

# THE EXTERNAL AFFAIRS POWER

## Overview of the External Affairs Power

### s 51(xxix), Constitution

- “The Parliament shall, subject to this Constitution, have power to make laws... with respect to external affairs.”
- Unlike activity-based heads of power, s 51(xxix) gives the Commonwealth legislative reach over matters outside Australia and its international obligations.
- Historically uncertain in scope because the Constitution does not define “external affairs.”
- Rooted in Australia’s transition to nationhood:
  - Before federation > colonies had no international legal personality; Britain handled foreign relations.
  - After federation > Commonwealth became Australia’s sole international actor.
- Although s 51 powers are concurrent, states cannot legislate for external affairs because they lack international legal personality.
- **Significance:** This head of power is now one of the broadest and most important, enabling Commonwealth intervention in areas (e.g., environment, health, human rights) where it otherwise lacks power.

### Exam Cues for s 51(xxix)

- Mentions of treaties, conventions, covenants, protocols, international agreements, UN declarations.
- Laws about regulating conduct overseas.
- Laws addressing foreign relations or interactions with international organisations.
- Key approach in exams:
  - Step 1 > Does the law concern **extraterritoriality**?
  - Step 2 > Does it concern **foreign relations**?
  - Step 3 > Does it implement a **treaty/international instrument**?
  - If treaty: check **four qualifications** (bona fide, obligation, specificity, conformity).

### Three Categories of the External Affairs Power

1. **Extraterritorial laws** - regulating conduct or events outside Australia.
2. **Relations with other nations and international organisations** - regulating Australia’s foreign affairs.
3. **Implementing international treaties/instruments** - incorporating treaty obligations into domestic law.

## Category 1: Extraterritorial Laws

- Commonwealth has plenary power to legislate regarding conduct and events occurring entirely outside Australia.
- Unlike the states, the Cth does **not** need to demonstrate a nexus with Australia.

### Cases:

- **Polyukhovich v Cth (1991):**
  - **Facts:** Commonwealth criminalised WWII war crimes committed in Europe. At the time of the crimes, neither Polyukhovich nor victims had any connection with Australia. He migrated here decades later.
  - **Legal Application:** High Court upheld the law. Confirmed Cth’s extraterritorial power is **plenary**: only requirement is “geographical externality” (that the event occurred outside Australia). No nexus needed. Even if practically unenforceable, law still valid.
- **XYZ v Cth (2006):**
  - **Facts:** Law made it an offence for Australian citizens to engage in child sex offences overseas. Defendant argued Polyukhovich should be overturned.
  - **Legal Application:** High Court reaffirmed the Polyukhovich principle. No nexus required, extraterritorial power extremely broad. Minority judges suggested this interpretation strayed from 1901 meaning, but majority stuck with expansive view.

## Category 2: Relations with Other Nations

- Cth may legislate with respect to its **foreign relations** - including both nation-states and international organisations.

### Cases:

- **R v Sharkey (1949):**
  - **Facts:** Sedition law made it an offence to excite disaffection against the UK and its Dominions.
  - **Legal Application:** Latham CJ held that “relations of the Commonwealth with all countries outside Australia” fall within external affairs. Early interpretation confined to friendly relations with UK/Dominions. Modern law extends to all countries (friendship not required).
- **Koowarta v Bjelke-Petersen (1982):**
  - **Facts:** Concerned **Racial Discrimination Act 1975** implementing CERD treaty.
  - **Legal Application:** Brennan J extended the Sharkey principle to cover relations with **international organisations** such as the UN or EU, broadening scope beyond states alone.
- **XYZ v Cth (2006):**
  - **Facts:** Defendant argued Cth law implementing treaty was invalid.
  - **Legal Application:** Kirby J said law could also be supported under “relations with other nations,” since it affected Australia’s relationship with Thailand (where conduct occurred) and the UN (via child rights conventions).

## Category 3: Implementing International Treaties

- Most important and controversial use of s 51(xxix).

- The Cth can pass laws implementing obligations from treaties, conventions, covenants, and sometimes even recommendations.
- Treaties are signed by the **executive** (Governor-General on advice of ministers) but only become enforceable domestically when **incorporated by Parliament**.

#### Cases:

- **R v Burgess (1936):**
  - **Facts:** Law regulating aviation under an international convention.
  - **Legal Application:** Court split. Some judges said Cth could implement all treaties; others limited it to treaties of sufficient "international significance." Unsettled scope at this stage.
- **Koowarta v Bjelke-Petersen (1982):**
  - **Facts:** Challenge to **Racial Discrimination Act 1975** implementing CERD.
  - **Legal Application:** Narrow 4:3 majority upheld Act. Broad view: Cth may implement any treaty obligations. Narrow view (minority): only treaties relating to matters already within external affairs. Majority's broad approach prevails.
- **Tasmanian Dams (1983):**
  - **Facts:** Cth blocked Tasmania's hydroelectric dam project by implementing UNESCO World Heritage Convention obligations to protect nominated areas.
  - **Legal Application:** Majority upheld law. Confirmed broad rule: Cth may implement **any treaty obligations**, regardless of subject matter (environment included). Minority argued only treaties of "international significance" should count, but this was rejected.
- **Richardson v Cth (1988):**
  - **Facts:** Cth law protected forests pending their World Heritage assessment. At the time, treaty imposed no duty to protect areas awaiting listing.
  - **Legal Application:** Court upheld law. Found that incidental measures (protecting candidate sites so obligations could later be met) were valid as reasonably connected to treaty duties. Expanded power to include incidental obligations.
- **ILO Case:**
  - **Facts:** Cth implemented recommendations in a draft International Labour Organisation instrument (not a binding treaty).
  - **Legal Application:** Court upheld law. Suggested even non-binding recommendations could be implemented. Highly controversial; criticised as incoherent. Obiter in Pape later cast doubt but not overruled.

#### Qualifications / Limits on Treaty Implementation

##### 1. Bona Fide Treaty

- Treaty must be genuine, entered into in good faith, not a sham device to expand Cth power.
- Addresses concern that Cth could deliberately sign trivial treaties just to legislate in areas outside its powers.
- In practice > impossible to prove bad faith because Cabinet motivations are confidential.
- **Koowarta:** Gibbs J described this as a "frail shield" - a theoretical but practically useless safeguard.
- **Exam point:** Always mention but note that no treaty has ever been struck down for lack of bona fides.

##### 2. Obligation Requirement

- Debate: must a treaty contain binding obligations, or are recommendations enough?
- **Tasmanian Dams:** no consensus. Some judges required obligations; others allowed broader incorporation.
- **Richardson:** incidental measures upheld (protecting forests pending listing).
- **ILO Case:** Cth law based on mere recommendations upheld - suggests obligations not strictly required. Highly uncertain.
- **Current position:** Cth can implement all treaty obligations + matters reasonably incidental. Recommendations may also suffice, but law unsettled.

##### 3. Specificity

- Treaty obligations must be reasonably specific in prescribing a course of conduct.
- Vague aspirational treaties ("take steps to address opioid crisis") may not be enough.
- Considerations:
  - Degree of discretion left to states.
  - Level of international consensus.
  - Whether treaty clearly directs government action.
- If treaty says "must prohibit X" > sufficiently specific. If treaty just says "take steps" > less certain.

##### 4. Conformity (Appropriate & Adapted Test)

- Implementing legislation must **conform** to treaty obligations. Cannot go beyond or contradict the treaty.
- Court applies a proportionality test: is law reasonably appropriate and adapted to achieving treaty's objectives?
- Penalties must also be proportionate - excessively harsh sanctions may breach conformity.
- **Tasmanian Dams:** confirmed proportionality applies.
- **Richardson:** Deane J argued measures unreasonably burdened property rights; others disagreed, highlighting balancing of values.
- **Exam tip:** Analyse each section of legislation separately. Some provisions may conform, others not. Remedy may be severance.

#### Summary Framework for s 51(xxix) Exam Analysis

1. Does the law concern **extraterritorial matters**? (*Polyukhovich, XYZ*).
2. Does it regulate **relations with foreign states/organisations**? (*Sharkey, Koowarta, XYZ*).
3. Does it implement a **treaty or international instrument**? (*Burgess, Koowarta, Tas Dams, Richardson, ILO*).
  - Check four qualifications:
    - Bona fide treaty (genuine, good faith).
    - Obligation requirement (must be binding? unsettled after ILO).
    - Specificity (obligations must be reasonably precise).
    - Conformity (law must be appropriate and adapted to treaty's objectives).
4. Apply proportionality/conformity test carefully to each legislative provision.

## FINANCIAL POWERS

### Exam cues (when to discuss Spending powers)

- Look for **Commonwealth money** directed to **States** or specific **projects**, especially with **conditions attached**.
- Red flags for **s 96**: Cth funding tied to **state compliance** with policies in areas outside Cth heads of power (education/health/infrastructure) > see **First & Second Uniform Tax Cases; Moran**.
- If the question asks whether the Cth can **attach conditions** to grants or bind States to **spending requirements**, you must run a **s 96** analysis.
- There are **two parts** to this topic:
  - **Part 1: s 96 Grants power**, and
  - **Part 2: Appropriation & expenditure under ss 61, 81, 83**.

### Part 1 - Grants Power (s 96)

#### 1) Text of s 96, Constitution

- *"During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."*

#### 2) Introduction to s 96 (vertical fiscal imbalance; why this matters)

- **VFI**: Cth raises most **revenue**; States deliver most **services** (health, education, etc.) > States are **structurally reliant** on Cth funding.
- **s 96** was meant to be **temporary (first 10 years)** to stabilise smaller States; in practice it has become **permanent leverage** for Cth to **shape State policy** by attaching **terms & conditions**.
- Wording is **open-textured** ("as it thinks fit" / "to any State") > HCA has read this **very broadly**: conditions may be **wide**, and distributions may be **unequal** between States.
- **Practical effect**: Cth uses **s 96** to secure **policy outcomes** in areas **outside** its own **s 51** heads of power by making **conditional grants** States cannot realistically refuse.

#### 3) Three Types of Grants

- **General revenue (GST) grants**: **Unconditional**; States free to spend; but **volatile** with economic cycles (GFC/COVID dips). (*Not a focus here.*)
- **Special assistance grants**: **Unconditional** relief (e.g., disasters/financial distress). (*Not a focus here.*)
- **Specific purpose ("tied") grants**: **Conditional** funding for programs (health/education/disability). **Core for exams** because they let Cth **steer policy** beyond **s 51** powers.

#### 4) Scope of s 96 (breadth; the "flagpole" example)

- HCA has **consistently upheld** a **near-plenary** conception of grant **conditions**.
- **Illustration (2004 education package)**: conditions required every funded school to:
  - have a **functioning flagpole** and **fly the Australian flag**,
  - **promote** the flagpole to the community, **acknowledge** Cth funding, and hold **regular flag-raising/anthem** ceremonies,
  - **non-compliance by one school** could jeopardise **the State's entire** education grant.
- **Point**: Even seemingly **trivial or symbolic** conditions fall within **s 96**; States' dependency makes refusal **politically/economically impossible** (even if styled as "incentives").
- **Limits?** Very few but see **below** for nuances.

#### 5) Early Cases on s 96 (breadth entrenched)

##### Federal Roads Act Case (1926) - *Victoria v Commonwealth*

- **Facts**: Cth offered funds for "**federal aid**" roads, including roads wholly within a State. States argued Cth was circumventing **s 51/s 52** by dictating intra-State matters.
- **Legal Application**: HCA upheld conditional grants under **s 96**; conditions could validly direct that States build particular roads. Also acceptable for States to contribute their own funds to meet conditions.
- **Takeaway**: **s 96** can influence intra-State matters via conditional funding.

##### Moran's Case (1939) - *Victoria v Commonwealth (Dairy Industry)*

- **Facts**: Cth imposed a levy on flour millers; revenue returned to States on condition it be paid to wheat growers. Challenge: Cth cannot use **s 96** to channel money to private persons.
- **Legal Application**: Upheld. Even if funds are passed through States to individuals/corporations, it remains "financial assistance to a State". Conditions may differentiate between States.
- **Takeaway**: **s 96** supports very broad conditionality, including State-as-conduit models.

## DOGS Case (1981) - AG (Vic) ex rel Black v Commonwealth

- **Facts:** Challenge to funding for non-government (religious) schools, raising s 116 concerns.
- **Legal Application:** Funding arrangements upheld; Court took a narrow view of s 116 and accepted Cth funding flows.
- **Takeaway:** Re-affirms that s 96 can support payments that benefit private/religious schools via State or Cth schemes (but see possible s 116 limits below).

## 6) The Uniform Tax Cases (central to s 96's power)

### First Uniform Tax Case (1942)

- **Facts:** Wartime scheme of four Acts centralised income tax at Cth level; States practically excluded from levying income tax; Cth redistributed revenues via s 96 grants.
- **Legal Application:** Upheld. Latham CJ: s 96 may induce States to act or refrain from acting (income tax), though it cannot legally compel them. Discrimination between States via grant conditions is permissible notwithstanding s 51(ii) and s 99.
- **Takeaway:** s 96 may be used to weaken or even destroy State activity; "inducement without legal coercion" is valid.

### Second Uniform Tax Case (1957)

- **Facts:** Post-WWII continuation of uniform tax scheme; question whether wartime context had mattered.
- **Legal Application:** Upheld again in peacetime. Dixon CJ confirmed Cth can dictate the object of State spending via conditions even outside Cth heads of power; ministerial discretion may control payments; States may be required to co-fund.
- **Takeaway:** The peacetime breadth of s 96 is entrenched. BUT note the limitation below.

## 7) Limits and Grey Areas Under s 96

### (A) Capability limit (from Second UTC)

- Conditions cannot require a State to **breach the Constitution**. States must be **constitutionally capable** of complying (e.g., cannot force a State to violate **implied freedom, separation of judicial power**, etc.).

### (B) Using s 96 to "circumvent" Cth limits (grey area often examined)

- **Uniform Tax Cases & Moran:** Effectively allow s 96 to **bypass** Cth **non-discrimination** limits (ss 51(ii), 99) by achieving similar outcomes **via grants**.
  - **Effect:** Cth cannot **directly** discriminate in taxation but can **indirectly** create differential outcomes with **differential grants**.
- **Pye v Renshaw (1951)**
  - **Facts:** Grants to induce State acquisition of property on terms that would be unconstitutional for the Cth if done directly (s 51(xxxi) just terms).
  - **Legal Application:** Upheld. s 51(xxxi) constrains Cth, not States; s 96 may induce a State to act even where Cth could not do so directly, provided the arrangement doesn't require an explicit constitutional breach.
  - **Takeaway:** s 96 can be used to achieve indirectly what Cth cannot do directly.
- **Potential religious limit - s 116**
  - **Idea:** s 96 cannot be used to **fund only Christian schools** (i.e., an overt **establishment** preference).
  - **DOGS** upheld broad funding to religious schools, but this **illustrates** that s 116 may still operate as a **hard limit** if a grant **overtly establishes** a religion or **discriminates** on religious grounds.
- **ICM Agriculture (2009) - obiter**
  - **Facts:** Grants and water rights arrangements.
  - **Legal Application:** Some **obiter** suggests **Moran's** tolerance for discrimination via s 96 could be **revisited**; hints that s 51(ii) non-discrimination principles might **override** s 96 in some contexts.
  - **Takeaway:** **Future uncertainty** - HCA may **tighten** s 96's capacity to **sidestep** Cth limits.

### Bottom Line on Limits (Now vs Future)

- **Current:** s 96 can **circumvent some** Cth restrictions (e.g., practical discrimination), but **not all** (e.g., s 116 as a hard limit).
- **Future:** ICM Agriculture hints at **possible retrenchment** (reconsidering **Moran**-style discrimination).

### How to Answer s 96 in an Exam (Structure + Points)

- **When relevant:** There is a Cth Act/scheme offering money to States with conditions.
- **Method:**
  1. State s 96 framework and VFI rationale.
  2. Assess **breadth** of conditions (Federal Roads; Moran; UTCs; DOGS).
  3. Address **limits**: State **capability**; potential s 116; the **circumvention** grey area (Moran/Pye vs possible retrenchment in ICM Agriculture).
  4. Apply only the **relevant** points to the fact pattern.

### Scope points you can raise (as relevant):

- **Very broad s 96 power:** Moran; First & Second UTC.
- **Inducement, not compulsion** (but may be irresistible in practice): Latham CJ (First UTC).
- s 96 may **weaken/destroy** State activity: Latham CJ (First UTC).
- s 96 may **distinguish between States** (avoids s 99): Moran; Latham CJ (First UTC).
- Courts read each Act in a **scheme separately**: UTCs.

### Cth can make s 96 grants even if:

- State is **bound to apply** money to a defined object: Second UTC.
- The **object is outside** Cth heads of power: Second UTC.
- **Payments** are left to **ministerial discretion**: Second UTC.
- Cth money is a **contribution** where State must **co-fund**: Second UTC.

- The State acts as a **conduit** to **private persons**: **Moran**.

#### Limits of grants power:

- State must be **constitutionally capable** of compliance: **Second UTC**.
- **Inconsistency with Constitution?** Discuss the **tension**: **Moran, Pye** (indirect circumvention) vs **DOGS, ICM Agriculture** (possible hard limits/retreat).

#### Class practice question (s 96)

- **No direct education head of power**: irrelevant for s 96; Cth can attach **education policy** conditions via grants.
- **Political resistance** is irrelevant: HCA does **not** weigh political/economic/social fallout in validity.
- **Intent to disrupt State policy**: still **valid** - s 96 may **undermine/replace** State policy (**First UTC**).
- **State co-funding required**: **permissible** (**Federal Roads**; **Second UTC**).
- **State capability constraint**: conditions cannot force States to **breach** constitutional limits (e.g., a condition requiring a **ban** on political protest would be invalid).

## Part 2 - Appropriation & Expenditure (ss 61, 81, 83)

#### Exam Cues

- **Budget allocations, program spending, or executive contracts** (infrastructure, education, welfare).
- Issues about whether Cth can **legally spend** in a given area → consider **appropriation vs spending**.
- If dispute is about **fit within an appropriation** category (e.g., “departmental expenditure” / “urgent & unforeseen”), think **Combet, Wilkie**.
- If about **judicial review** of appropriations or **emergency spending**, think **AAP, Pape**.
- Always finish with **Williams (No 1 & No 2)**: appropriation ≠ spending; and spending **needs a head of power**.

#### Overview (What ss 61, 81, 83 Actually Do)

- **s 81**: all Cth revenue forms the **CRF**; money must be **appropriated for the purposes of the Commonwealth**.
- **s 83**: no money drawn **except under appropriation made by law** → **parliamentary control** of the purse.
- **s 61**: **executive power** (incl. limited **nationhood** capacity).
- **Core idea: Appropriation** = *earmarking authority*; it does **not** itself authorise **spending/contracting**. Spending requires separate legal authority.

#### Interpreting s 81 - Who Polices Appropriations?

##### Pharmaceutical Benefits Case (1945)

- **Facts**: Challenge questioning whether an appropriation was for the “**purposes of the Commonwealth**.”
- **Legal Application**: Court **split** on what that phrase means (broad vs narrow vs “national functions”). Law **struck down**, but **no clear rule** crystallised.
- **Takeaway**: Unresolved meaning; set the stage for later **judicial restraint** around appropriation review.

##### AAP Case (1975)

- **Facts**: Social welfare programme (“Australian Assistance Plan”) funded by appropriation; challenge asked whether courts could police appropriations.
- **Legal Application**: Court divided; standing issues meant no final rule. Competing views: (i) very broad appropriation power, or (ii) non-justiciable (political) questions.
- **Practical effect**: Courts generally do not interfere with appropriations.

##### Pape v Commissioner of Taxation (2009)

- **Facts**: GFC “tax bonus” payments; challenge argued appropriation alone cannot justify the spend.
- **Legal Application**: Majority treated appropriations as likely non-justiciable but crucially held that appropriation ≠ spending. Upheld the payments under nationhood power (s 61) + s 51(xxxix) in an emergency national context.
- **Big takeaway**: To spend, Cth needs separate legal authority (a statute/head of power or valid nationhood basis), not just an appropriation.

##### Combet v Commonwealth (2005)

- **Facts**: Cth used money appropriated for “departmental expenditure” to run WorkChoices advertising; challenge argued propaganda is not covered.
- **Legal Application**: Upheld - the appropriation category was broad enough; courts defer to Parliament’s chosen level of specificity.
- **Takeaway**: Courts are highly deferential about whether spending fits within broad appropriation descriptions.

##### Wilkie v Commonwealth (2017)

- **Facts**: Funding of same-sex marriage postal survey under “urgent & unforeseen” provisions; critics said it wasn’t truly urgent.
- **Legal Application**: Upheld - Court again declined to second-guess categorisation.
- **Takeaway**: Appropriation categorisation is treated as a political question; judicial restraint applies.

#### Final conclusions from these cases

- Courts **rarely police** appropriations.
- **Appropriation ≠ spending** (**Pape**).
- Appropriation categories can be **broad**, and courts won’t re-label them (**Combet; Wilkie**).
- Real **legal control** happens at the **spending** stage.

#### Spending - the Williams Shift (Appropriation is Not Enough)

##### Williams No 1 (2012)

- **Background/ Facts**: Cth funded the National School Chaplaincy Program (NSCP) by executive contracts; there was an



appropriation, but no specific statute authorising the spend.

- **Legal Application:** Invalid. The executive cannot spend/contract just because money is appropriated. There must be separate legislative authority (and ultimately a head of power unless nationhood applies).
- **Key takeaway:** Appropriation is necessary, but insufficient to authorise spending.

#### Williams No 2 (2014)

- **Facts:** Parliament passed the **FFLA Act** to broadly authorise executive programs by regulation; chaplaincy was re-made under those regulations.
- **Legal Application:** Invalid. Even a statute that authorises spending is not enough unless the law is supported by a constitutional head of power.
- What Cth could have done: Fund via **s 96** grants to the States (conditional grants), avoiding the need to find a **s 51** head for direct Cth spending.
- Key takeaway: Spending requires (i) an appropriation, and (ii) statutory authority, and (iii) a supporting head of power (or a valid nationhood basis in narrow emergencies).

#### Big picture (post-Williams)

- Pre-Williams practice of **wide executive spending** is over.
- To **spend directly**, Cth needs:
  - a **separate Act** authorising the spend, and
  - a **head of power** (e.g., corporations, external affairs), or **nationhood** (rare; **Pape**-style emergency).
- Alternatively, Cth can route policy via **s 96** grants to States (conditions “as it thinks fit”), which **doesn’t** require a **s 51** head for the **subject-matter**.

#### Advising on Appropriation & Expenditure (Exam Summary)

- **Start:** Briefly note **appropriation must exist**, but courts are **deferential** about its **scope** (**Combet; Wilkie**).
- **Pivot to spending control:** the legal constraint is whether there is **valid legislative authority + head of power** (**Williams 1 & 2**).
- If **emergency/national concern** only Cth can address → consider **nationhood** (**Pape**) but apply **strict necessity** (is this **only** something the Cth can effectively do?).
- If **struggling to ground a head of power for direct spend** → consider **s 96** grants path.

#### Class Practice Questions

##### Q1 - Can the Minister spend on a social-media campaign promoting mask use?

- **Appropriation fit:** Courts are deferential - **Combet** (broad “departmental expenditure” can include comms/ads), **Wilkie** (“urgent & unforeseen” is not second-guessed). In a **pandemic**, “exigent” categorisation is **plausible**.
- **But: Appropriation ≠ spending** - you still need **legislative authority** for the campaign spend. If an existing Act authorises public-health communications by the relevant department, that may suffice; otherwise, enact a statute or **route via s 96** (e.g., grants to States for health campaigns).

##### Q2 - Post-Williams authority to contract with “Masks R Us”?

- **Williams 1 & 2 apply:** Need (i) **appropriation**, (ii) **statutory authority to contract/spend**, and (iii) a **head of power** (or **nationhood**).
- **Nationhood (Pape) test:** Does the function **require** a **uniquely national** response that **only the Cth** can effectively perform (as with ATO-administered tax bonuses)?
  - **Distinguish:** States can plausibly **procure masks** and **run public health campaigns** themselves; unlike **Pape**, this likely **isn’t** an activity **only** the Cth can do.
- **Workable paths:**
  - Ground spending in a **specific head of power** (e.g., perhaps **quarantine/biosecurity framework** if linked to federal responsibilities), **or**
  - Use **s 96** conditional grants to States to run procurement/distribution and campaigns.