Federal Constitutional Law

(LAWS2011)

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Overview

Usually, you will be determining the constitutional validity of a Commonwealth law, purportedly valid under a relevant head of power, and purportedly not in breach of any relevant constitutional prohibitions.

Examinable Heads of Cth Law-Making Power:

1. **The External Affairs Power** – s51 (xxix) → power to make laws ‘with respect to external affairs’

2. **The Corporations Power** – s51 (xx) → power to make laws ‘with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’

3. **The Taxation Power** – ss51(ii), 55 → power to make laws ‘with respect to taxation’

4. **The Grants Power** – s96 → power to grant financial assistance to ‘any State on such terms and conditions as the Parliament thinks fit’.

5. **The Excise Power** – s90 → grants Cth exclusive power to collect customs and excise duties.

6. **The Defence Power** – s51(vii) → power to make laws ‘with respect to the naval and military defence of the Cth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.’

Examinable Limitations/Prohibitions on Cth Law-Making Power:

1. **The Freedom of Interstate Trade** – s92 → ‘Trade, commerce, and intercourse among the States shall be absolutely free’

2. **The Doctrine in the Communist Party Case** → ‘Parliament cannot conclusively ‘recite itself’ into power’; ‘stream cannot rise above its source’

3. **The Implied Freedom of Political Communication** → Cth laws cannot breach the implied right to freedom of political communication, unless they satisfy the compatibility and proportionality testing in *McCloy*.

4. **Intergovernmental Immunities** → Implied prohibition on Cth laws impinging on state governments and their entities in a way that is specifically discriminatory against a state, or discriminatory vis a vis another person/s, or that impinges on their ability to operate/function as a State.
The Heads of Power
**The External Affairs Power – s51(xxix)**

**S51**: 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

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**Problem Question Summary**

The central question relating to whether a law is valid under s51(xxix) is, is it "with respect to external affairs"?

There are 4 areas that the court has considered on this point that might bring the law within power:

**A. Relations with other nations / international bodies**

- The Cth may regulate conduct in Australia that directly affects the nation’s relationship with other countries ([R v Sharkey](#)).
- The law need not have a ‘friendly relations’ objective, so long as it directly concerns foreign ties ([Zines](#)).
- There has been judicial endorsement of this principle extending to Australia’s relationship with ‘international persons’ e.g. the UN ([Brennan J in Tasmanian Dam](#))

**B. Geographic Externality**

- The external affairs power extends to any matter that is geographically situated outside Australia ([Sea and Submerged Lands Case per Mason J](#))
- It is now settled law that there is no ‘nexus’ required between the matter external to Australia, and Australia’s own interests and affairs; mere geographic externality of subject matter is enough ([Polyukhovic; confirmed in IRC Case; Horta; and XYZ](#))

**C. The Doctrine of International Concern**

- It has been suggested that, even absent a treaty or recommendation, a law may still be valid if it deals with a ‘matter of international concern’ (e.g. propositioned by Murphy J in [Tasmanian Dam](#))
- As yet, the HCA has not unambiguously confirmed that a matter of ‘international concern’ is or is not enough to enliven the external affairs power.
- However, at present the better view is that it is unlikely that just because something is of ‘international concern’ that it qualifies as part of our ‘external affairs’.
  - E.g. Callinan and Heydon JJ in [XYZ](#): argued the doctrine in the CP case negated the view that this doctrine existed as it requires a subjective judgement too volatile and elusive to define.
  - E.g. Kirby J in [XYZ](#): ‘undeveloped in Australia’
  - E.g. Heydon J in [Pape](#): Dismissed the ‘supposed’ international concern doctrine as having no merit.
**How to use doctrine in a PQ:** If you’re finding a law invalid in a PQ consider the possibility that if the doctrine of international concern were one day found to enliven the power, then perhaps the law would be valid on that ground.

- This would usually be a situation where you say ‘the law is an invalid attempt to implement a treaty’ (e.g. it lacks conformity or something), but the issue it deals with might be one of international concern, and as such were the court to accept the doctrine of IC, then perhaps the law might be valid after all. But then note the fact that such an acceptance would be unlikely.

**D. Implementing a Treaty**

1. It is a Crown prerogative to enter into Treaties on any subject, however such action only bind Australia *externally:* *Dietrich v The Queen.*

2. Indeed, Australia’s dualist system of treaty implementation requires that international law developments be incorporated into Australian law by an Act of Parliament. (*Koowarta per Mason* J).

3. Assuming the subject matter of the treaty isn’t covered under any other s51 law-making powers, Cth must rely on the fact that the subject matter is contained in a treaty to engage the power. *But what counts as a treaty?*

   a. The Cth certainly has the power to implement a treaty obligation or recommendation (*Tasmanian Dam; IR Act Case*).

   i. Since the *IR Case,* it is also likely valid to implement recommendation of international bodies where they are ‘hinged’ to a particular treaty (i.e. where international body is making recommendations directly related to that treaty: recommendations must reasonably be regarded as appropriate and adapted to giving effect to the terms of the conventions to which they relate: *Zines*).

   ii. However, as yet the broad view in *Burgess* that general recommendations by international organisations unconnected to treaties are adequate is not resolved as good law. In *IR Case,* majority seemed to cite *Burgess* view with approval however this was obiter that didn’t directly confirm this position as good law.

      * At best, the *IR Case* is authority for the proposition that the Commonwealth can implement recommendations where they are ‘hinged’ to a particular Treaty (e.g., where international body making recommendations is referred to in the Treaty), provided those recommendations are themselves appropriate and adapted to giving effect to the Treaty – i.e., directly related.

      * Accordingly, the question is whether the [legislation] is capable of being considered to be reasonably appropriate and adapted to [Convention], as interpreted by [body making Recommendation]*

   b. Treaty instrument must be bona fide (Full Court in *Burgess; Koowarta*)

   c. It is not longer necessary that the treaty’s subject matter be of ‘international significance’ (Broad view of Evatt-McTiernan in *Burgess; confirmed in* *Tasmanian Dam*)

   d. There are some suggestions in the *IR Act Case* that there exists a ‘specificity principle’ i.e. that the treaty instrument must provide a sufficiently specific method for the implementation of its particular provisions; so-called ‘aspirational statements’, for example, lack specificity e.g. an obligation to provide full employment, which could be thought by reasonable people to be accomplished via vastly divergent means.

4. If the treaty itself is capable of implementation, the next question is whether the implementing legislation itself satisfies the conformity principle (*Tasmanian Dam; Richardson; IRA Case*)
a. **Test:** In the *Tasmanian Dam Case*, Mason J affirmed that the entry into the treaty does not allow Parliament to legislate ‘as if that subject matter was a new and independent head of legislative power’. The Cth is restricted to carrying the provisions of a treaty into effect, and a law which does not conform to the treaty will be invalid.

    i. A law will conform with the treaty if it is ‘capable of being reasonably considered to be appropriate and adapted to implementing the treaty’ (Deane in *Tasmanian Dams Case*, confirmed in *Richardson v Forestry Commission* and unequivocally adopted in the *IR Case*). This test allows a significant margin of appreciation to the opinion of Parliament (the *IR Case*).

b. **Partial Implementation:** The law does not need to implement all the provisions of a Treaty in order for it to be valid (*See Tasmanian Dams*). However, a law will be invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention; i.e. if partial implementation amounts to partial conformity. (*IR Case*).

    o Quantitative partial implementation: This is where only some of the obligations in the Treaty are implemented. This is *prima facie* valid, unless it could be shown that the missing obligations were absolutely necessary to give effect to the Treaty, or that the relevant separate recommendations were dependent or conditional upon each other.

    o Qualitative partial implementation: This is where you legislate the benefit not the burden of a treaty article, or the burden but not the benefit. This cannot be said to met the conformity principle test and there is definitively invalid.

5. If the attempted treaty implementation is invalid (and PG advice – if it is, it’ll usually be on the basis of partial conformity so read up on this), just note the potential for a court to find a matter of ‘international concern’ without an international obligation might be enough.
Expansive Notes

A. Relations with other Nations / International Bodies

• **Rule:** The case of *R v Sharkey* found that it is within the scope of the ‘external affairs’ power to legislate conduct within Australia that affects our relations in some way with other countries or international persons. Indeed, Latham CJ in *Sharkey* said that ‘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.’

• **R v Sharkey (1949)**
  
  o **Principle:** Found that it is within the scope of the ‘external affairs’ power to legislate conduct within Australia that affects our relations in some way with other countries or international persons like the UN and its subsidiary organisations.
  
  o **Facts:** Commonwealth Law in issue created an offence of sedition. Defined sedition as inciting disaffection against the UK or any members of the Cth. Sharkey, Secretary General of the Australian Communist Party, was charged for sedition under this law.
  
  o **Issue:** Was this law a valid exercise of the external affairs power?
  
  o **Held:** Laws dealing with relations of the Commonwealth with all countries outside Australia are matters that fall directly within the subject matter of external affairs.
  
  o **Reasoning:**
    ▪ The external affairs power *does* permit laws that prohibit or regulate conduct in Australia that affects our relations with other countries;
    ▪ Note that this could be *any conduct* that Cth might otherwise not have power over
    ▪ Doesn’t just have to be about friendly relations; enough if the law directly concerns our *ties* with foreign nations in any respect; this opens up scope to make a law that doesn’t focus on friendly relations e.g. trade bans
    ▪ Note that it has been subsequently found by scholars that you can extend the Sharkey principle to include relations with international persons such as the UN and UN bodies.
  
  • **Note that like all s51 powers, this power is ‘subject to this Constitution’, including:**
    o The Freedom of Inter-State Trade;
    o The implied freedom of political communication, and;
    o The Doctrine in the Communist Party Case

B. Geographic Externality

• **Rule:** A valid treaty is not required to satisfy geographic externality [*Horta*]. Indeed, to be ‘with respect to external affairs’ it is accepted that the law deals with things *geographically external* to Australia, and there is no requirement that there be a nexus between Australia and the external affairs that the law purports to affect.

  o **A. General Rule: Plenary Extraterritorial Power**
    
    ▪ In *Sharkey*, we know that the Court found that the relations of the Cth with all other countries outside Australia fall directly within the external affairs subject matter. We also know from *Horta* that a valid treaty is not required to satisfy geographic externality.
    ▪ In *Polyukhovic*, Dawson J found that this plenary extra-territorial power “extends to places, persons, matters or things physically external to Australia…if a place, person, matter or thing lies outside the geographical limits of this country, then it is external to it and falls within the meaning of the phrase external affairs.”
    ▪ In *Koowarta*, Brennan J found that this includes relations with international persons like the UN and IGOs.
B. No Nexus Required

- **Rule:** It is now settled law that there is no nexus required between the matter external to Australia, and Australia’s own interests and affairs. Mere geographic externality is enough *(Polyukhovic, Industrial Relations Case, Horta, and XYZ).*
- Examples of valid laws under this rule include extradition laws, laws regarding judicial notice taken of foreign judgments of foreign evidence i.e. things that don’t directly relate to Australia’s internal affairs.
- However, note that just because a law is valid does not mean it will be enforceable e.g. Australia could pass a law prohibiting smoking on the streets of Paris under the external affairs power, but would have no power to enforce it.

- **History of this debate:**
  - Need a nexus:
    - In *Sea and Submerged Lands Case,* Brennan J tried to argue that ‘the affairs which are the subject matter of the power are in my view the external affairs of Australia; not affairs that have nothing to do with Australia…there must be some nexus, not necessarily substantial, between Australia and the external affairs which a law purports to affect before the law is supported by s51(xxix).’
    - Toohey J in that case said “it must be a matter which the Parliament recognises as touching or concerning Australia in some way”
    - Doubts also entertained by Kirby, Callinan and Heydon JJ in *XYZ.*
  - Don’t need a nexus:
    - Majority in both *Sea and Submerged Lands Case* AND *Industrial Relations Act Case* held that no nexus was required.
    - Brennan CJ and Toohey J in *Industrial Relations* discarded their views and joined McHugh and Gummow JJ to endorse the broader view that no nexus is required; found that this “must now be taken as representing the view of the court.”

C. Subject to this Constitution

- Note that like all s51 powers, this power is ‘subject to this Constitution’, including:
  - The Freedom of Inter-State Trade, and;
  - The implied freedom of political communication;

C. The Doctrine of International Concern?

- **Rule:** It is unlikely that just because something is of ‘international concern’ that it qualifies as part of our ‘external affairs’.
  - Callinan and Heydon JJ in *XYZ* addressed whether the law fell under external affairs as the extraterritorial prohibition on the sexual exploitation of children is a matter of international concern.
    - Argued that *Communist Party Case* negated the view that this doctrine existed; and it required a subjective judgment; too volatile and elusive to define.
  - Kirby J in *XYZ:* “undeveloped in Australia”
  - Heydon J in *Pape v Commissioner of Taxation:* Dismissed the ‘supposed’ international concern doctrine as having no merits.
D. Implementing a Treaty

A. Preliminary Points

(i) Why we’re engaging the external affairs power

- Need to characterize subject matter of the treaty;
- Acknowledge that in the absence of the subject matter falling under any other head of power in s51, must rely on the fact that it is contained in a treaty and look at the external affairs power.

(ii) Implications of Australia’s transformation theory

- Entering into treaties is an executive action that does not require an act of Parliament; this is a prerogative power, justified by desire for expediency
- However, Australia has a transformation theory of treaty implementation, so ratified treaties must be transformed into Australian law by Parliament:
  - Mason J in Koowarta:
    - Australia maintains Westminster system, where international legal order binds Australia as a nation, but not us as citizens without an Act of Parliament implementing them;
    - The international legal order and national system of law are separate
    - International law developments will have a direct effect on Australia only when the Parliament, by a deliberate and separate act of law making, incorporates the international law into the domestic law.
  - Mason CJ and Deane J in Teoh: “A treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law”
  - Gibbs CJ in Koowarta: “the power of the Parliament to carry treaties into effect is not necessarily as wide as the executive power to make them”
  - Dixon J: “the executive action of ratifying a treaty commits Australia as a nation only externally and does not have any legal consequences on the rights or duties of the subjects of the crown.”

B. The Treaty Instrument Itself

(i) Must be a bona fide treaty

- Totally non-controversial point that treaty must be bona fide to be the source of external affairs power
- All judges in Burgess agreed on this.
- Stephen J in Koowarta: ‘not instances of a foreign government lending itself as an accommodation party so as to bring a particular subject matter with the other party’s treaty power’ i.e. it can’t just be a treaty made so that the government of one country can get something in under the external affairs power.
- However, note that it’s unlikely anyone would base litigation on a treaty not being bona fide; Gibbs CJ in Koowarta said this is a ‘frail shield’ rarely available
- PG says don’t get caught up on this point, just say something like ‘assuming the treaty is bona fide, as required by all judges in Burgess…’

(ii) Subject matter need not be of ‘international significance’

- Current Position: Deane, Mason, Murphy and Brennan in Tasmanian Dam settled this issue; the mere implementation of a treaty is enough to bring the Cth law within the external affairs power; do not need to show that the subject matter was of ‘international significance. Evatt/McTiernan view in Burgess has won.
Historical Background:

- **R v Burgess (1936):** This case set up the foundations for a long-lasting jurisprudential dispute between the very expansive view of McTiernan and Evatt J on the one hand (who said subject matter of treaties is irrelevant; once agreement is duly made, whatever its subject matter is is thus brought within the field of international relations) and the narrow Dixon/Starke view (found that you need 1) a treaty, AND 2) subject matter of sufficiently internal character)

- **Koowarta v Bjelke-Peterson (1982):** Took the narrow view, but interpreted liberally. If we consider Stephen J’s position as the ratio, ratio seemed to be the test was 1) you need an international bona fide treaty obligation, and 2) the subject matter of the treaty being sought to be implemented into Australia law needs to be of international significance, but this is to be interpreted liberally and subjectively.

- **Tasmanian Dam Case (1983):** Majority of Mason, Murphy, Deane, and Brennan JJ held that mere implementation of a treaty obligation is enough to bring the legislation in the external affairs power; concept of international significance is met by the mere existence of an international convention created through international cooperation – this makes it necessarily international in character; we don’t need some separate question.

(iii) What instruments does ‘treaty’ encompass?

- **Australia need not be a party:** In Tasmanian Dam, Mason J said Australia need not be a party to the treaty if it nevertheless affects relationships with other countries (e.g. a treaty that is designed to secure Australia a benefit)

- **Can be a treaty recommendation:**
  - Cth can implement treaty recommendations (Tasmanian Dam; IR Act Case)
    - Tasmanian Dams provided dicta on this point, but no clear majority position as Brennan did not decide on it: however, note Mason, Murphy and Deane JJ willing to accept a treaty recommendation as being within power
    - Yet later, in Richardson v Forestry Commission, Brennan J joined Murphy, Mason and Deane to state that an actual treaty obligation is not necessary to rely on the external affairs power
  - Even if the recommendation is made by a UN body interpreting a treaty provision, this is now probably ok: Ratio of Industrial Relations Act Case found that if there is an existing treaty or convention upon which an international organisation bases its recommendations, this can count as a treaty instrument; i.e. you can rely on recommendations of an international body if they are connected to a treaty.
    - Zines: However, Zines qualifies that this provision could be supported “if, but only if, the terms of these recommendations themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the conventions to which they relate.”

- **Are general recommendations or drafts adequate?**
  - In Burgess, the broad Evatt/McTiernan view supported the idea that any recommendation by an international organisation like the ILO (whether in relation to a treat or not), and mere drafts of obligations could form the basis for engaging the external affairs power;
  - However, this issue is thus far unresolved conclusively. In the Industrial Relations Case, the majority cited this very liberal McTiernan/Evatt view from Burgess that appeared to allow for general recommendations of UN bodies etc. to be taken into account, however this was a point of obiter so it’s not clear this is good law. Further and perhaps more crucially, the majority only cited it with seeming approval rather than directly stating that it was correct, so the position here is even more unsure.
C. The Conformity Principle

(i) Rule

- The ‘Conformity Principle’ is contained in the judgment of *Tasmanian Dam*, and is a limit on the external affairs power. It was accepted in the *Industrial Relations Case* as good law.
- Rule is that a law will not be ‘with respect to external affairs’ if it fails to carry into effect or comply with the particular provisions of the treaty which it is set to execute pursuant to the margin of appreciation test.
- Mason J in *Tasmanian Dam*: “I reject the notion that once Australia enters a treaty, Parliament may then legislate with respect to the subject matter of the treaty as if it were a new and independent head of Cth legislative power. The law must *conform* to the treaty and carry its provisions into effect.”
- Mason J’s example in *Tasmanian Dam*: An international convention that requires us to take steps against the spread of some obscure sheep disease would not justify a law demanding the slaughter of all sheep; can’t use this treaty to do with sheep as grounds for having a head of power to cover all sheep-related affairs.
- Deane J in *Tasmanian Dam*: A law will not be with respect to external affairs if:
  - (i) It fails to 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 purported to be giving effect to was no more than a device to attract domestic legislative power (i.e. must be bona fide as well)

(ii) Test

- Set out by Deane J in *Tasmanian Dam* – ‘Margin of Appreciation Test’
  - The law must be capable of being reasonably considered to be appropriate and adapted to achieving what it is said to impress it with the character of a law with respect to external affairs, i.e. law must be reasonably appropriate and adapted to implementing the treaty.
    - Must ask if the law can be seen with reasonable clearness upon consideration of its operation to be ‘really, not fancifully, colourable or ostensibly referable’ to;
    - The focus is on what is capable of being considered to be reasonably appropriate and adapted, not whether the court actually thinks it is; clear ‘reasonableness’ standard.
- This test requires you to:
  1. Examine the treaty – what is its subject matter?
  2. Examine the Cth law implementing the treaty – inspect the operation of its provisions, and
  3. Determine if the law could reasonable be said to be implementing the treaty.
- In *Industrial Relations*, court confirmed the ‘margin of appreciation test’ and clearly adopted it; the legislation must be reasonably appropriate and adapted to the implementation of the treaty.

(iii) Conformity Principle + Partial Implementations

- In *Burgess*, it was said that law must represent ‘the fulfilment, so far that it is possible in the case of laws operation locally, of all the obligations assumed under the convention’ and any sections that go too far must be severed.
- However, the current position was stated in the *Industrial Relations Act* case, where it was held that partial implementation of provisions of a treaty are not fatal to the conformity principle:
  - a) **Quantitative partial implementation:** multiple obligations, but only some but not other provisions are implemented;
    - This is not fatal to conformity principle.
• So long as can demonstrate the obligations are separate, and not contingent on each other.

  o b) **Qualitative partial implementation**: i.e. particular provisions are implemented selectively, e.g. a provision provides for a benefit or right, together with a burden, or obligation, and only the benefit or right is legislated for or vice versa.

  • Will depend ultimately on the extent to which it can be said that the legislation is implementing the treaty and thus meeting the requirements of the conformity principle.
  • This type of implementation would probably fail the conformity test because the obligation is multifaceted
  • Obligation is only given on that particular condition, and if such an obligation exists within a treaty if must be implemented in full, pluses and minuses (e.g. benefits and compensation)
  • Usually a qualitative partial implementation will be legislating the benefit not the burden of the obligation, or the burden and not the benefit.

**iv) Precision Requirement? (Specificity Principle)**

  • **Rule**: there needs to be sufficient specificity in the treaty obligation for it to be capable of implementation, so that one can determine whether a law implements it (*Industrial Relations Act Case*)

    o I.e. “the law must proscribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by signatory states.” (*IR Case*)

    o So-called ‘aspirational statements’ lack precision e.g. an obligation to provide full employment. Zine says such an example could not justify a law adopting one of a variety of contradictory ways to pursue full employment.

    o Another example is ‘higher standards of living’ – there are subjective views on how to achieve this; can’t say a law is implementing this provision because it’s too imprecise.

  • **Is this a discrete principle?**

    o Zines suggests that “a broad objective with little precise content and permitting widely divergent policies by parties” will not be one on which common action can be taken and thus would “prevent its use as a basis for legislative action”.

    o This, however, could be putting too fine a point on the authorities.

    o Winterton, on the other hand, argues not so much that the law is not implementing the treaty but if the treaty itself is insufficiently precise, then it is impossible to determine whether or not it is being implemented, that is, the margin of appreciation test cannot be applied.
Expansive Case Law Notes

• **Horta v Commonwealth (1994) 181 CLR 183 (Casebook 606)** – Geographic Externality

  o **Principle:** A valid treaty is not required to satisfy geographic externality.
  
  o **Facts:** Legislation enacted pursuant to bilateral treaty between Australia and Indonesia. Treaty was an agreement to have a joint venture to exploit natural resources at Timor Gap. This is an area claimed by both Australia and Indonesia as part of their continental shelf but not within territorial waters of either country.
  
  o **Issue:** H disputed Indonesia’s assertion of sovereignty over Timor, arguing Indonesia did not have the power to enter the treaty, therefore it was void. If this was correct, could the treaty be implemented under external affairs?
  
  o **Found:** the legislation was valid.

  o **Reasoning:**
    - Did not need to deal with whether the treaty was valid: irrelevant if treaty is void under international law or contrary to Australia’s other obligations under international law.
    - Regardless of whether a nexus was required, the law clearly related to external matters and there was an obvious and substantial nexus between them and Australia.
    - Examining the act as a whole, it is prima facie a law with respect to external affairs. Whether the provisions enable the discharge of Australia’s obligations under the treaty or give effect to the provisions of the treaty is irrelevant. Would even be valid if there was no treaty.

• **Polyukhovic v Cth (1991)** – Geographic Externality

  o **Principle:** Majority (Mason C, Deane, Dawson and McHugh JJ) found that there need be no nexus requirement between the Cth and the subject matter; geographic externality is enough. Confirmed in Industrial Relations Act Case.

  o **Facts:** War Crimes Amendment Act 1988 amended War Crimes Act 1945. Concerned with war crimes which were committed in Europe during WW2. Act purported to identify certain actions which were not recognized as war crimes at the time they were committed (under Australian law). Provided for a trial in Australia for persons presently Australian citizens (even if not citizens at time committed crimes) or residents.

  o **Issue:** Polyukhovic challenged statute, because it applied regardless of the nationality of the perpetrator of the crime, and the victim.

  o **Found:**
    - Act could not be read down.
    - Issue of retrospectivity not important, as people at the time obviously knew they were not innocent.
    - **Mason, Deane, Dawson, McHugh JJ:**
      - No impediment, valid law under external affairs as Cth has plenary extraterritorial power.
      - Does not matter that there is no nexus with Australia – as long as matter is outside Australia, can pass it all.
      - This means that they can create laws that would not be valid if occurring inside Australia.
    - **Gaudron J:**
      - Not enough that outside Australia, needs to be a nexus requirement. This is met by the very decision of the Cth to legislate.
    - **Brennan and Toohey JJ:**
      - Need a sufficient nexus: external affairs power means external affairs of Australia, does not mean affairs that have nothing to do with Australia.
      - Brennan J: found that there was no nexus, as subsequent acquisition of Australian citizenship or residence is not a sufficient connection.
• Toohey J: conversely found the connection via WW2: “in which Australia was directly involved”, Australians killed, social, political and economic effects.
• This is rejected in Victoria v Cth and Horta v Cth.

**XYZ v Commonwealth [2006] HCA 25 (Casebook 607) – Geographic Externality**

- **Facts**: s 50A and 50B of the Crimes Act (Cth) made it an offence for Australian citizen/resident when outside Australia to engage in or attempt to engage in any form of sexual intercourse with a child.
- **Issue**: XYZ charged under this law, so challenged its constitutionality by urging the HCA to overrule the geographic externality principle.
- **Found:**
  - **Gleeson CJ, Gummow, Hayne and Crennan JJ**: simply relied on geographical principle to make it a valid law.
  - **But note dissents:**
    - **Kirby J**: entertained some doubt about the principle, felt it needed to be qualified or elaborated. However still justified the validity of the law as it was made with respect to Australia’s external relations with nation states and international organisations.
    - **Callinan and Heydon JJ**: principle of geographical externality should be rejected. Those cases of the HCA which stated that doctrine should be overruled. But this is not a long term/compelling dissent – so principle does not seem to be in danger.

**R v Burgess, ex parte Henry (1936) 55 CLR 608 (Casebook 608)**

- **Issue**: whether Air Navigation Act was in fact a valid law under the external affairs power.
- **Found**: the power supported the Air Navigation Regulations, but they were invalidated as they did not carry out and give effect to the Convention.
- **Reasoning:**
  - Foundation of the debate was a jurisprudential dispute between the very expansive view of McTiernan and Evatt JJ on the one hand, and more restrictive view of Dixon and Starke JJ on the other.
  - **Latham CJ, McTiernan and Evatt JJ**: broad reading of power
    - **Labor appointees – concern with broadening Cth power**.
    - **Latham CJ**:
      - Subject of Australia’s international agreements are infinitely various. Impossible to say that any subject is necessarily such that is could never be properly dealt with by an international agreement.
    - **McTiernan and Evatt JJ**:
      - subjects of treaties cannot be limited in advance of international situations.
      - Once an agreement is duly made, the subject of the agreement is brought within the field of international relations.
      - Therefore, the legislative power of the Cth includes the power to executive treaties and conventions entered into with foreign powers.
      - Further, Parliament may be competent to legislate for carrying out recommendations and draft conventions of international bodies (this goes further than Latham CJ).
  - **Dixon and Starke JJ**: need (1) treaty, (2) sufficiently international character
    - **Starke J**: laws are within power if the matter is of sufficient international significance to make it a legitimate subject for international cooperation and agreement.
    - **Dixon J**: “it seems an extreme view that merely because the executive government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which apart from the obligation undertaken by the executive could not be considered a matter of external affairs”.
    - **Note however that all judges accepted that the treat must be bona fide.**
• **Koowarta v Bjelke-Petersen** (1982) 153 CLR 168 (Casebook 610)
  
  **Test:**
  
  o 1. International bona fide treaty obligation
  o 2. Subject matter of the treaty being sought to be implemented into Australia law was of international significance. But, interpreted liberally – very subjective.

  **Facts:**
  
  o Minister for Lands in QLD refused to grant consent for transfer of a lease for a pastoral property. Lease was sought to be acquired by Aboriginal Land Fund Commission for the sake of Koowarta and other members of his clan.
  o Under *Land Act 1962* (Qld), in order for contract to be enforceable need the permission of the Minister.
  o However, policy of QLD government not to view favourably the acquisition of large areas of land whether freehold or leasehold for development by Aboriginals in isolation.
  o K argued this breached the *Racial Discrimination Act 1975* (Cth) which was enacted in response to the 1965 Convention on the Elimination of All Forms of Racial Discrimination. In particular, s 9(1) made restriction based on race unlawful, s 12(1) made it unlawful to discriminate based on race when dealing with property.

  **Issue:** As the Qld Act was inconsistent, Qld needed to invalidate the Cth Act to continue their actions. Argued the external affairs power did not support the Cth Act.

  **Found:**
  
  o **Law:** 4/3 majority (Gibbs CJ, Aickin, Wilson and Stephen JJ) that the subject matter being implemented must be of international character (the Dixon and Starke JJ view).
  o **Outcome:** 4/3 majority (Mason, Murphy, Brennan and Stephen JJ) that RDA was valid using the external affairs power.
    
    ▪ Stephen J came to this conclusion differently using the Gibbs CJ/Aickin/Wilson JJ view.

  **Reasoning:**
  
  o As Stephen’s judgment was in the majority on the law and outcome, it is the closest ratio of the case.

  o **Mason, Murphy and Brennan JJ:** broadest
    
    ▪ **Law:** The Cth did have the competence to legislate in order to implement the treaty into Australian domestic law, whether or not the subject matter was of sufficient international significance, so long as it was a bona fide treaty. That is, the treaty itself provided the requisite element of international significance.
    
    ▪ **Outcome:** Valid as there is a treaty.

  o **Mason J:**
    
    • McTiernan/Evatt’s approach in *Burgess*, but requires a treaty (not other agreements). Although, could still take a Sharkey approach if no treaty.
    
    • Subject to qualification that the treaty is genuine.
    
    • Treaty (especially when multilateral and brought into existence under UN or agency) is a matter of international concern – therefore is an external affair.
    
    • Once it is accepted that the treaty is an external affair, it is difficult to see how the law would not also be with respect to external affairs.
    
    • An affair will very often have characteristics endowing it with internal and external qualities.
    
    • Following rejection of reserve state powers, it is unacceptable to approach any question of interpretation on the footing that an expansive construction should be rejected because it will deprive states of power.
    
    • Even though the framers did not necessarily contemplate advancement of external affairs, it is expansion, not a change in meaning of external affairs as a concept. Therefore – Cth has entrée into legislative field.
    
    • No reason for thinking that legislative power conferred by s 51(xxix) was intended to be less than appropriate and adequate to enable the Cth to discharge Australia’s responsibilities in international and regional affairs.
• There is no evidence this presents a major disturbance to the balance of power – and if it does, this is a necessary disturbance to allow international obligations.

- Murphy J:
  • “Australia would be an international cripple unable to participate fully in the emerging world order”.
  • Exercise of this power is not an intrusion on the states – people in states are entitled and obliged to have legislative and executive conduct of those affairs carried out by Parliament.

- Brennan J:
  • When a 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.
  • Where a treaty is made, this is “a powerful indication that the subject does affect the parties to the treaty and their relations with one another”.
  • However, if a treaty was made as a means of conferring legislative power on the Cth Parliament, this would fail – as it would no in truth affect or be likely to affect Australia’s relations with other nations.

- Rationale: Mason J-
  • 1. Just because Cth has the power to do something doesn’t mean it will be used. Notions of restraint/balance typical of his generation.
  • 2. How will it be possible for Australia to fulfil its international obligations if it was constrained by these divisions of power in the Constitution?
  • 3. Determining international significance is difficult – highly subjective. Reason conservative judges have added this new criteria is to preserve state power.

- Gibbs CJ, Aickin and Wilson JJ:
  • Law: Treaty could only be implemented when the subject matter which was being implemented was itself an external affair; that is, it concerned extraterritorial matters or relations with other States and not purely domestic matters such as race. The mere existence of the treaty was not enough to create the requisite external affair.
  • Outcome: Invalid as race relations are purely domestic questions and therefore not sufficiently international in character to warrant the extension of Cth legislative power under the external affairs power.
    • Purely domestic as they operate to render unlawful an act done within Australia by one Australian, taking effect only within Australia.
  • Rationale: Gibbs CJ - Dixon/Starke view in Burgess.
    • Argued this is not reserve state powers thinking (pre-Engineer’s thinking – simply to maximize power of states).
    • Rather, rationale is about maintaining the “federal balance” – not maximising power to states, but ensuring they maintain some powers.
    • Division of legislative power must not be undermined, as federalism is important to ensuring balance of power.
    • Concern about the federal structure – if Cth can implement a law merely because of an international obligation, could make a law on nearly anything.
    • This view is compelling, but does it go so far as to overcome Mason J’s view about international obligations?

  • Law: Agreed with Gibbs, Aicken and Wilson – need more than the international obligation, need international character.
    • Although undoubted that the federal Executive can conclude treaties on any subject matter, it can therefore create “external affairs” at will.
    • This places the federal character of the system in jeopardy.
    • Matter of international concern must also be considered – a subject matter of international concern affects a country’s relations with other nations, making the subject matter an “external affair”.

To determine if a matter of international concern, look at the history of the matter in terms of negotiations, recommendations, agreements and diplomatic and other actions by countries (Zines).

- **Outcome:** Valid as race is not a purely domestic issue.
  - New global concern for human rights and international acknowledgement of the need for universally recognised norms of conduct.
  - Matters by virtue of the Charter of the UN become at international law a proper subject of international action.
  - Even if the convention was not signed by Australia, the subject of racial discrimination should be seen as an important matter of external affairs: slavery, genocide etc.

- **Commonwealth v Tasmanian (Tasmanian Dam Case) (1983) 158 CLR 1 (Casebook 624, 639)**
  - **History:** newly constituted HC re-examined *Koowarta* issues. Stephen J retired to become GG. Deane and Dawson JJ appointed. Dawson conservative – would always side with Gibbs and Wilson. Deane uncertain – view he would tend with Mason and Murphy.
  - **Facts:**
    - World Heritage Convention ratified by Australia – dealt with protection of cultural and natural heritage of the world. Obliging signatories to identify and take action to preserve areas of cultural/natural heritage.
    - Issue was ancient forests in Tasmania around Franklin River. Tasmanian Government wanted to build a hydro-electric dam that would destroy the forest, but bolster the economy. NSW had done this after WW2. Hawke Labor government wanted to preserve the forests.
    - Cth government wanted to implement World Heritage Properties Conservation Act – ss 6 and 9 are critical. By operation of the sections, heritage sites would be identified, listed as protected sites (s 6) and then couldn’t do certain things e.g. excavation, drill, recover minerals, buildings/structures, kill trees… (s 9). Tasmanian Government argued this was unconstitutional (needed to do this so the scheme was valid).
    - s 6(2)(b) proclamation may be made where “the protection or conservation of the property by Australia is a matter of international obligation, whether by reason of the Convention or otherwise.”
  - **Found:** the law was authorised under the power.
  - **Reasoning:**
    - **Majority (Mason, Murphy, Deane and Brennan JJ):**
      - Mason J:
        - Relevant section was valid and therefore authorised under the external affairs power.
        - Mere implementation of a treaty obligation is enough to bring the legislation in the external affairs power.
        - Concept of international significance is met by the mere existence of international convention or international cooperation – which makes it necessarily international in character. This is not a separate question.
        - It is too dubious to apply an international significance test – this is a question for Parliament, not the court.
        - Although external affairs have increased in frequency, they have not changed in kind. Only if they changed in kind could they receive a meaning different to ordinary principles of interpretation.
      - Murphy J:
        - Australia’s domestic affairs are more and more involved with those of humanity generally.
        - More widely, Cth could legislate on any international risk e.g. famine.
        - I.e. a de facto adoption of McTiernan/Evatt view on the point of obligation.
    - **Minority (Gibbs, Wilson, Dawson):**
      - Hold Dixon/Starke view – their view in *Koowarta*.
      - But acknowledged this could be liberal (adopt the Stephen line).
      - Although it is difficult to determine whether something is of international concern, the court must form its own impression of the facts, in part on the basis of judicial notice.