

COMMONWEALTH OF AUSTRALIA

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King, S. (2016). *Power, Accountability and Rights*. South Perth, WA: Political and Legal Educators Association of Western Australia.

Communist Party Case 1951

The Liberal Menzies' Government's attempt to ban the Communist Party was struck down. This is discussed, in detail, in Chapter 11.

Cases that favoured the Commonwealth

Concrete Pipes Case 1971

The right of the Commonwealth to legislate for the intrastate activities of corporations under Section 51(xx) the **corporations power** was accepted. This case made the *Trade Practices Act 1974* constitutional. The *Trade Practices Act 1974* was one of the most powerful pieces of legislation regulating the activities of companies in Australia. Prices, consumer protection and other aspects of corporate activity are covered by this Act.

Uniform Tax Case 1957

The States attempted to challenge the tax laws that the Commonwealth used to seize income tax during the Second World War. It was hoped that the end of the War had changed the nature of the powers involved, however, the High Court upheld most of its decisions in the *Uniform Tax Case 1942*.

Increasing Commonwealth Power: 1971 to contemporary times

Expansion of Commonwealth power – Section 51(xxix) external affairs

External affairs power

One of the powers of the Constitution that has been the subject of much interpretation has been Section 51(xxix) the **external affairs power**. Since the Second World War Australia has become far less dependent on the British and has emerged as a middle-ranking world power and highly significant regional power within Oceania and South East Asia. Additionally, international organisations such as the United Nations (UN), have become increasingly prominent in international relations. As a rich country with growing power and influence, Australia engages with the world far more today than in the past and the external affairs power has therefore grown in importance.

Section 51(xxix) works by allowing the Commonwealth to sign treaties or international agreements with other countries or organisations and then **ratify** these by passing a statute through the Commonwealth Parliament. Ratification makes a treaty or agreement law in Australia. Section 109 will then invalidate any State laws that conflict with the ratified law. In short, Section 51(xxix) provides constitutional

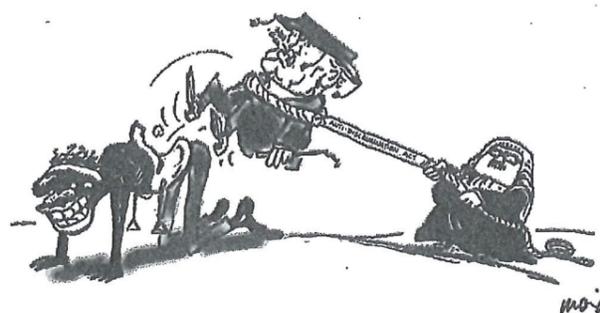
“Section 51(xxix) provides constitutional authority to make international agreements lawful in Australia and then override State laws that conflict with them.”

authority to make international agreements lawful in Australia and then override State laws that conflict with them. The external affairs power is especially important in Australia's protection of human rights, as we shall see later.

A perceptive student will see the combined potential of Section 51 (xxix) and Section 109 to allow the Commonwealth to become involved in areas of State responsibility, such as land management or the management of rivers. An example of this potential is the Bonn Convention. The Convention is an international agreement to protect migratory water birds by protecting their wetland breeding habitats. Australia has signed the Bonn Convention. The Commonwealth Parliament used the external affairs power to insert protections for the Murray River wetlands in the *Water Act 2007*. These protections limit extraction of irrigation water from the river because the Act placed environmental protection ahead of economic concerns. Rivers are a State residual power, however, one can see how the Commonwealth has been able to intrude into the State power in this instance.

Koowarta 1982

This case prevented a Queensland Government decision to stop John Koowarta, an Aboriginal man, from purchasing a lease on land because he was Aboriginal. The State decision contravened the Commonwealth *Racial Discrimination Act 1975*. This Act was passed using the **external affairs power** to give effect to the UN Convention on the Elimination of All Forms of Racial Discrimination, an international human rights agreement signed by the federal government in



■ Figure 9.13 – In Koowarta (1982) the High Court limited the power of the Queensland State government.

HIGH COURT CASE



1965. Queensland lost sovereign powers over land management because of this case.

Tasmanian Dams 1983

This case used the Koowarta precedent, and **external affairs power**, to prevent the Tasmanian government from damming the Gordon-below-Franklin River. The Commonwealth signed the International Convention for the Protection of the World's Cultural & Natural Heritage. Using Section 51(xxix) it then passed the *World Heritage Properties Conservation Act 1983*. Finally, the Commonwealth listed the Gordon-below-Franklin River as a World Heritage Area under the Act – making it unlawful for Tasmania to dam the river. In this case Tasmania lost sovereign powers over land and river management.

Case concerning financial powers

Ha and Hammond v NSW Cases 1997

State governments had levied fees on the sale of tobacco and business franchise fees on some types of businesses. In these cases the High Court found these fees to be **'excise'**, which are exclusive to the Commonwealth under Section 90. The High Court handed down its judgment in both cases at the same time because the facts of the cases were very similar.

The cases severely undermined State financial independence and reduced State tax powers, increasing the VFI and the financial power of the Commonwealth.

Cases concerning interstate trade

Cole v Whitfield 1988

State laws that discriminate against **interstate trade** in a protectionist manner are unconstitutional under Section 92. A Tasmanian company was not allowed to import smaller South Australian crayfish because the Tasmanian government had restricted the size of crayfish that could be sold to protect Tasmania's own crayfish stocks. The law was intended to protect the Tasmanian cray fishing industry, not to limit interstate trade. Thus the law was not intended

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to be protectionist in an economic sense but its effect was.

Cole v Whitfield 1988 means that a State law only needs to have the effect of creating advantage or disadvantage – it does not have to intend to create an advantage or disadvantage. The new interpretation meant that a State could no longer pass a law which had the effect of protecting intrastate trade and commerce (trade within a State) by giving it a 'competitive or market advantage' over interstate trade and commerce (trade between States). If a law did so it would be unconstitutional because of the wider meaning of 'absolutely free' in Section 92. *Cole v Whitfield 1988* undermined the legislative power of the States over aspects of their economies.

Betfair Case 2008

The *Betfair Case 2008* is a recent case concerning Section 92 and is the first that has explored the way the 'absolutely free' guarantee works in the internet age. Betfair is an online betting company. It won the case against the WA government when WA argued that Betfair should not be allowed to accept bets on Tasmanian sports events from WA State residents. The High Court found in favour of Betfair. This seems to extend **'absolutely free' trade** across borders to the realm of the internet and has wide implications for the future of trade and commerce given the increasing volume of trade occurring via online trading.

The power of the States to make laws about economic activity within their State may be further limited if the High Court develops the reasoning of *Cole v Whitfield 1988* and the *Betfair Case 2008* in future cases.

Expansion of Commonwealth power – Section 51(xx) corporations power

Corporations power

Section 51(xx) is the 'corporations power'. It provides the Commonwealth with the power to legislate for anything related to 'incorporated bodies'. Incorporation is a process for forming a legal entity that the law recognises as a 'person'. For example, an incorporated company can take a case to court and the court will treat it the same way as it treats a real person.

Companies, charities, not-for-profit organisations, and sporting clubs can all be incorporated bodies. One can see how the power to legislate for such legal entities allows the Commonwealth enormous legislative reach – it can make laws covering much of Australian society and activity using Section 51(xx).