of the treaty
 - **Amount of discretion** given to signatory states:
 - Greater discretion= less specificity
- **how many ways** are there to implement the obligation?
- **International consensus** on how to achieve the obligation?

2.4 Conformity

Compare words of statute with treaty

- [Cth legislation] must conform with the [international treaty]
- Act is too far reaching?
 - Treaty curtails [human right] thus suggests that law is disproportionate to treaty

Notes:

- **Proportionality test:** [LAW] is **reasonably capable of being considered appropriate and adapted** to implementing the treaty. (*Deane J in Dams and majority in ILO*)
- **Presumption** – that treaties don't undermine fundamental human rights (*Richardson per Gaudron and Deane dissent*)