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COMMONWEALTH POWERS: DOES THE LAW FALL WITHIN A VALID HEAD OF POWER (HOP)?

It is probable that the validity of the (Law) will be in issue. The question requires determining whether the (Law) has been validly enacted within constitutional limits and whether any inconsistency or implied restriction affects its operation. The party challenging validity will argue that the (Law) exceeds constitutional power or infringes a constitutional limitation, while the opposing party will contend that it falls within lawful authority. To ensure certainty of validity, the (Law) must be tested against the relevant constitutional principles and authorities in sequence.

TOPIC 5: EXTERNAL AFFAIRS POWER - s 51(xxix)

FACTOR	SCRIPT	PERSONAL NOTES
Extraterritorial Operation	Issue Whether the (Proposed Law), which regulates conduct occurring outside Australia, can be supported by s 51(xxix) as a law concerning matters external to Australia. Framework A law may be supported under s 51(xxix) where its subject matter is geographically external to Australia. The key inquiry is whether the law regulates things, places, or persons physically outside the Australian territory. There is debate as to whether a connection with Australia is necessary. Application The Commonwealth would argue that validity depends solely on geographical externality, as established in <i>Polyukhovich v Commonwealth</i>, where the <i>War Crimes Act</i> was upheld despite targeting war crimes committed in Europe. This view treats the power as plenary, requiring no nexus with domestic affairs. Further support arises from <i>XYZ v Commonwealth</i>, where legislation criminalising sexual conduct by Australians overseas was upheld; the Court reaffirmed that s 51(xxix) may apply even if the conduct regulated is lawful abroad. Conversely, the challenger might argue that a real and substantial connection to Australia is required, adopting the minority view of Brennan and Toohey JJ in <i>Polyukhovich</i>. If the (Proposed Law) regulates foreign conduct with no discernible link to Australian interests or citizenship, its validity could be contested as exceeding the intended external scope.	Core test → Is subject matter geographically external? <i>Polyukhovich</i>, XYZ → broad view (no nexus) Minority → “real and substantial connection” possible counter Mention nationality/effect as potential link

	Ultimately, the law's connection to Australia - e.g., through nationality, effect, or purpose - will shape the Court's conclusion. Conclusion If the law is characterised as regulating matters external to Australia, it falls within s 51(xxix). However, where the connection to Australia is too remote, validity may be doubtful.	
Relations with Foreign Nations or International Organisations	Issue Whether the (Proposed Law) regulates Australia's relations with other nations or international organisations. Framework A law will fall within s 51(xxix) where its substance or purpose concerns Australia's external relations - including diplomatic, political, or cooperative dealings with foreign states or organisations. The test focuses on subject matter, not motive or friendliness of relations. Application The Commonwealth would contend that the (Proposed Law) operates in the external sphere by managing Australia's obligations, communication, or cooperation with (foreign nation/international body). Such laws are valid even if not designed to foster "friendly" relations. This interpretation is consistent with <i>R v Sharkey</i>, where laws protecting relations with foreign states were valid, and <i>Koowarta v Bjelke-Petersen</i>, which recognised relations with international organisations as part of "external affairs." <i>XYZ v Commonwealth</i> further confirmed that laws affecting diplomatic obligations indirectly may still fall within the power. The challenger might respond that the (Proposed Law) primarily concerns domestic regulation and only incidentally affects foreign relations. If the law's purpose and operation are internal - for example, regulating private actors domestically - it may be characterised as falling outside s 51(xxix). The characterisation depends on whether the law's practical operation concerns Australia's relations or merely domestic consequences. Conclusion If the law is properly characterised as addressing or affecting Australia's relations with external entities, it will likely be supported by s 51(xxix). If the connection to such relations is incidental, it may not be.	Framework → does the law concern Australia's external relations? <i>Sharkey</i> → foreign states <i>Koowarta</i> → international bodies <i>XYZ</i> → indirect effect sufficient Distinguish internal vs external focus

Implementation of International Treaty or Instrument	Issue Whether the (Proposed Law) validly implements obligations arising under a binding international treaty or instrument. Framework Where Australia has entered a bona fide binding obligation, the Commonwealth may legislate to implement or give effect to that obligation under s 51(xxix). The key inquiries are: 1. Is there a genuine, binding obligation? (Treaty, convention, protocol, or clearly binding instrument - not merely a “recommendation” or “declaration”). 2. Does the law implement that obligation? (Directly or incidentally). 3. Is the law reasonably capable of being considered appropriate and adapted to fulfilling the obligation? ⚠ <i>If the instrument is not clearly binding, write: “Even assuming the instrument reflects or gives content to a binding obligation, validity depends on the (proposed law’s) conformity with that obligation.”</i> Application <u>For validity:</u> The Commonwealth would argue that the (<i>Treaty/Instrument</i>) imposes an obligation on Australia to (<i>describe obligation</i>), and that the (<i>Proposed Law</i>) implements that obligation domestically. In <i>Koowarta</i> and <i>Tasmanian Dams</i>, the Court held that once a binding obligation exists, the subject matter is immaterial - Parliament may legislate in any field covered by that obligation. Where the law goes beyond direct implementation, <i>Richardson v Commonwealth</i> supports validity for measures that are <i>incidental</i> or protective of compliance. In <i>Richardson</i>, the treaty required protection of listed World Heritage sites. The Commonwealth also protected areas being considered for listing - this was valid because it was incidental to fulfilling the main obligation. The <i>ILO Case</i> further recognises that non-binding recommendations <i>connected</i> to a binding convention can support validity if sufficiently related. In <i>ILO</i>, the Court upheld legislation implementing an ILO recommendation on employment, even though	Framework = Treaty existence → Obligation → Implementation → Proportionality <i>Koowarta, Tas Dams, Richardson, ILO</i> apply sequentially Focus = “appropriate and adapted” connection
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	it was not legally binding, reasoning that its close relationship to an existing binding convention made it a valid exercise of the external affairs power. <u>Against validity:</u> CONSIDER LIMITATIONS Conclusion The law will be valid if it gives effect, directly or incidentally, to binding and specific international obligations and remains proportionate to their fulfilment. If the obligation is non-binding, vague, or the law's measures are excessive, validity weakens.	
Limitations on Treaty Implementation	Bona Fide International Purpose Issue: Whether the (Treaty) was entered for genuine international purposes or merely to expand Commonwealth power. Framework: A treaty must be bona fide, not a device for legislative expansion. Courts rarely question motive but may invalidate a sham. Application: The Commonwealth would rely on Koowarta and Tasmanian Dams, where the High Court described this as a "frail shield." Unless clear evidence shows a contrived treaty, this ground will fail. Conclusion: The bona fide requirement is easily met unless the treaty is plainly artificial. Binding Character Issue: Whether the (Treaty) imposes a binding obligation sufficient to ground legislative implementation. Framework: The power extends to implementing binding or incidental obligations. Courts examine whether the treaty's terms are mandatory or aspirational. Application: If the treaty uses language such as "shall" or "undertakes to", it likely imposes binding duties (Tas Dams). If it merely "encourages" or "promotes" conduct, as in the ILO Case, it may be too weak. Conclusion: Validity depends on the treaty's binding character and the strength of its obligations. Specificity of Obligation	

	Issue: Whether the treaty provides a discernible standard or method of compliance. Framework: Obligations must be sufficiently specific to guide legislative action; vague or open-ended commitments may not sustain precise domestic measures. Application: Concrete requirements (e.g. “prohibit deforestation”) satisfy this standard. Broad aspirations (e.g. “promote full employment”) resemble the ILO Case, where indeterminate language defeated validity. Conclusion: Specificity supports validity; vague or aspirational provisions weaken it. Conformity (Appropriate and Adapted Test) Issue: Whether the (Proposed Law) is reasonably capable of being considered appropriate and adapted to achieving the treaty’s purpose. Framework: The law must bear a reasonable correspondence between its means and the treaty’s ends (Richardson, Tas Dams). Application: The Commonwealth would argue the law directly furthers the treaty’s aims or protects compliance. The challenger could claim overreach or inconsistency - for instance, imposing harsher or unrelated measures. Conclusion: A reasonable alignment between treaty purpose and legislative means is essential; excess or mismatch risks invalidity. Matters of International Concern (Obiter) Issue: Whether the (Proposed Law) may be supported under s 51(xxix) because it addresses a recognised matter of international concern, even without a treaty. Framework: Some judges have suggested that laws dealing with issues of global significance - such as human rights, environmental protection, or public health - may fall within the external affairs power without formal treaty obligations. Application: The Commonwealth may argue that the (Proposed Law) concerns such a universally recognised issue, drawing on dicta in Koowarta and the minority in Tasmanian Dams. The challenger would counter that this lacks majority authority and risks transforming s 51(xxix) into a general power. Conclusion: The “international concern” principle is persuasive but not authoritative. It may reinforce, not replace, treaty-based reasoning. → Never rely on it alone - it won’t win the case. → Use it as a supplement to show the law deals with an issue of “genuine international concern.”	
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	Final Conclusion The validity of the (<i>Proposed Law</i>) under s 51(xxix) depends on its characterisation within one or more recognised categories. Each category requires assessing connection, purpose, and conformity between the law and its external object, guided - but not controlled - by precedent.	
TOPIC 5: NATIONHOOD POWER (s 61)		
	Issue: Whether the Proposed Law is supported by the Nationhood Power (s 61) of the Commonwealth, which grants legislative authority to the Commonwealth over matters uniquely necessary for the effective governance of Australia as a nation. While it is not explicitly outlined in the Constitution, the High Court has implied this power to address situations that require national solutions, such as crises or issues that the states cannot manage alone. Application: The Proposed Law can be supported under the Nationhood Power if it pertains to a matter that is uniquely national, such as responding to national crises (e.g., pandemics, economic emergencies, or national security). The Commonwealth can legislate where states cannot act alone or where national unity and central control are required. Limits: The Nationhood Power is narrow and exceptional. It cannot be used to regulate routine matters that are within the scope of state powers. It is limited to matters that the Commonwealth alone can manage effectively, such as national responses that cannot be handled by the states due to their fragmentation or lack of resources. Conclusion: If the Proposed Law involves a national necessity or emergency that requires centralised action, it may be supported under the Nationhood Power (s 61). This power is best used for issues requiring a coordinated national response, but it should only be invoked in exceptional cases where no other head of power applies.	

TOPIC 6: SPENDING POWERS

SECTION 96 - GRANTS POWER

Text and Purpose	Section 96 empowers the Commonwealth Parliament to “grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.” It enables the Commonwealth to influence State policy through conditional funding, despite lacking a direct legislative head of power in that subject area (for example, health, education, or transport, which are not enumerated in s 51). Owing to Australia’s vertical fiscal imbalance, States rely heavily on such Commonwealth assistance.	
Types of Grants	1. General revenue grants - unconditional, supplementing State budgets. 2. Special assistance grants - to redress financial inequality or hardship between States. 3. Specific-purpose (tied) grants - conditional funds directed to a defined objective (e.g. roads, hospitals, schools). Disputes typically arise in relation to tied grants.	
Scope of Section 96	Framework A law is valid if it confers financial assistance on a State and the attached conditions do not legally compel the State’s acceptance. Practical or political pressure does not amount to coercion. Each Act in a scheme is analysed separately. Application The Commonwealth would submit that the (Proposed Law) validly grants funds to (State) for (purpose). In <i>Victoria v Commonwealth (Federal Roads)</i>, conditional grants for intra-State roads were upheld even though road construction was not within any Commonwealth head of power such as s 51(i) inter-State trade or s 51(xxxix) incidental. Likewise, in <i>First Uniform Tax Case</i>, inducement of States to refrain from imposing income tax was valid because the States remained legally free to refuse. Second <i>Uniform Tax Case</i> reaffirmed this in peacetime, confirming that the Commonwealth may attach extensive conditions, even in areas outside its legislative competence. The challenger could argue that the grant conditions effectively coerce the States by exerting irresistible financial pressure. However, as Latham CJ emphasised in the <i>First Uniform Tax Case</i>, “temptation is not compulsion.” Mere fiscal or political pressure does not amount to legal coercion. Coercion arises only where the law legally obliges acceptance or imposes penalties for refusal. Coercion exists only if the law <i>forces</i> acceptance, not merely <i>tempts</i> acceptance. (LIKELY VIA PENALTY)	

	Where States must contribute matching funds, Federal Roads confirms validity. If funds are channelled through States to private beneficiaries (e.g. farmers or schools), Moran v Commonwealth upholds such arrangements: States may act as conduits while the grant retains its s 96 character. Nor does discrimination between States invalidate a grant; Moran and the Uniform Tax Cases hold that s 96 operates independently of the non-discrimination limits in ss 51(ii) (taxation) and 99 (trade preferences).	
Conclusion	Provided the grant is genuinely financial assistance and leaves States legally free to decline, the measure lies within s 96's broad scope.	Test → financial assistance + no legal coercion. Cases → Federal Roads, Moran, First & Second UTCs. Discrimination OK; State-as-conduit OK; cost-sharing OK. "Temptation ≠ compulsion" (Latham CJ).
Constitutional Limitations on Section 96	(i) State Capability Limit In issue is whether the (Proposed Grant) requires the State to perform acts it is constitutionally incapable of doing. In Second Uniform Tax Case, Dixon CJ held that s 96 cannot compel a State to act beyond its constitutional powers. Here, if the (Proposed Grant) obliges the State to legislate contrary to an implied freedom or to exercise judicial power inconsistent with Ch III, the condition would be invalid. If, however, the grant merely offers funds to pursue a policy within State competence - leaving genuine choice to refuse - the condition would remain valid. Thus, the key question is whether compliance with the (Proposed Grant) would itself breach any constitutional limitation. (ii) Circumvention of Commonwealth Limitations The next issue is whether the (Proposed Grant) seeks to achieve indirectly what the Commonwealth is barred from doing directly. In ICM Agriculture, the Court held that s 96 cannot be used to evade limits such as s 51(xxi) (just-terms acquisition), s 90 (excise), or s 116 (religion).	A State must be constitutionally capable of compliance (Second Uniform Tax Case (Dixon CJ)). Invalid if the condition compels a breach of Ch III or implied freedoms. The key question: can the State lawfully do what the condition requires?

	If the (Proposed Grant) pressures the State to, for example, acquire property without just terms, it would be invalid as a disguised circumvention. By contrast, Pye v Renshaw tolerated a grant encouraging a State acquisition lacking just terms because the prohibition bound the Commonwealth, not the State, and compliance remained voluntary. So, if the Commonwealth gives a grant encouraging a State to acquire land without just terms, that's not unconstitutional, because the Commonwealth isn't the one doing the acquisition - the State is. Accordingly, the distinction lies between voluntary encouragement (permissible) and effective compulsion (invalid). Conclusion The grant is valid if the State can constitutionally comply and no Commonwealth prohibition is circumvented in substance. Compulsion to contravene constitutional limits would invalidate the condition.	
Overall Assessment under s 96	The (Proposed Grant) will be valid if the State can lawfully comply and no Commonwealth prohibition is evaded in substance (Second UTC; ICM Agriculture). It will be invalid if it compels the State to contravene constitutional limits or operates as an indirect means of doing what the Commonwealth itself could not (Pye v Renshaw).	
APPROPRIATION AND SPENDING - SS 61, 81, & 83		
Appropriation	Framework Sections 81 and 83 establish the Consolidated Revenue Fund and require that no money be drawn except under appropriation made by law. Appropriation authorises allocation of funds, not their expenditure. Judicial review of appropriation purposes is minimal. Application The Commonwealth would argue that funds for the (Proposed Program) were validly appropriated "for the purposes of the Commonwealth." In Combet v Commonwealth, the High Court held that a broad category such as "departmental expenditure" could cover advertising campaigns, and in Wilkie v Commonwealth ministerial determinations for "urgent and unforeseen" spending were accepted. AAP Case and Pape v Commissioner of Taxation confirm that appropriations are generally non-justiciable.	Appropriation ≠ spending (Pape; Williams). Courts defer (Combet; Wilkie; AAP). Purpose question is political, not legal.

	A challenger may allege that the purpose lies outside Commonwealth functions. Yet the Court in Pharmaceutical Benefits Case and later decisions has refrained from defining “purposes of the Commonwealth” narrowly. Whether an appropriation aligns with national purposes is a matter for Parliament, not the judiciary. Conclusion It is unlikely that any appropriation would be invalidated. Still, appropriation alone provides no authority to spend.	
Spending and Executive Expenditure	Framework Post-Pape and Williams (No 1 & No 2), Commonwealth expenditure requires: 1. a valid appropriation. Appropriation = “you may use up to \$X.” 2. legislative authorisation for the spending; and 3. a supporting constitutional head of power - e.g. s 51(ii) (taxation), s 51(xx) (corporations), s 51(xxix) (external affairs), s 51(v) (post, telegraph and telephony), s 51(i) (trade and commerce), or s 51(xxiiiA) (social services) - or, in rare cases, reliance on the nationhood power under s 61 and s 51(xxxix). The Executive cannot spend or contract merely because money has been appropriated. Application If the (Proposed Law) authorises expenditure without separate legislative backing, the spending would likely fail. In Williams (No 1), payments under the School Chaplaincy Program were invalid absent a statute. Williams (No 2) confirmed that even a statute conferring general spending power is insufficient unless supported by an enumerated head of power. Where Parliament enacts specific legislation authorising expenditure, the validity depends on its connection to a head of power such as: • s 51(xx) (trading or financial corporations) - if funding activities of corporations; • s 51(xxix) (external affairs) - if implementing an international obligation; • s 51(i) (inter-State trade and commerce) - if funding national transport or logistics; • s 51(v) (postal/telecommunications) - if funding digital or communications infrastructure; or • s 51(xxiiiA) (social services) - if welfare-related. Absent such connection, validity is doubtful.	Three-step test → Appropriation + Statute + Head of Power. Enumerated examples → s 51(ii), (i), (v), (xx), (xxix), (xxiiiA). Cases → Williams 1 & 2 (no autonomous spending). Nationhood limited to national crisis (Pape; Wilkie).

	If no statutory head supports the expenditure, the Commonwealth may rely on the implied nationhood power, permitting activities “peculiarly adapted to the government of a nation” (<i>Mason J in AAP</i>). In <i>Pape</i>, this justified emergency “tax-bonus” payments during the GFC; in <i>Wilkie</i>, it supported the marriage-survey funding as a measure of national administration. The power, however, is confined to urgent national circumstances that only the Commonwealth can effectively address, not routine programmes that States could implement. Conclusion Commonwealth spending is valid only where it satisfies: (i) a lawful appropriation; (ii) legislative authorisation; and (iii) support by a specific head of power or, exceptionally, the nationhood power. Otherwise, the expenditure is unconstitutional.	
Appropriation Acts and Ministerial Determinations	Where additional funds are required outside existing appropriations, a Minister may issue a determination for “urgent and unforeseen” expenditure. In <i>Wilkie</i>, such a determination was upheld if the Minister was satisfied that spending “ought to occur” and was unforeseen at the time of budgeting. The terms “urgent” and “unforeseen” are construed broadly; judicial review is confined to procedural compliance.	“Urgent” = ought to occur. “Unforeseen” = not anticipated (<i>Wilkie</i>). Ministerial satisfaction almost conclusive.
INTERRELATION OF GRANTS AND SPENDING POWERS		
Overview	The Commonwealth may pursue its objectives either through direct expenditure (requiring statutory and constitutional support) or indirect funding via s 96 grants. Following <i>Williams (No 2)</i>, channelling money to States under s 96 is often the safer course, since s 96 does not require identification of a substantive head of power like s 51(xx) or s 51(xxix) for the underlying subject-matter.	
Final Conclusion	When assessing Commonwealth funding validity: 1. Identify whether the arrangement is a grant to States (s 96) or direct Commonwealth spending (ss 61, 81, 83). 2. For grants, determine whether it constitutes financial assistance without legal coercion and whether the State can constitutionally comply. 3. For direct spending, ensure (i) appropriation; (ii) legislative authorisation; and (iii) support under an enumerated head of power (s 51(ii), (i), (v), (xx), (xxix), (xxiiiA) etc.) or, exceptionally, the nationhood power (s 61 + s 51(xxix)). Consider limits on circumvention (<i>ICM Agriculture</i>) and State capability (<i>Second UTC</i>).	s 96 Grants → very broad; inducement OK, coercion not (<i>Federal Roads; Moran; UTCs</i>). Limits → State capability + no circumvention (<i>ICM Agriculture</i>). Appropriation (ss 81, 83) → political question (<i>Combet; Wilkie</i>).

		Spending (s 61) → needs statute + head of power (Williams 1 & 2). Enumerated heads for direct spend s 51(ii), (i), (v), (xx), (xxix), (xxiiiA). Nationhood Power → limited to emergencies (Pape; Wilkie). Best Exam Flow → Identify appropriation → spending authority → head of power → fallback to s 96 grant.
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