

External Affairs

SECTION 51 (xxix) –

‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... **external affairs**’.

Test 1

- Dealing with external relations?
- External Affairs extends to anything which is external to Australia or matters geographically situated outside Australia
 - *Polyukovich v Commonwealth (War Crimes Act Case)*(1991) 172 CLR 501;
Horta v Commonwealth (1994) 181 CLR 183
- *R v Sharkey* (1949) 79 CLR 121
 - ‘The relations of the Commonwealth with **all countries outside Australia**.....are matters which fall directly within the subject of external affairs ... The **preservation of friendly relations** is an important part of the management of the external affairs of the Commonwealth’ (Latham CJ, 136-37).
- *Thomas v Mowbray*
 - ‘the external affairs power at least includes power to make laws in respect to matters affecting Australia’s relations with other countries. The commission of Terrorist Acts...is just one of these matters’
 - Facts:
 - involved laws counter-terrorism and it set up preventative detention orders where before crime was committed you could detain that person; and control orders where you could limit/restrict their movement if had knowledge that they were going to commit a crime

Test 2

- Geographically outside Australia?
- **Sovereignty over continental shelf**
 - *Seas and Submerged Lands Case* (1975) 135 CLR 337 (*Broad approach*)
 - **RULE:** Anything which in its nature is external to ... Australia ... and beyond the ‘low-water mark’ (Barwick CJ).
 - **RULE:** ‘matters or things geographically situated outside Australia’ (Mason J).
 - Sea = external to Australia.
 - External affairs = very broad power.

- – The external affairs power extends to anything ‘which in its nature is external to ... Australia’ or, according to Mason J, ‘to matters or things geographically situated outside Australia’ (Barwick CJ, 360 & 471).
- **Regulating matters, persons or things outside Australia**
 - *XYZ v Commonwealth (2006) 227 CLR 532*
 - The external affairs power at least includes power to make laws in respect to matters affecting Australia’s relations with other countries e.g. conduct in violation of international comity/law (Gleeson CJ, 543).
 - *Polyukhovich v Commonwealth (War Crimes Act Case) (1991) 172 CLR 501*
 - ‘There must be some nexus ... between Australia and the ‘external affairs’ which a law purports to affect before the law is supported by s 51 (xxix)’ (Brennan J, 551).
 - *Pape v Commissioner of taxation*
 - argument is that this was a law in respect to external affairs as the package was about keeping the Australian economy afloat which would impact the overall effect of the global crisis
 - majority said this was too general and vague- the matter needs to be more concrete than just ‘it will affect the world economy’
 - *Horta v Commonwealth*
 - matters geographically external to Aus with an ‘obvious and substantial nexus between them and Australia’

Test 3 - Implementing Treaties

1. Whether Aust entered into treaty in bad faith

- Why?
- Bad faith – just to get the extra power
 - *Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1*
 - ‘[A] law would not properly be characterized as a law with respect to external affairs if it failed to carry into effect or to comply with particular provisions of a treaty which it was said to execute ... or **if the treaty which the law was said to carry into effect was demonstrated to be no more than a device to attract domestic legislative power**’ (Deane J, 259).
- Entered into in bad faith? ie. An attempt to confer jurisdiction in order to legislate?
 - *(Tasmanian Dams Case (in obiter); R v Burgess; Ex parte Henry)*
- If treaty-related, look at why Cth entered the treaty, not why they legislated.

2. Whether treaty is aspirational

- Precise obligations rather than vague aspirations
- Trying our best
 - *Victoria v Commonwealth (Industrial Relations Case) (1996)*