

	<p>industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations" are laws with respect to constitutional corporations.</p>
	<p>GAUDRON J'S OBITER IN <i>PACIFIC COAL</i>: "I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.</p>
<p><i>Ravbar</i></p>	<p>Legislation inserted a new clause into the <i>Fair Work Act</i>, which makes a provision for the Construction and General Division of the CFMEU and each of its branches to be placed under administration. HELD: Doesn't matter whether the Union is a corporation or not; this was a law about what non-corporations can do with respect to Corporations.</p>

STEP FIVE – CONCLUDE!

EXTERNAL AFFAIRS POWER

- Fully overlaps with the Pacific Islands relations power.
- Has three heads of power under this external affairs power: power to make laws with respect to international relations, laws with respect to matters geographically external to Australia, and laws implementing international legal obligations.
- No power to enact laws with respect to matters of international concern, or laws implementing international recommendations that are not an implementation of an international legal obligation.

EXTERNAL AFFAIRS POWER PROVISION

Section 51 – The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (xxix) external affairs
 - International relations (subject matter power – sufficient connection test)
 - Geographical externality (subject matter power – sufficient connection test)
 - Implementing international legal obligations (purposive power)
- (xxx) the relations of the Commonwealth with the islands of the Pacific [subset of external affairs]

Sufficient connection test: Is there a sufficient connection between the practical and legal effect of the statute and the subject matter of international relations/geographical externality?

INTRODUCTION, WRITE: *Section 51(xxix)* of the *Constitution* provides Parliament with the power to pass laws with respect to 'external affairs'. Leeming JA in *Alqudsi* has outlined that the external affairs power includes power to

pass laws with respect to international relations, matters geographically external to Australia, and the implementation of international legal obligations.

Here, the scenario deals with [what conduct – only conduct in Aus?], and the relevant component of the external affairs power is therefore [what component]. [THEN GO BELOW TO THAT COMPONENT].

LAWS WITH RESPECT TO INTERNATIONAL RELATIONS

→ International legal person = e.g. the UN, States (countries)

WRITE: The relations of the Commonwealth with all countries outside Australia, including other Dominions of the Crown, are international relations and are matters which fall directly within the subject of external affairs (Latham CJ in *Sharkey*), as well as relations with all international legal persons (*Brennan J in Koowarta*).

APPLY: [Proposed law] concerns [what]. This is/is not a subject matter with respect to international relations as [why – analogise].

→ APPLY SUFFICIENT CONNECTION TEST + ANALOGISE

This is similar to ... [case] ... where it was found there was/was not a sufficient connection with external affairs as [why] ...

WRITE: While [proposed law] concerns international relations, per Kitto J in *Herald & Weekly Times*, for [proposed law] to be constitutionally valid, there must be a substantial connection between the subject matter of the law and s 51(xxix). *Re F* informs us that we must look to the practical effect of the statute to decipher if there is a sufficient connection. In assessing the practical effect, it is necessary to determine the character of [proposed law] with reference to the rights, powers, liabilities, duties and privileges it creates (per McHugh J in *Re Dingjan*).

[Statute's] practical effect is [what – what does the law do]. It creates rights, powers, liabilities and duties in respect of [what].

[Proposed law] will only be without respect to [what head of power] if it is 'so insubstantial, tenuous or distant' that it cannot sensibly be described as a law with respect to that head of power.

Examining the practical and legal operation of [proposed law], a connection does/does not exist with [what head of power]. This is because [why]. Consequently, [proposed law] is/is not a law with respect to [what head of power] and therefore is/is not constitutionally valid.

CONCLUDE, VALID?

ANALOGISE

R v Sharkey – SPEECH SUPPORTING SOVIET INVASION OF UK

Sharkey was a communist and gave a speech expressing support for a Soviet invasion of the UK. It was an offence under federal law to excite disaffection against the Government of Constitution of any of the King's Dominions (UK). Was this a valid law with respect to external affairs? Sharkey argued he is in Australia, so it should be invalid.

HELD: 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.

Applying the test of characterisation: Is there a sufficient connection between the practical and legal operation of this law and the subject matter of external affairs which includes relations with other countries? Yes, **this law has something to do with relations of other countries.**

Latham CJ: **The preservation of friendly relations with other Dominions is an important part of the management of the external affairs of the Commonwealth.** The prevention and punishment of the excitement of disaffection within the Commonwealth against the Government or Constitution of any other Dominion may reasonably be thought by Parliament to constitute an element in the preservation of friendly relations with other Dominions.

Koowarta

Brennan J: **When a particular subject affects or is likely to affect Australia's 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 Australia's relationships provides the connection which the words 'with respect to' require. Those relationships, various in form and significance, are the substance of Australia's external affairs.

Thomas v Mowbray – TERRORIST ATTACKS

Thomas had been found to be fighting with the Taliban in Afghanistan. He had not committed any crimes under Australian law. When he was brought back to Australia, the Govt enacted the control order regime designed to prevent terrorist attacks. A terrorist attack was defined to include acts direct at foreign states or at the public of foreign states.

Gleeson CJ, Gummow and Crennan JJ held that terrorist acts as defined are a matter affecting relations with other countries. Terrorist might be planning to do something to or in another country which would affect Australia's external affairs.

LAWS WITH RESPECT TO MATTERS GEOGRAPHICALLY EXTERNAL TO AUSTRALIA

WRITE: While it was suggested that there must be a (perhaps substantial) nexus between Australia and the external affairs which a law purports to affect in order for the law to be supported by *s 51(xxix)* (**Brennan J in War Crimes Act Case; Horta v Cth**), it is accepted that the mere externality principle is sufficient. Pursuant to the mere externality principle, if a law concerns any matter, thing or person occurring or situated outside Australia, it is a law with respect to external affairs (**per Deane J in War Crimes Act Case; XYZ v Cth**).

APPLY: [**Proposed law**] concerns [**what**]. This is/is not a matter, thing or person occurring or situated outside of Australia as [**how – ANALOGISE**].

- **War Crimes Act:** EXTERNAL MURDER

- P committed war crimes in Europe in WWII. Cth passed law identifying as 'war crimes' certain acts committed in Europe during WWII and provided for the trial in Australia of any person who was now an Australian citizen or resident who was accused of such crimes
- **HELD:** Valid under external affairs based on the fact the geographical location in which the relevant acts were committed was physically external to Aus.

- **Horta:**

- Australia and Indonesia entered into a treaty for joint exploration of oil resources in the Timor Gap. Both Australia and Indonesia claimed the area in question as part of the continental shelf. Legislation was passed to give effect to the treaty.
- **HELD:** Valid under external affairs as it was about a thing (namely, mineral resources) that were geographically external to Australia.

- **XYZ:**

- Had sex with a child overseas – against the federal law.
- **HELD:** Valid. It is enough if the place, person, matter or thing is physically external to Australia, nothing more is required.

- **Alqudsi:**

- Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) stated it is a crime (s 6(1)(a)) to enter a foreign State with the intent to engage in a hostile activity in that foreign State. Hostile activities in a foreign state was defined as ‘doing an act with the intention of engaging in armed hostilities in the foreign State’. Section 7(1)(e) stated it was 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.
- **HELD:** Valid. S 7 about doing something here to help someone there. The accused person’s intangible mental state had a sufficient connection with something geographically external to Australia, namely activities outside Australia carried out by other persons, because that mental state involved an intention to assist those external activities. The accused person’s tangible conduct within Australia had a sufficient connection with something geographically external to Australia, namely the carrying out of activities outside Australia other persons, because the conduct within Australia in fact assists the conduct outside Australia.
- **Leeming JA:** no reason to confine the subject matter regulated by the power to physical things’

→ APPLY CHARACTERISATION & SUFFICIENT CONNECTION TEST

WRITE: While [proposed law] concerns matters geographically external to Australia, per Kitto J in *Herald & Weekly Times*, for [proposed law] to be constitutionally valid, there must be a substantial connection between the subject matter of the law and s 51(xxix). *Re F* informs us that we must look to the practical effect of the statute to decipher if there is a sufficient connection. In assessing the practical effect, it is necessary to determine the character of [proposed law] with reference to the rights, powers, liabilities, duties and privileges it creates (per McHugh J in *Re Dingjan*).

[Statute’s] practical effect is [what – what does the law do]. It creates rights, powers, liabilities and duties in respect of [what].

[Proposed law] will only be without respect to [what head of power] if it is ‘so insubstantial, tenuous or distant’ that it cannot sensibly be described as a law with respect to that head of power.

Examining the practical and legal operation of [proposed law], a connection does/does not exist with [what head of power]. This is because [why]. Consequently, [proposed law] is/is not a law with respect to [what head of power] and therefore is/is not constitutionally valid.

CONCLUDE, VALID?

→ **ANALOGISE:**

War Crimes Act Case

Polyukhovich committed war crimes in Europe during WWII. He was not Australian, and the people he murdered were not Australian. After the war, he ended up in Australia.

Legislation passed by the Federal Parliament – ‘War Crimes Act’ – identified as ‘war crimes’ certain acts committed in Europe during WWII and provided for the trial in Australia of any person who was now an Australian citizen or resident who was accused of such crimes. P argued he didn’t fall within the scope of this, or that if he did, the statute is beyond power because none of this has anything to do with Australia – he was not Australia, nor were the people he murdered.

HELD: Mason CJ, Deane, Dawson and McHugh JJ held the law was valid based on the fact that **the geographical location in which the relevant acts were alleged to have been committed was physically external to Australia.**