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Subject-Matter Power

1. What is the character of the statute — by reference to the rights, powers, liabilities, duties, privileges it creates? (Grain Pool of Western Australia)
2. Is there a 'sufficient connection' between the practical and legal operation of the law and the head of power? (Grain Pool of Western Australia)
 - Sufficient = NOT 'so insubstantial, tenuous or distant' (Re Dingian)

Doctrine Against Deeming Constitutional Fact

For all questions of constitutional validity

Communist Party

Parliament cannot dictate fact that is material to a question of constitutionally validity (constitutional fact)

- Here, statute's recitals stated that since Communist Party had subversive aims, the statute was enacted under defence power
- Court did NOT treat these recitals as probative of whether statute was supported by defence power — rather, as raising possibility

BUT obiter: in period of war/imminent war, Parliament's opinion (that body/person is danger to safety of Cth) would be sufficient to bring statute within defence power

BUT Cth can reverse the onus of proving a constitutional fact

E.g., 'for the purposes of this Act, a corporation shall be deemed to be a trading corporation, unless it can establish that its trading activities constitute an insubstantial proportion of its overall activities'

Unless the reversal of onus, in substance, deems a constitutional fact — e.g., by the burden of proof being unreasonably onerous (e.g., beyond reasonable doubt), too difficult to satisfy, or regarding proving a fact that is irrelevant to the constitutional fact (Actors and Announcers)

- E.g., Actors and Announcers: deemed that union (non-CC) did conduct causing damage to CC, unless it could prove that it took reasonable steps to prevent its members from engaging in it —> not taking reasonable steps to prevent members is NOT relevant to constitutional question of whether conduct is related to CC

Cth can deem a non-constitutional fact: Communist Party

Severance

Australian National Airways

- Start with **presumption of constitutional validity**, whereby **all parts of statute are assumed to be independent of each other**, such that constitutionally invalid parts can be severed to save the statute
- **Provisions are severable if they are NOT indispensable to the conception of which statute is based**
- Here, invalid monopoly provision (due to s 92) can be severed
 - **Formal structure of statute**
 - Provision was in a **separate part of the statute** (separate to the parts establishing the Commission and giving it powers to run the airline)
 - Parliament would still have governmental airline if it were not a monopoly —> **whole purpose of the statute would be preserved even if provision was severed**

s 51(xxvi) Race

Subject-matter power

Constitution s 51(xxvi)

Statute with respect to 'people of any **race**, for whom it is **deemed necessary** to make **special laws**'

1. Does the statute pertain to a 'race'?

Depends on multiple factors (Tasmanian Dam)

- **Biological** — given rather than acquired
- BUT this is not a matter of proving ultimate genetic ancestry — rather, **ethnic category**
- E.g., **shared** ____
 - **Ethnic origin; physical features; colour**
 - **National origin**
 - **History**
 - **Culture**
 - **Religion** or spiritual beliefs

Examples of religion = race (UK cases)

- Judaism = race — unlike Catholicism, Judaism has **degree of inheritance** (become Jew if mother is Jew) (JFS Governing Body)
- Sikhism = race — **physical** similarities, common **lineage**, shared **traditions** (Mandla)

2. Does the statute have a differential effect on that race ('special law')?

Statute must have differential effect on that race (Koowarta)

—> By legally affecting a certain race in a different way (Koowarta)

- Here, statute prohibiting racial discrimination **applied equally to all races**

—> OR by having a special operation on a certain race (Tasmanian Dam)

- Incl. advancing (protecting or fostering) the race's historic, cultural, religious, and/or spiritual heritage
- Here, statute **prohibiting acts damaging Aboriginal site** —> operates to benefit Aboriginal race in particular (by protecting their heritage)
 - Although prohibition applies equally to all races (incl. Aboriginal people)

3. Does the statute need to benefit that race (is it 'deemed necessary')?

Not settled: **obiter in Kartinyeri** (apply all judgments below)

Gummow and Hayne JJ: can benefit or harm race

- BUT law in '**manifest abuse**' of race power may be invalid
 - NOT the case here, which **prevented declaration of Aboriginal heritage in area for construction of a certain bridge** —> valid

Kirby J: must benefit race

- **Detrimental and adversely discriminatory against that race** —> invalid
- Here, statute was **prevented Aboriginal people from making application under Heritage Act** for bridge area —> **detrimental**, invalid

This reasoning is consistent with subsequent trajectory of constitutional case law in other areas—because it assesses proportionality —> perhaps more likely to be supported

Gaudron J: the discrimination must be necessary

1. There must be **some difference pertaining to the race** or their circumstances, or **some material upon which Parliament might reasonably form political judgment that there is such a difference**

- Here, difference = need to protect Aboriginal heritage

2. The statute must be **reasonably** capable of being viewed as **appropriate and adapted to addressing the difference**

- Here, given material and manifest disadvantage, statute furthering that disadvantage could not be 'deemed necessary'
 - BUT Heritage Protection Act + Bridge Act amending it were appropriate and adapted to addressing this need to protect Aboriginal heritage
 - Because together, they protect heritage on reasonably limited terms (limitation: no protection of bridge area) — > broadly beneficial to Aboriginal race
 - Parliament has leeway — need NOT offer untrammelled protection

Majority/Ratio in Kartinyeri: The character of an amending statute is the same as the statute it amends

- Here, Bridge Act was amendment (partial repeal) of Heritage Protection Act, which was valid in itself —> its legal character was to amend the ambit of Aboriginal heritage protection —> NO need to consider race power