

Const'l Interp

“although the meaning of these terms does not change, their denotation must extend as new concepts develop”¹

Formalism vs Functionalism - *Kartinyeri*

Formalism (Brennan + McHugh, Gummow + Hayne, Gaudron)

Interp based on natural meaning of text itself. When text unclear, interp broadly the grant of power to Commonwealth power.

Functionalism (Kirby)

Functionalism: Interp text in its fed context. When text unclear, consid how implications of fed structure [and international stds] might limit Commonwealth power

Fed Div of Leg Power

EAs (xxix) - 4 limbs

IRA majority: (xxix) is not purposive.² Merely enacting legislation for the purpose of achieving a goal is likely not enough.

1. Treaty (*Burgess, Tas Dam*) - limitations: *Tas Dam, IRA*

a. Does treaty enliven xxix?

Broad view (accepted)

The well-established broad view propounds the notion that an international treaty or convention is sufficient to enliven (xxix).³

Burgess majority

- Globalisation makes it impossible to find subject not covered by xxix⁴
- Entering a treaty automatically makes it an external affair⁵

Tas Dams Mason J: a treaty itself is a matter of external affairs as is its implementation; the Commonwealth does not need another head of power in order to bring a treaty into effect⁶

IRA majority: (xxix) is not purposive - it does not require the ‘purpose of cementing international relationships or achieving international goodwill or even for implementing international treaties’.⁷

- Dawson J propounds a similar notion.⁸

¹*Lansell* [70] (Taylor J)

² *Industrial Relations Act* [34] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

³ *Burgess* (640) (Latham CJ), (687) (Evatt and McTiernan JJ); *Tasmanian Dams* [21-2] (Mason J); *Industrial Relations Act* [34] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), [16] (Dawson J)

⁴ *Burgess* (640) (Latham CJ)

⁵ *Burgess* (687) (Evatt and McTiernan JJ)

⁶ *Tasmanian Dams* [21-2] (Mason J)

⁷ *Industrial Relations Act* [34] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

⁸ *Industrial Relations Act* [16] (Dawson J)

Narrow view

The narrow view states that the matter must be of sufficient international significance.⁹

Burgess Min

- STARKE J: treaty must be of sufficient international significance¹⁰
- DIXON J: Commonwealth's power to implement treaties through legislation is necessarily limited by the Constitution's federal nature; the treaty must be 'indisputably international in character'.¹¹ (but does not say what that actually means)

Tas Dam Dissent (Gibbs CJ): re Stephen J in *Koowarta* - must be matter of international nature¹²

- Analogous to defence power - question is one of degree: testing validity of law by ref to connexion with international subject matter and with EAs of the nation
- International if it is regarded by the nations of the world as so; propounds notion of reciprocity between states
- HERE: something happening totally in Australia just affecting Australians ≠ international nature; cf racial discrim in *Koowarta*.
 - CRITIQUE: in *Koowarta*, the people were also wholly within Aus; also no reciprocity

RULE

1. Must be a bona fide treaty - it cannot just be a 'device to attract domestic legislative power'¹³
 - CRITIQUE: not a very useful test - wtf does that even mean?
 - ALSO: SOP issue - ct telling the govt what treaties it can and can't enter?!
2. An obligation is sufficient but unnecessary,¹⁴ but if the treaty is *purely* aspirational, it does not enliven (xxix), even if its subject matter is of international concern.¹⁵ (e.g. 'to promote full employment' - Zines)
 - Murphy J¹⁶, Deane J¹⁷: Ob unnecessary - recommendation sufficient
 - Deane J: Also, the 'absence of precision does not, however, mean any absence of international obligation.'¹⁸ [*IRA* maj: but if REALLY aspirational -> does not enliven xxix]
 - Brennan J: Ob sufficient (but unnecessary)¹⁹: here, yes there's an ob cf Mason
 - ^Says it fulfils Stephen's international concern test (*Koowarta*)
 - BUT notes that det'ing where an ideal ends and ob begins is a delicate (difficult) task (226)
 - Gibbs (dissent) - factual finding: treaty only provides an encouragement, not an obligation

World Heritage Convention <https://whc.unesco.org/en/conventiontext/> Articles 4 - 7

3. If there is no obligation, it may be necessary to consider whether it is likely to affect international relations with another person.²⁰

⁹ *Burgess* [4] (Starke J), [7] (Dixon J); *Tasmanian Dams* [97] Gibbs CJ

¹⁰ *Burgess* [4] (Starke J)

¹¹ *Burgess* [7] (Dixon J)

¹² *Tasmanian Dams* [97] (Gibbs CJ)

¹³ *Tasmanian Dams* [20] (Deane J)

¹⁴ *Tasmanian Dams* [60] (Murphy J); [18], [23] (Deane J); [27-9] (Brennan J)

¹⁵ *Industrial Relations Act* [33] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

¹⁶ *Tasmanian Dams* [60] (Murphy J)

¹⁷ *Tasmanian Dams* [18] (Deane J)

¹⁸ *Tasmanian Dams* [23] (Deane J)

¹⁹ *Tasmanian Dams* [27-9] (Brennan J)

²⁰ *Tasmanian Dams* (220) (Brennan J)

- Acks that it's a difficult task

b. Is law valid?

Conformity

Mason J in *Tasmanian Dams* elucidated the requirement that the law must conform with the treaty in bringing it into effect.²¹ Similarly, Murphy J elucidated that the legislative power is confined to what may 'reasonably be regarded as appropriate for implementation of provisions of the treaty'.²²

The majority in the *Industrial Relations Act Case* propounded a similar notion, and added that the legislation does not have to comply with all of the obligations assumed under the treaty, as long as it does not have substantial deficiency so 'as to deny the law the character of a measure implementing the Convention'.²³

- E.g. *Tas Dam*: only partial compliance, but not substantially deficient.

Proportionality (Maybe)

The court in the *Industrial Relations Act Case* stated that the 'reasonable proportionality' test²⁴ is useless.²⁵ Nonetheless, the test could still potentially be useful here.

1. Look at law's purpose
2. Look at proportionality b/w the purpose/object and the means used; app - *Tas Dams*:
 - s9(1)(a)-(g) invalid (disproportional)
 - Lack of proportionality with purpose of protecting + conserving the relevant property: all prohibs in a-g are automatically imposed in respect of any property which is proclaimed by GG pursuant to s6(3) regardless of their appropriateness for purpose of protecting/conserving property and regardless of whether any r/s at all exists b/w all/any of the prohib'd acts and the nature and source of likely dmg to the property.
 - 9(2) and 9(1)(h) valid (proportional)
 - they prohibit the doing, without Minister's consent, of an act prescribed for the purposes of the para in relation to particular property to which *Conservation Act* s9 applies. The power is limited to property prescribed by GG pursuant to s6(3) upon his satisfaction that the property is being or is likely to be dmg'd/destroyed.

c. Is it ltd by federalism? (*Tas Dam*)

1. Mason J: Acks that in context of expansive interop of power, there MIGHT be a limiting principle (*Mel Corp* - discrim/disability against states)²⁶
2. Wilson, Dawson (dissent): fed clause is important (art 34: if state not obliged to take leg measures, fed govt to inform states of their recommendation)²⁷

2. International r/s *Sharkey*

'The relations of the Commonwealth with all countries outside Australia, including other dominions of the Crown, are matters which fall directly within... external affairs'.²⁸

²¹ *Tasmanian Dams* [20] (Mason J)

²² *Tasmanian Dams* [44] (Murphy J)

²³ *Industrial Relations Act* [38] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

²⁴ *Tasmanian Dams* [21] (Deane J)

²⁵ *Industrial Relations Act* [33] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); [15] (Dawson J)

²⁶ *Tasmanian Dams* [24] (Mason J)

²⁷ *Tasmanian Dams* [31] (Wilson J); [48] (Dawson J)

²⁸ *Sharkey* (136-7) (Latham CJ)

3. Matters (anything) external to Australia

Broad View (accepted)

According to the currently accepted broad view of the geographic externality principle, the Commonwealth has the power to regulate places, people, matters, and things geographically external to it.²⁹

- XYZ maj (Kirby had some doubt): Independence from UK -> EA = ANYTHING ext to Aus (here: sex tour in Thailand)³⁰
- *War Crimes Act Case*: (crime and punishment of Aus citizens + res who committed ww2 war crimes, even if they weren't citizen/res at the time)

Nexus with Aus needed?

In *Polyukhovich*, Brennan and Toohey JJ found that a nexus with Australia was required.³¹ While they changed their views in *IRA*,³² this did not attract unanimous support in XYZ. However, Callinan and Heydon JJ propounded a similar notion in their dissent in XYZ: emphasising the requirement of a 'relationship' and the idea that it cannot be a 'unilateral act' on Australia's part, as this 'lacks the mutuality inherent in the conduct of "affairs"'.³³

- Brennan J: '*Australia's* EAs'³⁴ (emphasis added) - can't just sweep in everything ext to Aus
- Toohey J: must touch and concern Australia in some way³⁵

APP:

- *War Crimes Act*
 - Brennan J: no - not citizen/res at time of crime; subsequent citizen/res not sufficient nexus³⁶
 - Toohey J: no - sufficient connection in context of WWII, in which Aus was heavily involved³⁷
- *Horta*: dodges question b/c here there's 'obvious and substantial nexus' - exploration of oil in Timor Gap defs 'affecting/touching Aus'³⁸
- XYZ
 - Kirby J: defs affects Aus's r/s with international community - Aus citizens going on sex tours to rape kids³⁹
 - Callinan, Heydon JJ: no⁴⁰ (CRITIQUE - see Kirby J)

Corps Power (xx)

The Commonwealth parliament has the power to legislate with respect to foreign corporations and trading and financial corporations formed within the limits of the Commonwealth.⁴¹

²⁹ *Polyukhovich* [1] (Dawson J)

³⁰ XYZ [12] (Gleeson CJ)

³¹ *Polyukhovich* (550-551) (Brennan J); (654) (Toohey J)

³² *Industrial Relations Act Case* (485) (Brennan, Toohey JJ)

³³ XYZ [160] (Callinan, Heydon JJ)

³⁴ *Polyukhovich* (550-551) (Brennan J); (654) (Toohey J)

³⁵ *Polyukhovich* (550-551) (Brennan J); (654) (Toohey J)

³⁶ *Polyukhovich* (552) (Brennan J)

³⁷ *Polyukhovich* (655) (Toohey J)

³⁸ *Horta* (194-195) (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

³⁹ XYZ [139] (Kirby J)

⁴⁰ XYZ [208-212] (Callinan, Heydon JJ)

⁴¹ *Constitution* s 51 (xx)

1. What's a Corp? QLD Rail

Given that there are more types of corporations than the ones at the time of federation,⁴² the 'determinative consideration' of an entity being a corporation is its independent existence as a legal person, i.e. as a right and duty varying entity.⁴³

- Gageler J: 'it is an entity established by law with the capacity to own property, to contract, and to sue.'⁴⁴
 - NOTE: doesn't say whether or not a lesser combo will suffice.

It does not matter that the legislation says the entity is not a body corporation, as 'a state parliament cannot determine the limits of federal legislative power'.⁴⁵

- S 6(2) ('not a body corp'): doesn't tell us what a corp is

2. What's a Const'l Corp? (Foreign, Trading, Financial)

Activities Test (accepted)

Whether or not a corporation is a constitutional corporation depends on the activities test.⁴⁶

- Barwick CJ: only sure guide = current activities - test: whether 'trading is a substantial corporate activity'⁴⁷
- Mason J: 'sufficiently significant proportion of overall activities'⁴⁸
- Murphy J: incorporated for the purpose of trading OR 'not insubstantial' trading activities⁴⁹
- *State Super* all Js: *Adamson* rejects purposes test as the 'SOLE or principal criterion' for ascertaining whether it is a constitutional corporation; focuses on current activities as being the relevant test⁵⁰

This is not an inquiry into the 'true character', to be evaluated by reference to the corporation's 'characteristic activity'.⁵¹

- E.g. 'lighthouse' can be sthing designed for use as a lighthouse or sthing in fact used as a lighthouse - 'true character' irrelevant

Trading

Barwick CJ in *Adamson's*: 'trading is a substantial corporate activity'⁵²

- The players are pros employed for wages in the playing of the code.
- Altho income is retained and reinvested (not distrib'd to members), considerable profit is made by the Club or by the State League out of which considerable assets are built up.

⁴² *Queensland Rail* [22] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ)

⁴³ *Queensland Rail* [36] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ)

⁴⁴ *Queensland Rail* [49] (Gageler J)

⁴⁵ *Queensland Rail* [26] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ)

⁴⁶ *Adamson's* [54] (Barwick CJ); (233) (Mason J); [10] (Murphy J); *State Superannuation Board* [12] (Mason, Murphy, Deane JJ); [20] (Mason, Murphy, Deane JJ)

⁴⁷ *Adamson's* [54] (Barwick CJ)

⁴⁸ *Adamson's* (233) (Mason J)

⁴⁹ *Adamson's* [10] (Murphy J)

⁵⁰ *State Superannuation Board* [12] (Mason, Murphy, Deane JJ); [20] (Mason, Murphy, Deane JJ)

⁵¹ *Queensland Rail* [71] (Gageler J)

⁵² *Adamson's* [54] (Barwick CJ)