

*XYZ v Commonwealth of Australia*  
[2006] HCA 25

Despite the apparently definitive restatement in the *Industrial Relations Act Case*, uncertainty as to whether mere geographical externality suffices to attract s 51(xxix) has not in fact been put to rest. In *XYZ v Commonwealth of Australia* [2006] HCA 25, a further challenge to that idea was *rejected* by Gummow, Hayne and Crennan JJ (in a joint judgment), and by Gleeson CJ (in a separate judgment). But the challenge was *accepted* by Callinan and Heydon JJ, while Kirby J pointedly left the question open.

The plaintiff in *XYZ* faced prosecution for sexual offences allegedly committed in Thailand, contrary to ss 50BA and 50BC of the *Crimes Act 1914* (Cth), inserted by the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth). Gleeson CJ, Gummow, Hayne and Crennan JJ reaffirmed the externality principle and upheld the legislation on that basis. Kirby J admitted that the plaintiff's arguments "[114] have planted a doubt in my mind concerning the geographical externality principle ... that was not previously there", but found it unnecessary to resolve the doubt because he was able to uphold the law as "[128] one with respect to the international relationships of Australia with other nation states and international organisations". Callinan and Heydon JJ rejected this ground as well as that of "externality", and held that the law was invalid.

Even if the challenge to the externality principle had been wholly successful, it might not have meant that the actual decisions in *Polyukhovich* and *Horta v Commonwealth* would be overruled, since the challenge did not necessarily extend to the narrower version of the "externality" principle accepted in *Polyukhovich* by Brennan and Toohey JJ. Thus the joint judgment in *XYZ* picked up ([2006] HCA 25 at 34) the observation in *Horta* that "[194] the area of the Timor Gap and the exploration for, and the exploitation of, [its] petroleum resources" had "an obvious and substantial nexus" with Australia. Similarly, as to *Polyukhovich*, the joint judgment observed that "[34] [a]t the time the information against him was laid, Polyukhovich was an Australian citizen and resident 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" – thus apparently accepting the rationale relied on by Toohey J in *Polyukhovich*. Accordingly, in both cases the legislation "[37] touched and concerned Australia", so that the decisions "may be supported on a narrower reading of s 51(xxix) than the [mere] requirement of a geographically external matter or thing".

Kirby J made a similar point, though as to *Polyukhovich* he preferred to say that "[70] 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". Similarly, Callinan and Heydon JJ, though prepared to overrule the broad principle relied on in *Polyukhovich* and *Horta*, conceded that "[205] [a] wholesale overruling will not be necessary", since the actual results in those cases "could be justified on other grounds". Indeed, they relied on this point to "diminish any inconvenience which might be thought to flow from those cases being overruled" insofar as they treated mere geographical externality as sufficient to attract s 51(xxix).

One argument *against* the acceptance of mere externality as a source of power involved criticism of an argument used by Jacobs J in the *Seas and Submerged Lands Case* and by Dawson and Deane JJ in *Polyukhovich*: namely, that given the limits on the power of the States to legislate with extraterritorial effect, there would be a gap in the plenitude of Australia's legislative power if the Commonwealth were not able to do so. It was said that this argument underestimated the States' ability to legislate extraterritorially, especially since the *Australia Act 1986* (Cth); and that in any event it was always possible for the States to procure

Commonwealth legislation by request or concurrence under s 51(xxxviii). Gummow, Hayne and Crennan JJ responded that reliance on these ways of filling any gap “[42] assume at a theoretical level a common legislative purpose among the States”, whereas “practical considerations suggest that a common purpose may sometimes be absent”. They added that, in any event, it is contrary to basic principle to limit a head of Commonwealth legislative power by reference to the possibility of action under some other head of power.

Another argument was the novelty of the Court’s willingness to accept mere externality – first seriously advanced in *Seas and Submerged Lands*, and first accepted in *Polyukhovich*. In particular, such an approach was said to be inconsistent with *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 (see §4(a)). In that case the unsuccessful counsel, Flannery KC, had argued that “external affairs” are [614] those affairs of the Commonwealth which are external in the sense that they cannot be wholly completed within the territory of the Commonwealth”: one first identifies the relevant “business of the Commonwealth”, and if that business “is external to the territory”, it is an external affair. The successful counsel, Pitt KC, had countered that: “[613] What constitutes appropriate action depends not merely upon geographical situation, but upon subject matter also.” And without directly referring to this exchange, the various judgments had all proceeded to discuss “external affairs” in terms of the conduct of *relations* or *relationships* with other countries. (Moreover, they did expressly reject the slightly different argument “[640] that the meaning of the phrase ‘external affairs’ is limited to the external or extra-territorial aspect of the other subjects mentioned in sec 51”.)

The joint judgment in *XYZ* replied to this argument by quoting what was said in the *Industrial Relations Act Case* (187 CLR at 482): that, given the “continuing evolution” in Australia’s external relations both before and after Federation, there can be no justification for limiting the meaning of the expression “external affairs” to the meaning it had in 1900 – or, one might add, in 1936. One might also add that the plaintiff’s reliance on *R v Burgess; Ex parte Henry* seems rather double-edged. If the possibility of treating mere geographical externality as a relevant factor was raised, and not expressly rejected, in 1936, then the modern doctrine may be less newfangled than the plaintiff in *XYZ* sought to make out.

A third argument accepted in the dissenting judgment of Callinan and Heydon JJ was that, if Australia has power to criminalise activities in other countries, the power may be used in respect of activities which are *not* contrary to law in the country where they occur. This would not only be inherently anomalous but might also lead to problems with extradition, which is usually subject to a “double criminality” requirement”: that is, that the alleged offence be criminal in *both* the countries concerned. In particular, laws relating to sexual offences with children below the age of consent might encounter this problem in relation to countries where the age of consent is lower than in Australia. In its impact on the “externality” argument this appeared to be relied on only as an argument from inconvenience; but Callinan and Heydon JJ relied on it also as giving rise to difficulties with Kirby J’s reliance on “relations with other countries”.

In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (see §4(b) below), Stephen J suggested that the mere recognition of a problem as a cause for “international concern” might itself sufficient as a basis for Australian legislative action under s 51(xxix). That suggestion has often been adverted to in later cases, never as a basis for decision. (See especially Brennan J in *Polyukhovich*, 172 CLR at 560-62.) In *XYZ* Callinan and Heydon JJ, having rejected the other grounds relied upon by the Commonwealth to establish validity, had necessarily to reject an argument based on “international concern” as well; but the rest of the Court (again including Kirby J) left this issue unresolved.