
**UTS – 70616 CONSTITUTIONAL LAW
TEMPLATES**

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RACE POWER s51(xxvi)

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: **the people of any race for whom it is deemed necessary to make special laws.** [Subject matter – SC]

Koowarta v Bjelke-Petersen (1982): At the time, Qld govt said Aboriginals couldn't buy and develop land so blocked the sale of land to Wick people. Koowarta argued that blocking sale based on race was inconsistent with the Racial Discrimination Act. Court found Act valid under the external affairs power instead relying on a Convention which enabled them to legislate on race which it otherwise would not be able to do.

Court held Racial Discrimination Act applied to all races and so was a general not a special law.

- Power applied to all races not particular races
- Power to restrict them but can also make laws prohibiting discrimination against them.
- Stephen J – necessary special quality may be sufficiently attracted by facts outside the legislation.

Cth v Tasmania (Tasmanian Dam Case) (1983): Validity of World Heritage Properties conservation act. Cth sought to prevent building of dam on indigenous sites of immense cultural and historical value.

- Brennan J – Amendment of race power suggested the will of Australians to end oppression of Aboriginals and to primarily have beneficial effects. No limitation on type of benefit and none should be applied. The law may be special in its operation and not terms.
- Deane J – appears to affirm majority view from *Koowarta* that laws may be for or against a people. A law which preserves sites which are particularly significant to Aboriginals is a special law.

Part of Aboriginal race if identify with community and they identify you.

- Dissenting judges [3] – law preserving archaeological relics of significance to all mankind was not a special law for one race. Gibbs CJ – the provisions do not give them any special rights/obligations.

WA v Cth (Native Title Case) (1995): Races power not a power simply to make laws for persons of a designated character. It must be deemed necessary that special laws be made for a race. Duty of the court to determine if the constitutional description is satisfied based on Parliament's action. However, the Native Title Act passed by parliament is sufficient that they deemed the Act **necessary**. The **special** quality of a law is ascertained by its different operation upon a race – right/benefit or obligation/disadvantage. Thus, *Native Title Act* is a special law.

Benefit of a race? Brennan and Deane JJ in *Tasmanian Dam* have been read as supporting Murphy J in *Koowarta* that 1967 Referendum meant power in favour of benefitting the race. But nothing 100% conclusive.

Kartinyeri v Cth (Hindmarsh Island Bridge Case) (1998): Inconclusive on benefit-only interpretation SA Hindmarsh island connected to mainland by ferry. Local council to build bridge but opposed on environmental and Aboriginal heritage grounds. Claim of special indigenous women's business that could only be revealed to women but due to administrative issues under *Heritage Protection Act*, male minister unable to substantiate claims. *Hindmarsh Island Bridge Act* to prevent further claims