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1. *(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament*
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Practice & Procedure High Court & Federal Court of Australia

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PART V POWERS OF THE PARLIAMENT [ss 51–60]

[1505] 51 Legislative powers of the Parliament

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:—

(i) Trade and commerce with other countries, and among the States:

(ii) Taxation; but so as not to discriminate between States or parts of States:

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

(iv) Borrowing money on the public credit of the Commonwealth:

(v) Postal, telegraphic, telephonic, and other like services:

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(vii) Lighthouses, lightships, beacons and buoys:

(viii) Astronomical and meteorological observations:

(ix) Quarantine:

(x) Fisheries in Australian waters beyond territorial limits:

(xi) Census and statistics:

(xii) Currency, coinage, and legal tender:

(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:

(xv) Weights and measures:

(xvi) Bills of exchange and promissory notes:

(xvii) Bankruptcy and insolvency:

(xviii) Copyrights, patents of inventions and designs, and trade marks:

(xix) Naturalization and aliens:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxi) Marriage:

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxiii) Invalid and old-age pensions:

(xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription) benefits to students and family allowances:

[Placitum xxiiiA insrt Act 81 of 1946 s 2]

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

(xxvi) The people of any race for whom it is deemed necessary to make special laws:

[Placitum xxvi am Act 55 of 1967 s 2]

(xxvii) Immigration and emigration:

(xxviii) The influx of criminals:

(xxix) External affairs:

(xxx) The relations of the Commonwealth with the Islands of the Pacific:

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:

(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:

(xxxiv) Railway construction and extension in any State with the consent of that State:

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Section 51 Generally

[1505.5] Legislative powers

L Legislation cited in this paragraph

(CTH) *Australia Act 1986* s 2.

The following Imperial Acts extended the legislative powers of the Parliament: Whaling Industry (Regulation) Act 1934, s 15; Geneva Convention Act 1937, s 5; Emergency Powers (Defence) Act 1939, s 5; and Army and Air Force (Annual) Act 1940, s 3. See also the Australia Act 1986 s 2.

[1505.6] Implied limitations on legislative power

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51.

The legislative power of the Parliament is subject to several implied limitations drawn from the High Court's reading of the Constitution as embodying certain concepts of government. These include the concept of a federal system in which power is divided between the Commonwealth and the States; the doctrine of the separation of judicial power; and the concept of representative government: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *108 ALR 681* at *698–702* CB per Brennan J and 721–2 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; *108 ALR 577* at *590–2* CB ALR per Mason CJ and 649–54 ALR per Gaudron J.

Because the legislative powers of the Parliament are declared, in *s 51*, to be "subject to this Constitution", Commonwealth laws which would defeat the implications drawn from the Constitution will be invalid: see eg *Australian Capital Television Pty Ltd v Commonwealth (No 2)* , *above,*at ALR 664 per McHugh J; *Nationwide News Pty Ltd v Wills* , *above,*at ALR 740–1 per Gaudron J.

The task of the High Court, in interpreting a provision of the Constitution, is to expound its text and where necessary to ascertain what is implied in it: *Love v Commonwealth of Australia (2020) 375 ALR 597*; *[2020] HCA 3*; *BC202000584* at *[8]* CB per Kiefel CJ.

[1505.6A] Implications affecting common law rules

In *Theophanous v Herald & Weekly Times Ltd (1994) 124 ALR 1* CB, a majority of the High Court (Mason CJ, Deane, Toohey and Gaudron JJ; Brennan, Dawson and McHugh JJ dissenting) held that the implied freedom of discussion of political and governmental matters, derived from the representative character of the Constitution, operated so as to protect a publisher from the liability for defamation imposed by the common law (or by a State legislative codification of that common law), where the publisher had published material defamatory of a member of the Federal Parliament. In the words of Mason CJ, Toohey and Gaudron JJ (124 ALR at 12), "criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office … is at the very centre of the freedom of political discussion".

"The law of defamation, whether common law or statute law, must conform to the implication of

freedom, even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interests of individuals must give way to the requirements of the Constitution": at 23 per Mason CJ, Toohey and Gaudron JJ.

In *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80, the same majority of the High Court held that the implied freedom of communication, derived from the Commonwealth Constitution *and from the State Constitution*, and necessary to "protect the efficacious working of representative democracy and government", operated to protect a publisher against liability for defamation in respect of a publication about members of State Parliament — so long as the publisher could prove that it had not been aware of the falsity of the material in question, had not published the material recklessly and had acted reasonably.

The process by which the common law must adapt so as to accommodate constitutional requirements was further examined, this time by a unanimous High Court, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ; 145 ALR 96; 71 ALJR 818; BC9702860: see [1505.9].

Certain principles of constitutional liberty and security are part, however, of our common law inheritance: *Smethurst v Commissioner of Police* (2020) 376 ALR 575; [2020] HCA 14; BC202002866 at [126] per Gageler J.

[1505.7] The federal system

In its primary sense, the body politic described as "the Commonwealth" is a legal entity or right holder; it has a legal body or corpus like a body corporate and it represents the people who are its members: *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19; BC202004673 at [213] per Edelman J. The Commonwealth Parliament may not single out the states for special burdens or disabilities not imposed on the rest of the community. For this reason, s 48 of the Banking Act 1945 which prohibited the private banks from conducting banking business for a State government or instrumentality, was held to be invalid in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31:

"[T]o my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority" at 83 per Dixon J.

Similarly, the Conciliation and Arbitration (Electricity Industry) Act 1985, which prescribed a special procedure before the Commonwealth Conciliation and Arbitration Commission for the settlement of an identified industrial dispute involving several Queensland government authorities, was held invalid: *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; 61 ALR 1.

The Commonwealth cannot apply its legislation to the States where that legislation threatens the continued existence or independence of the States or a State: *Melbourne Corporation v Commonwealth*, *above*, at 66 per Rich J; at 75 per Starke J; *Victoria v Commonwealth* (1971) 122 CLR 353 at 424 per Menzies, Walsh and Gibbs JJ; *Queensland Electricity Commission v Commonwealth*, *above*, at 206; 61 ALR 1 per Gibbs J, 217 per Mason J, 226 per Wilson J, 231 per Brennan J, 247 per Deane J and 260 per Dawson J; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; 108 ALR 577 at 613–14 per Brennan J and 675–7 per McHugh J.

The extent of the States' immunity from Commonwealth legislation was examined in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431. A majority of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J

dissenting) held that the Commonwealth's legislative power over industrial arbitration and conciliation (s 51(xxxv)) was subject to an implied limitation with two elements: first, a prohibition against discrimination which involved placing special burdens or disabilities on the States; and, secondly, a prohibition against laws of general application which operated to destroy or curtail the continued existence of the States or their capacity to function as governments.

However, in *Austin v Commonwealth* (2003) 215 CLR 185; *195 ALR 321*; *[2003] HCA 3*; *BC200300114*, Gaudron, Gummow and Hayne JJ (with whom Kirby J agreed at [281]) emphasised that discriminatory treatment, without more, would not attract the *Melbourne Corporation* doctrine. It was not enough that "the like was treated as the unalike and thereby the States were burdened in a 'special way'" (at [123]). Instead, their Honours said (at [124]):

> There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments". These criteria are to be applied by consideration not only of the form but also "the substance and actual operation" of the federal law …

Both the Commonwealth and the States reciprocally have the benefit of the structured implication recognised in the *Melbourne Corporation* case; however, while it is one thing to acknowledge the reciprocal operation of the doctrine of inter-governmental immunities, it is quite another to find that limitation has been transgressed: *Spence v Queensland* *(2019) 367 ALR 587*; *[2019] HCA 15*; *BC201903864* at *[107]–[108]* per Kiefel CJ, Bell, Gageler and Keane JJ.

See *[2505.15]–[2505.30]*.

[1505.7A] Co-operative schemes

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(vi).

Administrative bodies set up under Commonwealth law can exercise functions conferred by State law as part of a co-operative legislative scheme: *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 563; *49 ALR 19*; 5 IR 15; *BC8300098*; *Re Cram; Ex parte New South Wales Colliery Proprietors Assn Ltd* (1987) 163 CLR 117 at 131; *72 ALR 161*; 21 IR 165; *BC8701788*; *R v Hughes* (2000) 202 CLR 535; *171 ALR 155*; *[2000] HCA 22*; *BC200002055*.

State law cannot impose a duty upon a Commonwealth authority to perform a State function, unless the Commonwealth law authorises and thereby itself imposes the duty. In that event, the Commonwealth law, in so far as it imposes a duty to perform functions or powers purportedly conferred by State law, must be supported by a Commonwealth head of power: *R v Hughes*, *above*.

It may be that a Commonwealth administrative body or tribunal must have authority under Commonwealth law to exercise functions under State law (even if there is no duty to exercise those State functions). In *O'Donoghue v Ireland* (2008) 234 CLR 599; *244 ALR 404* , at *[23]*; *[2008] HCA 14*; *BC200802740*, a majority of the High Court said that "It was accepted in *Hughes* that by force only of its own legislation a State could not unilaterally invest functions thereunder in an officer of the Commonwealth". That formulation of the holding in *Hughes* does not limit it to situations where there is a duty to exercise the State function.

In contrast, the Commonwealth can confer a power on the executive of a State, without the consent of the State, at least if there is no duty to exercise that power: see *Aston v Irvine* (1955) 92 CLR 353, 364; 29 ALJR 411; *BC5500660*. In *O'Donoghue v Ireland*, *above*, the High Court upheld the

validity of provisions of the Extradition Act 1988 that conferred functions on State magistrates, because it held that the effect of s 4AAA(3) of the Crimes Act 1914 was that State magistrates were not under any duty to exercise those Commonwealth functions.

Further, in the context of some heads of power (such as the defence power — *s 51(vi)*), the Commonwealth may compel the performance by State officers of duties under federal law even without State approval: *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373; 2 AITR 273; 16 ALJR 109; *BC4200026* CB; *O'Donoghue v Ireland*, *above*, at [16], [45].

If the consent of a State is required before the Commonwealth can compel performance by State officers of duties under federal law (a matter that the Court left open: see [57]), the High Court has left open the question whether any such consent must be a State legislature, or whether it may be given by the State executive: *O'Donoghue v Ireland*, *above*, at [15]–[20], [46]–[47]. In that case, s 46 of the Extradition Act provided for the Governor-General to make arrangements with the Governor of a State for the performance, by persons holding office as magistrates, of the functions of a magistrate under the Act. In the absence of any duty to perform Commonwealth functions, the validity of that provision did not need to be determined.

A State law imposing a burden on the enjoyment of a Commonwealth statutory power would be inconsistent with the Commonwealth law conferring the power and therefore inoperative by force of s 109 of the Constitution: *Spence v Queensland* *(2019) 367 ALR 587*; *[2019] HCA 15*; *BC201903864* at *[101]* CB per Kiefel CJ, Bell, Gageler and Keane JJ.

[1505.8] Separation of judicial power

The Commonwealth Constitution has been read by the High Court and the Privy Council as requiring a strict separation between the federal judicature and the other governmental branches of the Commonwealth — the Parliament and the Executive. Consequently, the Parliament cannot legislate so as to confer any part of the judicial power of the Commonwealth on a body which lies outside the federal judicature; nor can the Parliament legislate so as to confer non-judicial functions on the federal judicature: *New South Wales v Commonwealth* (1915) 20 CLR 54 CB; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 CB; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 CB; *Attorney-General (Cth) v R (Boilermakers Case)* (1957) 95 CLR 529 CB; *Harris v Caladine* (1991) 172 CLR 84; *99 ALR 193*; 65 ALJR 280 CB; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *163 ALR 270*; 73 ALJR 839; *BC9903189* CB.

[1505.9] Freedom of political communication

L Legislation cited in this paragraph
(CTH) *Broadcasting Act 1942* Part IIID.
(CTH) *Migration Act 1958* Pt 2A.
(CTH) *Commonwealth of the Australia Constitution Act* Ch III, 128, 24, 64, ss 7.
(CTH) *Commonwealth Electoral Act 1918* s 302CA, s 329A.
(QLD) *Vagrants, Gaming and Other Offences Act 1931* s 7(1)(d).
(QLD) *Corrective Services Act 2006* s 132(1)(a), s 132(1)(d), s 200(2), s 3.
(CTH) *Criminal Code* s 471.12.
(CTH) *Judiciary Act 1903* s 23(2).

(i) Introduction

The system of representative government established by the Constitution assumes a constitutional freedom to communicate on public affairs and political and economic matters. However, it does not specifically provide for it. But that freedom was recognised in *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; *108 ALR 577*; and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *108 ALR 681* (*Nationwide News*).

Partly underlying the analysis undertaken by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, above, is (as pointed out by Gageler J in *Unions NSW v New South Wales* (2019) 264 CLR 595; *363 ALR 1*; *[2019] HCA 1*; *BC201900267* at *[64]*) the High Court's decision (particularly in the judgment of Dixon J in the *Communist Party* Case) (*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; [2951] HCA 5).

The subjects which are constitutionally protected against legislative interference by the Commonwealth extend to all political matters relating to other levels of government within the Australian system of government: *Australian Capital Television Pty Ltd v Commonwealth (No 2)* , *above,*at 597 per Mason J, 618 per Deane and Toohey JJ and 656 per Gaudron J; at 725–6 per Deane and Toohey JJ.

Part IIID of the Broadcasting Act 1942, which prohibited the broadcasting of political advertisements during federal, State or Territory election campaigns, breached the constitutional freedom of communication on matters relating to the government of the Commonwealth and was, therefore, invalid: *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, *above*. And s 299(1)(d)(ii) of the Industrial Relations Act 1988, which made it an offence to publish matter calculated to bring the Australian Industrial Relations Commission into disrepute, was invalid because it restricted the constitutional freedom to discuss matters relating to the government of the Commonwealth: *Nationwide News* , *above* per Brennan, Deane, Toohey and Gaudron JJ.

In *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *124 ALR 1* (*Theophanous*), a majority of the High Court (Mason CJ, Deane, Toohey and Gaudron JJ; Brennan, Dawson and McHugh JJ dissenting) held that the implied freedom of communication will protect, against liability for defamation, a publisher of false and defamatory material about a candidate for the federal Parliament so long as the publisher proves that it was not aware of the falsity, did not publish the material recklessly and acted reasonably. The implication operates not only to constrain the legislative powers of the Parliament but also to prevent the invocation of State legislative and common law defamation laws.

The same result followed in relation to discussion of State political matters: see *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232–3; *124 ALR 80*; 68 ALJR 765; *BC9404651* (*Stephens*). See also *Muldowney v South Australia* (1996) 186 CLR 352; *136 ALR 18*; 70 ALJR 515; *BC9601352*; *McClure v Mayor And Councillors of City of Stirling [No 2]* *[2008] WASC 286*; *BC200810884*, at [81]–[82].

In *Cunliffe v Commonwealth* [1994] HCA 44; (1994) 182 CLR 272124 ALR 120, a majority of the High Court (Brennan, Dawson, Toohey and McHugh JJ; Mason CJ, Deane and Gaudron JJ dissenting) held that a prohibition on unregistered persons providing (for reward) advice and assistance to a person seeking to enter Australia as an immigrant or a refugee did not offend the Constitution's implied guarantee of freedom of communication on political matters. For example, Brennan J said (at [33]; ALR at 156):

> The immunity from legislative control which the Constitution implies in order to secure freedom of political discussion

> does not preclude the making of laws to control any activity the control of which might be politically controversial. The constitutional freedom of political discussion ensures freedom to engage in debate about the institutions of government and the exercise of any kind of governmental power but it does not impair, much less sterilise, the exercise of a power which might become the subject of political debate … To some extent, Pt 2A may inhibit communications between a citizen and an alien but the freedom to be implied from the terms of the Constitution is not a general freedom of communication. … Part 2A does not quell or chill any discussion about the control which the law imposes on the provision of services to aliens or about the manner in which that control is exercised. It is not apparent that Pt 2A inhibits communications of a political kind in any way but, if it does, the inhibition is manifestly incidental to the statutory protection of aliens.

The implied freedom of political discussion contained in *ss 7* and *24* is not offended by a Commonwealth law (eg, s 329A of the Commonwealth Electoral Act 1918) prohibiting the publication of material encouraging a voter to fill in a ballot paper other than in accordance with the instructions to voters: *Langer v Commonwealth* (1996) 186 CLR 302; *134 ALR 400*; 70 ALJR 176; *BC9600207* CB. See also, in relation to State electoral laws, *Muldowney v South Australia* (1996) 186 CLR 352; *136 ALR 18*; 70 ALJR 515; *BC9601352* CB.

(ii) *Lange's Case*

In *Lange v Australian Broadcasting Corporation* [1997] HCA 265; (1997) 189 CLR 520145 ALR 96; 71 ALJR 818; *BC9702860* CB (*Lange*), in a joint judgment of the Court, the implied freedom of political communication was revisited. The Court held that the "constitutional defence" to defamation actions that was recognised in *Theophanous* should not be accepted, because the constitutional implication could not operate directly to alter private rights and immunities. The Court held that *Theophanous* and *Stephens* should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the Constitution, which preclude an unqualified application of the English common law of defamation in relation to the publication of defamatory matter concerning government and political matters: CLR at 555–6, 566. That implication was based closely on *ss 7* and *24* of the Constitution, rather than a more general implied concept of "representative government" underlying the Constitution: CLR at 557; compare *Australian Capital Television Pty Ltd v Commonwealth (No 2)* and *Nationwide News*. The focus on specific constitutional provisions reflected the view expressed by McHugh J in *McGinty v Western Australia* [1996] HCA 48; (1996) 186 CLR 140 at 231–5; *134 ALR 289*; 70 ALJR 200; *BC9600206* CB.

In *Lange*, the Court said (at CLR 560; ALR 106–7):

> … *ss 7* and *24* and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power. As Deane J said in *Theophanous*, they are "a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a 'right' in the strict sense". In *Cunliffe v Commonwealth*, Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said:
>
> > The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.
>
> If the freedom is to effectively serve the purpose of *ss 7* and *24* and related sections, it cannot be confined to the election period. Most of the matters necessary to enable "the people" to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election.

The Court went on to explain the test for determining whether a law infringes the implied freedom as follows (at CLR 567–8; ALR 112):

> When a law of a State or federal parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by *ss 7*, *24*, *64* or *128* of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by *s 128* for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid.

The second limb of the above test was expressed preferably as an inquiry as to whether the impugned law is "reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with" representative and responsible government: see *Coleman v Power* (2004) 220 CLR 1; *209 ALR 182*; *[2004] HCA 39*; *BC200405576* at *[93]* CB per McHugh J (with whom, on this point, Gleeson CJ, Gummow, Kirby and Hayne JJ agreed).

In *Lange* the Court explained the scope of the common law defence of qualified privilege, as expanded to reflect the requirements of the Constitution. The Court said (at CLR 571–2, 574; ALR 115–16, 117–18):

> … this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government.
>
> Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable. Thus, the extended category of common law qualified privilege ensures conformity with the requirements of the Constitution. The real question is as to the conditions upon which this extended category of common law qualified privilege should depend. …

The Court continued:

> Having regard to the interest that the members of the Australian community have in receiving information on government and political matters that affect them, the reputations of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct. The protection of those reputations will be further enhanced by the requirement that the defence will be defeated if the person defamed proves that the publication was actuated by common law malice to the extent that the elements of malice are not covered under the rubric of reasonableness. In the context of the extended defence of qualified privilege in its application to communications with respect to political matters, "actuated by malice" is to be understood as signifying a publication made not for the purpose of communicating government or political information or ideas, but for some improper purpose. …

> Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

In *Levy v Victoria* (1997) 189 CLR 579; *146 ALR 248*; 71 ALJR 837; *BC9703254*, the Court considered the validity of a State law that prevented a person from entering restricted areas used for duck-shooting. The plaintiff wished to enter that area in order to recover the bodies of ducks killed so that they could be displayed to television cameras as part of a protest against duck-shooting. The Court held that the relevant law was valid because it was appropriate and adapted to the protection of public safety, but it accepted that the conduct in question was within the realm of the constitutionally protected guarantee of freedom of political communication: at CLR 594–5, 613, 622–4, 631.

(iii) Subsequent cases

In *Coleman v Power* *[2004] HCA 39*; (2004) 220 CLR 1209 ALR 182; *BC200405576*, the Court considered the operation of the implied freedom in relation to the distribution of a pamphlet accusing police (including one officer in particular, Constable Power) of corruption. When Power approached Coleman and asked for a copy of the pamphlet, Coleman cried out “This is Constable Brendan Power, a corrupt police officer”. Those words resulted in Coleman being charged with an offence against s 7(1)(d) the Vagrants, Gaming and Other Offences Act 1931 (Qld), which makes it an offence for a person to “use any threatening, abusive or insulting words to any person” if done “in any public place or so near to any public place than any person who might be therein, and whether any person is therein or not, could view or hear”. The validity of s 7(1)(d) was challenged on the basis that it infringed the implied political freedom. It was conceded before the High Court that s 7(1)(d) did burden political communication. The only issue was whether that burden satisfied the second limb of the *Lange* test (above at CLR 567–8). The High Court held (per McHugh, Gummow, Kirby and Hayne JJ; Gleeson CJ, Callinan and Heydon JJ dissenting) that the offence had not been committed. Gummow, Kirby and Hayne JJ, however, reached that conclusion primarily as a result of their interpretation of s 7(1)(d), although Gummow and Hayne JJ’s interpretation was “reinforced” by constitutional considerations: at [199]. Only McHugh J based his judgment squarely on the implied freedom of political communication: at [95]–[106].

The meaning (and significance) of malice in the context of the expanded test of qualified privilege was further examined in *Roberts v Bass* (2002) 212 CLR 1 at 29, 39–44; *194 ALR 161*; *[2002] HCA 57*; *BC200207519*.

The implied freedom of political communication confers a freedom from governmental action, but does not generate enforceable rights or freedoms that are not already cognisable by law: see *Lange v Australian Broadcasting Corporation*, above, CLR at 560; *Mulholland v Australian Electoral Commission* *[2004] HCA 41*; (2004) 220 CLR 181 at 223–224, 298, 303; *209 ALR 582*; *BC200405814*; *Levy v Victoria*, above, at CLR 622; *McClure v Australian Electoral Commission* *(1999) 163 ALR 734* at *740–1*; 73 ALJR 1086; *[1999] HCA 31*; *BC9903413*.

In *ALPA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *219 ALR 403*; 79 ALJR 1620; *[2005] HCA 44*; *BC200506315*, a majority (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) rejected a submission that the implied freedom of political communication operated to invalidate a restriction on legal practitioners advertising their services in relation to personal injuries: at [412]–[413], [497], [520]. The majority also rejected an alternative argument that an implication

derived from *Ch III* invalidated that restriction on advertising, although that alternative argument was accepted by McHugh and Kirby JJ at [423], [489].

In *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1285 ALR 1; BC201200756 CB, the Court dismissed a challenge to the validity of two provisions of the Corrective Services Act 2006 (Qld): s 132(1)(a) made it an offence for a person "to interview a prisoner, or obtain a written or recorded statement from a prisoner" (the term "prisoner" was defined to include a person released on parole), while s 200(2) of the Act provided that a parole order could contain conditions that the Parole Board considered reasonably necessary to ensure the prisoner's good conduct or to stop the prisoner from committing an offence. The majority (French CJ, Gummow, Hayne, Crennan and Bell JJ) assumed that the provisions infringed the first limb of the *Lange* test (at [29]), but concluded that the provisions did not infringe the second limb:

(a) The majority construed the offence provision in s 132(1)(a), for which there was an exception, in s 132(1)(d), if the chief executive gave written permission, as incidentally restricting political communication in pursuit of the object, in s 3 of the Act, of needing "to consider community safety and crime prevention through humane containment, supervision and rehabilitation of offenders". In circumstances where a decision of the chief executive under s 132(1)(d) could, if inconsistent with the limitations on State legislative power, including constitutional limits, be subject to judicial review, the majority concluded that the law complied with the constitutional limitation on state legislative power: see at [22], [24], [31], [33].

(b) The majority described the legitimate end of s 200(2) of the Act as being the imposition of conditions which the Parole Board considered reasonably necessary to ensure good conduct and to stop the parolee committing an offence. As with s 132(1)(a), the provision imposed an incidental burden on political communication, in circumstances where the Parole Board would, in imposing conditions, have to consider what was constitutionally permissible. Any decision of the Board with respect to conditions was judicially examinable under the Queensland judicial review legislation, such that resort to constitutional principles was unnecessary: at [32]–[33].

In separate judgments, Heydon J and Kiefel J concluded that neither provision imposed a burden of a nature that infringed the first limb of *Lange*. Heydon J at [54] described the requisite burden as one that must be "meaningful": "That is, it must not be 'insubstantial or *de minimis*' — it must be 'a real or an actual burden upon relevant communications'; it must be 'a real impediment'; and it must be 'an obstacle in some way'."

Looked at from this perspective, neither s 132(1)(a) nor s 200(2) realistically threatened any freedom of communication about political and government affairs: at [56]–[61]. Kiefel J examined the issue of burden by reference to the concept of proportionality. Her Honour described the burden imposed by s 132(1)(a) as "proportionate" in that it did not prevent a prisoner from communicating with others on matters relating to government and politics; rather, it was directed only to the method by which the media and others obtained information or opinions from a prisoner. In other words, the provision went no further than was necessary in seeking to achieve the relevant objectives of the Act (at [88]) and was not excessive (at [90]). Section 200(2) imported a requirement of proportionality into the board's decision making process, which would be subject to judicial review; accordingly, the burden imposed by the grant of power in s 200(2) also could not be said to be excessive: at [91].

On 27 February 2013, the High Court handed down two decisions on the implied freedom. In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 295 ALR 19787 ALJR 289; BC201300754 CB, a majority of the Court (constituted by six Justices) held that by-laws made by the first respondent, which prohibited persons preaching on any road and distributing printed matter on any road to any bystander or person passing by unless they obtained the Council's permission, did not impermissibly infringe the implied freedom. It was common ground between the

parties that the by-law infringed the first limb of the test in *Lange*; and the majority concluded that the by-laws in question satisfied the second limb:

(a) The majority judgments variously described the end sought to be achieved by the by-laws as the regulation of roads as a shared public resource (at [64] per French CJ), the prevention of the obstruction of roads (at [134], [140] per Hayne J), and ensuring the safety and convenience of users of roads (at [203], [221] per Kiefel and Crennan JJ, with whose reasons on this issue Bell J was in agreement (at [224])) which ends were legitimate.

(b) The manner in which the by-laws sought to achieve those ends was compatible with the maintenance of the constitutionally prescribed system of government: the restrictions in the provisions were directed to unsolicited communications, were confined in their application to particular places and did not apply in a designated area or to surveys or opinion polls conducted, or literature distributed, by or with the authority of a candidate during the course of a local, State or federal government election or in the context of a referendum, and were directed to unsolicited communications, and where the grant of permission could not be based on approval or disapproval of the content of the communications sought to be made. See at [68] per French CJ, at [141] per Hayne J, at [212]–[213], [221] per Crennan and Kiefel JJ.

In *Monis v R; Droudis v R* (2013) 295 ALR 259; 87 ALJR 340; [2013] HCA 4; BC201300755, the Court, again constituted by six Justices, was evenly divided on the question of whether s 471.12 of the Criminal Code Act 1995 infringed the implied freedom. The section prohibited use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, "offensive". Mr Monis was charged with 13 offences under s 471.12 in relation to letters he wrote to parents and relatives of soldiers who were killed on active service in Afghanistan; Ms Droudis was charged with aiding and abetting some of those offences. Hayne J described the letters as, "in form", offering condolences to the relatives of the deceased whilst also using "intemperate and extravagant language" to urge "the rejection of the policies which see Australian forces engaged in Afghanistan"; some of the letters "directly insulted those who had died": at [78].

All members of the Court were of the view that s 471.12 imposed a burden on the freedom of communication on government and political matters: at [71] per French CJ, at [93], [171] per Hayne J, at [236] per Heydon J, at [343] per Crennan, Kiefel and Bell JJ. In separate judgments, French CJ, Hayne J and Heydon J concluded that the section failed to satisfy the second limb of the test in *Lange*, while in a joint judgment Crennan, Kiefel and Bell JJ reached the contrary conclusion. In accordance with s 23(2) of the Judiciary Act 1903, the appeals were dismissed.

In the Court of Criminal Appeal, Bathurst CJ and Allsop P had construed "offensive" in the context of s 471.12 as meaning "calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances": (2011) 256 FLR 28 at [44], [81]–[83]. All members of the Court accepted that this higher threshold definition was appropriate in the context of the provision: at [57], [59] per French CJ (with whose reasons Heydon J agreed (at [236])); [90]–[91], [162] per Hayne J; at [333] per Crennan, Kiefel and Bell JJ.

The joint judgment described the second limb of *Lange* as looking, "in the first place, to whether the law is proportionate to the end it seeks to serve": at [347]. Construing "offensive" as referring only to communications of a higher degree of offensiveness, their Honours considered that the protective purpose of the section was directed to the misuse of postal services to effect an intrusion of seriously offensive material into a person's home or workplace. In circumstances where it was not possible to further read down the degree of offensiveness of a communication which is to be the subject of the offence and retain a field of operation for the section consistently with its purpose, the section went no further than was reasonably necessary to achieve that purpose: at [348]. Nor, bearing in mind that the prohibition in s 471.12 was limited to communications which were of a seriously offensive nature,

did the section impose too great a burden on the implied freedom by the means it employed: at [351]–[352].

By contrast, having regard to the meaning of "offensive", and the range of postal services to which s 471.12 applied, French CJ found it "difficult, if not impossible, to distinguish the purpose of s 471.12 from that of a law which makes it an offence to send or deliver offensive communications to anyone by any means": at [73]. His Honour considered that the prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive, should not be regarded as a legitimate end "not least because its very breadth is incompatible with its implementation in a way that is consistent with the maintenance of that freedom of communication which is a necessary incident of the system of representative government prescribed by the Constitution": at [73]. The application of the reasonable person test, applied to a high threshold definition of "offensive", did not "prevent the application of the prohibition to communications on government or political matters in a range of circumstances, the limits of which were not able to be defined with any precision and which could not be limited to the outer fringes of political discussion": at [74].

Hayne J reached the same conclusion, stating that the conclusions in *Lange* and *Coleman v Power* required the conclusion "that s 471.12 was too broad in its operation with respect to offensive use of a postal or similar service": at [88]. The section was directed generally to preventing serious offence, not an object or end that was compatible with the maintenance of the constitutionally prescribed system of government: at [88], [97], [178]–[184]. His Honour was particularly concerned that the prohibition in s 471.12 extended to communications about a political matter "even if what is said is true", or would, if defamatory, be covered by the defence of qualified privilege: at [88], [100], [207]–[214].

In his Honour's separate reasons, Heydon J observed that the conclusion of invalidity, which he agreed was required by authority, was "so extraordinary as to cast doubt, and perhaps more than doubt, on the fundamental assumption and the chain of reasoning which led to it": at [237]. His Honour echoed his comments in *Wotton* that consideration of the principles which had developed would only receive the close examination they required when "some litigant whose interests are damaged by the implied freedom in this Court, with leave if necessary, that the relevant authorities should be overruled": at [251]; see *Wotton* at [40].

(iv) Later authorities

The Court in *McCloy v New South Wales* (2015) 257 CLR 178; 325 ALR 15; [2015] HCA 34; BC201509677 held that provisions of the Election Funding Expenditure and Disclosures Act 1981 (NSW) Pt 6 Div 4A (insofar as they prohibited property developers from making political donations and prohibited accepting political donations from a property developer) did not impermissibly burden the implied freedom of communication on governmental and political matters contrary to the Constitution. At [2] French CJ, Kiefel, Bell and Keane JJ derived the following propositions from previous decisions of the Court (including *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; 145 ALR 96; 71 ALJR 818; BC9702860):

> 1. The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors." It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.
>
> 2. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:
>
> 1. Does the law effectively burden the freedom in its terms, operation or effect?

> If “no”, then the law does not exceed the implied limitation and the enquiry as to validity ends.
>
> 2. If “yes” to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as “compatibility testing”.
>
> The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.
>
> If the answer to question 2 is “no”, then the law exceeds the implied limitation and the enquiry as to validity ends.
>
> 3. If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as “proportionality testing” to determine whether the restriction which the provision imposes on the freedom is justified.
>
> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
>
> > *suitable* – as having a rational connection to the purpose of the provision;
> >
> > *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
> >
> > *adequate in its balance* – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
>
> If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be “no” and the measure will exceed the implied limitation on legislative power. (footnotes omitted)

Gageler J agreed but delivered a separate judgment as did Gordon J and Nettle J.

As Gageler J noted (at [96] the same 1981 Act (ss 96D and 95G(6)) had earlier been challenged in *Unions New South Wales v New South Wales* (2013) 252 CLR 530; *304 ALR 266*; *[2013] HCA 58*; *BC201315812* CB and it was held by the Court that both provisions imposed impermissible burdens on the implied constitutional freedom.

In *Comcare v Banerji* *(2019) 372 ALR 42*; 287 IR 302; *[2019] HCA 23*; *BC201906868* at *[20]* CB Kiefel CJ, Bell, Keane and Nettle JJ clarified that “the implied freedom of communication is not a personal right of free speech.” They said (ibid) that it is rather “a restriction on legislative power which arises as a necessary implication from ss 7, 24, 64 and 128 and related sections of the *Constitution* and, as such, extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the *Constitution*. The distinction to be drawn (ibid) was “the effect of a law on an individual’s … ability to participate in politican communication” and “the law’s effect on political communication *as a whole*.” Gageler, Gordon and Edelman JJ separately delivered concurring judgments. Accordingly, imposition of sanctions on a public servant who published comments contrary to the Australian Public Service Code of Conduct, was not protected.

In *Spence v Queensland* *(2019) 367 ALR 587*; *[2019] HCA 15*; *BC201903864* CB, were Commonwealth and State electoral laws each purporting to apply to the making of gifts to political parties. Those laws included s 302CA of the Commonwealth Electoral Act 1918 and provisions of the

Electoral Act 1992 (Qld). It was held that the impugned Commonwealth law was invalid but not the impugned State electoral laws. Kiefel CJ, Bell, Gageler and Keane JJ (at [97]) held that the State laws imposed a burden on political communication but that this was justified. The Commonwealth law, however, was beyond power and inseverable. Nettle J dissented as did Gordon J. Edelman J, delivering a separate judgment also, agreed with the answers to the special case formulated by Gordon J.

Earlier in *Brown v Tasmania* (2017) 261 CLR 328; *349 ALR 398*; *[2017] HCA 43*; *BC201708656* it was held that various provisions of the so-called "Protestors' Act" (Workplaces (Protection from Protestors) Act 2014 (Tas)) in their operation in respect of forestry land or business access areas in relation to forestry land were invalid as impermissibly burdening the implied freedom. Kiefel CJ, Bell and Keane JJ (at [88]) said that it is "necessary to keep firmly in mind that the implied freedom in [one] essential to the maintenance of the system of representative and responsible government for which the Constitution provides." The implied freedom, they said (ibid) "protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth."

In determining whether freedom is burdened they said (ibid) that "the inquiries posed by *Lange* are the indispensible means by which a legislative measure which is apt to impede the free flow of political communications may be justified." They then said (at [90]):

> Where a statute is said to impermissibly burden the freedom, the first enquiry is whether the statute in fact burdens the freedom. The extent of the burden is a matter which falls to be considered in relation to the assessments required by the second limb of *Lange*. The first enquiry requires consideration as to how the statute affects the freedom generally. It is not answered by reference to the operation of the statute in individual cases, although such evidence may provide useful examples of the statute's practical effect, and therefore of the burden the statute may have on the freedom. This Court has said more than once that the freedom spoken of is not a personal right or freedom. The freedom is better understood as affecting communication on the subjects of politics and government more generally and as effecting a restriction on legislative power which burdens communications on those subjects. (footnotes omitted)

Nettle J (at [236]) said that he substantially agreed with their Honours saying (at [237]) a "law is [to be] taken to impose an effective burden on the implied freedom of political communication if it at all prohibits or limits political communication, unless perhaps the prohibition or limitation is so slight as to have no real effect."

Gageler J also agreed with their Honours bur delivered a separate judgment in which he said (at [181]) the "effect of a law on the making or content of political communications is … gauged by nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law."

Gordon J dissenting in part said of the implied freedom (at [312]–[313]) as follows:

> Freedom of communication on matters of government and politics is an indispensable incident of the system of representative and responsible government which the Constitution creates and requires. The freedom is implied because ss 7, 24 and 128 of the Constitution (with Ch II, including ss 62 and 64) create a system of representative and responsible government. It is an indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation. For that choice to be exercised effectively, the free flow of political communication must be between electors and representatives and "between all persons, groups and other bodies in the community".
>
> 313. The implied freedom operates as a constraint on legislative and executive power. It is a freedom from government action, not a grant of individual rights. The freedom that the Constitution protects is not absolute. The limit on legislative and executive power is not absolute. The implied freedom does not protect all forms of political communication at all

> times and in all circumstances. And the freedom is not freedom from all regulation or restraint. Because the freedom exists only as an incident of the system of representative and responsible government provided for by the Constitution, the freedom limits legislative and executive power only to the extent necessary for the effective operation of that system (footnotes omitted).

Her Honour (at [315]–[317]) then spoke of "two questions":

> In determining whether a law impermissibly burdens the implied freedom, two questions must be answered.
>
> *First question*
>
> The first question asks: does the law effectively burden the freedom of communication about government or political matters either in its terms, operation or effect? Answering that question necessarily involves construing the law. That task is not a matter of evidence. It is a qualitative, not a quantitative, inquiry. And because of the integration of social, economic and political matters across federal, State and local politics, the freedom of political communication may be burdened by a State law.
>
> *Second question*
>
> The second question asks: if the law effectively burdens the freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. (footnotes omitted)

Edelman J dissented finding (at [442] that the Protestors Act was valid in its entirety in the circumstances of the case.

It can now be regarded as settled that the approach to be adopted, when a question of freedom of political communication arises, is that which is set out in *McCloy v New South Wales*, above. This is made apparent further by the decision in *Clubb v Edwards, Preston v Avery* (2019) 366 ALR 1; [2019] HCA 11; BC201902725 CB. In issue in that case was s 185D of the Public Health and Wellbeing Act 2008 (Vic) and s 9(2) of the Reproductive Health (Access to Terminations) Act 2013 (Tas) which prohibited certain communications and activities within an access zone around premises at which abortions are provided. It was argued that these provisions impermissibly burdened freedom of communication implied in the Constitution. Kiefel CJ, Bell and Keane JJ said (at [4]) that this argument "falls to be resolved by application of the test of invalidity stated in *Lange v Australian Broadcasting Corporation*, as explained in *McCloy v New South Wales* and *Brown v Tasmania*.

Briefly they set out the test (at [5]) as follows:

> The test to be applied was adopted in *McCloy* by French CJ, Kiefel, Bell and Keane JJ, and it was applied in *Brown* by Kiefel CJ, Bell and Keane JJ and Nettle J. For convenience that test will be referred to as "the *McCloy* test". It is in the following terms:
>
> 1. Does the law effectively burden the implied freedom in its terms, operation or effect?
>
> 2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
>
> 3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (footnotes omitted)

In summary (at [102]) they held (in the *Chubb* appeal) that the "limited interference with the implied freedom [occasioned by the impugned provisions] is not manifestly disproportionate to the objectives

of the communication prohibition". Nettle J (at [215]) agreed with their Honours but for reasons differing in some respects from theirs.

Gageler J (at [132]) regarded that the challenge in the *Chubb* appeal was "doomed to fail: and otherwise wholly agreed with Gordon J. It was his view also (at [146]) that "political communication" was not involved in the case.

Gordon J agreed the appeals should be dismissed and in the course of doing so (at [333]) said that the argument is not concluded by saying someone was not engaged in political communication: if "a provision is invalid because it infringes the implied freedom and is *not* severable, then the provision is invalid in its entirety." Her Honour said (ibid) that "any such invalidity is not dependent on a person contending that they engaged in communication on governmental or political matters."

Edelman J, in a separate judgment, agreed in the result. Specifically (at [442]) he said in the *Chubb* appeal that the "submission that it was for the prosecution to prove that her speech was not political should not be accepted." However (at [453]), in contrast to Gordon J, he also specifically said that the constraint imposed by the implied freedom "is against the imposition of undue burdens on political communication" although (at [455]) he said that the freedom is not confined to communication by way of oral words" — "sighs, symbols, gestures and images" are included.

See also *Smethurst v Commissioner of Police* (2020) 376 ALR 575; [2020] HCA 14; BC202002866 CB in which the Court held s 79(3) of the Crimes Act 1914, as it stood at 29 April 2018, invalid on the ground that it infringed the implied freedom.

LibertyWorks Inc v Commonwealth (2021) 391 ALR 188; [2021] HCA 18; BC202105113 CB concerned whether provisions of the Foreign Influence Transparency Scheme Act 2018 (Cth), which applied to "communications activity" by a person who acts on behalf of a "foreign principal", were invalid by reason of unjustified burden on the implied freedom of political communication. The impugned provisions imposed on such persons engaging in such activities a requirement to register themselves, and were thereafter subject to responsibilities to report certain information about themselves and their activities.

Kiefel CJ, Keane and Gleeson JJ delivered a joint judgment in which it was reasserted that the *McCloy* proportionality test had "consistently been maintained by a majority of this Court in each of the cases concerning the implied freedom since" *McCloy* (at [48]). Gageler J accepted that this approach was "precedent-mandated" (at [93]) but applied it in a different manner. Edelman J described the proportionality test as "the now accepted approach" and said that it "provides a transparent manner in which to determine whether a law which burdens political communication for some legitimate purpose has contravened the implied freedom of political communication" (at [199]–[200]). Gordon J did not directly comment on the proportionality test, but appeared not to favour it (at [134]). Steward J accepted that the structured proportionality test "can, in a given case, be used as analytical tools to test whether a given law is reasonably appropriate and adapted in the advancement of its purpose" and that its use in that case was "apt" (at [247]); however, his Honour went on to question the very existence of the implied freedom of political communication (at [298]–[304]).

The plurality found that the impugned law did "not place any burden on a person in Australia engaging in political communication on their own behalf, unaffected by any relationship with a foreign principal" (at [64]). The "only communication affected is that made under an arrangement with or at the direction of a foreign principal with the intention that it be used for the purpose of political or governmental influence", which was "only a small subset of political communication" (at [74]). Their Honours also found that the offence provisions of the law were "not directed to the making of political communication; rather they are directed to ensuring that the exposure of the relationship between the maker and the foreign principal is achieved" (at [72]).

The plurality found that the suitability element of the proportionality test was met in that there was "[c]learly" a rational connection between the impugned legislation's purpose of minimising the risk of influence being exerted by foreign principals on Australia's political or election processes and the requirement of registration (at [76]–[77]).

As to the necessity element of the proportionality test, the plurality found that "[r]egistration enables both the relationship between the person and their foreign principal and a description of the political communication undertaken by the person in that capacity to be matters of public record" and accordingly the necessity requirement was made out for both the obligations to be registered and to disclose relevant matters; disclosure alone was not enough (at [82]–[84]).

As to the adequacy of balance element, the plurality reaffirmed that "a law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom" and "a powerful public, protective purpose assumes a special importance" (at [85], citing *McCloy v New South Wales* (2015) 257 CLR 178; *325 ALR 15*; *[2015] HCA 34*; *BC201509677* at *[86]–[87]*; *Clubb v Edwards, Preston v Avery* (2019) 267 CLR 171; *366 ALR 1*; *[2019] HCA 11*; *BC201902725* at *[101]–[102]*; *Comcare v Banerji* (2019) 267 CLR 373; *372 ALR 42*; *[2019] HCA 23*; *BC201906868* at *[38]* and *[42]*). The impugned legislation had such a purpose, which was not outweighed by the legislation's modest burden on the implied freedom.

Edelman J (at [245]) and Steward J (at [246]) concurred with the plurality. Gageler J, in dissent, found that the registration requirement was "incompatible" (avoiding the terminology of proportionality) with the freedom of political communication, in short because the registration requirement had "incidents which burden political communication by a registrant to a substantially greater extent than is necessary to achieve the sole identified legislative object of improving transparency" (at [92]). Gordon J reached a similar conclusion (at [188]–[191]).

[1505.9A] Discriminatory federal legislation

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* 117, ss 51(ii), 92, 99.

"There is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth. There is, of course, the implication drawn from the federal structure erected by the Constitution that prevents the Commonwealth from legislating in a way which discriminates against the States by imposing special burdens or disabilities upon them or in a way which curtails their capacity to exercise for themselves their constitutional functions … There are also specific provisions prohibiting discrimination or preference of one kind or another, but these are confined in their operation. [See, for example, *ss 51(ii)*, *92*, *99*, *117*.] [T]here is nothing in [the decisions of *Street v Queensland Bar Assn* (1989) 168 CLR 461 ; *88 ALR 321* and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *90 ALR 371*] which would support any general implication to be drawn from the Constitution that Commonwealth laws must not be discriminatory or must operate uniformly throughout the Commonwealth": *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455107 ALR 672 at 679 per Mason CJ, Dawson and McHugh JJ.

"It would be offensive to the constitutional unity of the Australian people 'in one indissoluble Federal Commonwealth', recited in the first preamble to the Commonwealth of Australia Constitution Act 1900, to expose offenders against the same law of the Commonwealth to different maximum penalties dependent on the locality of the court by which the offender is convicted and

sentenced … On the other hand, where an offence against a law of the Commonwealth is defined to contain an element of locality within Australia, [the] law, which discriminates between conduct in one part of Australia and like conduct in another part must find support in the power under which the law is purportedly enacted": *Leeth v Commonwealth* , *above,*at 685 per Brennan J.

"[T]here is to be discerned in the Constitution as a whole an assumption of the fundamental common law doctrine of legal equality which operates to confine the prima facie scope of the legislative powers which the Constitution vests in the Commonwealth … The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment: *Leeth v Commonwealth* , *above*at 696 per Deane and Toohey JJ. See also per Gaudron J at 706–7 (the judicial process, which is an essential feature of the judicial power of the Commonwealth, requires that like matters be treated in a like manner and that proper account be given to genuine differences).

SECTION 51(i) — TRADE AND COMMERCE WITH OTHER COUNTRIES, AND AMONG THE STATES

[1505.55] Trade and commerce

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(i), Section 51(i).

The width of the activities which falling the concept of "trade and commerce" was stressed in *W and A McArthur Ltd v Queensland* (1920) 28 CLR 530 CB. "They are expressions of fact, they are terms of common knowledge, as well known to laymen as to lawyers, and better understood in detail by traders and commercial men than by judges": at 546. In that case (at 547) the Court said "all the commercial agreements of which transportation is the direct and necessary result form part of trade and commerce."

The power may be used to support environmental protection policies by prohibiting the export of a mineral whose extraction could damage the environment: *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; *9 ALR 199* CB.

It may be used to regulate employment in the loading or unloading of ships involved in interstate and international trade: *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 CB; *R v Wright; Ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528 CB.

Section 51(i) will support legislation authorising direct Commonwealth participation in interstate and overseas trade and commerce activities: *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 CB. The expression of s 51(i), as a power "with respect to … trade and commerce" will further extend the range of activities which may be regulated by the Commonwealth: *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

Accordingly, the Commonwealth may regulate production of commodities intended for trade and commerce with other countries (*O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 CB) and the subsequent distribution or sale of those commodities which had formed part of that trade and commerce: *Crowe v Commonwealth* (1935) 54 CLR 69 CB.

Section 51(i) also supported a Commonwealth law conferring on the Commonwealth Director of Public Prosecutions the function of prosecuting an offence against a State law where the offence related to the making of investments in another country "and thus to trade and commerce with other countries": *R v Hughes* (2000) 202 CLR 535; *171 ALR 155*; *BC200002055*; *[2000] HCA 22* at *[42]* CB.

By s 98 of the Constitution the power in s 51(i) extends to "navigation and shipping."

[1505.11] "for the peace, order and good government of the Commonwealth"

On one analysis, this is formulaic. However, on another, it may be argued that a law which cannot be characterised as a lawful exercise of power is not one "for the peace, order and good government of the Commonwealth". Compare, however, *Liyanage v The Queen* [1965] UKPC 39; [1967] 1 AC 259 [1966] 1 All ER 650.

[1505.60] Intrastate trade and commerce

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(i).

The power granted by s 51(i) has been read as assuming the division of trade and commerce into three categories: international, interstate and intrastate. The first two fall within the Commonwealth's legislative power, the last falls outside that power: *Wragg v New South Wales* (1953) 88 CLR 353 at 386. It may be observed that the framers of the Constitution "may not have envisaged the extent of the national markets which now exist": *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217; 286 ALR 221; [2012] HCA 12; BC201201677 at [126] CB.

The Commonwealth may regulate those intrastate activities which are "inseparably connected" with interstate trade and commerce, as when traders made a single agreement to restrict interstate and intrastate trade in tyres: *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194 CB. In some jurisdictions this is known as "commingling". The Commonwealth may also regulate intrastate trade where the effective regulation or protection of interstate trade cannot be achieved without the regulation of intrastate trade, as in the regulation of air safety: *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 CB.

However, this approach has only been accepted where there is a physical integration between intrastate trade and interstate and international trade; and any economic considerations, which might demonstrate that effective control of interstate trade requires control of intrastate trade because of the integration of the two, are constitutionally irrelevant: *Attorney-General (WA); Ex rel Ansett Transport Industries Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492; 12 ALR 17 CB.

[1505.16] Characterisation

The principles governing characterisation of a Commonwealth law in order to determine whether it is within the scope of a legislative power conferred by s 51 are well settled: *Spence v Queensland* (2019) 367 ALR 587; [2019] HCA 15; BC201903864 at [57] CB per Kiefel CJ, Bell, Gageler and Keane JJ. Their Honours quoted from the judgment of Latham CJ in *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; 22 ALJR 191; [1948] 2 ALR 89; BC4800090 CB, "it is in the first place obviously necessary to construe the law and to determine its operation and effect… and in the second place to determine the relation of that which the Act does to a subject matter in respect of which it is contended that the [Commonwealth] Parliament has power to make laws".

SECTION 51(ii) — TAXATION; BUT SO AS NOT TO DISCRIMINATE BETWEEN STATES OR PARTS OF STATES

[1505.65] The nature of taxation

The drafting history of s 51(ii) is set out in *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548; *300 ALR 26*; *[2013] HCA 34*; *BC201311629* at *[17]*.

"[A] tax … is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered …": *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 270 per Latham CJ. However, this is not an exclusive definition: "[T]here is no reason in principle a tax should not take a form other than the exaction of money or why the compulsory taxation of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public": *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467; *82 ALR 385* at *389*; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448; *268 ALR 232*; *[2010] FCAFC 52*; *BC201003449*. The Court in *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530; *281 ALR 671*; *[2011] HCA 40*; *BC201107575* at *[19]* said that the statement of Latham CJ "in some respects requires further analysis" and referred to the *Roy Morgan Research* decision.

The voluntary payment of money to achieve rights in the nature of property should not be characterised as taxation. Where a fee is exacted in return for the granting of rights over a public resource that the grantee has chosen to acquire, that fee will generally not be characterised as a tax: see *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541; *273 ALR 553*; *[2010] FCA 124*; *BC201007065* at *[81]–[82]*; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314; *88 ALR 38*; [1989] HCA 47; *BC8902706*. Appeal in the former case was dismissed by the Court: see *Queanbeyan City Council v ACTEW Corporation Ltd*, *above*.

[1505.70] Charge for services

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 53.

There is an indication itself, in the Constitution, *s 53*, that a proposed law is not to be taken as one imposing taxation by reason only of its containing provisions for payment of "fees for services."

To answer this description, a charge must be "a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment": *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 470; *82 ALR 385* at *391*. In that case a fee for immigration clearance imposed on Australian citizens entering Australia could not be accepted as a fee for services rendered to or at the request of the citizen. See also *Harper v Victoria* (1966) 114 CLR 361 at 377 and 382; *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 258; [1950] ALR 55; and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; *112 ALR 87*. Compulsory exactions of money by a public authority for a public purpose and not a payment for services rendered, may support their characterisation as a tax but they may not always be determinative: *Ausnet Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439; *322 ALR 385*; *[2015] HCA 25*; *BC201507278* at *[45]*.

Further, a law which levies an exaction on one group in the community to be expended for the benefit or advantage of another group in the community may be a law imposing taxation, the expenditure being properly described as for a public purpose: *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480; *112 ALR 53*. However, where a charge is imposed in substitution for an antecedent obligation, it is not a tax: see *Luton v Lessels* (2002) 210 CLR 333; *187*

ALR 529; *[2002] HCA 13*; *BC200201537*; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448; *268 ALR 232*; *[2010] FCAFC 52*; *BC201003449*.

A law authorising an exaction does not necessarily bear the legal character of a law imposing taxation merely because the exaction is in the form of a charge, the amount of which is not directly related to the cost of providing or the value of the particular services or facilities: *Airservices Australia v Canadian International Airlines Ltd* (1999) 202 CLR 133; *167 ALR 392*; *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541; *273 ALR 553*; *[2010] FCA 124*; *BC201007065*.

Under the legislation challenged in the former case, a charge was payable by an airline for air traffic services, rescue and fire fighting services, and meteorological services. The airline argued that the lack of relationship between the manner of calculation of the charges, the value to the airline of the services and the cost of providing the particular services to the airline meant that the charges were a tax. The Court rejected the argument on the basis that the object of the charges was not to raise revenue, but to recover the cost of providing the services across the entire range of users: at [92]. Accordingly, there was no warrant for concluding that the charges amounted to taxation on the ground that they exceeded the value to particular users of particular services or the cost of providing particular services to particular users: at [93].

[1505.75] Disguised taxation

A requirement that all vendors of petrol purchase (from local producers) a fixed proportion of power alcohol did not impose a tax, because it did not impose "a liability to the State, or to any public authority, or to any definite body or person authorised by law to demand or receive it": *Vacuum Oil Co Pty Ltd v Queensland* (1934) 51 CLR 108 at 125. However, legislation which expropriated all flour produced in a State and gave the producer the right to re-purchase the flour at a price above the expropriation price, while obliging the producer to store the flour at its own expense and risk, was held to impose a tax: *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390. The lack of legal obligation did not prevent this conclusion and this was quoted in *Knight v Secretary, Department of Justice* *[2012] VSC 613*; *BC201209807* at *[94]*. The payment was exacted by "sanctions consisting in the detriments arising from the adoption by the taxpayer of the alternative left open by the legislation": *Attorney-General (NSW) v Homebush Flour Mills Ltd*, above, at 413. See also *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 444–5.

[1505.80] Taxation distinguished from financial penalties

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 53.

Taxes are also distinguished from fines in *s 53* of the Constitution.

A tax is a payment "demanded as a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends", while a penalty is a payment "claimed as solely a penalty for an unlawful act or omission, other than non-payment of or incidental to a tax": *R v Barger* (1908) 6 CLR 40 at 99. See also *Re Dymond* (1959) 101 CLR 11 at 22.

This line of distinction was referred to by the Court in *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388; *211 ALR 18*; *[2004] HCA 53*; *BC200407491* at *[47]*.

[1505.85] Taxation distinguished from arbitrary exactions

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(ii).

To be treated as a tax within s 51(ii) rather than an arbitrary exaction outside s 51(ii), the liability to pay money must "be imposed by reference to ascertainable criteria with a sufficiently general application and [not] as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation": *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684; *59 ALR 431* at *434*. Further, to be classified as a tax rather than an arbitrary exaction, the imposition must not be an "incontestable tax". A person on whom the liability is imposed must have the opportunity to challenge the liability through some judicial process: *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 640–1; *52 ALR 53* at *64*.

In *Attorney General (NT) v Emmerson (2014) 307 ALR 174*; 88 ALJR 522; *[2014] HCA 13*; *BC201402411* at *[53]* CB the matter was expressed as follows:

> "Constitutional principles and common law values, rooted in British legal history, … preclude the arbitrary exercise of sovereign power. For example, a financial exaction imposed by a legislature, such as a tax, must be clear both as to the identification of the taxpayer and as to the taxpayer's liability to pay the tax. Delegation by a legislature to a member of the Executive of a discriminatory dispensing power in respect of such an exaction would offend against the operation of Powers."

[1505.90] Links with Consolidated Revenue Fund

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 81.

"In Australia, the fact that a levy is directed to be paid into the Consolidated Revenue Fund has been regarded as a conclusive indication that the levy is exacted for public purposes … But neither principle nor Australian authority provides any support for the converse proposition that an exaction is not a tax if it is not to be paid into the Consolidated Revenue Fund. The requirement imposed by *s 81* of the Constitution that all revenues or moneys raised or received by the Executive Government form one Consolidated Revenue Fund is not, and cannot constitute, a criterion for what is a tax. The purpose of *s 81* … was to ensure that the revenues of the Crown, including taxes, were brought together in one Consolidated Revenue Fund … under the control of Parliament. To hold that revenues or moneys that are not treated in accordance with the requirements of *s 81* cannot be taxes to which *s 81* applies is circuitous reasoning and deprives *s 81* of any effective content": *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 503–4; *112 ALR 53* at *60–1* per Mason CJ, Brennan, Deane and Gaudron JJ.

[1505.95] Characterisation of taxation laws

Legislation cited in this paragraph

(CTH) *Financial Transaction Reports Act 1988* Section 24.

(CTH) *Commonwealth of the Australia Constitution Act* s 51(ii).

The question whether a law is one with respect to taxation is to be determined "by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes": *Fairfax v*

Federal Commissioner of Taxation (1965) 114 CLR 1 at 7. Inquiry into the justice or wisdom of the legislature's chosen measures is precluded: *AG (NT) v Emmerson* [2014] HCA 13; BC201402411 at [80].

"In characterising a law the Court has regard to its operation, to what the law does in the way of creating rights and obligations, and how it operates within the permitted area of power. It matters not that the provisions which so operate may be intended to achieve some other purpose: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; 9 ALR 199; *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; 40 ALR 609; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; 61 ALR 1 ": *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 354; 73 ALR 161 at 175.

A law imposing a tax on the income of superannuation funds and offering an exemption to any fund which invested in public securities was a law with respect to taxation, despite its clear objective of controlling the funds' investment practices: "[T]he substance of the enactment is the obligation which it imposes and the only obligation imposed is to pay income tax": *Fairfax v Federal Commissioner of Taxation*, above at 13. See also *Osborne v Commonwealth* (1911) 12 CLR 321 at 344; *Moore v Commonwealth* (1951) 82 CLR 547 at 578.

In *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; 112 ALR 87 at 94, Mason CJ, Deane, Toohey and Gaudron JJ said, of a charge imposed on employers who did not make a minimum expenditure on training their employees "… the fact that the revenue-raising burden is merely secondary to the attainment of some other object or objects is not a reason for treating the charge otherwise than as a tax. One might as well suggest that a protective customs duty is not a tax because its primary object is the protection of a particular local manufacturing industry from overseas competition". In rejecting an argument that the charge was a penalty rather than a tax, Mason CJ, Deane, Toohey and Gaudron JJ said (CLR at 571; ALR at 95):

"Neither the Act nor the Administration Act mandates or proscribes conduct of any kind. The legislative provisions do not make it an offence to fail to spend the minimum training requirement; nor do they provide for the recovery of civil penalties for such a failure. Consequently, the charge is not a penalty because the liability to pay does not arise from any failure to discharge any antecedent obligations on the part of the person on whom the exaction falls … The fact that the legislature has singled out those who do not spend the minimum training requirement as the class to bear the burden of the charge and to quantify the amount of the liability by reference to the shortfall does not deprive the charge of the character of a tax."

Section 24 of the Financial Transaction Reports Act 1988, which prohibits the opening or operation of a bank account in a false name, is a law with respect to taxation within s 51(ii): *Rogers v R* (1995) 130 ALR 635 (Court of Criminal Appeal, South Australia). Doyle CJ (with whose judgment Prior and Nyland JJ agreed) said (at 646) that there was, from the textual point of view, no connection between s 24 and the subject matter of taxation; but he accepted that the practical effect of the law was to make evasion of tax liability significantly more difficult. It followed that the purpose or object of the law was within the power conferred by s 51(ii). Further, the connection between s 24 and the subject of taxation was not too insubstantial or indirect; and the provision could not be said to go beyond what is reasonably necessary for the achievement of a legitimate end sought to be attained — so that it could be described as reasonably proportionate to the end in view.

For the same reasons, s 31(1) of the Financial Transaction Reports Act 1988, which makes it an offence for a person to split a cash transaction into two or more transactions so as to avoid the reporting obligation imposed by s 7 of the Act in relation to cash transactions involving $10,000 or more, is a law with respect to taxation within s 51(ii) of the Constitution: *Leask v*

Commonwealth (1996) 187 CLR 579 at 612, 616, 638; *140 ALR 1* at *23*, *26*, *43* per Toohey, Gaudron, Kirby JJ.

The Court, however, has said that questions of characterization can turn on questions of degree and the "more the legal operation of [a] law is removed from the subject matter of the power, the more questions of degree will become important": *Spence v State of Queensland (2019) 367 ALR 587*; *[2019] HCA 15*; *BC201903864* at *[59]*.

[1505.100] Objects and subject of taxation

A law imposing a tax on the promoters of and other participants in tax evasion schemes, calculated by reference to the tax evaded by other taxpayers, is a valid law with respect to taxation: *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622; *52 ALR 53*. It is no objection to the validity of a tax law that there was no connection between the objects of taxation (the person on whom liability to pay a tax was imposed) and the subject of taxation (the criteria according to which the tax liability was created): CLR at 636 and 653; ALR at 61 and 74–5. See also *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 685; *59 ALR 431* at *435*.

[1505.105] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(ii).

Under s 51(ii), the Commonwealth Parliament may impose a tax on State government payrolls: "[T]he power of the Parliament with respect to taxation is not in any wise excepted from the basic principle that a valid law made by the Parliament may bind the Crown in right of a State according to its terms": *Victoria v Commonwealth* (1971) 122 CLR 353 at 383, (the *Payroll Tax* case). Similarly, the Commonwealth Parliament may impose a tax on State governments in respect of the "fringe benefits" which those governments paid to state ministers, members of parliament and judges: "[T]he States are subject to the Commonwealth Parliament's exercise of the taxation power; they have no immunity from Commonwealth taxation": *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 356; *73 ALR 161* at *176–7*. Nonetheless the Court in *Spence v State of Queensland* *[2019] HCA 15*; *BC201903864* at *[309]* quoted Dixon J that: "The Constitution predicates [the] continued existence [of the States] as independent entities."

[1505.110] Discrimination

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(ii).

Section 51(ii) requires that a law with respect to taxation prescribe the same rule and standards as between States and parts of States. If different standards are prescribed the *s 51(ii)* requirement is breached, "whether those standards are arbitrary or measured, whether dictated by a desire to benefit or to injure": *Cameron v Federal Commissioner of Taxation* (1923) 32 CLR 68 at 76–7. Uniform standards which operate unequally in the several States because of differences between conditions existing in the several States do not offend against the *s 51(ii)* requirement: *Colonial Sugar Refining Co v Irving* *[1906] AC 360* at *367–8*. See also *Conroy v Carter* (1968) 118 CLR 90; [1968] ALR 545; 42 ALJR 96.

Hence, it has been said that a "law with respect to taxation, in general, does not discriminate in the sense spoken of in s 51(ii) if its operation is general throughout the Commonwealth even though, by reason of circumstances existing in one or more of the States, it may not operate uniformly: *Austin v Commonwealth* (2003) 215 CLR 185; *195 ALR 321*; *[2003] HCA 3*; *BC200300114* at 241. This

was quoted in *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548; *300 ALR 26*; *[2013] HCA 34*; *BC201311629* at *[45]* CB.

[1505.115] "between States"

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(ii).

The discrimination prohibited by s 51(ii) involves the selection of different States or parts of States in their character as States or parts of States, not in their character as (for example) ports: *Elliott v Commonwealth* (1936) 54 CLR 657 at 675, 678, 680 and 705. For a critique of this approach, see *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 265. Authority is not clear on the meaning to be given to a "part" of a State.

SECTION 51 (iii) — BOUNTIES ON THE PRODUCTION OR EXPORT OF GOODS, BUT SO THAT SUCH BOUNTIES SHALL BE UNIFORM THROUGHOUT THE COMMONWEALTH

[1505.120] Exclusive power

The power to grant bounties on the production of goods is exclusive to the Commonwealth: Commonwealth Constitution, s 90 *[1800.5]*.

[1505.125] A governmental payment

A legislative requirement that vendors of petrol purchase a prescribed quantity of power alcohol from the producers of that commodity does not provide for the payment of a "bounty" on the production of power alcohol, because the purchase price of the power alcohol is not paid for or on behalf of a government or governmental authority: *Vacuum Oil Co Pty Ltd v Queensland* (1934) 51 CLR 108 at 120 and 125.

There is some doubt now about the remaining effect of this authority in light of observations in *Sportsbet Pty Ltd v State of New South Wales* *[2012] HCA 13* at *[18]*. Nevertheless, the Full Federal Court found the analysis in the case helpful in *Rocklea Spinning Mills Pty Ltd v The Anti-Dumping Authority* [1995] FCA 210.

SECTION 51(iv) — BORROWING MONEY ON THE PUBLIC CREDIT OF THE COMMONWEALTH

[1505.130] The financial agreement

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 105A(5), s 51(iv).

Section 105A(5) declares that any agreement made between the Commonwealth and the States relating to the public debts of the States, and dealing with (inter alia) public borrowing, "shall be binding on the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution … or in any law of the Commonwealth …". Consequently, any law made under s 51(iv) will be subject to the Financial Agreement 1927.

[1505.135] Protecting Commonwealth loans from state taxes

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(iv).

The Parliament may legislate under s 51(iv) to protect interest paid to Commonwealth bond holders

from State taxation: *Commonwealth v Queensland* (1920) 29 CLR 1 at 21. See *Spence v State of Queensland* [2019] HCA 15; BC201903864 at [355] CB.

SECTION 51(v) — POSTAL, TELEGRAPHIC, TELEPHONIC, AND OTHER LIKE SERVICES

[1505.140] Technological changes

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(v).

The object of s 51(v) was "to place under federal authority the control of distant communication carried on according to a systematic plan"; and there is "ample justification for holding that wireless broadcasting is a telephonic service": *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 282 and 284. Similarly, s 51(v) will support Commonwealth regulation of television broadcasting and receiving, and the establishment of a Commonwealth-owned television broadcaster: *Jones v Commonwealth* (1965) 112 CLR 206 CB. See also *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595; 206 ALR 1; [2004] HCA 19; BC200402132 at [145] CB per Callinan J.

[1505.145] Incidental matters

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(v).

Under s 51(v), the Commonwealth may regulate the corporate structure of the holders of television broadcasting licences: *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418 CB. Because the Commonwealth could prohibit the broadcasting of television services, it could permit or license that broadcasting subject to such conditions as the Parliament selected. Determining whether a law is incidental to the subject-matter of a power can be assisted by examining how the purpose of the law — what the law can be seen to be designed to achieve in fact — might relate the question of law to the subject-matter of the power: *Spence v State of Queensland* (2019) 367 ALR 587; [2019] HCA 15; BC201903864 at [60] CB.

[1505.150] Political advertising

Because the Constitution guarantees members of the community a right to communicate on public affairs, the Parliament cannot legislate to prohibit the broadcasting of political advertisements during federal, State or Territory election campaigns: *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; 108 ALR 577 CB.

SECTION 51(vi) — THE NAVAL AND MILITARY DEFENCE OF THE COMMONWEALTH AND OF THE SEVERAL STATES, AND THE CONTROL OF THE FORCES TO EXECUTE AND MAINTAIN THE LAWS OF THE COMMONWEALTH

[1505.155] Associated provisions

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 114, s 119, s 51(xxxii), s 52(ii), s 68.

Section 51(xxxii) authorises the Parliament to legislate for "The control of railways with respect to transport for the naval and military purposes of the Commonwealth"; *s 68* vests "The command in chief of the naval and military forces of the Commonwealth … in the Governor-General" [1640]; s 52(ii) gives the Commonwealth exclusive power over, inter alia, the former colonial departments of

naval and military defence *[1510.10]*; *s 114* precludes the States from raising or maintaining any naval or military force, except with the consent of the Commonwealth; and *s 119* imposes on the Commonwealth the obligation to "protect" every State against invasion and, on the application of the Executive Government of the State, against "domestic violence". Given the conditions at the time the Constitution was promulgated, "invasion" would seem limited to physical invasion.

[1505.160] A concurrent power

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 114, s 51(vi), s 52(ii).

Apart from the aspects of the defence power covered by *s 52(ii)* and *s 114*, the power granted by *s 51(vi)* is not exclusive to the Commonwealth: *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 571 and 596.

[1505.165] A comprehensive power

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(vi).

The words "naval and military" are not words of limitation: *Thomas v Mowbray* (2007) 233 CLR 307; *237 ALR 194*; *[2007] HCA 33*; *BC200706044* at *[137]–[138]*, *[436]*, *[588]*, *[611]* CB. The defence power "is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public": at [7] per Gleeson CJ. See also at [141]–[146] per Gummow and Crennan JJ (with whom Gleeson CJ and Heydon J agreed), at [436]–[443] per Hayne J and at [583] per Callinan J. See also *White v Director of Military Prosecutions (2007) 235 ALR 455*; *[2007] HCA 29*; *BC200704600* at *[21]* CB.

The Commonwealth may rely on *s 51(vi)* in time of war to support economic regulations which could contribute to the successful prosecution of the war: *Farey v Burvett* (1916) 21 CLR 433 CB.

[1505.170] A purposive power

The defence power "involves the notion of purpose or object": a law will be characterised as a law with respect to the defence of the Commonwealth where "defence or war [is] the purpose to which the legislation [is] addressed", which purpose is to "be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth": *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; *Thomas v Mowbray* (2007) 233 CLR 307; *237 ALR 194*; *[2007] HCA 33*; *BC200706044* at *[135]–[136]* CB. A law will usually be regarded as incidental to a power of this kind if it is designed to achieve a purpose related to the subject-matter of the power: *Spence v State of Queensland (2019) 367 ALR 587*; *[2019] HCA 15*; *BC201903864* at *[60]* CB.

[1505.175] Justiciability

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(vi).

The circumstances which can support an exercise of the defence power are frequently based on strategic and international political assessments, so that the relationship between the courts and the government which claims to rely on *s 51(vi)* is problematic. Judicial deference to the judgment of the Commonwealth Parliament was emphasised in *Farey v Burvett* (1916) 21 CLR 433 at 455, 448 and

449. But the High Court has at other times asserted its capacity to review the Parliament's claim of the defence necessity of legislation: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262 and 264.

A resolution of these opposing views can be found in the formulation adopted by Fullagar J in *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177 at 265: Commonwealth legislation will be accepted as within s 51(vi) if "it could reasonably be regarded as a means towards attaining an object which is connected with defence". In *Thomas v Mowbray* (2007) 233 CLR 307; 237 ALR 194; [2007] HCA 33; BC200706044, the Court accepted that the question whether a control order was reasonably necessary to protect the public from a terrorist act was justiciable, and that the legislation calling for that judgment was supported by the defence power: see, in particular, at [104]–[110]; compare at [493]–[514] per Hayne J (dissenting).

[1505.180] Military discipline

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Ch III, s 51(vi), s 80.

It is now accepted that s 51(vi) will support Commonwealth legislation establishing a disciplinary code to be administered judicially but standing outside the provisions of Ch III of the Constitution, including the guarantee of trial by jury contained in s 80: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 540; 84 ALR 1; 63 ALJR 250; 16 ALD 730; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; 100 ALR 645; 65 ALJR 486; BC9102615; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; 121 ALR 153; 68 ALJR 499; BC9404630; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; 209 ALR 311; [2004] HCA 44; BC200405815; *White v Director of Military Prosecutions* (2007) 235 ALR 455; [2007] HCA 29; BC200704600 at [14], [39]–[40].

There is some uncertainty as to the range of conduct that the Parliament may include in such a disciplinary code. One view is that the Parliament may provide that *any* conduct which constitutes an offence under the general law shall constitute a disciplinary offence if committed by a defence member: see, eg, *Re Tracey; Ex parte Ryan*, above, at CLR 544–5 per Mason CJ, Wilson and Dawson JJ; *Re Tyler; Ex parte Foley*, above, at ALR 156 per Mason CJ and Dawson J. Another view is that the Parliament can only make conduct a disciplinary offence where to do so can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline: *Re Nolan; Ex parte Young*, above, at CLR 477 per Brennan and Toohey JJ; *Re Tyler; Ex parte Foley*, above, at ALR 158 per Brennan and Toohey JJ. A third view is that the Parliament cannot confer on service tribunals authority to try and punish members of the armed forces for offences that are not exclusively disciplinary but are substantially the same as offences under the general law: *Re Nolan; Ex parte Young*, above, at CLR 497 per Gaudron J; *Re Tyler; Ex parte Foley*, above, at ALR 162 per Deane J; at ALR 163 per Gaudron J.

In *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; 209 ALR 311; [2004] HCA 44; BC200405815, a majority of the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ; Kirby, Callinan and Heydon JJ dissenting) held that s 51(vi) empowered Parliament to make it a service offence for a member of the defence force to commit rape while on leave in a country other than the country in which that member was serving. McHugh J (with whom Hayne J agreed) said (at [36]) that:

> [36] The difference between the views of Mason CJ, Wilson and Dawson JJ and on the other hand Brennan and Toohey JJ in these cases is the difference between the "service status" view of the jurisdiction and the "service connection" view of that jurisdiction. The "service status" view — which is now applied in the United States — gives a service tribunal jurisdiction over a person solely on the basis of the accused's status as a member of the armed forces. The "service connection" view of the jurisdiction requires a connection between the service and the offence …

McHugh J observed that since *Tracey*, *Nolan* and *Tyler* "it seems to have been generally accepted — indeed it was accepted by the Judge Advocate in the present case — that the proper test is the 'service connection' test and not the 'service status' test": at [37]. Callinan and Heydon JJ expressly agreed with McHugh J's adoption of the "service connection" test, although they disagreed with its application on the facts: at [158].

In *White v Director of Military Prosecutions*, above, the applicant did not advance an argument based on absence of connection between the alleged offence and military discipline, so it was not necessary for the Court to consider the relevant test: see at [3] per Gleeson CJ and at [76] per Gummow, Hayne and Crennan JJ.

It is clear that *s 51(vi)* will not support Commonwealth legislation prohibiting the trial of a defence force member for a State offence where the member had been tried by a service tribunal for a service offence arising out of the same conduct: *Re Tracey; Ex parte Ryan*, above.

In *Haskins v Commonwealth of Australia* (2011) 244 CLR 22; *279 ALR 434*; *[2011] HCA 28*; *BC201105899* at *[21]* CB the Court observed "that this Court has repeatedly upheld the validity of legislation permitting the imposition by a service tribunal that is not a Ch III court of punishment on a service member for a serious offence." The Court said (ibid) that steps taken to punish service members "are not steps taken in the exercise of the judicial power of the Commonwealth."

[1505.185] The defence power in peace-time

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(iv), s 51(vi).

The core of the defence power, which will be available even when Australia is not involved in or anticipating hostilities, will include "such matters as the enlistment (compulsory or voluntary) and training and equipment of men and women in navy, army and air force, the provision of ships and munitions, the manufacture of weapons and the erection of fortifications": *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 254; [1951] ALR 129; (1951) 24 ALJR 485; *BC5100030* CB. It will support legislation:

- authorising the manufacture and sale of non-military uniforms, because this assists the maintenance of a capacity to produce military uniforms: *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533 CB (the *Clothing Factory* case), but see *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 CB;
- establishing a code of military discipline: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 540; *84 ALR 1*;
- imposing a system of compulsory military service: *Krygger v Williams* (1912) 15 CLR 366 CB; *Giltinan v Lynch* (1971) 124 CLR 153 CB; and
- controlling commodities of military value to Australia: *Jenkins v Commonwealth* (1947) 74 CLR 400 CB; *Logan Downs Pty Ltd v FCT* (1965) 112 CLR 177 CB.

In the absence of war or an international emergency, the defence power will not support Commonwealth legislation proscribing a political party and excluding its members from participation in industrial affairs: *Australian Communist Party v Commonwealth*, above. However, in a deteriorating international political situation, *s 51(vi)* will support Commonwealth legislation restricting the capital raising activities of Australian businesses: *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177; [1952] ALR 821; (1952) 26 ALJR 321; *BC5200610* CB.

In *Thomas v Mowbray* (2007) 233 CLR 307; *237 ALR 194*; *[2007] HCA 33*; *BC200706044*, the Court accepted that legislation empowering the Court to make a control order if such an order was reasonably necessary to protect the public from a terrorist act was supported by the defence power. There was some criticism in the judgments of any attempt to draw a clear distinction between peace-time and wartime, which, even if it was once appropriate, may no longer reflect international reality.

There is extensive discussion of *s 51(iv)* in that case by Kirby J at [220]–[268].

[1505.190] The defence power in war–time

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(vi).

When Australia is involved in significant hostilities, the secondary aspect of s 51(vi) may be invoked by the Commonwealth. This secondary aspect "extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence. Examples now familiar are the prices of goods and the rationing of goods; rents and the eviction of tenants; the transfer of interests in land; and the conditions of employment in industry generally": *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 254–5. In this context, s 51(vi) will support legislation:

- allowing the detention of any person thought by the Government to threaten Australia's defence: *Lloyd v Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359; *BC4200006*; *Little v Commonwealth* (1947) 75 CLR 94; [1947] ALR 483; (1947) 21 ALJR 292; *BC4700330*;
- fixing the maximum prices of domestic commodities: *Farey v Burvett* (1916) 21 CLR 433; *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 335 (the *Prices Regulation* case);
- controlling industrial employment: *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 335 (the *Women's Employment* case); *Reid v Sinderberry* (1944) 68 CLR 504; and
- taking over the premises, staff, equipment and records of the States' taxation offices: *South Australia v Commonwealth* (1942) 65 CLR 373 (the *First Uniform Tax* case).

On the other hand, this secondary aspect of s 51(vi) will not support legislation controlling enrolment in Australian universities: *R v University of Sydney; Ex parte Drummond* (1943) 67 CLR 95; legislation authorising seizure of the property of an organisation declared to be prejudicial to the war effort, and prohibiting the publication of any of its doctrines: *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; and legislation prescribing standards for the lighting of industrial premises: *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 413 (the *Industrial Lighting* case).

[1505.195] Transition from war to peace

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(vi).

The secondary aspect of s 51(vi) does not disappear on the cessation of hostilities, but is "wound

down" as the transition is made from a war-time to a peace-time society: "The power must … extend to sustaining for some reasonable interval of time the laws and regulations in force at the end of hostilities so as to enable the legislature to proceed with the task": *Dawson v Commonwealth* (1946) 73 CLR 157 at 184.

Three years after the war, s 51(vi) still supported legislation requiring employers to give preference to former members of the armed services: *Wenn v A-G (Vic)* (1948) 77 CLR 84 CB.

On the other hand, in 1949 s 51(vi) was held to be incapable of supporting legislation which regulated women's employment, rationed petrol and controlled residential accommodation: *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43 CB; and in 1959, s 51(vi) was held to no longer support the legislatively-prescribed preference for ex-service personnel: *Illawarra District County Council v Wickham* (1959) 101 CLR 467 CB.

As Kirby J said in *Thomas v Mowbray* (2007) 233 CLR 307; *237 ALR 194*; *[2007] HCA 33*; *BC200706044* at *[236]* CB the "*defence power waxes and wanes*."

SECTION 51(x) — FISHERIES IN AUSTRALIAN WATERS BEYOND TERRITORIAL LIMITS

[1505.200] Australian waters

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(x).

Australian waters within s 51(x) are not confined to waters within the territorial limits of Australia but are areas of the sea, the outward boundaries of which are determined by geographical and political considerations; and a proclamation by the Governor-General that waters up to 200 miles from the Australian coast were Australian waters brought those waters within s 51(x): *Bonser v La Macchia* (1969) 122 CLR 177 CB.

[1505.205] Territorial limits

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(x), s 51(xxix), s 51(x).

Waters within 3 nautical miles of the Australian coast are within territorial limits for the purposes of s 51(x): *New South Wales v Commonwealth* (1975) 135 CLR 337; *8 ALR 1* CB (the *Seas and Submerged Lands* case). The Commonwealth has sovereignty over that area (*New South Wales v Commonwealth*, above) but the Parliament has no power under s 51(x) to make laws with respect to fisheries in that area: *Bonser v La Macchia* (1969) 122 CLR 177 CB. This may now be doubted as fisheries in that area could raise an external affair under *s 51(xxix)*. A Commonwealth law may be justified under more than one head of power. At the same time, however, a specific limitation contained within a head of power should not be able to be by-passed. *Section 51(x)* is not simply a law with respect to "fisheries in Australian waters"; it is "fisheries in Australian waters *beyond territorial limits*." This apparent conflict is not yet resolved in authority.

[1505.210] Forfeiture of vessels used for illegal fishing

L Legislation cited in this paragraph

(CTH) *Fisheries Management Act 1991* s 106.

(CTH) *Commonwealth of the Australia Constitution Act* s 51(x).

In *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *119 ALR 655* CB, the High Court held that s 106 of the Fisheries Management Act 1991 was supported by *s 51(x)* of the Constitution. Section 106 provided that, where a court convicted a person of the offence of using a foreign fishing boat for fishing within the Australian fishing zone, the court could order the forfeiture of the boat used in the commission of the offence. In the words of Mason CJ at 119 ALR 658, "the prescription of forfeiture of property used in the commission of a fisheries offence is within the power conferred by *s 51(x)* and that power extends to the prescription of forfeiture of that property, notwithstanding that the owner is innocent of complicity in the commission of the offence". See also *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21; *366 ALR 136*; *[2019] FCAFC 34*; *BC201901353* at *[107]–[133]* CB.

SECTION 51(xii) — CURRENCY, COINAGE, AND LEGAL TENDER

[1505.215] Associated provisions

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 115, 51(xiii).

Section 115 provides that "[a] State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts". Section *51(xiii)* authorises the Parliament to make laws with respect to, inter alia, "the issue of paper money".

[1505.220] Scope of the power

"Both 'coinage' and 'legal tender' involve quite specific and narrow concepts, the former being concerned with coins as money and the latter with the prescription of that which is, at any particular time, to be a lawful mode of payment within a polity"; while "'currency' [is] a term of wider meaning which appears wholly to overlap the subject-matter of 'coinage' and which, unlike it, would extend to paper money and its counterfeiting": *Watson v Lee* (1979) 144 CLR 374 at 398–9; *26 ALR 461*. The power extends to support a law requiring persons to report to the Government transactions involving the transfer of $10,000 or more in currency: *Leask v Commonwealth* (1996) 187 CLR 579; *140 ALR 1* CB "To require significant cash transactions to be reported is plainly a means of gathering information upon the movement of currency. A law imposing that requirement imposes an obligation upon those dealing in currency with respect to their dealings. There is a clear connection between the subject matter of currency and the imposition of that obligation and the connection extends to matters incidental to the performance of the obligation": *Leask v Commonwealth*, above, at 19 per Dawson J.

The expression "legal tender" is concerned with the prescription of that which is, at any particular time, to be a lawful mode of payment within a polity": *Watson v Lee*, above, at 398 per Stephen J. This was quoted in *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510; *270 ALR 253*; *[2010] HCA 33*; *BC201007174* at *[84]* CB.

[1505.225] Foreign currency

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xii).

Section 51(xii) authorises the Parliament to make laws with respect to foreign currency as well as Australian currency: *Watson v Lee* (1979) 144 CLR 374; *26 ALR 461* CB; *Leask v*

Commonwealth (1996) 187 CLR 579; *140 ALR 1* at *10* per Brennan CJ. See also *Travelex Ltd v Commissioner of Taxation* *[2010] HCA 33*; *BC201007174*.

[1505.230] Paper money

"[T]here is no substance in the argument that there is a constitutional bar against the issue by the Commonwealth of paper money as legal tender": *Re Skyring's Application (No 2)* *(1985) 58 ALR 629* at *633*. See also *Re Cusack* *(1985) 66 ALR 93*; 60 ALJR 302. There is no basis for any argument to the same effect: *Skyring, in the matter of Skyring* *[2013] FCA 997*; *BC201313398*.

[1505.235] Cryptocurrency

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xii), s 51(xxix), s 51(i).

There is no authority on the relation (if any) between *s 51(xii)* and cryptocurrency. It is likely that cryptocurrency is so far outside what the framers of the Constitution were considering that it is not within *s 51(xii)* at all. But it could still constitute "currency". If it falls outside this power, and is to be regulated, it must be under some other power such as s 51(i) (trade and commerce) or *s 51(xxix)* (external affairs).

SECTION 51(xiii) — BANKING, OTHER THAN STATE BANKING; ALSO STATE BANKING EXTENDING BEYOND THE LIMITS OF THE STATE CONCERNED, THE INCORPORATION OF BANKS, AND THE ISSUE OF MONEY

[1505.240] Banking

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xiii).

The essential characteristics of banking are "the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected by lending it again in such sums as required": *Commissioners of State Savings Bank of Victoria v Permewan, Wright and Co Ltd* (1914) 19 CLR 457 at 470–1. See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 63, 65, 69 and 97; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 194 and 257; *Australian Independent Distributors v Winter* (1964) 112 CLR 443 , at 455; 38 ALJR 330; *BC6400670*; *Siminton v Australian Prudential Regulation Authority (No 2)* (2008) 168 FCR 122; *248 ALR 34*; *[2008] FCAFC 88*; *BC200804012*, at [50]–[62]. A new definition of banking may be needed to take account of modern developments in currency.

Section 51(xiii) will support legislation:

- controlling the corporate and financial structure of banks, of their management and staff, and the ownership of banks: 76 CLR 1 at 194, 195 and 196;
- the licensing of banks, including the prohibition of the carrying on of banking business by any bank: 74 CLR 31 at 69; 76 CLR 1 at 197, 302, 332, 334 and 392; and
- the creation of the Commonwealth Bank and a central or reserve bank: 74 CLR 31 at 49, 77–8 and 94; 76 CLR 1 at 191–2 and 393.

Section 51(xiii) also supports legislation prohibiting a natural person from carrying on banking business, or from using words associated with banking. It also supports provisions empowering a

court to issuing injunctions to enforce those prohibitions: *Siminton v Australian Prudential Regulation Authority (No 2)* (2008) 168 FCR 122; *248 ALR 34*; *[2008] FCAFC 88*; *BC200804012* CB, at [24]–[25].

[1505.245] State banking

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xiii), s 51(xx),.

State banking does not mean banking in a State; it means a State owned or controlled business of banking: *Bourke v State Bank of New South Wales* (1990) 170 CLR 276; *93 ALR 460*; 64 ALJR 406 at 409–10; (1990) ATPR ¶41-033 CB; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369; *233 ALR 389*; *94 ALD 305*; *[2007] HCA 9*; *BC200701676* at *[14]* CB.

Banks established by the States are immune from Commonwealth legislation with respect to banking. The Commonwealth cannot legislate "with respect to the establishment, management and conduct of such banks by the State" or with respect to the customers of those banks; but the States have no immunity from *s 51(xiii)* in their capacity as customers of non-State banks: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 CB.

The exclusion, from the ambit of *s 51(xiii)*, of State banking operates to limit other Commonwealth legislative powers. It does not create a complete immunity from Commonwealth laws, but "the words of *s 51(xiii)* still require that, when the Commonwealth enacts a law which can be characterised as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking": *Bourke v State Bank of New South Wales* [1990] HCA 20 at [21](1990) 170 CLR 276; *93 ALR 460*; 64 ALJR 406 at 409–10; (1990) ATPR ¶41-033. Consequently, it seems s 18 of the Australian Consumer Law (ACL) (which proscribe misleading, deceptive and unconscionable conduct by, inter alia, financial corporations) cannot validly apply to a State bank in its business *within* the relevant State. See Competition and Consumer Act 2010 sch 2. The restriction in s 51(xiii) applies to all Commonwealth powers, meaning that it applied to a law enacted in reliance upon the corporations power (*s 51(xx)*) because, in its application to a State bank, that law was also a law with respect to banking.

[1505.250] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xiii).

The Commonwealth Parliament cannot use the power conferred by *s 51(xiii)* to prohibit private banks from acting as bankers for State governments: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 CB. To discriminate against the States in this fashion prevents the Commonwealth legislation being characterised as a law with respect to banking (at 61); conversely, although the legislation will be a law with respect to banking, it will offend against an implied constitutional limitation that Commonwealth powers not be used to discriminate against the States or not be used to interfere with "the normal and essential functions of government": 74 CLR 31 at 83 and 66.

SECTION 51(xiv) — INSURANCE, OTHER THAN STATE INSURANCE; ALSO STATE INSURANCE EXTENDING BEYOND THE LIMITS OF THE STATE CONCERNED

[1505.255] Insurance

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xiv).

The concept of insurance involves "the relationship of indemnity that exists between insurer and insured, rather than the source of that relationship … so that it matters not whether the relationship arises by statute or by contract": *R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577 at 588. This formulation distinguishes such a relationship from one based on contract; a contract of insurance is not of the essence of insurance as such: see *HIH Casualty & General Insurance Ltd (In Liq) v Insurance Australia Ltd* *[2005] VSC 342*; *BC200506953* at *[48]* CB.

Section 51(xiv) gives the Commonwealth power over the incorporation of bodies to carry on insurance; a system of mandatory registration for such bodies; detailed rules about their day-to-day operations, extending to such matters as security for and enforcement of the performance of insurers' obligations to insured persons; the keeping and regular return of financial accounts and actuarial investigations; and the receivership or winding up of any insurer: *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78 at 87–8. The power will support a Commonwealth law creating a statutory trust in favour of the spouse of a person whose life is insured under a life policy: *Commissioner for Probate Duties (Vic) v Mitchell* (1960) 105 CLR 126 CB.

In *Australian Health Insurance Association Ltd v Esso Australia Ltd* [1993] FCA 376; 41 FCR 450116 ALR 253, the Full Federal Court held that the concept of insurance, as used in *s 51(xiv)*, was sufficiently wide to include a scheme under which an employer undertook to meet health care costs incurred by its employees, in return for the payment of a premium which recouped one-fifth of the amount paid out by the employer. Black CJ said at ALR 260:

"When the term 'insurance' is used in the Constitution it cannot, in my opinion, be taken to be so restricted as to exclude from its scope transactions that have all the characteristics of insurance except the suggested need for the premium to be proportionate to the risk. That would involve a limitation on the scope of the power that could not have been intended because it would exclude from possible legislative regulation transactions having every outward appearance of insurance and serving, from the viewpoint of the policyholder, every function of insurance and involving the creation of rights indistinguishable from those created by a policy of insurance in respect of which the premiums were, in fact, proportioned to the risk."

[1505.260] "Other than State insurance"

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xiv).

"The expression 'State insurance' means the business of insurance conducted by an insurer owned or controlled by a State, that is to say, a business of State government insurance": *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369; *233 ALR 389*; *94 ALD 305*; *[2007] HCA 9*; *BC200701676* at *[5]* CB; *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 284; *93 ALR 460*; (1990) ATPR ¶41-033; *BC9002905* CB; *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 52, 65, 70 and 78; [1947] ALR 377; (1947) 21 ALJR 188; *BC4700100* CB.

State insurance does not mean the market for insurance in a State, or a State's regulatory scheme concerning insurance. State insurance means a State owned or controlled business that undertakes insurance of a certain kind. Section 51(xiv) does not show, and the historical material does not suggest, that it was proposed or regarded as necessary to confer on State insurance officers a monopoly in respect of any particular kind of insurance business: *Attorney-General (Vic) v Andrews*, above, at [6], [9]; compare at [84].

Section 51(xiv) does not confer on the States an exclusive power to make laws with respect to State insurance: *Attorney-General (Vic) v Andrews*, above, at [11], [78]. However, the restriction imposed in relation to State insurance applies to Commonwealth legislative power generally, provided that the law in question is a law with respect to (or with respect to matters including) insurance. Thus, a law supported by the corporations power (s 51(xx)) is subject to the restriction imposed by the provision to para (xiv) if it is also a law with respect to State insurance, except to the extent that any interference with State insurance is so incidental as not to affect the character of the law as one with respect to insurance other than state insurance: *Attorney-General (Vic) v Andrews*, above, at [12] [75], [79]; *Bourke v State Bank of New South Wales*, above, CLR at 289–91. Thus, in *Attorney-General (Vic) v Andrews*, above, Commonwealth licensing provisions that obliged Optus to make specified payments, and that excluded any State law with respect to workers' compensation after the licence came into force, did "not touch or concern insurance in any more than an incidental fashion" (at [83]) as they left Optus at liberty to decide whether to take out insurance to cover its possible liability to make payments under the Commonwealth Act, or to decide to remain a self-insurer.

See also discussion in *Environment Protection Authority v The Australian Sawmilling Co Pty Ltd (In Liq)* *[2020] VSC 550*; *BC202008503* at *[143]* CB. See further *Work Health Authority v Outback Ballooning Pty Ltd* *[2019] HCA 2*; *BC201900378* at *[65]* CB.

SECTION 51(xvi) — BILLS OF EXCHANGE AND PROMISSORY NOTES

[1505.265] Hire purchase agreements

L Legislation cited in this paragraph

(CTH) *Bills of Exchange Act 1909*.

On the relationship between the Bills of Exchange Act 1909 and State legislation deferring the rights of a lender under a hire purchase agreement, see *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 CB. If a Commonwealth law is intended as a complete statement of the law governing a particular matter, there is no room for a State (or Territory) law to apply to the same matter: at s 136. Quoted in *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428; *363 ALR 188*; *[2019] HCA 2*; *BC201900378* at *[65]* CB.

SECTION 51(xvii) — BANKRUPTCY AND INSOLVENCY

[1505.190] Bankruptcy

"Bankruptcy … is the creation of statute law … The essential features of a bankruptcy system are sequestration and distribution — an initial taking into custody of an insolvent debtor's property, and the subsequent realisation and division among creditors": *R v Davison* (1954) 90 CLR 353 at 375–6. See also *Storey v Lane* (1981) 147 CLR 549 at 556–7; *36 ALR 129*.

[1505.195] Scope of the power

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xvii).

Under *s 51(xvii)* the Commonwealth Parliament has power "to declare what acts shall constitute acts of bankruptcy, to divest the bankrupt of his assets, to provide for the administration thereof and distribution among creditors; it may create offences in relation to the subject matter and attach sanctions to those offences; it may also create courts with jurisdiction in bankruptcy matters and prescribe the procedure and powers of those courts": *R v Federal Court of Bankruptcy; Ex parte*

Lowenstein (1938) 59 CLR 556 at 575. The power given by s 51(xvii) is plenary: ibid. Quoted by Flick J in *Rahman v Dubs (No 2)* [2012] FCA 1081; BC201207630 at [11] CB.

[1505.200] Examples of the power

The Parliament may penalise the failure, on the part of a bankrupt person, to maintain proper books of account during a period of 5 years preceding the person's bankruptcy; and may declare void settlements made within 5 years before the settlor's bankruptcy: *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 571–2. "It is for the legislature and not for this Court to say what provisions are necessary to achieve the objects sought and for what period of time books of account should be kept": ibid per Starke J.

[1505.205] Crown rights as creditors

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xvii).

Section 51(xvii) authorises the Commonwealth to demand payment of Commonwealth taxes in priority to State taxes out of the estate of a bankrupt: *Victoria v Commonwealth* (1957) 99 CLR 575 CB (the *First Uniform Tax* case); and generally "excluding or reducing the priority of the Crown in right of the States in bankruptcy": *Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529.

[1505.210] Insolvency

"[I]n a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law allows a creditor to intervene, with the assistance of a court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law generally allows the debtor to apply for the same administration": *Attorney-General (British Columbia) v Attorney-General (Canada)* [1937] AC 391 at 402.

[1505.212] Ambulatory power

The provisions of laws made under s 51(xvii) were not intended to be stereotyped so as to confine the power of the Parliament to the legislative provisions existing in 1901 as to bankruptcy and insolvency: *Storey v Lane* (1981) 147 CLR 549 at 557–8 per Gibbs CJ. Quoted in *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479; 170 ALR 111; [2000] HCA 14; BC200001107 at [21] CB.

SECTION 51(xviii) — COPYRIGHTS, PATENTS OF INVENTIONS AND DESIGNS, AND TRADE MARKS

[1505.213] Copyright

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xviii).

See generally Copyright Act 1968. A law imposing a financial levy on the manufacturers of blank sound tapes, and providing that the proceeds of the levy be paid to the owners of copyright in recorded music, is a law having a clear relevance to or connection with the subject of copyrights and is a valid law within *s 51(xviii)* of the Constitution: *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 520; 112 ALR 53 at 74 per Dawson and Toohey JJ. It is unlikely a law providing for compensation for a wrong done can be characterised as offending s

51(xxxi): at CLR 510. See *BMW Australia Ltd v Westpac Banking Corporation* (2019) 374 ALR 627; [2019] HCA 45; BC201911310 at [230] CB.

[1505.214] Patents

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xviii).

See generally Patents Act 1990. The boundaries of the power conferred by s 51(xviii) are not identified solely by identifying what in 1901 would have been treated as a copyright, patent, design or trademark. Such an approach fails to give sufficient allowance for the dynamism which, even in 1901, was inherent in any understanding of the terms used in s 51(xviii): *Grain Pool of Western Australia v Commonwealth* (2001) 202 CLR 479; 170 ALR 111; BC200001107; [2000] HCA 14 CB at [23] (*Grain Pool*). Compare *Storey v Lane* (1981) 147 CLR 549 at 557–8.

The *Grain Pool* case involved a challenge to the validity of two statutes conferring a right to grant "plant breeder's rights" where the breeding of the plant variety constituted an invention for the purposes of s 51(xviii).

The evolution of the common law does not support caution against an over-broad construction of the term "patents of inventions": *Grain Pool* at [33]. The collocation in s 51(xviii) represents a classification of the various species of intellectual or industrial property which had developed in the second half of the 19th century. Given the cross-currents and uncertainties in the common law and statute at the time of Federation it plainly is within the head of power in s 51(xviii) to resolve them and to determine that there be fresh rights in the nature of copyright, patents of inventions and designs and trade marks: *Grain Pool* at [41]. Thus, the products of "intellectual effort" to which the grant of power relates embrace a variable rather than a fixed constitutional criterion: *Grain Pool* at [42]. In the event, even in 1901, the grant of monopoly rights in respect of plant varieties was not outside the "central type" of the subject of "patents of invention": *Grain Pool* at [36].

In *Grain Pool*, the Court rejected an argument that s 51(xviii) required that any law with respect to patents of inventions comprehend both novelty and inventiveness. In patent law, it was said, the distinction later drawn between lack of novelty (prior publication) and lack of inventiveness (obviousness) was not fully developed in 1901: *Grain Pool* at [51]–[53]. Further, while it may be accepted that there is a requirement of "novelty" in the constitutional concept of "invention", that requirement may be satisfied by various legislative regimes, which need not display any fixed character: *Grain Pool* at [64].

Further, the Court rejected an argument that notions of exclusivity of use and exploitation were inherent in the notion of a patent: *Grain Pool* at [79]–[80].

The area of patents is considered extensively in *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334; [2015] HCA 35; BC201509675 CB. The plurality (at [7]) express a note of caution about the limits of judicial law-making in allowing any new class of case to fall within a broad statutory concept set by the Patents Act 1990. Gageler and Nettle JJ (at [126]) specify that for a claimed invention to qualify as a patent "it must be something more than a mere discovery". They add (ibid) that "the essence of invention inheres in its artificiality or distance from nature".

[1505.215] Trade marks

L Legislation cited in this paragraph

(CTH) *Australian Bicentennial Authority Act 1980*.

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xviii).

See generally Trade Marks Act 1995. "[T]wo essential characteristics of a trade mark are (a) that it has the capacity to distinguish particular goods and services; and (b) that the proprietor of the mark has some connection with the goods and services." The words "200 years", the use of which was protected by the Australian Bicentennial Authority Act 1980, were "common words, having no capacity to distinguish the Authority or the activities in which it engages or which it promotes" and could not be supported by *s 51(xviii)*: *Davis v Commonwealth* (1988) 166 CLR 79 at 96–7; *82 ALR 633*.

The words of the statutory regime "reach[ed] too far" in their "extraordinary intrusion into freedom of expression" and thus were not reasonably and appropriately adopted to achieve the ends that lay within constitutional power: at CLR 100. Quoted in *Spence v State of Queensland (2019) 367 ALR 587*; *[2019] HCA 15*; *BC201903864* at *[63]* CB.

[1505.220] Original meaning

The decision, in *Attorney-General (NSW) v Brewery Employee's Union* (1908) 6 CLR 469; 14 ALR 565 CB, (the *Union Label* case), that the term "trade marks" must be understood in the light of its meaning in 1901, has been qualified: see *Davis v Commonwealth* (1988) 166 CLR 79 at 96–7; *82 ALR 633*. See also *Storey v Lane* (1981) 147 CLR 549; *BC8100098* CB at 557–8.

SECTION 51(xix) — NATURALISATION AND ALIENS

[1505.225] Naturalisation

"[N]aturalisation … is the passing from a state of alienage across the dividing frontier to a state of British nationality": *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 88. The change of a person's nationality to that of Australian citizen can only be achieved by Act of Parliament: *Pochi v Macphee* (1982) 151 CLR 101 at 111; *43 ALR 261*. "[I]f the power … to admit to Australian citizenship is within the power to make laws with respect to naturalisation, so must authority to withdraw that citizenship on specified conditions be also within that power": *Meyer v Poynton* (1920) 27 CLR 436 at 441.

It is for the Parliament to create and define the concept of Australian citizenship: *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *193 ALR 37*; *[2002] HCA 48*; *BC200206567* at *[31]*, *[58]*, *[90]*, *[108]–[109]*, *[193]–[194]*, *[204]*, *[227]–[229]* CB; *Koroitamana v Commonwealth (2006) 227 ALR 406*; 80 ALJR 1146; *[2006] HCA 28*; *BC200604227* at *[48]* CB.

[1505.230] Aliens

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xix).

(CTH) *Migration Act 1958*.

An alien is a "person who was born outside Australia, whose parents were not Australians, and who has not been naturalised as an Australian" This was how an "alien" was defined in *Pochi v Macphee* (1982) 151 CLR 101 at 109–10; *43 ALR 261*. It was held also that the person must not have been deprived of Australian citizenship by an act or process of denaturalisation: *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183; *80 ALR 561*.

The term "aliens" includes those who owe allegiance to another sovereign power or who, having no nationality, owe no allegiance to any sovereign power. A child born in Australia to parents who were

citizens of India and not Australian citizens or permanent residents is an alien: *Singh v Commonwealth* (2004) 222 CLR 322 ; *209 ALR 355*; *[2004] HCA 43*; *BC200405816*.

A child born in Australia to parents who were citizens of Fiji, where the child had a right to be registered as a citizen of Fiji but had not in fact been so registered, was an "alien" for the purposes of *s 51(xix)*: see *Koroitamana v Commonwealth (2006) 227 ALR 406*; 80 ALJR 1146; *[2006] HCA 28*; *BC200604227*. "Within the limits of the concept of 'alien' in *s 51(xix)*, it is for Parliament to decide who will be treated as having the status of alienage, who will be treated as citizens, and what the status of alienage, or non-citizenship, will entail": at [11] per Gleeson CJ and Heydon J. In saying this, their Honours referred to *Singh v Commonwealth*, *above*, at [4].

It is open to Parliament to treat a stateless person as an alien for the purposes of *s 51(xix)*: *Koroitamana*, *above*, at [15], [39]; *Al Kateb v Godwin* (2004) 219 CLR 562; *208 ALR 124*; *[2004] HCA 37*; *BC200404861* at *[1]*.

In *Kenny v Minister for Immigration and Ethnic Affairs* (1993) 42 FCR 330; *115 ALR 75* at *90*, Gummow J accepted a submission to the effect that, by 2 April 1984 (when the Migration Act 1958 was amended), "the consequence of Australia's emergence as a fully independent sovereign nation was that the term 'alien' in *s 51(xix)* of the Constitution had become synonymous with 'non-citizen'." See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *(1992) 110 ALR 97* at *112* per Brennan, Deane and Dawson JJ.

The power in *s 51(xix)* pursuant to which Parliament can enact legislation to treat the inhabitants of a territory as citizens also enables Parliament to treat the inhabitants of a territory that has become a new independent state as aliens. Thus, a person born in Papua at a time when Papua was administered by Australia as part of the Territory of Papua and New Guinea and who was, at the time of birth, an Australian citizen, could validly be deprived of that citizenship when Papua became independent: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439; *218 ALR 483*; *[2005] HCA 36*; *BC200505501*.

The cases in this area must be seen in the light of the ruling in *Love v Commonwealth; Thoms v Commonwealth* *[2020] HCA 3*; *BC202000584* in which *Singh v Commonwealth* and *Koroitamana v Commonwealth*, both above, and other authorities are considered.

Love holds that there is a class of persons who are not "aliens" within the meaning of s 51(xix): this class includes persons who are not citizens of Australia by birth, who are citizens of a foreign country but who are not naturalised as Australian citizens, but who are Aboriginal persons.

In issue in *Love* was whether two persons (Mr Love and Mr Thoms) who had lived in Australia for substantial periods of time as holders of visas permitting their residence, became unlawful non-citizens after their visas were cancelled under the Migration Act 1958 and liable to removal from Australia; if so, this would be on account of them having been convicted of offences carrying jail terms of 12 months or more thereby failing the character test under that Act. That is, if the Act could operate lawfully in their cases — that is, if they were aliens within s 51(xix). That was the power being relied upon by the Commonwealth in each case.

A majority (Bell, Nettle, Gordon and Edelman JJ) in separate judgments held that the power in s 51(xix) did not extend to allow the delegate of the Minister to exercise a power of cancellation under the Act in that neither of the persons was an "alien" providing, in the case of Mr Love, but not Mr Thoms, proof of Aboriginality was made out in the Federal Court. That meant, if made out, that the Act could not be relied upon under s 51(xix) to justify there moval of either.

Although it was acknowledged that they expressed their reasoning differently (see per Bell J at [81]), a clear statement in the matter was given by Nettle J (at [286]) as follows:

> although each of the plaintiffs was born abroad and is a non-citizen, each has long resided in Australia, each is of Aboriginal descent, each identifies as a member of an Aboriginal community, and each has been recognised as a member of an Aboriginal community.

Bell J (at [81]) said she was authorised by the other members of the majority to say that "we agree that Aboriginal Australians … are not within the reach of the 'aliens' power conferred by s 51(xix) of the *Constitution*". Gordon J (at [295]) said whether "either plaintiff is an alien is a constitutional question, not a statutory question". Edelman J (at [466]) said that "the constitutional concept of an alien is not co-terminous with any persons whom the Commonwealth Parliament chooses to make statutory citizens."

In marked contrast, Kiefel CJ (at [5]) said it is "settled that it is for the Parliament, relying on s 51(xix), to create and define the concept of Australian citizenship and its antonym, alienage." Her Honour together with Gageler and Keane JJ dissented. Gageler J (at [128]) said that "[m]orally and emotionally engaging as the plaintiffs' argument is, the argument is not legally sustainable." At [132] he said he could not "countenance the existence of a constitutional category of 'non-citizen non-aliens'" and, at [133], he said also he could not be "party to a process of constitutional interpretation or constitutional implication which would result in the inference of a race-based constitutional limitation on legislative power." Keane J (at [147]) said that neither plaintiff was born in Australia and each was a citizen of a foreign country; as, also, neither had been naturalised as an Australian citizen, each was in consequence within s 51(xix) as an alien.

The ruling in *Love* is significant and it remains to be seen what may be its long-term effects both on the Australian community generally and on the operation of the Migration Act and other laws in particular.

[1505.235] British subjects

Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xix).
(CTH) *Australian Citizenship Act 1948*.

Prior to the decision in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *182 ALR 657*; *[2001] HCA 51*; *BC200105242* (*Re Patterson*) with the establishment of separate Australian citizenship by the Nationality and Citizenship Act 1948 a British subject, who did not have Australian citizenship, could be dealt with as an alien under *s 51(xix)*: *Pochi v Macphee* (1982) 151 CLR 101; *43 ALR 261*; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *43 ALR 261*; 62 ALJR 539; *BC8802624* (*Nolan*). However, in *Re Patterson*, a majority of the Court (McHugh, Gaudron, Kirby and Callinan JJ; Gleeson CJ, Gummow and Hayne JJ dissenting) overruled *Nolan*, above, in so far as it determined that a citizen of the United Kingdom who had entered Australia before the amendment in 1987 of the Australian Citizenship Act 1948, was an alien; prior to that amendment, a British subject, by definition, could not be an "alien".

But, in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *203 ALR 143*; *[2003] HCA 72*; *BC200307491* the decision in *Re Patterson* was itself overruled, and the authority of *Nolan* was restored.

Shaw, *above*, is referred to at various points in the judgments *Love v Commonwealth* [2020] HCA 3; BC202000584, in particular by Bell J at [60], with no evident disapproval.

There is subsequent discussion of the meaning of "aboriginality" in *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* (2020) 379 ALR 248; [2020] NSWCA 83; BC202003687.

Shaw was applied most recently in *Chetcuti v Commonwealth* (2021) 392 ALR 371; [2021] HCA 25; BC202107288, see especially at [34]. There it was observed that not only was there no need to explore the applicability of the aliens power to a person "not born within the dominions and allegiance of the Imperial Crown who acquired under local naturalisation legislation in one part of the British Empire the status of a British subject not recognised in other parts"; "[e]ven less is there need to re-examine the present position of an Aboriginal Australian … recently examined in *Love v Commonwealth* " ((2020) 270 CLR 152; 375 ALR 597; [2020] HCA 3; BC202000584 at [81]).

[1505.240] Scope of the power

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xix).

(CTH) *Migration Act 1958* Pt 2A.

"The power to make laws with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it": *Robtelmes v Brenan* (1906) 4 CLR 395 at 404. See also *Al-Kateb v Godwin* (2004) 219 CLR 562; 208 ALR 124; [2004] HCA 37; BC200404861; *Re Woolley; Ex parte Applicants M276/* 2003 (2004) 210 ALR 369; 79 ALJR 43; [2004] HCA 49; BC200406534; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; 208 ALR 271; [2004] HCA 36; BC200404860.

Following the ruling in *Love v Commonwealth* [2020] HCA 3; BC202000584, it is clear, however, by majority, that s 51(xix) does not give power to the Parliament to deal with Aboriginal persons (including Aboriginal persons not born here and not naturalised as citizens) as "aliens". "The legislative power conferred by s 51(xix) with respect to 'aliens' is expressed in unqualified terms. It prima facie encompasses the enactment of a law with respect to non-citizens generally. It also prima facie encompasses the enactment of a law with respect to a particular category or class of non-citizens, such as non-citizens who are illegal entrants or non-citizens who are in Australia without having presented a visa or obtained an entry permit. Such a law may, without trespassing beyond the reach of the legislative power conferred by s 51(xix), either exclude the entry of non-citizens or a particular class of non-citizens into Australia or prescribe conditions upon which they may be permitted to enter and remain; and it may also provide for their expulsion and deportation": *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 25–6; 110 ALR 97 at 113 per Brennan, Deane and Dawson JJ. These observations, as regards those persons claiming Aboriginality, must now be seen in light of the decision in *Love v Commonwealth* , *above*.

In *Cunliffe v Commonwealth* (1994) 182 CLR 272; 124 ALR 120, all members of the High Court held that s 51(xix) supported Pt 2A of the Migration Act 1958. Part 2A provided for the registration of migration agents and subject to certain exceptions, prohibited an unregistered person from providing (for reward) advice and assistance to a person seeking to enter Australia as an immigrant or a

refugee. Because the law regulated the provision of immigration assistance to aliens and afforded aliens a measure of protection against exploitation, it had a sufficient connection with the aliens power, s 51(xix).

"The prohibitions or restrictions imposed by Pt 2A are not imposed on aliens, but their operation affects uniquely aliens who wish to give immigration assistance to, or make immigration representations on behalf of, aliens. The prohibitions or restrictions imposed by Pt 2A are not imposed on aliens, but their operation affects uniquely aliens who wish to make, who are making or who have made entrance applications": *Cunliffe v Commonwealth* , above, *ALR*at 144 per Brennan J.

In *Commonwealth v AJL20* (2021) 391 ALR 562; [2021] HCA 21; BC202105363 CB the plurality observed that "[i]t has long been recognised that a law that provides for the executive detention of an alien, in order to prevent unauthorised entry into the Australian community or to facilitate removal from Australia, is also within the scope of s 51(xix)" (at [21]). Although the "amplitude of the legislative power conferred by s 51(xix) is qualified by the implications of Ch III of the Constitution, involuntary detention being ordinarily within the exclusive province of the courts" (at [22]), "authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation" can "be conferred on the Executive [by the Parliament] without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates" (*Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 32; 110 ALR 97; BC9202669 CB, cited in *AJL20* at [22]):

> [25] Whether a law authorising or requiring detention is reasonably capable of being seen as necessary for the purpose of segregation pending receipt, investigation and determination of any visa application or removal of an unlawful non-citizen depends on the connection between the detention and segregation or removal [*Commonwealth v AJL20*].

SECTION 51(xx) — FOREIGN CORPORATIONS, AND TRADING OR FINANCIAL CORPORATIONS FORMED WITHIN THE LIMITS OF THE COMMONWEALTH

[1505.243] Generally

On the law relating to corporations see Corporations Act 2001. There is no reason to read s 51(xx) as granting power to deal only with classes of artificial legal entities having characteristics fixed at the time of federation: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; 318 ALR 1; [2015] HCA 11; BC201502297 at [22] CB.

[1505.245] Foreign corporations

L Legislation cited in this paragraph

(CTH) Commonwealth of the Australia Constitution Act s 51(xx).

An entity that is formed under the law of a foreign country and accorded a corporate legal personality, either by that law or by Australian law, is a foreign corporation for the purposes of s 51(xx) of the Constitution: see generally *New South Wales v Commonwealth* (1990) 169 CLR 482 at 498; 90 ALR 355; (1990) 64 ALJR 157; BC9002907 CB; *R v Federal Court of Australia; Ex parte Western Australian National Football League Inc* (1979) 143 CLR 190 at 238; 23 ALR 439; 53 ALJR 273; (1979) ATPR ¶40-103. See also *New South Wales v Commonwealth* (2006) 231 ALR 1; 81 ALJR 34; *[2006] HCA 52*; BC200609129 at [77] CB; *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; 318 ALR 1; [2015] HCA 11; BC201502297 at [20] CB.

[1505.250] Trading corporations

A trading corporation is a corporation whose trading activities form a sufficiently significant proportion of its overall activities so as to merit its description as a trading corporation: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; *23 ALR 439* CB. It is not necessary to show that trading is the corporation's predominant or characteristic activity, or that the corporation was formed for the purpose of trading: *Commonwealth v Tasmania* (1983) 158 CLR 1; *46 ALR 625* CB. However, the corporation's trading activities must be more than slight or merely incidental to some other principal activity, such as religion or education: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)*, above, ALR at 234. The "activities" test determines whether a corporation is a trading corporation or not: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; *318 ALR 1*; *[2015] HCA 11*; *BC201502297* at *[14]* CB.

[1505.255] Examples

The corporations classified as trading corporations on this approach have included incorporated associations promoting and organising professional football in Western Australia and South Australia, and an incorporated association sponsoring a team of football players in one of those competitions: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; *23 ALR 439* CB; and a statutory authority, established by the State of Tasmania, which generated, distributed and sold electrical power as a public utility: *Commonwealth v Tasmania* (1983) 158 CLR 1; *46 ALR 625* CB. Queensland Rail, a statutory authority, having functions including "managing railways" was held to be a trading corporation in *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; *318 ALR 1*; *[2015] HCA 11*; *BC201502297* at *[41]* CB.

[1505.260] "shelf companies"

Where a corporation has not yet commenced its activities, the stated purposes of its incorporation may be used to classify it as a trading corporation: *Fencott v Muller* (1983) 152 CLR 570; *46 ALR 41*; 57 ALJR 317; (1983) ATPR 40–350 CB.

[1505.265] Meaning of "trading"

"Trading" includes those activities which produce revenue: the concept is not limited "to buying and selling at a profit; it extends to business activities carried on with a view to earning revenue"; and a prohibition on the distribution of profits to a corporation's members will not prevent it being characterised as trading, although it will be relevant to that characterisation: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 235 and 236; *23 ALR 439*. See also [1505.350] above.

[1505.270] Financial corporations

"[T]he words 'financial corporation'… describe a corporation which engages in financial activities or perhaps is intended so to do." Financial activities need not be the predominant activities of the corporation: if a corporation "engages in financial activities in the course of carrying on its primary or dominant undertaking", it will be classified as a financial corporation: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 305; *44 ALR 1*. It is a corporation's "predominant or characteristic" activity which must be focused on: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; *318 ALR 1*; *[2015] HCA 11*; *BC201502297* at *[72]* CB. "Financial" activities include "transactions in which the subject of the transaction is finance (such as borrowing or lending money), as distinct from transactions (such as the purchase or sale of particular goods for a monetary consideration) in which finance, although involved in the payment of the price, cannot properly be seen as constituting the subject of the transaction": *Re Ku-ring-gai Co-op Building*

Society (No 12) Ltd (1978) 36 FLR 134; 22 ALR 621 at 642; (1978) ATPR 40–094 CB. The constitutional phrase is one directed to identifying a business which deals in finance: *Finance Sector Union of Australia v Unimoni Pty Ltd* [2019] FCA 1128; BC201906471 at [79] CB.

[1505.275] Examples

Adopting this approach, the High Court has classified as a financial corporation an agency established under State legislation to administer a superannuation fund for State government employees, because the agency engaged in substantial investment activities, such as making commercial and housing loans: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; 44 ALR 1 CB.

[1505.285] Corporations excluded from s 51(xx)

L Legislation cited in this paragraph

(CTH) Commonwealth of the Australia Constitution Act s 51(xx).

Amongst the corporations which will not be subject to the Commonwealth's power under s 51(xx) will be a corporation whose "principal activity [is] religion or education" and whose trading activity is "so slight and so incidental … that it could not be described as a trading corporation" (*R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 234; 23 ALR 439) and a corporation which is the holding company, a subsidiary, or a subsidiary of the holding company, of one of the three types of corporations listed in s 51(xx): *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 195, 209 and 210; 40 ALR 609. This particular ruling could seem doubtful. A holding company of a s 51(xx) corporation may on occasion itself be a foreign trading or financial corporation and, for that reason, would seem to be a constitutional corporation on its own. The Authority in *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; 318 ALR 1; [2015] HCA 11; BC201502297 at [38] CB was created as a distinct entity — "a separate right and duty bearing entity" which could own and possess property and had perpetual succession — and thus had "the full character of a corporation".

[1505.290] Obligations on persons other than corporations

"A law may be one with respect to a trading corporation although it casts obligations upon a person other than a trading corporation": *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 183, 194–5, 201, 212, 220 and 222; 40 ALR 609; *New South Wales v Commonwealth* (2006) 231 ALR 1; 81 ALJR 34; *[2006] HCA 52*; BC200609129 at [293], [295], [327] CB. "[W]hen in the legitimate exercise of the corporations power duties are imposed on corporations in relation to their trading activities, breach of which creates a civil liability, the power extends to the imposition of duties on natural persons, breach of which also creates a civil liability, not to engage in conduct which assists or facilitates a contravention by a corporation of duties thus imposed on it": *Fencott v Muller* (1983) 152 CLR 570 at 599; 46 ALR 41; 57 ALJR 317; (1983) ATPR 40–350. See also *United Firefighters Union of Australia v Country Fire Authority* (2015) 315 ALR 460; [2015] FCAFC 1; BC201500011 CB.

[1505.295] The width of the power conferred by s 51(xx)

L Legislation cited in this paragraph

(CTH) Commonwealth of the Australia Constitution Act s 51, s 51(xx).

In *New South Wales v Commonwealth* (2006) 231 ALR 1; 81 ALJR 34; *[2006] HCA 52*; BC200609129 CB, the High Court held that s 51(xx) supported a wide-ranging law for the regulation

of the industrial relations of constitutional corporations. That law created a national workplace relations system based on the corporations power that was intended to apply to a majority of Australia's employers and employees. Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ held that:

- A law may be characterised as a law with respect to more than one of the subject-matters set out in s 51. To describe a law as "really", "truly" or "properly" characterised as a law with respect to one subject-matter, rather than another, bespeaks fundamental constitutional error: at [73].
- Section 51(xx) confers a power to make laws with respect to particular juristic persons. It is what was described in argument as "a persons power" — it is not "a power with respect to a function of government, a field of activity or a class of relationships": at [173]. (But compare *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; 318 ALR 1; [2015] HCA 11; BC201502297 at [38] CB).
- The following observations of Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346; 172 ALR 257; [2000] HCA 34; BC200003156 at [83] CB should be adopted: "[T]he power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that subsection, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.": at [178].
- "[T]here is no evident basis upon which a law which imposes a duty or liability, or confers a right or privilege, *only* on a constitutional corporation should not be characterised as a law with respect to constitutional corporations … [L]aws regulating 'the activities, functions, relationships and the business' of a constitutional corporation, and laws creating 'rights, and privileges belonging to such a corporation, [imposing] obligations on it and, in respect to those matters, [regulating] the conduct of those through whom it acts' including its employees, and regulating 'those whose conduct is or is capable of affecting its activities, functions, relationships or business' would, on this test, be properly characterised as laws with respect to constitutional corporations": at [181].
- "[T]he impugned provisions of the Amending Act which depend upon s 51(xx) either single out constitutional corporations as the object of statutory command (and in that sense have a discriminatory operation) or, like the legislation considered in *Fontana Films*, are directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation. In so far as the plaintiffs' contentions required tests of distinctive character or discriminatory operation to be understood as inserting a new or different filter into the process of characterisation those contentions should be rejected. A law which prescribes norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations in the manner considered and upheld in *Fontana Films* or, as Gaudron J said in *Re Pacific Coal*, 'laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations' are laws with respect to constitutional corporations": at [198] (footnotes omitted).
- As "it is within the corporations power for the Parliament to regulate employer-employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs": at [322].

See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 149, 148, 153; *46 ALR 625*; 57 ALJR 450; *BC8300075*; *Victoria v Commonwealth* (1996) 187 CLR 416 at 539; *138 ALR 129* at *188–9*; 70 ALJR 680; *BC9603985*; *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; *40 ALR 609*; 56 ALJR 366; *BC8200068*.

[1505.300] The narrow view of s 51(xx)

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xx).

Following the decision in *New South Wales v Commonwealth (2006) 231 ALR 1*; 81 ALJR 34; *[2006] HCA 52*; *BC200609129*, it is clear that the narrow view of the scope of *s 51(xx)* that had previously been favoured by Justices to the effect that s 51(xx) only supported laws which relate to the trading and financial activities of trading and financial corporations has not prevailed: *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 182–3; *40 ALR 609*. See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 117–8 and 202; *46 ALR 625*; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; *128 ALR 81* at *95*; 69 ALJR 284; *BC9506436*.

[1505.305] Laws supported under s 51(xx)

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xx).

Amongst the aspects of corporate activities which have been held (or assumed) to fall within the scope of *s 51(xx)* are:

- the creation of a national industrial relations regime: *New South Wales v Commonwealth (2006) 231 ALR 1*; 81 ALJR 34; *[2006] HCA 52*; *BC200609129*;
- the monopolistic or anti-competitive practices of trading and financial corporations: *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; [1972] ALR 3;
- the quality of goods and services supplied to consumers by foreign, trading and financial corporations: *R v Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235; *13 ALR 273*; *Fencott v Muller* (1983) 152 CLR 570; *46 ALR 41*; 57 ALJR 317; (1983) ATPR 40–350;
- the protection of the business of trading corporations from secondary boycotts: *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; *40 ALR 609*; see also *Victoria v Commonwealth* (1996) 187 CLR 416 at 557–8; *138 ALR 129* at *203–4* (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); and
- the construction of a dam by an electricity authority: *Commonwealth v Tasmania* (1983) 158 CLR 1; *46 ALR 625*.

[1505.310] Incorporation

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xx).

Section 51(xx) is a power "with respect to 'formed corporations'. That being so, the words 'formed within the limits of the Commonwealth' exclude the process of incorporation itself"; and *s 51(xx)* "is not a power to bring into existence the artificial legal persons upon which laws made under the power can operate": *New South Wales v Commonwealth (The Immigration Case)* (1990) 169 CLR 482 at 498; *90 ALR 355*. Absent referral of power under s 51(xxxvii), the trading or financial corporations formed within the limits of the Commonwealth to which s 51(xx) refers will typically be constituted and organised according to the law of a State — foreign corporations being constituted and organized according to the law of another jurisdiction: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; *318 ALR 1*; *[2015] HCA 11*; *BC201502297* at *[20]*.

SECTION 51(xxi) — MARRIAGE

[1505.315] The meaning of "marriage"

In the 19th century, "marriage" was defined as "the union of one man and one woman, for life to the exclusion of all others": *Hyde v Hyde* (1866) LR *1 PD 130* at *133*. The possibility of a wider view, sufficient to encompass an established de facto marriage, is canvassed in P H Lane, *Commentary on the Australian Constitution*, 1986, and in *Russell v Russell* (1976) 134 CLR 495 at 549; *9 ALR 103*. But see Constitutional Commission, *Final Report*, 1988, p 672.

[1505.320] The primary aspects of marriage

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xxi).

Section 51(xxi) authorises the Parliament to regulate the primary aspects of marriage, the "forms and requisites" of the relationship, the "conditions and circumstances in which men and women might enter into matrimony, the method of doing so and the consequences of incapacities, impediments and informalities": *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 560 and 579 (the *Marriage Act* case).

[1505.325] Bigamy

Legislation cited in this paragraph

(CTH) *Marriage Act 1961* Section 94.

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxi).

Section 94 of the Marriage Act 1961 (Cth), which made bigamy a Commonwealth offence, is supported by *s 51(xxi)*: it is a law with respect to "a marriage ceremony with no capacity to do so": *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 547 (the *Marriage Act* case).

[1505.330] The secondary aspects of marriage

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xxi).

Section 51(xxi) authorises the Parliament to regulate the secondary aspects of marriage, "the mutual rights and obligations of the spouses", "the effect of marriage upon the relationship of those who marry and their children", and "the personal relationships that are the consequences of

marriage": *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 572, 574 and 580 (the *Marriage Act* case).

[1505.335] Legitimation

Legislation cited in this paragraph
(CTH) *Marriage Act 1961* ss 89, 90.
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxi).

Sections 89 and 90 of the Marriage Act 1961 (Cth), providing that a child born outside marriage should be legitimated by the subsequent marriage of the child's parents, are supported by *s 51(xxi)*: *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 CB (the *Marriage Act* case).

[1505.340] Children

Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xxi).

Section 51(xxi) authorises the Parliament to confer jurisdiction on the Family Court of Australia, in proceedings between parties to a marriage, over "the custody, guardianship or maintenance of, or access to, a child of the marriage", independent of any proceedings for such principal relief as dissolution of marriage.

[1505.343] Authorisation of sterilisation of children

Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxi), s 51(xxii).
(CTH) *Family Law Act 1975* Pt VII.

The question of sterilisation of a child of a marriage arises out of the marriage relationship and the sterilisation of the child arises from the custody or guardianship of the child. It follows that *s 51(xxi)* and *s 51(xxii)* of the Constitution give the Parliament the power to legislate so as to confer jurisdiction on the Family Court to authorise the sterilisation of a child of a marriage: *Secretary, Dept of Health and Community Services v JWB* (1992) 175 CLR 218 at 261; *106 ALR 385* at *413* (Marion's case); *P v P* (1994) 181 CLR 583; *120 ALR 545* at *555* CB. In the latter case, Mason CJ, Deane, Toohey and Gaudron JJ said;

"*Paragraph (xxi)'s* grant of legislative power with respect to 'Marriage' encompasses laws dealing with the protection or welfare of children of a marriage in so far as the occasion for such protection or welfare arises out of, or is sufficiently connected with, the marriage relationship. To a significant extent, the operation of *para (xxi)* overlaps *para (xxii)'s* express conferral of legislative power with respect to 'parental rights, and the custody and guardianship of infants' in relation to 'Divorce and matrimonial causes'. The authorisation of medical treatment of an incapable child of a marriage, including medical treatment of the kind involved in *Marion's case* and in this case, is something which is directly related to the protection and welfare of the particular child and which arises out of, and is itself an aspect of, the relevant marriage relationship. To the extent that the relevant provisions of Pt VII of the Family Law Act confer jurisdiction to give or withhold such authorisation, they are a law with respect to marriage within *s 51(xxi)*. Moreover, the relevant provisions of Pt VII are, in the context of that conferral of jurisdiction upon the Family Court, directly concerned with parental rights

and the custody and guardianship of infants in relation to divorce and matrimonial causes and are accordingly within the grant of legislative power contained in *s 51(xxii)*."

[1505.345] Parties to proceedings

The Parliament may confer jurisdiction on the Family Court to determine proceedings for the custody of a child of a marriage brought by either the surviving party to the marriage or "any other person", after the death of the child's custodial parent (*Vitzdamm-Jones v Vitzdamm-Jones* (1981) 148 CLR 383; *33 ALR 537* CB); or between the two parties to a marriage on the one hand and the grandmother of the child of the marriage on the other: *V v V* (1985) 156 CLR 228; *60 ALR 522* CB.

[1505.350] State child welfare legislation

L Legislation cited in this paragraph
(CTH) *Family Law Act 1975* Section 10(3).

Section 10(3) of the Family Law Act 1975 (Cth), which gave effect to a custody of the Family Court notwithstanding an earlier order under state child welfare legislation, is beyond the power of the Commonwealth Parliament: *R v Lambert; Ex parte Plummer* (1980) 146 CLR 447; *32 ALR 505* CB.

[1505.355] Ex-nuptial children

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxi).

The power conferred by *s 51(xxi)* extends only to a natural or adopted child of the marriage between the parties: *Russell v Russell* (1976) 134 CLR 495; *9 ALR 103* CB. See also *Cormack v Salmon* (1984) 156 CLR 170; *56 ALR 245* CB; *Re Cook; Ex parte C* (1985) 156 CLR 249; *60 ALR 661* CB; *Re F; Ex parte F* (1986) 161 CLR 376; *66 ALR 193* CB.

[1505.360] The reference of power

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxvii).
(NSW) *Commonwealth Powers (Family Law - Children) Act 1986*.
(QLD) *Commonwealth Powers (Family Law - Children) Act 1990*.
(SA) *Commonwealth Powers (Family Law) Act 1986*.

This limitation has largely been removed by a reference of power to the Commonwealth by five of the states, so as to invoke the power conferred on the Parliament by *s 51(xxxvii)*. The reference authorises the Parliament to legislate generally with respect to the maintenance of children, the payment of expenses in relation to children or child bearing and the custody and guardianship of, and access to, children; but does not include matters relating to child welfare under specified state child welfare legislation nor, apart from the Victorian reference, the matter of the adoption of children. The relevant legislation is:

Commonwealth Powers (Family Law — Children) Act 1986 (NSW);

Commonwealth Powers (Family Law — Children) Act 1990 (Qld);

Commonwealth Powers (Family Law) Act 1986 (SA);

Commonwealth Powers (Family Law) Act 1987 (Tas);

Commonwealth Powers (Family Law — Children) Act 1986 (Vic).

[1505.365] Property

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxi), s 51(xxii).

Neither *s 51(xxi)* nor *s 51(xxii)* will support Commonwealth legislation which would "deprive a third party of an existing right" or impose on that third party "a duty which it would not otherwise be liable to perform": *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354; *33 ALR 631*. The Parliament may authorise a Family Court official to execute a transfer of a husband's shares in a family company in favour of his wife; but cannot authorise the Family Court to order a company and directors of that company who are not parties to the marriage to register a transfer of the husband's shares in the company to the wife: *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337; *33 ALR 631* CB.

The Parliament may authorise the Family Court to order a husband not to exercise his votes as a director and shareholder in a family company so as to frustrate the wife's access to property legally owned by the company: *R v Dovey; Ex parte Ross* (1979) 141 CLR 526; *23 ALR 531* CB.

SECTION 51(xxii) — DIVORCE AND MATRIMONIAL CAUSES; AND IN RELATION THERETO, PARENTAL RIGHTS, AND THE CUSTODY AND GUARDIANSHIP OF INFANTS

[1505.370] Matrimonial causes

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxii).

Traditionally, a "matrimonial cause" included court proceedings for the dissolution of marriage, for a declaration of nullity of a purported marriage, for judicial separation, for restitution of conjugal rights and for jactitation of marriage: Divorce and Matrimonial Causes Act 1857 (UK), s 6. The juxtaposition, in s 51(xxii), of the terms "divorce", "matrimonial causes" and "custody" indicates that the expression "matrimonial causes" has a restricted meaning: *Lansell v Lansell* (1964) 110 CLR 353 at 368; *Russell v Russell* (1976) 134 CLR 495 at 537–8; *9 ALR 103*.

[1505.375] Ancillary relief

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* [1505.340], [1505.365], s 51(xxi), s 51(xxii).

Proceedings for the settlement of property, for the payment of spousal maintenance or for the guardianship and custody of or access to children are not "matrimonial causes" in their own right: they may be dealt with under *s 51(xxii)* as proceedings ancillary or incidental to principal relief, such as proceedings for annulment or dissolution of marriage; or they may be dealt with under *s 51(xxi)*, as arising out of the marriage relationship: *Russell v Russell* (1976) 134 CLR 495 at 538–9; *9 ALR 103*; see *[1505.340]* and *[1505.365]*.

SECTION 51(xxiii) — INVALID AND OLD-AGE PENSIONS

[1505.380] Not a general welfare power

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxiii).

The Parliament is empowered by *s 51(xxiii)* to appropriate moneys for the purpose of invalid and old age pensions, "but it has no general power to legislate for social services": *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237 at 282. "The word 'pensions' denotes money payments": *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 259.

SECTION 51(xxiiiA) — THE PROVISION OF MATERNITY ALLOWANCES, WIDOWS' PENSIONS, CHILD ENDOWMENT, UNEMPLOYMENT, PHARMACEUTICAL, SICKNESS AND HOSPITAL BENEFITS

[1505.385] Alteration

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Paragraph (xxiiiA).

Paragraph (xxiiiA) was inserted by the Constitution Alteration (Social Services) 1945 No 81 of 1946, s 2.

[1505.390] Cash payments and services

The terms "allowances", "pensions" and "endowment" appear to be limited to cash payments, while the term "benefits" covers "provisions made to meet needs arising from special conditions … or from particular situations or pursuits … whether the provision takes the form of money payments or the supply of things or services", and includes any "pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security": *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 259, 260 and 279. See also *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 280; *69 ALR 631*.

[1505.395] Limited to Commonwealth benefits etc

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xxiiiA).

Section 51(xxiiiA) authorises the Commonwealth Parliament to legislate only "with respect to the providing by the Commonwealth of the benefits mentioned in the paragraph"; so that Parliament cannot require the states to provide, or prevent the states from providing, the forms of allowances, pensions, benefits and endowment referred to in *s 51(xxiiiA)*; although there might be an inconsistency between Commonwealth and state laws relating to such matters, which would render invalid the relevant parts of the state law: *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 243–4 and 279. "[N]o express power is conferred on the Parliament to make laws to regulate the manner of performance of medical or dental services": *General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532 at 557; *31 ALR 369*. See also *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 279; *69 ALR 631*.

In *Williams v The Commonwealth* *(2012) 288 ALR 410*; 86 ALJR 713; *[2012] HCA 23*; *BC201204253* CB, Hayne J and Kiefel J both considered, and rejected, the argument that the Funding Agreement at issue, which related to the provision of chaplaincy services, could be supported by s 51(xxiiiA). Applying the reasoning in *Alexandra Private Hospital*, Hayne J considered that the provision of payment for a chaplain to a school was not a form of "benefits to students" because it did not involve

"the provision of material aid in satisfaction of human wants": at [285]; see also Kiefel J at [574]. The other members of the court in *Williams* did not specifically address this question. For further discussion of *Williams* see *[1605.5]* below.

[1505.400] Prohibition on civil conscription

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxiiiA).

"[T]he prohibition contained in the words 'but so as not to authorise any form of civil conscription' in *s 51(xxiiiA)* applies only to the reference in the paragraph to the provision of 'medical and dental services'"; but if medical or dental services are provided in the form of, for example, sickness or hospital benefits, that provision must not authorise any form of civil conscription of such services: *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 279; *69 ALR 631*.

[1505.405] Meaning of civil conscription

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxiiiA).

Section 7A of the Pharmaceutical Benefits Act 1947 (Cth), which obliged a medical practitioner to use a form supplied by the Commonwealth when prescribing certain listed drugs, infringed the prohibition on civil conscription contained in *s 51(xxiiiA)*, which protected the providers of medical and dental services against not only compulsory enrolment in full time civilian service but also against compulsion to "engage in a particular occupation, perform particular work or perform work in a particular way": *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 249. However, the prohibition is not infringed when the Parliament compels any medical practitioner, who opts to deliver a medical service which is to be financed by the Commonwealth, to deliver that service in accordance with a government-specified procedure — the prohibition "does not refer to compulsion to do, in a particular way, some act in the course of carrying on practice or performing a service, when there is no compulsion to carry on this practice or perform the service": *General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532 at 557; *31 ALR 369*. Accordingly, participating proprietors of Commonwealth-funded nursing homes (funded as a sickness and hospital benefit to their residents) can be required to conform to Commonwealth standards on bed numbers, the selection of residents, the fees to be charged to residents, the keeping of financial accounts and regular inspection of premises. Nevertheless, the prohibited "civil conscription" may be found not only in a law legally obliging practitioners to perform a service but also in a law which, because of economic or other pressure, places a practitioner under "practical compulsion" to perform that service: *General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532 at 550, 565, 566; *31 ALR 369*. The existence of practical compulsion to conform to professional standards in respect of any services provided does not constitute civil conscription in circumstances where there is no compulsion, legal or practical, to perform a professional service: *Wong v Commonwealth* (2009) 236 CLR 573; *252 ALR 400*; *[2009] HCA 3*; *BC200900209* at *[209]* CB and [226].

See also the discussion in *Wong v Commonwealth* (2009) 236 CLR 573; *252 ALR 400*; *[2009] HCA 3*; *BC200900209* at *[209]* CB at [18]–[54] and [174]–[192] of the use of extrinsic and historical material in interpreting *s 51(xxiiiA)*.

SECTION 51(xxiv) — THE SERVICE AND EXECUTION THROUGHOUT THE COMMONWEALTH OF THE CIVIL AND CRIMINAL PROCESS AND THE JUDGMENTS OF THE COURTS OF THE STATES

[1505.410] Purpose of s 51(xxiv)

"The nature of this power, as well as the prior history of the subject to which it relates, provides strong ground for interpreting it as enabling the federal legislature to regulate the manner in which officers of the law in one state should act with reference to the execution of the process of another state. It is a legislative power given to the central legislature for the very purpose of securing the enforcement of the civil and criminal process of each state in every other state": *Aston v Irvine* (1955) 92 CLR 353 at 364.

[1505.415] Deportation of offenders

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxiv).

In *Aston v Irvine* (1955) 92 CLR 353 CB, the High Court said that s 18 of the (now repealed) Service and Execution of Process Act 1901 (Cth), which authorised a magistrate or justice of the peace in a state or territory of the Commonwealth to order the deportation of a person to another state or territory in response to a warrant issued from that other state or territory, was a valid law within *s 51(xxiv)*; as was s 19 of the Act, which provided that a judge might review any order made by a magistrate or justice of the peace under s 18.

[1505.420] Not limited to judicial process

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxiv).
(CTH) *Service and Execution of Process Act 1992* s 76.
(NSW) *New South Wales Crime Commission Act 1985* New South Wales Crime Commission Act (NSW).

In *Ammann v Wegener* (1972) 129 CLR 415 CB, the High Court held that the civil and criminal process which might be served and executed pursuant to a law made under *s 51(xxiv)* was not limited to the process of a court; accordingly, process which required a witness to appear and give evidence at a committal proceeding before a magistrate might be served and executed under s 16 of the (now repealed) Service and Execution of Process Act 1901 (Cth). Whether "the power extended to the process of Royal Commissions and tribunals which were not courts in the strict sense" was queried: 129 CLR 415 at 441.

In *Dalton v NSW Crime Commission* *(2006) 226 ALR 570*; 80 ALJR 860; *[2006] HCA 17*; *BC200603094* CB, the High Court held that *s 51(xxiv)* supported s 76 of the Service and Execution of Process Act 1992. That section had been relied upon to support the service of a summons issued by the New South Wales Crime Commission upon a witness in Victoria. That summons was issued as part of the investigative process of the commission, not as part of the criminal process. Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ upheld the validity of s 76, holding that the words "civil and criminal" in s 51(xxiv) are not words of limitation: at [28]. They held that the term "process" in s 51(xxiv) is not limited to litigation conducted in the courts — that is, there may be "civil and criminal process" which is "of the States" but not "of the courts": at [34]. The court declined to attempt to define the meaning of the word "process". It was enough for the purposes of the case to decide that a summons issued under the New South Wales Crime Commission Act (NSW) was sufficiently analogous to subpoenas issued by courts so as to fall within the concept of a "process of the State": at [48]–[53].

SECTION 51(xxv) — THE RECOGNITION THROUGHOUT THE COMMONWEALTH OF THE LAWS, THE PUBLIC ACTS AND RECORDS, AND THE JUDICIAL PROCEEDINGS OF THE STATES

[1505.425] Associated provision

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 118.

Section 118 of the Constitution requires "full faith and credit" to be given throughout the Commonwealth to the laws, public Acts and records, and judicial proceedings of every state.

SECTION 51(xxvi) — THE PEOPLE OF ANY RACE FOR WHOM IT IS DEEMED NECESSARY TO MAKE SPECIAL LAWS

[1505.430] Alteration

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Paragraph (xxvi).

Paragraph (xxvi) was amended by the Constitution Alteration (Aboriginals) 1967 No 55 of 1967 s 2. The alteration had the effect of deleting the bracketed words, as indicated below: "The people of any race [, other than the aboriginal race in any State,] for whom it is deemed necessary to make special laws:".

[1505.435] Special legislation for Aboriginal people

As a consequence of the 1967 alteration, "[i]t is now competent for the Parliament to make special laws with respect to the people of the Aboriginal race": *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186; *39 ALR 417*. The power need not be exercised with respect to all persons of the race in question: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [46] and [83].

[1505.440] The Aboriginal race

The "Aboriginal race" refers to all Australian Aboriginal people, including any subgroup: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 180 and 274; *46 ALR 625*. The biological element of "race" is necessary but not sufficient: "Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race"; and "a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal": *Commonwealth v Tasmania* (1983) 158 CLR 1 at 244 and 274; *46 ALR 625*. "[T]he weight of authority is against the adoption of a merely genetic notion of the meaning of the word 'Aboriginal' and favours the following of ordinary usage", relying on "social factors such as self-recognition as Aboriginal and recognition by the Aboriginal community": *Queensland v Wyvill (1989) 90 ALR 611* at *617*.

[1505.445] Adversely discriminatory or repressive laws

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxvi).

It has been said that "the primary object of the power is beneficial": *Commonwealth v Tasmania* (1983) 158 CLR 1 at 242; *46 ALR 625* at *791*.

It is not clear whether s 51(xxvi) would support a repressive or adverse discriminatory law. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 209; 39 ALR 417 at 447; 56 ALJR 625; BC8200052, it was said that a law under s 51(xxvi) "may be benevolent or repressive". However, in *Kruger v Commonwealth* (1997) 190 CLR 1 at 111; 146 ALR 126 at 193; 71 ALJR 991; BC9703253 (*Kruger*), Gaudron J said it was "arguable that that power only authorizes laws for the benefit of 'the people of [a] race for whom it is deemed necessary to make special laws'". Gummow J observed that s 51(xxvi) had permitted detrimental as well as beneficial legislation "at least in its original form": *Kruger* at CLR 155; ALR 228.

In *Kartinyeri v Commonwealth* (1998) 195 CLR 337; 152 ALR 540; 72 ALJR 722; BC9800961, it was argued that s 51(xxvi) authorises only beneficial legislation. Gummow and Hayne JJ rejected that argument (at [90]–[94]). Brennan CJ and McHugh J did not decide the question (at [20]). Gaudron J said that the power may embrace adversely discriminatory as well as beneficial laws, but said that at present it was unlikely that a law disadvantaging a race would be within power (at [44]). Kirby considered that the power did not authorise laws discriminating against a race (at [152]). The position is therefore not settled.

[1505.450] Cultural heritage

Legislation cited in this paragraph
(CTH) *World Heritage Properties Conservation Act 1983* 11, Sections 8.
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxvi).

Sections 8 and 11 of the World Heritage Properties Conservation Act 1983 (Cth), which protect sites that are part of Australia's heritage and of particular significance to the people of the Aboriginal race, are supported by s 51(xxvi): *Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625. "[T]he cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers powers to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage": *Commonwealth v Tasmania* , *above,*CLR at 159.

[1505.451] Native title

Legislation cited in this paragraph
(CTH) *Native Title Act 1993*.
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxvi).

The Native Title Act 1993 (Cth), which recognises and protects native title while providing that such title may be extinguished by certain governmental acts, is supported by s 51(xxvi): "… the Native Title Act is 'special' in that it confers uniquely on the Aboriginal and Torres Strait holders of native title (the 'people of any race') a benefit protective of their native title … The special quality of the law thus appears. Whether it was 'necessary' to enact that law was a matter for the Parliament to decide and, in the light of *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1 [which recognised native title as part of the common law of Australia] there are no grounds on which this court could review the Parliament's decision, assuming it had the power to do so: *Western Australia v Commonwealth* (1995) 183 CLR 373 at 462; 128 ALR 1 at 44 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[1505.455] Special laws

L Legislation cited in this paragraph

(CTH) *Racial Discrimination Act 1975* 12, Sections 9.

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxvi).

(CTH) *World Heritage Properties Conservation Act 1983* 11, Sections 8.

Sections 9 and 12 of the Racial Discrimination Act 1975 (Cth), were outside the power granted by *s 51(xxvi)*, because those sections "prohibit discrimination generally on the ground of race; that is, they protect the persons of any race from discriminatory action by reason of their race": *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 187; *39 ALR 417*.

To be a special law, legislation must select a particular race for its benefits or penalties, but there is no requirement that the law must be with respect to all members of the race: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [46] and [83].

Sections 8 and 11 of the World Heritage Properties Conservation Act 1983 (Cth) comprise "special law" because there is "a special need to protect the sites for [Aborigines], a need which differs from, and in one sense transcends, the need to protect it for mankind": *Commonwealth v Tasmania* (1983) 158 CLR 1 at 159; *46 ALR 625*.

"[T]he 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. A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race. The law may be special even when it confers a benefit generally, provided the benefit is of special significance or importance to the people of a particular race": *Western Australia v Commonwealth* (1995) 183 CLR 373; *128 ALR 1* at *43–4* CB per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[1505.460] The "necessity" of the special law

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxvi).

The necessity of a special law is to be determined by the parliament, and is not justiciable: "The opinion of parliament that it is necessary to make a special law need not be evidenced by an express declaration to that effect; it may appear from the law itself": *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 187; *39 ALR 417*. In *Western Australia v Commonwealth* (1995) 183 CLR 373 at 460–2; *128 ALR 1* at *43*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ stated that, subject to the "possibility of manifest abuse of the races power", the judgment whether a particular law was "necessary" was for the parliament.

In *Kartinyeri v Commonwealth* (1998) 195 CLR 337; *152 ALR 540*; 72 ALJR 722; *BC9800961* at *[82]* CB, Gummow and Hayne JJ noted that it may be that the character of a law within s 51(xxvi) will be denied to a law enacted in a manifest abuse of that power of judgment. In the same case, Gaudron J said that there must be some material upon which the parliament may reasonably form a judgment that there is a difference necessitating some special legislative measure: at [39].

Section 51(xxvii) — Immigration and emigration

[1505.465] Associated provision

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xix).

Section 51(xix) authorises the Parliament to make laws with respect to "naturalisation and aliens".

[1505.470] Immigration

"In its ordinary meaning immigration implies leaving an old home in one country to settle in a new home in another country, with a more or less defined intention of staying there permanently or for a considerable time": *Ah Sheung v Lindberg* [1906] VLR 323 at 332. However, the power will also support controlling the entry of persons into Australia whether for temporary or for permanent residence here: *Ex parte de Braic* (1971) 124 CLR 162 at 164. See also *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 CB.

"'Immigrants' include persons who are intending settlers in a country other than their own and seek to enter (or do enter) that country and to remain in it for the purpose of making a permanent home there, or who, having entered another country without any original intention to settle there, do in fact endeavour to remain in that country as members of the community. Control of immigration involves control of the admission of such persons and determination whether such admission is to be allowed to be permanent or only temporary": *O'Keefe v Calwell* (1949) 77 CLR 261 at 276–7; [1949] ALR 381; (1949) 22 ALJR 576; *BC4900670* CB.

The power may also extend to a person born in Australia who has made a permanent home abroad, where that person is not "a constituent part of the Australian Community": *Donohoe v Wong Sau* (1926) 36 CLR 404 at 408.

[1505.475] Scope of the power

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxvii).

"[T]he subject matter of the power is immigration, not immigrants … Although the distinction is well taken, it cannot be pushed too far. A law about immigrants may be, and very often will be, a law about immigration": *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369 at 381; *8 ALR 233*.

"[I]t is now well settled that the concept of immigration extends beyond the actual act of entry into Australia to the process of absorption into the Australian community and that *s 51(xxvii)* confers legislative power in respect of both": (1975) 133 CLR 369 at 376. See also *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172.

A law made under *s 51(xxvii)* may operate "at the time of entry and because of that entry", and may take the form of conditions attached upon entry, to persist until the immigrant has been fully absorbed into the Australian community: (1975) 133 CLR 369 at 373–4. Such conditions may prevent absorption into the community: see *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168; [1971] ALR 715; *BC7100130* CB.

[1505.480] Absorption into Australian community

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xix), s 51(xxvii).

The constitutional power under s 51(xxvii), to affect the position of an immigrant, will be lost once the person "becomes a member of the Australian community": *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 64, 109–11 and 137. See also *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369 at 373, 374 and 382; 8 ALR 233.

The contrary view ("once an immigrant always an immigrant"), now clearly rejected, is set out in *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 80 and 127–8; [1925] ALR 46; BC2500003 CB; *Koon Wing Law v Calwell* (1949) 80 CLR 533 at 560–7; [1950] ALR 97; (1949) 24 ALJR 25; BC4900640 CB.

Absorption into the community is irrelevant to the scope of the aliens power in s 51(xix). "[W]hile absorption reflects the fact that an activity of immigration has come to an end, it may coexist, and commonly coexists, with a legal status of alienage. Resident aliens may be absorbed into the community, but they are still aliens": *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; 193 ALR 37; [2002] HCA 48; BC200206567 at [42] CB and see also at [134], [211].

SECTION 51(xxix) — EXTERNAL AFFAIRS

[1505.485] Matters external to Australia

L Legislation cited in this paragraph
(CTH) Commonwealth of the Australia Constitution Act s 4(6)(a), s 51(xxix),.
(CTH) Seas and Submerged Lands Act 1973.
(CTH) Navigation Act 1912.
(CTH) Crimes Act 1914 ss 50BA, 50BC.
(CTH) Criminal Code s 102.5.
(CTH) Foreign Acquisitions and Takeovers Act 1975 s 21A.

The power contained in s 51(xxix) "extends … to any affair which in nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole. For this purpose, the continent of Australia and the island of Tasmania are, in my opinion, bounded by the low-water mark on the coast": *New South Wales v Commonwealth* (1975) 135 CLR 337 at 360; 8 ALR 1 (the *Seas and Submerged Lands* case). Consequently, the Seas and Submerged Lands Act 1973 (Cth), which deals with the legal status of the territorial sea and the continental shelf of Australia, is a law with respect to "external affairs" within s 51(xxix). Similarly, provisions in the Navigation Act 1912 (Cth), protecting shipwrecks on or near the coast of Australia, are supported by s 51(xxix): *Robinson v Western Australia Museum* (1977) 138 CLR 283 at 335, 342; 16 ALR 623. The provisions of the War Crimes Act 1942 (Cth), as amended in 1988, declared that certain conduct in Europe during World War II constituted a crime punishable in Australia. Because these provisions attach legal consequences under Australian law to events outside Australia, they are a law with respect to external affairs within s 51(xxix): *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528–31, 632–5, 695–6, 712–14; 101 ALR 545 per Mason CJ, Dawson, Gaudron, McHugh JJ.

In *Horta v Commonwealth* (1994) 181 CLR 183; 123 ALR 1 CB, the High Court held, in a unanimous judgment, that Commonwealth legislation establishing a cooperative regime for the exploitation of petroleum resources beneath the continental shelf between Australia and New Zealand was

supported by s 51(xxix). The legislation dealt with matters external to Australia; and, even if (as the minority had held in *Polyukhovich v Commonwealth*) some additional connection with Australia was required, that requirement was clearly satisfied here: see *Horta v Commonwealth* (1994) 181 CLR 183 at 194; 123 ALR 1 at 5–6. See also *Victoria v Commonwealth* (1996) 187 CLR 416 at 485; 138 ALR 129 at 145 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). In *Thomas v Mowbray* (2007) 233 CLR 307; 237 ALR 194; [2007] HCA 33; BC200706044 at [153] CB, part of the challenged legislation, which empowered courts to make control orders to protect the public (defined to include the public in foreign countries) was upheld on the basis that it related to matters or things that lie outside the geographical limits of Australia. There was no suggestion in that case that some criteria additional to geographic externality needed be satisfied.

In *R v Hughes* (2000) 202 CLR 535; 171 ALR 155 ; BC200002055; [2000] HCA 22 at [42] CB, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that s 51(xxix) would support Commonwealth legislation authorising the Director of Public Prosecutions to prosecute an offence created by State law, where the offence related to investments in the United States — because the legislation related "to matters territorially outside Australia, but touching and concerning Australia".

The "geographic externality" aspect of the external affairs power can also support laws that operate within Australia, if it does so by reference to facts that are sufficiently connected to matters external to Australia.

In *XYZ v Commonwealth* (2006) 227 CLR 532; 227 ALR 495; 80 ALJR 1036; [2006] HCA 25; BC200604187 CB, the validity of ss 50BA and 50BC of the Crimes Act 1914, which criminalised acts of child sex tourism by Australian citizens or residents while outside Australia, was challenged. A majority of the court (Gleeson CJ, Gummow, Hayne and Crennan JJ) upheld the challenged laws on the basis that the external affairs power enabled the Commonwealth to make laws with respect to matters, persons or things physically external to Australia, irrespective of any further connection with the country: at [10], [30], [38], [49]. Callinan and Heydon JJ dissented from that view and considered that the first three cases noted above should be overruled (at [206]). Kirby J did not decide whether geographical externality was sufficient, but he expressed some doubt on that point (at [114], [117]).

In *Ul-Haque v R* [2006] NSWCCA 241; BC200611461 at [7]–[9] CB, [25], the New South Wales Court of Criminal Appeal (in an interlocutory appeal) held that s 51(xxix) supported a terrorism charge in Australia because the conduct the subject of the charge involved conduct that was geographically external to Australia. That provided a sufficient connection to the external affairs power, despite the fact that the elements of the offence in question (s 102.5 of the Commonwealth Criminal Code) did not require any connection with matters external to Australia; and, indeed, expressly operated in relation to conduct whether inside or outside Australia.

In *Wight v Pearce* (2007) 157 FCR 485; [2007] FCA 26; BC200700216 CB, the operation of the power to prohibit the acquisition of urban land within Australia under s 21A of the Foreign Acquisitions and Takeovers Act 1975, as extended by s 4(6)(a) to natural persons who are not ordinarily resident in Australia, was upheld on the basis of the external affairs power because "[t]o say that a person is not ordinarily resident in Australia means that ordinarily that person is outside the geographical limits of Australia": at [40]. The external affairs power applied despite the fact that the acquisition of land with which s 21A is concerned occurs within Australia: at [43]–[46].

[1505.490] Relations with other countries

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxix).

"The relations of the Commonwealth with all countries outside Australia, including other dominions of the Crown, are matters which fall directly within the subject of external affairs": *R v Sharkey* (1949) 79 CLR 121 at 136–7. Consequently, the parliament can render it an offence for a person to "excite disaffection against the Government or Constitution of any of the King's Dominions", as in s 24A(1)(c) of the Crimes Act 1918. Similarly, s 104(3) of the Navigation Amendment Act 1979, which repeals, within Australia, provisions of the Merchant Shipping Act 1894 (UK), is supported by *s 51(xxix)*: *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351; *58 ALR 29* CB. In *XYZ v Commonwealth* (2006) 227 CLR 532; *227 ALR 495*; 80 ALJR 1036; *[2006] HCA 25*; *BC200604187* at *[138]–[139]* CB, Kirby J upheld the validity of legislation that criminalised acts of child sex tourism by Australian citizens or residents while outside Australia on the basis that the international responses to child sex tourism showed that it was a matter that would affect Australia's relations with other countries: compare Callinan and Heydon JJ at [208]–[212]. In *Thomas v Mowbray* (2007) 233 CLR 307; *237 ALR 194*; *[2007] HCA 33*; *BC200706044* at *[151]* CB, Gummow and Crennan JJ said that "[t]he pursuit and advancement of comity with foreign governments and the preservation of the integrity of foreign states may be a subject matter of a law with respect to external affairs", and attributed that same view to Gleeson CJ in *XYZ v Commonwealth* (2006) 227 CLR 532; *227 ALR 495*; 80 ALJR 1036; *[2006] HCA 25*; *BC200604187* at *[18]* CB.

[1505.495] Implementation of treaties

The Parliament may legislate to implement, for Australia, any international obligation which the Commonwealth Government had assumed under a bona fide international treaty, regardless of the subject matter of the obligation: *Commonwealth v Tasmania* (1983) 158 CLR 1; *46 ALR 625* CB. "[A] treaty obligation stamps the subject of the obligation with the character of an external affair unless there is some reason to think that the treaty had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament": 158 CLR 1 at 218–19. See also *Richardson v Forestry Commission* (1988) 164 CLR 261; *77 ALR 237* CB; *R v Tang (2008) 249 ALR 200*; 82 ALJR 1334; *[2008] HCA 39*; *BC200807527* CB.

[1505.500] Identifying an international obligation

The existence of an international obligation on Australia is a question of fact, which the court is obliged to decide; but, the existence of such an obligation depends upon the international community's construction of the treaty or convention and the operation which that community would attribute to the treaty or convention in particular circumstances: *Queensland v Commonwealth* (1989) 167 CLR 232 at 241; *86 ALR 519*. Accordingly, where an area in Queensland had been accepted by the World Heritage Committee for listing under the Convention for the Protection of the World Cultural and National Heritage, that acceptance determined the area's status for the international community and was "conclusive of Australia's international duty to protect and conserve it": 167 CLR 232 at 242.

[1505.505] Federal clauses

Article 34 of the World Heritage Convention, requiring the central government in a federal system to implement the convention only where such implementation came "under the legal jurisdiction of the federal or central legislative power", should not be read as denying the obligatory nature of the Commonwealth's commitments under the Convention but as emphasising, in express terms, the Commonwealth's obligations: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 136, 178, 228 and 263; *46 ALR 625*.

[1505.510] Conformity to the treaty

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxix).

To be regarded as an implementation of a treaty to which Australia is a party, the legislation must be "reasonably capable of being viewed as appropriate or adapted to" the terms of the treaty, so that "the legislative judgment could reasonably be made or that there is a reasonable basis for making it": *Richardson v Forestry Commission* (1988) 164 CLR 261 at 347 and 295–6; *77 ALR 237*.

In *R v Tang* *(2008) 249 ALR 200*; 82 ALJR 1334; *[2008] HCA 39*; *BC200807527*, the High Court held that the definition of slavery in s 270.1 of the Commonwealth Criminal Code fell within the definition of slavery in the International Convention to Suppress the Slave Trade and Slavery (1926) 212 UNTS 17; [1927] ATS 11, Art 1. The relevant definition in the Code was materially identical to the definition in the Convention, save that it incorporated some inclusive words relating to the situation where slavery results from a debt or contract. The relevant provisions of Div 270 were held to be reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under the Convention. They were therefore sustained by the external affairs power.

It is not an essential requirement for the validity of legislation implementing a treaty that the legislation comply with all the obligations assumed under the treaty: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 268; *46 ALR 625* (Deane J). "Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention": *Victoria v Commonwealth* (1996) 187 CLR 416 at 489; *138 ALR 129* at *148* (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

However, where an international obligation is expressed in qualified terms, it will be necessary for the implementing legislation to observe that qualification. So, where an ILO Convention obliged Australia to eliminate discrimination on employment on various grounds and on any additional grounds nominated by Australia after consultation with employers and employees, the High Court held that any law which proscribed a ground of discrimination on which there had been no consultation would derive no support from *s 51(xxix)* of the Constitution: *Victoria v Commonwealth* (1996) 187 CLR 416 at 531; *138 ALR 129* at *182* (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[1505.511] Consistency with international law

It is no objection to the validity of a law implementing a treaty, to which Australia is a party, that the treaty is inconsistent with the requirements or constraints of international law, or that Australia's entry into and implementation of the treaty may involve Australia in a breach of international law: *Horta v Commonwealth* (1994) 181 CLR 183 at 195; *123 ALR 1* at *6–7* per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

[1505.515] Non-obligatory treaties

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxix).

A treaty obligation is "sufficient, though not necessary" to invoke *s 51(xxix)*: *Richardson v Forestry Commission* (1988) 164 CLR 261 at 332; *77 ALR 237*. See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 123–4, 130, 131, 170 and 171; *46 ALR 625*.

[1505.520] Bona fide treaty

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xxix).

Section 51(xxix) cannot be invoked to implement a treaty which "had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament" and "was demonstrated to be no more than a device to attract legislative power": *Commonwealth v Tasmania* (1983) 158 CLR 1 at 219 and 259; *46 ALR 625*. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 216 and 260; *39 ALR 417*; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 642, 658, 669 and 687.

[1505.525] Matters of international concern

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxix).

In the absence of an international treaty, there is some suggestion in the authorities that *s 51(xxix)* will support legislation dealing with a matter of international concern: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131–2, 171, 220 and 258; *46 ALR 625*. In concluding whether a matter is one of international concern, the High Court must "form its own impression of the facts, in part on the basis of judicial notice": 158 CLR 1 at 102. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 219–20; *39 ALR 417*. "However, unless standards are broadly adhered to or are likely to be broadly adhered to in international practice and unless those standards are expressed in terms which clearly state the expectation of the community of nations, the subject of those standards cannot be described as a true matter of international concern … whether the enlivening factor be an obligation or a concern it is necessary to define it with some precision in order to ascertain the scope of the power": *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *101 ALR 545* at *576–7* CB per Brennan J.

In *XYZ v Commonwealth* (2006) 227 CLR 532; *227 ALR 495*; 80 ALJR 1036; *[2006] HCA 25*; *BC200604187* at *[224]–[225]* CB Callinan and Heydon JJ argued that "international concern" should not be accepted as providing a proper foundation for the operation of *s 51(xxix)*. Kirby J left the question open, stating that the "suggestion that the constitutional validity of federal laws could be demonstrated by showing that they were made with respect to a 'matter of international concern' is still undeveloped in Australia", but noting that this argument may "assign insufficient attention to the appearance of the word 'external' in connection with the word 'affairs'": at [127]. Indeed, while not deciding the point, Gummow, Hayne and Crennan JJ also noted that there were "unsettled questions concerning the use of the notion of international concern". Their Honours appeared to regard "international concern" as a concept that had its origins as a limitation upon power, which had been misused as a criterion of power. They did not, however, need to decide that question: at [51]–[53].

[1505.530] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) *World Heritage Properties Conservation Act 1983*.

The World Heritage Properties Conservation Act 1983 (Cth) did not "inhibit or impair the continued existence of a state or its capacity to function" so as to offend an implied limitation on the Commonwealth's legislative power, despite the Act's prohibition of a wide range of activities on land owned by the State of Tasmania: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 139; *46 ALR 625*. Nor did the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Cth) impair Tasmania's legislative and executive functions, notwithstanding that the Act prohibited activities on land comprising some 4.5% of the area of Tasmania: *Richardson v Forestry Commission* (1988) 164

CLR 261 at 305 and 337; 77 ALR 237. And it was no objection to the constitutional validity of the Act that it placed a burden on Tasmania to which other states were not subject: the international obligation created by the World Heritage Convention to protect areas of world heritage significance "necessarily falls to be discharged with respect to particular properties"; and to protect those properties did "not invalidly discriminate against the state in whose territory the property is situated": 164 CLR 261 at 294.

SECTION 51(xxxi) — THE AQUISITION OF PROPERTY ON JUST TERMS FROM ANY STATE OR PERSON FOR ANY PURPOSE IN RESPECT OF WHICH THE PARLIAMENT HAS POWER TO MAKE LAWS

[1505.535] A comprehensive protection of property interests

L Legislation cited in this paragraph

(CTH) Commonwealth of the Australia Constitution Act s 51, Section 51(xxxi).

Section 51(xxxi) of the Constitution is, first and foremost, a head of legislative power: *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 187.2; 119 ALR 577; [1994] HCA 9; BC9404619 CB (Deane and Gaudron JJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; 152 ALR 1; [1998] HCA 8; BC9800074 at [44] CB (Toohey J). Reference to that paragraph as a "guarantee" is, therefore, apt to mislead: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; 152 ALR 1; [1998] HCA 8; BC9800074 at [126] CB (McHugh J).

Nevertheless, s 51(xxxi) has "assumed the status of a constitutional guarantee of just terms [which] was to be given the liberal construction appropriate to such a constitutional provision": *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; BC200911041 at [43] CB; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 202; 55 ALR 609. Any Commonwealth law, although supported by one of the other paragraphs of s 51, must conform to s 51(xxxi) to the extent that the law is properly characterised as a law with respect to the acquisition of property: *Johnston Fear & Kingham v Commonwealth* (1943) 67 CLR 314 at 318, 315; [1943] ALR 278 CB; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371–2.

In *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 188; 119 ALR 577; [1994] HCA 9; BC9404619 CB, Deane and Gaudron JJ (and to similar effect see also Dawson and Toohey JJ at 193) explained that:

> [T]he indirect operation of par. (xxxi) does not extend beyond abstracting from other grants of legislative power authority to make laws which can properly be characterized as laws with respect to the acquisition of property … [U]nless a law can be fairly characterized, for the purposes of par (xxxi), as a law with respect to the acquisition of property, that paragraph cannot indirectly operate to exclude its enactment from the prima facie scope of another grant of legislative power.

See also the discussion of the way that s 51(xxxi) abstracts from other legislative powers in *Wurridjal v Commonwealth* (2009) 237 CLR 309; 252 ALR 232; [2009] HCA 2; BC200900208 at [185]–[186] CB; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; BC200911041 at [135] CB.

[1505.537] Acquisitions outside the protection of s 51(xxxi)

L Legislation cited in this paragraph

(CTH) Commonwealth of the Australia Constitution Act s 51, s 51(i), s 51(ii), s 51(x), s 51(xvii), s 51(xxxi), s 51(xxxix),

s 61.
(CTH) *Circuit Layouts Act 1989*.

A Commonwealth law with respect to the acquisition of property may fall outside s 51(xxxi) because it is a law of a kind that is clearly within some other head of legislative power. For example, a law sequestrating the property of a bankrupt will be a law with respect to bankruptcy within s 51(xvii) and not a law with respect to the acquisition of property within s 51(xxxi) (*Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372), and a law forfeiting a prohibited import will be characterised as a law with respect to trade and commerce with other countries within s 51(i) and not a law within s 51(xxxi): *Burton v Honan* (1952) 86 CLR 169 at 180–1; [1952] ALR 553 CB. Because the taxation power in s 51(ii) authorises the compulsory acquisition of money for public purposes, a law that relates to the imposition of taxation will be unlikely to be characterised as a law with respect to the acquisition of property within s 51(xxxi): *Attorney-General (Cth) v Schmidt* , *above,*at 372; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 456–7; 26 ALR 185. See also *Wurridjal v Commonwealth* (2009) 237 CLR 309; 252 ALR 232; [2009] HCA 2; BC200900208 at [358] CB (Crennan J).

In *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; 119 ALR 577 CB, the High Court decided that legislation passed by the Parliament in 1992 to limit the Commonwealth's liability to refund amounts of tax paid by swimming pool manufacturers pursuant to 1986 legislation (held invalid in *Mutual Pools & Staff Pty Ltd v FCT* (1992) 173 CLR 450; 104 ALR 545; 66 ALJR 222 CB) was a law with respect to taxation within s 51(ii) (or, according to Brennan and McHugh JJ, a law supported by s 51(xxxix) and s 61) and was not an exercise of the power conferred by s 51(xxxi). It followed that the 1992 legislation could not be impugned as a law for the acquisition of property otherwise than on just terms. (The 1992 legislation provided that the Commonwealth was only liable to refund amounts paid under the invalid 1986 legislation where the manufacturer claiming the refund declared that it had not, at the time of paying of the tax, passed the tax on to purchasers of swimming pools, or that it had refunded to purchasers any tax passed on.)

In *Re DPP; Ex parte Lawler* (1994) 179 CLR 270; 119 ALR 655 CB, the High Court held that a Commonwealth law, providing for the forfeiture of a boat used in the commission of an offence against Australian fisheries control legislation, did not offend s 51(xxxi) even where the boat in question was the property of an “innocent third party”. The forfeiture provision was properly characterised as a law with respect to fisheries within s 51(x) of the Constitution and was not a law for the acquisition of property within s 51(xxxi). Similarly, a law providing for statutory liens to secure the effectiveness of charges relating to aircraft, attaching to and authorising the detention and sale of the aircraft, was not a law for the acquisition of property: *Airservices Australia v Canadian International Airlines Ltd* (1999) 202 CLR 133; 167 ALR 392 at [99]–[101] CB.

In *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134; 121 ALR 577 CB, the High Court held that the Circuit Layouts Act 1989 (Cth) did not effect an acquisition of property within s 51(xxxi), even though it could be said to impact on proprietary rights. The Act authorised the creator of an original circuit layout to bring proceedings to protect its intellectual property in the layout against any person who, without authority, sold the layout. The court decided that the Act was a law with respect to copyrights, patents of inventions and designs and trade marks, within s 51(xvii) of the Constitution. Six Justices said (at 595):

“It is of the essence of that grant of legislative power that it authorises the making of laws which create, confer and provide for the enforcement of, intellectual property rights in original compositions, inventions, designs, trade marks and other products of intellectual effort. It is of the nature of such laws that they confer such rights on authors, inventors and designers, other originators and

assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51(xvii) manifests a contrary intention which precludes the operation of s 51(xxxi)."

The High Court also made the point (at 595) that a law which was concerned with the adjustment of competing rights, claims or obligations in a particular area of activity (as the Circuit Layouts Act was) was unlikely to be characterised as a law with respect to the acquisition of property. Six Justices said (at CLR 161; ALR at 595):

> … a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of competing rights, claims or obligations or persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution.

A law which permits a court to impose a restraint on access to property until such time as it is determined whether that property was obtained in contravention of a prohibition is clearly incidental to the prohibition. If the regulating authority was required to provide just terms for the restraint, it would defeat the purpose of the restraint itself: *Siminton v Australian Prudential Regulation Authority (No 2)* (2008) 168 FCR 122; 248 ALR 34; [2008] FCAFC 88; BC200804012 , at [29] CB.

In *JT International SA v The Commonwealth* (2012) 291 ALR 669; 97 IPR 321; [2012] HCA 43; BC201207608 CB, the Commonwealth contended that s 51(xxxi) had no operation where the acquisition of property without compensation was "no more than a necessary consequence or incident of of a restriction on a commercial trading activity … reasonably necessary to prevent or reduce harm caused by that trading activity to members of the public, or public health". A majority of the court upheld the Tobacco Plain Packaging Act 2011 (Cth) on the basis that its provisions did not affect an acquisition of property. Accordingly, did not have to consider this broader proposition. Justice Gummow stated that it was sufficient to say that "propositions of the width put by the Commonwealth have not so far been endorsed by decisions of this Court" and that "whether such propositions should be accepted would require most careful consideration on an appropriate occasion": at [158]; see also at [189] per Hayne and Bell JJ; at [307] per Crennan J; at [344] per Kiefel J.

[1505.540] Acquisition of property in the territories

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 122, s 51, s 51(xxxi), s 51(xxix),.
(CTH) *Northern Territory (Self-Government) Act 1978* Section 50.

In *Teori Tau v Commonwealth* (1969) 119 CLR 564; [1971] ALR 190 CB, the High Court held that, because s 122, the territories power, is expressed in plenary terms, the Commonwealth Parliament has a power as wide as that of the states to legislate for compulsory acquisition of property in a territory; and when doing so, the parliament is not constrained by s 51(xxxi).

In *Wurridjal v Commonwealth* (2009) 237 CLR 309; 252 ALR 232; [2009] HCA 2; BC200900208 at [86] CB (French CJ), [189] (Gummow and Hayne JJ), [287] (Kirby J) (Heydon and Crennan JJ not deciding) held that *Teori Tau* should be overruled and that s 51(xxxi) applies to Commonwealth laws passed pursuant to s 122 of the Constitution.

Previously, in *Newcrest Mining (WA) Ltd v BHP Minerals Ltd* (1997) 190 CLR 513; *147 ALR 42* CB, Gaudron, Gummow and Kirby JJ had said that *Teori Tau* should be overruled on the basis that the "just terms" guarantee in s 51(xxxi) applied to laws made under *s 122*. Alternatively, their Honours said (and in this they were joined by Toohey J) that if a Commonwealth law operating in a territory could be characterised as a law with respect to one of the matters in *s 51* as well as a law within *s 122*, that law would be subject to s 51(xxxi). On that basis, Toohey, Gaudron, Gummow and Kirby JJ held that the National Parks and Wildlife Conservation Act 1975 was a law with respect to external affairs within s 51(xxix) as well as a law for the government of the Northern Territory and so attracted the guarantee of "just terms" in s 51(xxxi).

Section 50 of the Northern Territory (Self-Government) Act 1978 provides that the power of the Legislative Assembly does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms. This provision requires the application of decisions which have construed *s 51(xxxi)* to laws made by the Territory Assembly, subject to the possibility that some difference may flow from the fact that the legislative power of the Territory Assembly is not conferred by reference to enumerated heads of power: *Attorney-General (NT) v Chaffey (2007) 237 ALR 373*; *[2007] HCA 34*; *BC200706043* at *[3]–[4]* CB.

[1505.543] Relationship between s 51(xxxi) and s 96 of the Constitution

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxi), s 96.

A State can acquire land or other property, by resumption or otherwise, on any terms authorised by its Parliament, whether just or unjust. If a State Act provides for resumption of land on terms which are thought not to be just, that is of no consequence legally: it cannot affect in any way the validity of the State Act or of what is done under it: see *Pye v Renshaw* (1951) 84 CLR 58 at 79–80; [1951] ALR 880; (1951) 25 ALJR 519; *BC5100230* CB.

However, *s 51(xxxi)* may have an indirect operation upon State law via *s 96* of the Constitution, because *s 51(xxxi)* limits the circumstances in which the Commonwealth can grant funds to the States subject to a requirement that the States exercise their legislative power to acquire property without providing just terms. For discussion of this issue, see *[1830.30]* below.

[1505.545] Property

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxi).

(CTH) *Health Insurance Act 1973*.

(CTH) *Petroleum (Submerged Lands) Act 1967*.

(CTH) *Fisheries Act 1952* s 20.

Because *s 51(xxxi)* is "a provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms … the meaning of property … must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system": *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285; [1944] ALR 89 CB. Accordingly, "property" in *s 51(xxxi)* extends to a right to possession, and "to every species of valuable right and interest including real and personal property, incorporeal

hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action": 68 CLR at 290. A wide approach to the meaning of "property" in s 51(xxxi) was endorsed in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; BC200911041 at [131] and [189]; *Attorney-General (NT) v Chaffey* (2007) 237 ALR 373; [2007] HCA 34; BC200706043; *Victoria v Commonwealth* (1996) 187 CLR 416 at 559; 138 ALR 129; 66 IR 392; BC9603985; *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210; 243 ALR 1; [2008] HCA 7; BC200801217 , at [49]; *Wurridjal v Commonwealth* (2009) 237 CLR 309; 252 ALR 232; [2009] HCA 2; BC200900208 at [87]–[93] (French CJ), [293]–[297] (Kirby J), [356] (Crennan J).

In *Telstra Corporation Ltd v Commonwealth*, *above* at [44], the High Court said that "In many cases, including at least some cases concerning s 51(xxxi) [70], it may be helpful to speak of property as a 'bundle of rights'. At other times it may be more useful to identify property as 'a legally endorsed concentration of power over things and resources'. Seldom will it be useful to use the word 'property' as referring only to the subject matter of that legally endorsed concentration of power."

In *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297; 119 ALR 629; BC9404637, the High Court held that a right to bring an action to recover damages for injury caused through another's negligence was a species of "property" protected by s 51(xxxi): see per Mason CJ, Deane and Gaudron JJ at 632–3; per Brennan J at 638–9; per Toohey J at 645; per McHugh J at 650.

In *Commonwealth v Mewett* (1997) 191 CLR 471; 146 ALR 299; BC9703255 the High Court extended its earlier decision in *Georgiadis v Australian and Overseas Telecommunications Corp*, *above*, to conclude that a cause of action affected by a bar imposed by a statute of limitations "still has sufficient substance to answer the constitutional description of 'property' in s 51(xxxi) of the Constitution": CLRat 534 (per Gummow and Kirby JJ).

In *Health Insurance Commission v Peverill* (1994) 179 CLR 226; 119 ALR 675 a majority of the High Court (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ; Brennan J dissenting on this point) held that the amount of Medicare benefit payable, under the Health Insurance Act 1973 (Cth), to a medical practitioner who had provided services to a patient was a form of property within s 51(xxxi) of the Constitution. However, that property was susceptible to legislative alteration or extinction without any infringement of s 51(xxxi). See also the reasoning of the majority in *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; 152 ALR 1; BC9800990; [1998] HCA 24, to the effect that rights conferred on an exploration permit holder, under the Petroleum (Submerged Lands) Act 1967, were inherently susceptible of extinguishment — assuming that those rights might otherwise qualify as "property" for the purposes of s 51(xxxi). Likewise, the right to compensation under workers' compensation legislation may be defined in the legislation in such a way as to be the amount prescribed from time-to-time, such that an alteration in the prescribed amount after an injury has occurred does not acquire any "property" as, properly construed, there was no accrued right to receive compensation at the previous rate: *Attorney-General (NT) v Chaffey*, above, at [19]–[20], [30].

There are, however, cases where subsequent legislative modifications that remove existing statutory rights and interests may infringe rights that are properly regarded as "property" (such as, eg, the rights of copyright and patent owners): see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; 147 ALR 42; [1997] HCA 38; BC9703570; *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; 152 ALR 1; [1998] HCA 8; BC9800074 at [182]–[187]; *JT International SA v The Commonwealth* (2012) 291 ALR 669; 86 ALJR 1297; [2012] HCA 43; BC201207608. For example, in *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; 119 ALR 108 at 116, Black CJ and Gummow J assumed that the rights of the respondents to

fish for prawns, conferred by a plan of management issued pursuant to s 20 of the Fisheries Act 1952, were "property" for the purposes of s 51(xxxi) of the Constitution. As the Court said in *Telstra Corporation Ltd v Commonwealth*, *above* , at [49], "references to statutory rights as being 'inherently susceptible of change' must not be permitted to mask the fact that '[i]t is too broad a proposition... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi)'. Instead, analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue."

In *Wurridjal v Commonwealth* (2009) 237 CLR 309; 252 ALR 232; [2009] HCA 2; BC200900208 at [87]–[93] CB, the Court accepted that the fee simple granted pursuant to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) was "property" for the purpose of s 51(xxxi), notwithstanding that any such fee simple was subject to close regulation under that Act: at [101]–[102] (French CJ), [171] (Gummow and Hayne JJ) and [289] (Kirby J, agreeing with Gummow and Hayne JJ on this issue); [452] (Kiefel J); cf [413], [417] and [441] (Crennan J).

In *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; BC200911041 at [147] CB, Hayne, Kiefel and Bell JJ, and Heydon J (dissenting) accepted that licences to take bore water were a species of property (despite the fact that the majority held that the cancellation of those licences did not involve an acquisition of property).

[1505.550] Acquisition

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 50, s 51(xxxi),.
(CTH) *Competition and Consumer Act 2010* ss 152AL(3), 152AR, Section 81.
(CTH) *World Heritage Properties Conservation Act 1983*.
(CTH) *Health Insurance Act 1973*.
(CTH) *Fisheries Act 1952* s 20.
(CTH) *Protection of Movable Cultural Heritage Act 1986*.
(CTH) *Seafarers Rehabilitation and Compensation Act 1992* s 54.
(NSW) *Water Act 1912*.
(NSW) *Water Management Act 2000*.

Section 51(xxxi) is concerned with compulsory acquisition, and not acquisition by agreement: *John Cooke & Co Pty Ltd v Commonwealth* (1924) 34 CLR 269 at 282. The acquisition need not be by the Commonwealth, so that acquisition by a State under a Commonwealth law will invoke the requirements of s 51(xxxi): *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 CB (*Magennis*).

Further, what must be acquired is "property", not a benefit of a non-proprietary kind: *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 at 165–166 and 198; 108 ALR 577; 66 ALJR 695; BC9202654 CB; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 499 and 528; 112 ALR 53; [1993] HCA 10; BC9303610 CB; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145, 247–248, 282–283; 46 ALR 625; [1983] HCA

21; BC8300075; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; BC200911041 at [81]–[83] (French CJ, Gummow and Crennan JJ) and [132] and [147] (Hayne, Kiefel and Bell JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309; 252 ALR 232; [2009] HCA 2; BC200900208 at [90] (French CJ); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 172; 119 ALR 577; [1994] HCA 9; BC9404619 (Mason CJ), 185 (Deane and Gaudron JJ), 195 (Dawson and Toohey JJ).

The conferral on a lessee of the right to demand an interest in land against the lessor of that land is an acquisition of property within s 51(xxxi): *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 404, 407–8, 423 and 452; 26 ALR 185. Acquisition of property will result where an advantage or benefit (corresponding to that which is lost by the property holder) is conferred on any other person or entity. So, in *Smith v ANL Ltd* (2000) 204 CLR 493; 176 ALR 449, a majority of the High Court held that there was an acquisition of property where Commonwealth legislation had the effect of extinguishing a seafarer's common law cause of action (in negligence) against the owner of the ship on which he had suffered his injury — regardless of whether the owner was the Commonwealth or a private entity.

An obligation, imposed on the manufacturers of blank sound tapes, to pay a levy to the owners of copyright in recorded music, would be regarded as an acquisition of property from the manufacturers within s 51(xxxi), if that obligation were not characterised as a tax: *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 511; 112 ALR 53 at 67 per Mason CJ, Brennan, Deane and Gaudron JJ.

Section 81 of the Trade Practices Act 1974 (Cth), which authorises the Federal Court to order a person who has acquired shares in or assets of a corporation in contravention of s 50 of the Act to dispose of all or any of the shares or assets so acquired or to declare that the acquisition is void, does not involve an acquisition of property within s 51(xxxi). Section 81 takes its character from the object which it serves, namely enforcing compliance with the law: *Trade Practices Commission v Gillette Co (No 1)* (1993) 45 FCR 366; 118 ALR 280 at 275; ATPR 41–267. See also *WSGAL Pty Ltd v Trade Practices Commission* (1994) 51 FCR 115 ; 122 ALR 673; ATPR 41–314 (Full Federal Court).

An acquisition will involve more than a series of restrictions on the use of property, as in the restrictions imposed on the Tasmanian Government by the World Heritage Properties Conservation Act 1983 (Cth) and its associated legislation. Such restrictions did not give to "the Commonwealth nor anyone else … a proprietary interest of any kind in the property" nor was there "a vesting of possession in the Commonwealth": *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145, 181, 247–8; 46 ALR 625.

However, a contraction in what otherwise would be the measure of liability in respect of a cause of action or other right may constitute an "acquisition" for the purposes of s 51(xxxi): *Attorney-General (NT) v Chaffey* (2007) 237 ALR 373; [2007] HCA 34; BC200706043 at [21]; *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; 152 ALR 1; [1998] HCA 8; BC9800074 at [15], [56], [81]–[83] and [128]; *Smith v ANL Ltd* (2000) 204 CLR 493; 176 ALR 449; [2000] HCA 58; BC200006928 at [7], [20] [23], [89]–[91].

Section 51 (xxxi) cannot be invoked so as to prevent a government department using, in the course of its administration, confidential information supplied to the department: *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* (1991) 28 FCR 291; 99 ALR 679. "If there is property in confidential information, it remained in the applicant whose proprietary interest was not, even in a broad sense, acquired by the Commonwealth": *Smith Kline*, above, FCR at 306; ALR at 694.

In *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *119 ALR 675*, the High Court held that legislation reducing retrospectively the amount of benefits payable to a medical practitioner under the Health Insurance Act 1973 (Cth) did not amount to an acquisition of property within *s 51(xxxi)* of the Constitution. Mason CJ, Deane and Gaudron JJ accepted that the practitioner's right to payment was a form of property for the purpose of *s 51(xxxi)*, but held that the amending Act was not an acquisition but a genuine legislative adjustment of competing claims, a variation of statutory rights "which, as a general rule, are inherently susceptible of variation". Brennan J held that the practitioner's claim to payment of benefits was not property but a claim whose content remained, until payment, within the unfettered control of the Parliament. In separate judgments, Dawson, Toohey and McHugh JJ held that the practitioner's claim was a form of property (a chose in action) but that the reduction in value of that claim did not amount to an acquisition of property by the Commonwealth. McHugh J said that the right created by the Health Insurance Act 1973 was one that could be legislatively altered or abolished without infringement of *s 51(xxxi)*.

In *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 162–3; *119 ALR 108* at *118–19*, the Full Federal Court held that a reduction in the quantity of prawns which all licence-holders were entitled to catch, by an amendment to a Plan of Management issued pursuant to s 20 of the Fisheries Act 1952 (Cth), was not an acquisition of property within *s 51(xxxi)* of the Constitution: no proprietary benefit was conferred on the Commonwealth or on a third party, so there was no "acquisition" and any rights originally conferred on the licence-holders were a statutory creation that was always subject to alteration. "The making of such amendments is not a dealing with the property; it is the exercise of powers inherent at the time of its creation and integral to the property itself": FCR at 165; ALR at 121. See also *Bienke v Minister for Primary Industries* (1996) 63 FCR 567; *135 ALR 128*, where the Full Federal Court held that the compulsory surrender of units of fishing capacity effected by a legislative scheme was not an acquisition of property within *s 51(xxxi)* because no proprietary benefit accrued to the Commonwealth or any third party by reason of the compulsory restructuring plan.

In *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175; *119 ALR 89*, the Full Federal Court held that the Protection of Movable Cultural Heritage Act 1986 (Cth) did not effect an acquisition of property within *s 51(xxxi)*. The Act provided that a protected object was forfeited if its removal from Australia was attempted without a permit; and gave the minister a discretion to grant or refuse a permit. Although refusal of a permit might place the owner of an object at a commercial disadvantage, it did not follow that there was an acquisition by the Commonwealth of an interest in the object; nor did the legislation effect an indirect acquisition of an element of the proprietary interest of the owner of the object: FCR at 183, 184; ALR at 96–7, 97–8 per Black CJ and Gummow J.

In *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297; *119 ALR 629*, a majority of the High Court (Mason CJ, Brennan, Deane and Gaudron JJ; Dawson, Toohey and McHugh JJ dissenting) held that s 44 of the Commonwealth Employees' Rehabilitation and Compensation Act 1988 purported to effect an acquisition of property without providing just terms and was therefore invalid. Section 44 provided that no action for damages lay against the Commonwealth in respect of an injury suffered by a Commonwealth employee in the course of his or her employment — being an injury for which the Commonwealth would otherwise have been liable. The majority decided that, in its application to a cause of action that was not statute-barred, s 44 extinguished a valid cause of action against the Commonwealth and thereby acquired the property represented by that cause of action. Mason CJ, Deane and Gaudron JJ said that the term "acquisition" in *s 51(xxxi)* extended to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct financial benefit or financial gain to the potential defendant and the cause of action has arisen under the general law: CLR at 305; ALR at 634.

In *Commonwealth v Mewett* (1997) 191 CLR 471; *146 ALR 299*; *BC9703255*, the High Court held

that s 51(xxxi) of the Constitution operated to protect a cause of action in negligence against the Commonwealth, barred by the applicable state statute of limitation, against extinguishment by s 44 of the Commonwealth Employees' Rehabilitation and Compensation Act 1988.

In *Smith v ANL Ltd* (2000) 204 CLR 493; 176 ALR 449 CB, a majority of the High Court held that s 54 of the Seafarers Rehabilitation and Compensation Act 1992, the effect of which (in combination with a transitional provision) was to terminate a person's common law cause of action six months after the Act commenced operation, effected an acquisition of the property represented by the cause of action. Dealing with the submission that s 54 simply adjusted the limitation period for the cause of action, Gleeson CJ said that the effect of the legislation was to modify the appellant's pre-existing common law right and confer a corresponding benefit on the respondent; and "modification of a right to bring an action in circumstances where a corresponding advantage accrued to the party against whom action may be brought, would ordinarily involve an acquisition of property": at [7]. Gaudron and Gummow JJ saw the legislation as acquiring the appellant's common law cause of action and replacing it with a right to bring an action within six months; s 54 operated to bring about an acquisition of property and the substitute action did not provide just terms: at [45].

In *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; 152 ALR 1; BC9800990; [1998] HCA 24 CB, a majority of the High Court held that a Commonwealth law reducing the area in respect of which the respondent was entitled to explore for petroleum (the reduction having been agreed between Australia and Indonesia as part of the settlement of a dispute between the two countries in relation to sovereignty over the Timor Gap) did not effect an "acquisition" of the respondent's property within s 51(xxxi) of the Constitution. Brennan CJ and Gaudron J said that the modification or extinguishment of the permit holder's rights conferred no correlative benefit on the Commonwealth or any other person. McHugh J held that, because the rights under the permit were purely statutory and had no basis in the general law, those rights could be extinguished without effecting an acquisition of property, even if the extinguishment conferred a benefit on the Commonwealth. Gummow J said that, from the time when the permit was granted, the rights attached to the permit were defined by the Act as it stood from time to time; and it followed that any proprietary rights arising under the permit were liable to defeasance without any acquisition of property.

In *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210; 243 ALR 1; [2008] HCA 7; BC200801217 , at [51]–[54] CB, the High Court held that the access regime that required Telstra to provide its competitors with access to its national copper wire telecommunications network did not involve an acquisition of property. At the time that Telstra's predecessor acquired that infrastructure, that predecessor was wholly owned by the Commonwealth. The vesting of the infrastructure took place within a regulatory regime established by the Telecommunications Act 1997 which gave other carriers the right to interconnect their facilities to the infrastructure. Accordingly, Telstra's rights were always subject to a statutory access regime which permitted other carriers to use the assets in question. Accordingly, the provisions of the Trade Practices Act 1974 (ss 152AL(3) and 152AR) that provided access rights did not impair the bundle of rights owned by Telstra in such a way as to amount to an acquisition of property within the meaning of s 51(xxxi).

In *Wurridjal v Commonwealth* (2009) 237 CLR 309; 252 ALR 232; [2009] HCA 2; BC200900208 CB, the plaintiffs alleged that a five-year lease on the Maningrida land granted to the Commonwealth by s 31 of the Northern Territory National Emergency Response Act 2007 (Cth) (the NER Act) constituted an acquisition of property and that the acquisition was required to be but was not on just terms within the meaning of s 51(xxxi) of the Constitution. By s 35 of the NER Act, the Commonwealth was given exclusive possession of the land during the terms of the lease, subject to certain exceptions, and s 34 specifically provided that any interests in the land that existed prior to the commencement of the lease were preserved until the expiry of the lease. Section 60(2) of the NER Act relevantly provided that if an act under a lease granted pursuant to s 31 would result in an

acquisition of property other than on just terms to which s 51(xxxi) of the Constitution applies, the Commonwealth was liable to pay "a reasonable amount of compensation". Absent agreement, the person claiming compensation was empowered to institute proceedings to recover it in a court of competent jurisdiction, By majority, the High Court held that the NER Act did acquire the Plaintiffs' property, but that s 60(2) also provided compensation constituting just terms: at [104] (French CJ), [199]–[202] (Gummow and Hayne JJ), [324]–[331] (Heydon J), [463]–[469] (Kiefel J).

In *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; BC200911041 CB, the High Court held that the replacement of the plaintiffs' bore licences under the Water Act 1912 (NSW) with aquifer access licences under the Water Management Act 2000 (NSW), which entitled them to extract less water than had been the case under the bore licences, did not involve an acquisition of property. That followed because, at least since 1966, under NSW law the right to the use, flow and control of groundwater was vested in the State: at [72]–[73], [84], [108], [144]. Accordingly, the State obtained no benefit or advantage relating to the ownership or use of property from the reduction in the plaintiffs' entitlement to groundwater: at [81], [84], [149]–[154]. There was therefore no "acquisition", as distinct from "taking", of property: at [82], [147]–[150].

In *JT International SA v The Commonwealth* (2012) 291 ALR 669; 86 ALJR 1297; [2012] HCA 43; BC201207608 CB, a majority of the High Court held that the Commonwealth did not acquire property pursuant to the Tobacco Plain Packaging Act. Although there was some impairment of the plaintiffs' statutory intellectual property rights, such as amounted to a "taking" of their property, the legislation did not give the Commonwealth a legal interest in the packaging, or create a relationship of a proprietary nature between the Commonwealth and the packaging: at [44] per French CJ; at [141]–[154] per Gummow J; at [187]–[188] per Hayne and Bell JJ; at [283]–[295] per Crennan J.

[1505.551] Obligation to pay money

L Legislation cited in this paragraph

(CTH) Commonwealth of the Australia Constitution Act s 51(xxxi).

"In a case where an obligation to make a payment is imposed as genuine taxation, as a penalty for proscribed conduct, as compensation for a wrong done or damages for an injury inflicted, or as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any question of an "acquisition of property" within s 51(xxxi) of the Constitution … On the other hand, the mere fact that what is imposed is an obligation to make a payment or to hand over property will not suffice to avoid s 51(xxxi)'s guarantee of 'just terms' if the direct expropriation of the money or other property itself would have been within the terms of the subsection. Were it otherwise, the guarantee of the section would be reduced to a hollow facade": *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 510; 112 ALR 53 at 66 per Mason CJ, Brennan, Deane and Gaudron JJ.

[1505.555] Just terms

L Legislation cited in this paragraph

(CTH) Commonwealth of the Australia Constitution Act s 51(xxxi).

Although "the terms of acquisition are, within reason, matters for legislative judgment and discretion": *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 291; [1944] ALR 89 CB; nevertheless s 51(xxxi) "requires the terms actually to be just and not merely to be terms which the Parliament may consider to be just": *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 397.

It has been said that the requirement of "just terms" demands a balance between the interests of the individual and those of the community: "Unlike 'compensation', which connotes full money equivalence, 'just terms' are concerned with fairness": *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 569. However, in *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297 at 310–11; *119 ALR 629* at *638*; *BC9404637*, Brennan J said:

> In determining the issue of just terms, the court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.

Similarly, in *Smith v ANL Ltd* (2000) 204 CLR 493; *176 ALR 449*; *BC200006928*; *[2000] HCA 58* at *[9]*, Gleeson CJ said:

> The guarantee contained in *s 51(xxxi)* is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by *s 51(xxxi)* it must pay for them, or in some other way provide just terms of acquisition.

The general requirement is that the terms on which property is acquired should reflect the property's market value, "the price which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of the acquisition": *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 507, 546. However, the property's particular value to its former owner must be taken into account: *Johnston Fear & Kingham v Commonwealth* (1943) 67 CLR 314 at 323; [1943] ALR 278; *Minister for the Navy v Rae* (1945) 70 CLR 339 at 344–7; 51 ArgLR 177; *Minister of State for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 at 491–2, 515; 46 SR (NSW) 7. The amount paid must be fair and reasonable in all the circumstances: *Andrews v Howell* (1941) 65 CLR 255 at 264, 269, 282, 288; [1941] ALR 185; (1941) 15 ALJR 127; *BC4100023*; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 280–281, 295; [1946] ALR 209; (1946) 20 ALJR 78; *BC4600032*; *McClintock v Commonwealth* (1947) 75 CLR 1 at 24; [1947] ALR 530; (1947) 21 ALJR 326; *BC4700290*; *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 216, 228, 300; [1948] 2 ALR 89; (1948) 22 ALJR 191; *BC4800090*; *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 569; [1948] 1 ALR 145; *BC4800070*; *Wurridjal v Commonwealth* (2009) 237 CLR 309; *252 ALR 232*; *[2009] HCA 2*; *BC200900208* at *[190]*.

A statutory provision that provides for the payment of "reasonable compensation" as determined by a court amounts to provision of just terms: *Wurridjal v Commonwealth* (2009) 237 CLR 309; *252 ALR 232*; *[2009] HCA 2*; *BC200900208* at *[104]* (French CJ), [196]–[197] and [199] (Gummow and Hayne JJ), [304] (Kirby J, although his Honour held that in some context such a provision may be insufficient to give "just terms" were monetary compensation is not adequate), [324] (Heydon J), [463] (Kiefel J). See also *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210; *243 ALR 1*; *[2008] HCA 7*; *BC200801217* at *[41]–[42]*; *Western Mining Corporation Ltd v Commonwealth* (1994) 50 FCR 305 at 343; *121 ALR 661*; *BC9406844*; *Commonwealth v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 190, 200; *136 ALR 353*; *BC9601162*; *Minister for Primary Industry & Energy v Davey* (1993) 47 FCR 151 at 167; *119 ALR 108*; *BC9305118*.

In *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; *[2009] HCA 51*;

BC200911041 at [87]–[88] , [156] CB, the Court found it unnecessary to consider whether there is an implied constitutional right to payment of just terms were s 51(xxxi) is contravened.

[1505.560] Adjudication of just terms

While the terms of an acquisition may be determined administratively, it is inconsistent with the requirement for "just terms" that such an administrative determination be conclusive: *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 99 and 109. Vesting exclusive jurisdiction to determine the terms of acquisition in a specially-constituted Federal Court of Claims is an invalid attempt to oust the original jurisdiction of the High Court to hear and determine suits to which the Commonwealth is a party: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 276, 323 and 368.

SECTION 51(xxxv) — CONCILIATION AND ARBITRATION FOR THE PREVENTION AND SETTLEMENT OF INDUSTRIAL DISPUTES EXTENDING BEYOND THE LIMITS OF ANY ONE STATE

[1505.565] Conciliation and arbitration

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* Section 51(xxxv).

Section 51(xxxv) does not give the Parliament a general power to legislate on the topic of industrial relations. Laws made under this provision "cannot be laws simply for the prevention and settlement of … industrial disputes; they must be laws for the prevention and settlement thereof by means of conciliation and arbitration": *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 401. The Parliament must allow the conciliator or arbitrator substantial autonomy: "It must be given a discretion as to means having regard to the end, the prevention and settlement of industrial disputes by conciliation and arbitration. If the Act commanded that the Commission fix wages by reference to a basic wage it would, I consider, be invalid": *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 269.

Conciliation is "the coming together of … parties for the discussion of questions with a view to amicable settlement", and arbitration is "a means of settling a dispute by reference to a third party … when the contendents have failed to agree": *Australian Railways Union v Victorian Railways Cmr* (1930) 44 CLR 319 at 358 and 355. Arbitration may be "constituted not by the choice of the parties, but by public authority": *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 44.

[1505.570] No common rule

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxv).

Employees and employers who are not parties to an industrial dispute cannot be bound by the arbitrated award which settles that dispute. Accordingly, s 41(1) of the Commonwealth Conciliation and Arbitration Act 1904–1949 (Cth), which authorised the Arbitration Court to declare any term of an award to be a "common rule of any industry" in which the dispute arose, was invalid because the binding of persons not parties to the settled dispute was "foreign to arbitration": *R v Kelley; Ex parte Victoria* (1950) 81 CLR 64 at 82. However, s 51(xxxv) may support legislation to prevent "industrial disputes which fall short of being threatened, impending or probable disputes", and may authorise conciliation and arbitration to prevent industrial disputes, independent of the identification of any

dispute, "whether paper or real": *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 320 and 328; *84 ALR 80*.

[1505.575] Disputes

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxv), s 51(xxxv).

The power in *s 51(xxxv)* requires a disagreement between parties in an industrial relationship, rather than a mere disruption of that relationship (through strikes or lock-outs, for example). "[A] disagreement may cause a strike, a lock-out, and disturbance and dislocation of industry; but these are the consequences of the industrial dispute, and not the industrial dispute itself, which lies in the disagreement": *Caledonia Collieries Ltd v Australasian Coal and Shale Employees' Federation (No 1)* (1930) 42 CLR 527 at 552. Such disputes may be created by one party delivering a log of claims to the other party: "[T]he foundation of the system of creating … disputes by logs of demand is the doctrine that the essential quality of an industrial dispute is not the suspension of industrial relations but disagreement, difference of dissidence": *Metal Trades Employers Assn v Amalgamated Engineering Union* (1935) 54 CLR 387 at 429.

To support the legislative power in *s 51(xxv)*, the dispute must be genuine, arising out of a genuine claim which has been resisted, and not merely a device to invoke the Commonwealth power. Initially, the genuineness of the dispute must be determined by the arbitrator, but "it remains a question of fact for this court to determine on an application for relief by way of prerogative writ … Although it is for the court to decide the question for itself, it will give considerable weight to a decision of the Commission so far as the decision turns on the facts, the degree of weight depending on the circumstances": *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183–4; *60 ALR 641*.

For a wider view of the scope of *s 51(xxxv)*, sufficient to support legislation which would preserve interstate industrial peace rather than merely restore it where it has broken down, see *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 320–1, 327–8; *84 ALR 80*. See also *Victoria v Commonwealth* (1996) 187 CLR 416; *138 ALR 129* CB.

[1505.580] The ambit of a dispute

The award made by an arbitrator in settlement of a dispute cannot go outside the ambit of the matters in dispute between the parties, an ambit which will usually be settled by the terms of a trade union's log of claims and the employers' response. "If the provisions are outside [the] ambit or scope [of the log of claims] they cannot be characterised as a settlement of the dispute": *R v Holmes; Ex parte Victorian Employers Federation* (1980) 145 CLR 68 at 76; *31 ALR 487*.

However, the arbitrator may be justified, in travelling beyond the apparent ambit of dispute, by the consideration "that an appropriate and enduring solution of the dispute calls for an award in terms different from those contained in the log of claims": *R v Gaudron; Ex parte Uniroyal* (1978) 141 CLR 204 at 211; *18 ALR 395*. An additional award provision, not claimed by the disputants, may be made where that provision is "reasonably necessary or proper for the effective determination of the dispute between the parties and to secure the maintenance of the award provisions": *R v Spicer; Ex parte Seamen's Union of Australia* (1957) 96 CLR 341 at 351.

[1505.585] Extending beyond one state

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxv).

To invoke the power outlined in s 51(xxxv), a dispute must "(1) be industrial, and (2) exist in one state and (3) extend beyond the limits of one state": *R v Foster: Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 302. Accordingly, a dispute extending from one state into a territory will satisfy this requirement: *Lamshed v Lake* (1958) 99 CLR 132 at 143. The reference to "extending" is read as a reference to a current status rather than to a process. "The industrial disputes referred to in the Constitution … are industrial disputes which at the moment do in fact extend beyond the limits of any one state, that is, which cover Australian territory that is not confined to the limits of any one state": *R v Commonwealth Court of Conciliation and Arbitration* (1914) 18 CLR 224 at 243 *(Builders Labourers Case)*.

It is the dispute, and not merely the industry, which must extend beyond one state. Even though employees in one state have struck in support of employees in the same industry in another state, there will not be the necessary industrial dispute extending beyond one state unless each group of employees is in dispute with its employers: *Caledonia Collieries Ltd v Australasian Coal and Shale Employees' Federation (No 1)* (1930) 42 CLR 527 at 555. The subject matter of the dispute between employees and employers must be identical. There must be "a common cause" or "a community of interest between all the employees in [more than one state] for the same cause": *R v Commonwealth Court of Conciliation and Arbitration (Builders Labourers Case)* (1914) 18 CLR 224 at 255 and 265. There will not be an industrial dispute extending beyond one state where there are only "separate and unconnected industrial questions necessarily depending on local considerations": *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Australian Workers' Union* (1957) 99 CLR 505 at 511. The "common cause" will usually be established by the adoption of a log of claims on behalf of employees in different states and the refusal of that log of claims by the employers in those states. See, for example, *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178; 60 ALR 641 CB, where a log of claims served in several states and territories formed the basis for the necessary industrial dispute, notwithstanding that the union's immediate purpose had been to attract federal jurisdiction in relation to a Queensland dispute.

The necessary "community of interest: or unifying factor that will turn a series of disputes in different States into a dispute extending beyond one State will often be found in the existence of an identifiable industry. In *Re Australasian Meat Industry Employees' Union; Ex parte Aberdeen Beef Co Pty Ltd* (1993) 176 CLR 154 CB, the High Court found that there was an industrial dispute extending beyond one State arising out of a log of claims made by a union of employees on 30 employers involved in the processing of meat — six in Queensland, one in South Australia and the balance in New South Wales. In a joint judgment, six members of the court (Mason CJ, Brennan, Deane Dawson, Toohey and Gaudron JJ) said at 160, it was not significant that the activities carried on in the respective States did not coincide: the parties were engaged in a single industry and that gave them a sufficient "community of interest".

The community of interest may be found in some other factor. In *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431 CB, a majority of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting) held that there was an industrial dispute within s 51(xxxv) between several unions of employees and several state governments and their agencies. Even if the several states were not engaged in a common industry, the nexus which combines several demands into a single industrial dispute "may also be found in the calling or vocation in which the participants are engaged": above at 31.

[1505.590] Industrial relationship

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxv).

A dispute between employers in the airline industry about the wages each should pay to its employees is not an "industrial dispute" because there is "no industrial relation between them": *R v Portus; Ex parte Australian Air Pilots' Assn* (1953) 90 CLR 320 at 327. A demarcation dispute between unions over the recruitment of new members, irrespective of their place of employment, will fall outside the *s 51(xxxv)* power; but a demand, made on an employer and a union by another union, that the employer should only employ members of the latter union and that the former union should not seek to recruit new members from amongst employees of the employer, was capable of generating an industrial dispute: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Australian Paper Mills Employees' Union* (1943) 67 CLR 619 CB. See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Transport Workers' Union of Australia* (1969) 119 CLR 529 at 539.

An industrial dispute may exist between a trade union and employers in the same industry who employ no members of the trade union, where the dispute concerns the conditions on which union members should be employed: *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees Assn* (1925) 35 CLR 528 CB. "[A]bsolute definiteness of the individuals engaged in the dispute cannot be essential, for in industrial disputes claims and demands are usually made for the benefit of 'the ever changing body of workmen that constitute the trade' … The nexus is to be found in the industry or in the calling or vocation in which the participators are engaged: 35 CLR 528 at 548. See also *Metal Trades Employers Assn v Amalgamated Engineering Union* (1935) 54 CLR 387 at 417. Conversely, a demand by employers on a union in the same industry, that the union should be bound as to the conditions of employment of non-union labour in that industry, cannot give rise to an industrial dispute within *s 51(xxxv)*; the respondent union lacked the relationship with the third party, non-unionists, possessed by the respondent employers in the Metal Trades case:*R v Graziers' Assn of New South Wales; Ex parte Australian Workers' Union* (1956) 96 CLR 317 CB.

[1505.595] Industry

The restrictive view, that an industrial dispute could only arise in an industry which involved "the production or distribution of wealth [through] co-operation of capital and labour" (*Federated School Teachers Assn of Australia v Victoria* (1928) 41 CLR 569 at 575), was unequivocally rejected in *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297; *47 ALR 225* CB. The words "industrial disputes" must "be given their popular meaning — what they convey to the man in the street", so that they include "disputes between employees and employers about the terms of employment and the conditions of work": 153 CLR 297 at 312. Consequently, an "industrial dispute" may arise between a trade union of social workers and employers, involved in delivering welfare services to unemployed people (*R v Coldham; Ex parte Australian Social Welfare Union*, *above*), and between state school teachers and state governments: *Re Lee; Ex parte Harper* (1986) 160 CLR 430; *65 ALR 577* CB.

[1505.600] Industrial issue

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxv).

The conventional and narrow view was that the subject matter of an industrial dispute was limited to matters relating "to the employer-employee relationship so that the subject-matter of demands by either party which are, for example, of a political or social or managerial nature will not be industrial matters": *R v Portus; Ex parte ANZ Banking Group* (1972) 127 CLR 353 at 373. Accordingly, a claim, made by public transport employees on their employers, that the employers should not require an employee to operate alone a tram or bus on a route formerly serviced by two-person crews, related to "managerial prerogatives" and could not create an industrial dispute (*R v Commonwealth*

Conciliation Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board (1966) 115 CLR 443 CB), and a claim by a union of employees, that employers deduct union membership fees from their employees' wages and pay those fees to the union, related to an aspect of the relationship between employees (a "workers' matter") and could not create an industrial dispute: *R v Portus; Ex parte ANZ Banking Group* (1972) 127 CLR 353 CB.

This restrictive view has now been unequivocally rejected. In *Re Cram; Ex parte New South Wales Colliery Proprietors Assn Ltd* (1987) 163 CLR 117; *72 ALR 161* CB, the High Court held that a dispute about the recruitment of labour at a coal mine was an "industrial dispute" within *s 51(xxxv)*: "[M]anagement and labour have a mutual interest in many aspects of the operation of a business enterprise. Many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an 'industrial matter'": 163 CLR 117 at 135. Disputes over "manning" levels related to the volume and type of work to be performed by employees, and disputes over the recruitment of a competent and reliable workforce directly affected the conditions of work of employees in the areas of occupational health and safety: "Employees, as well as management, have a legitimate interest in both these matters": 163 CLR 117 at 135.

[1505.605] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxv).

The state governments, as employers, have no constitutional immunity from the industrial conciliation and arbitration system established by the Commonwealth Conciliation and Arbitration Act 1904 (Cth): *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 CB. However, the Commonwealth Parliament cannot legislate under *s 51(xxxv)* so as to place "special burdens or disabilities" on the states, by denying to it certain procedural advantages made available to other employers involved in arbitral proceedings: *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *61 ALR 1* CB. Such discrimination against a state or states conflicts with "the constitutional concept of the Commonwealth and the states as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organised state governments": 159 CLR 192 at 218. It has been suggested that "implications which are necessarily drawn from the federal structure of the Constitution itself" might prevent the Commonwealth Parliament subjecting the state governments to the control of the federal industrial arbitration system in relation to their employment of central departmental employees: *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 313; *47 ALR 225*. On the other hand it has been suggested that, in the absence of discrimination against a state, the Commonwealth's exercise of the *s 51(xxxv)* power "will not transgress the implied limitations on Commonwealth legislative power": *Re Lee; Ex parte Harper* (1986) 160 CLR 430; *65 ALR 577* CB. The apparent conflict between those suggestions was resolved in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431 CB. A majority of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting) held, at26 and 27, that the Commonwealth's legislative power over industrial arbitration and conciliation, *s 51(xxxv)*, was subject to an implied limitation with two elements: first, a prohibition against discrimination which involved placing special burdens or disabilities on the States; and, secondly, a prohibition against laws of general application which operated to destroy or curtail the continued existence of the States or their capacity to function as governments: above at 25. Otherwise, the States as employers had no immunity from laws passed under *s 51(xxxv)*: above at 14. The court held that the Commonwealth could authorise the Australian Industrial Relations Commission to settle a dispute between the States and their employees, other than those engaged "at the higher levels of government"; above at 27; over the minimum conditions of their employment. But the Commission

could not be authorised to determine, in settlement of such a dispute, the number of State government employees nor a State's redundancy processes. The conditions of employment at "higher levels" of government (departmental heads and ministerial staff, for example) and the determination of who should be employed or made redundant at all levels of employment were "critical to a State's capacity to function as a government", the majority justices said: above at 26, 27.

See also *Victoria v Commonwealth* (1996) 187 CLR 416; *138 ALR 129*, where the High Court held that provisions in the Industrial Relations Act 1988 (Cth) imposing obligations on employers with respect to equal pay, termination of employment and parental leave could validly apply to the States as employers, except with respect to the employment at the higher levels of government.

[1505.606] Contempt of the Industrial Relations Commission

The Parliament cannot make it an offence to publish matter calculated to bring the Australian Industrial Relations Commission into disrepute, regardless of the truth or otherwise of the matter published, because such a prohibition restricts the constitutional freedom to discuss matters relating to the government of the Commonwealth: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *108 ALR 681* per Brennan, Deane, Toohey and Gaudron JJ; or because the prohibition is not reasonably proportionate to protecting the reputation and authority of the Commission: *Nationwide News Pty Ltd v Wills*, *above* per Mason CJ, Dawson and McHugh JJ.

SECTION 51(xxxvi) — MATTERS IN RESPECT OF WHICH THIS CONSTITUTION MAKES PROVISION UNTIL THE PARLIAMENT OTHERWISE PROVIDES

[1505.610] Associated provisions

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* 10, 22, 24, 29, ss 3, 30, 31, 34, 39, 46, 47, 48, 65, 66, 67, 7, 73, 96, 97.

The sections of the Constitution which "make provision until the Parliament otherwise provides" include *ss 3*, *7*, *10*, *22*, *24*, *29*, *30*, *31*, *34*, *39*, *46*, *47*, *48*, *65*, *66*, *67*, *73*, *96* and *97*.

[1505.615] Effect of s 51(xxxvi)

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxvi), s 96.

"In all such cases [apart from *s 96*] the Constitution makes directly an interim provision for the subject-matter and *s 51(xxxvi)* operates to confer power on the Parliament to make thereafter such provisions with respect thereto as from time to time may appear appropriate": *Victoria v Commonwealth* (1957) 99 CLR 575 at 604 (the *Second Uniform Tax* case).

SECTION 51(xxxvii) — MATTERS REFERRED TO THE PARLIAMENT OF THE COMMONWEALTH BY THE PARLIAMENT OR PARLIAMENTS OF ANY STATE OR STATES, BUT SO THAT THE LAW SHALL EXTEND ONLY TO STATES BY WHOSE PARLIAMENTS THE MATTER IS REFERRED, OR WHICH AFTERWARDS ADOPT THE LAW

[1505.625] Form of reference

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxvii).

(VIC) *Terrorism (Commonwealth Powers) Act 2003*.

The use of the term "matters" permits a reference of power to be expressed in broad and general terms. It is "an entirely erroneous inference without foundation" to limit the power which may be referred under *s 51(xxxvii)* to the power to enact a law in the form of a described and defined statute. "It seems absurd to suppose that the only matter that could be referred was the conversion of a specific bill into a law": *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 at 224–5.

Modern references commonly take the form of a reference to a specific statutory text, together with a separate subject-matter reference that allows some amendment of that statutory text: see, eg, Terrorism (Commonwealth Powers) Act 2003 (Vic), discussed in *Thomas v Mowbray* (2007) 233 CLR 307; *237 ALR 194*; *[2007] HCA 33*; *BC200706044* at *[446]–[457]* CB. See also Corporations (Commonwealth Powers) Act 2001 (Vic).

Provisions in Commonwealth legislation that purport to prevent the Commonwealth from amending a referred text without the consent of the states are very likely invalid: see *Thomas v Mowbray*, above, at [212], [456]; compare at [607].

[1505.630] Reference may be terminable

"There is no reason to suppose that the words 'matters referred' cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the state Governor-in-Council and consists in the fixing of a date by proclamation": *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 at 226; *Airlines of New South Wales Pty Ltd v New South Wales (No 1)* (1964) 113 CLR 1 at 38 and 52.

[1505.635] Repeal of reference

A state parliament may, it seems, repeal a reference of power: "We do not … express any final opinion upon it … [but] it is the general conception of English law that what Parliament may enact it may repeal": *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 at 226; *Graham v Paterson* (1950) 81 CLR 1 at 18 and 25.

[1505.640] Not an exclusive power

L Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 109.

A reference of power by a state parliament to the Commonwealth Parliament does not divest the state parliament of legislative power over the subject matter: *Graham v Paterson* (1950) 81 CLR 1 CB. However, legislation passed by the Commonwealth Parliament may displace state legislation by virtue of *s 109* of the Constitution: *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 CB.

SECTION 51(xxxviii) — THE EXERCISE WITHIN THE COMMONWEALTH, AT THE REQUEST OR WITH THE CONCURRENCE OF THE PARLIAMENTS OF ALL THE STATES DIRECTLY CONCERNED, OF ANY POWER WHICH CAN AT THE ESTABLISHMENT OF THIS CONSTITUTION BE EXERCISED ONLY BY THE PARLIAMENT OF THE UNITED KINGDOM OR BY THE FEDERAL COUNCIL OF AUSTRALASIA

[1505.645] Current state requests

L Legislation cited in this paragraph

(NSW) *Constitutional Powers (Coastal Waters) Act 1979*.
(NSW) *Australia Acts (Request) Act 1985*.
(CTH) *Coastal Waters (State Powers) Act 1980*.
(QLD) *Australia Acts (Request) Act 1985*.
(SA) *Constitutional Powers (Coastal Waters) Act 1979*.
(TAS) *Australia Acts (Request) Act 1985*.
(TAS) *Constitutional Powers (Coastal Waters) Act 1979*.
(VIC) *Constitutional Powers (Coastal Waters) Act 1980*.
(VIC) *Australia Acts (Request) Act 1985*.
(WA) *Constitutional Powers (Coastal Waters) Act 1979*.
(WA) *Australia Acts (Request) Act 1985*.

The following state Acts have been passed to request the exercise of powers by the Commonwealth Parliament:

> New South Wales: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985;
>
> Queensland: Coastal Waters (State Powers) Act 1980; Australia Acts (Request) Act 1985;
>
> South Australia: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985;
>
> Tasmania: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985;
>
> Victoria: Constitutional Powers (Coastal Waters) Act 1980; Australia Acts (Request) Act 1985;
>
> Western Australia: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985.

[1505.650] A broad interpretation

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxviii).

"[T]he primary subject to which *s 51(xxxviii)* was addressed was the perceived need to ensure that legislative powers necessary for the purposes of the new nation could be exercised locally notwithstanding that, prior to federation, they were beyond the competence of local legislatures". Accordingly, *s 51(xxxviii)* should be given a broad interpretation reflecting its "national purpose of a fundamental kind", which is that of "plugging gaps which might otherwise exist in the overall plenitude of the legislative powers exercisable by the Commonwealth and state parliaments under the Constitution": *Port MacDonnell Professional Fishermens Assn Inc v South Australia* (1989) 168 CLR 340 at 378 and 379; *88 ALR 12*.

[1505.655] Not territorially limited

The words "within the Commonwealth" refer to the location of the exercise of the designated legislative power and not to the area of operation of the laws made in the exercise of that power; so that the Parliament may, at the request of the states directly concerned, legislate extra-territorially: *Port MacDonnell Professional Fishermens Assn Inc v South Australia* (1989) 168 CLR 340 at 376–8; *88 ALR 12*.

[1505.660] Power to alter state constitutions

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 106, s 51(xxxviii).
(CTH) *Coastal Waters (State Powers) Act 1980* s 5(c).

"[T]he continuance of the Constitution of a state pursuant to *s 106* is subject to any Commonwealth law enacted pursuant to the grant of legislative power in *s 51(xxxviii)* ": *Port MacDonnell Professional Fishermens Assn Inc v South Australia* (1989) 168 CLR 340 at 381; *88 ALR 12*. Accordingly, s 5(c) of the Coastal Waters (State Powers) Act 1980 (Cth), providing that the legislative powers of the states extend to the making of certain laws outside the coastal waters of the state, is a valid exercise of the power conferred by *s 51(xxxviii)*.

SECTION 51(xxxix) — MATTERS INCIDENTAL TO THE EXECUTION OF ANY POWER VESTED BY THIS CONSTITUTION IN THE PARLIAMENT OR IN EITHER HOUSE THEREOF, OR IN THE GOVERNMENT OF THE COMMONWEALTH, OR IN THE FEDERAL JUDICATURE, OR IN ANY DEPARTMENT OR OFFICER OF THE COMMONWEALTH

[1505.665] Matters incidental to legislative powers

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51, s 51(i) to (xxxviii), s 51(xxxix), Section 51(xxxix).

In relation to the legislative powers of the Parliament, *s 51(xxxix)* is, it seems, largely superfluous. The Parliament's power to make laws on specific subject matters, conferred by *s 51(i) to (xxxviii)*, "extends to matters incidental to those laws. That is, of necessity, included in the power granted … Though the incidental power would have been exercisable without [*s 51(xxxix)*], the subsection makes assurance doubly sure": *C G Crespin & Son v Colac Co-op Farmers Ltd* (1916) 21 CLR 205 at 214. "Section 51(xxxix) … has been treated (somewhat unnecessarily or superfluously, as I think, see *Le Mesurier v Connor* (1929) 42 CLR 481 CB) as including not only what attends, or arises in, the exercise of legislative power but also what is incidental to the subject-matter of each of the powers conferred by the other paragraphs of *s 51*. The description of the subject-matter of those powers is of course brief, but independently of *s 51(xxxix)* the description would be interpreted as including all matters that are incidental thereto": *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 54.

[1505.670] Punishing conduct directed against the Executive Government

L Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* [Section 51(xxxix)].

"*[Section 51(xxxix)]* seems to me to put beyond doubt the power of the Parliament to make laws as to frauds on the Commonwealth and for punishment of those who have been guilty of such frauds or have conspired to commit them … Frauds on the Commonwealth, and the punishment of such

frauds, as well as protection from such frauds, are, in my opinion, 'matters incidental to the execution' of the powers vested by the Constitution in the Government of the Commonwealth, as well as those vested in the Parliament; and it follows that the Parliament may make laws making such frauds punishable as crimes": *R v Kidman* (1915) 20 CLR 425 at 450.

[1505.675] Internal security

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxix).

"Under [*s 51(xxxix)*] the Commonwealth Parliament may make laws to protect and maintain the existing Government and the existing departments and officers of the Government in the execution of their powers … not only against physical attack and interference, but also against utterance of words intended to excite disaffection against the Government": *Burns v Ransley* (1949) 79 CLR 101 at 109–10. "Laws which are directed to the protection and maintenance of the legal and political organisation of the Commonwealth and of the Commonwealth in its legal and political relations may properly be enacted under [*s 51(xxxix)*]": *R v Sharkey* (1949) 79 CLR 121 at 135. On the other hand, Dixon J expressed the view (at 148) that this protective legislative power was implicit in the establishment of the Commonwealth: "The power is not expressly given but arises out of the very nature and existence of the Commonwealth as a political institution". See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 188; *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 357; *73 ALR 161*.

[1505.680] National enterprises

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxix), s 61.

"There is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of *s 51(xxxix)* and *s 61* a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation": *Victoria v Commonwealth* (1975) 134 CLR 338 at 397; *7 ALR 277* (the *AAP* case). Legislation regulating and protecting the Australian Bicentennial Authority is supported by *s 51(xxxix)*. It is within the executive power of the Commonwealth for the executive government "to recognise and celebrate its own origins in history … and legislation which is incidental to it falls within *s 51(xxxix)* ": *Davis v Commonwealth* (1988) 166 CLR 79 at 104; *82 ALR 633*.

[1505.685] Matters incidental to judicial power

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* [1705].

As with the Commonwealth's principal legislative powers, the power given to the Parliament to define the jurisdiction of any federal court other than the High Court and to invest state courts with federal jurisdiction (conferred by s 77(i) and (iii) of the Constitution: see *[1705]*) will carry with it a substantial incidental legislative power: see *R v Murphy* (1985) 158 CLR 596 at 614; *61 ALR 139*.

[1505.690] Execution of judgments

Legislation cited in this paragraph

(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxix).

"[T]he Parliament can, in the exercise of the power given by *s 51(xxxix)*, enable this court, in a proceeding by the Commonwealth to recover money owing by a state to it under the financial agreement, to pronounce a judgment that is unconditional, and can enact laws for the enforcement of that judgment against the state": *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 at 177.

[1505.695] Discovery in federal proceedings

Legislation cited in this paragraph
(CTH) *Judiciary Act 1903* Section 64.
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxix).

Section 64 of the Judiciary Act 1903 (Cth), to the extent that it removes the right of state to resist discovery in proceedings brought within federal jurisdiction, is supported by *s 51(xxxix)*: *Griffin v South Australia* (1924) 35 CLR 200 CB.

[1505.700] No power to extend jurisdiction of High Court

Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxix), s 76.

"*Section 51(xxxix)* does not extend the power to confer original jurisdiction on the High Court contained in *s 76* ": *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

[1505.705] No power to reconstitute state court

The reconstitution of a state court or of the organisation through which its powers and jurisdiction are exercised cannot be considered to be a matter incidental to the exercise of any federal jurisdiction vested in it, and therefore is not supported by s 51(xxxix): *Le Mesurier v Connor* (1929) 42 CLR 481 CB.

[1505.710] Ancillary power to invest federal jurisdiction in state courts

Legislation cited in this paragraph
(CTH) *Commonwealth of the Australia Constitution Act* s 51(xxxix).

The extent to which *s 51(xxxix)* may confer ancillary power on the Parliament to invest state courts with federal jurisdiction is a question unresolved by the High Court of Australia, being subject to a number of conflicting opinions: see *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437 at 452; *Lorenzo v Carey* (1921) 29 CLR 243 at 252; *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 at 105 and 115–16; *Le Mesurier v Connor* (1929) 42 CLR 481 at 498 and 514.

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