

External Affairs s51(xxix)

Two main aspects of the external affairs power

1. Geographical externality - Cth Parliament can make laws with respect to relations with foreign countries or actions outside Australia^[SEP] (things physically outside Australia) *Polyukhovich v Commonwealth*
2. Fulfilling international obligations such as treaties, which may involve matters within Australia^[SEP] (executive power, made under s61)

Geographical Externality: APPLY SUFFICIENT CONNECTION TEST

Polyukhovich v Commonwealth (1991) 172 CLR 501 – (War crimes). Mere externality to Australia is sufficient to bring it within power. The judges were divided on the issue of whether there needed to be some sort of connection with Australia, ultimately decided to leave it up to Parliament.

Horta v Commonwealth (1994) 181 CLR 183 – (East Timor Gap) affirmed mere externality principle but talked about requiring a “obvious and substantial nexus”.

Pape v Commissioner of Taxation (2009) 238 CLR 1 – (GFC) stimulus was only related to Australian economy, not matters external to Australia.

Alqudsi v Commonwealth (2015) 91 NSWLR 92 (Terrorism Offences) –NSWCA case, accepted that there was **sufficient connection** to geographical externality (not a proportionality test). Here the law was prohibiting someone doing things INSIDE Aus to support activities OUTSIDE Aus (supported on geographical externality)

Treaties: APPLY TASMANIAN DAM CASE

Teoh – treaties must be implemented in domestic law

R v Burgess, Ex parte Henry (1936) 55 CLR 608 (pirate pilot) – difficulty in characterizing treaties - whether they are of international concern? If something is brought within international relations, this is sufficient. Whether the external affairs power could be sued to govern internal matters via treaty law?

KEY CASE *Commonwealth v Tasmania (Tasmanian Dam case) (1983) 158 CLR 1* – Court ruled any bona fide treaty was supported by the power. If there is a treaty that means the international nations have decided that subject matter is of international concern.

1. Is there a bona fide treaty?
2. Is the treaty implemented in Australian law?
3. Apply the proportionality test (purposive aspect of the power)– reasonable proportionality between the designated purpose and object and the means, which the law embodies for achieving or procuring it. (Deane J)
4. Check whether it is subject to express or implied limitations
 - a. s92?
 - b. Separation of powers doctrine?
5. Law must implement treaty obligations that have a reasonable level of specificity. There must be an obligation to perform. Mere aspirations, which have no direction, will not be supported (*Victoria v Cth*)
 - a. There can be whole or part implementation
 - b. Unlikely that international recommendations would be sufficient
6. Then it is supported by the external affairs power

Richardson v Forestry Commission (1988) 164 CLR 261 – (protecting forests in QLD) applied Tasmanian Dam case, court will decide what is capable of being reasonably proportional, other up to Parliament to determine reasonably appropriate and adapted.

Victoria v Commonwealth (Industrial Relations Act case) (1996) 187 CLR 416 – settled that mere externality is sufficient (but do need some form of nexus). Treaty valid if it is implemented and capable of being reasonably appropriate and adapted to the objects of the treaty.