

Australian Constitutional Law – Interim Assignment

Question 1:

Gavin is concerned that s 3(b) of the *Energy Revolution Act 2012 (Cth)* ('the Act') will prevent the Australian Defence Force from purchasing palm oil from him. Determining the validity of the section will turn upon the application of the defence power.¹ The defence power is a purpose power² and, in characterising a law, the enquiry is concerned as to whether the law is reasonably proportionate to "achieving or procuring the relevant defence purpose".³

If the defence purpose is one of securing the supply of renewable energy for ADF vehicles it may be argued that the s 3(b) is concerned with the primary aspect of the defence power as previously established in the *Communist Party Case*; the "provision" of defence forces and matters *ex facie* connected to naval and military defence.⁴ It may be sustained that fuelling ADF vehicles is one such aspect of defence force provision and that the executive is best placed to determine the way in which this should be done.

Given the approach of Gleeson, CJ, Gummow and Crennan, JJ in *Thomas v Mowbray*⁵ it may not be necessary to apply a test of reasonable proportionality where the law relates to the primary aspect of the power. Irrespective, Kirby, Callinan and Heydon, JJ⁶ still applied the test and, if followed in this instance, it may be argued that the section is not appropriately adapted as it results in the frustration of the contract between Gavin and the ADF. In relation to the importance of defence, however, this may be viewed as insignificant and the law upheld, thus preventing the ADF from purchasing palm oil from Gavin.

Question 2:

Newman Petroleum Pty Ltd ('Newman') is concerned as to the effect the Australian Defence Force Fuel Commission ('ADFFC') may have on the market for petroleum products if it engages in commercial activities. The defence power is relevant and, as previously mentioned, a test of

¹ *Australian Constitution* s 51(vi)

² *Andrews v Hovell* (1941) 65 CLR 255, 278 (Dixon J).

³ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 592 (Brennan J).

⁴ *Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 254 (Fullagar J).
⁵ (2007) 233 CLR 307, 363.

⁶ *Ibid*, 481.

reasonable proportionality is applied to determine the appropriateness of the law.⁷ An analysis of the *Shipping Board*⁸ and *Clothing Factory*⁹ cases is useful. Both concerned defence bodies engaging in commercial activities in times of peace. Whilst the outcomes are difficult to reconcile, it would appear that the legislation in the latter case was upheld as the commercial activity was “incident in the maintenance”¹⁰ of the defence force and did not represent “the establishment of a business...wholly unconnected with any purpose...of defence”,¹¹ as was found to be invalid in the former.

On the current facts, a reading of the Act would appear to indicate that the ADFFC will only sell fuel “in excess of the needs of the defence force”, just as in the *Clothing Factory Case* uniforms were only produced having satisfied the needs of the ADF. This would suggest the activity is incidental to the overall provision of fuel for the ADF and does not represent the establishment of a wholly unconnected enterprise. Thus, it would seem that the High Court would find as it did in the *Clothing Factory Case* and uphold s 3c of the Act.

Question 3

S 4 of the Act prohibits the transportation of coal by means other than rail, thus suggesting that Boom Resources Pty Ltd (‘Boom’) may no longer be able to transport coal via trucks. In determining the validity of the section, it must be established that the section is valid under at least one constitutional head of power and that the Act applies to Boom. Given that the Act purports to give effect to Australia’s obligations under *The International Energy Reduction Treaty* (‘the Treaty’), an analysis of the external affairs power is relevant.¹²

External Affairs Power: Under the external affairs power the Commonwealth may pass laws implementing Australia’s treaty obligations.¹³ It must first be established that the external affairs power is enlivened by the existence of a *bona fide* treaty.¹⁴ Whilst the international

⁷ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 592 (Brennan J).

⁸ *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1.

⁹ *Attorney-General (Vic) v Commonwealth (Clothing Factory Case)* (1935) 52 CLR 533.

¹⁰ *Ibid*, 558.

¹¹ *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 9.

¹² *Australian Constitution* s 51 (xxix).

¹³ *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹⁴ *Ibid*, 485.

conference was convened at short notice there is nothing to suggest that the treaty was not made in good faith. Furthermore, the obligations appear to be binding. There may be some debate in relation to the specificity of the treaty. A treaty that is “expressed in terms of aspiration...cannot support a law which adopts one of possibly contradictory ways that might be selected to fulfil the aspiration”.¹⁵ There is no evidence to suggest that rail is the most environmentally efficient way to move coal and, as such, there may be contradictory ways to implement the objects of the treaty. Also, the words “to promote” (Article 2) reflect exactly the example of aspirational words given in the *Industrial Relations Case*.¹⁶ Given that the treaty very much resembles the example previously given by the High Court, a question arises of whether or not the power is enlivened due to a lack of specificity.

A final test is one of reasonable proportionality need be applied. A valid law is one “capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs”.¹⁷ As such, is s 4 ‘appropriate’ and ‘adapted’ to implement the Treaty? Article 1 stipulates that signatories “take all reasonable measures to reduce mining, production and use of fossil fuels”. It is unclear as to how s 4 of the Act relates to the Treaty. If it is posited that rail transportation of coal results in lower carbon emissions, a link between the Act and Treaty may be established, in that the Commonwealth is promoting lower carbon emissions with the transportation of mined coal.

However, it is unclear as to whether switching to the transportation of coal via rail (presumably with diesel trains) will *actually* reduce the use of fossil fuels to the target stipulated in Article 1. Furthermore, Article 1 limits the treaty obligation to only “reasonable measures”. The fact that Boom’s operations are not commercially viable if the rail transportation is pursued may suggest that the section is unreasonable. This scenario is analogous to *R v Burgess*,¹⁸ where High Court ruled that regulations were invalid as they were not closely enough related or

¹⁵ Ibid, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹⁶ Ibid.

¹⁷ *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1, 259 (Deane, J).

¹⁸ *Ex parte Henry* (1936) 55 CLR 608.

supplementary to the treaty concerned.¹⁹ On this basis it may be argued that the s 4 does not reflect the reasonableness requirement and that the stipulation of rail as the method for moving coal does not supplement the aims of the treaty, especially if rail still creates carbon emissions.

Conclusion: On balance it would appear quite possible that s 4, which implements one of a possible number of contradictory measures to achieve the treaty aims, would be held invalid on the grounds that it a) does not enliven the power and/or b) is not appropriately adapted to achieving a reduction in fossil fuel emissions. If Boom can establish this, they may continue to haul coal by truck.

Question 4

Depending on the validity of s 5 of the Act the Outback Lawn Bowling Club ('the Club') may not be allowed to use a diesel generator. Since the section purports to make the law under the corporations power, an analysis of that power is most relevant.

The Corporations Power & s 5(a): The Commonwealth has the power to make laws with respect to "Foreign companies, and trading or financial corporations".²⁰ As a subject matter power, it must be determined if there is a sufficient connection between the law and the subject matter. The majority in *Work Choices*²¹ endorsed Gaudron, J's earlier view that the power will extend to "the imposition of obligations on [corporations] and... the regulation of the conduct of those through whom it acts".²²

S 5(a) purports to impose an obligation upon all constitutional corporations: such bodies "must use renewable sources of energy". This is analogous to the legislation examined in the *Tasmanian Dams Case*,²³ where the Commonwealth made laws imposing obligations upon corporations operating in areas of significant environmental value. Mason, Murphy, and Deane, JJ held that the act was valid as the imposition of obligations *did* relate to trading activities.²⁴ In

¹⁹ *R v Burgess Ex parte Henry* (1936) 55 CLR 608, 659 (Starke, J).

²⁰ *Australian Constitution* s 51(xx).

²¹ *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 114.

²² *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375.

²³ *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1, 259.

²⁴ *Ibid*, 153.

much the same manner as *Tasmanian Dams*, the Act concerned seeks to impose obligations upon corporations for the purpose of environmental conservation.

The section also purports to regulate the “non-commercial” activities of corporations. The minority judgement of Gibbs, CJ Wilson and Dawson, JJ took the view that the words “trading and financial” limited the scope of the corporations power to the *trading* and *financial* aspects of a corporation.²⁵ If this is so the running of the Club generator may be classified as an internal operation and beyond the limits of the power. However, it appears that the latter argument is weakened by decision in *Work Choices*, where an act regulating the internal affairs of corporations (employer/employee relations) was upheld 5:2. Based on the wide interpretation given in *Work Choices*, and previous findings in *Tasmanian Dams*, the Commonwealth is likely to have the power to legislate in respect to the running of the generator.

Is the Club a Constitutional Corporation? If s 5(a) is to prohibit the Club from using a diesel generator, it must be established that Club is a constitutional corporation. It is relevant to look to the facts and ask what are the activities undertaken by the Club and whether such activities amount to “substantial” trade.²⁶ In recent times the Club has generated “significant revenue”. The membership pay fees and the club sells drinks and snacks. Revenue has been used to purchase new equipment. Such conduct is very analogous to that in *Adamson’s Case*, also involving a sporting club that traded merchandise and sold food. In that case the majority held that the club *was* engaged in substantial trading activity, establishing the body as a constitutional corporation. However, the situation in *Adamson’s Case* may be distinguished. In *Adamson’s* the club’s trade involved significant sums of money, here only one “modest” salary is paid. The judgement of Stephen, J may also be used to establish that the trading is merely incidental to the principle goal of the furtherance of bowling.²⁷ Irrespective, Stephen, J was the sole dissenter and the financial windfall the club has experienced may mean the Club being viewed as a trading corporation.

²⁵ *Ibid*, 119 (Gibbs CJ).

²⁶ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 234 (Mason, J); *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1.

²⁷ *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 218-20 (Stephen, J).

The Corporations Power & s 5(b) of the Act: Irrespective of whether the Club is a trading corporation, it may still have to change to a renewable source of energy to power the generator as s 5(b) places an obligation upon “persons” to use renewable energy in the course of “business dealings” with constitutional corporations. For the purposes of the Act a person is a non-profit organisation, thus capturing the club if it is not a corporation. As such, the dealings the Club has with Central Opals Pty Ltd (on the facts, a constitutional corporation) may be regulated. Gaudron, J stated that the corporations power extends to “the regulation of those [persons] whose conduct is or is capable of affecting its [the corporation’s] activities”.²⁸ In *Actors Equity* legislation prohibiting secondary boycotts of corporations by persons was upheld. *Actors Equity*²⁹ dealt with conduct by third parties that could be detrimental to the corporation *itself*, whereas the Act concerned deals with a detriment that is external to the corporation (climate change), but relevant to society as a whole. Thus, there is a possible distinction between the facts and Gaudron, J’s statement, suggesting that the current circumstances may be distinguished from *Actors Equity*. Irrespective, in imposing restrictions on unions, which arguably only had the potential to cause detriment to a corporation, *Work Choices* broadened the principle and it seems likely that the court may continue this approach and uphold s 5(b).

The External Affairs Power: The Act implements a treaty obligation, potentially relying on the external affairs power. A detailed enquiry seems unnecessary given the relative strength of the above arguments suggesting s 5 is valid. Previous arguments in relation to the appropriateness of the law would, again, be relevant.

Conclusion: Given *Work Choices* it appears that s 5(a) of the Act would be valid on the basis that the corporations power allows the Commonwealth to legislate in relation to the internal affairs of a corporation. If the club is not a trading corporation, s 5(b) regulating the conduct of persons in their dealings with corporations is likely to capture the Club. As such, it appears that Max will have to change to an alternative (renewable) fuel source to run the generator.

²⁸ *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375.

²⁹ *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.