

*Kruger & ors v The Commonwealth*

*Detention and the Separation of Powers*

1. It is undecided whether the separation of powers doctrine applies in the Territories.
2. The doctrine rests not only on textual indicators in the Constitution, and the need to preserve the federal balance. The imperative for the separation of judicial power from legislative and executive power also arises from the need to safeguard personal liberty.

*Re Tracey; Ex parte Ryan* (1988-1989) 166 CLR 518 at 574 per Brennan and Toohey JJ

*Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 606 per Deane J

*The Australian Communist Party & ors v The Commonwealth & ors* (1950-1951) 83 CLR 1 at 193 per Dixon J

Montesquieu, *The Spirit of Laws*, Book 11, Ch VI

3. It would be extraordinary if Territorians, who acquired the protection of the doctrine at Federation (covering clauses 3 and 6 to the *Constitution Act*), lost it upon surrender of the Northern Territory to the Commonwealth in 1911, or if State residents lose it when they cross a territory border.
4. It is not the case that the people of the Northern Territory and the Australian Capital Territory stand, in this regard, in the same position as residents of the States. The *Aboriginals Ordinance* could have been passed in exercise of the power under section 51(xxvi), in which case the doctrine of the separation of powers would have applied. The protection afforded by the separation of powers should not be derogable under any Commonwealth law, whether passed under section 51 or otherwise.

*Berwick Limited v Gray* (1975-1976) 133 CLR 603 at 605 per Barwick CJ, and at 608 per Mason J

*Spratt v Hermes* (1965) 114 CLR 226 at 270 per Menzies J

5. There is no warrant for treating section 122 as being disjoined from the rest of the Constitution; the Constitution is “one coherent instrument”.

*Lamshed v Lake* (1957-1958) 99 CLR 132 at 141 per Dixon CJ, and at 154 per Kitto J

*Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248 at 272 per Brennan, Deane and Toohey JJ

*Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 222 per Gaudron J

6. Section 122 has thus been said to be “subject to” other provisions of the Constitution such as sections 90 and 116.

*Capital Duplicators v The Australian Capital Territory*

*Lamshed v Lake* at 143 per Dixon CJ

Some of the provisions of Chapter III have also been held to apply to the Territories.

*Spratt v Hermes* at 241, 245-246 per Barwick CJ, and at 275-276 per Windeyer J

7. While it was once suggested that Territory courts are not “federal courts” within the meaning of Chapter III, and that Chapter III spoke exclusively to the relationship between the Commonwealth and the States, many judges have more recently queried an understanding of the federal system which would exclude the Territories.

*Spratt v Hermes* at 270 per Menzies J

*R v Kirby & ors; Ex parte Boilermakers' Society of Australia* (1955-1956) 94 CLR 254 at 290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; see also *Spratt v Hermes* at 251 per Kitto J

8. An analogy with the territories power in Article IV, section 3(2) of the United States Constitution, which assumed that territories of the United States are its property (see *Mormon Church v United States* 136 US 1 (1889) at 44 per Bradley J), is wholly inappropriate to the (at least

internal) territories of Australia, whose inhabitants comprised some of “the people” referred to in the preamble to the *Constitution Act*.

9. The view that territory courts are not “federal courts” was a wrong turning. Its consequences can now be corrected in one of three ways:
  - (a) holding that territory courts are Chapter III courts -
    - (i) for all purposes;
    - (ii) for the purposes of other than sections 72 and 73(ii), thus preserving the decisions in *Spratt v Hermes* and *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591; or
  - (b) holding that, independently of Chapter III, judicial power can be conferred only on ‘non-federal’ courts (which must exercise only judicial power).

That principle may be said to flow from the overall structure and background of the Constitution.

*Liyanage & ors v The Queen* [1967] AC 259 at 287-288

Paragraph 2 above

11. The Commonwealth’s alternative submission that the powers under the *Aboriginals Ordinance* are not judicial is also wrong: “putting aside ... the exceptional case ..., the involuntary detention of a citizen in custody is penal or punitive in character”.

*Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28-29 per Brennan, Deane and Dawson JJ

- #12. The *Aboriginals Ordinance* treated aboriginal people as intrinsically inferior; no benevolent purpose may be supposed where it is an offence to try to escape from or resist enforced 'protection' (see section 16(2); cf mental health legislation). The archival material (see tabs 22, 24-31 of Volume 2 of the Plaintiffs' materials) contains examples of the punitive measures taken under sections 6 and 16 of the *Aboriginals Ordinance*.
13. To hold that the compulsory removal of children from their mothers and families was wrong and unconstitutional is not to impose contemporary standards; such a practice is, and always has been, wrong.

See Stowe, *Uncle Tom's Cabin* (1852), Chapters 9 and 12

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*Legal Equality*

1. The doctrine of legal equality, which is at the “forefront” of those “fundamental [constitutional] doctrine[s] existing and fully recognised at the time the Constitution was passed ...”, is to be implied from the unification at Federation of all of the people of the colonies in one indissoluble Federal Commonwealth, and the common citizenship of the Australian people (including those of Aboriginal descent).

*Leeth v The Commonwealth* (1991-1992) 174 CLR 455 at 485-487 per Deane and Toohey JJ; see also at 475 per Brennan J, and at 502-503 per Gaudron J

*Commonwealth v Kreglinger & Fernau Limited and Bardsley* (1926) 37 CLR 393 at 411-412 per Isaacs J

*Gerhardy v Brown* (1984-1985) 159 CLR 70 at 128 per Brennan J

*Davis v The Commonwealth* (1988) 166 CLR 79 at 166 per Brennan J

Preamble and sections 3 and 5 of the *Constitution Act*

2. The doctrine of legal equality will not be 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 The Commonwealth* at 488 per Deane and Toohey JJ

3. Racial and ethnic distinctions are inherently suspect and call for the most exacting judicial examination in the context of a guarantee of equal protection of laws.

*Adarand Constructions v Pena* 115 S. Ct. 2097 (1995) at 2108

‘Good intentions’ alone are not enough to sustain a supposedly ‘benign’ racial classification. The perception that a race is less

qualified in some way can only exacerbate rather than reduce racial prejudice.

*Adarand Constructions v Pena* at 2113

4. It is not necessary to recognise a principle of equality as broad as that acknowledged by Deane and Toohey JJ (and *semble* Brennan and Gaudron JJ) in *Leeth* to hold that legislation in the nature of the *Aboriginals Ordinance* is invalid.
5. As has been held in the United States, it is a necessary implication that Commonwealth legislation will not divide “the people” of the Commonwealth into two peoples, one a superior master-race, the other inferior to and subjugated by the first (*Strauder v West Virginia* 100 US 664 (1879) at 665). Dividing the people of the Commonwealth in this fashion is fundamentally inconsistent with the concept of Australia being “one nation”.
6. No different conclusion is mandated by the fact that the Framers of the Constitution may well have endorsed the *Aboriginals Ordinance*.

*Theophanous v The Herald & Weekly Times Limited* (1993-1994) 182 CLR 104 at 127, 128 per Mason CJ, Toohey and Gaudron JJ; and at 166-167, 171 per Deane J

*Spratt v Hermes* (1965) 114 CLR 226 at 272 per Windeyer J, quoting from *Missouri v Holland* 252 US at 433 (1920)

7. While a few specific sections of the Constitution may contemplate discrimination (on constitutionally relevant grounds), there is now considerable authority that section 51(xxvi) only authorises laws which ‘discriminate’ for the benefit of the race concerned.

*Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 242 per Murphy J

*The Commonwealth v Tasmania* (1983) 158 CLR 1 at 242 per Brennan J

*Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 56 per Gaudron J

8. There was no justification whatever for the discriminatory regime embodied by the *Aboriginals Ordinance*. There was no relevant difference between persons of Aboriginal background and those of European origin which could provide a rational foundation for the treatment of the former as inferior beings. The odious nature of such distinctions has long been recognised.

*Somerset v Stewart* (1772) Lofft 1 at 19

*Strauder v West Virginia* 100 US 664 (1879)

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**Freedom of Association and Movement**

1. The entrenchment in the Constitution of a system of representative parliamentary democracy has necessarily led to the recognition of an implied constitutional freedom of communication for the purposes of preserving that democratic state. The implied freedom of communication extends to all matters relating to all levels of government. As such, the freedom must logically extend to matters relevant to the government of the Northern Territory.

*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 75 per Deane and Toohey JJ

*Stephens v West Australian Newspapers Limited* (1993-1994) 182 CLR 211 at 232 per Mason CJ, Toohey and Gaudron JJ

2. The indispensable and inevitable corollaries of the continuing existence of a democratic regime generally, and the freedom of political communication needed to sustain it in particular, are freedoms of association and movement which are at least coextensive in terms of the scope of their protection with the freedom to communicate. Freedom of political communication would be rendered a hollow entitlement without the correlative freedoms of association and movement necessary to facilitate its exercise.

See: *Australian Capital Television Pty Limited v The Commonwealth* (1992) 177 CLR 106 at 212 per Gaudron J

3. The United States and Canadian cases make this explicit.

*Gibson v Florida Legislative Investigation Committee*  
372 US 539 (1963) at 544, 558-559, and 563-565

*National Association for the Advancement of Colored People v Alabama* 357 US 449 (1958) at 460

*Alberta Union of Provincial Employees v Alberta (Attorney-General)* ("Alberta Reference") [1987] 1 SCR 313 at 334 per Dickson CJ, and at 393, 395-396 per McIntyre J



4. Freedom of association, in particular, is the means by which effective participation in representative democracy is achieved. Freedom to associate facilitates the exertion of political influence, as well as the formation of ideas and the attainment through collective effort of individual goals via political and public processes. The preservation of freedom of association maximises the potential for individual impact upon government and social policy. The freedom of the individual to associate with others of like ideas or with common interests is thus a “*sine qua non* of any free and democratic society”.

*Alberta Reference* at 334 per Dickson CJ, and generally per McIntyre J

*NAACP v Alabama* at 460461 per Harlan J

5. The constitutional freedoms of association and movement must support the entitlement to free expression in all its aspects. The freedom of communication as to political matters includes or extends to freedom to associate or move for the purpose of discussing or furthering political views. The constitutional freedom to discuss political matters and public affairs extends beyond matters calculated to influence voter choices to “all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about”, that is, to “discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators”. The test is what speech (and association and movement) is necessary “in order to ensure the efficacious working of representative democracy and government”.

*Theophanous v The Herald & Weekly Times Limited* (1993-1994) 182 CLR 104 at 124, 125 per Mason CJ, Toohey and Gaudron JJ

6. In the United States, the freedom of association (and movement) is not express in the Bill of Rights, the Fourteenth Amendment or elsewhere; rather, it is implied. The freedom of association so implied extends to the protection of the family unit, the basic building block in any ordered society.

*Griswold v Connecticut* 381 US 479 (1965)

7. Prior to express constitutional entrenchment, the tripartite freedoms of expression, association and movement had been accorded explicit recognition in Canada (cf the Defendant's Written Submissions at page 55, footnote 193).

*Irwin Toy Limited v Quebec (Attorney General)* [1989] 1 SCR 927 (see especially at 1007 per McIntyre J who acknowledged that pre-Charter freedom of expression had enjoyed "virtual constitutional status")

*Alberta Reference* at 403

*Winner v SMT (Eastern) Limited* [1951] 4 DLR 529 at 557-558 per Rand J, with whom Taschereau agreed, and at 566 per Kellock J

8. In Australia, there is early and continuing judicial support for the implication of a freedom of movement by citizens within the single nation which the Constitution created.

*R v Smithers; Ex parte Benson* (1912) 16 CLR 99

*Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536

*Miller v TCN Channel 9 Pty Ltd* (1986) 161 CLR 556 at 581-583 per Murphy J

Even though there may not be "any basis for implying a new section 92A", this background is supportive of the more limited freedom asserted in the present case.

9. The constitutional freedoms of association and movement thus comprehend the right of the individual to associate or join with others (including the individual's family and community) to pursue or further common interests, causes or beliefs by means of:

- \* influencing the formation and application of governmental policy;

- \* participating in other political processes, and processes aimed at addressing or resolving matters of public interest;
  - \* participating in self governance at a local or community level.
10. The protection conferred by the freedoms of association and movement extend, as does the implied constitutional freedom of political communication, to all Australian citizens, even those who are ineligible (whether by reason of minority or otherwise) to vote, (cf the Written Submissions of the Attorney General for Western Australia at pages 9-10, paragraphs 18-19).

See: *Theophanous v The Herald & Weekly Times Limited* at 122 per Mason CJ, Toohey and Gaudron JJ, at 150 per Brennan J, and at 181-182 per Deane J  
*Cunliffe v The Commonwealth* (1993-1994) 182 CLR 272 at 299 per Mason CJ, at 336 per Deane J, and at 378 per Toohey J

11. The *Aboriginals Ordinance* imposed contemporaneous and ongoing restrictions and fetters on the mobility and associational rights of the Plaintiffs so protected by the Constitution. This was not merely incidental: central to the policy of institutionalised upbringing was to cut them off from Aboriginal life. There was no compelling justification for this impairment of the Plaintiffs' constitutional rights to freedoms of association and movement which would render that impairment reasonably and appropriately adapted to the preservation or maintenance of an ordered society under a system of representative democracy and government. It was, therefore, unlawful.

See: *Cunliffe v The Commonwealth*, especially at 299-300, 304 per Mason CJ, and at 387-388 per Gaudron J  
*Australian Capital Television v The Commonwealth* at 143 per Mason CJ, 174 per Deane and Toohey JJ, and at 235 per McHugh J

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*Fundamental Rights and Genocide*

1. There are some rights that “go so deep” that no legislature, whatever the extent of its powers, has the power to destroy them. Within this category of rights are:
  - (a) the right of parent and child not to be compulsorily and permanently separated from each other except for good cause;
  - (b) the right of members of a racial group not to be subject of policies of compulsorily removing them from that group, especially by “forcibly transferring children of the group to another group”,

for the purpose or so as to have the necessary effect of the destruction in whole or in part of the racial group to which the children belong (namely, persons of partly Aboriginal descent).

*Griswold v Connecticut* 381 US 479 (1965) at 493-494 per Goldberg J, and at 500-502 per Harlan J

*Convention on the Prevention and Punishment of the Crime of Genocide* 1948, Article II

*Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (the “BLF case”) at 385-387 per Street CJ

Paragraphs E7-13, E31-40 of the Plaintiffs' Written Submissions

2. Although there may be a stronger argument that the powers of the Imperial Parliament would not be so constrained (*British Railways Board v Pickin* [1974] AC 765 at 782 cf *Union Steamship Company of Australia v King* (1988) 166 CLR 1 at 10), the fact that the powers of the Australian Commonwealth Parliament are conferred under a constitutional instrument provides a crucial point of distinction. The full doctrine of parliamentary supremacy has only ever applied to the Parliament of Westminster; a written constitution, which is the *source*

of legislative power conferred in specific terms, must be construed in the context of the circumstances in which it was brought into being.

Sir Owen Dixon, *Jesting Pilate*, (1965) at 46, 50-51, 199-200, 206-207, 210-211, 213  
*BLF case* at 387 per Street CJ

3. It is a fundamental principle of statutory construction that “the presence of general words in a statute is insufficient to authorise interference with the basic immunities which are the foundation of our freedom: to constitute such authorisation, express words are required.”

*Coco v The Queen* (1994) 179 CLR 427 at 436 per Mason CJ, Brennan, Gaudron and McHugh JJ

4. While the Constitution is no ordinary statute, there is no reason in principle why the same considerations should not apply to its construction.

*Griswold v Connecticut* at 495-496 per Goldberg J  
*Union Steamship Company of Australia v King* (1988) 166 CLR 1 at 10

5. Further, no objection should lie that the application of such a principle would bring an unacceptably subjective element to the task of constitutional construction. There does not appear to be any real difficulty in determining what constitute fundamental rights for the purposes of cases like *Coco*. Further:

“In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] ... as to be ranked as fundamental’. *Snyder v Massachusetts* 291 US 97, 105.” (*Griswold v Connecticut* at 493 per Goldberg J)

6. If the powers of the Commonwealth under section 51, and even more if the powers of the New South Wales or New Zealand Parliaments, are

subject to such limitations, then no different result can follow in respect of the power of the Commonwealth under section 122.

7. If it be said that it is necessary to establish an intention on the part of the Commonwealth to destroy the relevant rights, such an intention is plain from the contents of the Commonwealth's own archival material (see Volume 2 of the Plaintiffs' materials). Further, as has frequently been recognised in other contexts, there is no reason to suppose that people should be taken to intend other than the natural and probable consequences of their actions. The provisions of the *Aboriginals Ordinance* speak for themselves in this regard (see, for example, sections 45, 53, 67(1)(c)).

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*The Aboriginals Ordinance is not*  
*“A Law for the Government of the Territory”*

1. A gross deprivation of liberties may take a law outside some legislative powers.

See: *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ, at 101 per Wilson and Dawson JJ, at 117 per Toohey J, and at 116 per Brennan J

*Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 at 152, 154 per Starke J

2. While it was suggested in *Cunliffe v The Commonwealth* (1993-1994) 182 CLR 272 that a proportionality test will only be applied in determining the validity of a law where the head of power relied on is purposive, where the law constitutes an exercise of the express or implied incidental power, or where some express or implied limitation on power is involved, there were indications that, in the case of a non-purposive power, it may sometimes be appropriate to examine the purpose or object of a law in order to determine the existence of a rational or reasonable connexion with the relevant head of power. Proportionality may, therefore, perhaps sometimes be of application outside the three situations identified.

*Cunliffe v The Commonwealth* at 296-298, 300 per Mason CJ, at 320-324 per Brennan J, at 351-357 per Dawson J, and at 387-388 per Gaudron J

3. Section 122 is in many ways *sui generis*, and is, concededly, a power of very wide scope. Such a concession does not mean, however, that the power conferred on the Commonwealth by section 122 is boundless. Being a power *conferred*, rather than one which was seized or evolved, it must be subject to some limits: section 122 cannot be a vehicle for tyranny or wanton oppression. The question is, therefore, what those limits are.

*Teori Tau v The Commonwealth* (1969) 119 CLR 564 at 570  
*Capital Duplicators v Australian Capital Territory* (1992) 177  
 CLR 248 at 269 per Brennan, Deane and Toohey JJ (cf  
*Breavington v Godleman* (1987-1988) 169 CLR 41 at 137-138  
 per Deane J; *Australian Capital Television v The  
 Commonwealth* (1992) 177 CLR 106 at 222-224

4. The 'nexus with the territory' test is of use only when 'geographic' problems arise (for example, *Lamshed v Lake* (1957-1958) 99 CLR 132; *Attorney General (WA) v Australian National Airlines Commission* (1975-1976) 138 CLR 492), but the 'territory' is for this purpose primarily a political concept, not a geographic area (per Street CJ in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations & anor* (1986) 7 NSWLR 372 at 382), and some additional limiting factor must be found if "despotic power is [not to be] in its meridian": Blackstone, *Commentaries*, 17th ed (1830), Vol 1 at 269 (Plaintiffs' materials, Volume 4 at 11).
5. There is a strong case for a 'proportionality' test to be applied to section 122. This is particularly so in the light of comparisons which may be drawn between it and the defence power: both have the potential for open-ended expansion and it has been suggested in several cases that section 122, like section 51(vi), is purposive.

*Lamshed v Lake* (1957-1958) 99 CLR 132 at 148 per Dixon CJ  
*Attorney General (WA) v Australian National Airlines  
 Commission* (1975-1976) 138 CLR 492 at 513 per Stephen J

6. If such a doctrine is applicable, then the incursion of the *Aboriginals Ordinance* into fundamental rights (to a far greater degree than that considered in *Davis* or any other case) leads inevitably to the conclusion that the *Aboriginals Ordinance* is invalid.
7. Alternatively, if the relevant test is not proportionality, but sufficiency of nexus or connexion between the *Aboriginals Ordinance* and the territories power, it will still be invalid for the same reasons: the fact that the *Aboriginals Ordinance* "is inappropriate or ill-adapted for the



purpose of achieving a legitimate end” serves to “prevent there being a sufficient connexion” between the *Aboriginals Ordinance* and section 122 or any derivative of the power it confers.

See *Nationwide News Pty Ltd v Wills* (1991-1992) 177 CLR 1 at 88 per Dawson J

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**Freedom of Religion**

1. Freedom of religion is the “paradigm freedom of conscience”, the “essence of a free society”.

*Church of the New Faith v Commissioner of Payroll Tax (Vic)* (1982-1983) 154 CLR 120 at 130 per Mason ACJ and Brennan J

2. The spiritual belief systems of Aboriginal people have been judicially recognised as a ‘religion’.

*The Aboriginal Legal Rights Movement Inc v The State of South of South Australia and Stevens (the “Hindmarsh Island case”)* (unreported, Full Court of the Supreme Court of South Australia, 28 August 1995) per DeBelle J (at 1)  
*Church of the New Faith* at 151 per Murphy J  
*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167

3. Freedom of religion is not a freedom to practise in solitude. It is a necessary incident of the freedom of religion that there be a freedom to associate for religious purposes.

*National Association for the Advancement of Colored People v Alabama* 357 US 449 (1958) at 460-461  
*Gibson v Florida Legislative Investigation Committee* 372 US 539 (1963) at 565

4. As with many other religions, the spiritual beliefs of the Aboriginal people are handed down almost entirely by word of mouth from generation to generation.

Berndt, R & C, *World of the First Australians* (1992), especially at 228

5. The protection conferred by the freedom of religion therefore extends beyond those who actually hold religious beliefs, but includes those who will in the ordinary course pass on or acquire religious teachings.
6. The purpose of the *Aboriginals Ordinance* is revealed by its terms and its effect.

See *Attorney General (ex rel Black) v Commonwealth*  
(1980-1981) 146 CLR 559 at 615-616 per Mason J

7. The terms of the *Aboriginals Ordinance* reveal that its purpose was to:

- (a) prevent religious teachings being passed on to; and
- (b) prevent the continued practice of religious beliefs by,

those persons removed from their culture and traditions. It is therefore irrelevant that it did not specifically prohibit religion. It is also not to the point to say that those who drafted the *Aboriginals Ordinance* did not know that the practices which were being restricted constituted a religion.

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*The Application of Constitutional Provisions  
and Implications to Section 122*

1. The people of the Northern Territory, who were part of “the people” united to form “one indissoluble Federal Commonwealth”.

Preamble and sections 3, 5 and 6 of the *Constitution Act*

2. Northern Territorians did not, on surrender of the Territory to the Commonwealth, lose their guarantees, freedoms and rights found in the Constitution.

*Capital Duplicators v The Australian Capital Territory* (1992)  
177 CLR 248 at 286 per Gaudron J

3. The people of Australia are not to be treated as being divided into two separate groups. And, the Constitution is not to be treated as two constitutions.

*Capital Duplicators* at 272-273 per Brennan, Deane and Toohey JJ

4. In any event, the powers of the Commonwealth under section 122 should at least be the subject of the same limitations as those of State parliaments.

5. The view that the power under section 122 is subject to section 116 has already been expressed.

*Lamshed v Lake* (1957-1958) 99 CLR 132 at 143 per Dixon CJ  
*Attorney General (Vic) (ex rel Black) v The Commonwealth*  
(1981) 146 CLR 559 at 593 per Gibbs J, and at 649 per Wilson J

*Teori Tau v The Commonwealth* (1969) 119 CLR 564 at 570

*Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 123 per Latham CJ, and at 156 per McTiernan J

6. The majority in *Theophanous v The Herald & Weekly Times Limited* (1994) 182 CLR 104 (see at 128-129 per Mason CJ, Toohey and Gaudron JJ, and at 155-156 per Brennan J, in the minority) held that freedom of political expression is a fetter on State and Territory legislative power.
7. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 176-177 per Deane and Toohey JJ, and at 222-223 per Gaudron J, cf at 245-246 per McHugh J.

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**Paragraphs 29(d) and (e) of the Amended Defence: Intertemporal Issues**

1. The Commonwealth contends that the *Aboriginals Ordinance* may be valid on the basis that it is a law:
  - (a) which is reasonably capable of being considered appropriate and adapted for; or
  - (b) which *is* reasonably appropriate and adapted for,  
the protection and preservation of Aboriginal people.
2. Paragraph 29 also raises the question whether either criteria must be considered by reference to prevailing “standards and perceptions”.
3. Paragraph 29 is capable only of dealing with the express and implied freedoms (equality, association and movement and religion) that are not absolute.
4. It should *not* be sufficient that the infringement of a fundamental freedom is capable of being *considered* to be appropriate and adapted.

*Cunliffe v The Commonwealth* (1994) 182 CLR 272, at 300 per Mason CJ, 324 per Brennan J, 377 per Toohey J, and at 388 per Gaudron J  
*Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 155 per Starke J
5. Contemporary conditions may be relevant in that they may have a bearing on how the Constitution is to be interpreted.

Inglis Clark, *Studies in Australian Constitutional Law*, (1901) at 21-22

*Theophanous v The Herald & Weekly Times Limited* (1994) 182 CLR 104 per Deane J at 171

6. The scope of a freedom may also depend on contemporary conditions.

See *Australian Capital Television v The Commonwealth* (1992)  
177 CLR 106 at 158-159, per Brennan J  
*Theophanous* at 171-174 per Deane J

7. The *Aboriginals Ordinance* seeks to 'protect' *all* Aborigines in the Northern Territory. No then existing condition would justify that.
8. Any perceptions then prevailing would be equally irrelevant.
9. Protection and preservation of the Aboriginal people did not depend on perception, but on matters of fact.

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**Constitutional Rights of Action Sounding in Damages**

1. The Constitution can create 'rights' which may be enforced by the citizen against the Commonwealth: for example, section 84.

*Flint v The Commonwealth* (1932) 47 CLR 274 at 278

*Pemberton v The Commonwealth* (1933) 49 CLR 382 at 399

2. Each freedom that the Constitution confers constitutes:

- (a) an immunity in the sense that the legislature cannot encroach on the freedom (except in appropriate circumstances);
- (b) a right in the sense that the citizen is entitled to exercise the freedom.

“[O]ne man's freedom is another man's restriction” (*Maharaj v Attorney General of Trinidad & Tobago* [1979] AC 385 at 396 per Lord Diplock).

4. The existence of a 'right' is meaningless unless there is some effective remedy for its enforcement.

*Theophanous v The Herald & Weekly Times Limited*  
(1993-1994) 182 CLR 104

*Ashby v White & ors* (1703) 2 Ld Raym 938

5. Other jurisdictions accept that an effective remedy for breach of a constitutional right must be made available even in the absence of an express remedial provision.

See *Simpson v Attorney General (New Zealand)* [1994] 3 NZLR 667 (“*Baigent's case*”), and the authorities set out therein, especially in the judgment of Hardie Boys J at 700 & ff Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 958-959



6. The position in the United States is different. There, a breach of a constitutional right is treated as giving rise to an action in tort.

*Bivens v Six Unnamed Agents of the Federal Bureau of Narcotics* 403 US 388 (1971), especially at 407 per Harlan J

The fact that a *Bivens* remedy is not available against the United States, may be limited or abridged by Congress or is subject to State limitations laws is therefore explicable.

*Federal Deposit Insurance Corporation v Meyer* 127 L Ed 2d 306 (1994)

7. The rights here under consideration are very different to those which arise under section 92 of the Constitution considered by Dixon J in *James v The Commonwealth* (1939) 62 CLR 339.
8. The fundamental nature of the constitutional freedoms being considered here point to the conclusion that they create rights with correlative duties, rather than simply limitations on legislative power.
9. It is not asserted that there will be a right to an award of damages, nor that damages will be the appropriate remedy, in every case of a breach of a constitutional right. The Court has power to grant whatever remedy is most appropriate.

*Baigent's case* at 717-718 per Mackay J  
*R v Goodwin* [1993] 2 NZLR 153 at 191-192 per Richardson J  
*State (at the prosecution of Quinn) v Ryan* [1965] IR 70 at 126  
*Meskeil v Coras Iompair Eireann* [1973] IR 121 at 133

See also Hammond, "Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies", in Berryman, *Remedies Issues and Perspectives* (1991) (at 87 & ff)

10. There can be no immunity from suit in the Crown in right of the Commonwealth in respect of a breach of the Constitution. The ability

to sue the Commonwealth for a breach of the Constitution cannot depend on the will of the Commonwealth itself.

11. In any event, section 64 will render the Commonwealth liable for a breach of the Constitution.

See the general discussion on this section in:

*Commissioner for Railways for the State of Queensland v Peters* (1991) 102 ALR 597 at 600 & ff per Kirby P

See also:

*Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397 at 427 per Kitto J

12. The availability of a remedy at common law will not exclude a constitutional remedy.

*Rollinson v Canada* [1991] 3 FC 70