

Commonwealth Constitutional Law

Final Exam Scaffold



Included in the exam:

- Races Power
- Inconsistency
- Defence Power
- Freedom of Interstate Trade and Commerce
- Implied Freedom of Political Communication

Steps to take:

1. Is the law valid?
2. If the law is valid, is there an inconsistency between the State law and Commonwealth laws?

THE RACES POWER – s51(xxvi)

Section 51(xxvi): The Commonwealth may legislate with respect to ‘the people of any race, for whom it is deemed necessary to make special laws’

IS THIS LAW WITH RESPECT TO S51(XXVI)?

For a law to be with respect to **section 51(26)** it needs to be with respect to the people of any race that it deems necessary to make special laws. Traditional statutory interpretation of these three terms must be undertaken.

Does not have to be entirely about the person

The view of the majority in the *Tasmanian Dam Case* was that provisions based on s 51(26) need not be limited to dealing with special rights, special protection, or special duties of a particular race.

- A law which protected and preserved matters relating to the history, culture or religion of a race, things which had a **special significance to the people of the race**, would be valid, even if the law was addressed to persons generally.

A Race?

Is it the law in respect to race?

This is people of any race, and this **includes** Indigenous Australians (*Native Title Act Case*)

- **Section 51(26)** of the constitution used to exclude Indigenous Australians, but the 1967 referendum amended this section and removed the term ‘other than the Aboriginal race’
- NB: To date, ‘race’ has only ever considered Indigenous Australians

Does it specify a race out?

If their Indigeneity is contentious → You apply the **tripartite test** set out by Brennan J in *Mabo No 2*

Tripartite test: The person trying to prove their Indigeneity has the burden of proof to satisfy:

1. Biological descent from indigenous people
2. Self-identification as Indigenous
3. Community recognition

B Special Law?

Is the law beneficial or detrimental?

A law is special if it 'confers a right or benefit' or 'imposes an obligation' (especially on Indigenous Australians) (*Native Title Act Case*).

- Special essentially means particular to their race

→ Generally, this right or benefit has to **differentiate between different races** BUT it can also confer a **general benefit**, so long as it has a very **particular specialness** on Indigenous Australians

- Even laws of general application (not aimed at specific individuals) can be special in some circumstances (*Tasmanian Dams Case*)

Special laws may also operate on third parties (on occasion) that has indirect impacts on persons of any race

Can also be special if it only applies to a sub-group so long as the description of the sub-group goes to the heart of culture, heritage, law ways etc. if that racial minority (the court here was talking about Indigenous Australians - *Native Title Act Case*)

- The law was special in *Mabo (No 2.)* because native title was so vulnerable to extinguishment under the common law that the Cth had to introduce legislation to protect it (and the Indigenous People)

C Deemed Necessary?

Courts do not decide this so you cannot advise but you can say that Parliament decides it and court may have 'supervisory jurisdiction'

Whether something is 'deemed necessary' is determined by Parliament – it is NOT a decision for the courts to make

- However, there are some exceptions to this rule (See *Native Title Act Case* table)
- This includes if Parliament is exercising '**manifest abuse of power**' (*Native Title Act Case*)
- Any time parliament tries to pass detrimental laws this triggers the courts supervisory jurisdiction