FEDERAL CONSTITUTIONAL LAW
LAWS2011
TOPIC NOTES

TOPIC A – Principles of Constitutional Interpretation

TEXTBOOK

Early Federal Doctrines (1903–1920)

- The first five High Court justices (appointed between 1903–1906) were actively involved in drafting the Constitution.
- **Key justices and their views:**
  - **Griffith CJ, Barton, and O'Connor JJ**: Their views on Australian federalism aligned with most constitutional framers.
  - **Isaacs and Higgins JJ**: Often held minority positions during the 1890s Convention Debates.
- **Two key doctrines developed by the majority (Griffith, Barton, and O'Connor):**
  1. **Reserved Powers Doctrine** (or 'Implied Prohibitions')
  2. **Immunity of Instrumentalities Doctrine**
- **Isaacs and Higgins JJ** strongly opposed both doctrines, particularly Isaacs J.
- As the composition of the High Court changed over time (due to justices retiring or passing away), the balance of judicial views shifted, leading to the eventual demise of both doctrines.

Reserved State Powers Doctrine

- **Definition**: A principle of constitutional interpretation stating that if a Commonwealth legislative power (under ss 51 or 52) could be interpreted **broadly or narrowly**, the **narrow interpretation** should be preferred.
- **Purpose**: To **limit** the extent to which Commonwealth legislation intrudes into areas traditionally reserved for **State legislative power**.
- **Favoured the States** over the Commonwealth.
- **Not reciprocal**: Unlike Commonwealth legislative power, State legislative power is **not** restricted to specific topics.

Immunity of Instrumentalities Doctrine

Definitions and Origins

- Unlike the Reserved Powers Doctrine, which **protected only the States**, the Immunity of Instrumentalities Doctrine applied **reciprocally** to **protect both the Cth and the States**
- First articulated in *D'Emden v Pedder* (1904), where Griffith CJ, Barton, and O'Connor JJ held:
  - A State law that **fettered, controlled, or interfered** with the legislative or executive power of the Cth was **invalid**, unless expressly authorised by the Constitution.
- In *D'Emden*, this meant that Cth officers were exempt from State stamp duty

Extension to States

The **reciprocal application** of the doctrine was confirmed in *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association* (1906) (**'Railway Servants Case')**, which held that the State instrumentalities were also **protected from Cth industrial relations laws.**

Justification for the Doctrine

- Based on the federal structure of the Constitution, which was seen as creating a **'co-ordinate' federalism**, where:
  - The Cth and the States operated in separate spheres
  - Neither could interfere with the other's powers
- The HCA relied on US precedents, such as *McCulloch v Maryland* (1819) and *Collector v Day* (1870)

Exceptions & Limitations

1. **State taxation on Cth employees**
   - *Chaplin v Commissioner of State Taxation (SA)* (1911) 12 CLR 375 held that **non-discriminatory** State taxes could apply to Cth employees' salaries
   - This suggested that Cth Parliament could waive constitutional immunity

2. **Cth legislative control over States in certain areas**
    - *R v Sutton* (1908) **(Wire Netting Case)**
    - *Attorney-General for NSW v Collector of Customs* (1908) **(Steel Rails Case)**
    - Held that States were subject to Cth customs, quarantine, and similar regulatory powers under s 51(i), (ii), (ix), (xv) and (xxvii)
    - Based on the exclusive nature of Cth customs powers
3. **State instrumentalities engaged in commercial activities**
    - *Federated Engine Drivers' and Firemen's Association of Australia v BHP* (1911) held that the State-owned enterprises engaging in non-governmental functions (e.g. selling electricity) could be subject to Cth industrial laws

Challenges to the Doctrine

- The Privy Council opposed the doctrine in *Webb v Outtrim* (1906), ruling that a Cth officer's salary was subject to Victorian income tax
- This decision was rejected by the HCA in *Baxter v Commissioner of Taxation (NSW)* (1907), where Griffith CJ famously compare the Privy Council's reasoning to an **'astral intelligence'** trying to interpret the Constitution with a dictionary.
- Isaacs and Higgins JJ dissented, questioning both the Immunity of Instrumentalities and Reserved Powers doctrines.

Demise of the Doctrine – The Engineers' Case

***Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) (HCA)**

FACTS: An industrial dispute arose between the Engineer's Union and various employers, including the WA government, which operated the State Saw Mills and State Implement & Engineering Works. The union sought a Cth industrial award to apply to State employees.

ISSUE: Could a Cth industrial award, made under s 51(xxxv) (conciliation and arbitration power), constitutionally bind a State employer?

HELD (Knox CJ, Isaacs, Rich, Starke JJ (joint judgement) and Higgins J (separate opinion): The Cth had the constitutional power to legislate in industrial relations affecting State employees. Rejected implied intergovernmental immunities (i.e. immunity of instrumentalities and reserved powers doctrines). The Constitution should be interpreted based on its text rather than implications derived from political necessity or federal theory.

- **Isaacs J:**
    - Criticised past HCA rulings for relying on implications rather than the text of the Constitution.
    - Stressed that the Cth's legislative power under s 51(xxxv) was not limited by any implied State immunity.
    - Emphasised that s 109 (Cth law prevails over inconsistent State law) provided a clear framework for resolving conflicts.
- **Impacts of the *Engineers' Case***
    - Marked the end of implied intergovernmental immunities
    - Established that States and their agencies were subject to Cth laws unless expressly exempted.
    - Shifted Australian Federalism towards a centralised mode, where **Cth powers were interpreted broadly**.

Characterisation and Interpretation

What is characterisation?

- **Definition:** The process of determining whether a **federal law** is a law **'with respect to"** a **head of Cth legislative power** under **s 51 or s 52** of the Constitution

Steps in characterisation

1. **Examine the law**: Identify the 'rights, powers, liabilities, duties and privileges it creates' (*Grain Pool*). This is characterisation in the narrow sense – determining the nature of the law. What does it do. What was the law before and what is it now?
2. **Interpret the relevant head(s) of power**:
    - What do the **words and phrases** in the constitutional provision mean?

TOPIC B – Inconsistency

TEXTBOOK

Section 109 – Overview

What is s 109?

- Section 109 of the Constitution resolves conflict between Cth and State laws
- If a state law is inconsistent with a valid Cth law, the Cth law prevails
- The state law becomes invalid "to the extent of inconsistency"

Why does inconsistency occur?

- Both Cth and State parliaments can legislate on the same subject because many Cth powers (s 51) are not exclusive
- This leads to overlapping, conflicting, or repugnant legislation

Scope of s 109

What s 109 does NOT apply to:

- Does NOT resolve conflicts between:
  - Cth and Territory laws → instead, territorial laws may be invalid due to repugnancy or lack of power
  - State laws from different states → No constitutional provision directly resolves these conflicts
  - State and territory laws → there is debate over whether s 109 applies, but it generally does not

How state laws can still operate extra-territorially

- States can make laws that apply beyond their orders (e.g. NSW taxing companies operating outside NSW; *Broken Hill South v Commissioner of Taxation (NSW)* (1937)).
- However this does not prevent inconsistency issues with Cth laws

Purposes of s 109

Scholars and judges have identified different objectives for s 109:

1. **Federalism & institutional protection**
   - *Flaherty v Girgis* (1989) – Kirby P at 470:
     - S 109 helps maintain harmony in a federal system where multiple legislatures operate
   - *Re Foreman & Sons Pty Ltd; Uther v FCT*(1947) – Latham CJ at 520:
     - S 109 protects Cth functions from state interference
2. **Ensuring legal clarity**
   - S 109 clarifies when a state law must be disobeyed because it is inconsistent with Cth law
   - Example: *Croome v Tasmania* (1997)
     - A state criminal law was declared invalid even though no one had been prosecuted under it
3. **Protecting individuals from conflicting laws**
   - *University of Woollongong v Metwally* (1984) – Deane J at 477:
     - S 109 prevents individuals from being subject to conflicting state and Cth laws

What is a 'Law' under s 109?

- Includes **legislation** from State and Cth Parliaments (*Engineers' Case* (1920) at 155)
- Includes **subordinate/delegated legislation (e.g. regulations)**: *O'Sullivan v Noarlunga Meat (No 1)* (1956 – Cth regulations prevailed over State laws
- Cth **industrial awards**
- Does **NOT** include:
  - **Administrative orders or instructions** issued under Cth laws (*Airlines of NSW (No 1)* at 31)
  - **Cth common law or prerogative powers** (rejected in *Cowburn* (1926) at 497; *Ex parte McLean* (1930) at 483-485; *Farley's Case* (1940) Evatt J)

Inconsistency tests

The HCA has developed three main approaches to determine whether an inconsistency exists between Cth and State laws under s 109 of the Constitution:

1. **Impossibility of simultaneous obedience**
2. **Denial of rights**
3. **Covering the field**

Some argue that the second and third tests merge into one because both deal with whether State laws 'interfere' with Cth laws, rather than requiring contradiction

Impossibility of simultaneous obedience

- This is the strictest test: A state law is inconsistent only if it is impossible to obey both laws at the same time
- The State law is invalid if compliance with it automatically means breaking the Cth law
- **Example:** If a State law mandates an action that a Cth law prohibits, there is a direct inconsistency

***R v Licensing Court of Brisbane; Ex parte Daniell* (1920) HCA**

FACTS: s 166 of *Liquor Act* (Qld) required a referendum on liquor trading on the same day as the Senate election. S 14 of Cth Act prohibited any State referendum from being held on a Senate election day. Following one law meant disobeying the other.

HELD: Inconsistency existed → The State law was invalid because it was impossible to obey both laws at the same time

Denial of rights (alters, impairs, or detracts test)

- A state law is invalid if it '**alters, impairs, or detracts'** from a right conferred by Cth law (Dixon J at 630 *The Karkariki Case* (1937))
- Even if obedience to both laws is possible, a State law that takes away rights granted by Cth law is inconsistent
- **Example**: If a State law removes of limts a right provided by Cth law it will be inconsistent

***Clyde Engineering Co Ltd v Cowburn* (1926)**

FACTS: Cth award → 48-hour workweek (workers lose pay for time not worked). NSW law → 44-hour workweek (workers must be paid full wages for 44 hours). Cowburn worked a 44hr week and invoked NSW law and CE deducted an amount from wages, according to Cth award. The NSW law took away the Cth right of employers to deduct pay from workers who worked fewer than 48 hours.

HELD: State law was invalid because it denied a right given by Cth law. Obedience to both laws was possible, but State law interfered with a right created by Cth.

***Colvin v Bradley Bros Pty Ltd* (1943)**

FACTS: NSW law prohibited women from operating milling machines. Cth industrial award allowed women to be employed in any factory. State law took away a right conferred by Cth award.

HELD: Inconsistency existed → The State law was invalid because it denied a right granted by the Cth award.

Covering the Field

The covering the test is the broadest and most expansive basis for determining inconsistency under s 109. It was first articulated by Isaacs J in *Cowburn* at 489:

- **Key principle:** If the Cth Parliament intends to cover an entire area of regulation, then any State law that enters that field is automatically inconsistent, even if the State law does not directly contradict the Cth law.
- **Why does this matter?**
    - Unlike the impossibility of obedience and denial of rights tests, this test can invalidate laws even if they align with Cth laws.
    - It significantly broadens the scope of Cth legislative supremacy under s 109
    - If Parliament intends to completely regulate an area, no State law can enter that field

Key questions

To determine whether inconsistency exists, courts ask:

1. **What is the subject matter of the Cth law?**
    - Identify the specific area regulated by the Cth legislation

        - A law with a purely domestic operation may still be supported by s 51(xxix) **if** it advances a legitimate external affairs purpose (309).
    - However, merely asserting an external purpose is **not sufficient**:
        - "The mere fact that there can be discerned some purpose or object… which the impugned law is designed to advance or achieve will not, of itself, suffice for such characterization" (at 310).
    - The external purpose must:
        - **Pervade and explain** the law's operation;
        - Be **reasonably clear**;
        - Be **really and not colourably referable** to the external affairs purpose (311).
- **Two-Step Test for Domestic Laws under External Affairs Power**
    - **(1) Identify a legitimate external affairs purpose**:
        - Such as carrying out a treaty, performing an international obligation, or obtaining an international benefit (311).
        - It is an **objective inquiry** into the law's purpose, not the subjective motives of Parliament.
    - **(2) Reasonable proportionality**:
        - There must be a **reasonable proportionality** between the law's means and its external purpose (312).
        - The law must be capable of being **reasonably considered appropriate and adapted** to achieving the external purpose.
        - "[T]he operation of a law will not properly be seen as explained by the designated purpose or object unless it appears that that operation is capable of being reasonably considered to be appropriate and adapted to achieve it" (at 312).
    - The test is **less strict** than requiring the Court to be *positively* persuaded of appropriateness — it suffices if the law is **reasonably capable** of being viewed as appropriate.
- **Constitutional Context**
    - Deane J stressed that **not every domestic law** linked in some vague way to international affairs can be upheld:
        - "[I]t would be to ignore the constitutional context of s 51(xxix) to hold that the mere assertion of an external purpose suffices to justify a Commonwealth regime of complete control over a State" (at 310–311).
    - He warned against interpreting s 51(xxix) so broadly that it effectively grants the Commonwealth **general legislative power** over the economic, social, and moral wellbeing of Australians.

KEY TAKEAWAYS

- **Domestic laws can fall under s 51(xxix) if they have a genuine external purpose**
    - "Such a purpose or object must pervade and explain the substantive operation of the impugned law…" (Deane J at 310)
- **Two-step test: (1) legitimate external purpose, (2) reasonable proportionality**
    - "[T]here must be a reasonable proportionality between that purpose or object and the means which the law adopts to pursue it." (Deane J at 311–312)
- **Objective assessment of the law's purpose; not subjective legislative motives**
    - "It is a reference to the purpose or object of the law itself…" (Deane J at 311–312)
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Victoria v Commonwealth **(The Industrial Relations Act Case) (1996) 187 CLR 416**

FACTS: Victoria, South Australia, and Western Australia challenged amendments to the *Industrial Relations Act 1988* (Cth), introduced by the *Industrial Relations Reform Act 1993* (Cth) and the *Industrial Relations Amendment Act (No 2) 1994* (Cth). The impugned provisions imposed obligations on employers relating to:

- Minimum wages,
- Equal pay,

TOPIC E – Races Power

CLASS MATERIALS

Section 51(xxvi) - Introduction

Section 51(xxvi): The Parliament shall, subject to this Constitution, have powers to make laws for the peace, order, and government of the Commonwealth with respect to… (xxvi) the people of any race for whom it is deemed necessary to make special laws.

Historical Context & 1967 Referendum

- **Original wording** excluded "the aboriginal race of any State", leaving Indigenous Australians under State jurisdiction. This was reflective of a federation-era intent to allow the States to control Aboriginal affairs, including land, policing and labour.
- **1976 Amendment** removed this exclusion. This reform was passed with 90.8% approval – the highest for any referendum in Australian history. The public overwhelmingly believed the change would enable "a better deal" for indigenous Australians (French, *The Races Power: A Constitutional Chimera* (2003), 189).
- **The amendment did not alter the text's core operative features:** it remained a power to make "special laws" for people of "any race", only now it could include Aboriginal Australians.

Purpose of the Races Power

- Originally conceived as a **limitation on racial equality**, enabling Parliament to legislate in racially discriminatory ways if "deemed necessary" – both protectively and repressively.
- The phrase "deemed necessary" implies a **broad legislative discretion**, though subject to constitutional limits such as the separation of powers and possible implied rights (as argues in later case law).

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

FACTS: The Aboriginal Land Fund Commission sought to buy land in Far North QLD for the Winychanam people, including John Koowarta. Under QLD law, ministerial approval was required to transfer land to the Commission. The QLD Government refused consent on policy grounds, stating it did not view favourably the development of large areas of land "by Aboriginies or Aboriginal groups in isolation" (at 176). K claimed this refusal contravened the *Racial Discrimination Act 1975* (Cth) (RDA), particularly:

- s 9: Prohibits acts based on race that impair human rights.
- s 12: Prohibits racially discriminatory acts regarding land dealings.

ISSUE: Was the RDA supported by a valid head of power – either s 51(xxix) (external affairs) or s 51(xxvi) races power?

HELD (Majority – Gibbs CJ, Stephen, Wilson, Aickin, Brennan JJ): RDA is valid under s 51(xxix) (external affairs), implementing Australia's international obligations under the *International Convention of the Elimination of All Forms of Racial Discrimination*. But, **RDA not valid under s 51(xxvi).** The Act was not a "special law" for the people of any race, but a general law prohibiting discrimination against *all* races. Mason J agreed on s 51(xxix), declined to decide on s 51(xxvi). Murphy J (dissent) argued RDA is valid under both s 51(xxix) and s 51(xxvi). The races power should not be confined to laws "for the benefit" of the people of any race.

REASONING ON s 51(xxvi)

Gibbs CJ (majority)

- The races power historically enabled *discriminatory* laws, not just protective ones: e.g. restrictions on Chinese, Afghan and Kanaka workers prior to Federation (at 186, citing Quick & Garran and Sawer).
- A "special law" must be directed *to* a particular race – not one that applies to all races equally: "A law which applies equally to the people of all races is not a special law for the people of any one race" (at 187).
- Parliament may "deem" it necessary to make a special law for a race without formal declaration, but this must be evident from the content of the law itself (at 187).
- Ss 9 and 12 of the RDA apply generally and uniformly, thus not "special laws" for any one race under s 51(xxvi) (at 187).

Murphy J (dissent)

- Strongly disagreed with the idea that s 51(xxvi) authorises laws adverse to a race.

- Interpreted "for" in "for the people of any race" as meaning *for the benefit of:* "It does not mean 'with respect to', so as to enable laws intended to affect adversely the people of any race" (at 242).
- Highlighted the moral and purposive shift after the 1967 amendment, arguing that the races power should not be used to harm racial groups.
- Appended 29 reports and books evidencing discrimination against Aboriginal Australians, underscoring the importance of beneficial interpretation (at 243).

KEY PRINCIPLES

- **Majority view:** A law must single out *a particular race* and operate specifically on that race to fall within s 51(xxvi). A general prohibition of racial discrimination across *all* races is *not* a valid exercise of this power.
- **"Special law" ≠ general law:** A law for all races equally is not "special" for any one race (Gibbs CJ at 187)
- **Parliamentary deeming:** Parliament need not expressly state that a law is "deemed necessary", but the necessity must be implicit in the statute (Gibbs CJ at 187).
- **Murphy J's beneficial reading:** s 51(xxvi) should only allow laws for the *benefit* of races – not to disadvantage them (at 242).

***Tasmanian Dam Case* (1983)**

FACTS: The Cth enacted the *World Heritage Properties Conservation Act 1983* (Cth) to prevent the Tasmanian Gov from constructing a dam on the Gordon River, arguing that the area contained Aboriginal sites of archaeological and cultural significance. Sections 8 and 11 of the Act empowered the G-G to declare sites of "particular significance to the Aboriginal race" and prevent works without Ministerial consent. The Cth relied in part on s 51(xxxvi) to support these provisions. The HCA considered whether ss 8 and 11 were valid as "special laws for the people of the Aboriginal race".

ISSUES:

1. What constitutes a '*race'* under s 51(xxvi)?
2. What is a '*special law for the people of any race"*?
3. Must such a law be *beneficial* to that race to be valid?
4. Could the protection of sites with cultural significance qualify as a special law?

HELD (Majority – Mason, Murphy, Brennan, Deane JJ): Sections 8 and 11 are supported by s 51(xxvi).

What is a 'race'?

- **Brennan J:** Race is not a legal or scientific term. It includes both biological descent and shared cultural, spiritual, or historical identity. It is sufficient that members of a group identify themselves, and are identifies by others, as a race based on common heritage beliefs or physical characteristics (at 244-245).
    - "Race… includes physical similarities, and a common history, a common religion or spiritual beliefs and a common culture…" (at 244)
- **Deane J** similarly endorsed a broad, non-technical definition, finding the term "people of any race" includes all Aboriginal Australians collectively and any identifiable sub-groups, defined by descent, self-identification, and community recognition (at 274).

What is a 'special law'?

- **Brennan J:** A law may be 'special' in operation even if not on its face. A law that protects something of 'particular significance' to a race (e.g. spiritual or cultural sites) can validly be a special law (at 245-246).
    - "It suffices that [the law] is special in its operation" (at 245)

  A law need not confer rights or privileges directly – it is enough if its operation favours the people of a race in protecting something of special cultural meaning to them. For Brennan J, s 11 was valid because it protected sites that were culturally significant to the Aboriginal people (at 246).
- **Mason J** agreed: cultural heritage is inseparably connected to a people and its protection constitutes a special need. Even if such sites are of value to all humanity, their *special* cultural significance to Aboriginal people justifies their protection as a 'special law' (at 159-160).
- **Murphy J:** Expressly held that s 51(xxvi) can support laws for the benefit of a race. He characterised the sections as laws preserving evidence of Aboriginal culture, especially vital given the history of attempted genocide in Tasmania (at 181).
- **Deane J:** A law protecting ancient Aboriginal sites is 'with respect to' the people of the Aboriginal race, as it protects not just land but the "spirit, belief, knowledge, tradition and cultural and spiritual heritage" of that people (at 276).

TOPIC F – Taxation (ss 51(ii), 55, 90)

CASEBOOK

Section 51(ii): Taxation Power

Section 51(ii): The Commonwealth may legislate with respect to "**taxation; but so as not to discriminate between States or parts of States**".

- This power is **plenary** but subject to:
    - **Express and implied constitutional limitations**: e.g. s 51(xxxi), s 92, and federalism-based implications.
    - **Section 90** gives the Commonwealth exclusive power to impose duties of customs and excise and to grant bounties on production or export, rendering any equivalent State laws invalid once uniform customs duties are in place. It ensures national fiscal control by preventing States from imposing taxes on goods at the production or distribution stage
    - **S 99**: prohibits giving preference to one State over another.
    - **Ss 53–55**: protect the **Senate's role in financial legislation** and **prevent abuses of legislative power**, rooted in British parliamentary history.

Sections 53–55: Origins and Purpose

- Reflect the **financial primacy of the House of Representatives**, mirroring the British Commons' 1678 resolution: "...aids and supplies... are the sole gift of the Commons..." and the 1702 House of Lords' resolution against "**tacking**" unrelated measures onto supply bills.
- These principles were embedded into the Constitution via the **"Compromise of 1891"** and re-affirmed at the **1897 Adelaide Convention**.

Section 53: Limits on Senate Power

- **Taxation bills must originate in the House of Representatives.**
- **Senate cannot amend** taxation bills, but may:
    - **Request amendments**,
    - **Reject the bill outright** (e.g. *PMA Case* (1975) 134 CLR 81 at 121 (Barwick CJ), 143 (Gibbs J), 168 (Stephen J), 185 (Mason J); *AG (NSW) v Trethowan* (1931) 44 CLR 394 at 420 (Rich J)).

Section 55: Anti-Tacking & Subject Limitations

- Prohibits laws imposing taxation from dealing with **any other matter**, and mandates they deal with **one subject of taxation only**.
- Purpose: **Prevent tacking** (House attaching unrelated policies to tax bills, forcing Senate to accept both or neither).

Terminological Significance:

- **Sections 53–54** refer to "*proposed laws*", **s 55** refers to "*laws*".
    - Therefore, **ss 53–54 noncompliance** likely **non-justiciable**, only relevant at **bill stage** (*Osborne v Cth* (1911) 12 CLR 321 at 336, 351–2, 355–6).
    - High Court in *Northern Suburbs Cemetery v Commonwealth* (1993) 176 CLR 555 at 578: traditional view accepted (also *Buchanan v Cth* (1913) 16 CLR 315 at 329).
    - *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 482: s 53 not justiciable post-enactment.
    - But **s 55 may be enforceable post-enactment** due to its reference to "laws".

Scope of "Imposition of Taxation" under s 55

Narrow View (Majority in *Re Dymond* (1959) 101 CLR 11 at 20–21 per Fullagar J; concurred by Dixon CJ, Kitto & Windeyer JJ):

- A law **"dealing only with the imposition of taxation"** cannot include machinery provisions (returns, assessments, penalties).
- These are **"incidental to the imposition"**, but not part of the "imposition" itself.

- Commercial pricing rationale (Ramsey principles),
- Imposition only on users (at [319]–[321]).

Gleeson CJ and Kirby J (at 178–179 [91]–[94])

- Noted that not all taxation is revenue-raising and some taxes are inefficient.
- However, here:
  - The charges were for identifiable services and facilities,
  - Levied on users only,
  - Reasonably related to expenses incurred,
  - Supported a highly integrated national system,
- "There is no warrant for concluding that the charges amounted to taxation" (at [93]).

Gaudron J (at 192 [141]–[142])

- Set out **three criteria** for identifying a valid fee for service in a commercial public monopoly:
  1. Levied **only on users** of the services;
  2. Levied **on all such users**;
  3. **Commercial justification** for discriminatory pricing between users.
- These criteria were met. The services were delivered by a **public monopoly operating on a user-pays basis**, and pricing reflected economic efficiency (at [142]).

Gummow and Hayne JJ

- Agreed with Gaudron J on the taxation issue (at [516]).

PRINCIPLES

- **A charge will be a tax if it lacks a link to identifiable services**, even if compulsory and public.
- However, **compulsory acquisition of services in a monopoly context** will not necessarily render the charge a tax, especially when:
  - The provider is a **statutory authority with commercial functions**,
  - The charge supports **cost recovery and efficiency**, not general revenue raising,
  - There is a **coherent and policy-based pricing structure** (e.g. Ramsey pricing).
- The **discernible relationship test** remains relevant but is applied flexibly, especially where monopoly supply or service integration prevents individualised pricing.

***Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480**

FACTS: The Commonwealth imposed a **levy on the sale of blank audio tapes** under the *Copyright Act 1968 (Cth)*, directing the proceeds to a fund administered by a **private body** (the Australian Performing Rights Association, APRA) for the benefit of copyright owners to compensate for private copying.
The plaintiffs challenged the law as invalid under **s 55 of the Constitution**, arguing it imposed a tax but did so impermissibly within a law not dealing only with taxation.
ISSUE: Was the **levy on blank tapes** a "tax" within the meaning of **s 55 of the Constitution**, and therefore subject to the procedural and substantive constraints of that section?
HELD: Yes. By majority, the High Court held the levy was a **tax**, and the legislation was invalid to the extent it breached s 55 by including provisions other than taxation in a law imposing taxation.
REASONING
Mason CJ, Brennan, Deane & Gaudron JJ (joint judgment)

- Reaffirmed Latham CJ's classic definition from *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276: a tax is a **"compulsory exaction of money by a public authority for public purposes, enforceable by law, and not a payment for services rendered"** (at 497).
- Emphasised that this definition provides a **"generally acceptable guide"**, but **not exhaustive**. The **key determinant** is the **compulsory character and the public purpose** of the exaction, regardless of how the funds are used or who administers them (at 497–498).
- The **fact that the money was paid into a fund administered by a private body** did not prevent the exaction from being taxation. What mattered was that the **levy was imposed by law and enforceable by law**, not the identity of the recipient (at 498–499).
- "The fact that the money exacted is ultimately paid into a fund administered by a private body is not inconsistent with the characterisation of the exaction as a tax" (at 498).

- Clarified that the "public purpose" requirement is **not confined to the raising of revenue for general government purposes**, and can include purposes Parliament deems to be in the public interest, such as compensating copyright owners (at 498–499).
- Rejected arguments that the exaction was not a tax because it was **not paid into consolidated revenue**. The payment into general revenue is **not essential** to the concept of a tax under s 55 (at 499).

Dawson J (dissenting)

- Emphasised that a **tax must be a compulsory contribution for government purposes**, and argued that here, the money was **not collected for government use**, but for private distribution (at 508).
- Found the purpose to be **"essentially private"** — redistribution to copyright holders — and held that this disqualified it from being a tax (at 509).
- Considered that **paying money to a private organisation for the private benefit of copyright holders**, without being appropriated to the Crown, **lacked the public element** necessary for taxation (at 510).

Toohey J (concurring in result)

- Accepted that the levy had the **key indicia of taxation** — compulsory, imposed under statute, enforceable by law — and **rejected the argument that payment to a private body undermined its public character** (at 504).
- Focused on the **substance of the legal exaction** rather than its form or ultimate destination: "it is not fatal to the characterisation of the charge as a tax that the money is not paid into the Consolidated Revenue Fund" (at 504).

PRINCIPLES

- The definition of "tax" under s 55 includes **any compulsory exaction of money by statutory authority for public purposes, enforceable by law**, even where the funds are not paid into general revenue or administered by government. The **identity of the recipient is not determinative**.
- A payment may still be a tax even if the proceeds are **distributed by a private organisation**, so long as the exaction arises from statutory authority and serves a **publicly endorsed purpose** (*ATM Case* at 497–499; 504).
- The case **extends the scope of "public purpose"** for taxation: it need not involve funding government operations — **legislatively sanctioned redistribution to achieve policy goals** can suffice.
- Courts will focus on the **legal source, nature, and compulsion** of the exaction, not merely the destination of funds. As such, even **levies that serve private beneficiaries may still constitute taxation**, so long as the imposition itself reflects public law authority.

***Harper v Minister for Sea Fisheries* (1989) 168 CLR 314**

FACTS: The plaintiff, a Tasmanian abalone fisherman, challenged the validity of *reg 17A of the Sea Fisheries Regulations 1962 (Tas)*, which prohibited taking abalone in State waters without a licence. From 1989, licence fees became fixed: $28,200 for up to 15 tonnes and $40,000 for over 15 tonnes. Harper argued the fee was a **duty of excise** and thus invalid under **s 90 of the Constitution**.

ISSUE: Was the abalone licence fee a **duty of excise**—and thus a tax within the exclusive power of the Commonwealth under **s 90**—or a valid **fee for a property-like privilege**?

HELD: The High Court unanimously held the regulation was valid. The fee was not a tax or a duty of excise.

REASONING

Brennan J

- **Characterisation of the licence right:** The regulation abrogated the public right to fish and conferred a limited statutory privilege to take abalone, "a privilege analogous to a profit à prendre in or over the property of another" ([334]).
- **Nature of the fee:** The fee was not a general regulatory charge or tax but rather "the price of a profit à prendre"; it was "a charge for the acquisition of a right akin to property" ([334]).
- **Distinction from taxes:** Although the fee had the **positive attributes of a tax** under the definition in *Matthews v Chicory Marketing Board (Vic)*—i.e. "a compulsory exaction of money by a public authority for public purposes, enforceable by law" (per Latham CJ at 276)—those attributes were not determinative. It was not "a payment for services rendered" nor was it "a tax" where it had the **character of a property charge** ([334]–[335]).

TOPIC F – Grants (s 96)

CASEBOOK

Section 96: Grants and Terms & Conditions

Section 96 – Financial Assistance to States: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

- Operates **indefinitely**, despite time qualifier.
- Became **key mechanism** for Commonwealth to exert influence over State policy via **conditional grants**.
- Inserted as a **compromise for smaller States** (esp. Tasmania) in exchange for limiting the Braddon guarantee (Saunders, *The Hardest Nut to Crack*, in Craven (1986), p 171).

Constitutional Framework

- **Section 90** gives the Commonwealth exclusive power over **customs and excise**, depriving States of major revenue sources.
- **Section 87 (Braddon Clause)** initially guaranteed **¾ of Commonwealth customs and excise revenue** to States.
    - **Limited to first 10 years post-Federation** by the **Melbourne Premiers' Conference (1899)** to appease NSW voters.
    - **Repealed** by ***Surplus Revenue Act 1910* (Cth), s 3**.

Post-Federation Tax Practice

- Both Commonwealth and States levied **income tax** pre-WWII.
- Commonwealth tax was **uniform (per s 51(ii))**, but **State taxes varied** in burden and incidence, causing inequality.

WWII and the 1942 Uniform Tax Scheme

- War (esp. the **Pacific War 1941–45**) demanded higher federal revenue.
- Commonwealth–State negotiations over a joint income tax system failed.
- **Curtin Government (ALP)** introduced a **unilateral uniform income tax scheme** on **1 July 1942**.
    - States were incentivised to stop collecting their own income tax via **s 96 grants**.
    - Marked a **turning point** in the **financial dominance** of the Commonwealth over the States.

R.L Mathews & W.R.C Jay, *Federal Finance: Intergovernmental Finance Relations in Australia Since Federation* (1972) 171-173

Background: War, Welfare, and Tax Reform

- During WWII, the Commonwealth needed significantly more revenue:
    - For **war financing** and later for **social welfare**.
    - Income tax rose from **16% (1938–39)** to **44%** of total Commonwealth taxation pre-uniform tax.
- However, **State income taxes** impeded equitable federal tax collection:
    - Definitions of **taxable income**, **rates**, and **progressivity** varied widely between States.
    - Result: major disparities in tax burden across States and income groups.

Problems with Dual Taxation System

- Commonwealth couldn't increase rates uniformly without unfair impact:
    - E.g. Low-income earners in **NSW, QLD, WA** and high-income earners in **QLD** would be overburdened.
    - Uniformity was impossible due to:
        - Disparities in State systems.
        - Political resistance and practical delay in harmonising tax base and rate schedules.

The Policy Solution: Centralisation

- The **"obvious solution"** was a **single collector** imposing **uniform income tax**:

Federal Constitutional Law Scaffolds

LAWS2011

2025 Semester 1

USYD

CORPORATIONS POWER

1. **Which corporations can be regulated?**
    - What is a trading or financial corporation?
        - If you decide that is what it is, then…
2. **What aspects of those corporations can be regulated?**
    - Characterisation: must a law relate fundamentally / significantly to a 'trading', 'financial', or 'foreign' quality in order to be a law with respect to s 51(xx)?

1. Is the entity being regulated a constitutional corporation?

Introductory framing:

Section 51(xx) of the Constitution grants the Commonwealth Parliament power to legislate with respect to "**foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth**." This is a power with respect to *persons*, rather than a subject matter like trade and commerce or external affairs (cf s 51(i), (xxix)). Therefore, the first threshold issue in any s 51(xx) analysis is whether the entity being regulated falls within one of the three classes of constitutional corporations: foreign, trading, or financial corporations. The High Court has developed tests for identifying such corporations based on either their formation or their activities, depending on the category.

1.1 Foreign corporations

- A "foreign corporation" is one formed outside the limits of the Commonwealth (*Incorporation Case* (1990) 169 CLR 482 at 504).
- This category focuses on *formation*, not activities, and includes bodies incorporated overseas with legal personality.

1.2 Trading and financial corporations

- The terms *trading* and *financial* are not technical terms of art and do not have any special or narrow meaning in the Constitution: *State Superannuation Board* (1982) 150 CLR 282 at 304 (Mason, Murphy and Deane JJ).
- The settled approach for both trading and financial corporations is the **current activities test**, first adopted in *Adamson's Case* (1979) 143 CLR 190 and extended to financial corporations in *State Superannuation Board*. This test moves away from the original purpose-based test (*St George County Council*) and asks whether **a significant proportion of the corporation's present activities are trading or financial in nature**.

1.2.1 Trading corporations

- *Trading* involves buying and selling goods or services for profit, or activities carried on with a view to earning revenue (*Adamson* at 234 (Mason J)).
- Under *Adamson*, it is irrelevant whether the corporation's trading is for commercial or charitable ends — the test is whether trading is *substantial*, not merely incidental or occasional.
- This test was reaffirmed in:
    - *Tasmanian Dam Case* (1983) 158 CLR 1: The Hydro-Electric Commission was held to be a trading corporation even though its public policy role predominated. The Commission's sale of electricity generated a gross trading profit of $103 million, which was a significant activity (at 156, 240).
    - *E v Australian Red Cross Society* (1991) 27 FCR 310: Red Cross was a trading corporation due to its retail activities, which generated over $2 million.
    - *Quickenden v O'Connor* (2001) 109 FCR 243: The University of WA was found to be a trading corporation, despite trading comprising only 18% of total revenue.
    - *Adamson*: AFL/NRL clubs that traded merchandise were trading corporations
    - *CEPU v Qld Rail*: Queensland Rail was a "trading corporation" under s 51(xx), even though the Queensland Act declared it was "not a body corporate."

- Whether an entity is a corporation is a **substantive legal question** based on its functions, legal status, and attributes — not labels given by State Parliaments (at [1]–[3], [28], [38]).
- QR operated "as a commercial enterprise," supplying rail services and labour, with a view to revenue. These were substantial trading activities.
- **Profit motive is not required** for an entity to qualify as a trading corporation (Gageler J at [73]–[74]).
    - Confirms that **substance prevails over form**, and that **State-owned corporations can fall within s 51(xx)** if they engage in significant trading activity.
    - Also useful where States attempt to immunise public entities from Cth power through definitional exclusions.

1.2.2 Financial corporations

- A **financial corporation** is one that engages substantially in financial activities — e.g., borrowing, lending, investment — even if done for social or governmental purposes (*State Super* at 304–305).
- In *State Super*, the Vic public service superannuation board managed over $487 million in investments, including loans and property. The High Court held it was a financial corporation despite its public purpose.
- Both trading and financial characterisations depend on the *significance* of the relevant activities, not their purpose.

Clarifications:

- The **rejection of the "dominant purpose" test** means that public, charitable, or governmental purposes are irrelevant if significant trading or financial activities are carried on (*Tas Dams*, *State Super*, *Adamson*).
- Classes are **not mutually exclusive**: a corporation may be both a trading and a financial corporation (*State Super* at 304).

Cautionary academic note:

- **Zines** argues that in light of the expansive interpretation adopted in *Work Choices*, the courts may in future need to reintroduce a purposive limitation to prevent all universities, hospitals, or even the Crown (as a corporation sole) from being swept in under s 51(xx).

1.3 Shelf companies (inactive or pre-operational corporations)

- Where a corporation has not yet commenced trading or financial activities, courts may assess its status using its *constitution, memorandum and articles of association*.
- In *Fencott v Muller* (1983) 152 CLR 570, the High Court held that Oakland Pty Ltd, though a shelf company with no current business, was a constitutional corporation based on the objects in its constitution, which indicated intended trading and financial activity (at 601–602 per Mason, Murphy, Brennan and Deane JJ).
- However, **Fencott's relevance is now uncertain**: as **Zines** notes, following reforms to corporations law, most companies are incorporated without specific objects and instead are given all the powers of a natural person. If taken literally, this would make all corporations constitutional corporations — a proposition the Court may resist in future by reviving some form of purpose-based or functional limitation.

1.4 Holding and subsidiary companies

- The High Court has not definitively resolved whether being a **holding company** or **subsidiary** of a constitutional corporation is sufficient to bring the entity within s 51(xx).
- There is **some judicial support** for such a connection being valid:
    - *Fencott v Muller*: the majority accepted that regulating holding companies could be incidental to regulating their subsidiaries.
    - *Actors Equity* (1982) 150 CLR 169: Murphy J suggested s 51(xx) could support laws directed at subsidiaries or affiliates of constitutional corporations.
- However, this view was not shared by all Justices — Stephen, Mason and Aickin JJ did not accept that the corporations power could extend to affiliates without further connection.

RACES POWER

1. **Identify a race** or sub-group of a race
2. Does the law have a **special effect** on that race, either in its **terms or operation?**
3. Does the law work to the **benefit or detriment** of that race?
    - **Majority in *Kartinyeri*:** Parliament can choose to do either, subject only to the possible constraint on 'manifest abuse'
    - **Minority in *Kartinyeri*:** Take 'necessary' and 'special' as words of limitations
        - E.g. Guadron J – must be:
            - (1) Basis for identifying difference;
            - (2) Reasonably appropriate and adapted to the difference

Introduction

The issue is whether **Section X** can be characterised as a law with respect to "the people of any race for whom it is deemed necessary to make special laws," and is therefore valid under **s 51(xxvi)** of the Constitution.

If the law is a **Commonwealth law**:

- Since it is a Cth law, the starting point is **Kitto J's characterisation approach in *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1**, which requires identifying the rights, duties, powers or privileges which the provision alters, while considering its practical operation (**Grai*n Pool of WA v Commonwealth* (2000) 202 CLR 479**).
    - **Section X purports to change/regulate/abolish [insert effect],** which suggests it can be characterised as a law with respect to [**insert subject matter**].
    - Under the **dual characterisation principle** from *Fairfax*, if a law is capable of two characterisations, one within power and one not, it is sufficient that one characterisation brings the law within a head of power.

If the law is a **State law**:

- Since it is a State law, it must be recognised that States have plenary legislative power, but are nonetheless subject to any express or implied constitutional limitations — for example, s 109 inconsistency or constraints derived from rights and freedoms implied in the Constitution.

1 Identify the Race or Sub-Group

The first issue is whether the law concerns "the people of any race" within the meaning of **s 51(xxvi)**. While the Constitution does not define "race," the High Court has adopted a broad and flexible interpretation.

In *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam*), **Brennan J** held that "race" is not a technical or scientific term, but includes both biological and socio-cultural elements. It is sufficient that members of the group identify themselves, and are identified by others, as sharing a distinct racial identity based on heritage, belief systems, or physical characteristics.

Relevant factors include:

- Biological descent (though not necessarily genetic proof);
- Shared physical features (e.g. skin colour, facial features);
- Common ancestry or geographical origin;
- Common history or traditions;
- Shared religion, spiritual beliefs, or cultural practices;
    - Although it may be argued that religion is something that is acquired through conversion and therefore has no biological element to be recognised as a race, the stronger argument is that the people of [**religion**] likely originate from a common geographical area and therefore likely exhibit physical similarities that create a sense of identity among members of [**race**]
- Self-identification and recognition by others (*Tasmanian Dam*, Brennan J at 244–245; Deane J at 274).

TAXATION

1. **Is it a tax** (*Matthews* criteria)
    a. Compulsory exaction
    b. Public authority (not necessary if it is being used as a collection agency for a public purpose)
    c. Public purpose
    d. Is it a fine/penalty, licence fee etc? (go through it quickly)
    e. Payment for services rendered?
2. Is it a law **with respect to tax?** (are the multiple purposes?)
    a. Multiple characterisation
3. Is it **tacking** and thus invalid? (are there other provisions not taxes/amendment)
    a. Non-taxing statute and you try to amend it with a taxing statute / provision
    b. Taxing statute and you try to amend it with a non-taxing statute
4. Does it **discriminate** between states?
5. Is it an **excise** (tax on goods)
    a. Identify if it is a tax (no need if already done)
    b. Identify if it attaches to goods

INTRODUCTION

The issue is whether the **[provision]** can be characterised as a law with respect to taxation and therefore be within a head of power pursuant to s 51(ii) of the Constitution, given it does not discriminate between States or parts of States.

1. Is it a tax, does it have the positive attributes of a tax? (*Matthews* criteria)

In order to determine whether **[Act]** provides for a tax, we apply the definition outlined in *Matthews*, in which a tax is a **compulsory exaction of money by a public authority for public purposes, enforceable by law**, and **not a payment for services rendered** (at 276). This test has been affirmed in *Air Caledonie* (at 467) and remains the foundational formulation for determining whether an exaction constitutes a tax for the purposes of ss 51(ii) and 55.

3.3 Positive Attributes

a. Compulsory Exaction

i. Is the exaction compulsory?

There is clearly a compulsory exaction in **[section]** as [**People identified in legislation**] have no option as to whether to pay the money or acquire the services.

ii. Can it still be a tax if framed as a fee or charge?

It may be argued that **X** is **not a compulsory exaction** because it is **framed as a fee or charge**. However, *Air Caledonie* confirmed that a charge may still be classified as a tax if:

1. The person has **no choice whether to receive the service** (e.g. immigration clearance);
    - In *Air Caledonie*, the charge applied regardless of consent and was therefore held to be a tax (165 CLR 462 at 470).
    - In *Airservices Australia*, although services were practically unavoidable, they were held to be rendered to the payer and thus not a tax.
2. The **fee has no discernible relationship with the service received**;
    - In *Air Caledonie*, there was no clear correlation between the fee and any individual service, especially for citizens re-entering Australia (at 470–471), supporting its classification as a tax.
    - By contrast, in *Airservices*, a reasonable relationship between the fee and cost of services—based on commercial pricing and Ramsey principles—meant the charge was not a tax (202 CLR 133 at [319]). Despite the fee not exactly matching the court was willing to accept that the fee was a reasonable way of calculating
3. The **service is not rendered to the person who pays the fee**.
    - In *Air Caledonie*, the administrative processes funded by the charge were not performed **for** the payer in a way that constituted a service (at 470).

    - Purpose trumps destination — a statutory levy administered by a private body may still serve a public purpose.
- **Not everything paid into CRF is a tax**: In *Luton v Lessels* (210 CLR 333), the exaction supported private obligations (child support), and remained private in substance despite CRF processing (at [6], [58], [80]).

iii. Can a public purpose go beyond direct government funding?

Yes — a law may be for a public purpose even if it does not directly fund the operations of government.

- Public purpose includes promoting social, economic or policy goals that Parliament considers important: *Roy Morgan* at [18]–[19].
- For example, *ATM* upheld redistribution to private copyright holders as a valid public purpose.

iv. What types of purposes have been accepted as "public"?

- Compensation to copyright owners: *ATM*.
- Raising funds for the CRF: *Airservices*, *Roy Morgan*.
- Income taxation as a general public obligation: *Fairfax* (114 CLR 1 at 6–7).

v. Example response (apply to facts):

Moreover, it is for a public purpose, which is [raising funds to compensate States for lost transfer duty revenue in pursuit of the regulatory goal of assisting first-time home buyers to access the property market].

The fact that the tax is paid into the [Residential Property Tax Holding Fund] rather than Consolidated Revenue is not in itself a problem (*ATM*). *Tape Manufacturers* is also authority for the proposition that the taxation power may be used to **redistribute burdens and benefits between private actors**, such as between existing residential property owners and first-time buyers.

3.4 Negative Attributes (assess after positive attributes)

a. Is it a fee for services rendered?

An exaction will **not** be a tax if it is properly characterised as a **fee for services rendered**. This depends on whether the following four criteria (drawn from *Air Caledonie*) are satisfied:

i. Is there a specific identifiable service?

In *Air Caledonie*, there was **no identifiable service** provided in return for the immigration clearance fee. The Court held that the **grant of entry to a citizen** is an **exercise of a right**, not a service (165 CLR 462 at 470).

The implication is that governmental acts falling within constitutional rights or duties cannot be reframed as services.

ii. Is a fee paid for the service?

There must be an amount clearly charged **in exchange** for the service rendered.

iii. Is the service rendered to, or at the request of, the person required to make the payment?

In *Northern Suburbs*, the training guarantee charge imposed on employers was **not a fee for service**, as the **training** was not rendered **to the employers** but to others (176 CLR 555 at 588).

The service must benefit the payer directly, not third parties.

iv. Is there a discernible relationship between the cost and the value of what is acquired?

Where the total charges **exceed the actual cost** of providing services, a **rebuttable presumption** arises that the charge is for revenue-raising purposes, not service delivery: *Airservices Australia* (202 CLR 133 at [291]).

- **However**, the Court in *Airservices* also accepted that the **costs and fees need not perfectly align** — particularly in the context of a monopoly service provider.
    - **Ramsey pricing** principles were relevant here: so long as the pricing is commercially justified across different user categories, it may still be a fee for service (at [314]–[318]).