

External Affairs (s. 51 (xxix)):

S.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:

... (xxix) External affairs

Does the law exhibit 'the mere fact of externality'- supported by Horta, Victoria and Polyukovich but XYZ (Callinan and Heydon). There is also a theme throughout where there must be some sort of connection or nexus between matter and Australia.

The 4 limbs:

GEOGRAPHIC EXTERNALITY

1. On matters/affairs which are **physically external to Australia** – Geographic externality (this is a subject matter/non-purposive power)
 - Test to be applied: Is there sufficient connection to the head of power – look to the rights, duties, obligations and privileges which it changes, regulates or abolishes
 - *The Seas and Submerged Lands case* (1975)
 - i. Mere externality could be enough. Note Barwick.
 - *Polyukhovich* (the War Crimes case) (1991)
 - i. Must there be a connection to Australia?:
 1. Mason CJ, Deane, Dawson and McHugh JJ (Maj): **mere externality is sufficient**
 2. Toohey J: Need some connection, but the mere fact of Australia's involvement in WWII is sufficient.
 3. Gaudron J: Must be some element of Australian interest or concern, but the fact that Parliament has legislated in the area is sufficient to show this. Gaudron and other minority said that Australia was involved in WW2 is enough. And the other a circular argument that
 4. Brennan J: need sufficient connection and there isn't one here. Brennan rejected that argument. It leaves no gap. It is too far removed from Australia but for the other judges that just confirms it is 'external'. Said it should apply to external affairs to Australia not just anything outside of Australia.
 - *Horta* 1994
 - i. Horta brought case to HC that the laws Australia made with Indonesia which recognised Indonesian take over of East Timor (Australia had oil interests)...Bc it was based on an illegal treaty.
 - ii. Decided that the law was valid under EA power. Did not give any finality definitive statement about 'mere externality' say illegality of treaty is not relevant.
 - iii. 'Each of those matters is geographically external to Australia...an obvious and substantial nexus between each of them and Australia...all matters affecting or touching Australia'.
 - *Victoria v Cth* 1995
 - XYZ 2006 (Seem to show that mere externality with no connection is enough)

- i. Amendments to the *Crimes Act (Cth)* prohibited Australians from engaging in sexual activity with children in other countries.
 - ii. A Melbourne man, known as XYZ, was arrested in Melbourne in 2002 in relation to offences said to have been committed in Thailand in 2001. He challenged the laws' constitutionality.
 - iii. The question of whether mere geographical externality is sufficient to attract s 51(xxix) was revisited.
 - iv. Gummow, Hayne and Crennan JJ (in a joint judgment), and by Gleeson CJ (in a separate judgment) confirmed the view that mere geographical externality was all that was required
 - v. Callinan and Heydon JJ, rejected this view
 - vi. Kirby J left the question open
 - vii. HOWEVER NOTE. There is still a little doubt (might need connection) that mere externality is not enough. Bc both these cases involved Australian citizens.
 - viii. Mere externality prevails- on this principle the law was found valid.
- Pape
- i. Hayne, Kiefel and Heydon rejected the argument that because the origin of the financial crisis were external Australia, the fiscal package could be supported by externality. Most things originated external to Australia, said Heydon, if we were to accept the argument here, then most to anything could.
 - ii. Externality not found to be enough. Did not make it geographically external to Australia.

Note: online and technology- no test on this for geographic externality. Meaning of external completely changed? Speculation: geographic externally is relied on less bc less able to be pinpointed. Or may be that everything becomes partially external (but this is radical and HC bench is conservative).

INTERNATIONAL EXTERNALITY

2. Regarding Australia's **relationship with other nation states** – international comity (this is a purposive power)

- *Sharkey* (1949)- **Communist in Aus. Charged with sedition. Court found sedition law was valid.** Crime of sedition against any of the King's dominions was said to be covered by external affairs (note external not foreign) Latham said legislation relating to any country would be covered not just the 'dominion'.
- *Koowata* - extended Sharkey to international persons and organisations
- *Thomas v Mowbray* (2007)

Gummow and Crennan (Gleeson agreeing): relied upon the capacity of terrorism to affect Australia's relations with other countries (and, to the extent that it operated extra-territorially, geographic externality).