

## **External Affairs Power (s 51(xxix))**

Options (can fall under more than one):

### **i) Is it a law with respect to extraterritorial matters?**

- Occurs where parliament legislates with respect to acts/matters beyond its borders (text, 4.10). Is a plenary power that relates to 'places, persons, matters or things' lying outside geographical limitations (ILO case, confirmed in XYZ).
- There is no need for a nexus betw/ the legislating jurisdiction and the matter being regulated (Dunphy). Although, this is needed for state extraterritorial legislation; it is interpreted very liberally and 'even a remote and general connection will suffice' (Union Steamship Co of Australia).
- There is no longer a presumption that all British colonies have no extraterritorial power (Dunphy).
- Sea and Submerged Lands Case: Legislation vested sovereignty in respect of the territorial sea and sovereign rights in respect of natural resources in Australia's continental shelf. Was valid- the section conferred power on 'matters or things geographically situated outside Australia'.
- Polyukhovich: Amendment prohibited the commission of certain crimes outside Australia, majority found no need for WII crimes to be related to Australia at the time they were committed- plenary power.
- XYZ: Provisions of the Crimes Act which enabled the prosecution of Australian citizens if they committed certain sexual offences against children under 16yrs in other countries was valid- any offence overseas can be legislated for.

**NOTE: Federal limit on state action (Union Steamship Co of Australia)-** Extraterritorial powers of states may be limited where the exercise of such powers 'interferes unduly with the legislative powers of another state', implicitly from the nature of the federal system.

Mobil Oil (2002): Nexus existed- class action against sale of defective fuel, involving non-Victorian residents instituting proceedings in Victorian courts. One state cannot exercise legislative power that destroys or weakens the legislative authority of another state or its capacity to function as a govt (Gleeson CJ).

Sweedman (2006): Traffic accident in NSW betw/ Victorian and NSW car. NSW driver argued matter should be dealt w/ under NSW law which she felt was inconsistent w/ VIC law- no inconsistency found.

### **ii) Is it a law with respect to relations with other countries?**

- Covered creation of a 'sedition' offence in Sharkey, extradition laws (Vasiljkovic) and laws regarding the judicial notice taken of foreign judgements of foreign evidence. Extends to cover laws regarding relations with other 'international persons', including the UN (Koowarta), Kirby invoked this in XYZ.
- In Thomas v Mowbray (2007), three judges found the application of anti-terrorism laws, especially in relation to regulating control orders to terrorist organisations satisfied this.

iii) **Is it a law with respect to the implementation of a treaty? (more purposive)**

Scope

**a) Treaty ratification must be bona fide**

- The Cth can only implement treaties which have been entered into in good faith (Brennan J, Koowarta). This cannot be done simply as a means of conferring legislative power (Koowarta).

**b) Does the treaty impose an obligation?**

- Cth can legislate with respect to treaty obligations, as well as matters which are reasonably incidental to those treaty obligations (Richardson).
- In TAS Dams, no clear majority over whether obligatory words are necessary before a treaty can be implemented.
- Richardson: Cth legislation designed to protect heritage sites in accordance w/ World Heritage Convention. The act established a commission of inquiry into whether two TAS sites should be protected- this was sufficient as a treaty obligation even though it wasn't obliged to protect those forests not yet on the list.
- ILO: May imply Cth can implement treaty provisions which are not obligations at all.

**c) Does the treaty uphold the specificity principle?**

- A treaty must have sufficient specificity to guide states (i.e. countries) on what they must do (ILO case). s 51(xxix) will not support a law which adopts one of a variety of contradictory ways to implement a treaty (ILO case).
- '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' (ILO)- reasonable specificity needed (e.g. 'promote full employment' is not enough, 'minimise drug deaths' as a bare obligation may not be (criminalisation vs harm minimization), HIV/AIDS protection duty probably is in current context.
- Kirby J in Thomas v Mowbray: No defn of 'terrorism' in Resolution 1373 and it failed specificity test.

**d) Does the treaty uphold the conformity principle?**

- The implementing legislation must conform to the treaty obligations. It cannot undermine the object and purpose of the treaty (and is therefore not plenary). (E.g. CERB requires nations' parties to combat racial discrim- therefore Australia's ratification of it does not give Cth legislative plenary power over the topic of racial discrim.
- Test: Proportionality- the law must be 'appropriate and adapted' to giving effect to the purpose of the treaty (ILO case). (e.g. Cth cannot use disproportionate means to achieve the object of the treaty- look at penalties).

**i) What is the power trying to achieve? (aims and objectives)**

**ii) Is there a reasonable r'ship betw/ the end and the means used to achieve it?**

- Deficiency in legn may not make law invalid- the deficiency must make the law 'substantially inconsistent' with the convention (ILO case).
- Richardson: Deane and Gaudron JJ found Cth did not consider the impact decisions would have on ppl who owned land in the area (TAS)- disproportionate and therefore failed test.

NOTE: In ILO Evatt and McTiernan held non-treaties (e.g. recommendations and declarations) may be implemented under s 51(xxix).

Conclusion: If answers yes to all these, the law may be constitutionally valid.

## **b) Is the law reasonably appropriate and adapted to a purposive head of power?**

Generally- Purposive Powers:

- Power is conferred by s 51 not 'by reference to subject matter', but by reference to 'aims or objectives' (Dawson J, Leask)).
- There should be a reasonable r'ship or balance betw/ an end and the means to achieve that end (J Kirk).

### **The Defence Power (s 51(vi))**

'the naval and military defence of the Commonwealth and of the several states, and the control of the forces to execute and maintain the laws of the Commonwealth' (s 51(vi)).

#### **Is the law 'appropriate and adapted' to the purpose of defence?**

- 1. What is the power trying to achieve? (aims and objectives)**
- 2. Is there a reasonable r'ship betw/ the end and the means used to achieve it?**

Ways to determine this:

Firstly, if the law goes directly to the naval and military defence of the Cth and states, and the control of the forces to execute and maintain the laws of the Cth it will be validly characterised under the defence power. Fundamental things such as defence of nations, maintenance of the military etc. This was Fullagar J's concept in the Australian Communist Party Case (first/primary aspect).

However, if this is not the case (more common):

Scope:

- Power is elastic, waxes and wanes based on factual conditions, ebbs and flows- scope of power fluctuates (Stenhouse).
- "nature and dimensions of the conflict [depends]... upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incidental thereto (Dixon J, Andrews v Howell). In grave emergencies the government will assume control of the greater part of the human and material resources (Stenhouse).
- Andrews (1941): Upheld validity of regulations which had object 'to minimize the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities... because of the effects upon shipping of the present war'.
- Stenhouse: Ascertain 'true nature and operation of the provisions impugned and of their bearing upon the prosecution of the war'. Court upheld regulations conferring

on the minister a wide discretionary power to make orders controlling the sale/distribution of 'essential articles', provided the orders had a 'real connection' w/ defence.

*Consideration of the factual circumstances of the time (apply proportionality to all)*

### War

- Broad powers of delegation and broad exercise of discretionary power.
- According to Isaacs J in *Farey v Burvett*, scope of defence power is 'virtually unlimited' during a time of total war when the existence of Australia is threatened. It becomes a paramount source of power and displaces normal distribution of power betw/ Cth and states.
- Some regulations allowed were only very indirectly linked to defence- such as marketing scheme for apples and pears, drinking hours, fixing share prices, adjusting contracts and Christmas advertising (*Ferguson*). However, areas such as admissions to university (*Ex parte Drummond*), working conditions of public servants not related to defence (*Ex parte Victoria*), manufacture of fly spray w/out licence (*Wertheim*) and setting of general standards for artificial lighting in factories (*Victorian Chamber of Manufacturers*) were not sufficient to be linked to defence power.

### Transition from War to Peace

Women's paid labour:

- 'When actual hostilities have ceased ... [scope] necessarily diminishes, but the cessation of hostilities leaves behind various matters which can legitimately be made the subject of Commonwealth legislation as being incidental to the execution of the defence power in the past' (*Foster*).
- *Women's Employment Case (1943)*: Act had object to 'encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war'- was for defence therefore valid b/c for efficient supply of goods/services both for army and civil community + these employment classes were created by war. Latham CJ said valid b/c replacement of men who had given up their 'customary work'. Williams J emphasised need for temporary nature of women's work. Alternatively, Stake J argued it extended to women working for any purpose (not just war), and therefore invalid.
- *R v Foster (1949)*: Laws regulating female employment, petrol rationing and preferential housing for ex-service men were not valid. However, other measures (e.g. repatriation/returning to place of citizenship and rehabilitation of returned service men and rebuilding of a city destroyed/damaged by bombs) would fall under defence here.

### Peace

Includes matters such as the enlistment (compulsory or voluntary), training and equipment of men and women in navy, army and air force, provision of ships and