

Constitutional Law

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External Affairs power

External affairs power

Overview

- The external affairs power has three, maybe four, elements.
1. Implementation of Treaties
 - The treaty does not need to be on a matter of international concern and it does not need to impose obligations on Australia (*Tasmanian Dams*).
 - The treaty must be genuine or bona fide (*Koowarta*).
 - The treaty must not be aspirational (*Industrial Relations Act Case*).
 - The statute must conform to the treaty (*Tasmanian Dams*).
 - ‘the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty’ (*Industrial Relations Act Case*).
 2. Matters affecting Australia’s relations with other countries (*R v Sharkey*)
 3. Matters geographically external to Australia
 - Places, persons, matters or things outside the geographical limits of Australia (*XYZ v Commonwealth*).
 4. Matters of international concern?
 - Accepted by Murphy J in *Tasmanian Dams*.
 - Rejected by Callinan and Heydon JJ in *XYZ v Commonwealth*.

Introduction

- Whether [the Act] is constitutionally valid depends on whether [the Act] is supported by a head of Commonwealth legislative power. the relevant head of power is the external affairs power.
- Section 51(xxix) provides that Parliament has power to make laws with respect to external affairs.¹
- the external affairs power has three or possibly four aspects: (i) treaty implementation;² (ii) matters affecting Australia’s relations with other countries;³ (iii) matters geographically external to Australia;⁴ (iv) perhaps, matters of international concern.⁵

Treaty implementation aspect

Rule: Commonwealth Parliament can implement international treaties into domestic law under the external affairs power regardless of the treaty’s subject matter⁶ and regardless of whether it imposes obligations⁷ as long as: the treaty is genuine or bona fide;⁸ the treaty is not aspirational;⁹ and the implementing legislation conforms to the treaty¹⁰ in the sense that the law is reasonably capable of being considered appropriate and adapted to implementing the treaty.¹¹

Application

1. the treaty is genuine or bona fide

¹ *Australian Constitution* s 51(xxix).

² *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dams*); *Victoria v Commonwealth* (1996) 187 CLR 416 (*Industrial Relations Act Case*’).

³ *R v Sharkey* (1949) 79 CLR 121.

⁴ *XYZ v Commonwealth* (2006) 227 CLR 532.

⁵ See eg *Commonwealth v Tasmania* (1983) 158 CLR 1, 171–2 (Murphy J).

⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1, 125 (Mason J).

⁷ *Commonwealth v Tasmania* (1983) 158 CLR 1, 123–4 (Mason J).

⁸ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 260 (Brennan J).

⁹ *Victoria v Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (*Industrial Relations Act Case*’).

¹⁰ *Commonwealth v Tasmania* (1983) 158 CLR 1, 126–7 (Mason J).

¹¹ *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (*Industrial Relations Act Case*’).

- In application, look for:
 - when **and why** the treaty was agreed to (e.g. the situation leading up to the treaty);
 - the length of the treaty;
 - if it is a well-known treaty (e.g. ICCPR) or treaty made by the UN or similar intl organisations;
 - Or whether there is evidence suggesting the treaty is being ratified 'merely as a means of conferring legislative power'.¹²
- **ALSO NB:** the doctrine of bona fides is a 'frail shield' and would operate to prohibit implementation only in 'rare cases'.¹³

2. the treaty is not aspirational

- **The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.**¹⁴
- In application, look for:
 - Whether the law is so vague or aspirational as to allow for a variety of possibly **contradictory** ways to be selected to fulfil that aspiration. In this sense, it might be analogous to a treaty provision 'to promote full employment' that the Court in the *Industrial Relations Case* considered too vague to be capable of implementation under the external affairs power.
 - Or, whether the treaty is expressed with sufficient specificity to be not aspirational. [For example, it imposes a well-recognised legal standard and is limited to a specific type of activity.]
- **Also NB:** the Court stressed in the *Industrial Relations Case* that international treaties do not require the same level of details as domestic statutes: an 'absence of precision does not ... mean any absence of international obligation'.¹⁵

3. the implementing legislation conforms to the treaty in the sense that the law is reasonably capable of being considered appropriate and adapted to implementing the treaty.¹⁶

- It is not a power to legislate with respect to the subject matter of the treaty as if it were a new head of power.¹⁷
- In application, look for:
 - Whether the law goes beyond the terms of the treaty by potentially capturing activities or conduct that, in reality, would have an opposite effect, or would have no effect/significance at all on the purpose of the treaty.
 - **analogous or distinguish with Tasmanian Dams Case: is it closer to ss 9(1)(a)-(g) of the World Heritage Properties Conservation Act 1983 or is it closer to ss 9(1)(h) and (2) thereof?**

Tasmanian Dams -

all of the prohibitions contained in paragraphs (a) to (g) (inclusive) of s 9(1) are **automatically imposed** in respect of any property which is declared by the Governor-General **regardless of their appropriateness for the purpose of protecting or conserving the property and regardless of whether any relationship at all**

¹² *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 260 (Brennan J).

¹³ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 200 (Gibbs CJ).

¹⁴ *Victoria v Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

¹⁵ *Victoria v Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*'), citing *Commonwealth v Tasmania* (1983) 158 CLR 1, 261–2 (Deane J).

¹⁶ *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

¹⁷ *Commonwealth v Tasmania* (1983) 158 CLR 1, 131–2 (Mason J).

exists between all or any of the prohibited acts and the nature and source of likely damage to the property. [i.e. could capture conduct that actually helps preserving the world heritage, or has no effect at all]

Section 9(1)(h) and s 9(2) are in a different category. Paragraph (h) of s 9(1) prohibits the doing of an act which is prescribed for the purposes of the paragraph. The power to prescribe such acts is vested in the Governor-General by s 21. It is not an arbitrary power and must be construed in its context. It is exercisable only in respect of property which has been prescribed by the Governor-General upon his being satisfied that the property is being or is likely to be damaged or destroyed. In that context and in the context of s 6(2), the power to prescribe an act for the purposes of par (h) is limited by the purpose of preventing or avoiding damage or further damage to or destruction of the particular property. Section 9(2) provides that, it is unlawful for a person to do any act that damages or destroys any property to which the section applies. [i.e. ss 9(1)(h) and 9(2) are **specifically tailored** to implementing the treaty obligation to protect or preserve the world heritage property]

- **BUT NB:** as long as it is reasonably capable of being considered as implementing the treaty, **it is for the legislature to choose the means by which it gives effect to the treaty**¹⁸ and not for the court to second-guess a better alternative.
- **ALSO NB:** Some deficiencies or partial implementation are not necessarily fatal, as long as they are not so substantial as to deny it the character of a law implementing the treaty or make it inconsistent with the treaty.¹⁹

If implementation of **recommendations**, rather than a binding treaty:

- The treaty implementation aspect of s 51(vi) certainly extends to implementing recommendations which themselves can reasonably be seen as giving effect to terms of the treaty (e.g. on treaty implementation).²⁰ In this sense, a law implementing such recommendations is essentially implementing the treaty and the test should therefore be the same [bona fide; not aspirational; conformity].
- However, there is no definitive answer as to whether Recommendations, or draft treaties can be relied upon as a **standalone** basis for enlivening s 51(vi). Despite obiter dicta support in *Tasmanian Dams* (per Murphy J)²¹ and *Burgess* (per Evatt and McTiernan JJ)²² for an affirmative answer, the court in *Industrial Relations Act case* has found it unnecessary to decide.²³

Matters affecting Australia's relations with other countries

Rule:

- The Commonwealth's relations with all countries outside of Australia, including the Crown's dominions are matters which enlivened and fall under the subject of external affairs²⁴
- s 51(xxix) may be enlivened where it 'fosters or inhibits relations with Australia and other external nations, entities or groups'.²⁵
- This aspect is not confined to nation states. it could extend to relations with other international persons²⁶: e.g. international organisations including the United Nations, transnational corporations, international

¹⁸ *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

¹⁹ *Victoria v Commonwealth* (1996) 187 CLR 416, 488–9 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

²⁰ *Victoria v Commonwealth* (1996) 187 CLR 416, 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

²¹ *Commonwealth v Tasmania* (1983) 158 CLR 1, 171–2 (Murphy J).

²² *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 687 (Evatt and McTiernan JJ).

²³ *Victoria v Commonwealth* (1996) 187 CLR 416, 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

²⁴ *R v Sharkey* (1949) 79 CLR 121, 136–7 (Latham CJ).

²⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1, 171–2 (Murphy J).

²⁶ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, [10] (Brennan J).