LAW 314: Constitutional Law

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Major cases

Sue v Hill (1999) 199 CLR 462 ('Foreign Power')

Facts

Heather Hill stood for and won a seat in the Senate at the 1998 federal election. She had a dual UK and Australian citizenship.

Section 44(i) of the Constitution provides a person is incapable of being a senator or a member of the house of reps if they are 'under any acknowledgement of allegiance, obedience, or adherence to a foreign power …'

Legal issues

Was the United Kingdom a 'foreign power' under s 44(i)? Was Hill eligible to be elected to the federal parliament?

Key arguments

Plaintiff:

Sue argued that Hill was ineligible because of section 44(i) of the Constitution and since Australia was now an independent nation, the United Kingdom should properly be regarded as a foreign power. Sue also raised the example of section 51(xix) of the Australian Constitution, which grants the Parliament of Australia the power to make laws with respect to "naturalization and aliens", and argued that since the word "aliens" in that section had come to be regarded to include people from the United Kingdom, so too should the word "foreign power" be understood to include the United Kingdom.

The Australia Act 1986 ended all legal ties between Australia and the UK. The Act, enacted by the Parliament of Australia and the Parliament of the UK, ended the ability of the UK to make laws for Australia or enact the doctrine of repugnancy, and stopped all remaining avenues of appeal to the Privy Council from Australian courts, unless authorised by the High Court of Australia.

Defendant:

Hill argued that: "The United Kingdom was not a foreign power at Federation, is not a foreign power now and never will be a foreign power while the Constitution remains in its present form."

"So long as the United Kingdom retained any residual influence upon legislative, executive or judicial processes in Australia, it could not be regarded as 'foreign' to Australia."

Legal principles

Legal conclusions

Foreign power

On the important issue of whether the United Kingdom was a "foreign power", only Gaudron, and jointly Gleeson, Gummow and Hayne, decided the matter, the other three judges having already found that the court did not have jurisdiction to hear the case.

All four judges deciding did find that the UK was a "foreign power", because it no longer retained any legislative, executive or judicial influence over Australia. Gleeson, Gummow and Hayne said that the question was: "... not about whether Australia's relationships with that power are friendly or not, close or distant, or meet any other qualitative description. Rather, the words [of s 44(i)] invite attention to questions of international and domestic sovereignty." [48] 'At least since 1986 with respect to the exercise of legislative power, the United Kingdom is to be classified as a foreign power.' [64]

Thus, the question would revolve around legal connections, and not around "Australia's strong historical and emotional ties with the UK."

They first considered whether the UK had any legislative power over Australia. Section 1 of the Australia Act 1986 provides that:

1. No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

They held that this section completely removed any power held by the UK to exercise legislative power over Australia. Some commentators had suggested that section 1 of the Australia Act could pose constitutional problems in the United Kingdom, because of A. V. Dicey's proposition that the Parliament cannot restrict its future actions. To this, Gleeson, Gummow and Hayne decided that the position in Australia was not affected at all by the position in the United Kingdom, and for Australian purposes, the UK has no legislative power over Australia.

Similarly they decided that the UK could not exercise any judicial power over Australia and that no executive power existed over Australia. Even though the sovereign monarch of Australia and the sovereign monarch of the UK are the same person, the monarch acts in Australian matters on the advice of Australian ministers [77], and does not accept the advice of UK ministers in Australian matters at all.

Ultimately, they concluded that the UK was a distinct sovereign power and a distinct legal personality from Australia, and as such was a "foreign power" for the purposes of section 44 of the Australian Constitution.

Eligibility

Since the UK is a foreign power, Hill was not eligible to be elected to the Senate

Singh v Commonwealth (Interpretation, Citizenship, 'Aliens', Australian Independance)

Summary

- The constitutional question: is the commonwealth law within power?
- Interpretation: the relevance of text, purpose and history. What should matter? – The intentions of the authors, the current circumstances, feudal history, modern citizenship?
- Has the concept itself changed over time? What does it mean in contemporary Australia to owe allegiance to another country. What does it mean to not have allegiance to Australia?
- Who decides? If alien means non-citizen, then does this give parliament to define the scope of the power, or is this limited by a central characteristic?

Facts

Singh was born to Australia to 2 Indian citizens, she did not have a valid citizenship and Australia wanted to deport her

Legal issues

Was s 198 of the Migration Act, providing for the removal of a non-citizen who was born in Australia, within the naturalisation and aliens power?

Is a non-citizen born in Australia an alien within the meaning of s 51(xix) of the constitution?

Key arguments

Singh's argument

Australia inherited the common law position from the UK that anyone born in the country is a 'subject' of that country – i.e. you cannot be an alien if you are born in Australia . In 1900, citizenship was determined by: descent or place of birth and the common law generally attached prevalence to place of birth. Thus, despite her lack of Australian citizenship, her birth in Australia necessarily meant she was not an alien and treating her as such was beyond the legislative competence of Parliament

Legal principles

Section 10 of the Citizenship Act provides that a person born in Australia is an Australian citizen if at least one parent was an Australian citizen or permanent resident or other long-term resident

Interpretation

- McHugh J – the intention of the framers or the citizen at the time of writing the constitution and the separation of powers are important

- Why would we focus on the intention? Stability, it is binding (all the states came together and agreed on the written terms), statutory interpretation (mischief principle)

- Gummow, Hayne and Heydon JJ – The purpose of the constitution is to speak to a future
  - Concern for consequences
    - It would provide a one-way street: permitting persons to become non-aliens
    - Kirby - If Ms Singh's argument was accepted, people would be immune from being deported once they have babies here – i.e. they will come here and have babies just to stay…
- Kirby J – laws are not frozen in time [243] – originalist argument: 'subject of the crown' would require amendment to abolish birthright and subjecthood
  - We would have to amend the aliens power to make it clear that those sorts of people can be aliens
  - For him, the meaning of the word is not frozen in the meaning it had in 1981. As such, the case is about the proper approach to constitutional construction [243]
  - The framers intended for the constitutional meaning to change and evolve over time [247] – as such the meaning of non-alien has changed – it is no longer 'persons not subject to the queen' but it is now simply 'non-citizen'

'Alien/Non-Alien'

- Gummow, Hayne and Heydon JJ –
  - An alien is someone that owes obligations to a sovereign power other than the sovereign power in question
    - Citizenship has become synonymous with 'non-alien' – as an effect of Australia's emergence as a fully independent sovereign nation with its own distinct citizenship – it is not appropriate to understand alien the same way as in the British empire
  - The aliens power is a 'status power'
    - Allows parliament to create and define the concept of Australian citizenship
    - It permits flexibility
    - Alien is a central characteristic that can apply differently over time
  - As such, parliament could adopt the view that Ms Singh was a non-citizen and therefore an alien
- McHugh J (dissent)- Without constitutional amendment, anyone born in Australia cannot be an alien [35]
  - A person born in Australia is a natural-born subject of the Queen of Australia

Legal conclusions

The plaintiff is an alien within the meaning of s 51(xix) – as a citizen of India (by descent) she owes allegiance to another nation.

Amalgamated Society of Engineers v Adelaide Steamship (1920) 28 CLR 129 (Interpretation, Characterisation, 'External Affairs')

A seismic shift in interpretation; growth of national power. Widely regarded as one of the most important cases ever decided by the High Court of Australia, it swept away the earlier doctrines of implied intergovernmental immunities and reserved State powers, thus paving the way for fundamental changes in the nature of federalism in Australia

Facts

A union of engineers sought to enforce an award from the Commonwealth Court of Conciliation and Arbitration against 844 employers across Australia. In WA, the employers included two trading enterprises employed by the WA Minister for Trading Concerns.

Legal Issues

1. **Doctrine of implied immunity of instrumentalities/rejection of reserved state powers doctrine** – Could a Cth law made under the 'conciliation and arbitration' power (s 51(xxxv)) authorise an award binding those WA government employers?
2. **Interpretation –** Is the dispute that has been found to exist in fact between the claimant and the Minister for Trading Concerns (W.A.) an industrial dispute within the meaning of sec. 51 (XXXV.)?

Legal principles

The effect of the case constitutionally was threefold:

1) It abolished the immunity of instrumentalities doctrine,

2) It abolished the doctrine of reserved state powers
3) It changed the method of constitutional interpretation from a form of originalism, to one of literalism, where the historical context of the document was no longer viewed as relevant

Interpretation – authority for a shift to literalism and legalism

- The *Engineers Case* ushered in a period of literal interpretation of the constitution – literalism and legalism were characteristic of the court's constitutional interpretation for the greater part of the 20th century
- *Engineers* ' overturned the doctrine of implied prohibition (incapable of consistent application) as well as the doctrine of reserved powers
- The High Court states that it is returning to 'settled rules of construction,' which means giving words their 'natural' meaning
    - A shift to textualism (legalism) [152] - 'The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it
    - The greater emphasis on the strict reading of the Constitution meant that the court was limited in the material it would rely upon in interpreting the terms of the constitution
    - The court in the *Engineers'* case, now made up of lawyers who had not been involved in the framing of the Constitution and who had little political experience, wished to return to the settled rules of construction
- [142] - It is the duty of the court to turn its attention to the provisions of the constitution itself... and give effect to it according to its own terms, finding the intention from the words of the compact and upholding it throughout precisely as framed
- [145] - Knox CJ proceeds to ascertain the intention by reference to outside circumstances, not of law or constitutional practice, but of fact, such as the expectations and hopes of persons undefined. This method of interpretation cannot provide any secure foundation for Commonwealth or State action and will inevitably lead to divergencies and inconsistencies more and more pronounced as the decisions accumulate
- [148] - The only way courts can determine whether any given legislation exceeds the power granted is by looking to the terms of the instrument by which the legislative powers were created. It is not for any court to enquire further
- [150] - Once the true meaning of the words have been ascertained, they cannot be further limited by the fear of abuse
    - Primarily concerned with the text, without recourse to an external theory, but it can consider the context of the issue

Characterisation – Political consequences

- Growth of central power a shift away from federalism – A literal reading of the Constitution, combined with the view that the terms of the Constitution should be interpreted broadly, resulted in an expansive interpretation of the express federal powers, at the expense of the state residual powers
- The court decided that instead of limiting Cth power by appealing to federalism – we should look to responsible government

Does the Constitution have a *federal character* or a *national character*?

1. The constitution seems to point to a **federal** conception:
    - Section 7: Equal representation for founding states within the Senate, regardless of population
    - Sections 106 and 107: States maintain those powers not given to the Commonwealth, and their constitutions continue. The states are pre-existing societies with continuing power.
    - Section 128: the states have a heavy role in the alteration of the constitution – a referendum has to be approved by a majority of voters in a majority of states
2. The constitutional also has a **national** character
    - Section 109: where there is an inconsistency of laws, Cth law takes precedence
    - Section 117: aimed at preventing a State (and perhaps the Commonwealth) from discriminating against non-alien residents of other States.

- Section 118: 'full faith and credit' be given throughout the Commonwealth to 'the laws, the public Acts and records and the judicial proceedings of every State.'
- Section 92: 'trade, commerce and intercourse among the States shall be absolutely free'
- 'It appears to me incontrovertible that federation of the newly self-governing Australian colonies at the end of the nineteenth century was conceived not as a means of dividing and constraining government but as a means of empowering self-government by the people of Australia.'[1]
    - This is in contrast to early federalism views, which include implied immunity of instrumentalities doctrine and reserved state powers doctrine

<u>Early federalism views</u>

- **Implied immunity of instrumentalities doctrine (overruled in *Engineers*):** each government, as a sovereign entity, could not be bound by the other's exercise of legislative power
    - It is not found directly in the constitution – Section 114 – limited immunity provision: against states or the Commonwealth taxing each other's property.
    - Broader immunity implied because it was considered a necessary feature of federalism.
    - 'The sovereignty of each within its sphere should be absolute' (*Municipal Council of Sydney v Commonwealth* (***Municipal Rates Case***) (1904) 1 CLR 208, 239 O'Connor J)
    - ***D'Emden v Pedder*****,** Griffith CJ (for the Court), 109-10: 'In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is … a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution… [W]hen a State attempts to give its legislative or executive authority an operation which … would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Cth, the attempt … is … invalid and inoperative.'
        - *Engineers* attacks the reasoning in *D'Emden* but rationalises the conclusion
- **Reserved state powers doctrine (not applicable anymore since Engineers):** If a broad or narrow interpretation of the Commonwealth grant of power is possible, the Court must prefer the narrow interpretation to ensure the power does not encroach on the 'residual' powers of the states
    - Not directly found in the constitution
    - Section 107 – 'state power will continue'
    - E.g. *R v Barger* (1908) 6 CLR 41
        - **Facts**: Commonwealth imposed excise duties on various agricultural implements. Provided that duties would not be imposed if remuneration for labour had been declared by the House to be fair or if pay was awarded according to an industrial award under the Cth *Conciliation and Arbitration Act*.
        - **Issue**: was the law with respect to 'taxation' as empowered by s 51(ii) of the Const?
        - **Ruling (3:2 majority)**: the concern of the law was labour conditions in a particular industry. Labour conditions were accepted as being within the States' legislative power. The Cth's power as to industry was limited to industrial matters that cross state boundaries – s 51 (xxxv)
            - '[T]he power of taxation, whatever it may include, was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States, which was denied to the Parliament …' [69]
        - **Dissenting minority (Isaacs and Higgins JJ)** – Argued must first give full effect to the specific grants of Cth power, rather than interpret these in light of a claimed reserve; any residual power for the states is what is left over from this
        - 'It should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words.'

[1] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138:

- **Criticism**: reserved powers doctrine reversed the order of reasoning – what should be examined first is the meaning of the Cth power

Legal conclusions
The states, when parties to an industrial dispute, are subject to the Constitution s 51(xxxv)

Koowarta v Bjelke-Petersen (1982) CLR 168

Facts
The plaintiff was an aboriginal man from the Wik nation. The Aboriginal land Fund Commission, on behalf of Koowarta and others, contracted to purchase a property covering much of the Wik people's traditional homeland. This contract was blocked by the QLD government on the belief that Aboriginal people should not be able to acquire large areas of land.

The QLD government appealed a complaint by Koowarta to the Human Rights and Equal Opportunity Commission. This went to the Supreme Court. The QLD government also brought a separate action against the Cth government, arguing they had no power to pass the *Racial Discrimination Act*

Legal issues
Was the *RDA* within the scope of the Australian Consitution?

Key arguments
Koowarta
Argued that the *Racial Discrimination Act 1975* (Cth) (*RDA*) had been breached:

RDA, s 9(1) provided it is unlawful for a person (e.g.) to restrict the exercise, on an equal footing, of any human right …
RDA, s 12(1) made it unlawful to refuse to dispose of any land 'by reason of race'.

In regard to the external affairs power, they argued that it would affect Australia's international reputation if it were not to carry out its obligations as a signatory to the convention.

Bjelke-Peterson (on behalf of QLD)
The *RDA* was not valid and the Cth government had no power to make it. Firstly, s 51(xxvi) did not apply since it allows the Cth to make laws for "the people of any race, for whom it is deemed to make special laws", prohibiting discrimination against people of all races, Secondly, s 51(xxix) did not apply since the external affairs power cannot support legislation that is exclusively domestic in its operation.

Legal principles
The race power
Section 51(xxvi) originally made a specific exclusion for Aboriginal people. This was removed in the 1967 referendum and since then the Cth can make laws for Aboriginal people. However, the act addressed racial discrimination against all people, not just the people of one particular race.

The external affairs power
The *RDA* was intended to give effect within Australia to the UN Convention on the Elimination of All Forms of Racial Discrimination, and thus s 51(xxix) was put forward as an alternative source of authority for the act on the basis that, since the act gave effect to Australia's international obligations as a signatory to the convention, it is valid under the external affairs power. The issue then arose as to whether the Act could truly be regarded as an external affair since it applied entirely within Australia.

Mason, Murphy & Brennan JJ took a wide view, arguing that the mere existence of a treaty obligation was sufficient to render the matter an external affair, regardless of the subject. They were not concerned with the subject of racial discrimination, but rather the activity of treaty-making – without the ability to implement treaties, Australia would be an 'international cripple' (Murphy) - and that this would arise if implementing a treaty required federal and state legislation. There is a 'nationalism component', allowing Australia to participate as an international actor. Murphy

also recognised that QLD's argument was an attempt to bring back the reserved state powers doctrine, which was rejected in *Engineers.*

Mason J (expansive view): he considered that the power extends to legislating for ratification *and* for implementing obligations [224]

- There is no subject matter limitation: The Constitution draws no distinction where the matter operates domestically – '*The true position, in accordance with received doctrine, is that a law, which according to its correct characterisation is on a permitted topic, does not cease to be valid because it also happens to operate on a topic which stands outside power*.' Mason J [226]
- He refers to the federalism argument (concern that the external affairs power shouldn't be used to implement laws solely concerned with domestic matters) strikes of claiming the state has inalienable power over a particular topic. This is inconsistent with *Engineers* [226] (see also Murphy 241);
- Commonwealth powers should be construed liberally (226) – it was expected commonwealth power would grow through the exercise of the external affairs power
- Increasing power to the Cth is the policy of the external affairs power (226);
- The connotation of 'external affairs' hasn't changed, but the application to expanding internationalism has (denotation) [228]. This expansion to new applications is necessary to participation in world affairs [229]
- Mason J then goes on to directly attack the state's argument that the external affairs power can't extend to purely domestic matters:
    - The state's argument falsely assumes matters internal and external are mutually exclusive, or that that division can be judged by the Court [229]
    - Even so, it is likely that the RDA reflects a matter of 'international concern' [230] – unfair treatment in one country can lead to reprisals in another; the more central point, however: the Cth is implementing a multi-lateral treaty, Mason J [231]
    - Raises the possibility of a 'colourable treaty' [231] – the commonwealth might use the treaty as a front to gain more domestic power (see also Brennan J, [260]; Stephens J, [216]) – this is *dicta* (there is no suggestion that entering into the UN Convention on Racial Discrimination was a pretext for gaining domestic power)
    - Murphy J – all that is needed is simply to implement a treaty. He specifically pointed to preserving world's endangered species, maintaining human rights, controlling drug trafficking, eliminating infectious diseases as internal *and* external affairs [241]; he also considered the subject matter, even in the absence of a treaty, was of 'international concern' (242)

Brennan J

- A particular subject must affect or be likely to affect Australia's relations with other international persons if it were to fall under the EAP. Matters of Australia's internal legal order can do this [258]
- By accepting a treaty obligation, extending to Australia's internal legal order, the subject of that obligation becomes an external affair [259-60]
- There must be conformity between the provisions of statute (here ss 9 and 12) and the Convention obligation. If not, the matters themselves must relate to the subject matter of 'external affairs' [261].

Stephen J:

- 'External' must qualify affairs – it must relate 'to other nations or other things or circumstances outside Australia' [211]
- States a common thread in the decisions – implementing treaties was focused on matters of international character [212]
- Unlike a grant of power over treaties, 'external affairs' means the Court must examine 'subject-matter, circumstance and parties' [216]; a treaty must be of concern to 'the relationship between Australia and that other country … [or] of general international concern' [216-7] – looking to the words 'external affairs' and comparing it to the broad power of being able to implement treaties
- What is international concern? It must 'possess the capacity to affect a country's relations with other nations' [217] – generally international concern determined by community of nations [218]
- Racial discrimination has become such a matter of international concern [219-20] – has the broader community of nations decided this? YES

Stephen J agreed with Mason, Murphy & Brennan JJ but took a more narrow path to arrive at the same conclusion. His test was based on the subject matter of the treaty and whether it is of international concern. On the facts, he found that the *RDA* was of international concern and was valid

Gibbs, Aickin and Wilson JJ endorsed the test proposed by Justice Dixon in *R v Burgess; Ex parte Henry*, which focuses on whether a treaty is 'indisputably international' – very narrow view. They suggested that reading the external affairs power too widely would destroy the balance of powers between the Cth and the states, and it had to be read in light of federalism. Their view is concerned with the **subject** of racial discrimination.

Gibbs CJ:

- An expansive view of the external affairs power, whereby the Cth can pass legislation in implementing any form of treaty or international obligation, on any subject matter, leads to an overly expansive view of commonwealth power
- The provisions are 'purely domestic', dealing in acts done between Australians within Australia [187]
- This is in contrast to the natural meaning of 'external affairs' is 'matters concerning other countries' [189] – strict legalism approach
- Must be a matter 'international in character', meaning it 'in some way involves a relationship with other countries or with persons or things outside Australia.' [201] – this is his natural reading of the phrase 'external affairs
- Why should we not go beyond that natural reading?
  - The Commonwealth Executive, by treaty or even informal agreement, could establish the boundaries of its own power – e.g. to control education, regulate the workforce [198] – all these traditionally domestic matters could be regulated by the commonwealth
  - While noting *Engineers*, states the Court must still look to the federal nature of the Constitution [199]

** Even though there was a majority decision in favour of the *RDA*, there was no majority agreeing on the test for determining validity – there was no clear ratio. At best, a court would probably hold that s 51(xxix) would support legislation implementing treaties with the subject-matter of international concern – this was upheld in *Tasmanian Dams* and the *Industrial Relations Act Case.*

Legal conclusions

(6:1) The *RDA* was not valid under s 51(xxvi) of the Constitution, since they applied to all races and not to one particular race – Gibbs CJ, Stephen, Aickin, Wilson & Brennan JJ; Mason J not deciding

(4:3) The *RDA* was valid under s 51(xxix) of the Constitution, since implementing a treaty is a valid exercise of the external affairs power – Stephen, Mason, Murphy & Brennan JJ.

Gibbs, Aickin and Wilson JJ – held that the treaty did not meet the additional requirement of being 'indisputably international in character' and thus the legislation was not valid

Commonwealth v Tasmania (The Tasmanian Dams Case) (1983) 158 CLR 1 (external affairs power, corporations power)

Facts

The Hydro-Electric Commission (owned by the Tasmanian Government) proposed the construction of a hydro-electric dam on the Franklin river. It would have flooded the river but the Labour state government created the Wild Rivers National Park in an attempt to protect the river. 4 years later, a liberal state government was elected which supported the river. In November that year, UNESCO declared the Franklin area a world heritage site.

The following year, the Bob Hawke labour party won the federal election and passed the *World Heritage Properties Conservation Act 1983* (Cth) (*'WHPCA'*), which enabled them to prohibit clearing, excavation and other activities within the Tasmanian World Heritage area.

***World Heritage Properties Conservation Act 1983* (Cth)**

- Section 7 - declare a property is a property to which s 10 applies if it is being or is likely to be damaged or destroyed
- Section 10(1) – 'foreign' and 'trading' corporations as corporations within meaning of s 51(xx)
- Section 10(2) - prohibited, without the consent of the minister, a 'foreign corporation', a corporation 'incorporated in a Territory' and 'a trading corporation formed within the limits of the Commonwealth' from engaging in e.g. drilling, de-foresting

The Tasmanian government challenged the legislation, arguing that the federal government did not have the power to do so under the constitution.

Legal issues
Was the constitutionally *WHPCA* valid? Was it within the external affairs power?

Key arguments
Hawke government
Section 51(xxix) – the Hawke government passed the *WHPCA* under this provision, claiming that the act was giving effect to an international treaty to which Australia was a party (The Convention Concerning the Protection of the World Cultural and Natural Heritage – this governs UNESCO's world heritage program)

Tasmania
With the support of VIC, NSW and QLD, the Tasman government opposed the legislation on the basis that allowing the Cth to have such broad new powers would infringe on the states' power to legislate in many areas, and would upset the federal balance.

It also argued that s 51(xx) would not apply since the Hydro-Electric Commission was part of the government and therefore did not qualify as a corporation under that section.

Legal principles
External affairs power
This case upheld the decision in *Koowarta*, that the subject-matter must be of **international concern** to qualify. If a law is implementing a treaty, it ipso facto falls under the external affairs power. Mason J held that it is an 'elusive concept' [123] and stated 'if a topic becomes the subject of international co-operation or an international convention it is necessarily international in character' [125]

> In 1900, matters of international concern might have been limited. Now,
> Includes humanitarian, cultural, and idealistic goals.
> Further, how would the Court decide what is an 'international concern'? Appropriate to second-guess Parliament? [125]

Mason J – the external affairs power was intended to be ambiguous and capable of expansion. 'There are virtually no limits to the topics which may hereafter become the subject of international co-operation and international treaties or conventions.' [124] He responded to the TAS argument about the **federal balance** in 3 ways:

(a) Interpretive method: 'mere expectations [of federal balance] held in 1900 could not form a satisfactory basis for departing from the natural interpretation of words used in the Constitution.' [127]

(b) Purpose of the power

> 127 cont: Refers back to *Koowarta* [228-29]– the framers might have expected a more limited reach, but the *underlying purpose* was to enable the Commonwealth to act in 'external affairs'
> Therefore, an enduring power responds to increasing internationalisation. (See also *Koowarta* at [226-8]; Murphy J at 241.)

(c) There are negative consequences to constraining the power [127]

Murphy J – in order for a law to have international character, it is sufficient that it:

- Implements an international law or treaty
- Implements a recommendation from the UN or a related body
- Deals with relationships between bodies, or
- Deals with things inside Australia of an international concern

'International concern' cannot be limited only to relations with other nations [171], for example, the depletion of forests impacts on the stability of all life.

Gibbs CJ (dissenting)– although the constitution is open to interpretation, the external affairs power differs from the other s 51 powers since it has capacity for almost unlimited expansion. He reflected on the judgment of Stephens J in *Koowarta*, 'international concern necessarily possesses the capacity to affect a country's relations with other nations' (*Koowarta*, [217]). In regard to **federal balance**, he stated 'The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal

government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity.' (100)

Corporations power
Section 51(xx) – the federal government has the power to create laws over foreign, trading and financial corporations.

The Hydro-Electric Commission was engaged in widespread production and the sale of electricity, and operated largely independently to the government. Mason J [146] said 'The question then is whether the corporations power extends to the regulation of the activities of trading corporations, not being trading activities …' Mason J (in majority) stated the connection of the corporation with the government of a state does not take it outside the power; it is not a servant of the Crown; while it has a significant policy-making role, and engages in large scale construction, it can still be a trading corporation. By focusing on activities, not purposes, the test has facilitated a broad application of the corporations power. The 'distinctive character test' is also addressed at [148] but is rejected for 3 reasons:

1) That analysis does not apply to e.g. a foreign corporation – what is an activity undertaken for 'foreign' character?
2) A legislative power should be construed liberally
3) The power, attaching to a designated type of legal person, 'would seem naturally to extend to their acts and activities' (149)

Legal conclusions
(4:3) The prohibition of the dam by virtue of the *WHPCA* was valid under the external affairs power – Mason, Murphy, Brennan & Deane JJ

(4:0) Any constitutional restriction preventing the Cth from inhibiting the functions of sates did not apply – Mason, Murphy, Brannan & Deane JJ

NSW v Commonwealth (Work Choices Case) (2006) 229 CLR 1 (Corporations power)

Facts
In December 2005, the WorkChoices reforms were passed by Federal Parliament. *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) – This restructured workplace relations for 'constitutional corporations' (Affecting some 85% of workers) with the explicit aim to create a national workplace relations system based on the corporations power ([45]). Previously, Cth legislation relied largely on the conciliation and arbitration power (s 51(xxxv)). The Amending Act relied largely on the corporations power (s 51(xx)).
The two most fundamental changes were:

1) The purported elimination of State and Territory workplace relations legislation from the federal industrial landscape
2) The attempt to rely almost completely on the corporations power directly to prescribe minimum terms and conditions of employment regardless of the existence of an intrastate industrial dispute.

Legal issues
1. Could s 51(xx) of the Constitution (the 'corporations power') be used to refashion the legislative regime that had previously depended on s 51(xxxv) (the 'conciliation and arbitration power')?
2. Is a law requiring certain employee minimum entitlements in respect of s 51(xx) corporations a 'law with respect to such corporations'? [17]

Key arguments
The states of NSW, WA, SA, QLD, VIC; the Australian Workers' Union and Unions New South Wales; and the Attorneys-General for the Tasmania, NT and ACT joined in legal action against the constitutional basis of WorkChoices - seeking declaration the Act is invalid

Legal principles
Characterisation
What degree of relevance or connection to "constitutional corporations" is necessary for characterisation as a law 'with respect to' those corporations?

Distinctive character test [103]: the fact that the corporation is a foreign, trading or financial corporation should be significant in the way in which the law relates to it' if the law is to be valid. If this were used, the commonwealth would be able to regulate with regard to certain cavities within constitutional corporations (I.e. trading or financial). As such, employment matters are not a matter of trading and would fall outside of the corporations power. This test was rejected by the majority for 3 reasons:

(1) Rejecting previous cases indicating a requirement of 'trading' activity, or impacting upon trading activity – as concerned only with facts before it (of trading activity) [141]. i.e. the previous cases are not sufficient, this is a distinct new issue
(2) Rejects the parade of horribles concern – Must not interpret a power based on suspicion over power's future and potential use [118]. If you are able to identify a Constitutional Corporation and that allows you to regulate any action with regard to that Constitutional Corporation, the Cth could pass laws relating to anything to do with the corporation – it would gut the states of their own lawmaking capacity – the majority would say that this is not appropriate – echo of engineers (can't impose an external lense of federalism, must rely on ordinary processes or responsible govt)
(3) The distinctive character relies on federal balance argument; not the proper order of interpretation [141]. the states argue that to be a law with respect to Constitutional Corporation, it must be on the subject of trading or financial – this law is about IR – the court said this is not the appropriate order of interpretation – the proper order (post engineers) is to read the power naturally, broadly and liberally and to ask if the law significantly relate to Constitutional Corporation regardless of whether it encroaches upon matters traditionally reserved to the states

Object of command test: - A constitutional corporation is 'an "object of command" [of a law], permitting or prohibiting a trading or financial corporation from engaging in conduct or forming relationships' [140]. The corporations power is a 'persons power' with respect to juristic persons, which can be distinguished from a power 'with respect to a function of government, a field of activity or a class of relationships' [104].
In other words, once sufficiently connected to the juristic person (the constitutional corporation), the law may extend to subject matters beyond 'foreign', 'finance', and 'trade'.

(A2) What is the relevance of federal balance?

(A3) Is the corporations power 'read down' by limits within other powers? (Conciliation and arbitration power)

Legal conclusions
The majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) found the Constitution's corporations power capable of sustaining the legislative framework, while the conciliation and arbitration and Territories powers were also seen as supporting parts of the law. Further, the majority also held that the legislation permissibly limited State powers and did not interfere with State constitutions or functioning. A minority (Kirby and Callinan JJ) dissented.

At the time judgment was delivered, the daily press published numerous commentaries and opinion-pieces on the decision, in many of which the decision was seen to mark the "death of federalism"

Commonwealth argument

- The Commonwealth argued the WorkChoices legislation was constitutionally valid.
- It said the corporations power supported any law that directly created, altered, or impaired the rights, powers, duties, liabilities or privileges of a corporation.
- Further, it was said that the power was validly exercised by any law:
    - Relating to the conduct of those who work for corporations
    - Relating to the business functions, activities or relationships of corporations
    - Protecting corporations from loss or damage, and
    - Otherwise materially affecting a corporation.
- The principal argument was based around Section 51(xx) of the Australian Constitution, which gives the Parliament of Australia the power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

States and unions argument

- Argued the WorkChoices legislation was constitutionally invalid

- They wanted to identify relevant limits to the power since employment and IR law was always an issue for the states to regulate. 85% of employees fall within a constitutional corporation
- Argued there were three alternative limitations on the corporations power:
    1) It was limited to regulation of corporations' external relationships, and/or
    2) It was limited to laws in which the nature of the corporation was significant, and/or
    3) It was limited by the existence of the conciliation and arbitration power.
- They distinguished the WorkChoices legislation from other laws which rely on the corporations power (such as the Trade Practices Act 1974) on the basis that those other laws are "manifestly laws with respect to... corporations" because they have "a structure whereby the corporation is a relevant actor and the activities in question are to be in trade or commerce." - Those other laws were aimed directly at corporations, and more specifically at their trading and commercial activities.
- They argued that the WorkChoices legislation was really directed at industrial relations, and was only remotely connected with corporations.
- The states also argued that since the time of Federation, the industrial relations system in Australia had been largely state run. The Commonwealth's conciliation and arbitration power is specifically limited to interstate disputes, and does not extend to disputes existing entirely within one state.

Decision

- **Majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ)**
    - Rejected the plaintiffs' argument that the corporations power was limited to external relationships. Their Honours said it was inappropriate and unhelpful to draw any distinction between external and internal relationships of a corporation.
    - Did not expressly accept the plaintiffs' argument that the nature of the corporation had to be a significant element in the law. Their Honours said that the corporations power was validly exercised if a law prescribed norms regulating the relationship between corporations and their employees.
    - Rejected the plaintiffs' argument that the corporations power had to be limited by the existence of the conciliation and arbitration power. Their Honours said, amongst other things, this contention was contrary to the Constitution's text and structure and High Court precedent since 1920.
    - A law which prescribes norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations in the manner considered and upheld in Fontana Films or, laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations are laws with respect to constitutional corporations.
- **Kirby J (dissenting):**
    - At paragraph 481-3: it is unnecessary for this case to outline or define the scope of the corporations power. The corporations power is restrictions placed on laws regarding industrial disputes by s51(xxxv). What is forbidden is basing a law on one head of power (i.e. corporations power) when it is clearly a law with respect to another head of power (i.e. industrial disputes);
    - At paragraph 607: laws with respect to industrial disputes must fit within the two safeguards in s51(xxxv) namely interstateness and independent resolution;
    - At paragraph 609 (titled Preserving Industrial Fairness): the idea of a fair go that was at the heart of federal workplace laws is destroyed which has the potential to affect the core values that shaped the Australian Community and Economy; and
    - At paragraph 613: the high court should be attentive to the federal character of the Constitution.
- **Callinan J (Dissenting)**
    - Callinan J summarises his judgment at paragraph 913. Generally, the reasons set down in paragraph 913 include:
        - The Constitution should be read as a whole;
        - The substance of the legislation in question is with regards to industrial affairs;
        - The industrial affairs power includes the two safe guards;
        - As much as the corporations power may purport to support the legislation, the power is still subject to the restrictions of the industrial affairs power for industrial affairs legislation;
        - To affirm the validity of the Act would be to trespass on the functions of the states; and
        - The validation of the Act would result in an unacceptable distortion of the federal balance.