

Topic 5, External Affairs Power

s 51, External Affairs Power

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Cth with respect to:

- xxix. External affairs
- xxx. The relations of the Cth with the islands of the Pacific

Section 51(xxix), External affairs power		
International relations	Geographical externality	Implementing international legal obligations
<i>Subject matter power</i>	<i>Subject matter power</i>	<i>Purposive power</i>

Say in exam = in order for a law to be binding it must be shown to be validly enacted under a HoP. The Cth would argue that the [INSERT NAME] Act was created under the external affairs power. The external affairs power, s 51(xxix) of the Constitution allows the Cth to have power with respect to external affairs. There are 3 branches of external affairs...

Element	Definition
International Relations	<p>International relations = subject matter power</p> <ul style="list-style-type: none"> Includes the power to enact laws with respect to the relations of the Cth with other countries and other international legal persons (i.e.) UN Note – it also includes Acts within Aus that are directed at foreign governments or foreign publics <p><i>Does the practical and legal operation and effect of this law have a sufficient connection with the subject matter (this is <u>characterisation</u> must state this sentence)</i></p> <p>Test = whether there is a substantial connexion between the practical and legal operation between the subject matter and the HoP (<i>Herald & Weekly Times</i>)</p> <ul style="list-style-type: none"> Note – if you are asked about 2 or more sections of an Act, then use invalidity and reading down from Topic 2 <p>Example cases:</p> <ul style="list-style-type: none"> <i>R v Sharkey</i> – countries outside of Aus <i>Koowarta</i> – international relations extends to relations with international legal persons (i.e.) UN <i>Thomas v Mowbray</i> – even if the legislation is within Aus, but directed/ in relation to other foreign States, falls under this HoP
Geographical Externality	<p>Geographical externality = subject matter power</p> <ul style="list-style-type: none"> External affairs power to enact laws with respect to matters, things or persons situated or occurring outside of Aus <p>Things may be <u>tangible</u> or <u>intangible</u></p> <ul style="list-style-type: none"> Note – mere externality is enough (no need for any special nexus within Aus) <p><i>Does the practical and legal operation and effect of this law have a sufficient connection with the subject matter (this is <u>characterisation</u> must state this sentence)</i></p>

	<p>Test = whether there is a substantial connexion between the practical and legal operation between the subject matter and the HoP (<i>Herald & Weekly Times</i>)</p> <ul style="list-style-type: none"> Note – if you are asked about 2 or more sections of an Act, then use invalidity and reading down from Topic 2 <p>If the answer is <u>yes</u>, it can include where the conduct regulated occurs wholly in Aus</p> <ul style="list-style-type: none"> <i>Alqudsi</i> – man did things in Aus, with the intention to assist activities overseas <ul style="list-style-type: none"> Intention had a sufficient connection with thing/ event geographically external to Aus Doing those things had a sufficient connection with thing/ event geographically external to Aus <p>If the answer is <u>no</u>, recommendation is not itself</p> <ul style="list-style-type: none"> Because in implementing recommendations, you are <u>not</u> implementing any international legal obligation – it is just a “mere recommendation” <p>Example cases:</p> <ul style="list-style-type: none"> <i>War Crimes Act</i> – majority = any matter, thing or person occurring or situated outside Aus is related to the geographical externality component <ul style="list-style-type: none"> Minority = suggested there needs to be a nexus, not necessarily substantial <i>XYZ</i> – mere externality principle <i>Alqudsi</i> – elements: <ol style="list-style-type: none"> Intangible mental state (<u>persons intention</u>) Persons tangible conduct, had a sufficient connection <p>Places, persons, matters or things required to be external to Aus are not confined to conduct and tangible things</p>
Implementing International Legal Obligations	<p>Implementing international legal obligations = purposive power (<i>Tas Dams Case</i>)</p> <p>Test of proportionality = whether it can be reasonably considered to be appropriate and adopted to achieving what is said to impress it with the character of a law with respect to external affairs</p> <ul style="list-style-type: none"> <u>Reasonable proportionality</u> between the designated purpose or object and the means which the law embodies for achieving or procuring it <p>There are <u>2 main</u> sources of international law:</p> <ol style="list-style-type: none"> Treaties – functional contracts, conventions (<i>R v Burgess; Ex parte Henry & Koowarta</i>) Customary international law – common law <p><u>Elements:</u></p> <ol style="list-style-type: none"> International legal obligation <ol style="list-style-type: none"> Genuine/ bona fide international legal obligation (i.e.) not a sham treaty This element has been deemed a “frail shield” and not a strong argument (<i>Koowarta</i>, Gibbs CJ) Can arise under treaty or under customary international law Can be on any subject matter (<i>Tas Dams Case; Richardson</i>) <u>Cannot</u> be aspirational; must be sufficiently specific to direct the general course to be taken (<i>cf.</i> aspirational commitments, there being multiple contradictory ways of achieving the goal) (<i>Industrial Relations Act Case; Pape</i>)

	<p>Note – “shall endeavour” seems discretionary, but <i>Tas Dams</i> says that it is sufficient to make the law specific</p> <p>2. Is the law reasonably capable of being seen as appropriate and adapted to implementing the obligation?</p> <p>Note – check to see if the punishment is harsh or impinges on any rights, and what the person is doing (i.e.) it is small tampering; this would suggest that it is not reasonably capable of being seen as appropriate and adapted to implementing the ILO</p> <p>If so, supported by this component of external affairs power</p> <ol style="list-style-type: none"> Law can be about regulating conduct taking place wholly in Aus Partial implementation is ok Do not need to implement all obligations in a treaty (<i>Tas Dams Case</i>) You cannot contradict the treaty (<i>Tas Dams Case</i>)
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Laws with Respect to International Relations

Element	Definition
Cases to Consider	<p><i>R v Sharkey</i></p> <p>It was an offence under federal law to excite disaffection against the Government or Constitution of any of the King's Dominions. Sharkey was a communist and gave a speech expressing support for a Soviet invasion of the UK. Argued that his conduct was invalid according to the external affairs power</p> <p>Held – the relations of the Cth with all countries outside Aus, including other Dominions of the Crown, are matters which fall directly within the subject of external affairs. The sufficient connection is met as preservation of friendly relations with other Dominions is an important part of the management of the external affairs of the Cth</p> <p>Principle – <i>maintaining relations with other countries falls within the external affairs power</i></p> <hr/> <p><i>Koowarta v Bjelke-Petersen</i></p> <p>Held – when a particular subject affects or is likely to affect Aus' relations with other international persons, a law with respect to that subject is a law with respect to external affairs. The effect of the law upon the subject which affects or is likely to affect Aus' relationships provides the connexion which the words "with respect to" require</p> <p>Principle - <i>international relations component of the external affairs power extend to relations with all international legal persons (i.e.) including the UN</i></p> <hr/> <p><i>Thomas v Mowbray</i></p> <p>Case concerned the control order regime designed to prevent terrorist acts. Terrorist act was defined to include acts directed at foreign states or at the public of foreign</p> <p>Held – terrorist acts as defined are a matter affecting relations with other countries</p> <p>Principle – <i>terrorist activities falls under the external affairs power, as it is directed at foreign States and countries</i></p>

Laws with Respect to Matters Geographically External to Australia

Element	Definition
Cases to Consider	<p><i>Polyukhovich v Cth ('War Crimes Act Case')</i> Federal legislation identified as 'war crimes' certain acts committed in Europe during WWII and provided for the trial in Aus of any person who was now an Aus citizen or resident who was accused of such crimes</p> <p>Held – the law was valid based on the simple fact that the geographical location in which the relevant acts were alleged to have been committed was physically external to Aus</p> <p>Brennan J (dissenting) suggested that there must be some nexus, not necessarily substantial, between Aus and the "external affairs" which a law purports to affect before the law is supported by s 51(xxix)</p> <p>Principle – <i>any law which can properly be characterised as a law with respect to <u>any matter, thing or person occurring or situated outside Aus</u> is a law with respect to external affairs for the purpose of s 51(xxix)</i></p> <hr/> <p><i>Horta v Cth</i> In 1989, Aus and Indonesia entered into a treaty for joint exploration of oil resources in the Timor Gap. Both Aus and Indonesia claimed the area in question as part of the continental shelf. Legislation was passed to give effect to the treaty. Horta, an East Timorese independence leader, argued that the legislation was invalid because the treaty was void under international law because Indonesia did not have lawful sovereignty over East Timor</p> <p>Held – HC avoided this issue and held that the legislation was valid because the legislation was about a thing (namely, mineral resources) geographically external to Aus that had a substantial nexus with Aus</p> <p>Principle – <i>applied the <u>nexus</u> analysis as per Brennan J. Also stated that only one HoP was needed for the law to be valid in Aus</i></p> <hr/> <p><i>XYZ v Cth</i> Federal law makes it a crime under Aus law for a person to have sex with a child overseas. XYZ was alleged to have had sex with a child in Thailand. XYZ argued against the mere externality principle</p> <p>Held – upheld the validity of the Act on the basis of the <u>mere externality principle</u></p> <p>Mere externality principle – <i>if a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'</i></p> <hr/> <p><i>Alqudsi v The Queens</i> The <i>Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)</i>, s 6(1)(a) stated that it was a crime to "enter a foreign State with intent to engage in a hostile activity in that foreign</p>

	<p>State". s 6(3)(aa) defined engaging in hostile activities in a foreign State as "doing an act with the intention of... engaging in armed hostilities in the foreign State". And s 7(1)(e), 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 section 6". Mr A was paying for his friend to go to Syria, and sending him money to pay for his conduct overseas</p> <p>Held – s 7(1)(e) and its application to s 6(1)(a) and s 6(3)(aa) was a valid law with respect to external affairs, by reason of the geographical externality aspect of the power. The external affairs power, as it relates to matters outside Aus, is not a purposive power and does not involve a proportionality assessment. The "places, persons, matters or things" required to be external to Aus are not confined to conduct and tangible things</p> <p>Principle – <u>2 geographically external elements were shown in this case:</u></p> <ol style="list-style-type: none"> 1. The accused person's intangible mental state had a sufficient connection with something geographically external to Aus, namely activities outside Aus carried out by other persons, because that mental state involved an intention to assist those external activities 2. The accused person's tangible conduct within Aus had a sufficient connection with something geographically external to Aus, namely the carrying out of activities outside Aus other persons, because the conduct within Aus in fact assists the conduct outside Aus <p>Test = sufficient connection test</p>
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Laws Implementing International Legal Obligations

Element	Definition
Cases to Consider	<p>R v Burgess; Ex parte Henry</p> <p>The <i>Air Navigation Act 1920</i> authorised the making of regulations for the purpose of carrying out and giving effect to the <i>Convention Relating to the Regulation of Aerial Navigation</i> (treaty obligation). It was argued that the Convention required Aus to implement certain safety rules <u>within</u> Aus and thus there was nothing <u>external</u> involved to engage the external affairs power</p> <p>Held – external affairs power includes treaties that Aus has entered into, that they are executing within the Cth</p> <p>Principle – <u>the legislative power of the Cth over external affairs includes the power to execute within the Cth treaties and conventions entered into with foreign powers</u></p> <hr/> <p>Koowarta v Bjelke-Petersen</p> <p>Whether the <i>Racial Discrimination Act 1975</i> was supported by the external affairs power as implementing (a treaty), the <i>International Convention on the Elimination of All Forms of Racial Discrimination</i></p> <p>Held – external affairs power supported the implementation of any treaty, therefore the Act is valid</p>

A limitation was suggested that the subject matter of the treaty has to be indisputably international in character (suggested by Gibbs CJ, Aicken and Wilson JJ). Stephen J adopted a wider limitation that the treaty must be on a subject of international concern

Principle – *external affairs supports the implementation of any treaty*

Cth v Tas ('Tas Dams Case')

The Cth argued that the legislation was supported by the external affairs power as implementing Aus' treaty obligation to protect a World Heritage Area

Held – majority stated that the external affairs power could be used to implement any treaty obligation. Dissenting judges stated that the treaty had to be of international concern, holding that the building of a dam in Tas would not be of international concern

Principle – *test of proportionality. Partial implementation is adequate, however, the treaty cannot be contradicted*

Test of proportionality = whether it can be reasonably considered to be appropriate and adopted to achieving what is said to impress it with the character of a law with respect to external affairs

- Reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it
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Richardson v Forestry Commission

Federal legislation established a Commission of Inquiry to determine whether particular forests in Tas would qualify for inclusion on the World Heritage register under the relevant treaty. The legislation prohibited forestry operations and road construction in the forests during the period of the inquiry

Held – Wilson and Dawson JJ who dissented in *Tasmanian Dam Case* accepted that the case was binding

Principle – *more judges are suggesting that "any subject matter" will suffice as the test*

Vic v Cth ('Industrial Relations Act Case')

Provisions in the *Industrial Relations Act* relating to working conditions and minimum entitlements were said by the Cth to be supported by the external affairs power because the provisions were said to implement various Conventions and Recommendations of the General Conference of the International Labour Organisation

Held – reaffirmed *Tasmanian Dam Case*, that a treaty can be on any subject matter, and that to enliven the external affairs power an intention legal obligation need not be precise but it must be sufficiently specific to direct to the general course to be taken

Principle – *external affairs power an international legal obligation need not be precise but it must be sufficiently specific to direct the general course to be taken*

	<p><i>Cannot support a law which adopts one of a variety of possibly contradictory ways that might be selected to fulfil the aspiration</i></p> <p><i>The law must prescribe a regime that the treaty has itself defined with sufficient specificity to <u>direct the general course to be taken</u> by the signatory states</i></p> <p><i>The law must be reasonably capable of being considered appropriate and adapted to implementing the treaty</i></p> <p><i>Partial implementation is adequate, provided it does not contradict the treaty</i></p> <hr/> <p><i>Pape v Commissioner of Taxation</i> During the Global Financial Crisis in 2008, the G20 issued a Declaration in which G20 member states (including Aus) 'agreed' to 'use fiscal measures to stimulate domestic demand... as appropriate, while maintaining a policy framework conducive to fiscal responsibility'. The Cth argued that this amounted to a precise and identifiable commitment, although not an internationally enforcement agreement, such as to enliven the external affairs power</p> <p>Held – external affairs arguments were rejected. An agreement that "further actions are necessary" is far too unspecific to give constitutional validity to a particular and highly specific action like enacting the <i>Tax Bonus Act</i></p> <p>Principle – <i>the treaties language needs to be sufficiently specific, to direct the general course</i></p>
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No Power to Enact Laws

Element	Definition
Implementing International Recommendations	<p>There is no power to enact laws implementing international recommendations that are not an implementation of an international legal obligation</p> <p>Example cases that deem there is no power to enact laws implementing international recommendations:</p> <ul style="list-style-type: none"> • <i>Industrial Relations Act Case</i> – held that it was not necessary to decide on • <i>Pape v Commissioner of Taxation</i> – stated that mere recommendations do not create international obligations. The recommendations relied on in this case were too vague • <i>Alqudsi v The Queen</i> – the language was too general, and Aus had not undertaken the international obligation
Matters of International Concerns	<p>There is no power to enact laws with respect to matters of international concern</p> <p>Example cases that deem there is no power to enact matters of international concern:</p> <ul style="list-style-type: none"> • <i>Richardson v Forestry Commission</i> – stated that just because the matter is the subject of a bona fide <u>treaty</u>, does not necessarily deem it to be a matter of international concern • <i>Alqudsi v The Queen</i> – determined that the criteria to identify what is of <u>international concern</u> is vague, and thus there is no power to enact

