Class 6 External Affairs Power

- **S51(xxix)(29)**
  - **Cth has power to make laws with respect to external affairs**
    - Used to be 'external affairs and treaties', but removed since Australia would remain a colony and not be able to enter into treaties.
      - If able to enter into treaties, this would make AU an independent nation
        - Now: Executive prerogative power to enter into treaties
      - Treaties were also originally intended to be self-executing, but this was also changed, so that they **only take effect if implemented by domestic law**.
    - 'External affairs' was used rather than 'foreign affairs' in order to pick up 'imperial matters' that were external to AU but not 'foreign'
- Two aspects of this power
  1. First, there is the notion of '==geographical externality==' ==(in this aspect, subject-matter power)==
     - Commonwealth Parliament can make laws with respect to ==relations with foreign countries== or ==actions that occur outside Australia== or ==things that are physically outside Australia.==
       - **[R v Sharkey] - laws concerning external relations with other countries are within external affairs power**
         - Mr Sharkey said that Australian workers would welcome invading Soviet forces. He was charged with sedition. He challenged the validity of the law.
         - The law applied to exciting disaffection against the Government of any of the Dominions.
         - The High Court held that this was covered by s 51(xxix) because it involved the external relations of Australia
       - **[Seas and Submerged Lands Case] - laws concerning matters geographically external to AU are within external affairs power**
         - The external affairs power is not just about the implementation of treaties but also takes in matters external to Australia including **relations with other countries** and **conduct by a nation or its nationals which affects other nations** and **conduct in violation of international comity**
         - External affairs power extend to matters **geographically external to Australia**.
         - In this case the territorial sea and the continental shelf were at issue.
       - **[Polyukhovich v Cth] - to be within external affairs power, a law just need to be concerning matters external to AU. There is no need for a nexus between AU and external matter**
         - Facts
           - AU legislation was passed in order to punish Australians who committed war crimes in Europe during WWII.
           - The defendant was accused of committing war crimes in the Ukraine during World War II.
         - Issue:
           - Whether a legislation on matters occurring many years ago in a different territory which didn't really have any connection to Australia is supported by external affairs power?
         - Held:
           - YES
             - External affairs power supported the legislation because **it related to matters geographically external to Australia.**
               - At least once Australia became a fully independent sovereign nation, **any law which can properly be characterized as a law with respect to any matter, thing or person occurring or situate outside Australia is a law with respect to 'external affairs' for the purposes of s 51(xxix)**
             - ==Is a sufficient nexus between AU and the external matter required?==
               - NO.
                 - It is ==unnecessary for the Court to be satisfied that Australia has an interest or concern in the subject-matter of the legislation==. It is enough that Parliament judged this to be so. The Court would not overrule the Parliament's decision on that question.
               - Dissenting on this point
                 - s 51(xxix) relates to the external affairs of *Australia* and there must be a sufficient nexus or connection between Australia and the external matter.
                 - It was up to Parliament to determine in the first instance whether this connection exists, but 'if the legislative judgment cannot reasonably be supported, the law will be held to be outside the power conferred by s 51(xxix)'
                 - In this case, is there a sufficient connection?
                   - Toohey J - AU involvement in the war is sufficient connection
                   - Brennan J - persons involved are now Australian citizens or residents, but this was not a sufficient connection
       - **[Horta v Cth] - nexus MAY be required (court not clear on this point)**
         - Facts
           - Cth made legislation implementing the Timor Gap treaty.
           - It was argued that the treaty is invalid since contrary to international law (right of self-determination), thus the AU legislation is invalid.
         - Held:
           - HCA is not to determine whether a treaty is valid or not.
           - Legislation valid since externality
             - It was supported by the external affairs power **merely on the basis that the legislation related to matters geographically external to Australia.**
           - Nexus?
             - However, the Court stressed the **'obvious and substantial nexus'** with Australia. It also noted that the Parliament recognized that the subject matter of the law **affects or touches Australia.**
           - However, even though it was within the external affairs power, there could be circumstances where it is outside legislative power by reason of some other express or implied restriction in the Constitution, but that was not the case here.
       - **[Re Patterson; ex parte Taylor] - laws concerning deportation of aliens are supported by external affairs power. But laws concerning deportation of AU citizens are not.**
         - Facts
           - A British citizen had lived in Australia for 33 years after arriving as a child.
           - He had been convicted of serious offences.
           - AU has laws to deport him.
         - Issue
           - Whether the deportation law was supported by the external affairs power?
         - Held:
           - Laws concerning the deportation of **British citizens** are laws with respect to external affairs, thus supported by external affair power
           - Laws concerning the deportation of **AU citizens** are NOT laws with respect to external affairs. It is an internal AU matter, not something external to AU.
       - **[XYZ v Cth] - laws concerning acts took place outside AU are supported by external affairs power**
         - Facts
           - Commonwealth child sex tourism legislation made it an offence for Australians to have sex with people under 16 in foreign countries. It did not

involve a treaty.
- Issue:
  - ◊ Is the law supported by external affairs power?
- Held:
  - ◊ YES
    - ▶ It concerned acts that took place outside Australia.
- Dissenting:
  - ◊ The external affairs power concerned relations between countries, not persons, things or acts that take place, outside Australia.
  - ◊ The geographic externality of a legislative subject-matter may afford a reason why the legislation bears directly on Australia's relations with other countries but does not of itself make it a law with respect to external affairs.
  - ◊ It also undermines the carefully calibrated limits on treaty implementation, if mere externality is enough.
- □ **[Pape v Commissioner of Taxation] - a law concerning matters within AU does not fall within external affairs power simply because the cause of need to regulate arise outside AU.**
  - Facts
    - ◊ During GFC, Cth enact law to give money to people to stimulate AU economy
    - ◊ Cth argue that the Act was 'an appropriate and adapted response to what is an external matter or thing, namely, the global financial crisis'
  - Issue:
    - ◊ Is the law supported by external affairs power?
  - Held:
    - ◊ NO
      - ▶ The Act 'is directed, and directed only, to providing a fiscal stimulus to the **Australian economy**. It is not a law with respect to any matter or thing external to Australia'
      - ▶ It is true that GFC is caused by events occurring outside AU. However, ==a law regulating matters and things within Australia does not fall within the external affairs power 'simply because a cause of the perceived need to regulate those Australian matters and things arose outside Australia. That kind of law relates not to external affairs, but to domestic affairs.==
      - ▶ If Cth argument were correct, then it would have implications for the federal division of powers between the Commonwealth and the States. This would go further than what was contemplated in [XYZ v Commonwealth], which did not involve any consideration of that federal division of powers.
- □ **[Alqudsi v Cth (NSWCA)] - a law concerning conduct within AU but has sufficient connection with conduct outside AU is within external affairs power**
  - Facts
    - ◊ Mr Alqudsi was charged and committed for trial for 7 offences against **s 7(1)(e)** of the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), which made it an offence to 'give money or goods to, or perform services for, any other person ... with the intention of supporting or promoting the commission of an offence', against s 6, of entering a foreign State with intent to engage in hostile activity, including armed hostilities, in that foreign State.
    - ◊ Mr Alqudsi challenged the constitutional validity of s 7(1)(e).
  - Held:
    - ◊ Although Mr Alqudsi's alleged conduct occurred solely within Australia, there was a sufficient connection with conduct geographically external to Australia, as s 7(1)(e) only makes it an offence to engage in conduct intended to support or promote the entry of a militant into a foreign country.
    - ◊ The Court rejected the proposition that geographical externality applied only to tangible things.
    - ◊ The Court rejected the application of a proportionality test, because the geographical externality aspect of the external affairs power is not 'purposive' and the incidental power does not require a proportionality analysis.
2. The second aspect is the ==fulfillment of international obligations== such as treaty obligations, which may involve matters **within Australia**. ==(in this aspect, purposive power)==
   - ▪ Treaty and AU law
     - □ The power to enter into a treaty is an executive power. It is now supported by **s 61** of the Constitution.
     - □ Legislation is needed to implement a treaty – either Commonwealth or State.
       - Treaties may be implemented indirectly by non-action – i.e. by simply not breaching any rights granted by the treaty.
       - In **[Teoh's case]** the High Court made it clear that **a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.**
       - However, the Court established that there is **a legitimate expectation** that the Commonwealth Government **will comply with its treaty obligations**, and that its officials will do so when making administrative decisions
         - ◊ Note that the Court has since moved away from the concept of 'legitimate expectation' **[Minister for Immigration v WZARH]**
     - □ There is a presumption, in statutory interpretation, that the **Parliament intends to comply with Australia's international obligations, so laws should be construed consistently with those obligations, if possible.**
   - ▪ External affairs power can support laws...
     - A. ==S 51(xxix) is 'subject to this Constitution' and therefore subject to express or implied limitations, such as s 92 or implications derived from the separation of powers== **[R v Burgess; Ex parte Henry]**
     - B. ==A law implementing ANY treaty (whether treaty on external matter or internal matter) is supported by external affairs power, as long as made bona fide==
       - **[R v Burgess; Ex parte Henry] - a law implementing a treaty regarding external matter is supported by external affairs power. HCA not clear if a law implementing a treaty regarding purely domestic matter is supported by external affairs power or not, but suggest YES.**
         - ◊ Facts
           - ▶ Henry is a pilot who fly airplane around Sydney airport.
           - ▶ Cth has Air Navigation Act, which authorise the making of regulations for the purpose of implementing a treaty.
           - ▶ His license suspended after he breached regulations.
         - ◊ Is the Act authorising regulations supported by external affairs power?
           - ▶ YES
             - – **External affairs power NOT limited to laws implementing treaties concerning EXTERNAL MATTERS only.**
               - It is **difficult to characterise** treaties as to whether they concern international or domestic matters. It was impossible to say that any subject is of such a nature that it should not be dealt with by way of international agreement.
               - The fact that an international convention is made about a subject **brings it within the field of international relations**
               - ==Some dissenting opinions==
                 - It may be that the power only extends to **matters of 'sufficient international significance'** to make them a legitimate subject of international co-operation and agreement (Starke J)
                   - However, in this case, air navigation is a matter of such nature
                 - It is an extreme view that a treaty could be used to give the Commonwealth power over purely internal matters. The external affairs power should relate to matters which are **'indisputably international in character'** (Dixon J)
                   - However, in this case, air navigation is a matter of such nature
         - ◊ Is the actual regulation supported by external affairs power?
           - ▶ NO
             - – **External affairs power support laws implementing treaties, but purpose of legislation must be to actually implement the treaty, give effect to the treaty.**
               - Here, regulation not supported by treaty. Not supported by another head of power, so struck down.