EXTERNAL AFFAIRS

General

Nature of the power. Exclusive to the Cth – although not expressly stated to be exclusive in s 51(xxix) it 'must necessarily be so' (*Seas and Submerged Lands Case* at 373).

Geographic Externality [No treaty obligation]

1. **[The test]** Mere geographical externality is sufficient for s 51(xxix) to be engaged (confirmed in *Victoria v Cth; Horta v Cth*) even where there is no treaty or international agreement

   - Dawson J in *Polyukhovich*: 'the power extends to places, persons, matters or things physically external to Australia'

   - There *does not* need to be a 'nexus' to Australia as had been previously suggested (*Polyukhovich;* confirmed in *Victoria v Cth*)

   - <u>*Note*</u> some reservation to this doctrine (Kirby J), and dissenting views of Callinan and Heydon JJ in *XYZ* – however, the authority has held firm and dissenting views have not taken hold

2. **[Case law]**

   - [**International relations]** *R v Sharkey* (1949)
     - **F:** offence of sedition to excite disaffection against the UK/King's dominions
     - **H:** Latham CJ at 163: "The relations of the Commonwealth with all countries outside Australia, including other dominions of the Crown, are matters which fall directly within the subject of external affairs"
       - [**Friendly relations]** Latham CJ added that the preservation of friendly relations with other dominions is an important part of managing external affairs, though **Zines** opined that the pursuit of "friendly or unfriendly relations is a matter of policy for the executive" (p 437)
       - The key principle was whether the law had 'as its subject relations between Australia and other countries' (Zines p 437)

   - [**No international agreement needed]** *Seas and Submerged Lands Case* (1975)
     - **F:** the sea in question was not part of Australia's territorial area
     - **H:** Authority for proposition that the Cth could control things and activities outside Australia regardless of international agreements or international law (Barwick CJ at 360, Mason J at 470, Jacobs J at 497 and Murphy J at 502-04)
       - Barwick CJ: anything which 'in its nature is external to Australia'

   - [**No nexus]** *War Crimes Act Case* (1991)
     - **F:** offences created regarding acts committed overseas in WWII
     - **H:** offences valid; Cth had plenary extraterritorial power and there was no nexus requirement (affirmed in *Victoria v Cth*)
       - Dawson J: "The power extends to places, persons, matters or things physically external to Australia"

        - Zines: to the extent that the provisions concerned acts done out of Australia it was supported by s 51(xxix)

- [**Void at international law irrelevant]** *Horta v Commonwealth* (1994)
    - **F:** provisions implementing a bilateral treaty with Indonesia concerning exploitation of natural resources in the Timor Gap
    - **H:** it was irrelevant whether the treaty was void at international law; it was further made clear that the validity could be made out based on geographical externality and the existence of a treaty was immaterial in this case

- [**Mere geographic externality sufficient]** *XYZ v Commonwealth* (2006)
    - **F:** offence to engage in 'sexual tourism' (intercourse with people under 16 overseas)
    - **H:** Gleeson CJ, Hayne, Gummow and Crennan JJ upheld the validity of the laws based upon the geographical externality principle and rejected the challenge to its correctness
        - *Note* doubts expressed by Kirby J (holding the law valid based upon it affecting Australia's relations with other nations), and dissents by Heydon and Callinan JJ who rejected the principle of geographical externality

- [**Removing people to other countries]** *Plaintiff M68 v Minister for Immigration* (2016)
    - **F:** provisions arranging for certain non-citizens to be taken to Naura pursuant to the terms of an entered agreement
    - **H:** removing people to other countries fell within the ambit of s 51(xxix); *note* the dissent of Gordon J based upon a breach of Ch III (detention of aliens)

Treaty Obligations

1. **Specificity principle:** the question of whether the treaty provisions are sufficiently precise in their clarity (i.e. full employment example)

    - There is uncertainty whether this is a discrete principle, or whether the conformity principle is difficult to apply where language is ambiguous or vague (*IRA Case*)
        - Per the majority at 486: 'the law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states'

    - Majority referred to **Zines** at 486: 'the objective must, nonetheless, be one in relation to which *common* action can be taken'

    - [**Vagueness]** Often required to allow State parties to come to an agreement
        - *IRA* at 486 - international agreements in their nature lack the clarity and precision that courts are more accustomed to in dealing with domestic affairs
        - A recommendation will often seek to add more clarity to the ambiguity of a treaty obligation – serves an important purpose (e.g.PQ3)

2. **Transformation principle**– although the power to ratify treaties is executive and is independent of legislative authority, to be binding on *citizens* there must be legislative effect (Gibbs CJ in *Kiao v West*)

   - Mason CJ and Deane J in *Teoh* at 286-7: 'the making and ratification of treaties fall within the province of the Executive… whereas the making and the alteration of the law fall within the province of Parliament'

3. **Does the implementation of the treaty obligation fall within the ambit of s 51(xxix)?**

   - **[Background]** *R v Burgess* distilled the opposing views of Evatt and McTiernan JJ (broad) and Dixon and Starke JJ (narrow).
     - [Broad] Evatt and McTiernan JJ at 687: 'the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations'
       - **Treaty sufficient** 'the fact of an international convention having been duly made about a subject brings that subject within the field of international relations…' (at 686)
     - [Narrow] Dixon and Starke JJ: the provision(s) must relate to a treaty obligation and the subject matter of the treaty needs to be of '*sufficient international significance'* (Starke J) or '*indisputably international in character'* (Dixon J)

   - **[Uncertainty]** *Koowarta v Bjelke Petersen* (1982) – concerned the *Racial Discrimination Act 1975* (Cth) in implementing an international convention.
     - Mason, Murphy and Brennan JJ (majority) adopted the broad view that the existence of an international agreement evidenced that the matter concerned Australia's international relations and could be implemented so long as it was a *bona fide* attempt at treaty implementation
       - Mason J with a somewhat practical approach – broader approach necessary so that Australia can implement its international obligations
     - Gibbs CJ, Wilson and Aickin JJ (minority) took the narrow view – the power extended only to a treaty which itself could be described as a matter of external affairs; the mere existence of the treaty was not enough
       - *Note* Gibbs concerned of maintaining the 'federal balance' between States and the Cth
     - **Stephen J** adopted the reasoning of the minority but concluded that racial discrimination was indeed a matter of international concern based upon a historical analysis – *'international acknowledgement of the need for universally recognised norms of conduct, particularly in relation to the suppression of racial discrimination'* (at 218)

   - **[Existence of treaty is sufficient]** *Tasmanian Dams Case* (1983):
     - **Ratio:** confined to the power to implement an obligation under a treaty or customary international law
     - 1. [Subject matter?] The treaty contained *in itself* the requisite international significance
     - 2. [Treaty obligation?] No majority view (see ratio)

        - Brennan J did not accept the broader interpretation; if there was *no obligation,* Brennan J would have followed the approach of Stephen J and considered whether the subject matter was one of international concern
        - Nonetheless, the view of Mason, Murphy and Deane JJ (no obligation needed) was later followed in the *Industrial Relations Act Case*
    - 3. [Conformity principle – Deane J – see further below]

4. **No obligation needed? Subject matter which satisfies s 51(xxix)**

- **[Context]**
    - This was left slightly uncertain in *Tasmanian Dams* due to Brennan J not considering the matter, but was developed in *Richardson* (Brennan J said a recommendation did suffice), and settled in the *Industrial Relations Act Case*

- [**Recommendation connected to treaty**] *Industrial Relations Act Case*
    - **F:** concerned recommendations of the ILO and conventions relating to it – *note* the various conventions were expressed in very broad terms and the recommendations of the ILO sought to provide additional clarity
    - **H:** The majority cite the liberal passage of Evatt/McTiernan from *Burgess* (see above) but they do *not* expressly adopt that position and it is unclear to what extent that view has been endorsed (given that this case had the existence of an underlying treaty)
        - **Ratio:** we can say *clearly* that **recommendations connected to a treaty** can be legislated upon, but beyond that it is unclear, so long as the treaty is ***bona fide*** as well
        - [**If no treaty?**] Gerangelos: given the trajectory of the court's interpretation broadening it may well be that the Evatt/McTiernan view will prevail (although by no means certain); Zines pointed to 'some ambiguity' in this aspect of the joint judgement
- **[Recommendation must be in conformity with treaty]:**
    - This is a qualification for recommendations - legislating with respect to a recommendation (connected to a treaty) will be valid "if, but only if, the terms of those Recommendations themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the conventions to which they relate" (at 509 *IRA Case*)

- [**Incidental power: 'reasonably apprehended obligations'**] *Richardson v Forestry Commission*
    - **F:** under issue was implementation of the same convention as in *Tasmanian Dam*; specifically, s 16 prohibited certain acts harming sites which were under an inquiry as to whether they were of heritage value (such that there was no obligation in existence at the requisite time)
    - **H:** the law was valid despite the lack of obligation – a '*reasonably apprehended obligation*' or subject matter which is reasonably incidental to the obligation is enough

        - ‘[Section 51(xxix)] supports a law calculated to discharge not only Australia’s known obligations but also Australia’s reasonably apprehended obligations’ (Mason CJ and Brennan J at 295)
        - So, the establishment of the commission of inquiry to determine whether sites would be heritage sites, and *thus* would become subject to an international obligation, was valid (Brennan, Mason, Murphy and Deane JJ)
    - **[Test]** Per Deane J at 311 - where the law is with respect to ‘purely domestic matters’
        - 1. There must be identified a purpose or object, itself a legitimate subject of external affairs: ‘eg the carrying into effect of a treaty, the performance of an international obligation or the obtaining of an international benefit’
        - 2. That purpose or object must pervade and explain the operation of the law to an extent that warrants the overall characterisation of the law as one with respect to external affairs; ‘reasonable clearness’ to be ‘really…referable’ to and explicable by the purpose or object which is said to provide its character
            - This requires that the law be capable of being reasonably considered the appropriate and adapted to achieve the designated purpose or object

- **[Treaty Benefits]**
    - All judges in *Tasmanian Dam Case* declared that the power in relation to international agreements was not confined to the fulfilment of obligations (Zines at p 423)
    - Mason J in *Tasmanian Dam* referred to the implementation of ‘benefits’ as permissible (at 129-30), as Barwick CJ had previously done in *Airlines (No 2)* at 86

- **[Customary international law]**
    - Cth can legislate with respect to obligations arising out of CIL – per Zines, the ratio of *Tasmanian Dam Case* ‘was confined to the power of the Commonwealth to implement legislatively an obligation under a treaty or customary international law’ (p 426)

- [**No treaty at all?]**
    - Stephen J made obiter comments in *Koowarta* that if Australia were not a party to the Convention ‘this would not necessarily exclude the topic as a part of its external affairs’ (at 220)
        - *Note* also the point above under ‘recommendations’
    - *Thomas v Mowbray* – Gleeson CJ, agreeing with Gummow and Crennan JJ, that the impugned legislation was also supported by the EA power: ‘the pursuit and advancement of comity with foreign governments and the preservation of the integrity of foreign states may be a subject matter of a law with respect to external affairs’
    - **Zines at 429:** in relation with treaty implementation, we are concerned in part with legislation that cannot be seen to have any sufficient relation to external affairs *without* the treaty (‘it is the agreement which establishes the relationship’)

        - Example given: a law which proscribed discrimination against foreign people would clearly involve Australia's international relations
    - **Zines at 437**: 'a law which on its face deals with relations between Australia and other governments is a law with respect to external affairs and it is irrelevant that there are no treaty or customary rules that the law implements' (cf *Sharkey*)
    - This was noted in PQ3 as well – although there is some judicial support, there is no authoritative statement

- **[International concern?]** Zines described this as matters that do not come within the 'international relations' (*Sharkey* principle) area, but which are not the subject of any provisions (obligations, rights or recommendations):
    - **Mason J in *Koowarta* (1982):** 'a matter which is of external concern to Australia having become a topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it' (at 234)
    - ***But* note *XYZ v Commonwealth* (2006) –** Kirby, Callinan and Heydon JJ were the only judges to consider the 'international concern' argument as the majority upheld the provisions based on mere geographical externality
        - **Callinan and Heydon JJ (dissenting)** in *XYZ v Commonwealth* (2006) where they stated that there was no decision of the HCA that 'the international concern doctrine' existed (at 607), although there was various dicta in its support → they noted the issue of whether the concern had to exist when the legislation was enacted *and* when it was contravened
        - **Kirby J** in *XYZ* had similar reservations: 'it could refer to a diverse multitude of topics, lacking any precise definition or meaning' (at 572-3), though Kirby J found the provisions valid as they involved relations with other states (denied by Callinan and Heydon JJ)

5. **Conformity principle - the margin of appreciation test**

- **[Judicial approval]** The test was accepted in *Richardson* and the *IRA Case*

- [**The test]** This emerged from Deane J's judgement in *Tasmanian Dams* at 259*:*
    - (a) "A law will not properly be characterised as a law with respect to external affairs if it failed to …
        - i) carry into effect or to comply with the particular provisions of a treaty which it was said to execute or
        - ii) if the treaty which the law was said to carry into effect was demonstrated to be no more than a device to attract domestic legislative power…**AND**
    - (b) The law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs [in this case implementing a treaty] [**margin of appreciation**]

- Although not a '**proportionality'** test, Deane J noted at 260 that implicit within this requirement is that there be 'reasonable proportionality between the designated

purpose or object and the means which the law embodies for achieving or procuring it'

- [**Where there is no treaty]** We still must apply the margin of appreciation test:
    - **Zines at 441** rejected Callinan and Heydon JJ's suggestion in *XYZ* that 'international concern' would have validated the *Communist Party Case* under the EA power by saying that it would be difficult to conclude that the Act was 'appropriate and adapted to dealing with' the concern

- Example:
    - Used the 'extravagant example' at 260 of a law requiring all sheep in Australia to be slaughtered not falling within s 51(xxix) merely because an international convention required taking steps to safeguard against the spread of 'some obscure sheep disease' which had not reached our shores

6. **Partial implementation?** This may occur in two ways (*IRA Case*)

- [**Quantitative (easier)**]: only some but not other treaty provisions are implemented → court will generally say that the margin of appreciation test is satisfied, but not if:
    - A) the treaty itself requires implementation of all provisions
    - B) if certain provisions depend on others

- [**Qualitative (harder)**] where particular provisions are implemented selectively → will be invalid if 'the deficiency is so substantial as to deny the law the character of a measure implementing the convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the convention' (*IRA Case* at 489)

- Examples:

    - *Victoria v Cth* – it was noted at 488 by the majority that *Tasmanian Dam Case* and later authorities confirm that compliance with *all the obligations assumed under the treaty* was not an *essential requirement of validity*

    - *Tasmanian Dam Case* (Deane J at 268): 'if the relevant law '**partially'** implements the treaty in the sense that it contains provisions which are consistent with the terms…and also contains significant provisions which are inconsistent with those terms, it would be extremely unlikely that the law could…be characterised as a law with respect to external affairs'

- **[PQ Note]** If we determine that implementation is beyond express power, we have to consider severance/reading down; but, consider first the implied incidental power such that regulation of a certain matter is necessary in order to make effective the regulation of the subject matter of the treaty obligation (e.g. PQ3: African vs. Aboriginal & Torres Strait Islander)

7. **Further limitations on power**

- [**Constitutional prohibitions]** Judgement of Gordon J (dissenting) in *Plaintiff M68* – opined that the provision was within s 51(xxix), but that the authorisation was not valid to the extent that detaining aliens was in breach of Ch III
    - Although dissenting – this shows the approach to be taken in respect of the "powers/prohibitions" dichotomy

- [**Bona Fide**] Treaty must be 'bona fide' (though Gibbs CJ in *Koowarta* referred to this as 'at best, a frail shield' at 200)
    - In *Koowarta,* Brennan J at 260 said: 'a law with respect to a particular subject would not necessarily attract the support of para (xxix) if a treaty obligation had been accepted with respect to that subject merely as a means of conferring legislative power upon the Commonwealth Parliament'

The more effective limit is the conformity principle (see above)