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However, [insert party] will argue that [insert law] is invalid because it does not promote or preserve friendly relations with other nations. As per Callinan and Heydon JJ in XYZ, laws which have do not further Australia's international relationships, or adversely affect such relationships, will not be permitted under s 51 (xxix).

OTF, there is no evidence that [insert subject matter] worsens Australia's relationship with [insert foreign nation]. [Insert law] will therefore have no bearing on promoting friendly relations with [insert nation].

However, the Cth will argue that there has been no majority decision promoting this requirement. Further, utilizing the approach from the Engineers Case, there is nothing in the text of the Constitution to suggest such a limitation on Cth legislative power under s 51 (xxix). As such, it is sufficient that [insert law] concerns relations with [insert nation].

[Insert law] therefore will/will not be valid under s 51 (xxix).

XYZ	<p>Kirby in dissent under first aspect – didn't want to decide case under geographical externality. He decided under this aspect of EA – relied on IR aspect of EA to uphold that law</p> <ul style="list-style-type: none"> • Which relations were in issue – our relations with Thailand and other countries where our citizens might commit child sex offences • But also UN committee on rights of the child – we have obligations under convention of the rights of the child – so we should start criminalising these offences • Kirby was in the majority but relied on second aspect of EA not first aspect
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Treaty Implementation

Introduction	<p>A law will fall within s 51 (xxix) where it validly implements a treaty to which Australia is a party. Per the majority in Tas Dams, and held unanimously in Richardson, the treaty itself is sufficient as evidence of the international concern and is therefore linked to the external affairs head of power.</p> <p>To be valid, [insert legislation] must therefore be appropriate and adapted to the purpose of [insert HoP] (Australian Communist Party Case).</p> <p>As per Leask, such a test is an exercise of proportionality. The legislation must not go further than is necessary to achieve the purpose of the HoP, else it will be disproportionate (Thomas v Mowbray).</p> <p>The Commonwealth will argue that [insert legislation] is reasonably appropriate and adapted to the purpose of [insert HoP] because [insert facts]. [Insert legislation] therefore will/will not be validly characterised under [insert HoP].</p> <p>Not a treaty?</p> <p>[Insert party] may argue that [insert lesser international instrument] does not come within the treaty implementation power as it is not a binding treaty. However, the Cth will counter that, per Murphy J in Tas Dams, endorsed in the ILO Case, s 51 (xxix) can extend to non-binding instruments of international law such as charters, pacts, protocols, declarations, and draft international conventions.</p> <p>On balance, [insert international instrument] will/will not come within the treaty implementation power</p> <p>Recommendations of a treaty monitoring or treaty interpreting body</p>
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	<p>In ILO the court held that the recommendations of a treaty monitoring or treaty interpreting body themselves constitute external affairs that enliven the power under s 51(29) if the recommendations 'can be reasonably regarded as appropriate and adapted to giving effect to the terms of the Conventions to which they relate'</p> <p><i>Is it free standing or pursuant to the treaty?</i></p>
Characterisation – Purposive	<p>The executive has prerogative power under s61 to enter into treaties (Koowarta, Teoh per Mason J), but this is not enforceable unless it is incorporated into domestic law. It is now established that the Cth has the power to legislate to implement treaties regardless of whether it relates to a matter of international concern or significance (unanimous endorsement of the broad view in Richardson, majority in Tas Dams, Mason, Murphy and Brennan JJ in Koowarta).</p> <p>Incidental Scope? LOOK AT WHETHER LEGISLATION RELATES TO TREATY</p> <p>[Insert party] may argue that [insert legislation] is outside the core scope of s 51 (xxix) because [insert facts].</p> <p>However, the Cth will counter that, per Richardson, s 51 (xxix) extends to matters reasonably incidental to treaty obligations. [Insert legislation] is likely to come within the incidental scope of the external affairs power because [insert facts].</p>
Limitations	<p>For the Cth to validly implement [insert treaty/international instrument], the following limitations must be satisfied</p>
Bona Fide Requirement	<p>NOTE: Have they enacted law before ratifying treaty?</p> <p>As per Brennan J in Koowarta, treaties must be implemented in good faith, not merely to increase legislative power.</p> <p>[Insert party] may argue that the Cth is not acting in good faith, but that [insert legislation] is a "coloured attempt to gain power" (Brennan J, Tas Dams) or a 'mere device to procure for the Cth an additional domestic jurisdiction' (Gibbs CJ in Koowarta).</p> <p>However, the Cth would dispute this and argue that this limitation is at best a "frail shield available in rare cases" as Gibbs CJ later reflected on his above suggestion, stating that it is unlikely that an international agreement would be entered into as a mere device. He stated that even if the Executive was aware that Parliament had no legislative power to deal with the subject matter of a treaty when it made a treaty, that would not be enough to establish bad faith.</p> <p>NOTE: the validity of legislation does not depend upon the sincerity of Parliament, or the other motives that lie behind its enactment.</p> <p>On balance, this limitation would/would not be satisfied.</p>
Obligation Requirement	<p>For a law implementing a treaty to be valid under s 51 (xxix), it may also be necessary that it imposes an obligation on Parliament. The status of this requirement is uncertain, with Mason, Deane and Murphy in Tas Dams supporting the broad view (that no obligation is required) and Gibbs and Wilson supporting the narrow view (that imposes an obligation requirement).</p> <p>Obligatory language?</p> <p>The Cth will argue that, if an obligation is required, this is satisfied by the language of the treaty. OTF, the treaty obliges signatories to [insert obligation].</p> <p>As per Gibbs CJ, Brennan and Wilson JJ, the obligation requirement will not be enforced pedantically (Tas Dams). On balance, [insert obligation] will therefore be sufficient to meet this requirement, if it exists.</p>

	<p>No obligatory language? [Insert party] will argue that [insert legislation] is invalid because [insert treaty/international instrument] does not impose any obligations on signatories, per Gibbs CJ, Brennan and Wilson JJ in Tas Dams.</p> <p>However, the Cth will argue that, per Mason, Murphy and Deane JJ, an obligation is unnecessary, especially since treaties are generally expressed in broad, aspirational language. Deane J highlighted treaty obligations need not be of the same precision as you would expect of domestic law. Further, in the ILO Case, the majority held that non-binding international instruments (which do not impose any obligations) come within the scope of s 51 (xxix). The Cth will argue that by implication, the obligation requirement is therefore redundant.</p> <p>Further, Cth will contend that even if the language of the treaty is not obligatory, it can still fall within the incidental scope of the EA Power given that the EA power can support a law which not only discharged Australia's actual obligations but also Australia's reasonably apprehended obligations (Mason CJ and Brennan CJ in Richardson). Hence, per Richardson, Cth can legislate on matter which are reasonably incidental to its implementation of treaty obligation</p> <p>The law regarding the obligation requirement is unsettled, therefore it is unclear whether [insert legislation] will be valid on these grounds. However, I will continue with my analysis on the basis that this requirement is satisfied.</p>
<p>Specificity Requirement</p>	<p>To be validly implemented, [insert treaty] must prescribe a reasonably specific regime to direct the course of signatory states (ILO). Further, it must enable common action to be taken (ILO).</p> <p>[Insert party] will argue that [insert treaty] does not provide a sufficiently specific regime, because signatory states may engage in a range of actions in pursuit of [insert aim].</p> <p>However, the Cth will counter that there is a general consensus on how to deal with [insert issue], therefore [insert goal] will be sufficiently specific.</p> <ul style="list-style-type: none"> • Eg about recycling then even if treaty is vague, it could nonetheless be specific enough <p>On balance, [insert goals] will/will not be sufficiently specific to meet this requirement.</p>
<p>Conformity Requirement</p>	<p>To validly implement [insert treaty], [insert legislation] must conform with the requirements of the treaty.</p> <ul style="list-style-type: none"> • Purpose we are looking for is in the TREATY not in the HOP • Does the law fall within the scope of the treaty <p>RED FLAGS:</p> <ul style="list-style-type: none"> • Where the law undermines the purpose of the treaty, it is unlikely to be in conformity with the treaty's requirements. • Where the law imposes a disproportionately harsh penalty, it is unlikely to be appropriate and adapted to implementing the treaty. • Where the law exists outside the treaty but is reasonably incidental to it, it may nevertheless be in conformity with the treaty (Richardson). • That the law does not completely implement all the treaty's obligations does not necessarily indicate non-conformity (ILO). • Where the law infringes on civil liberties (e.g. property rights), it is unlikely to be appropriate and adapted to implementing the treaty (Richardson, per Deane J). <p>[Insert party] will argue that [insert legislation] fails to conform with the requirements of the treaty, because [insert facts]. [Insert legislation] therefore fails to enliven s 51 (xxix) and will be invalid for want of a HoP (ILO).</p>

	<p>However, the Cth will argue that, per <i>Tas Dams</i>, [insert legislation] is reasonably capable of being considered appropriate and adapted to advance the objectives of the treaty, as [insert facts].</p> <ul style="list-style-type: none"> • For example wouldn't pass law to slaughter all sheep because there's a treaty regulating an obscure disease in sheep in a far away land • Conforms – law exists outside the treaty but is reasonably incidental to it (freezing forest lands despite no WH status) per Richardson • Law which infringes on personal liberties, harder to conform per Deane J in Richardson • From Richardson, court doesn't have to agree that it's the best way for pmt to legislate, it is sufficient if pmt's decision could reasonably be made or could be based on reasonable grounds <ul style="list-style-type: none"> ○ Protection period was limited and realistic – 1yr24days ○ There was a priority given to the commission to identify land that was not within the world heritage first so they can release the land for use ○ Was compensation given to land owners ○ The minister could make an exception ○ The decisions were subject to judicial review • In <i>Williams no 2</i> the Cth tried to retrospectively validate contracts via legislation. Financial Management and Accountability Act 1997 <ul style="list-style-type: none"> ○ S32B – purports to give legislative basis for all the expenditures that were listed in regulations under that law ○ This law itself gives legislative basis to all the spends listed in regulations ○ The regulations – list 427 expenditures – included the chaplaincy program expenditures <ul style="list-style-type: none"> ▪ Was given retrospective application <p>On balance, the conformity requirement will/will not be satisfied.</p>
Conclusion	<p>Consequently, [insert legislation] will be ultra vires, as it fails to satisfy [insert requirement]. It will therefore not be valid under s 51 (xxix).</p> <p>OR</p> <p>Consequently, [insert legislation] will be valid under the treaty implementation power. It therefore enlivens s 51 (xxix) and is a valid exercise of federal legislative power.</p>

<i>Koowarta</i>	<p>Koowarta was from the Wik peoples and wanted to buy a cattle station that covered his traditional peoples' lands so he signed a K with the owner of the cattle station, but the purchase was blocked by the QLD act</p> <ul style="list-style-type: none"> • Ratified convention on elimination of racial discrimination – to prohibit and eliminate race discrimination in all its forms and guarantee rights to authority • S12 makes unlawful for person to refuse or fail to dispose of any estate or interest in land to a second person by reason of the race • QLD act did not give indigenous people right to own land
<i>Tas Dams</i>	<ul style="list-style-type: none"> • Have international treaty called world heritage convention • 2 obligations on AUS given that we have ratified <ol style="list-style-type: none"> 1. Duty to ensure the protection, conservation, preservation of cultural and natural heritage. 2. Must take effective and active measures to actually protect, conserve and preserve that heritage • Cth then legislates the world heritage properties conservation act. Under s6(2) – they can make proclamation which may be made to identify property which (b) the protection or conservation of the property by AUS is an international obligation or (c) the protection or conservation of the property by Aust is necessary or desirable for the purpose of giving effect to a treaty

	<ul style="list-style-type: none"> • Once we have identified the property, if GG is satisfied that such property is likely to be damaged or destroyed, they may declare that s9 may apply to that property • OTF TAS govt wanted to construct Gordon below the franklin dam. Wanted to construct a dam on special area • Broad view – treaty ratification sufficient – fact that the treaty was ratified, the international convention, was sufficient to make preservation of our natural heritage of international character and that then enlivened cth law making power under S51(29) <p>FOR CONFORMITY</p> <ul style="list-style-type: none"> • Don't get independent HOP under a treaty – what you legislate must conform to the treaty (Mason J)
<i>Richardson</i>	<ul style="list-style-type: none"> • 280,000 ha of forest ad 300 acres are going to be logged • Tiny part of a forest is to be logged – but we have cth legn and world heritage convention • Specific legislation – Lemonthyme and southern forest (commission of inquiry act) 1987 <ul style="list-style-type: none"> ○ Commission of inquiry was held in relation to those two areas of the forest to ascertain whether those forests should be protected under WHC ○ World heritage convention imposes that obligation to a) identify world heritage and b) protect it • Court unanimously held that the commission of inquiry was valid under s51(29) as convention itself imposed an obligation to identify relevant property • Aus's obligations of protection were only with respect to sites that were listed, that had already been listed. But the lemonthyme and southern forest were not yet listed – so we are protecting forest before we are listed – the identification would lead to the listing • Richardson relies on incidental aspect of treaty to uphold the law – about the incidental aspect of the HOP – reasonably incidental to the main obligation to allow some pre protection when deciding whether to protect that forest
<i>ILO</i>	<ul style="list-style-type: none"> • Cth turn to ILO convention (has binding obligations) and under that convention there are a number of recommendations made as to how to implement • Seems to suggest that international non treaty recommendations are within the scope of the EA power • Seems to suggest that international instruments that do not have the status of treaty fall within s51(29) and give cth power to legislate • Joseph and Castan think judgment here strange – “it is remarkable that the majority apparently endorses a very broad extension of legislative power under s51(29) with no analysis or justification of that extension beyond a cursory reference to a 1936 judgment”
<i>Pape</i>	<ul style="list-style-type: none"> • GFC response legislation • Heydon <ul style="list-style-type: none"> ○ Any support recommendations can give to a law enacted in reliance if 51(29) exist only where they are pronounced in order to give effect to the terms of the treaty in which they relate ○ Recommendations alone not sufficient – but if linked to a treaty, to give effect to terms of a treaty that's different and you can legislate vis a vis those recommendations because it is incidental to the EA power • Hayne and Kiefel JJ – said no obligations imposed by this declaration so not EA power
<i>Alqudsi</i>	<ul style="list-style-type: none"> • Judgement in ILO is really pointing to fact that you need a link between the recommendation and the treaties • Recommendation alone cannot engage EA power – needs link back to a treaty