CHARACTERISATION

Race Power s 51(xxvi) meaning and scope unsettled - *Kartinyeri*

Corporations Power s 51(xx)

CHARACTERISATION		
CASE	**FACTS/ISSUE**	**PRINCIPLE**
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) *(Engineers case)*	Industrial proceedings in the Cth Arbitration Court against 843 employers, including three WA government employers, were brought by, a trade union, the Amalgamated Society of Engineers. Under the prevailing doctrine of implied intergovernmental immunities (and the authority in *Federated Amalgamated Government Railway and Tramway Service Assn v New South Wales Railway Traffic Employees Assn (Railway Servants Case)* (1906) 4 CLR 488) those State employers were not bound by the jurisdiction of the court, established under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth).	**Held:** A new approach to the interpretation and characterisation of Cth laws under the Constitution was adopted. Cth heads of power were to be interpreted in accordance with the natural meaning of the words that conferred power. The scope of those heads of power would not be limited, unless such Implication followed necessarily or logically from the text. It was no longer necessary or logical for the court to imply that the State Instrumentalities were Immune from laws enacted under the Cth's conciliation and arbitration power **s 51(xxxv)**. The majority said '[w]e therefore hold that the States, and persons natural and artificial representing States, when parties to Industrial disputes in fact, are subject to Cth legislation under pl xxxv of **s 51** of the *Constitution*, if such legislation on its true construction applies to them.' The WA government employers could be bound by the Cth Arbitration Court. In *obiter* the court authorized the exercise of reciprocal authority by the States.
TESTS FOR CHARACTERISATION		
Fairfax v Federal Commissioner of Taxation (1965)	Under amendments in 1961 to the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) superannuation fund incomes would no longer be exempt from income tax obligations unless the Commissioner of Taxation was satisfied that 30% of a fund's assets were invested in 'public securities' and particularly Cth securities, that is, Cth 'bonds'. The trustees of the Fairfax superannuation fund appealed an unfavourable assessment by the Commissioner, arguing that the 1961 amendments were not valid, as they were not laws with respect to **s 51(ii)**.	Found that it was a law with respect to taxation **TEST: Is it a 'law with respect to' … s 51?** Kitto J: Under that section the question is always one of subject matter, to be determined by … the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?
South Australia v Commonwealth (1942) *(First Uniform Tax case)*		**TEST for direct characterisation** Latham CJ: What does the law do in the way of 'changing or creating or destroying rights or duties or powers?'
Murphyores Inc Pty Ltd v Commonwealth (1976)	The *Customs (Prohibited Exports) Regulations 1926* (Cth) enacted under the *Customs Act 1901* (Cth) prohibited the export of the mineral zircon without ministerial approval. In 1974, Murphyores sought the approval of the	The HC unanimously found that the Minister could indeed exercise an unfettered discretion in deciding whether or not to permit mineral exports. Mason J: (paraphrased) The court considers the *direct*, rather than

Race Power s 51(xxvi) meaning and scope unsettled - *Kartinyeri*		
CASE	**FACTS/ISSUE**	**PRINCIPLE**
Commonwealth v Tasmania (1983) *(Tasmanian Dam case)* **See case under corporations power s 51(xx) and external affairs power s 51(xxvi) and coercive nationhood power s 51(xxxix)**	The Tasmanian Liberal Government proposed to build a hydro-electric dam in a wilderness area, the Gordon River, in south-west Tasmania. The construction of the dam was to be undertaken by the Tasmanian Hydro-Electric Commission (HEC), a corporation established by a Tasmanian statute.	In *obiter* Murphy, Brennan and Deane JJ said **s 51(xxvi)** power could only support the enactment of laws which benefited a particular race Dissent, Gibbs: disagreed, said it was plenary power and that it was possible for the Cth to pass laws to the detriment of race
Western Australia v Commonwealth (1995) *(Native Title Act Case)*	Western Australia challenged the validity of the *Native Title Act 7993* (Cth).	*Native Title Act 1993* was found to be **validly enacted.** Was for *benefit* of indigenous people, so the HC didn't consider whether **s 51(xxvi)** could be used for detrimental laws. Stated that the court must retain supervisory jurisdiction over what is *deemed necessary.* Not just up to the parliament to make the decision – the High Court must have a say in it according to the court in the *Native Title Act case*
Kartinyeri v Commonwealth (1998) *(Hindmarsh Island Bridge case)*	In 1996, the new Liberal/National Government secured passage of the *Hindmarsh Island Bridge Act 1997* (Cth). This exempted a contested Hindmarsh Island Bridge project in South Australia from the ministerial approval processes usually required under the *Aboriginal and Torres Strait Islander* Heritage *Protection Act 1984* (Cth). This effectively allowed the disputed project to go ahead and removed the site from the potential protection of the Heritage Protection Act, ensuring the construction of the bridge despite any harm to Indigenous heritage within the area. The Aboriginal Ngarrindjeri women plaintiffs argued that their cultural heritage was threatened by the bridge construction. The constitutional Issue was whether the Bridge Act was validly enacted pursuant to **s 51(xxvi)** of the Constitution.	The Bridge Act was found to have been validly enacted pursuant to **s 51(xxvi)**. No majority, however, emerged with regard to the scope of the race power. Is it a **special law? Special laws** are those of differentiation (*Kartinyeri*). There is little doubt that this is a 'special' law as it differentiates between Aboriginal people in certain communities Is it deemed **necessary** to make special laws? How you answer this part of the characterisation test depends on the way you present the High Court's interpretation **s 51(xxvi)** in *Kartinyeri*.

JUDGMENTS		
Brennan CJ, McHugh J: The new Act was a valid repeal of the *Heritage Protection Act*. (Gaudron J agreeing)	Gaudron J delivered *obiter dicta* on that issue: Constitutional referendum did not alter the meaning of **s 51(xxvi).** It is for parliament to deem what is necessary. However, there must be	Dissent, Kirby J: He agreed with the issue about **s 51(xxvi)** being able to discriminate within a race but said **s 51(xxvi)** does not extend to discriminatory laws.

Nationhood Power **s 61& s 51(xxxix)**		
APPROPRIATE AND ADAPTED		
Victoria v Commonwealth and Hayden (1975) *(AAP case)*	The *Appropriation Act (No 1) 1974-75* (Cth), which authorised substantial expenditure on 'the Australian Assistance Plan', was at issue. The money was to be allocated to 35 Regional Councils for Social Development across Australia, which would in tum disburse the money to a number of State, federal, local government and voluntary agencies to spend on social and community welfare programs. The expenditure was to be administered within a complex executive, as opposed to statutory, scheme. One issue in *AAP* was whether the Cth executive had the power to administer such a spending scheme.	Majority McTiernan, Murphy, Mason, Stephen and Jacobs JJ, dissent Barwick CJ and Gibbs J, found that the allocation of the money to the Regional Council was a valid appropriation under **s 81** McTiernan & Murphy JJ – power to spend appropriated money linked to the power to appropriate money in **s 81**. Mason & Barwick JJ - separated power to appropriate and allocate money. Majority approach was rejected in *Pape*.
Pape v Commonwealth (2009) **No executive spending power is located within ss 81 and 83 of the Constitution**	Pape was a taxpayer who challenged certain aspects of a federal government stimulus package adopted to combat the effects of the global financial crisis of 2008-09. Under the *Tax Bonus for Working Australians Act (No 2) 2009* and the *Tax Bonus for Working Australians (Consequential Amendments) Act 2009*, the government was authorised to pay out means-tested bonuses to taxpayers who earned less than $100,000 in taxable income in the fiscal year 2007-08. The payments ranged from $250 (for the highest earners) up to $900 per person. Pape himself was entitled to a $250 bonus. He claimed the payment of his bonus, as well as all bonuses under the Act, were invalid.	The entire court concluded that no power of expenditure found in **s 81**. French CJ - mitigating large scale adverse effects of the economy. Is not an interference with the constitutional distribution of powers. Power of expenditure originates from **s 61** and **s 51(xxxix) (broad).** Gummow, Crennan & Bell JJ: Undertaking of action appropriate to the Cth as a 'polity' Dissent, Hayne & Kiefel JJ: expenditure doesn't derive from character and status as a polity or as deduced from existence of Cth as a national government. If the end is to meet a national crisis, it does not follow that any means is within power – engages no constitutional criterion. Dissent, Heydon J: did not accept nationhood power.
Williams v Cth (2012) *(School chaplains case)* **Requirement of Religious Test a Qualification for Public office**	As part of the National School Chaplaincy Programme, the Cth government entered into a funding agreement with Scripture Union Qld for the provision of chaplaincy services at a State school in Qld. The agreement was challenged by Ronald Williams, the father of four children attending the school. One of the questions asked was: Is the Funding Agreement invalid because it is prohibited by **s 116** of the Constitution? Williams argued that this amounted to a religious test for qualification for public office.	Majority found executive spending programme to be invalid – no crisis or emergency, the nationhood power did not apply. For the first time in a long time, the High Court is supporting the federal concept. **TEST: Does the law require a religious test for public office?**

Commonwealth (1992) *(ACTV)* **'NO' to the Second Stage of the *Lange/ Coleman* Test**	Under **Pt HID** of the *Broadcasting and Television Act 1942* (Cth) all political advertising in elections was prohibited. Instead, free broadcasting time was accorded to political parties. 90% of free-time broadcasting spots on television and radio was to be allocated to political parties already represented in the relevant legislature. Parties without sitting members & independents were given remaining 10%. No provisions for groups not standing (e.g. trade unions).	reasonable justification for the way they restricted the freedom of political communication. Mason CJ reasoned that the **test** to be applied in determining whether the implied freedom was infringed required one to ask 'whether the burden imposed on free communication was disproportionate to the attainment of a competing public interest'. A majority of 5:2 Dissenting, Brennan and Dawson JJ: held that the legislation unjustifiably overrode that protection as it infringed an implied constitutional right of freedom of communication with respect to the government of the Cth.
Nationwide News v Wills (1992) **'NO' to the Second Stage of the *Lange/ Coleman* Test**	Provisions in the *Industrial Relations Act 1988* (Cth), which created an offence of bringing the Industrial Relations Commission or one its members into disrepute, were challenged. Wills was an officer of the Australian Federal Police he prosecuted The Australian newspapers publisher – Nationwide News Pty Ltd for publishing an article attacking the integrity and independence of the Industrial Relations Commission. The issue for decision is whether **s 299(1)(d)(ii)** of the *Industrial Relations Act 1988* (Cth) is a valid exercise by the Parliament of the Cth of the legislative powers conferred by **s 51(xxxv)** and **(xxxix)** of the *Constitution*.	The High Court found **s 299(1)(d)(ii)** to be invalid – but on different grounds. They were within the scope of the legislative head of power but that they breached an implied freedom of political communication. Mason CJ, Dawson and McHugh JJ, found the provision to be invalid on the ground that it was not supported by the implied incidental power attending **s 51(xxxv)** of the *Constitution*. (outside the scope)

Broad, Narrow and Middle Views on Source of the Freedom in *Nationwide News v Wills*

BROAD VIEW: Brennan, Deane, Toohey and Gaudron JJ found that the provision was invalid on the ground that it infringed a freedom to discuss governments, governmental institutions and agencies implied within the *Constitution*. The text and structure of the constitution established a representative democracy and thus, incorporated, by implication, a degree of freedom of communication.	**NARROW VIEW:** Dawson J - Implications must appear from the terms of the instrument itself. **ss 7 & 24** (sections that talk about the senate and house of reps) that those houses must be - '*directly chosen by the people'.* A true choice means appreciation of the choices. An election without appreciation of choice is not an election for the purposes of the constitution.	**MIDDLE VIEW:** McHugh J Meaning of **ss 7 & 24** are informed by conceptions of representative government and responsible government.

DEVELOPMENTS ON SOURCE

Theophanous v Herald and Weekly Times Ltd (1994)	Theophanous was a Labor MP in the House of Reps. *The Herald and Weekly Times* published an article by Bruce Ruxton, 'Give Theophanous the shove'.	Majority held that freedom of political communication was a defence to defamation.

	gave the SA Industrial Court the power to order the re-employment of workers who were unfairly dismissed, whether they had been employed on a permanent or temporary basis. The Cth intended to give the employer, the ABC, unlimited power to set the conditions for temporary workers.	The court found the State provision inconsistent with the Cth legislation, despite the acknowledgment that the Cth provisions dealing with temporary employees were less detailed and less comprehensive than those applicable to permanent employees. Mason J: The absence of detailed provisions applying to them is not an indication that it is contemplated that other laws will apply to them, but rather that the employer has an unqualified authority to make decisions affecting their employment and the termination of their services.
Commonwealth v Australian Capital Territory (2013)	Concerning the validity of ACT legislation which provided for marriages between adults of the same sex. As the case concerned a territory law rather than a State law, **s 109** was not directly engaged. Rather the key issue was whether the ACT law complied with s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), which provides that ACT laws are inoperative to the extent of any inconsistency with federal laws	The High Court did not answer whether **s 28** operated in precisely the same way **as s 109**, but it did confirm that the 'cover the field' test was incorporated into that provision. It duly found that the *Marriage Act 1961* (Cth) was 'a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage'. The *Marriage Act 1961* had been amended in 2004 to provide that 'marriage' be specifically defined so as to exclude the possibility of same sex marriage.
INCONSISTENT CRIMINAL PENALTIES	**Overlapping State and Cth sentencing laws**	
Ex parte McLean (1930)	**Facts above**	Dixon J stated (at 483) that the matter depends upon the intention of the Cth Parliament, to 'completely exhaustively or exclusively express, through its law, what shall be the law governing the particular conduct or subject'. It was said where the Cth prescribed a penalty for a certain conduct there is a presumption that it is meant to 'cover the field' of the conduct subject to regulation.
R v Loewenthal; Ex parte Blacklock (1974)	The Court considered federal and State criminal laws which set differing penalties for willful destruction of property. The federal law related specifically to damage to Cth property, and the State law applied more generally to property damage.	The laws were found to be indirectly inconsistent, as the subject of preservation of Cth property was a field that required uniform regulation. Intention of Cth relates specifically to Cth property in relation to penalties, which required uniform regulation. Similar to the idea of implied intention of uniformity.
R v Winneke; Ex parte Gallagher (1982)	Gallagher was convicted under identical State and Cth provisions penalty was for failure to answer questions at a Royal commission of inquiry. There was a question of whether there was inconsistent criminal penalties	The two Acts prescribe penalties for questions under two different authorities. Difference in substance. Therefore, they were actually about independent offences. It was the same conduct – the fact that the person failed to