

# Constitutional Law Exam Notes

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	<b>Authority</b>	<b>Restriction/Limitation</b>
<b>Cth</b>	External affairs (s 51(xxix)) Corps Power (s 51(xx)) Grants Power (s 96) Spending power (parliamentary authorisation)	IGI SoJP ( <i>Boilermakers</i> ) IFPC IRV S 92 S 128
<b>State</b>	Plenary power (s 16 <i>Vic Const</i> )	RP IGI SoJP ( <i>Kable</i> ) IFPC ( <i>Unions NSW</i> ) S 92

## Cth law

1. Is there a HOP (authority)
2. Is there a relevant limitation on power?

## State law

1. Authority conferred by plenary grant of power
2. Is there a relevant limitation on power?

**Don't mix up State/Cth cases on IGI or SoJP** - can use them in other area but note

**IGI is most missed issue**

## Intro:

The Commonwealth's (Cth's) legislative powers are enumerated rather than plenary. Accordingly, each of the Cth laws must be supported by a head of power (HoP). Furthermore, the Acts or the provisions therein must not contravene any limitations or prohibitions on Cth legislative power.

## External Affairs Power (s 51(xxix))

The \_\_\_\_\_ (law) may arguably fall under the external affairs (EA) (s 51(xxix)). The Cth will argue that \_\_\_\_\_ (law) 1. Implements a treaty; 2. Is on Matters of international concern; 3. Affects relations with other countries; and 3. Is extraterritorial.

### 1. Treaty Implementation

The Cth has the prerogative power to ratify treaties (*Teoh*) to bind Australia in international law. Given the nature of the dualist system, treaties must be incorporated into domestic law via legislation.

Prior to *Dams* there was a divergence of views on whether subject matter was important (see *Dams minority and Koowarta per Stephens J*). However, the prevailing view now is that the Cth can implement treaties regardless of subject matter (*Dams; Richardson*) subject to four limitations.

#### 1.1 Bona fide ratification

It has been said that the treaty must be ratified in good faith (*Koowarta per Brennan J* – never accepted by the majority). There appears to be no indication on the facts (OTF) that the treaty was entered into merely to acquire legislative power and accordingly this 'frail shield' (*Koowarta per Gibbs CJ*) is satisfied.

Indications may include:

- Short time before implementation BUT in *Koowarta* the Cth ratified CERD in 1975 and enacted *RDA* in same year even though CERD was created in 1966
- Difficult to enquire into subjective motivations of Cth

#### 1.2 Obligation requirement

In *Dams* Gibbs CJ stated the treaty needed to impose an obligation not 'merely a recommendation'. The Cth will argue that Mason, Murphy and Deane JJ's view in *Dams* that no obligation is required should be preferred given international instruments aim to achieve consensus (per Deane J). Furthermore, the Cth will argue that *ILO* implicitly overruled the need for obligation. If any obligation requirement exists it appears to be satisfied as the words \_\_\_\_\_ [shall/must/undertakes] import a duty.

In *Dams* an article providing the parties will do their utmost or shall endeavour was sufficient to enliven s 51(xxix) – it obliges action even if it permits discretion as to the extent