HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

XYZ PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA DEFENDANT

XYZ v The Commonwealth [2006] HCA 25
Date of Order: 17 November 2005
Date of Publication of Reasons: 13 June 2006
M14/2005

ORDER

The questions set out in the Case Stated dated 2 June 2005 are answered as follows:

(1) *Q.* *Is either of sections 50BA and 50BC of the* Crimes Act *1914 (Cth) a law "with respect to … External affairs" within section 51(xxix) of the Constitution?*

A. *Yes, both of them.*

(2) *Q.* *If the answer to question (1) is "no", is either of sections 50BA and 50BC of the* Crimes Act *1914 (Cth) otherwise a valid law of the Commonwealth?*

A. *This question does not arise.*

(3) *Q.* *By whom should the costs of the Case Stated to the Full Court of this Honourable Court be borne?*

A. *The plaintiff.*

Representation:

S J Gageler SC with K L Walker for the plaintiff (instructed by Buxton & Associates)

D M J Bennett QC, Solicitor-General of the Commonwealth with R J Orr for the defendant (instructed by Australian Government Solicitor)

CATCHWORDS

XYZ v The Commonwealth

Constitutional law (Cth) – External affairs – Plaintiff charged with three offences of engaging in sexual activity with a child under 16 years while outside Australia contrary to ss 50BA and 50BC of the *Crimes Act* 1914 (Cth) – Whether either of ss 50BA and 50BC of the *Crimes Act* are laws with respect to external affairs – Whether "external affairs" extends to any place, person, matter or thing lying outside the geographical limits of Australia – Whether "external affairs" is restricted to subjects having some connection with Australia – Whether "external affairs" is restricted to matters touching or concerning the relationships of Australia with other countries and international organisations – Whether "external affairs" extends to "matters of international concern" – Relevance of proposition that "external affairs" extends to implementation of treaty obligations.

Constitutional law (Cth) – Constitutional interpretation – Whether permissible to consider separately the meaning of components of a composite phrase – Relevance of distorting or alarming possibilities – Relevance of possible lacuna in the plenitude of the combined legislative powers of the various Parliaments of the Australian federation – Relevance of original meaning of the Constitution – Relevance of development of Australian nationhood – Relevance of extra-territorial reach of other heads of legislative power in s 51 to the interpretation of s 51(xxix) – Relevance of principles of international law concerning extra-territorial legislation – Relevance of the federal character of the Commonwealth – Relevance of notion of proportionality.

Constitutional law (Cth) – Overruling – Whether leave necessary to reopen such authority of the Court as upheld the geographical externality principle – Whether such authority should be overruled.

Criminal law – Sexual offences – Child sex tourism offences – *Crimes Act* 1914 (Cth), ss 50BA, 50BC – Whether such offences valid laws under the Constitution.

Words and phrases – "external affairs".

Constitution, ss 51(xxix), 51(xxxviii).
Australia Act 1986 (Cth), s 2.
Crimes Act 1914 (Cth), ss 50AD, 50BA, 50BC.
Criminal Code (Cth), s 11.1(1).

1 GLEESON CJ. The issue in this case concerns the constitutional validity of legislation enacted by the Parliament which makes it a criminal offence, punishable by the law of Australia, for an Australian citizen or resident, while outside Australia, to engage in certain forms of sexual activity involving children. The Court was informed that legislation of that nature (aimed primarily at what is sometimes called "sex tourism") has been enacted by some 34 countries. The power relied upon to support the legislation is that conferred by s 51(xxix) of the Constitution, that is, the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs.

2 Sections 50BA and 50BC of the *Crimes Act* 1914 (Cth) respectively make it an offence for a person, while outside Australia, to engage in sexual intercourse with a person under 16, or to commit an act of indecency on a person under 16. By virtue of s 50AD, the first-mentioned "person" relevantly means a person who was, at the time of the offence, an Australian citizen or a resident of Australia.

3 The plaintiff is an Australian citizen. He has been committed for trial in Victoria for offences against the above laws. The offences are said to have been committed in Thailand in 2001. The alleged victim is neither a citizen nor a resident of Australia. By a case stated, questions as to the validity of the laws were reserved for the decision of a Full Court. Those questions were answered at the conclusion of argument. The Court held that the legislation is valid, and said that reasons would be given at a future date.

4 No issue of statutory construction arises. That the legislation has, or purports to have, extra-territorial effect is clear. In terms, it relates to conduct outside Australia, but is limited in its operation to the conduct of Australian citizens or residents. Within Australia, territorial legislative jurisdiction with respect to crimes involving sexual abuse of children is exercised by the State and Territory legislatures. The assertion of extra-territorial criminal jurisdiction is not, in itself, contrary to the principles of international law. As has already been noted, an exercise of extra-territorial jurisdiction in respect of this kind of offence has been undertaken by many other countries. The territorial principle of legislative jurisdiction over crime is not the exclusive source of competence recognised by international law. Of primary relevance to the present case is the nationality principle, which covers conduct abroad by citizens or residents of a state. Jurisdiction is also exercised by states under the passive nationality principle, under which foreigners are punished for conduct harmful to nationals of the legislating state, the principle which enables protection of the security of the state, and principles concerning the repression of certain kinds of crime[1].

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1 Generally, see Brownlie, *Principles of Public International Law*, 6th ed (2003) at 299-306; *Oppenheim's International Law*, 9th ed (1992), vol 1 at 456-479; *In re Piracy Jure Gentium* [1934] AC 586 at 589.

The fact that international law does not regard criminal jurisdiction as limited to jurisdiction based upon the territorial principle is relevant to the nature of external affairs. It identifies a topic of potential concern to a national legislature. The relevance does not result from any limiting effect upon the construction of the Constitution. Section 51 is a grant of legislative power, and the fact that conceptions of state sovereignty, both at common law and in international law, embrace the existence of a power of the kind exercised by the legislation in question is of assistance in giving content to the constitutional idea of external affairs. The considerations that there are other bases of jurisdiction, that their boundaries are not entirely clear, that the practice of states in asserting extra-territorial jurisdiction varies, and that such assertions may give rise to difficulties in international relations are additional reasons for not giving the power a narrow and confined meaning. Although the present case is not concerned with legislation governing, or purporting to govern, the conduct of foreigners in foreign countries, there are well-known examples of assertions by states of legislative competence of that kind, extending to conduct of foreigners which is lawful where it occurred. Antitrust legislation of the United States of America is one such case. In cases of ambiguity, rules of construction may guide the interpretation of legislation so as to conform to international law[2]. In this Court, in *Meyer Heine Pty Ltd v China Navigation Co Ltd*[3], early Commonwealth legislation against anti-competitive conduct was construed as applying only to conduct within Australia. Three aspects of that decision should be noted. First, the legislation was enacted in 1906, and amended in 1910, at a time when there was still "an uncertain shadow upon the competence of the Australian Parliament to pass an Act having extra-territorial operation"[4]. Secondly, there was in the language of the legislation itself a very clear indication that its operation was territorially confined. That was a decisive consideration in the reasoning of the majority. Thirdly, Taylor J said that the presumption of territoriality was a rule of interpretation only "and, if by a local statute otherwise within power, provision is made 'in contravention of generally acknowledged principles of international law' it is binding upon and must be enforced by the courts of this country"[5]. Anti-terrorist legislation provides another example of circumstances in which many states are concerned to legislate with respect to conduct occurring outside their territorial borders, and with respect to conduct of foreigners.

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2 *R v Jameson* [1896] 2 QB 425 at 430.

3 (1966) 115 CLR 10.

4 (1966) 115 CLR 10 at 43 per Windeyer J.

5 (1966) 115 CLR 10 at 31.

6 Where a state legislates with respect to the conduct abroad of its citizens and residents, and exercises judicial power only upon their return, there is ordinarily no invasion of the domestic concerns of the place where the conduct occurred. Plainly, however, it may be otherwise when other jurisdictional principles are invoked in aid of extra-territorial legislative competence. Professor Brownlie has summarised the effect of international law as follows[6]:

> "Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:
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> (i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
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> (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
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> (iii) that a principle based on elements of accommodation, mutuality, and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence."

7 No doubt the provisions of s 50AD of the *Crimes Act*, confining (so far as is presently relevant) the operation of the legislation to the conduct of Australian citizens and residents, are explained in part by a desire on the part of the Parliament to conform to international expectations, and to confine the operation of extra-territorial legislation to a basis that is internationally accepted. As was noted earlier, we are not here concerned with a problem of construction of the *Crimes Act*. Legislation, including criminal legislation, is commonly expressed without territorial reference, and is construed and applied on the understanding "that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State"[7]. This legislation is expressed to apply to conduct outside Australia, but only where engaged in by persons over whom Australia, according to the comity of nations, has jurisdiction. Nor are we concerned with legislation which manifests a clear intention to reach beyond bounds that would be regarded as acceptable according to the comity of nations.

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6 Brownlie, *Principles of Public International Law*, 6th ed (2003) at 309.

7 *Niboyet v Niboyet* (1878) 4 PD 1 at 7, cited by Dixon J in *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 424. See also *R v Jameson* [1896] 2 QB 425 at 430 per Lord Russell of Killowen CJ.

8 The issue raised in the present case is whether a law which applies to conduct outside Australia by Australian citizens or residents is within the legislative competence of the Parliament as being a law for the peace, order, and good government of Australia with respect to external affairs. The resolution of the issue turns upon the construction of the Constitution and, in particular, the expression "external affairs". It is not argued that the formula "for the peace, order, and good government of the Commonwealth" imports any relevant limitation on legislative power[8].

9 The argument for the plaintiff is that the Parliament's power to make laws with respect to external affairs is, and is only, a power to make laws with respect to relations between Australia and other countries. Because, in 1901, those other countries included Great Britain and other parts of the British Empire, "external affairs" was regarded as a more appropriate expression than "foreign affairs". Great Britain was not then "foreign". The power, it is said, was conferred to allow the Commonwealth Parliament to enact legislation regulating "relations between Australia and other countries, including other countries within the Empire"[9]. This, in 1901, and for many years thereafter, was seen as "the substantial subject matter of external affairs"[10]. The corollary of the argument is that s 51(xxix) does not confer a general power to legislate extra-territorially.

10 For this argument to succeed, it would be necessary for the Court to depart from the decision in *Polyukhovich v The Commonwealth*[11], and to decide that the construction placed upon s 51(xxix) by every member of the Court in that case was wrong. In my view, the Court, upon reconsideration, should hold that *Polyukhovich* was correctly decided insofar as the decision bears upon the question of construction that arises in this case. Insofar as the decision goes beyond that, and bears, for example, upon Ch III of the Constitution, it is not presently relevant and it is unnecessary and inappropriate to say anything further about it. There was a difference between the view of s 51(xxix) taken by Mason CJ, Deane J, Dawson J, Gaudron J and McHugh J, on the one hand, and the views of Brennan J and Toohey J on the other. That difference does not affect the point presently in issue. *Polyukhovich* held that the external affairs power covers, but is not limited to, the matter of Australia's relations with other countries. It also includes a power to make laws with respect to places, persons, matters or things outside the geographical limits of, that is, external to,

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8 cf *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 635-636 per Dawson J, 695 per Gaudron J.

9 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643 per Latham CJ.

10 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643.

11 (1991) 172 CLR 501.

Australia[12]. That conclusion represents the current doctrine of the Court on the external affairs power, and should be maintained because it is correct.

11 In *Victoria v The Commonwealth* ("the *Payroll Tax Case*")[13] Windeyer J, explaining the constitutional consequences of certain developments during the twentieth century, said:

> "The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations."

12 The development of Australia's nationhood, which included the shedding of inhibitions on its capacity to legislate extra-territorially, and the attainment and maturing of its international status as an independent state rather than a component part of the British Empire, inevitably had consequences for the practical content of the constitutional concept of external affairs. No clearer example of the consequences of that development could be given than one which touches a matter of history upon which the argument for the plaintiff relies. It is true that, in considering the matter of Australia's relations with Great Britain and the other parts of the Empire, Australians in the late nineteenth century would not have described those as "foreign" relations or affairs. Yet, 100 years later, four members of this Court[14], in *Sue v Hill*[15], held that the United Kingdom was a "foreign power" within the meaning of that expression in s 44 of the Constitution. Reference was made to statements by Windeyer J in *Bonser v La Macchia*[16] that

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12 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 528 per Mason CJ, 602 per Deane J, 632 per Dawson J, 696 per Gaudron J, 714 per McHugh J; *Horta v The Commonwealth* (1994) 181 CLR 183; *Victoria v The Commonwealth* (*The Industrial Relations Act Case*) (1996) 187 CLR 416 at 485 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

13 (1971) 122 CLR 353 at 395-396.

14 Gleeson CJ, Gaudron J, Gummow J and Hayne J.

15 (1999) 199 CLR 462.

16 (1969) 122 CLR 177 at 223-224.

the law had followed the facts, and that Australia had become "by international recognition ... competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty"[17]. The developments in nationhood and international status that affected so profoundly Australia's relationship with the United Kingdom have also affected the nature of the external affairs that are now of potential legislative concern. The same developments have been recognised for their effect upon the practical content of the power to make laws with respect to naturalization and aliens. An example of such recognition is *Nolan v Minister for Immigration and Ethnic Affairs*[18].

13 The rights that, by the law of nations, are regarded as appurtenant to, or attributes of, sovereignty include the right to regulate, by legislation, the conduct outside Australia of Australian citizens or residents. That is not the full extent of the right, but it is sufficient for present purposes. If the argument for the plaintiff is correct, how is that right now to be exercised by, or on behalf of, Australia? This was the concern raised by Jacobs J in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Act Case*")[19]. In that case counsel for Victoria put the same argument as has been put for the plaintiff in this case. The argument is reported as follows[20]: "A law is not within s 51(xxix) simply because it deals with or operates upon a thing which is outside Australia. The subject matter is restricted to things which are the subject of the relations between Australia and other countries. The word 'affairs' in par (xxix) is apt to describe relationships between governments." Jacobs J's response[21] to that argument is worth quoting in full, because of its influence on later decisions, especially *Polyukhovich*:

> "The words 'external affairs' must be given their ordinary meaning. It is true that the operation of the power may have been limited in 1900 by the concept that Australia, lacking sovereignty, could legislate only for its territory; but that limitation, if it existed, did not alter the meaning of the words. It is not a sufficient reason for reading down the meaning of these words that there are other provisions of the Constitution, eg s 51(xxx), which expressly confer power to legislate with extra-territorial effect or which, eg s 51(x), may place a particular limitation in favour of the States on the power to legislate extra-territorially.

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17 (1999) 199 CLR 462 at 487.

18 (1988) 165 CLR 178.

19 (1975) 135 CLR 337.

20 (1975) 135 CLR 337 at 347.

21 (1975) 135 CLR 337 at 497-498.

> The express power of the Australian Crown to make laws with respect to places outside, or matters or things done outside the boundaries of the Commonwealth is no more fettered by notions of extra-territoriality than is the power possessed by the British Crown. That power attached to the British Crown by virtue of the pre-eminence and excellence which it claimed and which, even though there be limitations imposed by the common law itself as well as by statute on its exercise by the Crown in Council, is wholly without limit when exercised by the Crown in Parliament. Hence sprang the sovereignty of the British Parliament at Westminster and it followed that no statute of that Parliament could be held invalid on any ground whatsoever, even if it invaded the rights of the Crown or of the subject under the common law, even if it operated extra-territorially and even if it violated international law.
>
> Clearly the Crown in the Australian Executive Council and in the Australian Parliament has one bound which the British Parliament has not, for it cannot transgress the Constitution. But subject to that Constitution it in Council and in Parliament has that pre-eminence and excellence as a sovereign Crown which is possessed by the British Crown and Parliament. Exactly when it attained those qualities is a matter of the constitutional history of the British Commonwealth of Nations largely reflected in the Imperial Conferences following the Great War. Legal recognition came through the Statute of Westminster, 1931 and its later adoption by Australia. Now the Constitution is the only limitation. There is no gap in the constitutional framework. Every power right and authority of the British Crown is vested in and exercisable by the Crown in Australia subject only to the Constitution. The State legislatures do not have that sovereignty which the British legislature and now the Australian legislature possess. A State can only legislate in respect of persons acts matters and things which have a relevant territorial connexion with the State, a connexion not too remote to entitle the law to the description of a law for the peace welfare and good government of the State ... The words of s 51 of the Constitution do not import any similar territorial limitation and there now is none in the case of the Australian legislature. The words 'external affairs' can now be given an operation unaffected by any concept of territorial limitation. The result is that the Commonwealth, outside the boundaries of the States and subject to any particular constitutional injunctions, may make laws on all subject matters in exercise of its sovereignty."

14 That reasoning was criticised in argument in the present case as having been based upon a misconception as to the limits of State legislative power. The capacity of State Parliaments to enact legislation with extra-territorial reach, a matter now dealt with in the *Australia Act* 1986 (Cth), s 2(1), was discussed in

Union Steamship Co of Australia Pty Ltd v King[22], and more recently in *Mobil Oil Australia Pty Ltd v Victoria*[23]. State legislation requires a relevant territorial connection, but the test of relevance is to be applied liberally, and even a remote or general connection will suffice[24]. Jacobs J was writing before *Union Steamship*, but *Polyukhovich* was decided after that case, and in *Polyukhovich* Deane J (who had been a party to the joint judgment in *Union Steamship*) expressly agreed with the passage from the judgment of Jacobs J quoted above[25]. Dawson J also emphasised the point that had been made by Jacobs J[26].

15 The legislation presently in question provides a compelling example of the matter that concerned Jacobs J. Let it be assumed that, consistently with conceptions of sovereignty, it is of legitimate concern for Australia to regulate the conduct, outside Australia, of Australian citizens and residents in relation to sexual abuse and exploitation of children. The proposition that Australia's capacity to respond to that concern depends upon legislative activity by the States and Territories is surprising. The plaintiff is a citizen of Australia. Presumably, on the plaintiff's argument, it would be for the Parliament of Victoria to regulate his conduct in Thailand. And, presumably, legislative competence would be based upon his Victorian residence. Even if that were sufficient connection, on the plaintiff's approach, Australia's capacity to deal with the phenomenon of sex tourism would be limited to the existence of a pattern of potentially different State and Territory legislation. The problem would be even more obvious in cases of extra-territorial legislation based upon the passive nationality principle or the principle of protecting Australia's security. What State power would extend to the enactment of a law aimed at conduct of foreigners, abroad, threatening or damaging Australians or their property? Would a State law against terrorist activity abroad aimed at Australian persons or property be limited to activity aimed at persons or property in that State?

16 There are some forms of extra-territorial legislation that would not have even a remote or general connection with the States. If the Commonwealth Parliament cannot legislate with respect to such matters, then the federal system "denies the completeness of Australian legislative power"; a conclusion which, as

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22 (1988) 166 CLR 1.

23 (2002) 211 CLR 1.

24 (2002) 211 CLR 1 at 22-23 [9].

25 (1991) 172 CLR 501 at 603.

26 (1991) 172 CLR 501 at 638.

Dawson J said in *Polyukhovich*, "is unacceptable in terms of constitutional theory and practice"[27].

17 To deny to the Commonwealth Parliament the power for which the defendant contends would expose a substantial weakness in Australia's capacity to exercise to the full the powers associated with sovereignty. The plaintiff argues that this potential weakness is either non-existent, or exaggerated. In that respect only, the plaintiff invokes State and Territory legislative power and additionally points to s 51(xxxviii). If the power of the Commonwealth Parliament to legislate extra-territorially to the same extent as could the Parliament of the United Kingdom at 1901 depends upon the concurrence of the Parliaments of all the States, that supports the point made by Jacobs J.

18 Although the plaintiff points to State legislative power to answer the defendant's argument, the dispute about the meaning of s 51(xxix) that arises in this case is not one that raises the kinds of concern about what is sometimes referred to as the federal balance that are raised by some other disputes about that provision[28]. It is the aspect of the external affairs power that the plaintiff acknowledges, and asserts constitutes its entire content, that gives rise to problems of that kind. The plaintiff accepts that the power at least includes power to make laws with respect to matters affecting Australia's relations with other countries, and that includes matters the subject of treaties entered into by Australia. It has sometimes been said that, if a subject matter is of international and not purely domestic concern, that is itself enough to make that subject matter a part of Australia's external affairs. This was said, for example, by Stephen J, in *Koowarta v Bjelke-Petersen*[29], in a context where his Honour equated matters of international concern with areas properly the subject matter of international agreement. Indeed, in this case, the defendant, as an alternative submission, put that prohibition of conduct involving the abuse and exploitation of children is itself a matter of international concern, and of concerted international action. Because the defendant's primary argument, based on externality, should be accepted, it is unnecessary to resolve that question. The argument, however, and the potential width of a concept which may go beyond obligations assumed by Australia under a treaty, to matters that *could* properly be the subject of a treaty (if that be what is meant), illustrates the potential for extension of Commonwealth legislative capacity by resort to what is, in this case, the uncontroversial aspect of s 51(xxix). The range of topics that might, on one view, be described as being of international concern, is wide and constantly

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27 (1991) 172 CLR 501 at 638.

28 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 632 per Dawson J.

29 (1982) 153 CLR 168 at 217.

increasing. We do not need, in this case, to address the problem that arises from the need to relate the external affairs power to the federal scheme. That problem arises out of what is, on the plaintiff's argument, the essence of s 51(xxix). We are here concerned with that aspect of s 51(xxix) that allows the Australian body politic to exercise the plenitude of power which flows from nationhood and independence. That involves no threat to the legislative capacity of the States.

19 The reasoning in *Polyukhovich* was criticised as being based upon inappropriate literalism. In particular, it was said to be erroneous to consider, separately, the meanings of "external" and "affairs", and build a composite meaning from the result. There are many instances where it is misleading to construe a composite phrase simply by combining the dictionary meanings of its component parts[30]. In the law of defamation, "public interest" does not mean "of interest to the public"; and it may be doubted that a topic is relevantly of international concern simply because it is discussed at an overseas conference. The argument, however, does not do justice to the reasoning in *Polyukhovich*, which was based upon a consideration of the constitutional consequences of Australia's emergence as a nation, and its independence of Great Britain. Furthermore, the alternative solution offered by the plaintiff, said to involve a purposive construction, is in truth founded upon an incomplete and inadequate description of the relevant purpose. As was emphasised in *Sue v Hill*[31], the framers of the Constitution were building for the future, and creating a union that would become an independent nation. The Constitution's purpose is not to be taken to be circumscribed by the circumstances of dependence which then applied. Indeed, in 1901 much of what was involved in Australia's relations with other countries was attended to in London rather than in Australia. If the grant of power were not forward-looking, its scope would have been quite limited. Just as the United Kingdom has now become a foreign power, Australia has attained full independence, and the kinds of matters of extra-territorial legislative concern that were potentially the subject of regulation by the United Kingdom Parliament are now potentially part of the external affairs with which the Australian Parliament may be concerned.

20 It is for those reasons that I joined in the answers to the questions in the case stated that were announced at the conclusion of argument.

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30 eg *General Accident Fire and Life Assurance Corporation Ltd v Commissioner of Pay-roll Tax* [1982] 2 NSWLR 52. In the course of argument before the Privy Council, Lord Wilberforce remarked that an Australian who looked up the words "commission" and "agent" in a dictionary would probably be surprised to be told that, in England, a commission agent is a bookmaker.

31 (1999) 199 CLR 462 at 487-488 [51]-[52] per Gleeson CJ, Gummow and Hayne JJ, 524-525 [162] per Gaudron J.

11.

21 GUMMOW, HAYNE AND CRENNAN JJ. The plaintiff is an Australian citizen. On 18 September 2003, he was committed to stand trial in the County Court of Victoria on three charges of offences, each alleged to have been committed in Thailand between 4 July 2001 and 13 December 2001.

22 The first charge was that the plaintiff engaged in sexual intercourse with a child under 16 years, contrary to s 50BA(1) of the *Crimes Act* 1914 (Cth) ("the Crimes Act"). The second charge was that he attempted to engage in sexual intercourse with a child under 16 years contrary to s 50BA(1) of the Crimes Act and s 11.1(1) of the *Criminal Code* (Cth) ("the Code"). The third charge was that he committed an act of indecency on a child under 16 years contrary to s 50BC(1)(a) of the Crimes Act. The child referred to in the charges is not and never has been an Australian citizen or resident.

23 When committed to stand trial on the charges, the plaintiff entered a plea of not guilty. On 17 January 2005, the Commonwealth Director of Public Prosecutions filed an indictment in the County Court of Victoria alleging the commission by the plaintiff of the acts identified in each of the charges. In advance of his arraignment in the County Court, the plaintiff, on 25 February 2005, instituted an action in the original jurisdiction of this Court seeking a declaration that ss 50BA and 50BC of the Crimes Act are not valid laws of the Commonwealth. A Justice stated a case for consideration of the Full Court under s 18 of the *Judiciary Act* 1903 (Cth).

24 The following questions were reserved by the case stated for the consideration of the Full Court:

(1) Is either of sections 50BA and 50BC of the [Crimes Act] a law "with respect to ... External affairs" within section 51(xxix) of the Constitution?

(2) If the answer to question (1) is "no", is either of sections 50BA and 50BC of the [Crimes Act] otherwise a valid law of the Commonwealth?

(3) By whom should the costs of the case stated to the Full court of this Honourable court be borne?

25 At the conclusion of the hearing by the Full Court on 17 November 2005, the Court answered the questions as follows:

(1) Yes, both of them.

(2) This question does not arise.

(3) The plaintiff.

26 What follows are our reasons for joining in the order made on 17 November 2005.

The legislation

27 Sections 50BA and 50BC are included in Pt IIIA of the Crimes Act (ss 50AA-50GA). This Part is headed "Child Sex Tourism" and was inserted into the Crimes Act by s 3 of the *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth). The legislation has since been amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth)[32]. Section 50BA(1) states:

> "A person must not, while outside Australia, engage in sexual intercourse with a person who is under 16.
>
> Penalty: Imprisonment for 17 years."

Paragraph (a) of s 50BC(1) states:

> "A person (the first person) contravenes this section if, while the first person is outside Australia:
>
> (a) the first person commits an act of indecency on a person who is under 16".

Section 50AD, so far as material, provides:

> "A person must not be charged with an offence against this Part that the person allegedly committed outside Australia unless, at the time of the offence, the person was:
>
> (a) an Australian citizen; or
>
> (b) a resident of Australia".

28 The second charge, that of attempting to engage in sexual intercourse with a child under 16 years, is founded upon s 50BA(1) of the Crimes Act supported by s 11.1(1) of the Code. The Code provision states:

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32 Sched 10.

> "A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed."

29 As already indicated, the plaintiff contended that ss 50BA and 50BC were invalid because neither was a law supported by the external affairs power in s 51(xxix) of the Constitution. The questions stated for and answered by the Full Court identified the two sections without confining them to s 50BA(1) and par (a) of s 50BC(1), but no point was taken on that account. We proceed on the footing that, if s 50BA(1) and par (a) of s 50BC(1) are valid, the provisions as a whole are valid. It also is to be remarked that the answer by the Full Court that s 50BA and s 50BC are valid did not confine the reach of the external affairs power to acts allegedly committed outside Australia by Australian citizens or residents.

The modern doctrine

30 In the joint judgment of five members of the Court in the *Industrial Relations Act Case*[33], it was said:

> "The modern doctrine as to the scope of the power conferred by s 51(xxix) was adopted in *Polyukhovich v The Commonwealth*[34]. Dawson J expressed the doctrine in these terms[35]:
>
> > '[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".'

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33 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 485 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

34 (1991) 172 CLR 501.

35 (1991) 172 CLR 501 at 632.

> Similar statements of the doctrine are to be found in the reasons for judgment of other Justices: Mason CJ[36]; Deane J[37]; Gaudron J[38]; and McHugh J[39]. They must now be taken as representing the view of the Court."

31 In the present case, the "matter or thing" which lies outside the geographical limits of Australia is the conduct proscribed by the terms of ss 50BA and 50BC of the Crimes Act ("A person must not" and "A person ... contravenes this section if" respectively). The result is that the proscribed conduct falls within the meaning of the phrase "external affairs" and supplies a sufficient "constitutional fact".

32 Such an outcome is consistent with what was foreseen by Dixon J in *R v Burgess; Ex parte Henry*[40]. His Honour accepted that the power conferred by s 51(xxix) would enable the Parliament to make laws operating outside the limits of the Commonwealth, even if the "primary purpose" of the head of power was not to regulate conduct occurring abroad. Dixon J added[41]:

> "The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example."

The case law

33 The plaintiff's primary submission is that s 51(xxix) does not support a law "simply because that law operates on matters or events outside Australia". The Commonwealth submits to the contrary. The plaintiff further contends that, to the extent that this Court held otherwise in *Polyukhovich*[42] and *Horta v The*

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36 (1991) 172 CLR 501 at 528-531.

37 (1991) 172 CLR 501 at 599-603.

38 (1991) 172 CLR 501 at 695-696.

39 (1991) 172 CLR 501 at 712-714.

40 (1936) 55 CLR 608 at 668-669.

41 (1936) 55 CLR 608 at 669. See also the remarks of Deane J in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 258.

42 (1991) 172 CLR 501.

Commonwealth[43], those decisions are incorrect and should be overruled. The considered statement in the *Industrial Relations Act Case*[44], set out above, was said to be but comment made in passing.

34 At the time the information against him was laid, Polyukhovich was an Australian citizen and resident[45] and the charges arose out of events in the then Soviet Union during the Second World War, in which Australia had been allied to the Soviet Union. As to *Horta*, there was an obvious and substantial nexus between Australia and exploration for petroleum resources in the Timor Gap[46]. Hence, the outcome in those cases might be supported upon a qualified view of the scope of the external affairs power.

35 Two further authorities should be mentioned here. In *De L v Director-General, NSW Department of Community Services*[47], the Court upheld the validity of regulations made under the *Family Law Act* 1975 (Cth), whose support by the Hague Convention respecting international child abduction was called into question. In the joint judgment of six members of this Court, it was said of this submission[48]:

> "The subject matter of the Regulations, the return of children abducted from Australia and the return of children abducted to Australia, is concerned with the movement of children between Australia and places physically external to Australia. It thus falls within the content of the phrase 'external affairs' in s 51(xxix) of the Constitution. Accordingly, the legislative authority for the making of the Regulations, found in s 111B [of the *Family Law Act*], is to be supported in this sense as a law with

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43 (1994) 181 CLR 183.

44 (1996) 187 CLR 416 at 485.

45 (1991) 172 CLR 501 at 523.

46 (1994) 181 CLR 183 at 194. See further *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

47 (1996) 187 CLR 640.

48 (1996) 187 CLR 640 at 650 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

> respect to external affairs[49] independently of the Convention[50], and the Regulations, in turn, take this character."

The citation of the *Industrial Relations Act Case* as containing an authoritative exposition of the external affairs power should be noted.

36 Thereafter, in *R v Hughes*[51], the view was expressed by all members of this Court that a federal law regulating the placing by Australian investors of moneys in the United States would attract s 51(xxix). The law would relate to matters territorially outside Australia but would touch and concern Australia.

37 Several points are to be made respecting these authorities. The first is that what was said in *Hughes* and decided in *Polyukhovich*, *Horta* and *De L* concerned legislation which touched and concerned Australia. Accordingly, these authorities may be supported on a narrower reading of s 51(xxix) than the requirement of a geographically external matter or thing, as urged by the Commonwealth and denied by the plaintiff. The second concerns the plaintiff's challenge to the broader reasoning apparent in these cases and the need for the plaintiff first to obtain leave before pressing his point to conclusion.

38 It is unnecessary to embark upon the question of what is involved in the statement in the joint judgment in *Evda Nominees Pty Ltd v Victoria*[52] that leave of the Court is required before the Court hears argument urging it to depart from "the actual decision" in earlier cases[53]. That is because any re-opening would be futile. The reading of s 51(xxix) accepted in the *Industrial Relations Act Case* is correct and denies the reading for which the plaintiff contends in the present case.

The construction of s 51(xxix)

39 The broad terms in which heads of legislative power may be expressed in the Constitution do not provide a sound basis for a reading which restricts their scope out of fear of some distorting or alarming possibility. The point has been

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49 *Industrial Relations Act Case* (1996) 187 CLR 416 at 485, 566-568, 571-572.

50 *Industrial Relations Act Case* (1996) 187 CLR 416 at 486-489, 566-568, 571-572.

51 (2000) 202 CLR 535 at 556 [42], 583 [118].

52 (1984) 154 CLR 311 at 316.

53 As to *stare decisis* in constitutional cases, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

made in this Court on various occasions[54]. One such distorting possibility has had an apparent influence upon some minority judgments in cases upholding legislation based upon treaties touching "domestic" matters. But that particular concern is of no moment in the present case.

40 The distinction was explained as follows by Dawson J in the course of his judgment upholding the legislation challenged in *Polyukhovich*. His Honour remarked[55]:

> "In perceiving that the Constitution requires the exclusion of domestic matters from the ambit of the external affairs power, I have elsewhere pointed to the division of legislative power between the Commonwealth and the States and have observed that, if international concern over entirely domestic matters were sufficient to bring those matters within the external affairs power, par (xxix) would have the potential to obliterate the division which s 51 was intended to effect. To construe par (xxix) in that way would be to disregard entirely its constitutional setting."

However, Dawson J continued[56]:

> "But if, as I think to be the case, it is necessary to have regard to the scheme of the Constitution in construing the external affairs power, the result is different with regard to circumstances external to Australia. For although the sovereignty of the Australian nation is divided internally between the Commonwealth and the States, there is no division with respect to matters which lie outside Australia. There the sovereignty of the nation is the sovereignty of the Commonwealth which may act as if it were a unitary state without regard to the 'conceptual duality' within Australia to which Stephen J referred to in the *Seas and Submerged Lands Case*[57]. There is no corresponding capacity on the part of the States, either singly or together."

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54 *Western Australia v The Commonwealth* ("the *Territorial Senators Case*") (1975) 134 CLR 201 at 271, 275; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 604-605; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88]; *Sue v Hill* (1999) 199 CLR 462 at 480 [26].

55 (1991) 172 CLR 501 at 638.

56 (1991) 172 CLR 501 at 638.

57 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 458.

To that his Honour added[58]:

> "Indeed, any limitation upon the power of the Commonwealth to legislate with respect to matters outside the country would leave a gap in the totality of legislative power which the Constitution bestows upon the Commonwealth and the States. An interpretation of the Constitution which denies the completeness of Australian legislative power is unacceptable in terms of constitutional theory and practice. Apart from express or implied constitutional prohibitions or limitations, it is not to be contemplated that there are laws which no Parliament has the power to pass".

41 Counsel for the plaintiff challenged this reasoning. They pointed to what was said to be the plentitude of the extraterritorial legislative competence of the States spelt out or confirmed by s 2 of the *Australia Act* 1986 (Cth) and the decision shortly thereafter in *Union Steamship Co of Australia Pty Ltd v King*[59]. Further, s 51(xxxviii) of the Constitution ensured there need be no "gap" between the competence of the Parliament at Canberra and that at Westminster, if there be the request or concurrence of State Parliaments[60]. The words "within the Commonwealth" in s 51(xxxviii) do not import a territorial limitation upon laws supported by that head of power[61].

42 Of these submissions two things may be said. First, they assume at a theoretical level a common legislative purpose among the States. However, practical considerations suggest that a common purpose may sometimes be absent. Secondly, it is appropriate to recall, in dealing with the interrelation

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58 (1991) 172 CLR 501 at 638.

59 (1988) 166 CLR 1.

60 Paragraph (xxxviii) reads:

> "[T]he exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia".

61 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 376-378.

between s 51(xxix) and other heads of legislative power, what was said by Latham CJ in *Burgess*. His Honour remarked[62]:

> "It has been argued that s 51(xxix) should be construed as giving power to make laws only with respect to some external aspect of the other subjects mentioned in s 51. Prima facie it would be as reasonable to argue that any other single power conferred by s 51 is limited by reference to all the other powers conferred by that section – which is really an unintelligible proposition. There is no reason whatever why placitum xxix should not be given its natural and proper meaning, whatever that may be, as an independent express legislative power."

43 Words of O'Connor J, uttered in 1908 and often repeated in this Court[63], are in point when construing s 51(xxix). In *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*[64], after noting that the broad and general terms of the Constitution were "intended to apply to the varying conditions which the development of our community must involve", O'Connor J continued[65]:

> "For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

44 Hence that branch of the argument for the Commonwealth in the *Seas and Submerged Lands Case*[66] that the sea and the shelf were external to Australia and therefore proper subjects for legislation under s 51(xxix) because "external"

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62 (1936) 55 CLR 608 at 639. See also the judgments of Mason J and Jacobs J in the *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 471, 497.

63 See, for example, *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 378-379; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 527, 554. See generally *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16].

64 (1908) 6 CLR 309 at 368.

65 (1908) 6 CLR 309 at 368.

66 (1975) 135 CLR 337 at 342.

means external to the Australian land mass. That submission was accepted and developed by Barwick CJ, Mason J and Jacobs J[67]. Murphy J[68] said that the power was not limited to the making of laws for the implementation of treaties or conventions. In particular, Mason J emphasised that the term "affairs" was not limited to relationships with other countries[69]. From this basis there developed the statements of principle respecting the construction of s 51(xxix) encapsulated a decade ago in the passage in the *Industrial Relations Act Case*[70] set out earlier in these reasons.

45 The plaintiff criticised this course of development in the construction of s 51(xxix), but it is in line with well-settled principles of constitutional interpretation.

Particular submissions by the plaintiff

46 The plaintiff urged that the proposition that it suffices for validity of a law reliant upon s 51(xxix) that it operates on matters, persons or things external to Australia is contrary to the connotation of the phrase "external affairs" as understood in 1900. To that the following statement in the *Industrial Relations Act Case*[71] is in point:

> "[T]he external relations of the Australian colonies were in a condition of continuing evolution and, at that time, were regarded as such. Accordingly, it is difficult to see any justification for treating the content of the phrase 'external affairs' as crystallised at the commencement of federation, or as denying it a particular application on the ground that the application was not foreseen or could not have been foreseen a century ago."

With respect to the position in the United States, Holmes J spoke memorably to like effect in *State of Missouri v Holland*[72].

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67 (1975) 135 CLR 337 at 360, 470-471, 497-498.

68 (1975) 135 CLR 337 at 503.

69 (1975) 135 CLR 337 at 470.

70 (1996) 187 CLR 416 at 485.

71 (1996) 187 CLR 416 at 482.

72 252 US 416 at 433 (1920).

47 The plaintiff further submitted that what is supported by par (xxix) is the implementation of international obligations under treaties and under customary international law. That may readily be accepted, but there is no pregnant negative that the power has no other operation. The point is illustrated by what was said by Dawson J in *The Tasmanian Dam Case*[73]:

> "It is, of course, true that a law can be a law with respect to external affairs although it is not made in the implementation of any international obligation. The subject-matter of the law may of itself be within that category although it is not passed pursuant to any international obligation. Such matters as diplomatic rights and immunities, the treatment of fugitive offenders, the determination of external boundaries or the excitement of disaffection against other countries are affairs which, on their face and without more, are within the legislative power of the Commonwealth".

48 Finally, the plaintiff referred to the territorial reach of other heads of legislative power in s 51 of the Constitution as bearing upon (and confining) the interpretation of s 51(xxix). That matter has been considered earlier in these reasons.

The Commonwealth's submissions

49 The Commonwealth correctly submitted that legislation proscribing conduct engaged in outside Australia, such as s 50BA and s 50BC of the Crimes Act, is supported by the external affairs power. That is so without the further requirement, here imposed by s 50AD, that the person alleged to have committed the offence outside Australia must be an Australian citizen or a resident of Australia.

50 However, the Commonwealth also submitted, as an independent ground for validity, that the subject-matter of the provisions in question is a "matter of international concern". Particular reliance was placed upon what had been said on that subject by Stephen J in *Koowarta v Bjelke-Petersen*[74]. His Honour remarked[75]:

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73 (1983) 158 CLR 1 at 300-301.

74 (1982) 153 CLR 168.

75 (1982) 153 CLR 168 at 217.

> "A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'."

51 The phrase "matter of international concern" appears to have been introduced in the consideration by Willoughby of the treaty-making provisions of the United States Constitution[76]. In the first edition of his treatise, published in 1910, Willoughby sought to limit, not expand, the authority of the President in that regard by contrasting the use of the treaty-making power to regulate or control matters properly and fairly "matters of international concern", and its use to regulate or control matters of domestic law ordinarily relating "to the reserved powers of the States or to the private rights of the individuals"[77]. Thereafter, in 1920, arguments of that nature were rejected in *State of Missouri v Holland*[78].

52 In *The Tasmanian Dam Case*[79], four Justices appear to have indicated that the presence of a subject-matter of international concern sufficed to attract the exercise of the external affairs power even in the absence of a treaty. Dawson J preferred to see the requirement of international concern as a restriction on the power[80]. The subject was revisited in *Polyukhovich*[81].

53 Some of the unsettled questions concerning the use of the notion of international concern were raised in argument in the present case. However,

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76 cf Henkin, *Foreign Affairs and the Constitution*, (1972) at 152, which gives the primary source as a speech by Charles Evans Hughes in 1929.

77 Willoughby, *The Constitutional Law of the United States*, (1910), vol 1, §190; cf *The Constitution of the United States of America, Analysis and Interpretation*, (1996) at 486.

78 252 US 416 (1920).

79 (1983) 158 CLR 1 at 131-132 per Mason J, 171-172 per Murphy J, 222 per Brennan J, 258-259 per Deane J.

80 See *Richardson v Forestry Commission* (1988) 164 CLR 261 at 322-323.

81 (1991) 172 CLR 501 at 561-562 per Brennan J, 604-605 per Deane J, 657-658 per Toohey J.

given the direct path by which the legislation in question is upheld, these questions may be left for a later occasion on which they arise.

54 KIRBY J. These proceedings on a case stated for the opinion of the Full Court[82] concern the constitutional validity of two sections[83] of the *Crimes Act* 1914 (Cth) ("the Crimes Act"). It is pursuant to those sections that the plaintiff, who is an Australian citizen, has been charged with sexual offences involving "a person who is under 16"[84]. The offences are alleged to have occurred in the Kingdom of Thailand.

55 On 17 November 2005, having heard the arguments of the parties, this Court answered the questions stated in terms upholding the validity of the sections. I agreed in the answers given by the Court. It remains for me to state my reasons.

56 In his text on constitutional law, Professor P H Lane states that "external affairs" was "once a phrase that had some kind of peculiar connotation with a resulting extent". He complains that now this Court "does not explain 'external affairs' as an identifiable notion"[85]. Whilst this statement is not entirely accurate, at least in respect of that aspect of "external affairs" upon which the Commonwealth primarily relied for the validity of the legislation contested in this case, the general complaint deserves attention. The issue is of constitutional importance because of the risk, expressed by the plaintiff, that the approach to the constitutional validity of the federal legislation urged by the Commonwealth could cause an unravelling of the balances established in the applicable federal legislative power by reference, in particular, to facts, persons or things existing beyond Australia's geographical borders.

57 Unquestionably, this is a significant issue for the Constitution and for the meaning and limits of the powers of the Federal Parliament. The plaintiff charged that, in the recent elaborations of the "external affairs" power[86], this Court had taken a wrong turning. He submitted that the Court should now return

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82 Case stated by Hayne J, 2 June 2005. The name of the plaintiff was anonymised, taking into account s 15YR(1) of the *Crimes Act* 1914 (Cth). See [2005] HCATrans 311.

83 Sections 50BA and 50BC.

84 Crimes Act, ss 50BA(1) and 50BC(1)(a).

85 *Lane's Commentary on The Australian Constitution*, 2nd ed (1997) at 284.

86 Constitution, s 51(xxix).

to earlier doctrine lest the more recent explanation of the power become entrenched so as to wound the federation[87].

58 This case affords an occasion suitable to consider this submission[88]. In the end, it does not avail the plaintiff, for the constitutional validity of the legislation may be upheld on an alternative elaboration of the power. However, the point needs to be noticed so that it is not lost for a future occasion when it might prove to be determinative.

The facts and legislation

59 *The facts*: The plaintiff is charged with offences against ss 50BA and 50BC of the Crimes Act. He denies his guilt of the alleged offences. However, no submission was put to the effect that, if the offences are constitutionally valid, they do not apply to him, to a "person who is under 16" and to the place outside Australia (namely Thailand) where the "physical elements … of the offence[s]"[89] are alleged to have occurred.

60 The details of the charges are set out in the reasons of Gummow, Hayne and Crennan JJ[90]. It is not necessary for me to repeat them. One point to notice at the outset is that, as the general age of consent in Thailand was said to be fifteen years, there is thus a possibility that, under the impugned provisions, an Australian citizen or permanent resident might be rendered liable in Australia for acts happening in Thailand that would not constitute a criminal offence in that country. The plaintiff complained about this and about other features of the legislation. It will be necessary to return to those complaints[91]. Whether they ultimately have any relevance to the accusations against the plaintiff is unknown, lying as they do outside the facts appearing in the case stated.

61 *International background*: The federal legislation challenged in these proceedings has a background. It can best be understood in the context of a number of events occurring both within and outside Australia.

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87 Specifically as to the plenary ambit of s 51(xxix) of the Constitution in any law with respect to facts, persons and things beyond the geographical limits of Australia.

88 Cf *Dalton v NSW Crime Commission* [2006] HCA 17 at [94]-[97].

89 Crimes Act, s 50BA(2). See also s 50BC(2).

90 Reasons of Gummow, Hayne and Crennan JJ at [21]-[23].

91 See below these reasons at [146].

62 Of critical importance was the adoption by the General Assembly of the United Nations, on 20 November 1989, of the Convention on the Rights of the Child ("the CRC"). Australia ratified that Convention in January 1991[92]. So have most other nation states. Stimulated by the CRC, and by the commitments contained within it[93], a number of initiatives were taken within the United Nations Organisation, designed to protect children from various harms and dangers[94]. Eventually, an Optional Protocol to the CRC was adopted by the General Assembly on 25 May 2000. By Art 4.2(a) of that Protocol it is provided that:

> "Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1 [including '[s]exual exploitation of the child'] … (a) [w]hen the alleged offender is a national of that State or a person who has his habitual residence in its territory".

63 Australia, through the federal Executive Government, took a leading part in drafting, proposing and securing the adoption of this Protocol[95]. However, the Commonwealth did not rely upon the Protocol as a treaty which the provisions of the Crimes Act in question were designed to implement[96]. Nevertheless, the Commonwealth submitted that the Protocol indicated that the subject matter of the Crimes Act was one of "international concern" and was relevant to Australia's relationships with other nation states and with relevant international organisations.

64 The plaintiff raised no objection to the tender by the Commonwealth of a great deal of material concerning initiatives within the international community, and in Australia[97], concerning the protection of children from sexual acts by

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92 [1991] *Australian Treaty Series* 4.

93 CRC, esp Arts 19, 34.

94 A World Summit for Children was held in September 1990, concluding with the World Declaration on the Survival, Protection and Development of Children.

95 See speech by the Hon D Kerr MP, Minister for Justice, at the opening of the World Congress on Family Law and Children's Rights, Sydney, 4 July 1993 at 4.

96 The Protocol was not in force when the Crimes Act was amended in 1994 by the *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth). That amendment inserted in the Crimes Act the offences with which the plaintiff is charged.

97 Such as the convening of the First World Congress on Family Law and Children's Rights, Sydney, 4 July 1993.

foreign nationals[98]. Such material provides further background against which the impugned provisions of the Crimes Act may be understood.

The issues

65 As I approach these proceedings, there are five issues:

(1) *The geographical externality issue*: Is a federal law that operates extraterritorially with respect to facts, persons or things geographically external to Australia, for that reason alone, necessarily a law with respect to "external affairs" within the meaning of s 51(xxix) of the Constitution? Does the present authority of this Court uphold that proposition? If so, should this Court simply apply that authority and, without more, answer the question stated adversely to the plaintiff, notwithstanding the criticisms of that authority advanced by the plaintiff?

(2) *The leave to reopen issue*: Contingently on a determination of the first issue adverse to his arguments, the plaintiff sought leave, if necessary, to reopen such authority of the Court as upheld the geographical externality principle for the content of the "external affairs" power in the Constitution. Is leave necessary to permit any such reopening of a past ruling concerning the meaning of a provision of the Constitution? If so, should such leave be granted?

(3) *The reversal of authority issue*: If leave to reargue the correctness of the geographical externality principle for the meaning of s 51(xxix) of the Constitution is granted or is not required, should the principle be reconsidered by the Court in the light of earlier authority, the language, structure and purpose of s 51(xxix) and other relevant considerations? Should that principle be overruled or re-expressed having regard to the plaintiff's arguments?

(4) *The alternative validity issue*: If the geographical externality principle should be overruled or re-expressed, or if that question should be reserved for a decision in a case where it is essential to the result, is the law impugned by the plaintiff in these proceedings nonetheless valid under the Constitution because:

    (a) it is adequately demonstrated that the law in issue is with respect to a matter of "international concern" affecting Australia and thus, without more, concerns a subject within s 51(xxix) of the Constitution; or

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98 [2005] HCATrans 957 at 2660. See also at 2999.

(b) it is sufficiently connected with the legislative powers of the Federal Parliament with respect to crimes of the nominated type committed overseas by an Australian national or permanent resident on the basis that such crimes affect, or may affect, the external relations of Australia with other nation states or international organisations?

(5) *The proportionality issue*: Assuming that one of the suggested criteria for establishing the validity of the law impugned by the plaintiff is arguable, is the law nonetheless invalid because, upon analysis, it is disproportionate (not "reasonably appropriate and adapted") to the power of the Federal Parliament to enact such a law in the terms of the contested provisions of the Crimes Act?

The geographical externality principle

66 *The geographical externality criteria*: The reasons of Gummow, Hayne and Crennan JJ explain the geographical externality principle, as it has been elaborated to describe the ambit of the powers of the Federal Parliament to make laws with respect to "external affairs", pursuant to s 51(xxix) of the Constitution[99].

67 Those reasons state that the principle, in the terms in which it was expressed in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[100], is "[t]he modern doctrine". This is the very complaint that the plaintiff makes against the principle, in so far as it claims to express part of Australian constitutional law. He argues that it represents a departure from a carefully formed past doctrine based on a more faithful application of the constitutional text. He submits that it involves the acceptance of an unsettling new approach which was not adequately considered when adopted[101] and has not been sufficiently analysed in the cases in which it has subsequently been applied[102].

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99 Reasons of Gummow, Hayne and Crennan JJ at [30]-[45].

100 (1996) 187 CLR 416 at 485. See reasons of Gummow, Hayne and Crennan JJ at [30].

101 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 528-531 per Mason CJ, 599-603 per Deane J, 632 per Dawson J, 695-696 per Gaudron J, 712-714 per McHugh J.

102 *Horta v The Commonwealth* (1994) 181 CLR 183 at 193-194; *Industrial Relations Act Case* (1996) 187 CLR 416 at 485 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 650 per Brennan CJ, Dawson, Toohey, Gaudron,

(Footnote continues on next page)

68 In *obiter* remarks, I have earlier accepted the geographical externality principle in cases where it was not criticised or questioned in argument[103]. So, it seems, have other present members of this Court. The plaintiff argued that this was the error that should now be corrected[104]. The plaintiff said that the holding in *Polyukhovich v The Commonwealth* (*War Crimes Act Case*)[105], where, for the first time, a majority of this Court endorsed the geographical externality principle, had been accepted uncritically in subsequent cases. Now, so it was suggested, was the time to pause and reconsider the "modern doctrine" with the benefit of critical analysis, which the Court needed in order to sharpen its federal jurisprudence[106] and to correct a dangerous wrong turning.

69 Various arguments can be mounted to sustain alternative rationales supporting the actual orders of this Court in *Polyukhovich*, quite apart from the geographical externality principle. Thus, I agree with the reasons of Gummow, Hayne and Crennan JJ that the outcomes in *Polyukhovich*, and in later cases, can be supported "upon a qualified view of the scope of the external affairs power"[107].

70 In some of the cases since *Polyukhovich*, the constitutional validity of the federal law was not contested[108]. In one case the impugned principle was not

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McHugh and Gummow JJ; cf at 680-682 of my own reasons; *R v Hughes* (2000) 202 CLR 535 at 556 [42] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

103 *De L* (1996) 187 CLR 640 at 668 fn 79; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 334 [82] fn 103.

104 Apart from *Horta*, the *Industrial Relations Act Case*, *Hughes* and *De L*, see, eg, *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 85 [182] per Callinan J. Specific mention is made in *Aird* (2004) 220 CLR 308 at 313 [7] of the subject provisions of the Crimes Act.

105 (1991) 172 CLR 501 at 528, 549, 599, 632, 696 and 712.

106 Selway and Williams, "The High Court and Australian Federalism", (2005) *Publius* 467 at 476-478.

107 Reasons of Gummow, Hayne and Crennan JJ at [34]; cf reasons of Callinan and Heydon JJ at [205].

108 *De L* (1996) 187 CLR 640 at 668; cf *Hughes* (2000) 202 CLR 535 at 583 [118].

critical to the point ultimately decided[109]. In other cases the law in question substantially relied on a treaty, implementation of which is an undisputed basis for a valid federal law relying on s 51(xxix) of the Constitution[110]. In other instances there were, as the reasons of Gummow, Hayne and Crennan JJ state, "obvious" and "substantial" connections between Australia and the contested subject matter[111]. Thus, in *Polyukhovich* there was at least one matter of "international concern", being the response of nation states to established instances of crimes of universal jurisdiction, provision for which is arguably also a matter affecting Australia's relations with other states and international organisations and thus a law with respect to "external affairs" upon those grounds[112].

71 Nevertheless, all this being said, the *ratio decidendi* to be derived from *Polyukhovich* depends not on what a majority of this Court *might* have reasoned in arriving at their conclusions but upon the way in which the majority *in fact* reasoned. Moreover, the binding rule is to be derived from the legal principles accepted by those members of the Court who, for common reasons, agreed in the Court's orders[113]. The principle in *Polyukhovich* did not emerge out of thin air. It had a number of heralds in the earlier *dicta* of individual Justices of this Court. These included Jacobs J in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Act Case*")[114]; Barwick CJ in *Robinson v Western Australian Museum*[115]; Murphy J in *Viro v The Queen*[116]; Mason J in *Koowarta v*

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109 *Aird* (2004) 220 CLR 308. The decisive point argued concerned the compatibility of the legislation with the requirements of Ch III of the Constitution.

110 *Industrial Relations Act Case* (1996) 187 CLR 416.

111 Reasons of Gummow, Hayne and Crennan JJ at [34].

112 *Polyukhovich* (1991) 172 CLR 501 at 684 per Toohey J.

113 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56]. See MacAdam and Pyke, *Judicial Reasoning and The Doctrine of Precedent in Australia*, (1998), Ch 10.

114 (1975) 135 CLR 337 at 497. See also at 360 per Barwick CJ, 470-471 per Mason J, 503 per Murphy J.

115 (1977) 138 CLR 283 at 294. See also at 335 per Mason J.

116 (1978) 141 CLR 88 at 162. See also *Pearce v Florenca* (1976) 135 CLR 507 at 528 per Murphy J.

Bjelke-Petersen[117]; and Deane J in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[118].

72 Still, the turning point occurred in *Polyukhovich* when the geographical externality principle gathered support from a majority of the Justices. That majority included Dawson J[119] who, before *Polyukhovich*, had repeatedly expressed the strongest reservation over an expansive interpretation of the "external affairs" power of the Constitution, lest the power, so expanded, be used to disturb the internal federal balances between the Commonwealth and the States beyond that which was clearly required by Australia's participation in the international community and by its relations with other nation states and international organisations.

73 The consideration that Dawson J in *Polyukhovich* treated as critical to tipping the balance in favour of acceptance of the geographical externality principle was his view that "[t]he word 'external' is precise and is unqualified"[120]. Facts, persons and things lying outside the geographical limits of this country fell within the description "external to it" and thus within the language of s 51(xxix) of the Constitution. It was this reasoning that the plaintiff sought to challenge in these proceedings. In my view, this Court should not brush the challenge aside. We should address it, so far as it is necessary to do so in order to reach an outcome.

74 *A binding rule?* From the foregoing it follows that if the "modern doctrine", as propounded by a majority in *Polyukhovich*, correctly expresses the ambit of s 51(xxix) of the Constitution, the conduct proscribed by ss 50BA and 50BC of the Crimes Act, being with respect to facts, persons or things outside the geographical limits of Australia, falls within the meaning of the phrase "external affairs". This supplies a sufficient "constitutional fact" to sustain the validity of those sections[121]. That conclusion, without more, unless its underlying principle is overruled or re-expressed more narrowly, therefore supports the orders announced by this Court. It sustains the constitutional validity of the charges brought against the plaintiff.

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117 (1982) 153 CLR 168 at 223. See also at 211 per Stephen J.

118 (1983) 158 CLR 1 at 255-256; cf at 171-172 per Murphy J.

119 (1991) 172 CLR 501 at 632.

120 (1991) 172 CLR 501 at 632, cited in the reasons of Gummow, Hayne and Crennan JJ at [30].

121 Reasons of Gummow, Hayne and Crennan JJ at [31].

75 The plaintiff did not really contest any of the foregoing. Nor did he suggest that it was possible, in the language of the impugned provisions, to read them down or to re-express them in some way, so as to affect their validity on this hypothesis. For its part, the Commonwealth did not argue for a source of constitutional validity other than s 51(xxix) of the Constitution. Nor, as I have said, was any treaty nominated, the implementation of which would sustain the validity of the contested provisions under that paragraph.

76 This being the case, it is necessary to consider immediately whether the plaintiff requires, and if so whether he should have, leave to reopen the geographical externality principle as a rule of Australian constitutional law.

Constitutional reargument requires no leave

77 *The supposed requirement of leave*: As this Court unanimously said in *Lange v Australian Broadcasting Corporation*[122], it is not bound by its previous decisions[123]. Nor has it laid down any particular rule or rules or set of factors for reopening the correctness of earlier authority[124]. Obviously, the Court approaches with caution any suggested reconsideration of a legal principle, including one affecting an understanding of the meaning of the Constitution, which has been decided by a majority of the Justices. Nevertheless, there is no doubt that the Court will re-examine such a principle if it involves a question of "vital constitutional importance"[125] and it considers it to be "manifestly wrong"[126]. As all members of the Court said in *Lange*[127]:

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122 (1997) 189 CLR 520 at 554.

123 *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968) 117 CLR 390 at 396; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 610; *Baker v Campbell* (1983) 153 CLR 52 at 102.

124 Cf reasons of Callinan and Heydon JJ at [204]-[205].

125 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630. See also *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 at 377.

126 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278-279; *The Tramways Case [No 1]* (1914) 18 CLR 54 at 58, 69, 83.

127 (1997) 189 CLR 520 at 554.

> "Errors in constitutional interpretation are not remediable by the legislature[128], and the Court's approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes."

78 Various considerations of principle and convenience argue against the reopening of the constitutional rules expressed in *Polyukhovich*. I will assume that the cases since that decision that have applied the geographical externality principle add nothing of importance to the content of that rule. The rule emerged, as I have shown, from observations and reasoning of individual Justices expressed over more than a decade. Brennan CJ and Toohey J, who expressed a different view in *Polyukhovich*, nonetheless appear (to the extent necessary) to have endorsed its reasoning without relevant qualification in the *Industrial Relations Act Case*[129]. In consequence, at least to some extent, the principle has been used to sustain particular provisions of federal legislation, the validity of which might be cast in doubt by adoption of a more qualified view of the scope of the external affairs power[130].

79 Yet are these simply the customary reasons for the exercise of care in giving effect to an opinion about constitutional meaning that is different from that adopted by an earlier majority in this Court? Or is there a procedural barrier of leave that must be overcome, in order to secure consideration by this Court of any submissions critical of past authority about the meaning of the Constitution?

80 *No leave is required*: In my view, leave is not required by a party in order to advance arguments contesting a previous determination by the Court as to the meaning of the Constitution. My reasons for that opinion are identical to those stated by Deane J in *Evda Nominees Pty Ltd v Victoria*[131]. As my own reasons

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128 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 588.

129 (1996) 187 CLR 416 at 485. See also *Horta* (1994) 181 CLR 183; *Hughes* (2000) 202 CLR 535 at 556 [42].

130 Amongst other legislation, the Commonwealth referred to *Historic Shipwrecks Act* 1976 (Cth); *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (Cth), ss 5(a)(v) and 7; *Weapons of Mass Destruction (Prevention of Proliferation) Act* 1995 (Cth), s 6(3)(b); *Space Activities Act* 1998 (Cth), s 108(2)(b); *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), ss 5(2) and 5(5); *Crimes at Sea Act* 2000 (Cth); *Transport Safety Investigation Act* 2003 (Cth), s 6. Some at least of these provisions might be sustained by treaty obligations or by other explanations of the power afforded by the Constitution, s 51(xxix). It is unnecessary to decide such questions.

131 (1984) 154 CLR 311 at 316.

have been stated in several cases[132], including recently[133], I will not repeat them now. In the present case, the plaintiff was allowed to present his full arguments. His counsel did so[134]. I therefore agree with the reasons of Gummow, Hayne and Crennan JJ that it is unnecessary in this case to embark on a detailed examination of the meaning and application of the majority opinion in *Evda*[135]. That question should be left to a case, if any exists, where it must be determined. This is not such a case.

81 I therefore proceed directly to the geographical externality principle. It was the primary basis upon which the Commonwealth supported the constitutional validity of the provisions of the Crimes Act challenged by the plaintiff. I accept that a number of arguments can be advanced in favour of the approach expressed in that principle. Many of them are collected, or referred to, in the reasons of Gummow, Hayne and Crennan JJ.

Support for the geographical externality principle

82 *The textual foundation*: If the anchor for constitutional interpretation is the text[136], certain textual indications lend support to the "modern doctrine". Section 51(xxix) does not, in its terms, confine itself to "Australia's external affairs". Nor does it expressly limit itself to subjects having some special, and defined, connection with Australia[137]. The word "affairs" has a "wide and indefinite meaning". This is what has led advocates of the current approach to conclude that s 51(xxix)[138]:

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132 Eg *Brownlee v The Queen* (2001) 207 CLR 278 at 312-315 [100]-[108]; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 80 [134].

133 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 451-453 [176]-[180].

134 [2005] HCATrans 957 at 1194.

135 Reasons of Gummow, Hayne and Crennan JJ at [38].

136 Tucker, "Textualism: An Australian Evaluation of the Debate between Professor Ronald Dworkin and Justice Antonin Scalia", (1999) 21 *Sydney Law Review* 567.

137 *Polyukhovich* (1991) 172 CLR 501 at 599 per Deane J.

138 *Polyukhovich* (1991) 172 CLR 501 at 599.

> "encompass[es] both relationships and things: relationships with or between foreign States and foreign or international organizations or other entities; matters and things which are territorially external to Australia regardless of whether they have some identified connexion with Australia or whether they be the subject matter of international treaties, dealings, rights or obligations".

83 *The broad constitutional grant*: The general principle commanding a broad construction of the constitutional text lends additional support to the geographical externality principle unless there is some countervailing consideration that has the effect of cutting down the grant[139]. Certainly, the principle as it presently stands involves a very wide view of the constitutional grant of power, encompassing as it does the power to make laws without limitation with respect to facts, persons or things anywhere in the world external to Australia.

84 *Early federal history*: As a matter of history, even before federation, the Australian colonies were beginning to take an active part, within the British Empire, in matters of external concern, as for example by involvement in the Universal Postal Union, formed in 1874[140]. Once the Commonwealth was established, the Imperial authorities insisted that the international face of the new federal polity which would be recognised by the Crown was the Commonwealth, and not the States.

85 This position was illustrated in the *Vondel Case* that arose in April 1902 concerned with the conduct of South Australian officials dealing with seamen who had deserted from a Dutch ship. The responsible British Minister, Joseph Chamberlain, rebuffed the attempt of the Lieutenant-Governor of South Australia (Sir Samuel Way) to contest the insistence of the British authorities that the State should deal through the Federal Government and its officials[141]:

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139 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 368 per O'Connor J. See reasons of Gummow, Hayne and Crennan JJ at [39]; cf reasons of Callinan and Heydon JJ at [180].

140 Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth", in Zines (ed), *Commentaries on the Australian Constitution*, (1977) 1 at 7. See also Harrison Moore, "The Commonwealth of Australia Bill", (1900) 16 *Law Quarterly Review* 35 at 39. The latter described the power with respect to "external affairs" as a "dark one". He suggested that it was designed to overcome the question, still then vexing Canada, as to whether the Federal Parliament had the power to enact laws with extraterritorial operation.

141 Australia, *Correspondence respecting the Constitutional Relations of the Australian Commonwealth and States in regard to External Affairs*, (1903)

(Footnote continues on next page)

> "So far as other communities in the Empire or foreign nations are concerned the people of Australia form one political community for which the Government of the Commonwealth alone can speak, and for everything affecting external states or communities, which takes place within its boundaries, that Government is responsible. The distribution of powers between the Federal and State Authorities is a matter of purely internal concern of which no external country or community can take any cognizance. It is to the Commonwealth and the Commonwealth alone that, through the Imperial Government, they must look, for remedy or relief for any action affecting them".

86 Whilst not specific to the geographical externality principle, the stated approach shows how, from the very beginning of the Commonwealth, federal officials and federal law were expected, within the Empire, to bear the sole responsibility for Australia's relationships ("affairs") with nations, organisations and entities external to Australia.

87 *The external discrimen*: Given the necessity to draw lines in respect of the respective lawmaking and other responsibilities of the federal, State and Territory polities, the relevant line that s 51(xxix) of the Constitution provides, suggested by the reference to "affairs" that are "external", is one that begins at the outer limit of the Australian land mass. This, at least, affords an objective *discrimen*. It refers to the entirety of the rest of the world and, indeed, so far as relevant, any "affairs" that lie beyond that[142].

88 *"Affairs" and "relations"*: By reference to the juxtaposition of language in s 51(xxx) (with its mention of "the relations of the Commonwealth with the islands of the Pacific"[143]), the suggestion can be made that if it was intended that "external affairs" refer, and refer only, to "relations" of the Commonwealth with other states, that is what would have been said. Instead, the paragraph is more open-textured. It refers to several areas of legal operation including (but not limited to) the implementation of treaties entered with other nation states, organisations or entities[144].

[Cd 1587] at 26. See also Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth", in Zines (ed), *Commentaries on the Australian Constitution*, (1977) 1 at 17-18.

142 As for example dealt with in the *Space Activities Act* 1998 (Cth).

143 *Ruhani v Director of Police* (2005) 79 ALJR 1431 at 1467 [201]-[202]; 219 ALR 199 at 246.

144 *Seas and Submerged Lands Act Case* (1975) 135 CLR 337 at 503 per Murphy J.

89 Once it is accepted that the Constitution is not to be confined to meanings that were held, or to applications that were expected, at the time of its adoption in 1900[145], a functional analysis of its terms lends support to the geographical externality principle.

90 *Responding to external concerns*: Clearly, the ambit of international treaties has expanded enormously in recent decades, thereby unquestionably enlarging the denotation of s 51(xxix)[146]. It would be a constitutional misfortune if the Australian Constitution were unable effectively to respond to these changes[147]. If the legislative power conferred by s 51(xxix) were "inapt to embrace the wide responsibilities and obligations now falling upon the Commonwealth ... [which] needs a more ample grant of legislative power to enable it to conduct a foreign policy that is adequate to ensure its security, and to play its proper part as a member of the … institutions which contribute at the present time towards the maintenance of international order [and] the welfare of human beings on a world-wide scale"[148], the result would be a serious inconvenience. While such an inconvenience is not determinative, and some inconvenience is inherent in a constitutional instrument expressing limited powers, where the language of the grant suggests a broader view, that view will generally be preferred having regard to the character of the document in which the grant is made[149].

91 The geographical externality principle largely solves these suggested problems. It avoids the "irksome"[150] necessity to seek a formal amendment of the constitutional text. It allows the Constitution, read with today's eyes, to respond to the necessities of the present age. To the extent that the text permits it,

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145 *Sue v Hill* (1999) 199 CLR 462 referred to in the reasons of Gleeson CJ at [13]; cf reasons of Callinan and Heydon JJ at [153]-[155]. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-553 [44] and *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522-523 [111].

146 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 590 [65] (referring to the fact that Australia is a party to about 900 treaties).

147 *Industrial Relations Act Case* (1996) 187 CLR 416 at 482. See reasons of Gleeson CJ at [17].

148 Starke, "The Commonwealth in International Affairs", in Else-Mitchell (ed), *Essays on the Australian Constitution*, 2nd ed (1961) 343 at 374.

149 Cf reasons of Callinan and Heydon JJ at [201]-[203].

150 *Industrial Relations Act Case* (1996) 187 CLR 416 at 565 per Dawson J.

Australia, as a nation, should be capable of enacting laws, as other nations can do, with respect to "a place, person, matter or thing [that] lies outside the geographical limits of the country"[151].

92 *Safeguards for the federation*: Whatever problems and fearsome possibilities may be conceived, including in the form of a Trojan horse dressed in the colours of "external affairs" that could invade the usual subjects of State powers under the Constitution (the anxiety that most troubled Dawson J[152]), that concern is irrelevant in the case of federal laws addressed to subject matters arising in or affecting facts, persons or things geographically external to Australia[153]. In such a case the dangers of constitutional nightmares are thereby avoided, or at least significantly lessened[154]. This is so because, substantially, States are only concerned with lawmaking for their own geographical territory and not beyond.

93 *No constitutional "cripple"*: There are strong reasons of principle for interpreting the Constitution so as to avoid the risk that the Federal Parliament, in terms of its capacity to make laws apt to the contemporary world, would be an international "cripple", with a gap in its lawmaking powers where that gap is not compelled by the constitutional text[155]. To the plaintiff's suggestion that any "gap" of this kind could be filled, conformably with the Constitution, by invoking s 51(xxxviii)[156], the Commonwealth responded with a reminder of the cumbersome procedures and practical difficulties in adopting that course and limited instances where that paragraph has been used. That head of constitutional power hardly responds, in an effective way, to the current

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151 *Polyukhovich* (1991) 172 CLR 501 at 632 per Dawson J.

152 *Polyukhovich* (1991) 172 CLR 501 at 632.

153 *Polyukhovich* (1991) 172 CLR 501 at 632 per Dawson J. See also *The Tasmanian Dam Case* (1983) 158 CLR 1 at 300-301.

154 See, eg, *Western Australia v The Commonwealth* ("the *Territorial Senators Case*") (1975) 134 CLR 201 at 271. The plaintiff contested this argument on the basis that the geographical externality principle afforded a foundation for federal laws burdening Australians within Australia, simply by reference to a fact, person or thing beyond Australia in some way said to be relevant to the terms of the law.

155 *Seas and Submerged Lands Act Case* (1975) 135 CLR 337 at 498 per Jacobs J, 503 per Murphy J. See also *Polyukhovich* (1991) 172 CLR 501 at 529-530. *Contra* reasons of Callinan and Heydon JJ at [184]-[188].

156 Reasons of Gummow, Hayne and Crennan JJ at [41]-[42].

necessities of national and international governance[157]. The Commonwealth invoked the gradual expansion of the recognised powers of legislative extraterritoriality that had accompanied the emergence of Australia as an independent nation and the consequential decline of Imperial inhibitions that had been held applicable in the first decades after federation[158]. The geographical externality principle was thus, at once, a response to the changing international context in which the Constitution must now operate and a consequence of the necessity for the Commonwealth to be in a position to respond effectively to that context. So went the main arguments of the Commonwealth.

94 *Resulting difficulties*: Despite the powerful arguments of legal authority and also of legal principle and policy supporting the geographical externality principle, the plaintiff made a number of telling criticisms of that approach. It is necessary to take those criticisms into account in deciding whether the principle, now challenged, should be overruled or re-expressed.

Problems of the geographical externality principle

95 *The original expectations*: So far as it is relevant, it seems tolerably clear that, in its purest form, the geographical externality principle was not an approach to s 51(xxix) of the Constitution that would have been accepted by the framers of the Constitution or accepted within the setting of the British Empire in the early decades of federation[159]. The reasons of Callinan and Heydon JJ demonstrate why this is so[160].

96 Historically, the very reason for adopting in s 51(xxix) the expression "external affairs", as distinct from "foreign affairs", was to address the comparatively limited grant of legislative power which, in 1900, was thought apt to the Federal Parliament of Australia. Most of the "affairs" relevant to dealings between members of the British Empire were then still the responsibility of the Imperial Government at Westminster. So far as legislating with respect to

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157 Cf *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 306-307 per Windeyer J; reasons of Callinan and Heydon JJ at [187].

158 "The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929", in Keith (ed), *Speeches and Documents on the British Dominions: 1918-1931*, (1932) 173 at 182; cf Hanks, *Constitutional Law in Australia*, 2nd ed (1996) at 225; *Croft v Dunphy* [1933] AC 156 at 163.

159 See, eg, Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 631-632.

160 Reasons of Callinan and Heydon JJ at [157]-[173].

external relations was concerned, in the early days of federation that remained in large part the continuing responsibility and concern of the Imperial authorities.

97 *"Affairs" and "relations"*: Allowing that the Constitution must be construed according to what it means now, not what it meant in 1900, the starting point for the plaintiff was suggested by the text. The word "external" in s 51(xxix) was designed to connote relationships and things connected with other nations and with international organisations, both within and outside the British Empire. But for the legal opinion that parts of the British Empire were not "foreign" to each other[161], the words in s 51(xxix) would probably have read "foreign affairs". That, then, was the real subject matter with which (absent the Imperial gloss) the power was intended to deal. Yet once that ambit is understood, it is clear that, in its ordinary Australian meaning, "external affairs" connotes "international relations; activities of a nation arising from its dealings with other nations"[162]. The plaintiff urged this Court to return to that meaning, which, he argued, was implicit in the composite idea of "external affairs". Even allowing for a contextual and non-originalist approach to the meaning of s 51(xxix) of the Constitution, the plaintiff submitted that the terms of the paragraph were confined to relationships with foreign nations, a concept that should be restored.

98 *Uniform earlier authority*: The plaintiff argued that the adoption of the "modern doctrine" of s 51(xxix) had involved a radical shift from the earlier decisions of this Court concerning the meaning of that paragraph. In *R v Burgess; Ex parte Henry*[163], counsel explicitly advanced an earlier version of the geographical externality principle. However, it was not accepted by the Court. It is clear enough from the reasons of all members of the Court in *Ex parte Henry* that they derived much significance for the meaning of the phrase from the word "affairs", used in conjunction with "external". Their Honours' approach was not ostensibly confined to construing the power strictly in accordance with what it had been taken to include in 1900. On the contrary, some of their reasons in that case explicitly traced the gradual emergence of Australia's international personality[164].

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161 See now *Sue v Hill* (1999) 199 CLR 462.

162 See *Macquarie Dictionary*, 4th ed (2005) definition of "foreign affairs" (at 553). By cross-reference, the same definition is provided for "external affairs" (at 499).

163 (1936) 55 CLR 608 at 614; cf at 640.

164 See, eg, (1936) 55 CLR 608 at 640-642 per Latham CJ.

99 Nevertheless, the proposition that s 51(xxix) should be construed as giving power to make laws with respect to matters external to Australia, as such, was not adopted. Latham CJ said that "the substantial subject matter of external affairs" was "[t]he regulation of *relations* between Australia and other countries, including other countries within the Empire"[165]. The Chief Justice considered the phrase as equivalent to a power to make laws with respect to "foreign affairs or *relations*"[166]. A like connotation, equating "affairs" to "the more common expression" of "foreign *relations* of a State", was accepted by Starke J[167]. In his reasons, Dixon J expressed the "evident … purpose" of the paragraph as being[168]:

> "to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external *relations* of the Commonwealth".

100 Similarly, Evatt and McTiernan JJ, whilst acknowledging that the expression "external affairs" was one "of wide import", said[169]:

> "It is frequently used to denote the whole series of *relationships* which may exist between States in times of peace or war. It may also include measures designed to promote friendly *relations* with all or any of the nations."

101 There is nothing in any of the reasons in *Ex parte Henry* to lend support to the geographical externality principle. On the contrary, all the reasons appear to accept that "external affairs" is concerned with external *relations* or *relationships* of Australia with other nation states. This is the essential meaning that the plaintiff asked this Court to restore.

102 *Meaning of composite expressions*: As a textual matter, there is a difficulty in some of the more recent reasoning of members of this Court, so far as they have attempted to explain the expression in s 51(xxix) by splitting up the words and giving separate meaning to "external" and to "affairs" as, arguably, Deane J did in *Polyukhovich*[170]. We now appreciate that this is an inaccurate way

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165 (1936) 55 CLR 608 at 643 (emphasis added).

166 (1936) 55 CLR 608 at 643 (emphasis added). See also at 640.

167 (1936) 55 CLR 608 at 658 (emphasis added).

168 (1936) 55 CLR 608 at 669 (emphasis added).

169 (1936) 55 CLR 608 at 684 (emphasis added).

170 (1991) 172 CLR 501 at 599.

of construing composite expressions[171]. Each part of such an expression throws light on the meaning of the rest. Each must be taken into account.

103 The Constitution did not here use the word "foreign" or "external" in association with "matters"[172] or "people"[173] or "disputes"[174]. Still less did the Constitution confer on the Federal Parliament, as the *British North America Act* of 1867 had done in Canada[175], a legislative power to make laws with respect to the general subject of crime which, with expanding notions of extraterritorial operation of laws, could apply to facts, persons and things occurring in the territory of foreign countries.

104 It was the context of the phrase considered as a whole, and especially the use of the word "affairs", that led Gibbs CJ in *Koowarta*[176] to favour confining the application of the power in s 51(xxix) of the Constitution to "public business, transactions or matters concerning men or nations collectively"[177]. The plaintiff therefore urged that this meaning of the phrase "external affairs" was grounded in more than half a century of this Court's authority. It was more consonant with the evident purpose of the power and its history as appearing in a written Constitution conferring specific and limited powers upon the new Federal Parliament that it created. The plaintiff called for this Court to reverse its departure from the earlier doctrine that had followed the embrace by a minority of the new argument of the Commonwealth in the *Seas and Submerged Lands Act Case*[178].

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171 *R v Brown* [1996] AC 543 at 561 per Lord Hoffmann; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397. This legal analysis is sustained by modern research into universal elements in human languages and their structure; the modes of acquisition of language by children; and the essentiality of context to give meaning to individual words: Diamond, *The Rise and Fall of The Third Chimpanzee*, (1991) at 125-151. See also reasons of Gleeson CJ at [19] and reasons of Callinan and Heydon JJ at [176].

172 As it does in ss 51(xxxvi), (xxxvii), (xxxix) and 52(ii), (iii).

173 As it does in s 51(xxvi).

174 As it does in s 51(xxxv).

175 Now in the *Constitution Act* 1867 (Can), s 91(27).

176 (1982) 153 CLR 168.

177 (1982) 153 CLR 168 at 188.

178 (1975) 135 CLR 337 at 342. Contrast the arguments advanced at 347.

105 *Reconciliation with treaty strictness*: Whilst the plaintiff accepted, and authority supported, the notion that s 51(xxix) extended beyond the making of treaties and laws to give those treaties effect within Australia, he submitted that a comparatively unbridled power, suggested by the geographical externality principle, was incompatible with a unified notion of the meaning of the paragraph in the Constitution. He argued that it risked unravelling the careful limitations which the Court's previous expositions of s 51(xxix) had established.

106 Thus, if all that were required to sustain a federal law as valid was some application or relevance to a place, person or thing existing beyond the geographical boundaries of Australia (and especially if, as some *dicta* proposed, the opinion of the Parliament was to be treated as conclusive as to that connection[179]) the previous insistence of Australian constitutional law upon close conformity between the provisions of a treaty and the federal laws enacted to give such treaty effect[180] would be effectively put at nought. Why bother implementing a treaty, the plaintiff asked rhetorically, if the strictures of compliance with the treaty were unnecessary and all that was required to uphold the validity of a federal law was that it could be characterised as one "with respect to" a fact, person or thing geographically external to Australia?

107 The plaintiff argued that there was an unresolved tension between the geographical externality principle and the principle upholding the constitutional validity of laws based on treaties. The tension could only be resolved by a return to the expositions of s 51(xxix) appearing in *Ex parte Henry* which, the plaintiff insisted, were already ample enough to permit lawmaking by the Federal Parliament as required for Australia's full participation in relationships with other nations where grounded in an *obligation* of legal derivation, not a nebulous *concern*.

108 *Endangering past authority*: In elaboration of this last submission, the plaintiff argued that, if the geographical externality principle were correct, it would open the constitutional doors to federal lawmaking with respect to an enormous range of subjects. It would suggest that earlier important decisions of this Court had been wrongly decided.

109 Thus, if it could be argued that the *Communist Party Dissolution Act* 1950 (Cth), held not to be a law with respect to "defence"[181], was nonetheless a law

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179 See, eg, *Polyukhovich* (1991) 172 CLR 501 at 653-654 per Toohey J.

180 See, eg, *Industrial Relations Act Case* (1996) 187 CLR 416 at 489.

181 Constitution, s 51(vi).

with respect to "external affairs"[182] because of the world-wide character of the communist threat found by the Federal Parliament to exist beyond Australia and because of the service outside Australia of an Army battalion then operating under the United Nations flag in Korea, the decision in the *Communist Party Case*[183] could have been different. That decision denied the power of the Federal Parliament, by statutory preamble, to find conclusively the existence of the requisite constitutional power[184]. There would remain questions of characterisation of the law as one "with respect to" facts, persons or things geographically external to Australia. However, the very large ambit encompassed by the "modern doctrine" is beyond question. Particularly is this so because of the accumulation of matters *beyond* Australia's borders that are now relevant to the claims of federal lawmakers to make laws having effect *within* those borders.

110 *Dangers to federalism*: The plaintiff also pointed out that it is not accurate to suggest, simply because a place, person or thing is geographically outside the mainland territory of Australia, that it necessarily falls beyond State lawmaking powers, so that any federal laws enacted on the basis of the "modern doctrine" could cause no effective disturbance to the federal-State balance.

111 States now enjoy substantial powers to enact laws having extraterritorial operation[185]. Quite apart from this consideration, as the present case demonstrates, the geographical externality principle, in its most ample application, would certainly authorise federal laws that cut across the enactment of State laws otherwise having operation within the State's own territory. An example may be seen in ss 50DA and 50DB of the Crimes Act providing "[o]ffences of benefiting from, or encouraging, offences against this Part". Those sections, which appear to be directed to travel organisations and like bodies engaged in advertising or promoting child sex tourism, might ordinarily be the subject of State laws, expressing State offences for conduct that would often occur wholly, or substantially, within the borders of the State concerned. The notion which Dawson J appeared to accept in *Polyukhovich*[186], that there was no

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182 Constitution, s 51(xxix).

183 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

184 (1951) 83 CLR 1 at 189-195; cf at 161.

185 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 22-26 [7]-[18], 33-38 [45]-[62], 53-58 [111]-[121]; cf at 82 [188]. See also *Australia Act* 1986 (Cth), s 2(1).

186 (1991) 172 CLR 501 at 632.

danger to the federal-State balance in the geographical externality principle, appears erroneous or at least doubtful in the light of provisions such as ss 50DA and 50DB of the Crimes Act.

112 In constitutional terms, this particular issue might not be a large problem. However, it cannot be said to be "of no moment"[187], at least in the present case. The plaintiff complained that the Commonwealth had confused the expansion of the extraterritorial *operation* of a constitutional power that already exists and the expansion of the *power* itself, beyond its previously acknowledged ambit. The plaintiff urged this Court to return to adherence to that distinction, which, he said, was essential to the scheme of a written federal Constitution that divided power between the several lawmakers in Australia and demanded conformity with its provisions if enacted law were to be valid.

113 Whilst accepting that the grant of power to the Federal Parliament to make laws for the peace, order and good government of the Commonwealth was expressed in the language of a grant and not in terms of a limitation upon power, the plaintiff argued that the character of the federal Constitution and its purposes required a relevant nexus to exist between the constitutional interests of the Commonwealth and the subject matters to which an enacted federal law was addressed. To the extent that such a law went beyond "external affairs", in the sense of the relationships between nation states (and now relationships with international organisations), it exceeded the proper subject matter of s 51(xxix) of the Constitution. It was therefore invalid.

Alternative validity and the avoidance of problematic issues

114 *Conflicting features of the Constitution*: The arguments of the plaintiff in this case have planted a doubt in my mind concerning the geographical externality principle. It is a doubt that was not previously there. I do not accept, as the plaintiff urged, that the *Polyukhovich* principle should be overruled. However, the plaintiff's submissions call attention to some difficulties in the "modern doctrine" that have not, so far, received sufficient attention from this Court. Such attention may be needed in future cases where the sole constitutional foundation available or propounded for a federal law is that it is made with respect to facts, persons or things external to Australia, without connection otherwise to relationships with other nation states and with international organisations that seem to be implied by the composite expression "external affairs".

115 In accepting arguments about the scope of federal legislative powers, this Court should be conscious of two important and sometimes conflicting features

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187 Cf reasons of Gummow, Hayne and Crennan JJ at [39].

of the Constitution. The first is the *federal* character of the polity thereby created. This introduces checks and balances. It divides the power of lawmaking. The divisions are essential to the constitutional design. They are also protective of individual liberties and personal freedoms. Liberties and freedoms can sometimes be endangered by the concentration of power within modern government[188]. It may therefore be necessary for this Court to look afresh at its federalism jurisprudence to ensure that it accords with the constitutional text and purpose.

116 The second feature is the *functional* capacity of the Constitution to adapt so as to be relevant to a world in which Australia must now operate as an independent nation state – a world quite different from that of 1900. In that world, there are now so many facts, persons and things *external* to Australia's geographical borders that, if this is accepted as a valid criterion for sustaining federal laws applicable to facts, persons and things *within* Australia, there would be almost no limit to the lawmaking power thereby accorded to the Federal Parliament. This is why Brennan J in *Polyukhovich*[189] proposed the need for some additional factor of connection ("nexus" with Australia) to reconcile the second stated feature with the first. The present case suggests to me that the Court needs to revisit Brennan J's reasoning and to elaborate the geographical externality principle further before applying it as an accepted doctrine of Australian constitutional law.

117 *Avoiding problematic issues*: Having identified the problems raised by the plaintiff, I can circumvent them in this case. There is, in my view, an alternative foundation for the constitutional validity of the challenged provisions of the Crimes Act. At the risk of being criticised as "unduly timorous or full of self-doubt"[190], I will therefore place the geographical externality principle aside in the present case. I will do so because of what I regard as unresolved difficulties that can be left to another day.

118 The main alternative bases propounded by the Commonwealth for affirming that the impugned provisions of the Crimes Act constitute laws with respect to "external affairs" were that, on the uncontested materials placed before

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188 Thus in Australia, whatever the inconvenience, the military are always subject to "civil power [and] constitutional norms": see *X v The Commowealth* (1999) 200 CLR 177 at 230 [166].

189 (1991) 172 CLR 501 at 552-553.

190 Allan, "'Do the Right Thing' Judging? The High Court of Australia in *Al-Kateb*", (2005) 24 *University of Queensland Law Journal* 1 at 11.

this Court, they were laws with respect to a "matter of international concern" or laws affecting Australia's external relationships with other nation states and with international organisations. Should either of these arguments be accepted? Do they sustain the provisions of the Crimes Act as valid laws, made under the Constitution?

A matter of international concern

119 *The Commonwealth's submissions*: The Commonwealth submitted that, on the basis of the materials received by the Court, the challenged provisions of the Crimes Act were supported by the external affairs power on the footing that they were laws with respect to a "matter of international concern" and thus within the ambit of s 51(xxix) of the Constitution. In past decisions of this Court, several Justices have suggested that the criterion "matter of international concern" describes a proper subject of the "external affairs" of the Commonwealth with respect to which the Federal Parliament is empowered under the Constitution to enact laws[191].

120 An obvious difficulty with the expression "matter of international concern" is that, at its widest, it could refer to a diverse multitude of topics, lacking any precise definition or meaning[192]. As long ago as 1936, Latham CJ recognised the impact on time and space of modern inventions which imposed on nations everywhere (including Australia) a duty to "endeavour to discover means of living together upon practicable terms"[193]. In the intervening seventy years, the dimensions of international concern have expanded exponentially.

121 Evidence in the materials received by this Court in the present case for such "international concern" in respect of sexual offences by foreign nationals against children included:

(1) The adoption by the General Assembly of the United Nations on 20 November 1989 of the CRC, which had entered into force in 1990[194];

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191 See, eg, *Koowarta* (1982) 153 CLR 168 at 217 per Stephen J. See also at 235 per Mason J, 242 per Murphy J; cf at 202, 207 per Gibbs CJ.

192 *Polyukhovich* (1991) 172 CLR 501 at 561 per Brennan J, 657 per Toohey J. See also reasons of Callinan and Heydon JJ at [219].

193 *Ex parte Henry* (1936) 55 CLR 608 at 640.

194 The CRC, Art 19 commits state parties to take "all appropriate legislative ... measures to protect the child from all forms of ... injury or abuse ... including sexual abuse, while in the care of ... any ... person who has the care of the child". Article 34 commits state parties to "protect the child from all forms of sexual

(Footnote continues on next page)

(2) The adoption by the General Assembly of the United Nations on 25 May 2000 of the Optional Protocol to the CRC[195];

(3) The appointment by the Secretary-General of the United Nations[196] of a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography with a mandate to report on those topics to the United Nations Commission on Human Rights. According to an early report by the Special Rapporteur, he welcomed the Australian laws in question in this case as a desirable response to the "transnational sexual exploitation of children"[197];

(4) The adoption annually between 1994 and 1997 of resolutions of the United Nations Commission on Human Rights, addressed, amongst other things, to promoting effective international responses to transnational problems of child abuse;

(5) The signature of particular Memoranda of Understanding in 1997 and 1998 between the Government of Australia and, respectively, the governments of the Philippines and the Fiji Islands, designed to combat child sexual abuse committed by Australian nationals in such countries[198];

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exploitation and sexual abuse [including by] national, bilateral and multilateral measures".

195 The Protocol commits state parties to prohibit child prostitution (Art 1) and to establish jurisdiction, relevantly "[w]hen the alleged offender is a national of that State or a person who has his habitual residence in its territory" (Art 4.2(a)). Although not binding on Australia at any relevant time, the Protocol entered into force generally on 18 January 2002.

196 Pursuant to United Nations Commission on Human Rights, Resolution 1993/82.

197 United Nations, *Report to the Commission on Human Rights of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* (Mr Vitit Muntarbhorn), Economic and Social Council, E/CN.4/1994/84 (14 January 1994) at [170]. See also at [166]-[169].

198 Memorandum of Understanding Between the Government of Australia and the Government of the Republic of the Philippines for Joint Action to Combat Child Sexual Abuse and Other Serious Crime, 11 October 1997; Australia-Fiji Memorandum of Understanding for Joint Action to Combat Child Sexual Abuse and Other Serious Crimes, 18 December 1998.

(6) The enactment by a large number of nation states[199] of legislation providing for criminal offences in respect of sexual conduct of their nationals with children outside the national borders of the states concerned; and

(7) The report published by the House of Representatives Standing Committee on Legal and Constitutional Affairs on the 1994 Bill that introduced into the Crimes Act the provisions the subject of the present proceedings[200].

122 Against the background of this international and national evidence, the Commonwealth submitted that, whatever the precise ambit of the expression "matter of international concern" might be, the subject of sexual offences against children by Australian nationals in foreign countries was such a matter. It was therefore one that attracted the power to enact laws under s 51(xxix) of the Constitution.

123 *The contrary arguments*: In resisting these submissions, the plaintiff repeated many of his earlier arguments to challenge the proposed criterion of "matter of international concern". Once it is accepted that the legislative power with respect to "external affairs" is not confined, as such, to giving effect to binding treaties, the plaintiff acknowledged that some other verbal explanation had to be found to support legislation apt to the full engagement of Australia with the external world, as it now exists.

124 The plaintiff complained that the suggested criterion of a "matter of international concern" was far too broad to provide a stable and meaningful foundation for the legislative validity of federal laws under s 51(xxix) of the Constitution. On this view, some additional adjectival qualification (such as "real", "genuine", "widespread", "pressing", "established" or "undisputed") had to be deployed to confine the power to an ambit that is clear and proper to its context[201]. Alternatively, some other controlling requirement must be introduced,

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199 The Commonwealth's submission stated, by reference to an international survey, that thirty-four countries had enacted such laws and that two others (Argentina and South Africa) had such laws in preparation at the time of the survey.

200 Australian Parliament, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Report on the Crimes (Child Sex Tourism) Amendment Bill 1994* (May 1994) at 1-3 [1.2.1]-[1.2.8].

201 The context includes the existence of the power in a Constitution of defined and limited federal powers that is intended to operate in a polity that is divided into federal, State and Territory governments.

by an alternative verbal formula (such as having a strong "nexus between Australia and the supposed subject of external affairs" or "capable of being reasonably considered to be 'appropriate or adapted'" to addressing the concern[202]) so as to prevent any suggested "matter of international concern" from becoming a means that would destroy the federal character of the Australian Constitution. Certainly, a vastly increased number of matters are now of "international concern". They expand every day. As a criterion of federal law, the concept would therefore be virtually limitless and potentially destructive of Australian federal arrangements.

125 It is desirable that the Federal Parliament, as the legislature of the national government of Australia, should be able to make laws with respect to matters of international concern to the fullest extent possible as the legislatures of other independent nations may do. However, this is subject to certain qualifications[203]. First, such laws must conform to the constitutional requirements stated in an instrument of government of defined and limited powers. Relevantly, they must be laws with respect to "external affairs". Secondly, they must be laws compatible with the divisions of power within the federal polity. Thus, at the very least, they must not, in the guise of being laws with respect to "external affairs", endanger the continued existence and constitutional viability of the States provided for in the Constitution. Thirdly, any such laws must conform to the other requirements of the Constitution, such as those contained in Ch III. The notion that the Federal Parliament in Australia must have plenary and untrammelled power to make laws having some relationship to international or external concerns is not one that is unarguably consistent with such a carefully calibrated, limited and federal constitutional document.

126 The powers of the Parliament under s 51(xxix) are broad indeed. They are more than ample for most purposes. But they are not and cannot be unlimited. It is the Constitution that limits them. And it is the duty of this Court to uphold the limits.

127 *Conclusion: an undeveloped concept*: As with the geographical externality principle, I prefer to put this second argument of the Commonwealth to one side. The suggestion that the constitutional validity of federal laws could be demonstrated by showing that they were made with respect to a "matter of international concern" is still undeveloped in Australia[204]. This second argument

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202 Reasons of Callinan and Heydon JJ at [221].

203 See, eg, *Re Wakim* (1999) 198 CLR 511.

204 Reasons of Callinan and Heydon JJ at [217].

may, like the first, assign insufficient attention to the appearance of the word "external" in connection with the word "affairs".

128 It is therefore appropriate to move, finally, to the third argument for validity advanced by the Commonwealth, namely that the contested law is one with respect to the international relationships of Australia with other nation states and international organisations and on that basis is within the external affairs power of the Constitution. I can take this step immediately because, as will appear, I am of the view that it provides a convincing argument for validity. It is an argument that gives full force to the word "affairs" in the constitutional grant. It is also one that is consistent with the long-standing authority of the Court that the power afforded in s 51(xxix) is one concerned at its core with international relationships.

Relationships with nation states and international organisations

129 *The active nationality principle*: The understanding of how this third explanation of the ambit of "external affairs" comes about first requires brief mention of a development of international law that occurred during the first century of the Commonwealth. Starting from a general principle that "crime is local" and historically part of the public law of a nation[205], international law might have developed in a way that forbade one nation state making its own laws imposing criminal liability by reference to the conduct of its own nationals within the territory of another nation state[206]. Such laws might have been viewed as an infringement by the former nation state of the sovereign rights of the latter.

130 However, this is not the way international law in fact developed. Instead, the active nationality principle holds that "[t]here is no restriction on the competence in international law of a State to prosecute its own nationals for acts done on foreign territory"[207]. In the present case, both Thailand (under the territorial principle) and Australia (under the active nationality principle) could exercise jurisdiction over the plaintiff in full conformity with international law. The international relations of nation states, including those of Australia and

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205 *Lipohar v The Queen* (1999) 200 CLR 485 at 497 [15], 542 [141], 546-547 [154].

206 See, eg, the dissent of Judge Moore in *The Case of the SS "Lotus"* (1927) Permanent Court of International Justice (Series A, No 10) at 92-93.

207 *Aird* (2004) 220 CLR 308 at 347 [123] quoting O'Connell, *International Law*, 2nd ed (1970), vol 2 at 824. See also Shearer, *Starke's International Law*, 11th ed (1994) at 210-211; Shaw, *International Law*, 5th ed (2003) at 588-589; *Restatement of the Foreign Relations Law of the United States*, 3d, §421(2)(d); cf reasons of Gleeson CJ at [4].

Thailand, have developed in accordance with this principle of international law. Indeed, the principle has been clear, at least since the decision of the Permanent Court of International Justice in *The Case of the SS "Lotus"*[208] more than seventy years ago.

131 Necessarily, a prosecution based on the active nationality principle affects, to some degree, the external relations of Australia with other nation states, notably in this case with Thailand. It does so because both nations assert a right to impose criminal liability by reference to events that happened within the territory of Thailand and which involved alleged conduct with at least one person there who, by inference, is a Thai national or resident. That person and possibly others in Thailand might be called upon to give evidence in a prosecution of the plaintiff. Some might possibly have to come to Australia for that purpose. To this extent, the relations between Australia and a country external to Australia, namely Thailand, are affected, to some degree at least, by the provisions of the Crimes Act whose validity the plaintiff contests.

132 Once a relationship with another nation state is enlivened (as it necessarily is in the facts of the present case) there is incontestably an "external affair". No doubt or hesitation can arise in the attribution of that phrase to the relationship between states that is inherent in the criminal process envisaged in the present case by the contested provisions of the Crimes Act.

133 That the provisions intended to enliven the foregoing principle of international law governing the relations between nation states is clear from the terms of s 50AD of the Crimes Act stating that a person must not be charged with an offence of the impugned kind, allegedly committed outside Australia, unless, at the time of the offence, the person was an Australian citizen or a permanent resident of Australia. On the facts contained in the stated case, the plaintiff's Australian citizenship sufficiently enlivens that provision. It afforded a clear connection between the plaintiff and the subject matter of the federal law[209].

134 On this footing, within this view of the ambit of s 51(xxix) of the Constitution, power existed under that paragraph to enact the law. As the notion of the power of the Federal Parliament to enact laws having extraterritorial

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208 (1927) Permanent Court of International Justice (Series A, No 10) at 18-20.

209 *Polyukhovich* (1991) 172 CLR 501 at 551-553 holding that there must be some "nexus ... between Australia and the 'external affairs' which a law purports to affect".

operation was enlarged[210], the impediments to the making of such federal law evaporated so long as the relationship with another state was affected by the intended prosecution. Subject to what follows, the effects on the relationship with Thailand (and in other cases with other nation states by the very terms of the contested provisions of the Crimes Act) sufficiently found the validity of the provisions in s 51(xxix) of the Constitution.

135 *Characterisation of the law*: There are *dicta* in the cases that might be understood as suggesting that the courts should defer to the Federal Parliament or the Executive of the Commonwealth in the determination of the relations of Australia with other nation states and with international organisations. Such *dicta* might suggest that whether such relations sustain laws of the impugned kind is a matter exclusively for the Parliament or the Executive to decide[211]. Certainly, in the Australian system of government, the conduct of foreign relations is peculiarly the responsibility of the Executive Government of the Commonwealth[212]. It is not, as such, a responsibility of courts.

136 Nevertheless, the rule of law is a foundational principle of the Australian Constitution. It is inherent in the provisions and purposes of Ch III of the Constitution. This Court cannot surrender, or renounce, its duty of determining the character of a law where the constitutional validity of that law is questioned. The Parliament cannot, by preamble or statutory assertion, exclude the courts from the performance of their constitutional function to decide contested questions as to the meaning and validity of a federal law. This is as true of a law said to be supported by s 51(xxix) of the Constitution as one supported by any other source of constitutional power.

137 It is not necessary in this case to explore this issue further. The Commonwealth did not rely solely on the language of the Crimes Act, without more. On the contrary, it placed much material before this Court to explain the background and purpose of that law. That material was received as affording constitutional facts upon which the Court was invited to act.

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210 *Seas and Submerged Lands Act Case* (1975) 135 CLR 337 at 497-498, cited by Gleeson CJ at [13].

211 *Polyukhovich* (1991) 172 CLR 501 at 530-531 per Mason CJ: "It is enough that Parliament's judgment is that Australia has an interest or concern. It is inconceivable that the Court could overrule Parliament's decision on that question." Cf *Horta* (1994) 181 CLR 183 at 194.

212 *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 50-51 per Brennan J. See also *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767 at 777-779; 144 ALR 677 at 689-692.

138 The facts so received unquestionably demonstrated the active involvement of many states, including Australia, in multilateral and bilateral relationships designed to respond effectively to sexual offences by the nationals of those states against children in other states. As well, active debates in the agencies of the United Nations and in other international and regional bodies over the past two decades have concerned the protection of children from sexual conduct on the part of foreign nationals. The material received by the Court affords clear evidence that the subject matter of the challenged provisions of the Crimes Act is (and already was when the law was enacted) one relevant to the external relations of Australia with the international organisations concerned. The participation of many nation states in the activities of such international organisations reinforces the conclusion already reached that the subject of the law is one with respect to the relations of the Commonwealth with nation states other than Australia and thus within s 51(xxix) of the Constitution[213].

139 *Conclusion: validity is sustained*: Subject to what follows, this conclusion is sufficient to sustain the constitutional validity of the impugned provisions of the Crimes Act. These provisions are shown to be laws with respect to the *relationships* (relevantly between Australia and Thailand) affected by the alleged conduct in Thailand of an Australian national. They also affect the *relationship* between Australia and the United Nations treaty body with responsibility for the implementation of the CRC, a treaty that Australia has ratified. Upon this basis, even on a qualified understanding of the external affairs power, a constitutional foundation for the challenged law is proved. The law, although having operation *within* Australia, is made with respect to Australia's international relationships. It is thus valid under the Constitution as a law with respect to "external affairs".

The proportionality argument fails

140 *An argument of proportionality*: The plaintiff had one last argument. It was not expressed in terms of proportionality. However, that is what, in my view, the argument involved. The plaintiff complained that, even if the constitutional criteria postulated by the Commonwealth for the validity of a federal law on sexual conduct of Australian nationals and permanent residents

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213 Cf *R v Sharkey* (1949) 79 CLR 121 at 136. See also *Seas and Submerged Lands Act Case* (1975) 135 CLR 337 at 450 per Stephen J; *Koowarta* (1982) 153 CLR 168 at 190-191 per Gibbs CJ, 221 per Stephen J, 234 per Mason J; *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 439 per Deane J.

with children outside Australia were established[214], the impugned provisions of the Crimes Act extended beyond, and differed from, these criteria. The plaintiff argued that the provisions of the law, in their potential field of operation, were invalid because the contested sections of the Crimes Act far overreached the power relied upon. Having regard to the preceding analysis, the question so presented arises for me only in respect of that elaboration of the external affairs power expressed in terms of the relationships of Australia with foreign states and international organisations. Accepting that criterion, is the contested law disproportionate (that is, not "reasonably appropriate and adapted")[215] to the exercise of the external affairs power so understood?

141 In support of this argument, the plaintiff pointed to a number of features of the law. Thus, the relevant provisions of the Crimes Act are not confined (as they might have been) to the implementation of a treaty (such as the Protocol to the CRC) or even, if that would be valid, of any Memorandum of Understanding with Thailand, such as those that have since the enactment of the law been negotiated with the Philippines and the Fiji Islands. The result, so the plaintiff submitted, was a law of general application that imposed Australian criminal sanctions upon conduct occurring overseas, included some conduct that was not criminal in the place where the conduct happened. This was so in the case of Thailand where the age of consent was said to be fifteen years, not sixteen as provided in the Crimes Act of Australia. *A fortiori*, the law also applied to events involving Australian citizens and permanent residents in countries with substantially lower ages of consent for lawful sexual relations. For instance, Canada adopts a general age of consent of fourteen years for most sexual activity. The same age is said to apply in Albania, Croatia, China, Colombia, Germany, Hungary and Iceland. In some countries, such as Chile and Mexico, the age of consent is said to be twelve years[216].

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214 Namely (1) geographical externality to Australia of the relevant facts, persons or things; (2) being with respect to a matter of international concern, however delimited; and (3) its impact on the relations of Australia with foreign states and international organisations.

215 Cf *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300, 324, 338, 387-388; *Lange* (1997) 189 CLR 520 at 567 fn 272; *Theophanous v The Commonwealth* [2006] HCA 18 at [68]-[71].

216 Conventionally, under English, Scots and other law, the male age of consent to sexual intercourse for the purpose of marriage was 14 years and for females 12 years, a fact reflected in several royal marriages: see Lee, *1603*, (2003) at 92. Large numbers of women were married in England at the age of 15 years well into the nineteenth century: Wilson, *The Victorians*, (2002) at 324.

142 In these circumstances, the plaintiff asked how criminalising, according to Australian law, conduct that was not criminal where it occurred could ever possibly affect the relationships between nation states or with international organisations? Instead, he submitted, the law represented an illegitimate and over-extensive attempt, beyond the available federal power, to impose Australian cultural norms on activities happening elsewhere in the world. The spectre was presented of an adult Canadian citizen who was an Australian permanent resident being prosecuted on his return to Australia for consensual sexual intercourse or activity lawful in Canada with a person older than fourteen but younger than sixteen years[217]. Alternatively, the danger was propounded of the Federal Parliament, supposedly based on Australia's relationships with other nation states or international organisations, enacting laws cutting across different laws enacted by the Australian States on a wide range of matters. Different ages of consent for the purposes of State and Territory criminal laws have long been a feature of Australian legislation[218]. The potential use of federal law to undermine the effect of reforms achieved by States and Territories locally was implicit in these submissions.

143 In default of a provision limiting criminal liability in Australia to a case of equivalent liability in the place where the relevant events occurred[219], the plaintiff argued that the true *character* of the impugned law was not, as asserted, a law with respect to the external relationships of the Commonwealth with other nation states or international organisations. It was revealed, instead, as a law with respect to a crime involving a matter of postulated domestic concern for which the Federal Parliament had no applicable legislative power under the Constitution.

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217 *Criminal Code* (Canada), s 151.

218 Bronitt and McSherry, *Principles of Criminal Law*, 2nd ed (2005) at 602. The authors trace the variations and changes to the age of consent in Australia to "successive moral panics about white sex slavery in the 1880s, the anti-homosexual campaigns of the 1950s and child pornography in the 1970s"; cf Bavin-Mizzi, "Understandings of Justice: Australian Rape and Carnal Knowledge Cases, 1876-1924", in Kirkby (ed), *Sex Power and Justice*, (1995) 19.

219 As in the *Sexual Offences Act* 2003 (UK), s 72. In New Zealand an extraterritorial offence is created of engaging outside New Zealand in sexual conduct with a child which, if done in New Zealand, would be an offence against the *Crimes Act* 1961 (NZ). See *Crimes Amendment Act* 1995 (NZ), s 2 inserting s 144A into the *Crimes Act*.

144 *The law is proportionate*: Having regard to the terms of the impugned provisions of the Crimes Act, these arguments should not be accepted in the circumstances of this case. Assuming for present purposes that the constitutional power cannot rely on a criterion of operation merely by reference to geographical externality, and putting aside the suggested criterion of a "matter of international concern", the remaining explanation of s 51(xxix) of the Constitution suffices to sustain the validity of this law. This is so despite apparent discrepancies in the operation of the federal law in particular cases.

145 True, there is no statutory reason why an instance of the kind postulated involving the hypothesised Canadian citizen could not arise[220]. However, in a law of general application applying to acts occurring anywhere other than Australia, such discrepancies are bound to arise in a minority of instances because the Australian federal legislation chooses to adopt a uniform age of consent of sixteen years. The prosecutorial discretion; the judicial conduct of the trial; the common sense of juries; and the exercise of discretions in any punishment that is imposed might respond to disparities of the kind complained of by the plaintiff, were they to arise in practice. Such disparities do not deprive the provisions of the Crimes Act under which the plaintiff has been charged of the constitutional character that sustains their validity upon the basis that I have explained. They remain laws with respect to Australia's relationships with other nation states, in this case Thailand. And for constitutional validity that is enough.

146 It may be said that, if laws of the present kind were to become common, other countries could impose on people criminal responsibility for acts, not necessarily sexual, done or omitted whilst in Australia, although such acts are perfectly lawful here. However, these are complaints that do not affect the validity of the law contested in this case. There was no suggestion in the materials before this Court that any particular problem had arisen out of the legislation of a very large number of nation states that have already imposed extraterritorial criminal liability upon their nationals for offences against children occurring in foreign jurisdictions[221]. The age of sixteen chosen by the Federal Parliament is now the most common age of consent applicable in Australian criminal law[222]. In so far as it is relevant to determining the constitutional

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220 The provisions of the *Criminal Code* (Cth), s 10.5 do not appear to limit prosecutions of persons for offences by reference to the definition of a "law", as there appearing, which refers to a "law of the Commonwealth". See [2005] HCATrans 957 at 1465, 1485.

221 Set out in ECPAT International, *Child Sex Tourism Action Survey*, (April 2001) at 37-38.

222 Bronitt and McSherry, *Principles of Criminal Law*, 2nd ed (2005) at 605.

question of proportionality ("reasonably appropriate and adapted"), and thus the constitutional character of the law, the Australian legislation is neither unusual nor impermissibly overreaching. It appears generally consistent with laws passed by many other nation states. That feature of the law brings it within the external affairs power of the Constitution as that power has long been understood.

147 The validity of the impugned law can therefore be decided in the present case without reaching any final conclusion on the more difficult constitutional arguments propounded by the Commonwealth: namely "geographical externality" and "matter of international concern". In my view, both of these arguments require further analysis and elaboration to ensure that they are consistent with the essential constitutional postulate of federalism and with the notion inherent in that postulate that the Constitution is one of divided and limited lawmaking powers. Such division is often the best safeguard of limited government and of personal freedom. It is therefore a division to be cherished and safeguarded. When it is at any risk, it behoves this Court to proceed with caution.

Conclusion: the legislation is valid

148 The provisions of the Crimes Act contested by the plaintiff are valid federal laws. They are sustained by s 51(xxix) of the Constitution. They are validly made with respect to Australia's external relations with other nation states and with international organisations. The provisions of the Crimes Act relevant to this case are proportionate to the exercise of the power so granted to the Federal Parliament for that purpose. That is sufficient to uphold validity. Other suggested arguments advanced by the Commonwealth to support the constitutional validity of the disputed laws do not therefore need to be decided.

149 The foregoing are my reasons for joining in the orders announced by the Court at the end of argument on 17 November 2005[223].

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223 [2005] HCATrans 957 at 3160.

150 CALLINAN AND HEYDON JJ. The legislation and background circumstances are set out in other judgments. The defendant contended that ss 50BA and 50BC of the *Crimes Act* 1914 (Cth) were valid on four bases[224].

(a) A law that operates on conduct geographically external to Australia is necessarily a law with respect to external affairs within the meaning of s 51(xxix) of the Constitution[225].

(b) A law that operates on conduct geographically external to Australia necessarily affects Australia's external relations and is thus a law with respect to external affairs.

(c) In any event, ss 50BA and 50BC are laws in fact concerning Australia's external relations.

(d) Sections 50BA and 50BC are laws with respect to external affairs on the basis that the extraterritorial prohibition of the sexual exploitation of children is a matter of sufficient international concern.

151 The arguments of the plaintiff denying validity are to be preferred. They correspond broadly with the reasoning set out below.

Is a law that operates on conduct geographically external to Australia a law with respect to external affairs?

152 The defendant urged an affirmative answer. That answer is supported by three decisions of, and numerous dicta in, this Court. The view reflected in that answer will be called the "geographic externality" view of s 51(xxix) for short.

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224 The defendant did not contend that the legislation was supportable as being reasonably appropriate and adapted to give effect to a treaty to which Australia is a party, such as the Convention on the Rights of the Child; nor as fulfilling any obligations Australia may have under customary international law; nor as falling under any head of power other than s 51(xxix); nor as capable of validation by being read down.

225 Section 51(xxix) provides:

"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".

153 *Approaches to construction.* The defendant submitted that the correct question in the present context is: what do the words "external affairs" mean "to us as late twentieth century Australians?"[226] This is hard to square with many statements by members of this Court[227] that the constitutional words bear the meaning "they bore in the circumstances of their enactment by the Imperial Parliament in 1900"[228]. It is also hard to square with the following unanimous statement by the Court about the history of s 92[229]:

> "Reference to the history ... may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of *identifying the contemporary meaning* of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged."

These inquiries seem pointless unless, in general, the meaning of an expression in the Constitution like "external affairs" comprises the meanings which skilled lawyers and other informed observers of the federation period would have attributed to it, and, where the expression was subject to "dynamism"[230], the meanings which those observers would reasonably have considered it might bear in future. What individual participants in the Convention debates said it was intended to mean, or meant, either during those debates or later, is no doubt immaterial, save to the extent that their linguistic usages are the primary sources from which a conclusion about the meaning of the words in question can be drawn. Further, no doubt the mere fact that a particular instance of the

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226 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 [44] per McHugh J.

227 For example, those quoted by McHugh J in *Eastman v The Queen* (2000) 203 CLR 1 at 41-44 [134]-[140].

228 *King v Jones* (1972) 128 CLR 221 at 229 per Barwick CJ.

229 *Cole v Whitfield* (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ (emphasis added). See also *State of Tasmania v The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329 at 358-360 per O'Connor J; *Breavington v Godleman* (1988) 169 CLR 41 at 132-133 per Deane J.

230 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 496 [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

expression "external affairs" was not foreseen, or could not have been foreseen, in 1900, does not conclusively indicate that the instance in question could not now fall within it[231]. But, subject to considerations of those kinds, it might be asked whether it is not legitimate to seek to measure the ambit of the power by reference to the meaning which, in 1900, that expression bore or might reasonably have been envisaged as bearing in the future.

154 In this case, the question of the extent to which views contemporary with the federation period should be taken into account is not crucial and need not be decided. That is because in relevant respects the meaning held then and the meaning which the words bear now are identical.

155 *The constitutional structure.* Dealings between Australia and the rest of the world rest on two constitutional foundations: the power vested in the executive under s 61 and the power granted to the legislature under s 51(xxix). At least for a time after 1901, the executive did not enter treaties directly with other nations to any significantly greater extent than the Australian colonies had. Now it does so routinely. But entry into a treaty or other international agreement may make it appropriate to enact legislation to give it domestic force, as, for example, where legislation is desirable to secure to Australian citizens the benefits which entry into the treaty was designed to bring. That is the function which the legislative power granted by s 51(xxix) serves.

156 In *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[232] the joint judgment demonstrated, by detailed reference to developments before and at the time of federation, that:

(a) while before 1900 the Imperial Government negotiated treaties on behalf of itself and the colonies, there was a practice of consulting those colonies that, like the Australian colonies, had advanced towards constitutional independence, before concluding commercial treaties that applied to them;

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231 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

232 (1996) 187 CLR 416 at 476-484 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. Similar points are made by Twomey in "*Sue v Hill* – The Evolution of Australian Independence", in Stone and Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law*, (2000) 77 and "Federal Parliament's Changing Role in Treaty Making and External Affairs", in Lindell and Bennett (eds), *Parliament: The Vision in Hindsight*, (2001) 37. The analysis puts in doubt or qualifies several factual assertions made in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 124 and 126 per Mason J.

(b) there was also a practice of including in those treaties a clause providing for the voluntary adherence of a colony;

(c) the number and range of treaties entered by the Imperial Government had increased and was continuing to increase;

(d) there also existed international organisations in which constituent parts of the British Empire like the Australian colonies had the vote; and

(e) there was a practice of leaving colonial legislatures free to determine whether it was necessary to legislate to give effect to a treaty entered into by the Imperial Government.

Contemporary lawyers would have foreseen that Commonwealth legislation of that kind would be needed in relation to the same type of treaty, whether with nation States or international organisations, after 1900. Now, of course, Commonwealth legislation implements only treaties entered into by the executive of the Commonwealth, rather than, as was the case in the early years after 1900, treaties largely entered into by the Imperial authorities. But that fact is, as counsel for the defendant said, merely a "fresh denotation" of s 51(xxix) arising out of the development of Australia's international personality[233].

157 *Usages in the federation period.* It is clear that in the federation period skilled lawyers and other informed observers gave "external affairs" a meaning which included relations between the Commonwealth and other parts of the British Empire, and also relations between the Commonwealth and nations outside the Empire. Evatt and McTiernan JJ were of that view in *R v Burgess; Ex parte Henry*[234]. In support of that view, they pointed to, among other things, linguistic usages, in 1887 and 1902 respectively, by British statesmen who were exceptionally knowledgeable about Imperial and colonial affairs – Sir Charles Dilke and Joseph Chamberlain.

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233 Thus Mason J, after contending that the framers' expectations in relation to s 51(xxix) were irrelevant, pointed out that in any event the difference between those expectations and events as they actually fell out "seems to have been a difference in the frequency and volume of external affairs rather than a difference in kind": *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 126-127.

234 (1936) 55 CLR 608 at 684-685.

158 Other examples of those usages can be found in the House of Commons debates on the Commonwealth of Australia Constitution Bill in 1900. The most distinguished lawyers and political thinkers in the House attended and participated in these debates – for example, H H Asquith, R B Haldane, James Bryce and Sir William Anson – and in this fact there lay a certain safeguard against any nonchalance or thoughtlessness on the part of members of the Government. The statements referred to below are cited, not necessarily as accurate accounts of the effect of s 51(xxix), but as examples of contemporary usage. In his speech introducing the Bill, Joseph Chamberlain, Secretary of State for the Colonies, made a plain allusion to the external affairs power and to s 61: "everything which has to do with the *exterior relations* of the six colonies concerned will be a matter for the Commonwealth, and not for the individual Governments"[235]. A little later in that speech, while arguing for the preservation of Privy Council appeals, the Secretary of State cited s 51(xxix) among other placita to which he called "special attention" because they involved interests outside Australia as well as "locally". He said "external affairs" was "a phrase of great breadth and vagueness, which, unless interpreted and controlled by some other provision, might easily ... give rise to serious difficulties". He went on: "It will be seen that almost all the points to which I have thus called special attention are matters in which the Imperial Government may have to *deal with foreign countries*. It is important, therefore ... that measures of this kind, which may involve the Imperial Government in the most serious responsibility, should be interpreted by a tribunal in which all the parties have confidence."[236] On 21 June 1900, Sir Robert Finlay, the Attorney General, said that s 51 contained "certain most important powers not now enjoyed at all by any of the Australian colonies, such as powers with reference to foreign *affairs*"[237].

159 It is not in dispute that the expression "external affairs" was used in s 51(xxix) in preference to "foreign affairs" in order, as Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ have said, "to make it clear that the power comprehended both the *relationship* between the Commonwealth of Australia and other parts of the then British Empire and the *relationship* with foreign

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235 United Kingdom, House of Commons, *Parliamentary Debates* (Hansard), 14 May 1900 at 46 (emphasis added).

236 United Kingdom, House of Commons, *Parliamentary Debates* (Hansard), 14 May 1900 at 54-55 (emphasis added).

237 United Kingdom, House of Commons, *Parliamentary Debates* (Hansard), 21 June 1900 at 648 (emphasis added).

countries"[238]. That language is significant. It points against the grant of a wider power to legislate on matters located externally to Australia. It points towards a more specific power for the legislature to act in a manner complementing the executive's conduct of Australia's relationships with foreign nations and international organisations.

160 If "external affairs" are those which relate to relationships between countries, it is necessary to identify the particular relationship on which the legislation relying on s 51(xxix) rests. A "relationship" in this sense means a dealing between Australia and another country. That dealing can be a treaty, but it need not be: any of a vast range of diplomatic relationships between Australia and other countries could, depending on the circumstances and subject to the Constitution, be a relevant dealing. On this view, what "external affairs" cannot include is something which is the subject of a unilateral act or desire on the part of Australia. That lacks the mutuality inherent in the conduct of "affairs" in the sense of a relationship or dealing with another nation or an international organisation.

161 The plaintiff's contention that the power to legislate in relation to external affairs extends beyond legislation implementing treaties to other relationships with other countries, but not beyond that point to include legislation about geographically external matters, is supported by other material reflective of the views of distinguished lawyers contemporary with the federation period, or persons acquainted with those views. While the writers and judges now to be referred to were not considering the precise point under consideration in this case, what they said suggests that the meaning of "external affairs" in the federation period did not include the geographic externality view.

162 In chronological order, the first opinion to consider is that of Quick and Garran. Their conclusion on s 51(xxix) was[239]:

> "As already pointed out[240], it can hardly be intended to confer extra-territorial jurisdiction; where that is meant, as in other sub-sections, it is

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238 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 482 (emphasis added).

239 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 631-632.

240 Earlier, Quick and Garran had pointed out that the only provisions in the Constitution Act explicitly relating to extraterritorial operation of laws were covering cl 5 ("the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of

(Footnote continues on next page)

> distinctly expressed. It must be restricted to matters in which political influence may be exercised, or negotiation and intercourse conducted, between the Government of the Commonwealth and the Governments of countries outside the limits of the Commonwealth. This power may therefore be fairly interpreted as applicable to (1) the external representation of the Commonwealth by accredited agents where required; (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries; and (3) the extradition of fugitive offenders from outside countries."

163 The volume of the "matters" to which Quick and Garran referred has perhaps turned out to be much greater than they would have envisaged at the time. This has come about as a result of the United Kingdom authorities, particularly at the Imperial Conferences of 1923 and 1926, ceasing to oppose full diplomatic representation and treaty making power for the Dominions. But it does seem that Quick and Garran did not see the words of s 51(xxix) as bearing a meaning consistent with the existence of a power to legislate with respect to things identified by reference to their location externally to Australia.

164 The defendant contended that the views of Quick and Garran were not shared by other prominent writers at the time. It cited only an article by W Harrison Moore suggesting that the effect of s 51(xxix) was to prevent Commonwealth statutes from being "impugned on the ground that they reach beyond local affairs; in other words, the rule against laws 'intended to operate extraterritorially' will within the Commonwealth be a rule of construction only, and not a rule in restraint of power"[241]. That statement did not exhaustively define the content of "external affairs". It is difficult to enlist W Harrison Moore as a supporter of the geographic externality view when regard is had to what he said in 1910[242]:

> "[T]he 'external affairs' of the Commonwealth, like the foreign affairs of the Empire, are primarily matters of negotiation and administrative policy rather than of legislation. So far however as the conduct of external affairs may require the co-operation of the legislative power, the authority

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destination are in the Commonwealth") and s 51(x) ("fisheries in Australian waters beyond territorial limits"): at 354-355.

241 "The Commonwealth of Australia Bill", (1900) 16 *Law Quarterly Review* 35 at 39.

242 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 460-461 (emphasis added). Passages similar to the first two sentences quoted appeared in the first edition (1902) at 142-143. Nothing in either edition supports the geographic externality view.

> of the Parliament extends ... [I]n very many cases, legislation may be necessary to *give effect to international obligations*, or to *assert international rights*. So far as the exercise of such a power is consistent with the unity of the Empire, and the responsibility of the Imperial Government in respect to foreign affairs ... the Commonwealth Parliament would appear to have power to make provision."

The mere fact that conduct takes place outside Australia does not create an international obligation or an international right.

165 Soon after federation, O'Connor J, one of the most prominent framers of the Constitution, said[243]:

> "The control of trade and commerce with other countries, the imposition of Customs duties, immigration, quarantine, and *external affairs*, are all different aspects of Australia's *relations with other countries*."

He also said that taken as a whole these powers "vest in the Commonwealth the power of controlling in every respect Australia's *relations* with the outside world"[244].

166 One lawyer whose early career was contemporary with federation – he was studying law when the Constitution was enacted – was Latham CJ. His language in *R v Burgess; Ex parte Henry*[245] is significant. He could "draw no distinction" between the terms "external or foreign affairs or *relations*". He said:

> "The establishment of a political community involves the possibility, indeed the practical certainty in the world as it exists to-day, of the establishment of *relations* between that community and other political communities. Such *relations* are necessarily established by governments, which act for their people *in relation to* other peoples, rather than by legislatures which make laws for them."

He called this a "fact of international *intercourse*". He said:

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243 *Attorney-General of NSW v Collector of Customs for NSW* (1908) 5 CLR 818 at 842 (emphasis added).

244 (1908) 5 CLR 818 at 842 (emphasis added).

245 (1936) 55 CLR 608 at 643-645 (emphasis added).

> "The regulation of *relations* between Australia and other countries, including other countries within the Empire, is the substantial subject matter of external affairs."

He also said:

> "The execution and maintenance of the Constitution, particularly when considered *in relation to* other countries, involves not only the defence of Australia in time of war but also the establishment of *relations* at any time with other countries, including the acquisition of *rights and obligations* upon the international plane."

After discussing respectively s 61, s 51(xxix) and s 75(i) (conferring on this Court original jurisdiction in all matters "arising under any treaty") he said:

> "These provisions contemplate not the *relations* of the States of Australia with other countries but the *relations* of Australia, including all the States, *with other countries*."

167 Another contemporary of federation was Starke J – then a barrister in possession of a good practice, and destined to appear in many constitutional cases early in the life of this Court. He asked[246]:

> "[W]hat else are external affairs of a State – or, to use the more common expression, the *foreign affairs* or *foreign relations* of a State – but matters which concern its *relations and intercourse* with other Powers or States and the consequent *rights and obligations*?"

168 The adult life of Dixon J began after federation, but his legal education and early professional life commenced only a short time later. In his view, it was not to "be supposed [of s 51(xxix)] that its primary purpose was to regulate *conduct occurring abroad*. ... I think it is evident that its purpose was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the *external relations of the Commonwealth*."[247]

169 Evatt and McTiernan JJ were in the same position as Dixon J, although a little younger. It has been seen that they treated "external affairs" as dealing not only with the "relationship" between the Commonwealth and other parts of the

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246 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 658 (emphasis added).

247 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 668-669 (emphasis added).

British Empire, but also with the "relationship" between the Commonwealth and foreign States. They also said that the expression "external affairs"[248]:

> "is frequently used to denote the whole series of *relationships* which may exist between States in times of peace or war. It may also include measures designed to promote friendly *relations* with all or any of the nations."

170 These early statements about "external affairs", with their constant references to "relationships" and "relations", do not suggest that the contemporaries of federation perceived "external affairs" as bearing a meaning giving power to enact in legislation the unilateral desires of the executive to control conduct taking place externally to Australia without any relation with another country or an international organisation being involved. The view, shared by every member of the Court in *R v Burgess; Ex parte Henry*, that the expression "external affairs" refers to relationships between Australia and other countries or international organisations, does not limit s 51(xxix) to the implementation of treaties. For example, legislation related to the preservation of friendly relations with other Dominions[249] or other countries[250] may be supported by s 51(xxix). However, the geographic externality view of s 51(xxix) goes beyond these criteria.

171 *Extradition at federation.* Any contention that a contemporary of federation would understand "external affairs" to include the conduct of Australian residents in regions external to Australia, so that s 51(xxix) could support legislation rendering that conduct criminal even though it was not criminal by local law, would be contradicted by the contemporary understanding of extradition. The passage quoted from Quick and Garran above reveals that extradition was well to the forefront of their minds, at least. In a later passage they discussed the nature of extradition, its general dependence on treaties, and the consolidation of extradition law in the *Extradition Act* 1870 (Imp). They then said[251]:

> "The Imperial Extradition Act (1870), 33 and 34 Vic c 52, consolidated the law then in force relating to the apprehension and

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248 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 684 (emphasis added).

249 *R v Sharkey* (1949) 79 CLR 121.

250 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 234 per Mason J.

251 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 635-636.

> surrender to foreign States of fugitive offenders. It provides that where an arrangement has been made by Her Majesty with any foreign State, respecting the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that the procedure and machinery of the Act should apply in the case of such foreign State: that Her Majesty may limit the operation of the Order to fugitive criminals in specified parts of Her dominions, and render it subject to such conditions, reservations, and exceptions as may be deemed expedient. The schedule to the Act contains a list of the crimes for which a suspected offender may be surrendered, subject to the restrictions that no fugitive shall be surrendered to a foreign State (1) for an offence of a political nature, or (2) unless provision is made by the law of that State that he shall not, when surrendered, be detained or tried in that State for any other offence committed prior to his surrender."

They then explained how it would be possible, by reason of s 18 of the *Extradition Act*, for Commonwealth legislation to be enacted regulating "all negotiations and proceedings for the enforcement of extradition treaties entered into by Great Britain with foreign powers"[252].

172 In the course of the 19th century, certain key rules evolved from State practice in relation to extradition. Two of them were stated by Quick and Garran in the passage just quoted – the political offence doctrine and the speciality rule. A third was the double criminality rule. That rule required that the conduct constituting an extraditable offence should be punishable as a crime not only under the law of the requesting State but also under the law of the extraditing State. Thus the *Extradition Act*, s 9, prevented extradition unless the crime for which extradition was sought was an "extradition crime", namely a crime which, if committed within England or within English jurisdiction, would be one of the crimes described in the first schedule. That schedule listed numerous offences known to English law.

173 Contemporaries of federation would have appreciated that the laws of the Australian jurisdictions, both before and after federation, often differed markedly from those of jurisdictions outside the Empire, and indeed from those of many jurisdictions within it. It is unlikely that contemporaries of federation would have perceived "external affairs" as used in s 51(xxix) as bearing a meaning sufficiently extensive to confer power to enact legislation rendering criminal conduct outside Australia which was not criminal by the law of the place where it occurred. A perception of that kind could not have stood with the contemporary

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252 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 636.

understanding of the double criminality rule as part of the law of extradition. In the light of that understanding, it would have been seen as futile for Australia to enact legislation of that kind if the person contravening it could not be prosecuted outside Australia and could not be extradited to Australia.

Arguments for the geographic externality view

174 Three broad lines of reasoning have been employed to support the geographic externality view. One turns on a textual analysis of the meaning of "external affairs" by inquiring what "affairs" means and what "external" means. The second rests on the absence of any territorial restriction in the opening words of s 51 of the Constitution. The third relies on the supposed existence of a "lacuna" in governmental power in Australia which would exist if the geographic externality view were wrong[253].

"External affairs" textually analysed

175 *The prevailing approach.* Members of the Court in *R v Burgess; Ex parte Henry* propounded the view that "external affairs" refers to the relationships between Australia and other countries. That view prevents the expression from being dissected into two parts. This process of dissection, however, was the approach adopted in *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) in which, for the first time, a clear majority of the Court decided, as distinct from saying, that the geographic externality view was correct: five Justices in an unqualified form and two Justices with a qualification. In that case, for example, Deane J said[254]:

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253 The defendant advanced a further argument. It said that to limit s 51(xxix) to legislation concerning relations with other nations would be limiting it to something which did not exist in 1901, hence making s 51(xxix) a purely anticipatory power, for it was not the Commonwealth but the Imperial Government which then conducted relations with other nations. The weakness of the argument was demonstrated in *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 476-484 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ: the power to legislate with respect to external affairs included a power to implement treaties, whichever Government – British or Commonwealth – made those treaties, and the same must be true of dealings with other nations short of treaty making.

254 (1991) 172 CLR 501 at 599. Similar reasoning was employed at 632 by Dawson J, at 695-696 by Gaudron J and at 712-713 by McHugh J. The reasoning was first employed by Mason J in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Act Case*") (1975) 135 CLR 337 at 470-471 and developed by him in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 223.

> "The word 'external' means 'outside'. As a matter of language, it carries no implication beyond that of location. The word 'affairs' has a wide and indefinite meaning. It is appropriate to refer to relations, matters or things. Used without qualification or limitation, the phrase 'external affairs' is appropriate, in a constitutional grant of legislative power, to encompass both relationships and things: relationships with or between foreign States and foreign or international organizations or other entities; matters and things which are territorially external to Australia regardless of whether they have some identified connexion with Australia or whether they be the subject matter of international treaties, dealings, rights or obligations."

The reasoning is – "affairs" are relations, matters or things; "external" means "territorially external to Australia"; therefore as long as a "matter" or "thing" is territorially external to Australia it is within the expression "external affairs"; and legislation may be enacted about it whether or not it relates to Australia's international relations with other countries or international organisations.

176 *The preferred approach.* It is sometimes inappropriate to dissect a composite phrase into particular parts, give each part a meaning which that part has when used in isolation, and combine those meanings so as to give the composite phrase a meaning at odds with the meaning it has when construed as a composite phrase.

> "[It is a] fallacy ... to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence ... This is not the way language works. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole."[255]

177 Here, the better view is that "external affairs" in its context in s 51(xxix) is to be construed as a composite term and that the plural form of the noun has importance. Indeed, Deane J himself had earlier and rightly adopted this view in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[256]:

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255 *R v Brown* [1996] AC 543 at 561 per Lord Hoffmann (Lord Browne-Wilkinson concurring), approved in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397 by Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ.

256 (1983) 158 CLR 1 at 253-254.

> "The phrase 'external affairs' is, like the phrase 'foreign affairs' and 'foreign relations', a composite one in which the noun exists in its plural form ... The use of the singular 'external affair' to refer to a particular matter or aspect of 'external affairs' is not only inapposite: it is liable to convey incorrect shades of meaning which will assume added significance if one proceeds to engage in the reverse process of defining the limits of the external affairs power by reference to whether a particular matter or object can or cannot properly be described as an 'external affair'."

As noted above, Latham CJ could "draw no distinction" between the phrases "external or foreign affairs or relations"[257], and Starke J appears to have been of the same opinion[258]. The meaning of "foreign affairs" is not usefully elicited by reasoning that an "affair" is anything and that "foreign" means anything that is situated outside a district. The expression "foreign affairs" means now what it meant in 1900: "international relations; activities of a nation arising from its dealings with other nations"[259]. And the expression "foreign relations" also means now what it meant in 1900: "the relationship between nations arising out of their dealings with each other" and "the field of foreign affairs"[260]. Contrary to what the defendant submitted, the expression "external affairs" has the same meaning.

178 Once it is accepted, as this Court has, that the expression "external affairs" was selected to apply to relationships between Australia and places which were external to it, either because they were other parts of the British Empire or because they were foreign countries[261], it becomes clear that not only is it wrong to analyse the meaning of the expression "foreign affairs" by looking at the meaning of each of the two words separately, but it is also wrong to adopt the same process for "external affairs".

179 *Criticisms of the prevailing approach.* But even if it were right to analyse the expression "external affairs" by taking the meaning of each word in isolation, it does not follow that of the various meanings of "affairs", those which are least appropriate to the context should be selected to give a widening effect –

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257 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643.

258 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 658.

259 *Macquarie Dictionary*, Federation Edition (2001).

260 *Macquarie Dictionary*, Federation Edition (2001), meanings 1 and 2.

261 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

"matters", "things" – while that which is most appropriate is given no more than a partial role – "relationships". Nor, if "external affairs" is to be the subject of analysis by looking at the meaning of each word separately, is it legitimate to reason, as a matter of language, that the word "external" carries, as Deane J said it carried, "no implication beyond that of location"[262]. No doubt many of the meanings of "external" do have an implication of "location". But several go beyond mere location. One meaning is "[c]onnected with, or having reference to, what is outside; having an outside object or sphere of operation"[263]. Another is "[h]aving reference to dealings with foreign countries"[264]. A like meaning is "relating to or concerned with what is outside or foreign: *external commerce*"[265]. Another like meaning is "coming from or relating to a country or institution other than the main subject: *a department of external affairs*"[266]. If the meaning of "external affairs" to modern Australians is crucial to the construction of s 51(xxix), many of them will remember that while Australia was slower than other Dominions to develop its own diplomatic service and its own independent foreign policy, when it began to do so in the 1930s, that development proceeded through the "Department of External Affairs" before it was renamed the "Department of Foreign Affairs", and this institution, under both names, was the means by which Australia conducted its relations with other nations, whether they were inside or outside the British Empire, and with international organisations.

180 For these reasons, textual analysis points against the correctness of the geographic externality view of s 51(xxix)[267]. The geographic externality of legislative subject-matter may afford a reason why the legislation bears directly on Australia's relations with other countries, but it does not necessarily mean, as the defendant contended, that the legislation is legislation with respect to external

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262 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 599.

263 *Oxford English Dictionary*, 2nd ed (1989), meaning 5a.

264 *Oxford English Dictionary*, 2nd ed (1989), meaning 5b.

265 *Macquarie Dictionary*, Federation Edition (2001), meaning 5.

266 *Concise Oxford English Dictionary*, 11th ed (2004).

267 The defendant supported the geographic externality view by pointing to the contrast between "external *affairs*" in s 51(xxix) and "the *relations* of the Commonwealth with the islands of the Pacific" in s 51(xxx). No member of this Court has relied on the contrast, and it is insufficient to defeat the conclusions which flow from the ordinary meaning of s 51(xxix).

affairs. The grant of a legislative power may well need to be construed with all the generality which the words used admit[268]; but the words "external affairs" are insufficiently general to include the geographic externality view, and the principle just referred to does not permit the widening of the constitutional words beyond what their meaning will permit.

Absence of territorial limitation on s 51

181 The second basis advanced for the geographic externality view of s 51(xxix) rests on the fact that the words "peace, order, and good government of the Commonwealth" at the start of s 51 of the Constitution have no territorial limitation. Thus in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Act Case*")[269] Jacobs J said that while a "State can only legislate in respect of persons acts matters and things which have a relevant territorial connexion with the State", s 51 imports no similar territorial limitation. The "Crown in the Australian Executive Council and in the Australian Parliament ... has that pre-eminence and excellence as a sovereign Crown which is possessed by the British Crown and Parliament". That position was attained, Jacobs J said, no later than the adoption by Australia in 1942 of the *Statute of Westminster* 1931 (Imp). "The words 'external affairs' can now be given an operation unaffected by any concept of territorial limitation." According to Mason CJ, who agreed with this reasoning in *Polyukhovich v The Commonwealth*[270]:

> "It follows that the legislative power of the Parliament with respect to matters external to Australia, using 'matters' in a comprehensive sense, is not less in scope than the power of the Parliament of the United Kingdom with respect to such matters."

182 That reasoning supports the view that the "Crown in the Australian Executive Council" has power as extensive as the British Crown has (or at least had) in relation to dealings with the external world – a position which has

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268 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, quoting from *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ, which applied *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J.

269 (1975) 135 CLR 337 at 498.

270 (1991) 172 CLR 501 at 529-530. Others who have relied on this reasoning include, in that case, Dawson J at 633-634 and McHugh J at 713.

arguably obtained at least since the Imperial Conference of 1926. The reasoning also supports the view that whichever power in s 51 is under consideration is not limited in its territorial operation beyond any limitation inherent in the particular terms of the placitum granting the power. That flows from s 2 of the *Statute of Westminster* 1931 (Imp), nullifying the operation of the *Colonial Laws Validity Act* 1865 (Imp) and doctrines of repugnancy, and s 3, giving the Commonwealth Parliament full powers to make laws having extraterritorial operation. But to say that the relevant power is not limited as to its territorial operation beyond any limitation flowing from its terms is not to say anything about whether there is, in fact, any territorial limitation flowing from its terms. Hence it does not follow that the subject-matter on which legislation can be enacted under s 51(xxix) is wider now than it was in 1901. And it does not follow that a "concept of territorial limitation" which existed in s 51(xxix) before the Crown in the Australian Parliament attained "that pre-eminence and excellence as a sovereign Crown which is possessed by the British Crown and Parliament" was removed when that event took place. For, as Jacobs J accepted, there is one difference even after that event: in Australia the Constitution applies. Thus Menzies J, speaking of pars (i) to (xxxix) of s 51, was correct to say: "The *Statute of Westminster* does not remove any restriction stated expressly in, or to be inferred from, the language of these paragraphs."[271]

183 Accordingly, the geographic externality view is not supported by recourse to the opening words of s 51 of the Constitution or the consequences of Australian independence.

A lacuna in Australian governmental power

184 A third, and related, argument for the geographic externality view is that if it were not correct, a lacuna might exist. Thus in *Polyukhovich v The Commonwealth* Deane J said[272]:

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271 *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 300.

272 (1991) 172 CLR 501 at 602-603. Dawson J reasoned similarly at 638. See also Mason CJ at 529-530, and see *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Act Case*") (1975) 135 CLR 337 at 498 per Jacobs J. Another way of putting this was employed by Murphy J in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Act Case*") (1975) 135 CLR 337 at 503: if the geographic externality view were not correct, Australia would be an "international cripple unable to participate fully in the emerging world order".

> "... Commonwealth laws with respect to matters, things or persons outside Australia are likely to operate in areas where there will commonly be no competing State interests with the result that, in the absence of Commonwealth legislative power, there would be a lacuna in the plenitude of combined legislative powers of the various Parliaments of the Australian federation. It has long been recognized in this Court that, subject to express and implied constitutional limitations and guarantees, no such lacuna exists in legislative authority in relation to internal matters ... With the emergence of Australia as a fully sovereign and independent nation, there remains no acceptable basis for maintaining any such lacuna in the combined powers of the Parliaments of the federation to legislate for this country with respect to extraterritorial matters beyond that resulting from the limitations which the Constitution itself expressly or impliedly imposes."

185 The argument that there is a lacuna is not an argument that there is a lacuna in the power of the Commonwealth under s 61 to deal with the external world. On the other hand, the capacity of the executive to deal with the external world under s 61 may be reduced if there is no corresponding legislative power to enact Australian laws which the dealings of the executive would make desirable.

186 Underlying Deane J's reasoning is the assumption that at all costs the constitutional language must be construed so as to achieve the result most desired by the analyst. That assumption fails to recognise that the Constitution was a creation of a particular time and of particular circumstances by particular voters influenced by particular leaders to establish a particular form of federation. Its makers, both in Australia and in London, were hard-headed and unsentimental. Its form was moulded by pressures proceeding from conflicting interests. It is thus almost certain to contain what some observers, then and now, would regard as flaws. It is not a permissible approach to the Constitution to adopt strained constructions in order to avoid consequences which a particular analyst may dislike, such as a constitutional vacuum. Federation was a great achievement, but it was an achievement for which various prices had to be paid. It is possible that one of those prices is a limitation on the power of the Commonwealth to legislate extraterritorially which cannot be overcome efficiently by State legislative power or which, to an extent, cannot be overcome at all by the States. That possibility cannot be excluded merely because it is thought to be undesirable. Nature does not necessarily abhor a constitutional vacuum. Even if it did, velleity would not fill that vacuum.

187 Is there in truth any relevant lacuna if the geographic externality view is wrong? In answering that question, it is necessary to bear in mind several considerations. First, even in the circumstances where s 51(xxix) does not give power to the Commonwealth to legislate extraterritorially, the Commonwealth

may legislate extraterritorially in relation to matters over which it has some head of power other than s 51(xxix). Secondly, since 1986 it has been clear that State Parliaments have plenary power to enact laws having an extraterritorial operation: *Australia Act* 1986 (Cth), s 2(1); *Australia Act* 1986 (UK), s 2(1). There must be a relevant connection between the circumstances on which State legislation operates and the particular State, but it is clear that this requirement is liberally applied, and that even a remote and general connection between the subject-matter of the legislation and the State may suffice[273]. Thirdly, the apprehended lacuna would be narrowed further if uniform State legislation were enacted – if necessary, at the Commonwealth's suggestion. Finally, the power conferred on the Commonwealth by s 51(xxxviii) to exercise, at the request or with the concurrence of the States, "any power which [could] at the establishment of [the] Constitution be exercised only by the Parliament of the United Kingdom", is one that may be exercised by the making of laws within the Commonwealth which operate outside the Commonwealth. Thus it operates to "ensure that a plenitude of residual legislative power is vested in and exercisable in co-operation by the Parliaments of the Commonwealth and the States"[274]. It may be that even if the last two possibilities reduce the theoretical existence of a lacuna to vanishing point, the requisite political cooperation may not always be easily achievable. But, if the matter is sufficiently important to the well-being of the nation, one should not be too pessimistic about the possibility of achieving consensus[275].

188 The reference at the end of the passage quoted from Deane J's reasons for judgment in *Polyukhovich v The Commonwealth* to limitations on extraterritorial legislation which the Constitution imposes is crucial. The question is: "does s 51(xxix) give power to legislate extraterritorially merely because the matter to which the legislation relates is geographically external to Australia?" That in turn raises the question: "is there some limitation on extraterritorial legislation

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273 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

274 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 381 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

275 The defendant submitted that as a matter of public international law, pursuant to the nationality principle, no-one disputes the right of a nation to subject its citizens abroad to the operation of its own penal laws. It is not, however, the concern of public international law to deal with whether, as a matter of the internal constitutional law of a federal nation, that right can be exercised by the central power or only by the component units.

created by the express terms of s 51(xxix)?" If there is no such limitation, the emergence of Australia as a fully sovereign and independent nation does not make s 51(xxix) wider than it was before. If there is any such limitation, it is hard to see how that emergence abolished it: for to abolish it would be to amend the Constitution, and the Constitution can only be amended by recourse to s 128. Either way, the emergence relied on is immaterial. And even if s 51(xxix) on its true construction were to leave a lacuna because of theoretical or practical limits on State power, that consequence cannot legitimately be avoided by wishing for, or applying, another construction.

Geographic externality view to be rejected in principle

189 Independently of authority, the arguments advanced by the plaintiff are to be preferred. But the matter is not free from authority. The extent to which authority forms a barrier to their acceptance must now be examined.

Authorities in favour of the geographic externality view

190 *New South Wales v The Commonwealth.* The geographic externality view of s 51(xxix) first appeared in developed form in *New South Wales v The Commonwealth* in the judgments of Mason J and Jacobs J, and perhaps in that of Barwick CJ[276]. Whether Barwick CJ shared the geographic externality view depends on what he meant by "affair" when he said: "The power extends ... to any affair which in its nature is external to" Australia. A brief remark by Murphy J[277] suggests that he shared this view, but his observations were undeveloped, and it is clear that his conclusion rested on the fact that the legislation under challenge effectively implemented the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental

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276 (1975) 135 CLR 337 at 360 per Barwick CJ, 470-471 per Mason J and 497 per Jacobs J.

277 (1975) 135 CLR 337 at 502-504.

Shelf. In some measure the reasoning of Barwick CJ[278] and Mason J[279] also rested on Australia's adhesion to these Conventions. Contrary to what the headnote suggests, Jacobs J[280] specifically denied that the legislation could be upheld by recourse to the Conventions.

191 There is thus a controversy about whether the geographic externality view is a basis for the decision in *New South Wales v The Commonwealth*. Gaudron J[281] and McHugh J[282] thought it was not. Mason J thought it was[283]. Deane J thought it arguably was[284]. Gibbs CJ thought that no more than three Justices stated the geographic externality view, and then only as an alternative ground of decision[285]. The controversy turns partly on what Barwick CJ meant by "affair", partly on whether Murphy J's brief statement about the geographic externality view was a ground of decision, and partly on the extent to which the reasoning of those Justices finding support in the Conventions can be regarded as having put the geographic externality view as an independent ground of decision or merely as a dictum.

192 In *New South Wales v The Commonwealth*[286], Mason J contended that the geographic externality view accorded with what Evatt and McTiernan JJ said in *R v Burgess; Ex parte Henry*[287]. As counsel for the plaintiff submitted, it is difficult to see why. The contention must depend on the discussion by Evatt and

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278 (1975) 135 CLR 337 at 361-366.

279 (1975) 135 CLR 337 at 472-476.

280 (1975) 135 CLR 337 at 496-497.

281 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 694.

282 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 712.

283 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 223.

284 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 600 and 602.

285 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 190.

286 (1975) 135 CLR 337 at 471.

287 (1936) 55 CLR 608 at 678.

McTiernan JJ of Evatt J's judgment in *Jolley v Mainka*[288] and on their statement about the legislation for the Mandated Territory of New Guinea in that case: "[O]f necessity the legislation ... was in respect of matters geographically external to the Commonwealth."[289] To select those words as supporting the geographic externality view is to ignore the central basis of Evatt J's reasoning in *Jolley v Mainka*. He saw the legislation as directed solely towards the performance of international obligations in relation to the former German colony owed to the League of Nations by Australia in its capacity as a signatory of the Treaty of Versailles and a mandatory of the League. Evatt J traced these obligations through Arts 118 and 119 of the Treaty of Versailles, Art 22 of the Covenant of the League of Nations, and the resolutions of the Council of the League made on 5 August 1920, 1 December 1920 and 17 December 1920. The last of these issued the relevant mandate to "His Britannic Majesty, to be exercised on his behalf by the Government of the Commonwealth of Australia"[290]. That this was the basis of Evatt J's reasoning in *Jolley v Mainka* was stressed by Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry*[291].

193 *Developments before Polyukhovich v The Commonwealth.* The geographic externality view was next advanced in *Robinson v Western Australian Museum*[292] and *Viro v The Queen*[293]. The passages are brief obiter dicta. There is nothing to show that any argument was presented on the point. The geographic externality view was repeated in *Koowarta v Bjelke-Petersen*[294]. The relevant statements were brief, but were part of passages upholding the

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288 (1933) 49 CLR 242.

289 (1936) 55 CLR 608 at 678.

290 (1933) 49 CLR 242 at 270-273.

291 (1936) 55 CLR 608 at 678-679.

292 (1977) 138 CLR 283 at 294 per Barwick CJ, at 335 per Mason J and possibly at 343 per Murphy J.

293 (1978) 141 CLR 88 at 162 per Murphy J.

294 (1982) 153 CLR 168 at 223 per Mason J and 237 per Murphy J. In *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 528 Mason CJ said that Stephen J at 211 adhered to the geographic externality view and that Gibbs CJ in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 97 did so too. There, Gibbs CJ merely repeated what Stephen J had said. If Stephen J did state the geographic externality view, he did so in vague terms in a case not calling for a decision on the point.

validity of the legislation in question as implementing a treaty. As noted above, it is questionable, however, whether it was right to say, as Mason J said, that in *New South Wales v The Commonwealth*[295], "a majority of this Court decided that the power extends to matters and things, and ... persons, outside Australia"[296]. In *The Commonwealth v Tasmania*[297] Murphy J repeated the geographic externality view, but in a judgment turning on the opinion that the legislation under challenge was valid as implementing a treaty.

194 *Polyukhovich v The Commonwealth and after.* There is no doubt that the statements by the majority in *Polyukhovich v The Commonwealth* supporting the geographic externality view were necessary to the conclusion that s 9 of the *War Crimes Act* 1945 (Cth) was valid to the extent that it operated on conduct outside Australia[298]. The reasoning of Brennan J[299] and Toohey J[300], supporting a version of the geographic externality view which is qualified by the need for some Australian nexus, was necessary to their conclusion also.

195 In *Horta v The Commonwealth*[301] the Court upheld legislation relating to an area of the Continental Shelf independently of the fact that it implemented a treaty. The Court observed that whether or not the opinion of Brennan J and Toohey J that s 51(xxix) required some connection between affairs geographically external to Australia and Australia was correct, the requirement for which it called was, in any event, satisfied[302].

196 In *Victoria v The Commonwealth*[303] Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said that the unqualified geographic externality view

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295 (1975) 135 CLR 337.

296 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 223.

297 (1983) 158 CLR 1 at 171-172.

298 (1991) 172 CLR 501 at 528-529 per Mason CJ, 602-603 per Deane J, 632 per Dawson J, 695-696 per Gaudron J and 712-713 per McHugh J.

299 (1991) 172 CLR 501 at 550-551.

300 (1991) 172 CLR 501 at 654.

301 (1994) 181 CLR 183.

302 (1994) 181 CLR 183 at 193-194.

303 (1996) 187 CLR 416 at 485.

on which the reasoning of the majority relied in *Polyukhovich v The Commonwealth* must now be taken as expressing the view of the Court. That was a significant pronouncement. At the time its significance lay in the fact that Brennan CJ and Toohey J, who had not adhered to the unqualified geographic externality view in *Polyukhovich v The Commonwealth*, now expressed adherence to it. It later became more significant when that pronouncement was referred to with approval by a majority of the Court in passages necessary for its decision in *De L v Director-General, NSW Department of Community Services*[304]. The actual result in *Victoria v The Commonwealth*, however, turned on the treaty implementation aspect of s 51(xxix).

197 In *De L v Director-General, NSW Department of Community Services*[305] it was said that the Family Law (Child Abduction Convention) Regulations 1986 (Cth), dealing with the return of children abducted from Australia and the return of children abducted to Australia, were valid under s 51(xxix) independently of whether they implemented an international Convention to which Australia was party. It was said that movements of children between Australia and places physically external to Australia were "external affairs". These statements were necessary steps in the Court's reasoning.

198 *Horta v The Commonwealth* was followed in *R v Hughes*[306], but the geographic externality view was not a necessary step towards the conclusion that the relevant legislation was valid in that case, since the Court found its validity to be supported by s 51(i).

199 The defendant relied on the following statement of Callinan J[307] in *Shaw v Minister for Immigration and Multicultural Affairs*: "'External affairs' is a simple and clear expression. It is concerned with events, places and people external to Australia and *their relation to Australia*." When that statement is read in context, it does not support the defendant's arguments. There are two dicta upholding the geographic externality view in *Re Aird; Ex parte Alpert*[308] but they did no more

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304 (1996) 187 CLR 640 at 650 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

305 (1996) 187 CLR 640 at 650 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

306 (2000) 202 CLR 535 at 556 [42] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

307 (2003) 218 CLR 28 at 85 [182] (emphasis added).

308 (2004) 220 CLR 308 at 317 [27] per McHugh J and 334 [82] per Kirby J.

than cite *Polyukhovich v The Commonwealth*. Another statement in *Re Aird; Ex parte Alpert*[309] that the legislation in issue in the present case is valid was a dictum only, and of a very tentative kind. There is also a statement in the same case that legislation making all crimes committed by Australian nationals abroad triable and punishable in Australia could be supported by the external affairs power[310]. That was a dictum as well. The five statements referred to in this paragraph were each uttered in a case in which no argument of the kind advanced to the Court in this case was offered. Indeed the respondent in *Re Aird; Ex parte Alpert* expressly disavowed reliance on the external affairs power.

200 This survey suggests that although the geographic externality view has attracted considerable support within the Court since 1975, it formed the ratio decidendi only in *Polyukhovich v The Commonwealth*, *Horta v The Commonwealth* and *De L v Director-General, NSW Department of Community Services*. In view of the division of opinion on this point in relation to *New South Wales v The Commonwealth*, it cannot be said that the geographic externality view clearly forms part of the ratio decidendi of that case. The three relevant decisions were decided within a five year period. They are relatively recent. *Polyukhovich v The Commonwealth* was fully argued by counsel and the opinions of the Justices were fully reasoned. It stands in contrast with the later two cases. In neither of them was any application made for leave to reargue the correctness of *Polyukhovich v The Commonwealth*. In the former the Court held without elaboration that on any of the views stated in *Polyukhovich v The Commonwealth* the legislation was valid. In the latter it simply applied the majority view in *Polyukhovich v The Commonwealth* (which the majority in *Victoria v The Commonwealth*[311] had said "must now be taken as representing the view of the Court").

201 *Inconvenience and injustice.* These three cases have not become so woven into the fabric of the law as to be irremovable without causing serious damage. The defendant argued, in answer to the plaintiff's contention that the cases resting on the geographic externality view should be overruled, that this view had produced results which were neither inconvenient nor unjust. This, it was said, was demonstrated by a "range of Commonwealth legislation that potentially relies on the principle". Thirteen enactments were referred to. It was submitted, without detailed examination of the enactments, that while some of

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309 (2004) 220 CLR 308 at 313 [7] per Gleeson CJ. ("That legislation was presumably enacted under the external affairs power".)

310 (2004) 220 CLR 308 at 361 [168] per Callinan and Heydon JJ.

311 (1996) 187 CLR 416 at 485.

these gave effect to international obligations, in all of them Parliament had relied on the geographic externality view, and in some Parliament had given the legislation an extraterritorial effect where the "relevant convention may not expressly impose such an obligation". The defendant did not, however, unequivocally submit that any of this legislation was supported only by the geographic externality view of s 51(xxix). In view of the speculative and tentative character of the submissions, and the undesirability of determining the constitutional validity of legislation where that is not in issue and has not been the subject of any specific argument by the parties, it is undesirable to examine in detail each piece of legislation referred to.

202 There is no doubt that the geographic externality view is useful for the Commonwealth, but questions of inconvenience, even grave inconvenience, have little weight on issues of constitutional interpretation[312]. Further, no doubt the geographic externality view will often not operate unjustly, although it arguably does where the action prohibited by Australian legislation is not contrary to the law of the place in which the action occurs. What is significant, however, is that the defendant did not contend that its rejection would cause the collapse of significant legislative schemes, or would, by reason of its having been relied on in some other way, cause inconvenience or injustice beyond that which might flow from the existence of any lacuna which that would leave.

203 But, in any event, even if inconvenience or injustice were the yardstick, a case brought under the legislation challenged here could itself produce inconvenience. Assume that an Australian national conducts himself in a foreign country in a way which is not criminal by the law of that foreign country but which would be criminal under the challenged legislation. Assume that he is charged in Australia but returns to the foreign country. Assume that the extradition law of that country adopts the double criminality doctrine. The double criminality doctrine would prevent the Australian national being extradited to Australia.

204 *Overruling.* In *The Commonwealth v Hospital Contribution Fund* Gibbs CJ acknowledged that the Court has power to reconsider past authority but also held that such power was to be exercised "with restraint"[313]. Gibbs CJ then pointed to various matters relevant, in that case, to the reversal of earlier authority. Three of them were that the past decisions did not rest on a principle

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312 See, for example, *Ha v New South Wales* (1997) 189 CLR 465 at 503 per Brennan CJ, McHugh, Gummow and Kirby JJ.

313 (1982) 150 CLR 49 at 56.

that had been carefully reasoned through a series of cases[314], that the past authorities led to "no useful result, but [rather] considerable inconvenience"[315] and that the past decisions had not been acted upon by legislatures in a manner which would lead to adverse consequences if they were overruled[316]. Callinan J, in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[317], was of the view that these matters were not to be applied in a mechanistic way and raised further questions relevant to a reconsideration of past authority. One was "whether the decision of a bench which itself may have overturned what had for a long time been regarded as settled legal orthodoxy should have a monopoly on the thinking on the topic in question for all time".

205 The statements of Gibbs CJ and Callinan J suggest that the authorities under challenge should be overruled. A wholesale overruling will not be necessary, however. In this case the defendant concurred with the plaintiff's proposition that the results in *Polyukhovich v The Commonwealth* and *Horta v The Commonwealth* could be justified on other grounds. To state this proposition is not to deny that, if not overruled, the cases stand as authority for the reasoning they employed[318]; but the proposition does diminish any inconvenience that might be thought to flow from those cases being overruled on this point.

206 The geographic externality view should be rejected. To the extent that it was a necessary step in the reasoning of three cases, they should be overruled.

Are ss 50BA and 50BC laws that, since they operate on conduct geographically external to Australia, necessarily affect Australia's external relations?

207 The defendant's argument was that since the legislation operated on a matter external to Australia, it had an "inevitable" effect on Australia's external relations. This does not follow. It might have such an effect; it might not. The effect is not established merely by pointing to the fact that the legislation operates on conduct geographically external to Australia.

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314 (1982) 150 CLR 49 at 56.

315 (1982) 150 CLR 49 at 57.

316 (1982) 150 CLR 49 at 58.

317 (1999) 201 CLR 49 at 104-105 [164].

318 See *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 484 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

Do ss 50BA and 50BC concern Australia's external relations?

208 The defendant's argument was that the prohibition of child sexual exploitation by Australian residents and citizens abroad concerned, affected and was designed to protect Australia's relations with other countries. It relied on statements in the Second Reading Speech delivered by the Minister for Justice, Mr Duncan Kerr, on introducing the Crimes (Child Sex Tourism) Amendment Bill 1994, containing the clauses which became ss 50BA and 50BC. He said that a minority of Australian citizens and residents were now known internationally as major offenders in several Asian countries; that Australia was "gaining an unenviable reputation in the world press" in relation to child sex tourism; and that the Asian countries which are chiefly affected "welcome any assistance ... that other governments can give"[319]. The House of Representatives Standing Committee on Legal and Constitutional Affairs said that the sexual abuse of children by Australian men in Asia "brings Australia into disrepute and ought not to be tolerated by Australians at home"[320].

209 There are the following difficulties with these submissions. The statements relied on do not actually say that the conduct targeted by the legislation has worsened Australia's relations with other nations, or that enactment of the legislation would improve them. Even if they did, it is questionable whether assertions by members of the executive or by parliamentary committees (as distinct from the public and solemn acts of the executive in entering a treaty and of the legislature in implementing it[321]) can establish a factual condition precedent to a constitutional power to legislate. To accept that they do would give the executive the power not only to enable the Commonwealth legislature to legislate on anything (whether inside or outside Australia) which may affect Australia's relations with other nations, and thereby radically alter the distribution of powers for which the Constitution provides[322] –

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319 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 May 1994 at 73. He also, unlike the defendant in this case, relied on "international obligations to protect children", citing Australia's ratification of the Convention on the Rights of the Child on 17 December 1990.

320 *Report on the Crimes (Child Sex Tourism) Amendment Bill 1994*, (1994), par 2.3.9.

321 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 125 per Mason J.

322 This is not a problem in relation to legislation, like that involved here, which is purely extraterritorial. It could be a problem where the legislation is not purely extraterritorial.

a course which the cases on treaty implementation[323] permit, subject to safeguards[324] – but also to do so on the strength of the "bare *ipse dixit*"[325] of an executive officer or member of Parliament without equivalent safeguards. The latter step is very different from the former.

210 A further consideration relates to extradition. Extradition is a voluntary act of a sovereign power usually carried out pursuant to a treaty in the interests of comity between nations. For Australia to criminalise conduct in a foreign country, the law of which does not prohibit it, as has been seen, tends to futility by reason of the double criminality rule. It does not fit coherently with extradition law and custom. In addition, it might also affect the relations of Australia with other nations adversely, because, unless it results from a treaty with those nations and extradition arrangements are in place, it could be seen as an attempted intrusion, however ineffectual, into the affairs of those other nations.

211 The defendant also pointed to two memoranda of understanding entered by Australia, one with the Philippines and the other with Fiji, for joint action to combat child sexual abuse. These, however, post-dated the introduction of ss 50BA and 50BC, and the operation of those provisions in any event is not limited to the territory of those nations or indeed of any other nations that may have requested Australia's assistance in combating child sexual abuse.

212 Finally, the defendant's submission does not explain how it is to be reconciled with the fact that the operation of ss 50BA and 50BC may adversely affect Australia's relations with countries having a lower age of consent than the age of 16 referred to in ss 50BA and 50BC. A national of one of those countries who is a resident of Australia could be convicted under ss 50BA and 50BC for acts in his or her country of nationality even though those acts were lawful under the law of that country.

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323 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1.

324 The law could not discriminate against a State or prevent it from continuing to exist and function; there must be a Convention; the Convention must be "bona fide"; and the law must be reasonably and appropriately adapted to give it effect.

325 The phrase is Lord President Cooper's in *Davie v Magistrates of Edinburgh* 1953 SC 34 at 40.

Are ss 50BA and 50BC laws with respect to external affairs on the basis that the extraterritorial prohibition of the sexual exploitation of children is a matter of international concern?

213 *The defendant's arguments.* The defendant argued that laws on matters of international concern were supported by s 51(xxix). Below, this will be called the "international concern doctrine" for short[326]. The defendant argued that the sexual exploitation of children, and its extraterritorial prohibition, were matters of international concern.

214 The defendant said there were 34 countries which had legislation similar to ss 50BA and 50BC – about a sixth of the nations of the world; but the Court was told nothing of the legislative position in the other five-sixths of those nations.

215 The defendant also relied on the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989; the Optional Protocol to that Convention on the Sale of Children, Child Prostitution and Child Pornography adopted by the General Assembly of the United Nations on 25 May 2000; declarations adopted at various World Congresses (including two World Congresses Against Commercial Sexual Exploitation of Children); and various resolutions of the United Nations Commission on Human Rights and the United Nations General Assembly. While the Convention on the Rights of the Child entered into force generally on 2 September 1990, was ratified by Australia on 17 December 1990, and entered into force for Australia on 16 January 1991, the Optional Protocol to that Convention on the Sale of Children, Child Prostitution and Child Pornography was not in force when ss 50BA and 50BC came into force. That Optional Protocol was adopted on 25 May 2000 and entered into force generally on 12 February 2002. Australia has signed it, but not ratified it; hence it is not a party to it. Further, the two World Congresses and many of the resolutions of the United Nations Commission on Human Rights and the United Nations General Assembly came into being after the challenged legislation came into force.

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326 It should be emphasised that the question whether the sexual exploitation of children, and its extraterritorial prohibition, is a "matter of international concern" within the legal context of the international concern doctrine and Australian constitutional law, which was controversial in this case, is entirely distinct from the question of whether the sexual exploitation of children is a "matter of international concern" in a more general sense which, of course, it is – it troubles many people around the world.

216 If it be assumed that this material demonstrates that in some sense the sexual exploitation of children is a matter of international concern, the question arises whether the international concern doctrine exists – the view that the Commonwealth has power by virtue of s 51(xxix) to legislate on a matter of international concern.

217 *The authorities.* There is no case in this Court deciding that the international concern doctrine exists. There are dicta which support the view, or which some contend support the view, that it does[327]. But there is less to these

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327 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 687 per Evatt and McTiernan JJ ("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 Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations" – a dictum limited in several respects); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 217 per Stephen J ("A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'"), at 234 per Mason J ("a matter which is of external concern to Australia having become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it") and at 242 per Murphy J ("matters of international concern" said to be "the observance in Australia of international standards of human rights"); *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 131 per Mason J, at 171 per Murphy J ("it is not necessary that the subject be one of concern demonstrated by the other nation States generally. For example, concern expressed by the world's scientific community or a significant part of it over action or inaction in Australia might be enough to bring a matter within Australian external affairs") and at 258-259 per Deane J (quoting Evatt and McTiernan JJ); *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 560-561 per Brennan J, 604-605 per Deane J and 657 per Toohey J. In *Richardson v Forestry Commission* (1988) 164 CLR 261 at 322 Dawson J said a majority in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 supported "sufficient international concern" as a basis for attracting power under s 51(xxix); whether or not they did (his assertion that Brennan J did at 222 may be doubted and a key part of the passage in Mason J's opinion at 129-132 he relies on has been called "somewhat ambiguous": Zines, *The High Court and the Constitution*, 4th ed (1997) at 294), he proceeded to discuss the proposition with considerable coolness. In *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 604-605 Deane J suggested that several Justices in *Richardson v Forestry Commission* supported "sufficient international concern" but it is hard to see that any did apart from Dawson J in the special sense just mentioned.

dicta than meets the eye. Some of them do not in fact support the international concern doctrine as a means of widening s 51(xxix); rather, for example, they discuss whether it narrows s 51(xxix) in its treaty implementation aspect. It is curious that a doctrine potentially narrowing s 51(xxix) so far as it depends on treaties is said to widen s 51(xxix) where no treaty can be relied on. All the dicta, so far as they were approving, were unnecessary for the actual outcome of the particular reasoning in which they appeared. They tended to be passing remarks made in the course of enunciating some more final conclusion, but not all of them were directed to the international concern doctrine itself. Assuming that a matter of "international concern" can be interpreted and defined, the outer limits of and the difficulties in applying such a doctrine do not, with respect, appear to have been tested in the authorities.

218 In addition to the dicta just discussed, there is also an actual decision of a single judge of the Federal Court of Australia applying the international concern doctrine[328]. In that case it was twice seen as important to state that the legislation related to matters of international concern both when it was enacted and when it was contravened[329]. These statements reflect the possibility that at different times a matter may not be of international concern, may then become of international concern, and may then cease to be of international concern again[330]. But if validity is to depend on the position not only at the time of enactment but also at the time of contravention, the outcome will be that legislation which was once invalid can later become valid, and legislation which was valid when enacted can become invalid. This volatility, and the elusiveness[331] connected with attempts to define "international concern", strongly suggest that the international concern doctrine does not exist; for if it did, it would operate antithetically to the rule of law. To those attempts it is now necessary to turn.

219 *What is a matter of international concern?* The defendant endeavoured in various ways to overcome the criticism that the international concern doctrine is too vague to be employed as a basis on which to support legislation under s 51(xxix). The defendant submitted that it sufficed if the concern were

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328 *Souliotopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584 at 598-600 [51]-[57] per Merkel J.

329 *Souliotopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584 at 598 [51] and 599 [53].

330 See *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 562 per Brennan J.

331 The criticism is Mason J's: *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 123.

expressed in resolutions passed at international meetings attended by the representatives of governments (as distinct from private interests). But many things are discussed at international meetings and many resolutions passed about them: are they all of international concern[332]? The defendant submitted that one could list "a fairly small number of" matters which, though their boundaries were admittedly fuzzy, were clearly of international concern – global warming, genocide, race relations, torture, terrorism, space exploration, air safety, marine safety and exploitation of children. It suggested that smoking cigarettes and drinking alcohol were not of international concern, unless some United Nations conference called for a prohibition on use of these substances. The submission did not, however, explain what the distinction was between these subjects and the many other subjects discussed at international conferences. The defendant could not explain how many nations, or which classes and numbers of persons within nations, must share a concern before a matter becomes one of "international concern". And it did not explain what evidence might demonstrate international concern. At least outside the field of constitutional law, the courts have taken judicial notice of governmental matters such as the existence of a state of war and the recognition of a foreign State by reliance on a certificate from the executive. The question of whether this should be done where the facts are disputed constitutional facts has been left open[333]. On the other hand, it has been said that the fact of entry into, and of ratification of, an international Convention evidences the judgment of the executive and of Parliament that the subject-matter of the Convention is of international character; and further that whether the subject-matter of a Convention is of international concern is not a question "on which the Court can readily arrive at an informed opinion" but rather one which involves "nice questions of sensitive judgment which should be left to the executive government for determination"[334]. Whether a subject-matter not dealt with by a Convention is of international concern involves equally difficult questions. But if international concern is to be demonstrated otherwise than by public and solemn acts like treaties, what other material, proved by what means, can be considered? The opinions of national governments, and the opinions of particular segments of their populations, can differ across the world: the defendant did not explain how conflicting "international concerns" are to be

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332 This difficulty troubled Brennan J in *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 561-562.

333 *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at 149 [54] per Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.

334 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 125 per Mason J.

taken into account in evaluating the existence of Commonwealth legislative power under s 51(xxix)[335].

220 The difficulty of identifying "matters of international concern" is connected, then, with a difficulty in measuring the extent of the international concern. Which countries share the concern and which do not? Can the concern be said to exist, or to be international, if no treaty has been entered? No doubt many people in many different countries share concerns, but it has not been demonstrated that, in the absence of formal arrangements about them to which Australia is a party, those matters could possibly be regarded as external affairs within the placitum[336].

221 *What limits are there to the Commonwealth's power to legislate?* Further, assuming a matter of "international concern" could be identified, the defendant did not explain what boundaries there are to the Commonwealth's power to legislate in relation to it. Will the Commonwealth have plenary power under s 51(xxix) to legislate on a subject of "international concern"? If so, the external affairs power would be a power of very broad scope and would be capable of unduly disrupting the distribution of powers between the States and the Commonwealth – an outcome which the Court, in developing the application of s 51(xxix) so far as treaty implementation is concerned, has endeavoured to minimise[337]. If the international concern doctrine does not give the Commonwealth plenary power, how is the power to be limited? Would the power of the Commonwealth be limited to legislation that is "capable of being reasonably considered to be 'appropriate and adapted'" to addressing the concern[338]? That test, employed in applying s 51(xxix) in relation to implementing treaties[339], seems very hard to apply to matters of international

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335 Some of the materials on which the defendant relied revealed that Australian lawyers had expressed hostility to the enactment of the impugned legislation by reason of its potentially unfair effects on accused persons.

336 It will be remembered that although the defendant pointed to the Convention on the Rights of the Child to show that the sexual exploitation of children was a matter of international concern, it did not seek to uphold the challenged legislation as giving effect to that Convention.

337 See above at [209], notes 324 and 325.

338 As Deane J suggested in *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 604-605.

339 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

concern: for treaties, indeterminate though the language of some of them is, are normally incomparably more detailed and specific than "matters of international concern".

222 *Novelty of the doctrine.* If s 51(xxix) could support legislation on matters of "international concern" it would be a means of upholding the legislation struck down in *Australian Communist Party v The Commonwealth*[340]. If anything could be described as being a matter of international concern, it was Communism in the 1950s. Yet it did not occur to any of the Justices or any of the many counsel during the lengthy arguments in that hard-fought case that the legislation banning the Australian Communist Party could be validated because it related to a matter of international concern. That is not logically fatal to the defendant's argument, but it weakens its credibility.

223 The international concern doctrine is negated by another aspect of *Australian Communist Party v The Commonwealth*. It has been said that whether a subject-matter is of international concern is not a question on which the Court can "substitute its judgment for that of the executive government and Parliament"[341]. This was said in relation to the treaty aspect of s 51(xxix). If this statement is to be taken as part of the international concern doctrine, it is analogous to Latham CJ's approach to the defence power in *Australian Communist Party v The Commonwealth*[342]:

> "The decisions to fight Germany and Japan were not made by the Court. The Court was not asked, and did not presume, to hold laws valid or invalid on the ground that the war was or was not really a war for the defence of Australia. The laws were held valid not because the Court agreed with the policy of the Government and Parliament in regarding Germany and Japan as enemies, but because the legislation was held to have a real connection with the war against Germany and Japan. In other words, the action of the Government in declaring war and of Parliament in adopting that decision and legislating in pursuance of it *itself created a defence situation which provided a basis for the legislation*."

From this Latham CJ concluded that it was not open to the courts to challenge the truth of recitals in the impugned legislation averring that the activities of the Australian Communist Party made it necessary, for the security and defence of

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340 (1951) 83 CLR 1.

341 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 125 per Mason J.

342 (1951) 83 CLR 1 at 151-152 (original emphasis).

Australia, to dissolve it. This conclusion was not accepted by the majority[343]. Indeed, it went beyond the defendants' argument in that case which treated the preamble as conclusive not of the facts recited but only of the existence of the legislative opinions disclosed[344]. The similarity between Latham CJ's conclusion and the international concern doctrine in this respect casts grave doubt on the latter.

224 *Divisions about the doctrine.* The international concern doctrine has never been decisive in this Court. Its life has been quite short. But it has caused sharp divisions within the Court already. Thus in *The Commonwealth v Tasmania*[345] Mason J said of a law being sustained as implementing a treaty under s 51(xxix):

> "The law must conform to the treaty and carry its provisions into effect. The fact that the power may extend to the subject-matter of the treaty before it is made or adopted by Australia, because the subject-matter has become a matter of international concern to Australia, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it."

Of this Dawson J said in *Richardson v Forestry Commission*[346]:

> "I cannot see why, if it is international concern which gives a subject-matter the character to bring it within the description of external affairs, the conclusion of a limited treaty upon that subject-matter should place outside the external affairs power that part of the subject-matter which is beyond the limits of the treaty. Nor can I see why legislation passed with respect to a matter of international concern should no longer be legislation with respect to external affairs simply because Australia becomes a party to a treaty upon a more limited basis than is reflected by the legislation."

One solution to these problems would be to reject the existence of "international concern" not reflected in treaties as a basis for s 51(xxix) validity. Indeed, Mason J was concerned to negate the possibility that s 51(xxix) gave no legislative power to implement a treaty unless it was shown, independently of the

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343 See, for example, Dixon J at 200-201.

344 See Dixon J at 191.

345 (1983) 158 CLR 1 at 131-132.

346 (1988) 164 CLR 261 at 325.

decisions of the executive to enter it and the legislature to implement it, to be of international concern; he did not appear to be endeavouring to advocate s 51(xxix) as giving a power to legislate on any matter of international concern[347].

225 There are immense difficulties facing any court wishing to recognise, as a matter of decision, the international concern doctrine. The arguments advanced in this case have not resolved those difficulties. In these circumstances it would not be right to uphold the legislation impugned in this case by reliance on the doctrine.

226 *Inapplicability of the doctrine to the present legislation.* Even if there are relevant matters of international concern, and even if the international concern doctrine is sound, that doctrine could not support ss 50BA and 50BC. The material relied on by the defendant reveals concern – let it be assumed to be "international" – about the sale of children, child prostitution and child pornography. Sections 50BA and 50BC do not criminalise that conduct, they criminalise different conduct. The material also reveals general concern about sexual activity involving children under 12 – not under 16, because some of the legislation relied on by the defendant for another purpose reveals that in some countries, no matter how many Australians might deprecate it, activity with children as young as 12 is lawful, and in others with children as young as 14 or 15. If the material demonstrates a general concern about children under 12, the legislation, in criminalising conduct with older children, goes beyond the area of international concern.

Questions reserved

227 At the conclusion of the hearing the Court answered the reserved questions in favour of the defendant. For the reasons we have stated, we did not join in those orders.

228 Instead, we favour the following answers to the questions reserved for the consideration of the Full Court:

(1) No.

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347 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 125-126.

(2) No.

(3) The defendant.