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RESERVED STATE POWERS

The Court in *Engineers* rejected the idea that State powers could limit the interpretation of Commonwealth powers. Instead, it held that the Constitution must be interpreted according to its express terms and that no implied prohibitions or immunities should be read in to protect State interests. While the Constitution leaves some powers residual to the States, these powers only exist insofar as they have not been exclusively vested in the Commonwealth or are not inconsistent with a valid Commonwealth law. Applying that approach, the scope of **[insert relevant head of power]** is to be construed broadly, and the law will be valid so long as it can fairly be characterised as a law with respect to **[insert head of power]**.

CHARACTERISATION

SUFFICIENT CONNECTIONS TEST

Since **[insert Commonwealth law]** purports to be enacted under **[insert head of power, e.g. s 51(xx) corporations]**, the key issue is whether it can be fairly described as a law “with respect to” that subject matter. This requires assessing whether there is a sufficient connection between the law and the constitutional power. The High Court has consistently held that the connection must be more than merely incidental or tenuous – the law must regulate the subject matter in a substantive way. As Latham CJ explained in *Bank of New South Wales v Commonwealth (1948) 76 CLR 1*, it is not enough for a law to simply “touch or concern” the subject matter; it must be directed to its regulation in a real and practical sense.

The sufficiency of the connection is determined by the legal operation of the law – that is, the rights, duties, powers, and obligations it creates – not by its underlying policy motives. In *Grain Pool of WA v Commonwealth (2000) 202 CLR 479*, the Court emphasised that the connection must not be so insubstantial or tenuous that the law cannot reasonably be said to relate to the head of power. Similarly, in *Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29*, Rich J noted that the validity of a law depends on its terms and effect, not its desirability or political purpose. Accordingly, since **[insert law]** regulates **[insert conduct, entity, or subject]** in a manner that materially relates to **[insert head of power]**, and the connection is more than remote, the law is likely to be valid under that power regardless of its broader objectives.

DUAL CHARACTERISATION (RELATES TO MORE THAN ONE HEAD OF POWER)

Since **[insert Commonwealth law]** has features that relate to both **[insert head of power 1]** and **[insert head of power 2 or area of State concern]**, the issue is whether it must be characterised under a single constitutional power or whether it may validly operate under multiple powers. The High Court has moved away from the rigid ‘pith and substance’ or ‘either/or’ approach seen in *R v Barger (1908)* and now recognises that a law may possess multiple valid characters. In *Fairfax v FCT (1965)* and *Actors & Announcers Equity Association v Fontana Films Pty Ltd (1982)*, the Court affirmed that as long as a law can be fairly described as being with respect to a head of power, it does not matter that it also affects or incidentally regulates other matters. As a general rule, each head of power in s 51 is interpreted independently, meaning one power does not limit another unless there is an express restriction. In *Work Choices (2006)*, the majority confirmed that the existence of s 51(xxxv) does not restrict the scope of s 51(xx), and that a law will only be invalid if it breaches a “positive prohibition or restriction” imposed by another head of power, such as s 51(xiii)’s limitation regarding “State banking.” Therefore, since **[insert law]** does not fall within any express restriction in **[insert other head of power]**, it remains valid as it can be fairly characterised as a law with respect to **[insert primary head of power]**.

PURPOSE POWERS TEST

Where a law is enacted under a purposive power – such as the defence power (s 51(vi)) or the external affairs power (s 51(xxix)) – the key issue is whether the law is proportionate to achieving the constitutional purpose for which the power was granted. The High Court has repeatedly held that this requires an objective assessment of whether the law is reasonably appropriate and adapted to securing that purpose. In Stenhouse v Coleman (1944) 69 CLR 457, Dixon J explained that a law under s 51(vi) must be genuinely connected to the defence of the Commonwealth, judged by its scope, effect, and operation, not by its form or political justification. Similarly, in Polyukhovich v Commonwealth (1991) 172 CLR 501, Brennan J held that a law under the defence power must not only be directed to defence but must also be proportionate in its means; a retrospective criminal law aimed at a narrow class failed this test

The inquiry does not turn on legislative motive but on whether the law's content and practical operation align with the stated constitutional objective. Accordingly, since **[insert law]** is directed at **[insert asserted purpose, e.g. national defence or treaty implementation]**, its validity depends on whether it can reasonably be seen as appropriate and adapted to achieving that end. If it is selective, oppressive, or exceeds what is necessary to fulfil the purpose, it may be invalid on proportionality grounds – even if it encroaches on areas usually reserved to the States. Here, it can be shown to be proportionately directed to **[insert purpose]**, and thus, it is most likely to be valid, even if it affects areas ordinarily governed by the States or appears broad in scope.

INCIDENTAL POWERS

Every substantive head of power in s 51 of the Constitution carries with it an implied incidental power to enact laws that are reasonably necessary or appropriate to give effect to that power. This includes provisions that may not directly regulate **[insert core subject matter]** but are designed to support or enforce the broader legislative scheme. In Grannall v Marrickville Margarine Pty Ltd (1955) 93 CLR 55, the High Court confirmed that the phrase “with respect to” includes laws that are ancillary to the main subject matter. Similarly, in Burton v Honan (1952) 86 CLR 169, enforcement mechanisms—such as **[insert enforcement measure, e.g. forfeiture, penalties, or administrative procedures]**—were upheld where they were reasonably adapted to securing compliance with valid Commonwealth laws. Courts focus on the law's legal operation and its connection to the substantive power, rather than on its policy motives or fairness.

Where **[insert Commonwealth law or provision]** relies on the incidental power to support its connection to **[insert primary head of power, e.g. s 51(xxxv) industrial relations or s 51(xxxvi) elections]**, the key issue is whether there is a sufficient connection to that power. In Leask v Commonwealth (1996) 187 CLR 579, the High Court confirmed that proportionality is not a general requirement for laws under non-purposive powers—such laws need only bear a sufficient connection to the subject matter. However, where **[insert provision]** intrudes into areas traditionally regulated by the States, as in Spence v Queensland (2019) 268 CLR 355, a stronger connection may be required to justify its operation. If the provision primarily affects **[insert area outside the Commonwealth head of power]** and lacks a direct link to **[insert Commonwealth objective]**, it risks falling outside the scope of the incidental power. The more attenuated the connection, the greater the constitutional risk of invalidity.

HEAD OF POWER: EXTERNAL AFFAIRS (S 51(XXIX))

Since the Commonwealth has enacted legislation relating to **[insert subject matter]**, the constitutional issue is whether this law is supported by the external affairs power under s 51(xxix) of the Constitution. This provision allows the Commonwealth Parliament to legislate with respect to “external affairs”. The first step is to

determine the character of the law in question. This involves assessing whether the law, in its legal and practical operation, can be characterised as a law with respect to external affairs.

MATTERS EXTERNAL TO AUSTRALIA

The external affairs power clearly extends to matters “geographically external to Australia,” as affirmed by Mason J in *New South Wales v Commonwealth (Seas and Submerged Lands Case) (1975)*, where he held that laws concerning matters located outside the territory of Australia fall within the scope of s 51(xxix).

Here, since the legislation concerns **[insert geographically external conduct/place/actors, e.g., criminal offences committed in Thailand or resource exploitation in a disputed maritime zone]**, it is prima facie within the scope of the external affairs power. This position was upheld by the majority in *Polyukhovich v Commonwealth (1991)*, which found that mere externality, even without a direct Australian connection, is sufficient. In the *Industrial Relations Act Case*, a five-judge joint judgment confirmed the principle from *Polyukhovich*, holding that the external affairs power extends to “places, persons, matters or things physically external to Australia.” This approach supports the validity of legislation concerning **[insert conduct or issues occurring wholly or partly outside Australia]**, provided the law addresses an external subject matter.

Limits on the Externality Argument

A possible challenge is that **[the law]** merely addresses domestic consequences of an external cause. In *Pape v Commissioner of Taxation (2009)*, the argument that the legislation was valid under s 51(xxix) because the global financial crisis originated overseas was rejected by Hayne, Kiefel, and Heydon JJ. They held that a law relating to the domestic economic response to an external event was not a law about external affairs.

Here, the legislation addressed **[insert domestic impact or response to an overseas issue]**, so this may fall outside the external affairs power if it cannot be properly characterised as relating to an external matter itself. A law relating to a consequence is not necessarily a law relating to its cause, and caution must be exercised to avoid extending s 51(xxix) too broadly in a way that undermines the federal balance of powers.

Conclusion

Given that the legislation concerns **[insert issue or conduct]** occurring outside Australia, and consistent with High Court authority including *Seas and Submerged Lands*, *Polyukhovich*, and *XYZ*, the law is likely to be valid under s 51(xxix) as one with respect to a matter external to Australia. Although some dissenting opinions argue for a required Australian connection, the majority view supports a broad interpretation based on geographical externality alone. However, care must be taken where the law only responds to external causes without regulating external matters themselves.

RELATIONS WITH OTHER COUNTRIES

Since the Commonwealth has enacted legislation concerning **[insert subject matter]**, the constitutional issue is whether the law is valid under the external affairs power in s 51(xxix) of the Constitution. Although the external affairs power has been most frequently applied to treaty implementation and geographically external matters, it also extends to laws affecting Australia's relations with other countries. However, the High Court has not established definitive criteria for assessing whether a law sufficiently engages with this aspect of the power.

The external affairs power includes matters affecting Australia's relations with other countries, even in the absence of treaty obligations. This interpretation was accepted by Latham CJ in *R v Sharkey (1949)*, where he upheld a sedition provision on the basis that sedition directed at the governments of other Dominions could jeopardise Australia's diplomatic relations.

International Concern and Australia's Global Responsibilities

A law may also fall within the external affairs power if it addresses a matter of international concern or relates to Australia's standing within the international community. In *Thomas v Mowbray (2007)*, the majority upheld terrorism control orders on the basis that international cooperation to prevent terrorism is a matter of mutual concern among nations. Gummow and Crennan JJ emphasised that preserving comity and global security can be a valid subject matter for laws under s 51(xxix).

Relations Not Limited to Treaty Obligations

Even though there was no formal treaty here, the High Court has also recognised that relations with other countries are not limited to formal treaties. In *Koowarta v Bjelke-Petersen (1982)*, Brennan J extended the external affairs power to include relations with international organisations such as the United Nations. Likewise, in the *Seas and Submerged Lands Case (1975)*, various justices upheld Commonwealth sovereignty over the continental shelf as a valid exercise of external affairs, even where no treaty obligation existed, because the matter arose under international law and affected Australia's international standing.

Since **[insert subject matter]** relates to Australia's interactions with foreign states, international institutions, or multilateral arrangements, it may be characterised as affecting Australia's external relations independently of any treaty. The fact that **[insert conduct or policy]** arises in the context of international expectations or cooperation reinforces its constitutional validity under s 51(xxix).

Practical Arrangements with Foreign Governments

As **[insert legislation]** enables the Commonwealth to undertake cooperative actions with foreign states as it **[insert how]**, it may also fall under the external affairs power. In *Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016)*, provisions authorising Australia's offshore processing arrangements with Nauru were upheld under s 51(xxix). Gageler and Gordon JJ found that the legislation was valid because it authorised action external to Australia under an international arrangement with another country.

Here, since the legislation enables or facilitates **[insert cooperative actions or agreements with foreign government or agency]**, and involves **[insert external location or transnational arrangement]**, it falls squarely within the external affairs power based on its connection to international partnerships and Australia's international obligations or practices.

DOES THE LAW GIVE EFFECT TO AN INTERNATIONAL TREATY OR AGREEMENT?

Since the Commonwealth has enacted legislation relating to **[insert subject matter]**, the issue is whether the law is valid under the external affairs power in s 51(xxix) of the Constitution. The key question is whether the law implements a treaty obligation or relates to a matter of international concern such that it engages Australia's external relations. Even where the subject matter may appear domestic – such as **[insert example, e.g. environmental protection, racial discrimination, or industrial relations]** – the High Court has recognised an expanding conception of what constitutes an "external affair."

The external affairs power enables the Commonwealth to implement bona fide international treaties, even if the subject matter would otherwise fall within State legislative competence. In *Koowarta v Bjelke-Petersen (1982)*, the majority upheld the *Racial Discrimination Act 1975* (Cth) under s 51(xxix) on the basis that racial discrimination was a matter of international concern and the legislation implemented Australia's treaty obligations. Similarly, in the *Tasmanian Dam Case*, the Court upheld legislation protecting the Franklin River as validly implementing the World Heritage Convention. The High Court in *Tasmanian Dam Case* also

need to prove a subject is of "international concern" in addition to being the subject of a treaty. Mason J criticised the "international concern" test as vague and impractical. The majority held that the existence of a valid treaty obligation is sufficient to attract s 51(xxix). Courts should not substitute their view for the executive's decision to enter a treaty, especially where the treaty relates to matters of international cooperation or global interest.

Since **[insert treaty]** is a valid international agreement to which Australia is a party, the Court is likely to accept the subject matter of **[insert legislation]** as falling within external affairs, without inquiring into whether it also satisfies an abstract test of international concern.

Limits on Treaty-Based Legislation

While the High Court has recognised broad Commonwealth power under s 51(xxix), it has also emphasised that legislation must be "appropriate and adapted" to fulfilling Australia's treaty obligations. In the *Industrial Relations Act Case*, the Court held that not all treaty-based legislation is valid. Laws must conform to specific obligations within the treaty. Vague or aspirational treaties do not justify broad legislative powers, and laws must be closely connected to the treaty's terms. Here, **[insert legislation]** seeks to give effect to a treaty provision that is **[insert vague, aspirational, or loosely worded]**, so the Commonwealth must demonstrate that the law is reasonably capable of fulfilling Australia's international obligation. Otherwise, the law risks exceeding the scope of s 51(xxix).

[Insert if treaty is too aspirational/doesn't have specific obligations]

The High Court in *Pape v Commissioner of Taxation (2009)* held that general international recommendations – such as those made by the G-20, IMF or OECD – cannot by themselves support legislation under the external affairs power unless they impose precise and specific legal obligations on Australia. Accordingly, since **[insert international instrument]** does not impose binding legal obligations on Australia, the legislation is unlikely to fall within the scope of s 51(xxix) and may be constitutionally invalid on that basis.

INTERNATIONAL LAW OTHER THAN TREATIES

Since the Commonwealth has enacted legislation concerning **[insert subject matter]**, the issue is whether this law is valid under s 51(xxix) of the Constitution based on sources of international law other than treaties. The High Court has accepted that customary international law and binding obligations arising under instruments such as **[insert international instrument or resolution, e.g., UN Security Council Resolution]** may support a valid exercise of the external affairs power. In *Koowarta*, Stephen J considered racial non-discrimination a matter of international concern grounded in customary international law. Similarly, in *Thomas v Mowbray*, Kirby J acknowledged that a law may be supported by external affairs if it implements binding Security Council resolutions, though he warned that vague or aspirational provisions (like **[insert specific provision, e.g., para 2(b)]**) lacking specificity may not suffice.

If the Commonwealth relies on **[insert source of international law, e.g., customary law, Security Council resolution, or universal jurisdiction]** to justify the legislation, the domestic law must conform to the scope and content of that international norm. In *Polyukhovich*, Brennan J rejected the external affairs argument where the War Crimes Amendment Act defined 'war crimes' inconsistently with international law at the time the acts occurred. Although he accepted that universal jurisdiction could in principle justify such laws, the domestic offence must align with the internationally accepted definition. Here, since **[insert legislation]** purports to give effect to **[insert international obligation or norm]** but does so in a way that is **[insert inconsistent, overly broad, or vague]**, it may fall outside the scope of s 51(xxix), even if the subject matter is of legitimate international concern.