Races power

Step 1: Identify the power

Section 51 (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

"Special Laws" → **Koowarta v Bjelke-Peterson** → NEGATIVE APPLICATION

- The legislation purporting to exercise the races power must be a 'special law' for the people of a particular race

For a law to be considered a valid exercise of the races power, it must affect a particular race, either negatively or positively, rather than confer a benefit (such as protection from racial discrimination) on the Australian people generally and all races equally.

- While in some contexts the word 'any' can be understood as having the effect of 'all', it would be self-contradictory to say that a law which applies to the people of all races is a special law (Gibbs CJ)

The flip side case for Koowarta → **Tasmanian Dam case** → POSITIVE APPLICATION

- Majority (Mason, Murphy, Brennan and Deane JJ) held that the Act was a valid use of the races power. Koowarta distinguished on basis that World Heritage Properties Conservation Act had special significance for Aboriginals, although all 'mankind' was interested in preservation of these Aboriginal sites.
    - Where Parliament seeks to confer a discriminatory benefit on the people of the Aboriginal race, s 51(xxvi) does not place a limitation upon the nature of the benefits which a valid law may confer and none should be implied
- the law is not required to be 'special' in its terms, but can be special in its operation
    - Thus, a law whose operation is to protect and preserve sights of universal value which are of particular importance to the Aboriginal people is also a special law for those people
- If there is a differential practical impact on one race, this is sufficient to bring the law within the head of power.
- Though protecting the rights of all mankind through Aboriginal sites of universal value, disproportionately affects Aboriginal people

Affirms Tasmanian Dam Case → **Western Australia v Commonwealth** (1995) ('Native Title Act Case')

- Do not make a judgement of necessity of law as that is for the parliament not court → some space if there is a abuse of races power
- The special quality of a law must be ascertained by reference to its differential operation upon the people of a particular race, not by reference to the circumstances which led the Parliament to deem it necessary to enact the law.

KEY PRINCIPLE: The court confirmed Tasmanian Dam by stating that the 'special' element may be produced:
1. where the law confers a right, benefit, obligation on people of a particular race, as well as
2. where the law confers a benefit generally, provided it is of some special importance to the people of the particular race.

Meaning of 'race' → Tasmanian Dam Case

Meaning of race: The word 'race' is not precise, but includes physical similarities, common history, religion, spiritual beliefs and culture. It does NOT have to have a biological element per se.

For the benefit of a race? → **KARTINYERI V Commonwealth**

Grants power

Section 96: 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

Section 96 lets you play fav child and s51(ii) and s99 will not stop it:

- Victoria v the commonwealth "the federal roads case" → case for **CONDITIONAL** grants
- **Deputy Federal Commissioner of Taxation (NSW) v WR Moran (1939) 61 CLR 735 ('Moran's Case')** → case for **UNCONDITIONAL** grants

Uniform tax cases

South Australia v Commonwealth (1942) 65 CLR 373 ('First Uniform Tax Case') → majority considered each of the acts individually

1. Invalid for court to say tax is too high or too low hence they cant say such a legislation is invalid
2. Valid if it says to states not to levy tax rather than compelling them to → (relying on Federal Roads Case)

Victoria v Cth (1957) 99 CLR 575 ('Second Uniform Tax Case')

1. Giving priority to fed over state income tax → INVALID
2. Use of s 96 to compensate for lost income tax revenues? → VALID
    a. susceptible to a very wide construction
    b. The only restrictions on use of s 96 are that it must be used for providing financial assistance (rather than for enacting ordinary legislation) and must not be used coercively (laws which **'demand obedience' [e.g. sanctions rather than policies**]
    c. Provided law provides for financial assistance, Cth may set any conditions it likes

Limits of the power

Commonwealth not to legislate in respect of religion → S116

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

- **Is a limitation on grants power**

Attorney-General (Vic); Ex rel Black v Cth (1981) 146 CLR 559 ('DOGS Case')

- A law which finds its authority in s 96 may nevertheless be subject to s 116
- ss 96 and 116 should be read together – result being that the Commonwealth has power to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit, provided that a law passed for that purpose does not contravene s 116
    - An Act which granted money to a State on condition that the State would prohibit entirely the exercise of a particular religion would be a law for prohibiting the free exercise of that religion and would be invalid

PARA

The issue is whether the Act is a valid exercise of the Commonwealth's grants power under s 96, which permits the Commonwealth to grant financial assistance to any State on such terms and conditions as it thinks fit. The grants power is exceptionally broad and is not confined by subject-matter limitations, allowing the Commonwealth to influence areas otherwise outside its legislative competence by attaching conditions to funding, as affirmed in South Australia v Commonwealth (First Uniform Tax Case) and Victoria v Commonwealth (Second Uniform Tax Case).

Freedom of Interstate Trade and Commerce

Section 92

Trade within the Commonwealth to be free.

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

1. **Does a party in State X receive a significant advantage that a party in State Y does not receive? Is this distinction substantively discriminatory in a protectionist sense?**

Cole v Whitfield (1988)

The law cannot be protectionist of the trade and commerce → and from external competition

- s 92 prohibits imposition of discriminatory burdens on interstate trade and commerce of a protectionist kind, i.e. subjection of interstate trade and commerce to disabilities or disadvantages for purposes of protecting intrastate trade and commerce from external competition
    - But Court accepted in alternative it might be discriminatory in effect. Even if thus discriminatory, however, purpose was not to protect industry from competition but to protect for some other reason
- Can be discriminatory but cannot be of a protectionist kind it has to be to achieve some other purpose

Eg:

- If a State law applies to all trade and commerce, interstate and intrastate alike, it is **less likely to be protectionist** than if there is discrimination appearing on the face of the law
- Where a State law in effect, if not in form, discriminates in favour of interstate trade, it **will offend against s 92** if the discrimination is of a protectionist character.
- A law which has as its real object the prescription of a standard for a product or a service or commercial conduct, will not ordinarily be grounded in protectionism, thus **not be prohibited by s 92.**
- But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which warrants characterisation of the law as protectionist, a court will be justified in concluding that it nonetheless **offends s 92.**

Bath v Alston Holdings Pty Ltd (1988)

- Substantively discriminatory in a protectionist sense
    - The act needs to discriminate from one to the other

A state law may be discriminatory in a protectionist sense if

a. If the state law conferred a competitive advantage on the intrastate trade;
b. If the state law removed a competitive advantage from the interstate trade/industry

Law encourages **intrastate** trade (commercial enterprise) rather than burdening **interstate** trade

1. Only reason inter-state traders are disadvantaged is because the state legislature cannot extend the benefit to interstate providers without specially legislating
    a. E.g. Deregulation, lowering taxes

2. After entry into a state, all burdens on goods must be equal whether produced locally or interstate. If the goods from interstate did already have a competitive advantage based on cost structures in their state of origin, these competitive advantages must be allowed to be maintained

2. **If there is a legitimate objective for burdening interstate trade, then the question is whether the burden was NECESSARY or APPROPRIATE and ADAPTED to the protection of the people of the State. If it is DISPROPORTIONATE to that end, then s92 will strike it down.**

- And Step 2 requires consideration of effect of law even where no discrimination on face

But this still leaves the problem of purpose and effect:

- A law with a perfectly legitimate purpose may in effect discriminate in a protectionist sense
- Betfair implies that such a law will not be invalid if there was no alternative means to achieve the legislative purpose in question (because it would then not be disproportionate to a legitimate end)
- But Betfair also says that a law 'the practical effect of which is to discriminate against interstate trade in a protectionist sense is not saved by the presence of other objectives such as public health which are not protectionist in character' (para 47)
- Two dicta may be reconciled if second dictum is understood to mean that the law is 'not saved merely by the fact that it has

PARA

The issue is whether the impugned law contravenes s 92 of the Constitution, which provides that trade, commerce and intercourse among the States shall be "absolutely free." The modern interpretation, established in Cole v Whitfield, rejects a literal approach and instead asks whether the law imposes a discriminatory burden of a protectionist kind on interstate trade.

The first inquiry is whether the law imposes a burden on interstate trade or commerce, which is broadly construed to include both fiscal and non-fiscal restrictions affecting the movement of goods, services or commercial activity across State borders. Here, the law imposes a burden by [insert: tax, prohibition, restriction, licensing requirement, cost, limitation] on [interstate traders/products], thereby affecting interstate trade.

The second inquiry is whether the law is discriminatory, either on its face or in its practical operation. A law is discriminatory if it treats interstate trade differently from intrastate trade, for example by imposing heavier costs, restrictions or disadvantages on out-of-state goods or traders. Here, the law [expressly distinguishes / does not expressly distinguish] between interstate and intrastate trade; however, even if facially neutral, it may still be discriminatory in effect if it disproportionately burdens interstate participants, as recognised in Castlemaine Tooheys Ltd v South Australia.

The third and critical inquiry is whether the discrimination is protectionist in nature, meaning that it operates to protect local industry or traders from interstate competition by conferring a competitive or market advantage on intrastate participants. Here, the law appears [protectionist / non-protectionist] because [apply facts: e.g. shields local producers, restricts entry of interstate goods, advantages local market]. Even where a law is discriminatory and protectionist, it may still be upheld if it pursues a legitimate, non-protectionist purpose and is reasonably necessary to achieve that purpose, with no reasonably practicable, less discriminatory alternative, as demonstrated in Castlemaine Tooheys.

In the present case, the asserted purpose is [insert purpose, e.g. environmental protection, public health, safety], which is [legitimate / not legitimate], and the law is [reasonably necessary / not reasonably necessary] to achieve that purpose because [apply facts, including availability of alternatives]. Accordingly, if the law imposes a discriminatory burden of a protectionist kind that is not justified as reasonably necessary to achieve a legitimate objective, it will be invalid under s 92; otherwise, it will be upheld as a permissible regulation of interstate trade.

The issue is whether [the State law] contravenes s 92 of the Constitution, which provides that trade, commerce and intercourse among the States shall be "absolutely free." The High Court in Cole v Whitfield rejected earlier literal interpretations and held that s 92 prohibits discriminatory burdens of a protectionist kind imposed on interstate trade. The analysis therefore proceeds in three steps. First, it must be determined whether the law imposes a burden on interstate trade or commerce. Here, the law [insert what it does: restricts, taxes, regulates, or conditions interstate goods/services], which may affect the ability of interstate traders to participate in the market, thereby satisfying this threshold. Secondly, the Court considers whether the burden is discriminatory, either on its face or in its practical operation. Discrimination may arise where the law treats interstate and intrastate trade differently, or where it imposes a disproportionate burden on interstate traders, even if framed in neutral terms. In this case, the law [insert: expressly distinguishes between interstate/local goods OR has a practical effect disadvantaging interstate participants], suggesting discrimination. Thirdly, and most critically, the Court asks whether the discrimination is protectionist in nature, meaning that its purpose or effect is to advantage local industry by shielding it from interstate competition. If the law is protectionist, it will be invalid unless

CRITICAL JUDGMENTS

"The High Court's commitment to legalism masks underlying value judgments." Discuss.

The High Court of Australia has long presented itself as a legalist court, particularly following Dixon CJ's articulation of "strict and complete legalism." This approach emphasises text, structure, and precedent, while rejecting overt reliance on political or moral considerations. However, it is increasingly argued that this commitment to legalism does not eliminate value judgments, but rather conceals them behind the language of doctrine.

This critique is strongly illustrated in Kartinyeri v Commonwealth. The central issue—whether the races power in s 51(xxvi) is limited to beneficial laws—was directly raised but left unresolved. Brennan CJ and McHugh J relied on the repeal principle, avoiding engagement with the normative implications of allowing racially detrimental laws. Similarly, Gummow and Hayne JJ adopted a strictly legalist approach, treating the Constitution as value-neutral and declining to impose moral constraints. While these judgments appear doctrinally restrained, they implicitly endorse a significant value choice—that the Constitution permits racially adverse laws. The refusal to engage with that consequence is itself a normative stance, not an absence of one.

By contrast, Kirby J's dissent exposes what legalism obscures. His Honour adopted a purposive and rights-oriented approach, interpreting the races power in light of the 1967 referendum and contemporary human rights values. While often criticised as judicial activism, Kirby J's reasoning makes explicit the value judgments that are otherwise implicit in the majority's approach. Similarly, Gaudron J introduced a requirement of a "real and relevant difference", reflecting an early form of proportionality reasoning. This demonstrates that even within the Court, legalism competes with more normative and structural approaches.

The same pattern appears in federalism cases. In Amalgamated Society of Engineers v Adelaide Steamship Co Ltd, the Court rejected doctrines protecting State autonomy in favour of a textual and legalist reading of Commonwealth powers. While framed as a neutral interpretive method, this decision had profound consequences for the centralisation of power, reflecting an implicit preference for national over State authority. This trajectory continued in New South Wales v Commonwealth (WorkChoices Case), where the Court upheld an expansive interpretation of the corporations power, again prioritising textual reasoning over federal balance.

Even in areas where the Court appears to move away from legalism, such as the implied freedom of political communication, value judgments remain unavoidable. In McCloy v New South Wales, the adoption of structured proportionality requires judges to assess whether a law is adequate in balance, a process that inherently involves weighing competing values. While presented as a legal test, proportionality makes explicit what legalism tends to obscure: that constitutional adjudication involves choices about the relative importance of competing interests.

Ultimately, the High Court's commitment to legalism does not eliminate value judgments, but reframes them as legal reasoning. While this approach promotes legitimacy and restraint, it risks obscuring the normative foundations of constitutional decisions. The better view is that legalism should be understood not as the absence of values, but as a method of expressing and constraining them, rather than denying their existence.

"Kirby J's approach represents a more legitimate method of constitutional interpretation than strict legalism." Discuss.

The contrast between Kirby J's jurisprudence and the High Court's traditional commitment to strict legalism highlights a fundamental debate about the nature of constitutional interpretation. While legalism emphasises textual fidelity and judicial restraint, Kirby J's approach reflects a purposive, evolving, and rights-oriented method. The question is whether this approach is more legitimate in a modern constitutional system.

Kirby J's reasoning in Kartinyeri v Commonwealth provides a clear example. His Honour argued that the races power should be interpreted in light of the 1967 referendum, which he viewed as transforming the provision into a beneficial power. He also drew on international human rights law, reflecting a commitment to aligning