

External Affairs Power: s51 (xxix)

Section 51(29): 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**

The HC has adopted a **broach approach** to the term external affairs

[Law] bears the hallmarks of a law derived from the external affairs HoP (“EAP”) (s 51(xxix)).

This encompasses lawmaking powers with regard to:

- Matters external to Australia
- Relations with other nations
- Treaty implementation
- Matters of international concern (possibly)

Limb 1: Extraterritorial Power (Matters external to Australia)

- The Commonwealth has power to legislate with regards to **matters beyond Australia’s borders**
- HC decided that Cth have **plenary extraterritorial power** – no requirement for a **nexus** (*Polyukhovich*)
- The Cth has plenary extraterritorial power (*s 3 Westminster Act*)

Cth will argue that [LAW] falls under its EAP because it relates to “matters and things geographically situated outside of Australia.” (Seas and Submerged Lands Case)

- Relates to “affairs” external to Australia, which covers “places, persons, matters or things.” (*ILO*)

There is no requirement for a **nexus** between the **law and Australia** – **mere externality is enough** (*XYZ; Polyukhovich*)

- *X may counter that merely relating [LAW] to a matter external to Australia is insufficient, pointing to cogent judicial dissents by Callinan and Heydon JJ in XYZ who required a nexus, Brennan and Toohey JJ in Polyukhovich who required a “genuine connection”, and Kirby J in XYZ who left the issue open (literal approach)*
- *However, Cth may argue that, even if X is right, due to [FACTS] a nexus exists. Moreover, Gaudron J states in Polyukhovich that the very decision of the Cth to legislate on a matter is conclusive evidence of a nexus*

S 3 of the Statute of Westminster “It is hereby declared and enacted that the parliament of a Dominion has full power to make laws having extra-territorial operation.”

→Made it clear that the commonwealth does have extraterritorial power

Polyukhovich v Commonwealth

Facts: War Crimes Amendment Act (1988) (Cth) – retrospectively criminalized certain war crimes committed in Europe during WWII. Only Australian citizens or residents could be charged under the Act; Neither victim nor perpetrator had to be Australian at the time the act was committed. P was charged under the act for war crimes he allegedly committed in WWII. He challenged act on grounds that it was constitutionally invalid

Issue: was there a requirement for a nexus between Australia and the subject matter being connected?

Held: confirmed that s 51(29) gives the Commonwealth Parliament plenary power to make legislation for matters external to Australia. Dismissed the need for a nexus between the legislating Parliament and the matter being regulated.

KLP: Court adopted a literal approach and took the view that the words external affairs refer to all things external to Australian territory. On this basis, HC decided that the Cth has plenary extraterritorial power – no requirement for a nexus

XYZ V Cth (2006)

Facts: Prohibited sex crimes against children overseas. XYZ was charged with committing a sex crime against a child in Thailand. XYZ argued that the legislation prohibiting him from doing this was invalid – that Polyukovitch was invalid and that the Cth needed a link

Held: Endorsed Polyukhovich. Gleeson CJ, Gummow, Hayne and Crennan JJ: the Cth has **plenary** extraterritorial power; **geographic** externality is by itself enough to invoke the external affairs power.

Minority (Callinan & Heydon JJ): Adopted an originalist approach to constitutional interpretation. In 1900, external affairs meant the same thing as foreign affairs does now – relationships with other countries

Limb 2: Relations with Other Nations/Countries

The **relations of the Commonwealth with all countries outside Australia**, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs (*R v Sharkey*)

- The Cth parliament may legislate on domestic matters insofar as they relate to another country (*Sharkey*)
 - *Cth will argue that [LAW] falls under its EAP (s 51(xxix)) because it concerns a relationship with another country. The question will turn on whether or not [LAW] has, as its subject, relations between Australia and other countries.*

The **preservation of friendly relations** with other dominions is an important part of the management of the external affairs of the Commonwealth (*Latham CJ, R v Sharkey*)

- Relations don't have to be friendly – can be of any character
- *“The prevention and punishment of the excitement of disaffection within the Commonwealth against the Government or Constitution of any other **Dominion may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions.**”* (*R v Sharkey*)

Must the law **enhance** Australia's relations with other nations to be valid?

- **Unsettled** as to whether this limb **requires improvement** of relations or whether relations must merely be affected.
 - Callinan and Heydon JJ (minority) in *XYZ* – seemed to suggest that laws under s 51(xxix) must enhance Australia's foreign relations
 - Zines (commentary): a law doesn't need to be for the betterment of relations – it just has to concern relations with another country.

Doctrine may be extended to include Australia's relationship with international organisations (see also Brennan J in *Koowarta v Bjelke-Petersen*)

Examples:

- Relations with “international persons” (UN, WHO, World Bank etc.)?
 - Yes (Brennan J in *Koowarta*; Kirby J in *XYZ*)
- Matters of “international comity (importance)” or international law?
 - Yes (*Seas and Submerged Lands Case*)
- Counter-terrorism law criminalising intimidation of foreign governments/populations?
 - Yes (*Thomas v Mowbray* per 3 judges)
- Law criminalising conduct committed in a foreign country?
 - *XYZ* case: Kirby J said yes / Callinan and Heydon JJ said no
- Other examples from textbook: extradition laws and laws regarding the judicial note taken of foreign judgments of foreign evidence