

# CHARACTERISATION

The Commonwealth doesn't have a general legislative power like the states, Cth can only make laws where there is a grant of power to it in the Constitution. The validity of Commonwealth legislation is not presumed: **Attorney General (Cth) v Colonial Sugar Refineries**. Because the Cth only exercises enumerated powers it is necessary to determine whether a law comes within the ambit or scope of the power. Where a Commonwealth law bears several characters, it is fruitless to attempt to characterise it as relating to one subject to the exclusion of all others **Fontana Films; Tasmanian Dam**

1. **Identify the head(s) of power that could reasonably be invoked to support a Commonwealth law**
2. **What is the scope of the grant of power? What limits have been applied by the High Court in its interpretation?**
3. **Is the power non-purposive or purposive, or is it a power incidental to the execution of the grant of power?**
4. **Characterising the law**

Non-purposive "subject matter" power	Purposive	Incidental
Race, Taxation, Marriage, T+C	Defence, External affairs	Implied incidental
<b>Test:</b> Is it a law 'with respect to' to head of power – ascertain substantive legal operation by determining the rights, duties, obligations, powers and privileges which it creates: <u>Fairfax v Commissioner of Taxation</u> <b>SUFFICIENT CONNECTION</b>	<b>Test:</b> A law made in exercise of a purposive constitutional power will be valid if it is reasonably capable of being regarded as appropriate and adapted to the object which gives the law its character as a law with respect to the relevant head of power. It is a question of proportionality.	<b>Test:</b> Law will not fall within the scope of what is incidental to that power unless it is considered by the court to be reasonably proportionate or reasonably and appropriately adapted to the pursuit of that end: <u>Nationwide News Pty Ltd v Wills</u>
<ul style="list-style-type: none"> <li>- Connection must not be so insubstantial that it cannot be regarded as a law with respect to the relevant head of power: <u>Tasmanian Dams</u></li> <li>- The ulterior motive of the legislature, or the indirect consequences which it seeks to achieve are irrelevant: <u>First Uniform Tax Case</u></li> <li>- HCA may consider practical operation where prohibition: <u>Tasmanian Dam</u></li> </ul>	<ul style="list-style-type: none"> <li>- Court looks to direct legal operation AND purposes or object: <u>Richardson v Forestry Commission</u></li> </ul>	<ul style="list-style-type: none"> <li>- Every grant of power conferred by the Constitution extends to the making of laws in relation to matters necessary to for the reasonable fulfilment of that legislative power: <u>Grannall v Murrumbidgee</u></li> <li>- In determining reasonable proportionality, Court will ascertain what is 'reasonably necessary' for the achievement of the legislative object sought to be obtained.</li> </ul>

## 5. **Limitations**

- Once the law can be characterised as being within power, consider any constitutional limitations on the Commonwealth's exercise of power.
- There are both express limitations (eg. s 51(xxxi), s 92) and implied limitations (eg implied freedom of communication, Melbourne Corporation doctrine)

## 6. **Read down or sever**

- Don't be too generous
- Cant read down unless plausible; not plausible: all => all incorporated

# RACE POWER s51(xxvi):

**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.

\*\*\*Amendment to s51(xxvi) 1967 “other than aboriginal race in any State” deleted and s127\*\*\*

## Scope of the Head of Power:

### 1. **Special Law**

- Special qualifies law and does not relate to necessity. Special is ascertained by the differential treatment upon the people of a particular race → **Native Title Act Case; Kooworta; Kartinyeri**
- Special quality appears when law confers a right /benefit or imposes an obligation /disadvantage on the people of a particular race. → **Tasmanian Dam; majority Kartinyeri; Native Title Act of Gaudron**
- A law will be special if it has some special connexion with the people of a race; it will not answer that description if it applies equally to all races
- Distinguishes them as a race of people → **Gauldron J in Kartinyeri**
- *Must it be re special needs/threats/requirements of a particular race* → **Kartinyeri per Gaudron J**

### 2. **Race**

- DEFINITION Should not be based on biology but rather culture, community, real determinant for purpose of race power is how they self-identify and how the community identifies them → **Kartinyeri**
  - Brennan Kooworta: *common history, religion spiritual beliefs, culture, biological origins*
  - Deane: *all that makes up personality and identity of people of a race*
- Can also refer to a sub-group of a particular race → **Tasmanian Dam**
- Not a power to make laws generally about race but enables special laws specific to a certain race Any = no matter which ≠ all → **Kooworta Gibbs CJ**

### 3. **Necessary**

- Parliament required to form political value judgement of necessity, not for courts → **Kartinyeri**
- Wide enough to authorise both advantageous and disadvantageous law → **Kartinyeri (majority)**
- “For” means “in respect of” or “with reference to” “purpose of” rather than for the benefit of
- Best argument is if Gaudron’s conception of special law is accepted. Reasonably appropriate and adapted, therefore benefit. BUT disagreement with Gaudron, other judges thought irrelevant

## Characterisation:

- The majority of **Kartinyeri** would consider as non-purposive power (although Gaudron would disagree; power dealing with human beings should be reasonably appropriate adapted; → **Kartinyeri**)
- It must be demonstrated that the law in question is sufficiently connected to the head of power invoked to support it.

## Limitations

- Implied freedom of political communication??? → **Lange**
- Subject to manifest abuse test → **Native Title Act, Kartinyeri (majority), cf Gaudron J**: reasonably appropriate and adapted to a relevant difference which the parliament judges to exist **cf Kirby J** in dissent; said power should be for benefit only; should look at international

### **Koowarta v Bjelke-Petersen (1982)**

- It was concerned with the constitutional validity of parts of the RDA.
- Argument that Qld govt was being discriminatory by blocking the sale of land to an Aboriginal group. The group attempted to buy a pastoral lease from a farmer for land that was traditionally theirs but this sale was blocked by the government.
- The court got around answering the question regarding the race power by holding that the RDA applied to ALL races, rather than being a law specific to a particular race. Hence, they held, that the race power was not applicable in this circumstance.
- The external affairs power was said to apply since the RDA was enacted following Australia signing an international treaty. A majority held that the RDA was validated under this section.
- The power is not a power to make laws generally about race but enables **special** laws specific to a certain race