Races Power

S 51(xxvi)	Gives the Cth the power the make laws wrt 'the people of any race for whom it is deemed necessary to make special laws'
STEP 1: Is the law in question a special law?	

General	• **Definition:** the special quality of a law is ascertained by reference to its differential operation upon people of a particular race (Tassie Dams)
	  ○ The special quality of a law is NOT ascertained by reference to the circumstances which led Parl to deem it necessary to enact the law
	• **Examples:**
	  ○ A law which protects any aspect of the personality and identity of the people of a race – i.e. protecting cultural and spiritual heritage by protecting property with significance to that cultural or spiritual heritage (Tassie Dams)
	
	1A Any race [NB: likely not contentious – just need a line of acknowledgement]
	• **Race:** the words 'any race' are used in the context of 'no matter which race' → cannot be a law for all races (Koowarta); the exception being where in operation it is significant to one race (see STEP 1B)
	• **Test:** whether the individuals or the group regards themselves and are regarded by others in the community has having a particular historical identity in terms of their colour or their racial, national, or ethnic origins (Brennan J in Tassie Dams)
	  ○ Wide and non-technical meaning (Deane J in Tassie Dams)
	  ○ Factors (Brennan J)
	  ▪ Common history
	  ▪ Common religion or spiritual beliefs
	  ▪ Common culture
	  ▪ Common knowledge
	• **Examples:**
	  ○ All Australian Aboriginals collectively
	  ○ Any identifiable racial subgroup among Australian Aboriginals (Deane J in Tassie Dams)
	
	1B Differential operation
	• A law will be special regardless of its terms if it is special in its operation (Tassie Dams)
	• **Factors for differential operation:**
	  ○ **Practical operation:** where the law discriminates in favour of a particular race by its operation upon the subject-matter to which it relates (Tassie Dams)
	  ▪ A law may be special even when it confers a benefit generally to all races or does not target a particular race/is seemingly neutral to race on its face, provided in operation the law is of special significance or importance to the people of a particular race (Tassie Dams)
	  • e.g. the preservation of a site which has special significance for Aboriginals even though it is in all Australians' interest to have the site protected/is of significance to 'all mankind' (Deane and Brennan JJ in Tassie Dams)
	  ○ **Confers rights and obligations:** the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race (Native Title Act Case)

STEP 2: Is the law in question deemed necessary?	
General	**2A Deemed necessary**

	• **Definition:** that which Parl judges or reaches conclusion as necessary → this is a VALUE JUDGEMENT for PARL and NOT THE COURT to make (thin majority in Native Title Act Case)
	  ○ The circumstances which led Parl to deem the enactment of a law necessary are irrelevant (Native Title Act Case)
	• Alternative approaches:
	  ○ Reasonably appropriate and adapted → Gaudron J in Kartinyeri
	  ○ Parl except in extreme cases → Kirby J in Kartinyeri
	
	2B THE EXCEPTION: Manifest abuse of power
	• There may be grounds for the court to retain some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power (Native Title Act Case)
	  ○ This is a low level of review – essentially invoked where there is no conceivable reason for Parl to have singled out a particular race

STEP 3: Does the law confer a benefit or detriment?	

General	• Whether a law relating to Indigenous peoples enacted under s 51(xxvi) must be a law for their benefit has remained a point of contention
	• **Case law for positive discrimination only:**
	  ○ Murphy J in Koowarta
	  ○ Brennan and Deane JJ in Tassie Dam
	  ▪ Deane J applies this only to Ab Australians – for all other races it could go either way
	  ○ Gaudron J in Stolen Generations Case
	  ○ Kirby J's dissent in Kartinyeri → the 1967 amendment of s 51(xxvi) means 'for' can only be construed to mean 'for the benefit of'
	• **Case law for either way:**
	  ○ Gummow J in Stolen Generations Case (but only in regards to the power in its original form)
	  ○ Gummow and Hayne JJ in Kartinyeri suggest that adverse laws are permissible given they are 'clearly manifested by unmistakable and unambiguous language' → the races power at least supports law withdrawing stat benefit previously extended to Ab people
	  ○ Gaudron J's dissent in Kartinyeri → test of reasonably capable of being viewed as appro and adapted to a relevant diff between the races; **BUT** considering the current circumstances, only laws directed to remedying disadvantages of Aboriginal Australians could be reasonably viewed as appro and adapted
	  ▪ Ab are in a position of severe disadvantage – the test is not would it be expedient/convenient etc, the question is it necessary; given the level of disadvantage they currently face, it cannot in the current situation be reasonably appropriate and adapted to a difference based on their aboriginality to enact a law that would further entrench that disadvantage
	  ▪ In regards to the referendum change, Gaudron J noted the ref as a minimalist change and that the point of the ref to put Abs onto equal footing to people of other races; if we then try to say that the race power limited the scope of the races power so that laws could only be for the benefit of Ab ppl but both advantageous and disadvantageous for other races then that would not put the races on equal footing
	• Going by dicta in case law, it seems the power can only be used to confer a benefit, but this is highly ambiguous

GRANTS POWER

Grants Power (96)

The Grants Power in s 96 was not included in the original draft Constitution, and only included following the failure of the NSW referendum in 1898. It was intended to be a transitional provision, as the opening words indicate ('*During a period of ten years after the establishment of the Commonwealth…*').

Nevertheless, it has proved to be a significant vehicle for the Commonwealth's arrogation to itself of additional regulatory powers through Australia's system of federal financial relations.

Scope

The grants power is extremely wide and is **virtually unreviewable** and enabling the Cth to make grants with no real restrictions: *Deputy FCT (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735; *Victoria v Cth* (1926) 38 CLR 399 ('*Federal Roads Case*').

- The grants power **is not limited by any prohibition on discrim aside from the express limitations in ss 51(ii), 51(iii), 99** as the element of 'just' differentiation based on rel circumstances is a rel element of national policy *Moran*, 763 (Latham CJ) → in the matter of financial assistance, Parl has power to discrim between States as much as it thinks fit *Moran* (Viscount Maugham)
- Viscount Maugham noted that 'cases may be imagined in which a purported exercise of the power to grant financial assistance under s 96 would be **merely colorable**. Under the guise or pretense of assisting a State with money, the real substance and the purpose of the Act might simply be to effect discrimination in regard to taxation' – this *might* be invalid: *WR Moran Pty Ltd v Deputy Commissioner of Taxation for NSW* [1940] AC 838, 858.
- It does not matter that the grant was given to the State to pay over the money to private persons (the grant of financial assistance to pay producers/millers): *Moran*.

Federal Roads Case, Moran's Case and the *First Uniform Tax Case* decisively establish that the Cth may attach any conditions it wishes to a s 96 grant. The power is confined to granting money to governments.

- It is not a power to make laws with respect to a general subject matter, although this is double-edged: in *Melbourne Corporation*, he had held that a 'general' power of that kind might be subject to an implied limitation so as not to extend to interference with the States' constitutional functions.
- However, the passage of the *Second Uniform Tax Case* appears to suggest that, because the grants power necessarily 'relates to State finance', it is **subject to no such limitation**.

First Uniform Tax Case

- Latham CJ (dissented on validity of Act 3):
  - Stated the principle that courts undertaking judicial review do not inquire into the policy or desirability of given laws, but merely consider their validity.
  - The proper stage of determining validity, is to look at whether a particular law falls within Cth power, notwithstanding any State law.
  - Although the Cth may not direct its legislative powers towards destroying or weakening the constitutional functions or capacities of a State, this is **not a prohibition or limitation expressly or impliedly drawn from the Constitution**. This is simply **resultant from the absence of power in the Cth Parliament to legislate in certain areas**, i.e. the Cth Parliament cannot legislate with respect to any subject unless conferred power to do so by the Constitution
  - The Cth could **conceivably pass legally valid laws destroying the federal balance**. Such a result cannot be prevented by legal decisions (e.g. by the courts).
    - Rather, the determination of the propriety of any policy ultimately rests with the Cth Parliament and the people – any **remedy for an alleged use of power is to be found in the political arena** and not in the courts.
- Starke J (dissented validity of Acts 2, 3):

- Held that the government of Australia was a dual system based on a separation of organs and powers, such that the maintenance of both States and the Cth were core objects of the Constitution – it was therefore beyond power for either to abolish the other.
- Rejected the argument that the Act was valid, since it arose in the form of inducement rather than coercion, considering this argument '*specious, but unreal'*

- **COMMENTARY**: sometimes regarded as the '***high-water mark of the Engineers' case doctrine'***, partly because of the refusal to consider the implications of the legislative 'scheme' exemplified the literal approach to statutory construction laid down in that case, and partly because of the outright rejection of the kind of argument that was later to succeed in *Melbourne Corporation*.

Second Uniform Tax Case

- Dixon CJ:
  - Suggested that s 96 cannot be used to 'enable the making of a coercive law' (i.e. one that demands obedience). This too, may be equivocal:
    - In ruling out coercive laws, he may have meant only that, in laying down policies which it wishes the States to follow, the **Cth can use a carrot but not a stick**. The Cth can use s 96 to make an offer of financial assistance that a State is in no position to refuse, so long as the offer formally requires the consent of the State.
    - On the other hand, his insistence that s 96 is only a 'spending power' suggests that under it, the Cth is confined to those policies that essentially involve the distribution of money.
      - It can directly confer financial benefits on the States, or on others through the 'conduit' of the States.
      - But it cannot impose a regulatory scheme designed to order the behaviour of citizens as most 'ordinary' legislation does. Such legislation could only be justified by reference to a specific head of legislative power, not as a mere by-product of 'spending'.

Limitations

It has been observed that the power has a **consensual aspect** – since States are under no obligation to accept grants under s 96 (see, eg, *AAP Case, Barwick CJ; School Chaplains Case*).

There are several consti limitations on s 96:

1. The Cth cannot pass a **coercive** law – one that compels the States to surrender a power or prohibiting the exercise of a power:
   - 'The freedom of each State to decide whether to accept or reject the grant, however restricted it may be in a political sense, is legally fundamental to the validity of the scheme': *A-G (Vic); Ex rel Black v Cth* (1981) 146 CLR 559 660 (Wilson J) (*'DOGS Case'*).
   - A grant may offer an **inducement** for the State to exercise or to not exercise a power: *First Uniform Tax Case*, 417 (Latham CJ).
     - An **'attractive inducement'** (or **temptation**) does not amount to **compulsion**.
2. The grants power is subject to s 116 (no law est religion): *DOGS Case*.
   - This is because s 116 'prevails over and limits all provisions [of the C] which give power to make laws': *Adelaide Company of Jehovah's Witnesses Inc v Cth* (1943) 67 CLR 116, 123 (Latham CJ), 156 (McTiernan J).
3. The grants power is subject to s 51(xxxi) (acquisition of property on just terms): *P J Magennis Pty Ltd v Cth* (1949) 80 CLR 382 (the *War Service Land Settlement Agreement Act 1945* (Cth) was held to be invalid as it authorised the Cth to enter into an agreement with the States to acquire land for solider resettlement on terms that were not just); *ICM Agriculture Pty Ltd v Cth* (2009)
   - The problem in *Magennis* was avoided by an agreement between the Cth and the States, on essentially the same terms but the acquisition was now only authorised by state legislation: *Pye v Renshaw* (1951) 84 CLR 58 (a grant will not be invalid even if it is for a 'purpose' of inducing the states to acquire property on unjust terms because s 96 is not concerned with purpose).
4. Section 96 is **NOT limited by policy considerations**: