

Q1. R&S is affected by the Cth Act s3©(iii). To ascertain whether the section is within power, it should be assessed whether it can be characterized, following the principles enumerated in the Grain Pool case et al, as following with one of Cth Parliament's areas of legislative power.

The beginning of s3© in conjunction with s1(a) points clearly to an attempt to characterize with respect to s51(xx) of the constitution – the corporations power.

Assuming R&S isn't a foreign corporation to fall under s51(xx) it must be a 'trading or financial corporation'.

Adamson's case (1979) tells us that the primary test as to whether a corporation is a trading/financial one is the 'Activities Test'. That is, trading should form a "substantial" part of the Corporations activities (as clarified in State Superannuation Board v Trade Practises Comm).

In Adamson's Case, the WAFL was found to be a trading corporation, even though (arguably) its main business was running a football league.

Here, you would say running prisons is their predominant business, but being engaged in manufacture and sale of goods, you would have to say is a 'substantial' trading activity and thus it would be a trading one.

The question then becomes, can this element of the corporation be regulated?

Following Work Choices, it would appear the law is that the grant of power in s51(xx) is of trading corps not their trading activities, thus anything a trading corp does could be regulated.

Even on the old view of Tasmanian Dams Case (anything done in preparation for trade) this appears a valid section in terms of characterization.

State Act – S20(a) of the SA and Australian Constitutions, SA Parliament has Plenary Power with regard to subject matter.

The question arises of intergovernmental immunities. Section 19 of State Act purports to bind the Crown in right of the Cth.

Henderson's Case says that the state cannot affect the capacities of the Cth, but can regulate the exercise of the capacities.

It could be argued the state has done nothing to diminish the capacity of the Cth to trade, just regulated who with. Although a case from the opposite side of intergovernmental immunities, it could be seen as analogous to the Tas Dams Case: state Parliament still has capacity to do what it likes, it just can't build a dam. Here: Cth can still trade with who it likes, just not them.

The stronger argument, however, would seem to be that it has diminished the Cth capacity to trade, and would thus either have s20(a) read down not to include the Cths, or 7(a) read down not to include the Cth.

Inconsistency – Assuming both laws were to be valid in their current forms, the question then arises of inconsistency between the two.

S109 of the Const. tells us in instances of inconsistency, the Cth law shall prevail.

There are three tests for inconsistency. Direct inconsistency, inconsistent rights and duties, and covering the field. Offending any of these will render the law inconsistent.

Direct inconsistency – occurs when it is impossible to obey both laws (see *Ex Parte Daniell*) in this case, we seem to have a case of direct inconsistency: the Cth Act requires goods be produced and sold to it, the State Act forbids it.

There is no need to consider the more in depth tests, as this offends even the most basic. The State Act would thereby be inoperative to the extent of the inconsistency. This may just render it inoperative in dealings between prisons and the Cth.

Conclusion – In my opinion:

S30 (iii) of Cth Act is within power. State Act fails to bind crown from buying the goods. Even if it doesn't, inconsistency exists, rendering it inoperative at least in dealing with Cth.

Q2. Exercise Equipment - Firstly, considering the gym equipment requirement. This is made in s30(i) of the Cth Act, which is directed at Constitutional Corporations – a category to which SA does not belong, so the section will not apply to it.

Corporations running prisons for it like R&S may have to comply with this. As in Q1 R&S is probably a trading corp, the only question here is whether this aspect could be regulated, and this requirement may be OK.

On a more narrow reading, it may only be “business activities” which this may not fall under (Although maybe it would – they are in the business of running prisons).

Single Cells – External Affairs – The requirement in s3(b) of the Commonwealth Act appears to stem from Article 2 of the convention, prescribing ‘reasonable conditions.’

Implementation of conventions into Australian law is a valid exercise of power under s51(xxix) on external affairs in the constitution (see for example *Horta*, *IR Case*, *Tas Dams*) provided certain conditions are met.

The treaty must be bona fide/in good faith (e.g see *King v Burgess* where they said ‘No suggestion it is a mere device). There seems to be no issue with this here.

The treaty obligations must be specific: *Tas Dams*, *IR Case*. Here our obligation is “housed in reasonable conditions”. This doesn't seem to impose any specific obligation at all on Australia.

Still, it probably seems to vague.

The third question is generally of proportionality and whether the Act is appropriate and adapted” to the convention (*Tas Dams*). But with a vague aspiration, this question is too hard to answer.

Intergovernmental Immunities – If the laws of the Cth are valid, can they bind the state? Intergovernmental immunities is based on the implication from the text and structure of the constitution that the states continue to exist and exercise power. *Melbourne Corporation* lays out

the 2 limb test. Is the law discriminatory with a special burden? Does it curtail or impair the ability to function as a government?

Limb 1 – In this case, neither section looks to discriminate against a State or the States in general. S3(b) binds anyone running a prison, and s(4)(c)(i) doesn't discriminate against the states, as they are the ones responsible for prisons. While the QEC case says limb1 alone can be enough to invalidate, it is hardly likely this is enough discrimination on its own. And the burden it imposes isn't particularly special – just a regulation on prisons.

Limb 2 – This can be enough on its own to invalidate without limb one (See Gaudron, Gummow and Hayne in Austin. There doesn't seem to be anything curtailing gov capacity however. Like in Tas Dams, state hasn't lost capacity to exercise power, just one element of its exercise has been regulated.

Judicial Power – There appears to be two issues here – firstly – the power exercised by the Committee second – the fact a judge is on it.

Power held by the committee – The power conferred on the committee allows it to:

Review issues rendered to it, review issues on its own s4(b) make orders as it sees fit that must be complied with s4(d)

To determine if this power is judicial, must turn to indicia of judicial power.

Deciding controversies only when called upon is a feature of judicial review (Huddard Parker)

They can both review issues and be proactive.

Committee looks to be able to establish new rights, not just decide on present ones (Data Holdings)

Both of these factors make the power seem non-judicial, as they are two _____ of judicial power.

The part that makes it seem judicial is the binding nature of the decision (Huddard Parker). Certainly this is not a Ch III Court, so it cannot exercise judicial power (Boilermakers). The analogous case might be Luton v Lessels. Action could be sought against non-_____ but the enforcing of that was done in the court.

Judge on Committee – Assuming from above the power is non-judicial it is ordinarily improper for a judge to hold such a power – Boilermakers Persona Designata, however, is an exception allowing judge to have non-judicial roles in his personal capacity (Drake). Nothing in here says that the judge personally consented, which would strengthen the exception (Grollo v Parker). Judge was also appointed as he was “most senior” available – seems to point away from “personal capacity”.

Incompatibility Doctrine Says can't do something inconsistent with his judicial role (An exception to the exception). Here reporting to a Minister seems to put him in the executive like in Wilson.

But Minister distancing himself may be able to distinguish.

Conclusion – State wouldn't need to comply – not valid under Corp. power/external affairs power.

Q3. Eric may have complaints about judicial power on the committee. Would be the same as Q2.

Characterization – s3(a) attempts to bring in Article 1 of the Convention. External Affairs power to implement treaties would be drawn upon.

Reaching the specific obligations section this time Article 1 clearly is specific. The question then is whether s3(a) is “appropriate and adapted” (Tas Dams). Rigid adherence is not necessarily (IR Case, Tas Dams), but this appears to change from 10 to 15 hrs for no apparent reason. May make it no longer appropriate. The requirement of testing seems to just be tacked on and doesn’t seem to be proportionate at all. Also requirement of religious on him when Convention says it could also be “educational and cultural” may not be proportionate to the treaty.

Religion – s 116 of the Const. regulates Cth’s law making powers on religion. Nothing here makes a requirement of religion for office.

Establishing a religion - DOGS case says nothing short of est a state church would do. Even if all prisoners are taught one religion (which isn’t said here), prob still fall short.

Imposing religious observance – very little case law. Nothing to say he’s being made to practise any religion, just learn about religion in general.

Free exercise – Note however protecting religion includes lack of religion – Lathan CJ in Adelaide Comp of Jehovah’s. But requiring a man to do an act which his religion forbids does not come within s116 – Krugger v Williams

Q4. SA Fire Act – State has plenary subject matter power.

Political Communication – Lange – Two limb test. 1) burden freedom of comm. On political government matters? Is it on gov/politics? Yes protesting decision of executive/legislature – can be between citizens – Nationwide, ACTV. 2) Legitimate End? Yes, stopping bushfires. Means used comparable with Rep Gov (Colman v Power) – Yes still can voice opinion other way appropriate and adapted? Yes safety is at risk, and not much burden (see Levy)

Therefore Law valid she can be charged. NB Political Comms freedom drawn from implications about responsible government.

Defamation – Common law defence of qualified privilege has been shaped by freedom of political communication. Lange test says the key is whether publication was ‘reasonable in all the circumstances’. Lange lays out steps for reasonableness: reasonable grounds to believe it was true. Proper steps taken to verify. Did not believe to be untrue. Sought and published a response.

Unfortunately, most of these cannot apply as it was broadcast live, leaving no chance to check. Court would consider whether letting her on live would be ‘reasonable in the circumstances’. – burning effigies – fairly likely to say something fairly out there. Could have used resources of TV station to have some delay.

Q 5. NB s116 – No application as doesn’t come into Cth and can’t bind state. Cth Act – ½ food. Under Corporations power – key thing is lockemup a trading corp. activities test – Adamson – could very

well be. Though profits used charitably, it's the WAFL raising revenue and reinvesting in footy. Can this be regulated? Work Choices – wide view – yes. Narrow view – maybe – business activities.

State Act

Is 1,000 licence actually a licence? Denis Hotels, No closer connection. Seems like it could pass this – not calculated with reference to value just to it.

Interstate trade – Act Doesn't discriminate on face value could be protectionist discriminatory like in *Castlemaine Tooheys* since there is no prison produced goods in SA.

Interstate Residence s117

Not an issue – corporation is not a resident (*Sweedman*)

S109 Inconsistency Did Cth intend to cover the field

Identify field – Couldn't say attempted to cover field on prisons in general as would need to state laws about prisons too.

Perhaps intended to supplement state law on prisons, overriding where necessary to minimise provisions of the convention guarantee.

Enters into field of production and supply of goods in s3(iii), so state law might not be good here. It it did intend to cover the field which state law encroaches onto state law would be invalid to the extent of the inconsistency – rendered inoperative in those parts.