

Constitutional Law Exam Notes

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Topic 5: External Affairs and Nationhood Powers

“The Parliament shall, subject to this Constitution, have power to make laws with respect to... external affairs” s51 (xxix).

RED FLAG: Cth implements treaty, regulates conduct abroad (ET), law affects relations w/ other countries (relations w/ other countries).

Extraterritorial Power (ET)

Arises when Parl legislates with respect to acts or matters **beyond** its borders.

- A law will be extraterritorial where it relates to “*places, persons, matters or things*” situated “*outside the geographical limits of Australia*” (ILO)
- Non-purposive power (no nexus requirement), **broad scope**.
- There ‘mere fact’ a **matter external to Australia is sufficient** (XYZ, confirming *Poly*).
- As per s3 of the State of Westminster, all colonial denominations — incl the Cth of Australia have extraterritorial power. This power is **plenary**.
 - The Cth will argue [*insert law*] is extraterritorial because [*insert facts*]. As per *Polyukhovich* and confirmed in XYZ and ILO, there is no requirement for nexus between the legislating jurisdiction and the matter being regulated as long as the matter is external to Australia.

Polyukhovich v Commonwealth (1991)

Can the Cth regulate ET matters under s51 (xxix) **without a nexus** between the Cth and that matter?

- Polyukhovich was guilty under the Cth War Crimes Act for conduct in Ukraine.
- His lawyers argued the law was beyond the scope of Cth legislative power in s51 (vi) (defence) and s51 (xxix) EA.

Held: 6:1 majority, the HC ruled the Act was a **valid exercise of EA power**.

- The majority agreed **no nexus was required at all**.
- Gaudron J suggested a nexus might be desirable, but held that the decision of the Cth to legislate is itself **sufficient evidence of that nexus**. Effectively, this reflects that the issue of a nexus was **non justiciable** (a political, not legal question).
- Toohey J argued the Cth should only legislate over matters with a **genuine connection to Australia**, but found Australia’s involvement in WWII **provided such** a connection.

Principle: the case **confirmed s 51(xxix) confers plenary extraterritorial power**, holding that a **nexus is not necessary** though some judges preferred a practical connection.

Horta v Commonwealth (1994)

- Australia & Indonesia signed a bilateral treaty, the Cth legislated to implement the treaty.
- Horta challenged the Act and treaty, claiming it was invalid as it violated international law.
- HC held: the treaty was **valid**. Even if the treaty itself was invalid, it need not matter as the **legislation fell within the EA power, and the Cth's HoP.**
- The validity of the treaty & Australia's conduct under international law were **irrelevant to the constitutional validity of the Act.**
- The Act related to matters '**physically external**' to Australia (which is **sufficient** to bring it within s51 (xxix).
 - Clear broad scope of ET power.
 - "Regardless of whether the mere fact that a matter or thing is territorially outside Australia is of **itself sufficient** ... it is clear that the area of the Timor Gap ... all fall within ['external affairs']. There is an obvious and substantial nexus between each of them and Australia" [Mason CJ, Dean, Dawson, Toohey, Gaudron, McHugh JJ at 8)

Victoria v Commonwealth (1996) ('ILO' Case)

Reaffirmed *Polyukhovich*: the external affairs power **extends to any place, person, matter or thing outside Australia's geographical limits.**

- Confirms test of sufficient connection and ET power.
- "*External*" is precise and unqualified; "*affairs*" is broad and inclusive.
- This now represents the modern doctrine of extraterritorial power.
 - "(T)he power extends to places, persons, matters or things physically external to Australia. The word '*affairs*' is imprecise, but is wide enough to cover places, persons, matters or things. The word '*external*' is precise and is unqualified. 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*'"

XYZ v Commonwealth (2006)

Does the EA power allow the Cth legislate with respect to acts done by Australians, **outside** Australia? ***Mere geographical externality is sufficient for a law to fall within the EA power.***

- XYZ charged w/ offences he committed overseas, Crimes Act was **amended** to prohibit such overseas conduct. XYZ argued that *Polyukhovich* was wrongly decided.
- Held: **Cth law was valid, endorsing *Polyukhovich*.**
- s 51(xxix) supports legislation concerning acts, matters, or things outside Australia, including conduct by Australian nationals overseas. So long as the subject matter is **physically external to Australia**, s51(xxix) **is sufficient** - no additional justification required.
- The law was valid because it related to matters **physically external to Australia** following *Polyukhovich* and *Horta*.

Topic 6: Financial Powers

The Grants Power

As per s96 of the Const, 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

RED FLAG: look for parl wanting to give States financial assistance

There are three categories of grants:

1. **General Revenue Grants** (for state general budget, not for a specific purpose)
2. **Special Assistance Grants** (from time-to-time to respond to financial inequalities between states)
3. **Specific Purpose Grants** (specifying for what purpose the \$ can be used; e.g. activities that fall outside the HoP)

Scope of s96

Defined by a broad view, once Cth establishes that a law is made pursuant to s96, the Cth is able to attach any conditions whatsoever to the grant, so long as it does **not legally compel the States to accept** (*Fed Roads Case*); though, compulsion is not readily found, meaning Courts are typically reluctant to find it (*First UTC*) *Federal Roads Case*

WR Moran Pty Ltd v DFCT NSW (1940)

- The Cth can use s96 when 'it thinks [its] proper'.
- No constitutional impediment to granting money discriminately.
- States **can** be used as mere conduits for funds.
- Cth can use s96 to address inequalities between States.
- **Temptation ≠ compulsion**, financial pressure is also permitted, Cth legislation is permitted to weaken State activity (Latham CJ) (*First UTC*).
- The object of the law can be outside Cth powers (e.g. Federal Roads re: road building)

LIMITATIONS TO GRANTS POWER:

- States **must be constitutionally capable** of fulfilling conditions (e.g. cannot be compelled to pass laws contrary to Vic's IFPC for instance)
- S96 cannot be **merely be 'colourable'** e.g. s96 cannot be used to evade constraints of HoPs (e.g. cannot be used discriminatorily per s51(ii) (tax power) **if** it is colourable, though it was not found in *Moran*); 'colourable' Cth is effecting discrimination as its real purpose under the guise of the grants power; though, HC can be reluctant to find such as it is difficult to ascertain parliament's intention;

- *ICM Agriculture v Cth 2009*: s96 power 'does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to **acquire property on other than just terms**'
- *DOGS Case (1981)*: s96 **cannot be used to evade const limits** like s116 (govt cannot establish a religion, though this wasn't the case in DOGS)

Victoria v Commonwealth 1926 ('Federal Roads Case')

- *Federal Roads Act 1926 (Cth)* made Specific Purpose Grants to States, requiring them to use the funds to create 'federal aid roads.'
- Some roads were intra-state and thus outside of the scope of the trade and commerce power under s51(i)
- Vic and SA challenged the scheme, arguing Parl could not use s96.
- **Issue: were the grants valid under s96?**
- Cth can attach any reason to a grant, as long as there is no compulsion.
- Cth can legislate to grant aid to shape State activities, this does not contravene const.
- Held: the grants were **valid**, did not affect any provisions.
 - *'It is plainly warranted by the provisions of sec. 96... and not affected by those of sec. 99 or any other provisions... so that exposition is unnecessary.'*

South Australia v Cth 1942 ('First Uniform Tax Case')

- Cth sought uniform income tax during WWII; States refused.
- The Cth nevertheless introduced a uniform income tax scheme by way of 4 Acts
- Cth couldn't directly prohibit State income tax but made its collection practically impossible via the scheme.
- Held: **all Acts valid**, each considered separately; Cth **can use financial pressure** via grants to achieve uniform policy w/o breaching federal limits.
- **temptation ≠ compulsion**
 - Act 1: unanimously valid under **s 51(ii)** (taxation).
 - Act 2: 4:1, Latham in majority: Cth may **induce** (not compel) States via conditional grants; **temptation ≠ coercion**. No breach of **s99** (discrimination).
 - Act 3: Valid as incidental to taxation power.
 - Act 4: Valid (3:2) under **s 51(vi)** (defence power).

South Australia v Cth 1957 ('Second Uniform Tax Case')

- **Post-war**, the defence power was no longer relevant.
- The issue was whether the **same scheme could be maintained in peacetime**, relying on **other powers (taxation s 51(ii), grants s 96, incidental s 51(xxxix))**.
- The States argued that the scheme was **coercive**, as it left them practically unable to impose their own income tax.
- Held: The Court reaffirmed the validity, but **purely on fiscal and constitutional grounds** (taxation + s 96 grants), **not defence power**. Courts look at the 'true reason' of the grant.

HD Answer Guide

External Affairs (TREATY POWER)

Introduction

By virtue of section 51(29) of the Constitution, the Commonwealth is granted the **external affairs power**, which enables it to give domestic legal effect to treaties and other international obligations.

The High Court has interpreted this power broadly, with its scope refined through **Koowarta, Tasmanian Dams, Richardson** and **ILO**. The *Tasmanian Dams* test determines whether the Commonwealth has validly enacted legislation under section 51(29).

Preliminary Issue (if the instrument is NON binding)

Although the **[non-binding instrument]** is not a treaty, the Commonwealth may nonetheless rely on section 51(29) where the measure is **reasonably connected** to Australia's broader international commitments in the relevant field (*Tasmanian Dams*; *ILO*). In *ILO*, the Court accepted that Parliament may give domestic effect to **recommendations or incidental obligations** where the legislation is reasonably capable of achieving the instrument's objectives, and where Australia's participation as a member state in the **[relevant international org/UN framework]** supports that connection. Accordingly, the Commonwealth may rely on the external affairs power on an **incidental basis**, provided the *Tasmanian Dams* test is otherwise satisfied.

Limb 1 BONA FIDE:

First, the treaty, recommendation, or instrument must be **bona fide**, meaning that it was entered into in good faith and not merely to expand Commonwealth power (*Koowarta*). As *Brennan J* observed, courts are reluctant to infer bad faith, given the difficulty of ascertaining parliamentary intention. OTF, there is nothing on the facts to suggest that the Commonwealth acted in bad faith; therefore, this limb is satisfied.

Limb 2 OBLIGATION:

Binding:

Second, the instrument should reflect an obligation upon the signatory. The inclusion of **mandatory or imperative wording** is evidence of an obligation. For example, terms such **[insert obligatory terms/words]** indicate binding commitments. On the facts, the **[instrument/legislation]** clearly contains such mandatory terms, and an obligation is therefore established.

Non Binding:

Alternatively, where the instrument employs soft or aspirational language, such as **[soft language]** the absence of precision does not necessarily defeat validity. In *Tasmanian Dams*, the Court did not require binding obligations, and in *ILO*, it affirmed that Parliament may legislate to give effect to recommendatory or incidental commitments, provided these relate to Australia's recognised international responsibilities in the relevant subject area. Although this remains an unsettled area of law, the narrower view in *Tasmanian Dams* would confine validity to laws implementing binding obligations. Nevertheless, courts will not read