THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND AUSTRALIAN LAW

VICTORIA v THE COMMONWEALTH
SOUTH AUSTRALIA v THE COMMONWEALTH
WESTERN AUSTRALIA v THE COMMONWEALTH

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The recent challenge to the validity of the 1988 Industrial Relations Act (Cth) ("the Act") in *Victoria v The Commonwealth, South Australia v The Commonwealth* and *Western Australia v The Commonwealth*[1] provided the High Court of Australia with the opportunity to revisit the relationship between international law and Australian law, and the scope of the external affairs power in the Constitution, namely, section 51(xxix). This article will address its consideration of section 51(xxix) and it implications for reliance on international law to support future Commonwealth legislation. The challenge was heard by the High Court from 5-8 September 1995 and the decision handed down on 4 September 1996. In a joint judgment, Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ declared the relevant provisions of the Act valid, with the exception of a few provisions which were read down.[2]

BACKGROUND

In 1993, the then Federal Labor Government enacted the 1993 Industrial Relations Reform Act (Cth) ("IRRA"). The IRRA introduced a number of significant changes to the Act. The IRRA's objective was to provide a framework for the prevention and settlement of industrial disputes which promoted the economic prosperity and welfare of the people of Australia.[3]

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1 Victoria and ors v Commonwealth (1996) 70 Australian Law Journal Reports 680.

2 Ibid at 695, 697, 703, 712, 717, 733-735. The provisions which were read down were either on the grounds that they did not bind the states with respect to employment by state public servants at high levels, or because the provisions went beyond the terms of the supporting convention. Dawson J delivered the dissenting judgment which is based upon the construction of the external affairs power in section 51(xxxi): ibid at 735-742. He states: "...the external affairs power is a broad power but for a law to fall within its terms, it must, in my view, operate upon something which is external to Australia:" ibid at 738.

3 Section 3 of the Act was inserted by IRRA section 4.

promoted the economic prosperity and welfare of the people of Australia.[3] This was to be achieved by ensuring that labour standards met Australia's international obligations and it also introduced measures designed to prevent and eliminate discrimination based on race, colour, sex, sexual preference, age, physical and mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[4]

The changes introduced by the IRRA created new Australia-wide and uniform obligations on employers regarding minimum wages, equal pay, termination of employment, discrimination in employment and family leave. The IRRA included a right to strike and new provisions on collective bargaining. The amendments were based on Australia's international treaty obligations and customary international law. Most of the relevant treaty obligations were found in treaties initiated by the International Labour Organisation ("ILO"). They were in the form of conventions ratified by Australia[5] and Recommendations[6] adopted by the General Conference of

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3 Section 3 of the Act was inserted by IRRA section 4.

4 Ibid.

5 These conventions are now scheduled to the Act - Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries (Schedule 5), Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Schedule 6), Convention concerning Termination of Employment at the Initiative of the Employer (Schedule 10), Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Schedule 12), Convention concerning Freedom of Association and Protection of the Right to Organise (Schedule 15), Convention concerning Right to Organise and Collective Bargaining (Schedule 16), Convention concerning Discrimination in respect of Employment and Occupation (set out in Schedule 1 to the 1986 Human Rights and Equal Opportunity Commission Act (Cth) and the 1919 Constitution of the ILO.

6 ILO Recommendations are not binding instruments in international law as they are not conventions. States that are members of the ILO are not required to ratify Recommendations. Their purpose, as Starke explains, "is to enunciate principles to guide a State in drafting labour legislation or labour regulations and to this extent they are 'standard defining instruments'": see Starke note 7 at 117. The Recommendations are also set out in the schedules to the Act. Examples are Recommendation No 90 - Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Schedule 7), Recommendation No 111 - Recommendation concerning Discrimination in respect of Employment and Occupation (Schedule 9), Recommendation No 166 - Recommendation concerning Termination of Employment at the Initiative of the Employer (Schedule 11), Recommendation No 165 - Recommendation concerning Equal Opportunities and Equal Treatment for Men and

the ILO.[7] Other international human rights treaties which were relied upon included the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR")[8] and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.[9]

EXTERNAL AFFAIRS POWER - SCOPE OF THE POWER

The Commonwealth's reliance on the external affairs power to legislate in areas where it has no express constitutional head of power has been contentious. There has been a number of challenges by the states to the Commonwealth's use of this power.[10] Prior to the cases which are being reviewed in this article, the High Court had held, as a general rule, that "external affairs" had been construed with all the generality the words permitted.[11] The Commonwealth could also rely on the external affairs power to legislate in respect of any international obligation imposed upon Australia by a treaty or customary international law,[12] or in matters of international concern or in aid of promoting friendly international relations.[13] Moreover, the external affairs power could be invoked to legislate with respect to Australia's known and reasonably apprehended international obligations[14] and these could also include international Recommendations and requests.[15] The Court held that a Commonwealth

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7 See Starke, "Australia and the International Labour Organisation" in O'Connell DP (ed), International Law in Australia (1965, Law Book Co Ltd, Sydney) 115-140.

8 The Act only refers to specific parts of the Convention, namely the Preamble, and Parts II and III (schedule 8).

9 Scheduled to the 1984 Sex Discrimination Act (Cth).

10 Koowarta v Bjelke-Petersen (1982) 153 Commonwealth Law Reports 168, Commonwealth v Tasmania (1983) 158 Commonwealth Law Reports 1, Queensland v Commonwealth (1989) 167 Commonwealth Law Reports 232, Western Australia v Commonwealth (1995) 128 Australian Law Reports 1.

11 R v Coldham; Ex parte Australian Social Welfare Union (1983) 153 Commonwealth Law Reports 297, 314.

12 Koowarta v Bjelke-Petersen (1982) 153 Commonwealth Law Reports 168, 220, 234; Polyukhovich v Commonwealth (1991) 172 Commonwealth Law Reports 501.

13 Richardson v Forestry Commission (1988) 164 Commonwealth Law Reports 261, 289, 309, 322-3.

14 Queensland v Commonwealth (1983) 167 Commonwealth Law Reports 232, Richardson v Forestry Commission (1988) 164 Commonwealth Law Reports 261, 295.

15 R v Burgess; Ex parte Henry (1936) 55 Commonwealth Law Reports 608, 687, Commonwealth v Tasmania (1983) 158 Commonwealth Law Reports 1, 171-2, 177, 258-259; Koowarta v Bjelke-Petersen (1982) 153 Commonwealth Law Reports 168,

enactment which purported to give effect to an international obligation could give effect to all or part of an international instrument.[16]

However, a Commonwealth enactment should give effect to principles stated in the international treaty and had to be capable of being reasonably considered to be appropriate and adapted to the object of the international treaty obligation.[17] As far as reliance on a treaty was concerned, the Commonwealth law could not use a treaty as a mere device for attracting jurisdiction[18] and the Commonwealth's power to legislate under the external affairs power was also subject to existing constitutional limitations, both express and implied.

THE CONSTITUTIONAL CHALLENGE

It is against this background that Western Australia, South Australia and Victoria challenged the IRRA amendments claiming that they were beyond the Commonwealth's power. The states argued that the Commonwealth's power to legislate with respect to external affairs did not extend to the implementation of treaty obligations unless the subject matter of the treaty was one of international concern. In this case, the states argued that ILO conventions and Recommendations did not involve matters of international concern. Further, they argued that the conventions and Recommendations did not impose any obligations which required legislative action by the Commonwealth; or alternatively, the provisions in question could not be viewed as appropriate or adapted to their implementation.[19]

In effect, the states wanted the High Court to turn back the clock and apply the narrow construction of the power as advocated by Stephen J in *Koowarta,* namely, that the external affairs power could not be used to give effect to a treaty unless it was of special concern to Australia or of general international concern.[20] As the Court observed, the states "placed much

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248-249.

16 Commonwealth v Tasmania (1983) 158 Commonwealth Law Reports 1, 172; Koowarta v Bjelke-Petersen (1982) 153 Commonwealth Law Reports 168, 261.

17 Commonwealth v Tasmania (1983) 158 Commonwealth Law Reports 1, 259.

18 Koowarta v Bjelke-Petersen (1982) 153 Commonwealth Law Reports 168, 200, 217, 231, 260.

19 Victoria and ors v The Commonwealth (1996) 70 Australian Law Journal Reports 680, 683.

20 Ibid at 688; see note 18.

emphasis upon what were said to be the limits to the external affairs power and sought to disturb what appear to be settled aspects of the scope of that power".[21]

Before addressing the specific sections of the Act, the Court considered the operation of the Commonwealth's external affairs power in the executive and legislative spheres generally; the executive power being conferred on the Commonwealth by section 61 of the Constitution and the legislative power conferred on Parliament by section 51(xxix). The executive power includes the signing and ratification of treaties, while the legislative power extends to enactment for the implementation of treaty provisions entered into by the Executive.[22] On legislative power, the Court affirmed that under common law, the Executive's entry into a treaty would not modify the domestic or municipal legal order by creating or changing public and private legal rights and obligations unless there was specific legislation to implement it.[23]

The Court did not address the position of customary international law under the common law and whether, unlike treaty provisions, norms of customary international law were automatically incorporated into the common law or whether legislative action was required to give effect to these provisions.[24]The Court traced the legislative history of section 51(xxix) and the record of Parliament in legislating to give effect to international treaty obligations. In the ILO's particular context, the Court referred to *R v Burgess; Ex parte Henry*[25] where Evatt and McTiernan JJ stated that Parliament may well be deemed competent to legislate to give

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21 Ibid at 683.

22 Ibid at 684.

23 Ibid at 686.

24 The role and place of customary international law in Australian common law remains uncertain. There has been no authoritative determination on the issue and the decisions where the issue of customary international law has been raised have been inconclusive. For decisions which lend support to the proposition that norms of customary law are incorporated into Australian law without the need for legislative enactment see Wright v Cantrell (1944) State Reports New South Wales 45; Chow Hung Chung v The King (1949) 77 Commonwealth Law Reports 449; Coe v Commonwealth (1994) 68 Australian Law Journal Reports 110. However, for a contrary indication see Jago v District Court of New South Wales (1988) 12 New South Wales Law Reports 588; Cachia v Hanes (1991) 23 New South Wales Law Reports 304; Re Jane (1989) 85 Australian Law Reports 408.

25 (1936) 55 Commonwealth Law Reports 608, 687.

effect to ILO Recommendations as well as draft international conventions resolved upon by the ILO.[26] The Court did not depart from its previous decisions and in its general discussion of the use of treaties to enliven the external affairs power, it considered three specific points:

(a) that not all treaties will enliven the external affairs power;

(b) that the purpose and object of the Commonwealth enactment must be to implement the treaty obligation; and

(c) that the notion of reasonable proportionality is not always helpful in determining the breath of the legislative measure giving effect to a treaty obligation.

The Court was particularly concerned with the extent to which Parliament could enact legislation based on a treaty or obligation which was expressed in aspirational terms, or where the nature of the obligation was imprecise, or where there could be a number of ways to give effect to the obligation. The Court stated:

> When a treaty is relied on under section 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. 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 state.[27]

The Court noted Deane J's observations in the *Tasmanian Dams Case* where he said the absence of precision in the international instrument would not mean that there was an absence of obligation; rather, one had to look at the way in which it was expressed. It would appear that the Court's focus would be to determine the nature of the obligation. In this context, it closely examined the relevant conventions and Recommendations and then the terms of the Act. It noted that the terms of the conventions were general but in drafting the Act, it was clear that the Act closely followed the conventions. The consistency between the provisions of the Act and the

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[26] Victoria and ors v The Commonwealth (1996) 70 Australian Law Journal Reports 680, 688.

[27] Ibid at 689.

supporting conventions meant that the former were therefore appropriate, adapted for the purposes of Australian legislation and designed to ensure compliance with international obligations. As a result, the Act, with a few exceptions, was a valid exercise of the external affairs powers.

The Court referred to the character of the "external affairs" power and the issue of determining a Commonwealth enactment's purpose. It noted that the word "purpose" was used to identify the object for the advancement and attainment of which a law was enacted. In this matter, it stressed that "the validity of the law depended upon whether its purpose or object was to implement the treaty."[28] Unlike the other heads of power found in the Constitution section 51, section 51(xxix) contained no expression of purpose because the power was not a power for the purpose of "cementing international relations".[29] The Court adopted Dawson J's comments in the *Tasmanian Dams Case* where he noted that the implementation of treaties fell within that power because of the treaty's *subject matter*. For this reason, whether a law had the purpose of giving effect to a treaty obligation would not be found within the head of power but within the subject matter of the relevant treaty.[30]

So, where the Commonwealth law in question does not implement the terms of a convention but goes beyond its requirements and adds an alternative grounds, it will be invalid.[31] The external affairs power will not support provisions for which there is no corresponding ground in the convention.[32]

Finally, the Court held that the test of reasonable proportionality, as a means of determining whether the law was adapted and appropriate to give effect to treaty obligations was not always helpful. The Court held:

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28 Ibid.

29 Ibid at 690.

30 Ibid.

31 Ibid at 700. The provisions of the Act which shifted the onus in relation to the test of what was a harsh, unjust or unreasonable termination of employment in sections 170DE(2) and 170EDA(1) were invalid because they went beyond the requirements of the treaty.

32 Ibid at 715. The Court held that the addition of a ground (mental disability) upon which a termination would be considered to be unlawful, was not valid because there was no such obligation in the relevant convention and the process established under the convention to allow additional grounds to be included after all the relevant consultations had occurred, had not been complied with.

> The notion of proportion suggests a comparative relation of one thing to another as respects magnitude, quantity or degree; to ask of the legislation whether it may be reasonably seen as bearing a relationship of reasonable proportionality to the provisions of the treaty in question appears to restate the basic question. This is whether the law selects means which are reasonable capable of being considered appropriate and adapted to achieving the purpose or object of giving effect to the treaty, so that the law is one upon a subject which is an aspect of external affairs.[33]

The Court considered the tests proposed in previous decisions and concluded that:

> a law will be held invalid if the deficiency (in implementation) is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficient which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention.[34]

CUSTOMARY INTERNATIONAL LAW

The Court's consideration of the extent to which customary international law may support a Commonwealth enactment was brief compared to its consideration of the treaty provisions. For example, IRRA section 170PA provides a right to strike. This section indicates that this right is provided for in article 8 of the ICESCR, 1950 ILO Freedom of Association and Protection of the Right to Organise Convention, 1951 ILO Right to Organise and Collective Bargaining Convention, 1919 ILO Constitution and customary international law relating to freedom of association and the right to strike. The Court did not accept that customary international law supported this "right" and said:

> Customary international law requires both uniformity and consistency of state practice (*Asylum Case* [1950] ICJ Rep 266 at 276-277; *North Sea Continental Shelf Cases* [1969] ICJ Rep 1 at 43) as well as acceptance by those states that they are bound to so act. It is not enough that states act in a uniform manner if in doing so they see themselves as

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33 Ibid at 690.
34 Ibid at 691.

not acting out of a sense of legal obligation but from motives of fairness, courtesy and morality.[35]

Although the Court applied the classic formulation of how a customary international law rule was established[36] and concluded that it was not present in the case, it gave no guidance on the evidence the Commonwealth should have produced to prove that the legislation was to give effect to a customary international law rule or what evidence would be persuasive.[37]

THE FUTURE FOR USING INTERNATIONAL LAWS AND THE EXTERNAL AFFAIRS POWER

The judgment does not displace any of the Court's previous decisions on the scope and application of section 51(xxix) with respect to treaty law. If the domestic law is consistent with the subject matter of the international treaty obligation, then it will be a valid law. Treaties therefore remain an important source of legislative power.

The Court devoted little attention to the operation of customary international law in the context of section 51(xxix). It was not contested that customary international law might support a Commonwealth enactment. However, it appears that reliance on customary international law under section 51(xxix) will be more difficult than reliance on treaty provisions. First, the customary international norm must be proven and the Court has indicated that it will follow accepted international practice on

35 In Victoria and ors v The Commonwealth (1996) 70 Australian Law Journal Reports 680, the Court at 724 refers to Polyukhovich v The Commonwealth (1991) 172 Commonwealth Law Reports 501, 560; Brownlie I, Principles of Public International Law (1990, 4th ed, Clarendon Press, Oxford) 7; Brierly JL, The Law of Nations (1963, 6th ed, Clarendon Press, Oxford) 61.

36 The requirement of proving the element of opinio juris, namely, a state acts because it accepts that it is bound, is coming under some challenge: see Mendelson, "The subjective element in customary international law" (1995) British Yearbook of International Law 177.

37 In contrast, see the judgment of Brennan J in Polyukhovich v The Commonwealth (1991) 172 Commonwealth Law Reports 501, 559, 567 where he exhaustively explored the evidence of a customary international law norm. Proof of customary international law is a difficult issue and there remains a question whether it should be proven as foreign law or whether the court may accept a pleading on customary international law by way of judicial notice. It would appear that the High Court will not accept a pleading of customary international law by way of judicial notice and that proof will be required.

this aspect. What is not clear is the level of proof required. Is it proof that there is a norm of customary international law covering the subject matter of what will be the domestic law, or will the proof of customary law require proof of a specific obligation, once the subject matter is also established? It would seem that only when the norm is provided to the Court's satisfaction will the external affairs power be enlivened. Bearing in mind the Court's observation for the need to identify the obligation with some certainty, it may be difficult to characterise the nature of the obligation imposed by the customary international norm in a manner which will ensure that the domestic law can be appropriate and adapted to give effect to the obligation. In this respect, regard must be had to the substantially different character of customary international law and treaty law. However, the judgment is silent on this matter.

Customary international law is itself a controversial source of law[38] and, with the exception of *jus cogens*, is inherently slippery. It is often not specific and couched in very vague terms. Further, the language of international law may not be the language which is familiar to an Australian common law lawyer, so translating the language of a customary international law norm into an obligation which will ensure the domestic legislation is clear and the rights and obligations translated into domestic law are meaningful, may at times be impossible.

The future of customary international law as a source of legislative power under section 51(xxix) is less certain than that of treaty provisions. It is likely that customary international law will be used to supplement an argument founded on a treaty-based provision or used as an alternative. It is unlikely that customary international law in its own right will be used as a means of legislating pursuant to section 51(xxix).

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[38] Charlesworth, "Customary international law and the Nicaragua Case" (1984-1987) 11 Australian Yearbook of International Law 1.