

# TOPIC 6 – THE EXTERNAL AFFAIRS POWER (s 51(xxix))

**HEAD OF POWER – s 51(29):** the Cth shall ... have power to make laws ... with respect to external affairs.

- External affairs = purposive head of power, therefore test is proportionality (Leask see above)

**INTRODUCTION:** [X] may argue that [LAW] is valid/invalid because it is/is not wrt the EA power (s51(xxix)). The [LAW] in was enacted as it purports to validly exercise the [x] aspect of the EA power. Aspects →

1. Extra-territorial laws;
2. Laws wrt relations w/ other countries;
3. Treaty implementation;
4. Laws with regards to matters of intl concern.
5. Customary international law

## 6.1 – ASPECT 1: EXTRATERRITORIAL LAWS

**SAY:** Prima Facie the Cth can pass ET laws as s 3 of *Statute of Westminster*, gives the CTH powers to legislate wrt to matters located geographically external to Australia (*Seas and Submerged Lands Case*). Pursuant to the majority in *Polyukhovich*, there is no nexus requirement to s 51(xxix) as plenary ET power is conferred on the CTH. Mere geographic externality is sufficient, as anything to the contrary would offend PMTary sovereignty (ILO & XYZ endorsing *Polyukhovich*). On the facts...

When PMT legislates for matters/events beyond its borders, it is said to have exercised extraterritorial power.

- Extraterritorial laws → only part of s 51(29) which is not a purposive power, it is a non-purposive power
- *Seas and Submerged Lands case* – e.g. territorial seas and continental shelf

### IS A NEXUS REQUIRED?

*Polyukhovich v Cth* (1991) – Non-Aus citizen, committed crimes in WWII. Found on Aus territory. Re *War Crimes Act*

- ISSUE – does s 51(29) confer plenary powers over ET legislation such that no nexus was required back to Aus?
- MAJORITY – s 51(xxix) conferred plenary ET power on the CTH... no nexus required.
  - Brennan J and Toohey J found that a genuine connection to Aus was required – must touch or concern

*XYZ v Cth* (2006) – Legislation made it an Aus crime for Aus citizen to engage in sexual activities w/ children while overseas.

- ISSUE: Is legislation valid under the “geographical externality principle”?
- MAJORITY (lead by Gleeson CJ): accepted *Polyukhovich* – no nexus needed
  - Confirmed s 51(xxix) incl. power to make laws w/ respect to places, persons, matters or things outside the geographical limits of (external to) Australia.

## 6.2 – ASPECT 2: RELATIONS W/ OTHER COUNTRIES OR INTL ORG’S

**SAY:** s 51(xxix) allows CTH to legislate w/ respect to foreign relations incl. w/ other countries (*Sharkey*) and intl entities (*Koowarta*; ILO). On the facts.

### EXAMPLES of laws involving relations w/ other countries

- Sedition laws which prohibit “the excitement of disaffection” against a foreign govt fall w/in scope of EA (*R v Sharkey*)
- Laws recognising foreign judgments and foreign evidence • Extradition laws
- Anti-terrorism laws come w/in this aspect of power (See 3/7 JJs in *Thomas v Mowbray* (2007))
- Brennan J (*Koowarta*), and Kirby J (*XYZ v Cth*) noted the s 51(29) extends to ‘international entities’ e.g. UN
- XYZ – Heydon and Callinan J said that laws which adversely affect relations w/ other nations may not fall w/in this pwr

## 6.3 – ASPECT 3: LAWS IMPLEMENTING INTERNATIONAL TREATIES

**SAY:** s 51(xxix) empowers the CTH PMT to ratify any international treaty/covenant and incorporate provisions of such treaties into Australian law. The provisions are not binding until incorporated into domestic legislation (*Koowarta*). s 51(xxix) grants CTH power to incorporate all of its treaty obligations into domestic laws (*Tas Dams*; *Richardson*), including matters which are “reasonably incidental” to those treaty obligations (*Richardson*). This indicates that non-treaty documents such as drafts, declarations and recommendations, may be legislated on as well (ILO). On the facts...

Most controversial aspect of the External Affairs Power... can potentially be on any topic.

- Could undermine federal/state balance of legislative power → b/c CTH enters into the treaties

**SCOPE OF INCORPORATION** – Can implement all treaty obligations on any treaty topic, despite otherwise having no HOP

*R v Burgess*; *Ex parte Henry* – Majority (3/5) support **broad view** = CTH power to incorporate all of its treaty obligations

*Tasmanian Dam Case* (1983) – Majority (4/7) support **broad view**

*Richardson* (1988) – **UNANIMOUS adoption of broad view**. At 295: CTH can legislate on any matters that are “reasonably incidental” to its treaty obligations

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## EFFECT OF UNINCORPORATED TREATIES

*Minister for Immigration & Ethnic Affairs v Teoh* (1995) – govt wanted to deport T. T claimed deportation was in conflict w/ rights of the child. However, Convention of Rights of the Child hadn't been incorporated into domestic legislation.

- **Held:** [Unincorporated treaties have procedural effects](#) in Aus law, but [cannot alter substantive rights](#) until implemented in domestic law.

*Re Minister for Immigration and Ethnic Affairs; Ex parte Lam* (2003) 214 CLR - McHugh, Gummow and Callinan JJ suggested if the *Teoh* case was to come before HC again, would be on shaky ground (expressed displeasure).

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***Koowarta v Bjelke-Petersen* (1982)** – Involved *Racial Discrimination Act 1975* (RDA), which implemented *Convention on the Elimination of Racial Discrimination* 1972. QLD refused to sell land to K b/c govt policy. Held: RDA valid under EA power.

***Commonwealth v Tasmania* (1983) (*Tasmanian Dam Case*)** – 1980s. Tas govt decided to build dam. CTH govt passed legislation to prevent Tasdam being built due to area listed on World Heritage List. Legislation valid under EA power.

- Minority adopted Stephen J's approach from *Koowarta's Case* – [must be a matter of international concern](#)

***Richardson v Forestry Commission* (1988)** – HC upheld CTH law providing interim protection to parts of Tas Forest while assessed for World Heritage protection, even though no existing obligation under treaty.

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## LIMITATIONS (EXCEPTIONS) ON THE POWER TO IMPLEMENT TREATIES – GO THROUGH 1 BY 1

**SAY:** [X] will have no case unless it can be proved that the Cth law is subject to certain limitations developed by the courts.

### 1. Treaty ratification must be [bona fide \(in good faith\)](#) – *Koowarta*

**SAY:** [X] may argue that the treaty was not entered into with good faith by the Cth, as it was merely used as a means of conferring additional legislative power upon the Cth (*Koowarta* per Brennan J), however this is difficult to establish as Gibbs CJ notes that this doctrine would at best be a “frail shield available in rare cases”. [On the facts...](#)

### 2. Treaty must impose [obligations](#) – Not 100% clear whether still a requirement, or superseded by third limitation.

**SAY:** [X] may argue that the treaty lacks any obligations and therefore the Cth does not need to follow it. The Cth may note that treaties are usually phrased in non-precise language, aspirational language, so words which may not supply an obligation in domestic law will be sufficient to supply an obligation in International law (Deane J, *Tas Dams*).

#### Follow steps →

Q1: Does treaty contain an obligation?

- CTH [need not comply with all of the obligations](#) under treaty (maj in *ILO case*)
- [Cth can implement obligations](#) (*Tas Dams*), AND matters reasonably [incidental](#) to the obligations (*Richardson*)

Q2: Can CTH implement non-obligations?

- *Tas Dams* – 3 judges (Mason, Deane, Murphy JJ) believed so. But no clear majority.
  - If treaty confers a benefit to Aus, it may be more likely CTH can implement it (Mason J in *Tas Dams*)
- *Richardson* found statute to be [valid despite the lack of an existing treaty obligation](#).
- *ILO Case* – [CTH can implement provisions of international instruments which did not have the status of treaties](#), e.g. draft treaties or recommendations → impliedly supports implementation of non-obligations.

### 3. Treaty must be [reasonably specific](#)

**SAY:** [X] may argue that the [LAW] is invalid because the terms of the treaty/international instrument is not sufficiently specific (*ILO*) as to what must be done to comply with international standards. Deane J in *Tas Dams* notes four indicators regarding specificity:

1. [Language](#) of treaty;
2. Amount of [discretion](#) given to signatory states (greater choice, less specific);
3. [Number of ways](#) to implement treaty (vast ways, less specific); and
4. Whether there's [international consensus](#) on how to achieve obligation (the greater the general knowledge on how to deal with issue, the less specific treaty needs to be). [On the facts...](#)

Policy: the more specific a treaty is the less plenary power Cth acquires. Hence concept of specificity is an attempt to reduce the discretionary power of Cth. This requirement was adopted to regulate balance of powers.

### 4. Law must [conform to the treaty](#) – [well-established limitation](#)

**SAY:** [X] may argue that the [LAW] fails the conformity test outlined in *ILO* that: ‘to be a law with respect to “external affairs”, the law must be [reasonably capable of being considered appropriate and adapted to implementing the treaty.](#)’

[X] may point to the fact that (ONLY SAY IF RELEVANT):

- The Act clearly contradicts the purpose of the treaty it has not conformed
- The Act only partially implements the treaty
  - [Partial implementation](#) of may be permitted, but [not where](#) there is such a deficiency which makes the legislation make it [substantially inconsistent w/ the treaty](#) (*ILO case* @ 488).

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E.G. CTH can't pass any law relating to 'World Heritage'. Can only pass laws in conformity w/ the treaty.

- This is a 'PROPORTIONALITY' TEST, applicable to the PURPOSIVE ASPECT of the External Affairs power.

## **Implementation of non-treaties**

In *ILO case*, a number of ILO recommendations were relied upon by CTH as basis for impugned labour laws.

- Majority in the *ILO Case* held that *such power did exist*.
- E.g. of non-treaties → declarations, advisory notices, general comments, recommendations.
- Castan: Suggested that international recommendations must give rise to obligations if they are to form basis of legislation grounded in s 51(xx) (corps power) – *Pape v Commissioner of Taxation* (2009)