

Treaty Implementation

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Most important branch of EA HOP.

The broad approach has meant the Cth has acquired very broad power over a large range of subject matters.

Can the Cth incorporate any treaty, or can it only implement treaties whose specific subject matter concerns external affairs?

Koowarta v Bjelke-Petersen (1982)

Facts:

- Koowarta was a member of the Wik community.
- K planned to purchase the Archer River Cattle Station, which was situated on the Wik people's traditional homeland.
- The people agreed on selling the land to K, but the sale was blocked by the Qld government.
- Bjelke-Petersen didn't believe that Aboriginal or Torres-Strait Islanders should be able to acquire large areas of land, and made this official cabinet policy.
- He directed the minister who was in charge of these issues to not approve the sale.
- K made a complaint to the Human Rights and Equal Opportunity Commission.
- He claimed that blocking the sale constituted discrimination based on race, in contravention of the Commonwealth's Racial Discrimination Act.
- HREOC upheld K's complaint, and the matter went to the HC.

Issue:

- Whether the EA power could support the implementation of the International Convention on the Elimination of all Forms of Racial Discrimination in the form of the Racial Discrimination Act (Cth).
- In 1975, the executive had ratified the ICEFRD.
- Parliament then passed the Racial Discrimination Act in order to implement the terms of this treaty into Australia's domestic law.

Held:

- The HC (4:3) found the Racial Discrimination Act was valid.
- Mason, Murphy, Brennan JJ (broad view) - the Cth has the power to implement any treaty which it had ratified, regardless of the subject matter of that treaty.
- It was not necessary to consider if the subject matter was an external affair, the very existence of a treaty on an issue was viewed as sufficient evidence that the issue was an EA.
- Mason J - from a practical perspective, if the Cth is empowered to enter into treaties on behalf of Australia, it must also be empowered to implement those treaties into Australian law, otherwise it would serious damage Australia's reputation in the international sphere.
- Gibbs CJ, Aikin and Wilson JJ (narrow view) - the Cth could only implement a treaty under the EA power when the subject matter of the treaty was itself an EA.
- Protecting people from racial discrimination was not an EA - it must concern extraterritorial matters or relations with other countries
- Gibbs CJ - if the Cth could implement any treaty regardless of the subject matter, and regardless if the subject matter concerned international affairs, then it could use this EA power to legislate w.r.t to almost anything, as there exists a treaty that covers virtually every subject matter - concerned about federal balance of power - would invade law making powers of the states
- Stephen J - under the external affairs powers, the Cth could implement a treaty where that treaty related to a **matter of international concern** - in this case, racial discrimination was a matter of international concern.

Tasmanian Dam Case (1983)

Facts:

- Tasmania wanted to construct a dam over the Franklin River.
- There were a huge number of protests which were mounted against the construction of this dam.
- The protest was for environmental reasons - the Cth stepped in and passed the World Heritage Conservation Act, which prevented Australia from constructing the dam.
- Tasmania took the Cth to the HC, claiming the Act was constitutionally invalid.
- Cth claimed that the legislation could be validly characterised under the EA HOP.
- Cth claimed that it was implementing the World Heritage Convention - treaty aimed at protecting world heritage sites.
- Cth claimed that the Franklin River was a world heritage site, and by protecting the river, it was implementing its obligations under the world heritage convention.

Held:

- s.51(xxix) of the CC granted the Cth power to incorporate **any treaty obligations** into Australian law, **regardless of the subject matter**.
- The decision of the executive, that a matter is of sufficient international significance, that it warrants the Cth ratifying the treaty, and that it is significant enough for the parliament to implement it into Australia's domestic law, should be taken at face value.
- Mason J - "if the topic becomes the subject of international co-operation nor an international convention, it is necessarily international in character."
- Followed Mason, Murphy, Brennan JJ in **Koowarta**.
- Murphy J - adopting such a broad approach is necessary to protect Australia's intentional standing and reputation - the Cth's ability to implement treaties goes to heart of Australia's responsibility as an international citizen.