

TABLE OF CONTENTS

Characterisation	1
External Affairs Power.....	2
Defence Power	3
Acquisition of Property on Just Terms.....	5
Trade and Commerce Power	7
Trial by Jury.....	8
S 109 Inconsistency.....	9
Separation of Powers	11
Melbourne Corp Doctrine.....	12

EXTERNAL AFFAIRS POWER

(xxix) external affairs;

1. A power to regulate places, persons, matters or things geographically external to Australia (*XYZ v Cth 2006*)

The Parliament have the power to legislate with extra-territorial effect (e.g. the law will be valid outside of Australia).

Minority Judgements

The minority view of Callinan and Heydon JJ in *XYZ v Cth 2006* was that the words 'external' and 'affairs' should be treated as a composite expression, so as to mean the relationship **between nations** arising out of their dealings with each other.

2. Authorises parliament to legislate with respect to matters affecting Australia's relations with other countries (*R v Sharkey 1949*)

The preservation of friendly relations with other dominion is an important part of the management of external affairs of the Commonwealth.

3. Authorises the implementation of a treaty (*Victoria v Cth 1996*)

Treaty itself is enough to enliven s 51(xxix), no matter is character. If a topic becomes the subject of international cooperation/ international convention, it is a matter which is fundamentally international in character (*Cth v Tasmania 1983*).

- However, where a treaty is **expressed in aspirational/exhortatory language, it will not enliven legislative power.** The law must prescribe a regime that the treaty has itself defined with sufficient specificity (*Victoria v Cth 1996*)
- E.g. a treaty to "promote full employment" is one expressed in terms of aspiration (*Victoria v Cth 1996*)
- The **law must be appropriate and adapted** to give effect to the treaty. It is for the legislature to choose the means by which it gives effect to a treaty, provided the means chosen are reasonably capable of being considered appropriate and adapted to that end (*Victoria v Cth 1996*)
- Legislation **need not give effect to the treaty in its entirety** (*Victoria v Cth 1996*)

Minority Judgments

The minority view in *Cth v Tasmania 1983* & the majority view in *Koowarta v Bjelike-Peterson 1982* was that the subject matter of a treaty must be of international character/concern. Otherwise the Commonwealth could acquire unlimited legislative power, through executive action of treaty signing. The split in both cases was 4:3, demonstrating that the High Court judgments have in no way been black or white in regards to this head of power.

4. Is 'international concern' an independent basis for upholding the validity of Commonwealth legislation? (*XYZ v Cth 2006*)

The argument that s 51(xxix) supports laws concerning matters of international concern was raised in *XYZ v Cth 2006*. Because the argument was left unanswered, it could be so that the Commonwealth **can** legislate on matters of international concern under external affairs HOP. However, the judgments from Callinan and Heydon JJ suggest against such a finding, because the topic is too vague and problematic.