

# PROPORTIONALITY AND PURPOSIVE CONSTITUTIONAL POWERS

By Stephen Tully



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In *R v Alqudsi; Alqudsi v Commonwealth of Australia*, Justice Adamson dismissed a challenge to the constitutional validity of s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (the Act). The NSW Supreme Court also considered the extent to which proportionality applies to each aspect of the external affairs power.

## Background

Hamdi Alqudsi was committed for trial on the basis that in 2013 he assisted seven men to travel without detection to Syria via Turkey and engage in armed hostilities against the Syrian government.

Section 7(1)(e) of the Act makes it an offence for a person to provide certain forms of assistance with the intention of supporting or promoting incursions into foreign States to engage in hostile activity. Mr Alqudsi sought to quash the indictment. The head of constitutional power relied on by the Commonwealth to support the legislation included s 51(xxix), that is, the power to make laws with respect to external affairs.

## Judgment

Adamson J considered (at [55]) that a Commonwealth law could be authorised by the following aspects of the external affairs power:

- Australia's external relations with other States;
- places, persons, matters or things outside Australia's geographical limits;
- matters of international concern;
- giving effect to recommendations of international agencies in the pursuit of international objectives; and
- giving effect to treaty obligations.

Section 7(1)(e) was held to be a valid law with respect to external affairs under s 51(xxix) because it fell within all but the last aspect (at [159], [161]-[162]):

- externality was met by a requirement that the Crown prove entry into a foreign State (at [120]);
- consistent with *The King v Sharkey* (1949) 79 CLR 121, criminalising intention and conduct occurring in

## Snapshot

- In *R v Alqudsi; Alqudsi v Commonwealth of Australia* [2015] NSWSC 1222, it was held that section 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) is constitutionally valid.
- The principle of proportionality operates as a constraint on a purposive head of constitutional power.
- Proportionality is only relevant to one aspect of the external affairs power: treaty implementation.

Australia sought to be preparatory to entry into a foreign State for the purposes of engaging in hostile activities engaged the external relations aspect of the external affairs power as such activity had the potential to affect Australia's external relations (at [147]);

- the material relied upon by the Commonwealth, including the *United Nations Declaration on Friendly Relations*, established that States had to criminalise the activities of individuals within their territory who assist foreign fighters engage in hostile activities within other States (at [143]).

Finally, the absence of any 'real world effect' did not deprive the prophylactic measure in s 7(1)(e) of the Act of its character as a law with respect to external affairs (at [158]).

## Proportionality as a constraint on heads of constitutional power

Proportionality raises the question whether a law is reasonably appropriate and adapted to a particular end or purpose.

In *Plaintiff S156/2013 v Minister for Immigration* [2014] HCA 22, for example, the High Court rejected a proportionality argument in the context of a non-purposive power and said that, although

proportionality might be relevant to express or implied limitations which restricted a head of power, it did not apply in the context of the aliens power.

In the present case, the Supreme Court concluded there was no jurisprudential support for the proposition that any aspect of the external affairs power, other than the treaty aspect, was qualified by a requirement of proportionality. Although proportionality was relevant to defence and other purposive powers, given *Leask v The Commonwealth* (1996) 187 CLR 579 at 602-603 per Dawson J, proportionality was not relevant to subject matters such as external affairs, except insofar as the Commonwealth relied on implementing the recommendations of international agencies (at [129]-[130]). The Commonwealth had accepted (at [59]) that proportionality could be imported into the treaty aspect of the external affairs power (given *The King v Burgess; ex parte Henry* (1936) 55 CLR 608 at 659-660 per Justice Starke). Furthermore, there was no basis for limiting the external relations aspect of the external affairs power to hostile activities which might damage Australia's relationship with the foreign State in respect of which incursion was contemplated. The selection of friends or foes among nation States was not a matter for Australian courts (at [137]).

## Conclusion

This case considered the definition of 'mercenaries' under international law, the international legal principle prohibiting intervention within the internal affairs of States, and Australia's efforts to stem the flow of 'foreign fighters'. However, the judgment is especially noteworthy for assessing the relevance of the principle of proportionality as an express or implied limitation that restricted the operation of each aspect of the external affairs power. For that reason it will likely inform the deliberations of the Australian Law Reform Commission, which is currently considering proportionality under the *Constitution* as part of its review of Commonwealth legislation which unreasonably encroaches upon traditional rights, freedoms and privileges (the Freedoms Inquiry). **LSJ**