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**2:20 PM: 20 MINS PLANNING**

**2:40 PM: START WRITING**

**2 MINS PER MARK**

**50 WORDS PER MARK**

1. Identify the head(s) of power that could be invoked to support the Commonwealth law
2. How has the power(s) been interpreted by the High Court?
3. Is it a subject matter or purposive power
  - a. If the law relates to an activity covered by a purpose power, the ‘proportionality test’ applies (is the law ‘appropriate and adapted’ to the HOP?).
  - b. If the law relates to an activity covered by a subject matter power, the ‘sufficient connection’ test applies (‘is the law in its real substance’).
4. Consider any constitutional limitations on the Commonwealth’s exercise of power. There are both express limitations (e.g. **s 51(xxxi)**, **s 92**) and implied limitations (e.g. implied freedom of communication, *Melbourne Corporation* doctrine)
5. Address inconsistency

## — HEADS OF POWER —

### EXTERNAL AFFAIRS

**Section 51(xxix)** of the *Constitution* enables the executive power to legislate with respect to extraterritorial affairs (*XYZ; Polyukhovich*).

#### **GEOGRAPHIC EXTERNALITY LIMB (matters physically external to Australia):**

Under the external affairs power, the Commonwealth may legislate with respect to place, persons, matters, relationships, events and conduct which are territorially outside Australia (*Seas and Submerged Lands case*). It is deemed geographically outside of Australia if it falls beyond 12 nautical miles off the coast (*Law of the Seas*).

**Section 51(xix)** of the *Constitution* when concerning geographic externality is a subject matter power, and the sufficient connection test must be applied to determine the validity of this law (*Seas and Submerged Lands Case (1975)*). \_\_\_\_\_ is constitutionally valid under **s 51(xix)** as the Commonwealth law is sufficiently connected to something geographically external to Australia (*Polyukhovich*). A mere externality is sufficient connection (*XYZ v Cth (2006)*).

#### **IMPLEMENTATION OF TREATIES LIMB**

The external affairs power can be used to implement any treaty obligation assumed by Australia (*Tasmanian Dams*), provided the legislation is not a “sham or circuitous device to attract legislative power” (*Koowarta*). In this case, the \_\_\_\_\_ is not a sham and the Commonwealth’s domestic enactment of \_\_\_\_\_ is not unlawful.

In the implementation of international instruments/treaties, the purposive test is to be applied, whereby the issue is whether ss \_\_\_\_\_ are reasonably appropriate and adapted to implement \_\_\_\_\_ (*Tasmanian Dams*). The treaty, \_\_\_\_\_ concerns a matter indisputably international in nature as it relates to \_\_\_\_\_ (*Burgess*).

\_\_\_\_\_ can be considered to comply with the conformality doctrine, as \_\_\_\_\_ conforms closely to the initial treaty of \_\_\_\_\_ signed (*R v Poole; ILO case*) and is capable of being considered reasonably appropriate and adapted (*Koowarta*) to give effect to Australia’s international obligations of \_\_\_\_\_, thereby impressing it with the character of a law with respect to external affairs (*Tasmanian Dams*).

The act, \_\_\_\_\_ satisfies the specificity test as \_\_\_\_\_ is reasonably specific to the aims of the treaty, (*Burgess*) \_\_\_\_\_ and is reasonably capable of implementing the treaty as it does not just embody the vague aspirations (*Victoria v Cth (1996)*). Provisions cannot go beyond what is required (*Tasmanian Dams*). The treaty needs to be specific enough to define what the states need to do and must prescribe a regime that the treaty has defined, though meticulous adherence to the treaty’s terms is not required (*Victoria v Cth*) Furthermore it must be implemented on good faith and not merely as a means of conferring legislative power upon the parliament (*Koowarta*).