

# Note - External Affairs in Flux: *R v Alqudsi* (2015) 300 FLR 11; [2015] NSWSC 1222

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## I INTRODUCTION

The New South Wales Supreme Court's recent decision in *R v Alqudsi*<sup>1</sup> ('*Alqudsi*') stands as a cogent example of the ambiguity and tension surrounding the role of proportionality in the characterisation of heads of power under s 51 of the *Australian Constitution*. This ambiguity is particularly relevant in the external affairs context given that the power has, through a series of High Court decisions, been held to be both a purposive power and a subject matter power, depending on the circumstances.

This note posits that in rejecting the use of proportionality in external affairs outside the treaty aspect, Adamson J's reasoning is troubling in two respects. Firstly, it is predicated on the assumption that proportionality cannot be introduced outside the factual circumstances of previous cases. Secondly, it is predicated on the assumption that the current division between purposive and subject-matter powers is supported by sound legal precedent. This note will focus on the soundness of these two assumptions and come to the conclusion that neither promote the development of reasoned jurisprudence. Therefore, greater clarity is needed in the constitutional characterisation process.

## II FACTUAL BACKGROUND

Hamad Alqudsi ('the plaintiff') was committed for trial for offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ('the Act'). Section 7(1)(e) of the Act proscribes the performance of a service, intending another person to enter a foreign State<sup>2</sup> with intent to engage in armed hostilities in that State.<sup>3</sup> Alqudsi applied for the indictment to be quashed on the basis that the provision was constitutionally invalid as it was not supported by any power conferred by s 51 of the *Australian Constitution*. The specific power in question was s 51(xxix) of the *Australian Constitution*, which grants the power to make

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<sup>1</sup> (2015) 300 FLR 11.

<sup>2</sup> *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 6(1)(a).

<sup>3</sup> *Ibid* s 6(3)(aa).

laws ‘for the peace, welfare and good government of the Commonwealth with respect to external affairs’ (‘the external affairs power’).

In making the argument that the relevant provision could not be characterised as a law with respect to external affairs, the plaintiff contended that proportionality analysis should apply to all aspects of the external affairs power. The plaintiff contended that this was the case because (i) *Victoria v Commonwealth* extended the requirement of proportionality to the international concern, external relations, and international recommendation aspects of the external affairs power,<sup>4</sup> and that therefore, (ii) authorities relating to the requirement of proportionality in connection with incidental exercises of power, such as *Davis v The Commonwealth*,<sup>5</sup> and *Nationwide News Pty Ltd v Wills*,<sup>6</sup> were relevant.

In response, the Commonwealth contended that there was no basis for importing notions of proportionality beyond any aspect of the external affairs power, save for the treaty aspect. The Commonwealth contended that this was the case because (i) the proper test of direct characterisation was whether the practical effect and legal operation of the law revealed a ‘sufficient connection with the subject matter of the head of power’,<sup>7</sup> which excluded notions of proportionality, and (ii) even in incidental exercises of power, proportionality was not relevant.<sup>8</sup>

The Commonwealth relied on four aspects of the external affairs power: (i) external relations, (ii) geographical externality, (iii) international concern, and (iv) recommendations of international agencies, to argue that s 7(1)(e) of the Act could be characterised as a law with respect to external affairs.<sup>9</sup> At first instance, Adamson J found that these four pleaded aspects of the external affairs power were enlivened by s 7(1)(e) of the Act because:

- (i) *External relations*: the prohibition of preparatory acts for the purpose of supporting foreign incursions has the potential to affect Australia’s external relations, in a manner sufficient to enliven the external affairs power, analogous to how the tolerance of the publication of seditious words that tended to incite violence against foreign States was found to be sufficient in *R v Sharkey*.<sup>10</sup>

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<sup>4</sup> (1996) 187 CLR 416, 487.

<sup>5</sup> (1988) 166 CLR 79.

<sup>6</sup> (1992) 177 CLR 1.

<sup>7</sup> *Alqudsi* (2015) 300 FLR 11, 25 [59], citing *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479, [16].

<sup>8</sup> *Alqudsi* (2015) 300 FLR 11, 25 [59], citing *Theophanous v Commonwealth* (2006) 225 CLR 101 and *Leask v Commonwealth* (1996) 187 CLR 579.

<sup>9</sup> There is a fifth aspect of the external affairs power, to give effect to Australia’s treaty obligations, which the Commonwealth did not rely on.

<sup>10</sup> *Alqudsi* (2015) 300 FLR 11, 39 [139] referring to *R v Sharkey* (1949) 79 CLR 121.

- (ii) *Geographical externality*: while the criminal act was committed inside Australia, the associated mental element had an external purpose, sufficiently extending to a matter geographically external from Australia.<sup>11</sup>
- (iii) *International concern*: that taking prophylactic measures to prevent conduct within their own territories (directed at supporting incursions into the territories of other States) falls within the international concern aspect of the external affairs power.<sup>12</sup>
- (iv) *Recommendations of international agencies*: the implementation of the recommendations in the *Friendly Relations Declaration*<sup>13</sup> falls within the ambit of giving effect to the recommendations of international agencies in pursuit of international objectives.<sup>14</sup>

Adamson J went further and rejected the plaintiff's contention that proportionality analysis was relevant to all aspects of the external affairs power.<sup>15</sup> His Honour held that proportionality was *only* relevant to the treaty aspect, which was not enlivened in this case, as the implementation of treaty obligations was not asserted as a basis for justifying the impugned provision.<sup>16</sup>

His Honour arrived at this conclusion by chronologically analysing cases which considered the external affairs power, and finding that proportionality analysis had never been used in the external affairs power outside the treaty aspect.<sup>17</sup> This aspect of His Honour's analysis is particularly troubling in two respects. Firstly, it is predicated on the assumption that proportionality cannot be introduced outside the factual circumstances of previous cases. Secondly, it is predicated on the assumption that the current division between purposive and subject-matter powers is couched in sound legal analysis. These two assumptions are

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<sup>11</sup> Ibid 43 [159].

<sup>12</sup> Ibid 43 [161].

<sup>13</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 25/2625, UN GAOR, 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, Agenda Item 85, UN Doc A/RES/25/2625 (24 October 1970).

<sup>14</sup> *Alqudsi* (2015) 300 FLR 11, 43 [163].

<sup>15</sup> Ibid 38 [130].

<sup>16</sup> Ibid.

<sup>17</sup> *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *R v Sharkey* (1949) 79 CLR 121; *New South Wales v The Commonwealth* (1975) 135 CLR 337; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Victoria v Commonwealth* (1996) 187 CLR 416; *Vasiljkovic v Commonwealth* (2006) 227 CLR 614; *Thomas v Mowbray* (2007) 233 CLR 307.

fundamentally linked, and result in an artificiality of reasoning that result in the unsound application of legal principles, as will be shown.

### III PROPORTIONALITY AND EXTERNAL AFFAIRS

Jurisprudence has not applied proportionality analysis to all aspects of the external affairs power. The earliest reference to proportionality as a component of the core of external affairs was made by Starke J in *R v Burgess; Ex parte Henry*:<sup>18</sup>

All means which are appropriate and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power.<sup>19</sup>

This early recognition of proportionality in external affairs, a subject matter power, was not phrased in terms meant to confine it *only* to the treaty context. This expansive view was subsequently adopted in *Commonwealth v Tasmania*,<sup>20</sup> where Deane J recognised that in certain circumstances such as the carrying into effect of a treaty, the performance of an international obligation or the obtaining of an international benefit, there is a necessary balancing exercise between the faithful pursuit of a purpose and the rights of citizens.<sup>21</sup>

Deane J stated that:

... the nature of this power necessitates a faithful pursuit of the purpose, namely, a carrying out of the external obligation, before it can support the imposition upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth.<sup>22</sup>

This constitutes explicit recognition of some circumstances outside of the treaty context where there must be an assessment of 'faithful pursuit'<sup>23</sup> of a purpose before an imposition on citizens may be effectuated. Similarly, Gibbs CJ warned against the potential of the external affairs power for unlimited expansion, necessitating the adoption of proportionality analysis to limit federal power.<sup>24</sup>

This reasoning was subsequently adopted by Mason CJ in *Cunliffe v Commonwealth*,<sup>25</sup> underscoring the importance of restricting governmental interference with citizens' rights. The danger of government overreach was

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<sup>18</sup> (1936) 55 CLR 608.

<sup>19</sup> Ibid 659–60 (Starke J).

<sup>20</sup> (1983) 158 CLR 1.

<sup>21</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 260 (Deane J).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 104 (Gibbs CJ).

<sup>25</sup> (1994) 182 CLR 272, 296 (Mason CJ).

again employed to justify proportionality analysis in *Richardson v Forestry Commission*<sup>26</sup> where Deane J stated that the ‘prohibitions of the overall protection regime’<sup>27</sup> must be balanced against the ‘ordinary rights of citizens’.<sup>28</sup>

The Court, however, has not been consistent in following this line of reasoning. Dawson J in *Richardson v Forestry Commission* makes a strict distinction between purposive powers and subject matter powers, such as the external affairs power.<sup>29</sup> His Honour reasoned that the purposive aspect is only relevant to determine whether ‘legislation operates in fulfilment of the treaty and thus upon a subject which is an aspect of external affairs’.<sup>30</sup> This reasoning precluded the use of proportionality in any aspect of external affairs save for the treaty aspect, and was subsequently adopted by a unanimous High Court in *Victoria v Commonwealth*.<sup>31</sup> It is ultimately this line of reasoning which was adopted by Adamson J in *Alqudsi*,<sup>32</sup> and subsequently by Basten JA,<sup>33</sup> Leeming JA,<sup>34</sup> and McCallum J<sup>35</sup> on appeal.

This view of the external affairs power seems to have prevailed. Special leave to appeal *Alqudsi* was sought from the High Court, and again, the plaintiff contended that the proportionality was relevant to aspects of external affairs outside the treaty aspect.<sup>36</sup> However, special leave was refused, with no reasons given, bringing an end to the plaintiff’s pursuit of the proportionality issue.

It is far from clear that the restriction of proportionality to this context alone is the correct view. Dawson J asserted in *Richardson* that proportionality should be restricted to assessing conformity to treaty obligations.<sup>37</sup> However, it is not clear how treaty obligations are any different from the performance of an international obligation or the obtaining of an international benefit. The attainment of any of these three objectives

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<sup>26</sup> (1988) 164 CLR 261 (*Richardson*).

<sup>27</sup> Ibid 317 (Deane J). See also Wilson J’s approval of proportionality analysis at 303.

<sup>28</sup> Ibid.

<sup>29</sup> (1988) 165 CLR 261, 326 (Dawson J).

<sup>30</sup> Ibid.

<sup>31</sup> (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>32</sup> *Alqudsi* (2015) 300 FLR 11, 38 [130].

<sup>33</sup> *Alqudsi v Commonwealth* (2015) 302 FLR 454, 459 [12] (Basten JA) (*Alqudsi Appeal*).

<sup>34</sup> *Alqudsi Appeal* (2015) 302 FLR 454, 477–8 [114] (Leeming JA).

<sup>35</sup> Ibid 488 [171]–[173] (McCallum J).

<sup>36</sup> *Alqudsi v Commonwealth* [2016] HCATrans 32 (12 February 2016).

<sup>37</sup> (1988) 164 CLR 261, 326 (Dawson J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 45 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

involves an assessment of conformity to purpose, thereby leading Deane J in *Commonwealth v Tasmania* to view them of the same species.<sup>38</sup>

More fundamental to the logic of rejecting proportionality is the idea that proportionality analysis should *only* be the preserve of purposive powers. To this end, Adamson J in *Alqudsi* relied on *Leask v Commonwealth* in establishing the relevant test:<sup>39</sup> that in matters of direct characterisation of subject-matter powers, the test remains one of ‘sufficient connection’,<sup>40</sup> and the notion that ‘a law must be reasonably appropriate and adapted’<sup>41</sup> is alien to this assessment. As will be shown, however, this is also based on artificial logic, which has led to the unsatisfactory result in *Alqudsi*.

#### IV THE ARBITRARY DIVISION OF COMMONWEALTH HEADS OF POWER

The purported distinction between purposive and non-purposive (‘subject-matter powers’) was first elucidated by Dixon J in *Stenhouse v Coleman*.<sup>42</sup> Dixon J referred to the distinction between the defence power under s 51(vi) of the Australian Constitution which seemed to involve ‘the notion of purpose or object’,<sup>43</sup> and ‘most of the other paragraphs of s 51’<sup>44</sup> where:

the *subject of the power* is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognised category of legislation (as taxation, bankruptcy).<sup>45</sup>

Dixon J recognised that the defence power is *particularly suited* to ‘justifying measures which at another time would be unwarranted’,<sup>46</sup> because of the necessity of enacting measures that seriously interfere with the rights of the citizen in times of emergency. In effect, Dixon J recognised that the governmental objective of defence had the substantial potential to negatively impact the rights of the citizen, and therefore needed to be proportionate. However, since *Stenhouse*, this nuanced distinction has gradually been eroded, eventually leading Dawson J to conclude in *Leask*

<sup>38</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 260 (Deane J).

<sup>39</sup> *Alqudsi* (2015) 300 FLR 11, 37 [129].

<sup>40</sup> 187 CLR 579, 602 (Dawson J) (‘*Leask*’).

<sup>41</sup> *Ibid.*

<sup>42</sup> (1944) 69 CLR 457 (‘*Stenhouse*’).

<sup>43</sup> *Stenhouse* (1944) 69 CLR 457, 471 (Dixon J).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid* (emphasis added).

<sup>46</sup> *Ibid* 472.

*v Commonwealth* that proportionality had no place in the direct characterisation of Commonwealth heads of power.<sup>47</sup>

For a view that proportionality has no place in the direct characterisation of Commonwealth heads of power to be valid, there must be a clear way to draw a distinction between purposive and non-purposive heads of power. However, there are difficulties in drawing this distinction in practice. Dixon J in *Stenhouse* suggested identifying subject-matter powers where the subject is described by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage).<sup>48</sup> By this metric, it is conceivable to identify circumstances, such as the establishment of international defence force contracts, as a specie of ‘legal transaction of activity’<sup>49</sup> which would not need to wax and wane according to the exigencies of the time. In such circumstances, would it be the defence power, or the external affairs power which would need to be invoked? In the former, proportionality analysis would be employed, and in the latter, proportionality would have no place.

It is precisely the arbitrary nature of this distinction between purposive and non-purposive powers that led Kirby J to condemn the confused state of precedent. Kirby J stated in *Leask* that:

Such distinctions find no reflection in the concept of proportionality in the legal systems from which that concept was originally derived. They were not mentioned in the authorities by which the concept originally found its way into the jurisprudence of this Court. They are difficult to reconcile with the essential idea of proportionality. They are not universally accepted by the opinions expressed within the Court. It is difficult, in principle, to embrace the proposition that proportionality might be an appropriate criterion for some paragraphs of s 51 of the Constitution yet impermissible in respect of others. The same basic question is in issue in every case: namely where the boundary of federal constitutional power lies.<sup>50</sup>

The High Court has found difficulty in maintaining this distinction for other subject-matter powers. While Adamson J in *Alqudsi* cited *Plaintiff S156*<sup>51</sup> as an example of the High Court rejecting the use of proportionality in the context of the ‘aliens power’ under s 51(xix) of the *Australian Constitution* on the basis that it is a subject matter power,<sup>52</sup> even the ‘aliens power’ has had a confused history. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, Gaudron J suggested

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<sup>47</sup> (1996) 187 CLR 579, 602.

<sup>48</sup> *Stenhouse* (1944) 69 CLR 457, 471.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Leask* (1996) 187 CLR 579, 635 (Kirby J).

<sup>51</sup> (2014) 254 CLR 28.

<sup>52</sup> *Alqudsi* (2015) 300 FLR 11, 35 [116]–[118].

using proportionality analysis in the ‘aliens power’ under s 51(xix) of the Australian Constitution.<sup>53</sup>

It is evident from this analysis that there is significant uncertainty surrounding the use of proportionality in the external affairs power, which has its roots in the arbitrary distinction between purposive and non-purposive powers. Proportionality has been recognised as having utility in a wide array of circumstances.<sup>54</sup> However, greater clarity in the circumstances which proportionality analysis applies to is necessary to avoid the adoption of the kind of artificial reasoning as seen in *Alqudsi*.

## V CONCLUSION

*Alqudsi* has considerable value in highlighting the inconsistent application of proportionality in the context of external affairs, and the arbitrary distinction between purposive and subject-matter heads of power in constitutional characterisation. As a consequence of these issues, a line of authority has emerged that is based on conflicting reasoning, resulting in confusing precedent. Greater clarity is needed in jurisprudence in order to promote consistency in the characterisation of the external affairs power, and in constitutional characterisation more generally.

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<sup>53</sup> (1992) 176 CLR 1, 55–7 (Gaudron J).

<sup>54</sup> As recognised in *McCloy v New South Wales* (2015) 325 ALR 15; [2015] HCA 34 (7 October 2015), [3], these circumstances include: (i) its application to purposive powers, (ii) to constitutional legislative powers authorising the making of laws to serve a specified purpose, (iii) to incidental powers, which must serve the purposes of the substantive powers to which they are incidental, and (iv) to powers exercised for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication.