C. EXTERNAL AFFAIRS
POWER (s 51(xxix))

Section 51(xxix)
- “The P shall subject to this C have power to make laws for the peace, order, and good government of the Cth with respect to: external affairs”

The Cth would rely on the external affairs power s 51(xxix) to enact s xx.

a. GEOGRAPHIC EXTERNALITY
   i. Since the XX Act purports to xxxxx, it regulates/prohibits/abolishes rights/duties/privileges with respect to matters beyond domestic Australian concern, {and so can be characterised as a law with respect to external affairs} [Fairfax per Kitto J].
   ii. S 51(xxix) is a non-purposive power, and so the purpose of the XX Act is irrelevant [Murpheyores].

Mere physical externality is sufficient to invoke the power [matters or things geographically outside Australia Seas and Submerged Lands Act case per Barwick CJ; no need for nexus between the subject matter and Australia Polyukovich per majority, held unanimously in Industrial Relations Act case]
   1. Should note that there was some disquiet expressed in XYZ, with Callinan and Heydon JJ dissenting and Kirby J expressing misgivings about the geographic externality principle, but the principle is unlikely to be overturned especially now that these judges have left the bench.
   2. Can enact legislation that operates purely externally [Seas an Submerged Lands Case] (smoking on the streets of Paris eg)

Matters involving the relations between Australia and other countries fall directly within the subject matter of s 51(xxix) [Sharkey per Latham CJ]
   1. This extends to relations with international persons such as the UN [Koowarta per Brennan J]
   2. Eg:
      a. Sedition laws
      b. Extradition laws
      c. Taking notice of foreign judgements

iii. The power to enact the XX Act under s 51(xxix) is ‘subject to this Constitution’ and thus is limited by express and implied prohibitions and rights
   a. Implied intergovernmental immunities
   b. Implied freedom of political communication
   c. Freedom of religion [s 116]
   d. S 92 freedom of interstate trade, commerce and intercourse
   e. ‘just terms’ s 51(xxix)
b. TREATY IMPLEMENTATION
   i. Since the XX Act purports to implement provisions of an international treaty/convention/obligation/recommendation, it can be characterised as a law with respect to external affairs s 51(xxix).
   ii. The obligations/treaty/convention/recommendations are not binding in Australia until implemented by legislation [Teoh].
   iii. The Tasmanian Dam case by majority (4:3 Mason, Brennan, Deane, Murphy JJ) endorsed the position of McTiernan and Evatt JJ in Burgess that it is no longer necessary to determine whether the subject matter of the treaty/convention/obligation/recommendation being implemented under s 51(xxix) is of international concern; the mere existence of the international instrument will satisfy this requirement.
      1. While A might argue that XX is not itself an external affair (or of ‘international character’), the majority position (4:3 Gibbs CJ, Aicken, Wilson, Stephen JJ) in Koowarta is no longer the law and is unlikely to be resuscitated [Industrial Relations case].
   iv. It probably does not matter whether a treaty is contrary to international law [Horta (obiter)]
   v. Recommendations/draft conventions
      1. … However it is to clear from [the treaty] that [what is done in the Act] is a valid method of achieving [the purpose of the treaty], and so reliance must be placed on the [recommendation] to validly enact [s xx]…
      2. The Industrial Relations case decided that recommendations stemming from an existing obligation (i.e. referable to YY treaty/convention) will be able to be validly implemented [per Brennan CJ, McHugh, Toohey, Gaudron and Gummow JJ]
      3. There is no authoritative statement on whether recommendations/draft conventions that are not referable to an existing obligation can be implemented under s 51(xxix). However it is probably likely that they would be implementable because a) the majority in the Industrial Relations case [Brennan CJ, Toohey, McHugh, Gaudron and Gummow JJ] invoked the McTiernan/Evatt view without qualification and b) High Court jurisprudence has been moving inexorably towards the full McTiernan/Evatt view of encompassing ‘unhinged’ recommendations since Burgess, and there seems no reason why it would be halted before the current bench.
vi. Limitations

1. The power to enact the XX Act under s 51(xxix) is ‘subject to this Constitution’ and thus is limited by express and implied prohibitions and rights
   a. Implied intergovernmental immunities
   b. Implied freedom of political communication
   c. Freedom of religion [s 116]
   d. S 92 freedom of interstate trade, commerce and intercourse
   e. ‘just terms’ s 51(xxix)

2. The treaty/convention/obligation/recommendation must be bona fide [Koowarta]
   a. Entering into the treaty cannot merely be a means to confer legislative power upon the Commonwealth

3. CONFORMITY PRINCIPLE
   a. The Commonwealth law must conform with the treaty and carry its provisions into effect [Tasmanian Dam per Mason J].
   b. Parliament can make laws implementing not just the treaty obligations themselves but reasonably apprehended obligations necessary to give effect to the primary obligations; this confers an incidental power to s 51(xxix) [Richardson esp per Mason CJ and Brennan J].
   c. The Cth must satisfy the ‘margin of appreciation’ test articulated by Deane J in Tasmanian Dam and affirmed in the Industrial Relations case: is the XX Act capable of being reasonably considered to be appropriate and adapted to implementing the treaty?
      i. Consider the purpose of the treaty and the means adopted to achieve that purpose
   d. Quantitative partial implementation- usually OK
      Qualitative partial implementation- probably not
      i. …thus AA will argue that the partial implementation is so substantial that it denies the XX Act the character of a measure implementing the international treaty/etc [Industrial Relations Case per majority citing Tasmanian Dam as being decided on this basis] OR
      ii. …thus AA will argue that the partial implementation, when coupled with other provisions of the XX Act, make it substantially inconsistent with the international treaty/etc [Industrial Relations Case per majority citing Tasmanian Dam as being decided on this basis]
   e. Specificity principle: AA might rely on Zines’ contention [cited by the majority in the Industrial Relations case] that if the international obligation/etc is not in sufficiently precise terms, it may be impossible for an implementing statute, in specifying the means to meet the purpose/aspirations of the treaty/etc, to be in conformity with that treaty/etc. That is, the margin of appreciation test cannot even be applied.

{{The subject matter of s 51(xxix) is not clearly defined, in part because of the changing nature of Australian sovereignty and international obligations since the Constitution’s enactment in 1900.}}

vii. S 51(xxix) is a non-purposive power, and so the purpose of the XX Act is not, in itself, determinative [Murpheyores]. However…

i. The XX Act will be valid under the external affairs power s 51(xxix), which enables the Commonwealth Parliament to make laws with respect to external affairs, where the act regulates any subject matter that is geographically external to Australia [Seas and Submerged Lands Act case] or any conduct that may affect the relations between Australia and another country [Sharkey] or international person [Koowarta per