

# THE RACE POWER – ITS REPLACEMENT AND INTERPRETATION

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## ABSTRACT

The Expert Panel on the Constitutional Recognition of Indigenous Australians has recommended the repeal of the 'race power' in the *Constitution* and its replacement with a power to make laws with respect to Aboriginal and Torres Strait Islander peoples. This article analyses that recommendation, the assumptions that underlie it and the way the new provision might be interpreted by the High Court. In doing so, it uses archival material to shed new light on the 1967 referendum and whether it was intended only to permit 'beneficial' laws. The article concludes that there is a disjunction between the intention of the Expert Panel and the likely effect of its proposed amendment.

## I INTRODUCTION

The Expert Panel on the Constitutional Recognition of Indigenous Australians has recommended the deletion of the race power in s 51(xxvi) of the *Constitution* and the insertion of the following provision:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

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 Aboriginal and Torres Strait Islander peoples.<sup>1</sup>

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<sup>1</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Blue Star Print Canberra, 2012) 153.

In addition it recommended the inclusion of a constitutional guarantee against racial discrimination in a new s 116A, although this expressly does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritages of any group'.<sup>2</sup>

This article addresses how the High Court might interpret s 51A, if it is successfully inserted in the *Constitution*. It focuses on s 51A as a stand-alone provision, rather than in conjunction with the anti-discrimination provision. This is for two reasons. First, the anti-discrimination proposal is particularly contentious and may not necessarily be included in a future referendum, or may be the subject of a separate question, which could fail. It is therefore important to see how s 51A would operate if it stood on its own. Secondly, the relationship between proposed s 51A and proposed s 116A is complex and contentious and deserves separate detailed treatment.<sup>3</sup>

This article commences with consideration of how the High Court interprets constitutional amendments, and in particular, the amendment to the race power in 1967. It sheds new light upon the contentious issue of whether it was intended that the amended race power could only be exercised for the benefit of Aboriginal people and Torres Strait Islanders. It then proceeds to consider how proposed s 51A might be interpreted if the Court were to take a traditional textual approach to the section. It contrasts this position with the view of the Expert Panel about how its proposed s 51A would be interpreted. It then breaks down the various assumptions upon which the Expert Panel's view is based, analysing each of them and pointing to the various uncertainties that arise.

The article concludes by noting that if particular outcomes are intended in terms of the interpretation of s 51A, then efforts should be made to clarify the text of the provision so that those outcomes are achieved. Currently, the text of the amendment does not match the intention evinced by the Expert Panel. Further, if the intent of the voters in approving an amendment is later to be taken into account by the High Court in interpreting a provision, then these questions need to be ventilated and the issues discussed so that the voters can make an informed choice in which the intended outcome is clear to all and that intent can be used to interpret the provision in the future.

## II THE INTERPRETATION OF CONSTITUTIONAL AMENDMENTS

We have over 100 years of jurisprudence available to us on the interpretation of the *Commonwealth Constitution*. Nearly all of this concerns the interpretation of words that were written in the 1890s, approved by the people in referenda in 1899 and enacted by the Westminster Parliament in 1900. In interpreting the *Constitution*, the Justices of the High Court have in many cases looked to the original meaning of the words,<sup>4</sup> drawing

<sup>2</sup> Ibid 173.

<sup>3</sup> For a brief discussion of this issue see: Anne Twomey, 'Indigenous Constitutional Recognition Explained – The Issues, Risks and Options' (Constitutional Reform Commentary, Sydney Law School Constitutional Reform Unit, January 2012) 8.

<sup>4</sup> Note the more detailed analysis by Heydon J which draws distinctions between different types of originalist and non-originalist theories: Justice J D Heydon, 'Theories of constitutional interpretation: a taxonomy' *Bar News: The Journal of the NSW Bar Association* (Winter 2007) 12.

on the constitutional convention debates of the 1890s to aid the identification of the objective, but not subjective, intent behind provisions.<sup>5</sup> In other cases they have focused more closely on the text and structure of the *Constitution*.<sup>6</sup> In yet others, Justices have regarded the *Constitution* as a 'living force' which needs to be reinterpreted over time to accommodate changing facts (such as Australia's independence) and changing community values.<sup>7</sup>

When it comes to the interpretation of a constitutional amendment, matters are different. We have very little jurisprudence on how this should be done. As Justice Kirby has observed, '[b]ecause there have been so few amendments to the Australian Constitution, it has not hitherto been necessary to develop a theory of the approach to be taken to the meaning of the text where a provision is altered.'<sup>8</sup>

If the constitutional amendment is being interpreted shortly after it has been made, then the gap between the temporal focus of originalists and non-originalists is virtually closed, because the original meaning and the contemporary meaning of the words used is likely to be the same. The difficulty, however, is determining whether one should place greater emphasis upon the words as chosen by the framers of the amendment or the 'intent' behind those words. If intent is important, then questions also arise as to whose intent has priority – the intent of those who suggested the amendment (eg expert panels, review commissions or parliamentary committees); those who chose the words (eg Ministers and Cabinet); those who voted in the Parliament to approve the words; or those who voted in a referendum to approve the words?<sup>9</sup>

Difficulties also arise with regard to the sources of material to aid in the identification of objective intent.<sup>10</sup> In the case of the 1890s, there are detailed constitutional convention debates during which each clause was the subject of discussion and approval. While the debates are not always illuminating and in many cases inconclusive, they are often helpful for identifying the mischief that a provision was intended to deal with and identifying the meaning of words or why particular words were chosen. In addition, there are a number of scholarly works to which the

<sup>5</sup> *Cole v Whitfield* (1988) 165 CLR 360, 385; *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 106 [298] (Hayne and Kiefel JJ) and 148–9 [430]–[431] (Heydon J); *NSW v Commonwealth* (2006) 229 CLR 1, 272–3 [683] (Callinan J); *Singh v Commonwealth* (2004) 222 CLR 322, 337–8 [21]–[22] (Gleeson CJ); 349–50 [54] (McHugh J); and 385 [159] (Gummow, Hayne and Heydon JJ). For two different originalist approaches to the race power, see M J Detmold, 'Original intentions and the race power' (1997) 8 *Public Law Review* 244; Robert Dubler, 'Race and the Constitution' (2002) 76 *Australian Law Journal* 456.

<sup>6</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; *Eastman v Queen* (2000) 203 CLR 1, 47 [149] (McHugh J). Note, however, that textualism still involves reading the text and structure in its historic context.

<sup>7</sup> See, eg, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171–2 (Deane J); *Eastman v The Queen* (2000) 203 CLR 1, 79–80 [242] (Kirby J).

<sup>8</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 413 [157] (Kirby J) ('*Kartinyeri*').

<sup>9</sup> See also McHugh J's question during the hearing of *Kartinyeri*: '[W]ho is the relevant body that we look at? Is it the people in Cabinet? Is it the people who pass the Act or is it the people that voted on it?'. Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 12 (5 February 1998) 31.

<sup>10</sup> See Alex Reilly, 'Reading the Race Power: A Hermeneutic analysis' (1999) 23 *Melbourne University Law Review* 476, 489–91.

High Court can refer to aid it in understanding the intent behind provisions at the time the *Constitution* was enacted.<sup>11</sup> Interestingly, the High Court rarely if ever attempts to discern the intent of the voters who approved of the *Commonwealth Constitution* in referenda in the various colonies.

When it comes to interpreting constitutional amendments, the sources are much more limited. While there may be a report of a commission, committee or panel,<sup>12</sup> there is always a risk that the report is more focused upon advocacy of a constitutional reform rather than explication or analysis.<sup>13</sup> The different drafts of amendments, analysis of how they would operate and the crucial decisions regarding wording will all be found in government documents and cabinet records, but these are usually kept secret for a period of time and may not be available to a court.<sup>14</sup> Parliamentary debate is more likely to focus on advocacy of positions that have previously been established in the Cabinet and shadow-Cabinet, rather than providing an analysis of how the constitutional provision is intended to work. The 'Yes/No' cases are also documents aimed at advocating a position, with the consequence that they are frequently misleading and often shed little light on how the amendment is intended to operate.<sup>15</sup> Those advocating positions on either side of a referendum debate tend to choose to campaign, if possible, on an emotional level, avoiding analysis of the detail if at all possible.

These problems are well illustrated by the attempts to discern the intent behind the 1967 referendum with respect to Aboriginal people.

### III THE 1967 'ABORIGINALS' REFERENDUM AND ORIGINAL INTENT

#### The 1967 amendment to the race power

Prior to the 1967 referendum, the 'race power' in s 51(xxvi) of the *Constitution* conferred upon the Commonwealth Parliament power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The *Constitution Alteration (Aboriginals) 1967*, as approved by the people in a referendum, deleted s 127 of the *Constitution* and deleted the words 'other than the aboriginal race in any state' from s 51(xxvi). From a textual point of view, the removal of an exception to Commonwealth power clearly

<sup>11</sup> See, eg, J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney (1901); W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, London, 1902); A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, Melbourne, 1901). See also historical works including: J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972); John M Williams, *The Australian Constitution – A Documentary History* (Melbourne University Press, 2005).

<sup>12</sup> See, eg, Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988).

<sup>13</sup> See, eg, Expert Panel on Constitutional Recognition of Indigenous Australians, above n 1.

<sup>14</sup> The traditional rule was that they were kept secret for 30 years, although this is gradually being reduced to 20 years: *Archives Act 1983* (Cth) s 7(3).

<sup>15</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth, *Reforming our Constitution: A Roundtable Discussion* (June 2008) 11–12.

augmented the Commonwealth's power.<sup>16</sup> No words were included to limit that power. If one accepts that in 1901 the power to make laws with respect to the 'people of any race for whom it is deemed necessary to make special laws' included the power to make laws that discriminated adversely against those people,<sup>17</sup> then the textual amendment in 1967 did not, on its face, limit that power to one to make beneficial laws.<sup>18</sup>

It was argued in *Kartinyeri* that either the meaning of s 51(xxvi) had changed over time along with contemporary values, so that it could only be exercised in a 'beneficial' manner or that the 1967 referendum evinced a 'new founding intention'<sup>19</sup> which governed the interpretation of the provision. Kirby J accepted the latter argument. He considered that the intent behind the 1967 referendum was to permit the enactment of laws that only applied to the benefit of the people of the race(s) affected. This intent was discerned from parliamentary debates, which he regarded as showing an intention to permit the Commonwealth Parliament to legislate to aid Aboriginal people and the official 'Yes' case that was put to the people in the referendum which also described a purpose of the provision as being to 'make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Commonwealth Parliament considers this desirable or necessary'.<sup>20</sup>

The problems with this argument, however, include that it is inconsistent with the plain words of the provision (which do not qualify the grant of power by reference to benefit), the fact that the amendment merely excised an exception, thereby increasing

<sup>16</sup> *Kartinyeri* (1998) 195 CLR 337, 363 [32] (Gaudron J). See also Eastick who draws an analogy with the deletion of an exception in s 105 of the Constitution, which resulted in the expansion of Commonwealth legislative power: Jennifer Eastick, 'The Australian Aborigine: Full Commonwealth Responsibility under the Constitution' (1980) 12 *Melbourne University Law Review* 516, 522–3.

<sup>17</sup> Note Dubler's argument that 'discrimination' is treating people differently when that difference in treatment is not objectively justifiable by reference to relevant differences. He argued that at the time of federation, the framers would have believed that there were relevant differences between races and that the types of laws supported by s 51(xxvi) would be able to be objectively justified by reference to those differences. Hence, the provision would not have been intended to be 'discriminatory' in that sense; Dubler, above n 5, 458–61; cf Detmold, above n 5.

<sup>18</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 186 (Gibbs CJ), 244 (Wilson J); *Kartinyeri* (1998) 195 CLR 337, 361–2 [29]–[30] (Gaudron J); 382–3 [91]–[94] (Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, 27980 [653] (Callinan J). Compare Murphy J's argument about the meaning of 'for': *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 242 (Murphy J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 180 (Murphy J). Note the rejection of this argument: *Commonwealth v Tasmania* (1983) 158 CLR 1, 110 (Gibbs CJ); *Kartinyeri* (1998) 195 CLR 337, 364 [36] (Gaudron J), resiling from her earlier comments in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 56. See also Robert Sadler, 'The Federal Parliament's Power to Make Laws "With Respect to.... The People of any Race...."' (1985) 10 *Sydney Law Review* 591, 606.

<sup>19</sup> Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 13 (5 February 1998) 27.

<sup>20</sup> *Kartinyeri* (1998) 195 CLR 337, 407 [145], 413 [157] (Kirby J); see also Brennan J's observation in *Commonwealth v Tasmania* (1983) 158 CLR 1, 242 that the *primary* object of s 51(xxvi) is beneficial; see also John Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' in (1997) 19(1) *Adelaide Law Review* 95, 119–27.

the Commonwealth's power,<sup>21</sup> rather than restricting it, and the fact that the academic commentary of the day had warned that the mere excision of the exclusion would result in the Commonwealth Parliament gaining a power to discriminate adversely against Aboriginal people.<sup>22</sup>

Further, neither the Yes Case nor the parliamentary debates stated that it was intended that the Parliament *only* be able to enact beneficial laws.<sup>23</sup> As Geoff Lindell has noted, 'there is a difference between showing an intention to use the power for beneficial purposes and an intention to *only* use it for such purposes'.<sup>24</sup> The Commonwealth Solicitor-General noted that there was 'an obvious distinction between power and policy' in this case.<sup>25</sup>

Neither the Yes case nor the parliamentary debates explained whether such a beneficial intention, if it existed, limited the race power only with respect to Aboriginal people, or generally with respect to all races. Nor did they explain how such a limitation would work in practice – who would judge what was beneficial, whether a beneficial law could be repealed or would remain entrenched, whether a law had to be solely beneficial or simply beneficial overall and whether a beneficial law would lose the support of its head of power if it were amended to reduce the benefit or introduce a non-beneficial element or tip the balance of the law from beneficial to non-beneficial. The reality is that these issues were not put to the people and not decided by the people when they voted. To assume that the people had addressed these issues and reached a particular conclusion would appear highly presumptuous and, at the very least, unsupported by any evidence.

An examination of the public debate at the time of the referendum shows that it was largely confused and ill-informed, with many people believing that they were voting to 'give Aborigines rights',<sup>26</sup> including voting rights<sup>27</sup> and 'citizenship',<sup>28</sup> which Aboriginal people already had.<sup>29</sup> The public campaign was pitched at achieving an emotional pull on hearts and minds – it did not focus on the detail of the amendments and their actual effects.<sup>30</sup> In any case, the people were not the ones who initiated the

<sup>21</sup> Dubler, above n 5, 457.

<sup>22</sup> Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 35.

<sup>23</sup> *Kartinyeri* (1998) 195 CLR 337, 362–3 [31] (Gaudron J).

<sup>24</sup> Geoffrey Lindell, 'The Races Power Problem: Other Observations' (1998) 9 *Public Law Review* 272, 274. See also *Kartinyeri* (1998) 195 CLR 337, 382 [91] (Gummow and Hayne JJ) where they noted that an aspiration to 'provide federal legislative power to advance the situation of persons of the Aboriginal race' does not of itself amount to a limitation on constitutional power.

<sup>25</sup> Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 14 (6 February 1998) 31 (Mr Griffith).

<sup>26</sup> See, eg, advertisements such as 'Vote Yes for Aboriginal Rights' at National Museum of Australia, *Changing the Constitution – what were the roles of people, groups and ideas in the referendum campaign?* <[http://indigenoustrights.net.au/pdfs/67Ref\\_Act5.pdf](http://indigenoustrights.net.au/pdfs/67Ref_Act5.pdf)>.

<sup>27</sup> Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 50.

<sup>28</sup> *Ibid* 44–5.

<sup>29</sup> See also Brian Galligan and John Chesterman, 'Aborigines, Citizenship and the Australian Constitution: Did the Constitution Exclude Aboriginal People from Citizenship?' (1997) 8(1) *Public Law Review* 45.

<sup>30</sup> Attwood and Markus, above n 27, 46.

referendum proposal or chose the words that were used or the method by which the change would be made (i.e. the deletion of the exclusion rather than the insertion of a positive power).

In reality, these choices were made by the government, which held the support of a majority in the Parliament.<sup>31</sup> As French CJ and Gummow J noted in *Wong v Commonwealth* the requirement that a referendum bill be considered by each legislative chamber 'directs attention to the considerations which animated the executive and legislative branches of government'.<sup>32</sup> The parliamentary debates on the 1967 referendum proposal, however, while considered by the High Court in *Kartinyeri*,<sup>33</sup> were not particularly informative either. They were focused on the politics of advocating the change, rather than explaining what it was actually intended to do. While the proposed new power was discussed in terms of its potential use to aid Aboriginal people, no reference was made to its other possible uses or whether it was intended to be limited in any particular way.

### The Wentworth Bill and the Cabinet's response

To really understand why the Government chose the approach of deleting the exclusion in s 51(xxvi), rather than the inclusion of a positive power, and to understand whether or not it intended its provision to be confined to a beneficial application, one needs to look at the Cabinet records. It was in Cabinet, rather than Parliament, that these issues were addressed. Curiously, despite being publicly open documents at the time *Kartinyeri* was heard by the High Court,<sup>34</sup> no reference was made in argument to the relevant Cabinet documents. Perhaps this was because questions might arise as to whether or not the Court could have regard to them. However, given that they far more clearly evince the Government's intention than the parliamentary records and that they appear to contradict the argument made to the Court by counsel for the Plaintiffs, it is surprising that they were not presented to the Court.

To understand the Cabinet documents, one must first have regard to the 1966 Private Member's Bill, *Constitution Alteration (Aborigines) 1966*, introduced by the Liberal Government backbencher, Bill Wentworth.<sup>35</sup> It proposed two constitutional changes that are remarkably similar to those proposed in 2012 by the Expert Panel. They were:

- (a) The deletion of s 51(xxvi) and its replacement by:

<sup>31</sup> Note, for example, the argument that courts focus on the second reading speech when attempting to discern the intent of Parliament, because 'the government maintains the initiative for introducing legislation and its intent is the dominant intent'; Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 13 (5 February 1998) 35 (Mr Spiegelman).

<sup>32</sup> (2009) 236 CLR 573, 582 [21] (French CJ and Gummow J).

<sup>33</sup> *Kartinyeri* (1998) 195 CLR 337, 391–3 [117], 401–2 [132] (Kirby J). Note Gummow and Hayne JJ's reference to these materials at 382 [91] with the rider 'assuming regard may properly be had to them'. Note the more extensive use of parliamentary materials concerning a referendum bill in *Wong v Commonwealth* (2009) 236 CLR 573.

<sup>34</sup> The main relevant Cabinet Minute was determined to be 'open' for access by the National Archives of Australia from 31 December 1997, which was before *Kartinyeri* was heard on 5–6 February 1998.

<sup>35</sup> See the brief discussion of this Bill in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 405–6 [141] (Kirby J).

(xxvi) the advancement of the aboriginal natives of the Commonwealth of Australia.

- (b) The insertion of the following guarantee after section 117:

117A Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin:

Provided that this section shall not operate so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia.

Wentworth, in his second reading speech, argued that these proposed amendments were far preferable to the simple omission of the words 'other than the aboriginal race in any State', as had previously been proposed in an earlier Bill by Labor's Arthur Calwell.<sup>36</sup> Wentworth expressed concern that the mere omission of those words would allow the Parliament to discriminate in a way that was adverse or favourable. He wanted to exclude the possibility of adverse discrimination.<sup>37</sup>

So the Parliament had had before it a Bill that would have directly achieved the outcome of permitting only laws that were beneficial towards Aboriginal people, yet it chose not to enact it. Instead, it chose to approve a constitutional amendment which Wentworth had expressly warned would continue to permit adverse discrimination. Why did it do so?<sup>38</sup> The answer lies in the Cabinet documents.

The Commonwealth Cabinet had previously agreed in April 1965 that it would put to referendum a Bill for the repeal of s 127 of the *Constitution* only. On 30 August 1965, Cabinet considered whether s 51(xxvi) should also be amended at the same time and decided that it should be retained in its existing form. The introduction of Wentworth's Private Member's Bill, being the Bill of a Government backbencher, attracted a great deal of attention and some support within the Liberal Party. The Attorney-General, Nigel Bowen, felt obliged to bring the matter back to Cabinet in January 1967 for reconsideration.

Bowen's Cabinet submission considered whether the Government should itself propose amendments that would replace the race power with one for the 'advancement of Aboriginal people' and insert an anti-racial discrimination provision. In rejecting these proposals, Bowen noted that the one concerning the 'advancement' of Aboriginal people:

would raise difficulties as to what was to be regarded as "advancement". Would, for example, a particular law made under the new provision have to be a law for advancement in substance, on the whole or in every detail of the law? It would incorporate in the Constitution express words which would tend to distinguish

<sup>36</sup> Constitution Alteration (Aborigines) Bill 1964 (Cth). See Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1964, 1902 (Arthur Calwell). The Bill proposed the deletion of the exclusion of Aboriginal people from s 51(xxiv) and the deletion of s 127 of the Constitution.

<sup>37</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 123 (Bill Wentworth).

<sup>38</sup> Note the observation by Williams and Bradsen that the Wentworth Bill was not put to referendum 'primarily to counter the vagaries of constitutional amendment in Australia' but that 'the sentiments that it contained were transferred to the decision to omit the words "other than the Aboriginal race in any State" from s 51(xxvi)'; Williams and Bradsen, above n 20, 123.



aborigines as second class citizens. Furthermore, the change would repeal the existing power to legislate with respect to people of any race other than the aboriginal race. The power has not been used since the early years of Federation, but the Commonwealth could well find it of value in the future.<sup>39</sup>

Bowen noted that the reason the Commonwealth Parliament had not needed to use the race power was because its immigration laws, by implementing the White Australia policy, had excluded the 'entry of people who might create racial problems.' He went on to observe:

If our Immigration policy were changed so as to admit such people in substantial numbers, the power conferred by s. 51(xxvi) might then be needed. In these circumstances, it seems undesirable to deprive the Commonwealth of the power presently vested in it by s. 51(xxvi).<sup>40</sup>

The Cabinet accepted this view, agreeing to retain its race power but to delete the exclusion of Aboriginal people from it, so that the Commonwealth Parliament could legislate with respect to the people of the Aboriginal race as well as other races. This ensured that in the future the Commonwealth could legislate adversely with respect to any race if it regarded this as necessary. It also avoided all the potential problems that would arise in relation to trying to identify which laws would be for the 'advancement' of Aboriginal people.<sup>41</sup>

As for s 117A, Bowen noted that at 'first sight' it had some attractions, but that it also had disadvantages. First, he saw such a provision as providing 'a fertile source of attack on the constitutional validity of legislation' and thought that it would cause difficulties out of all proportion to the gains its inclusion might achieve. He pointed to the extent of litigation regarding the application of s 92 of the *Constitution* and saw this as a warning against introducing a provision of this kind.<sup>42</sup>

Secondly, Bowen expressed concern that such a constitutional guarantee might restrict the exercise of the immigration power, the defence power and the external affairs power. It should be noted, however, that Wentworth had specifically confined his anti-discrimination provision in its application to people born or naturalised within Australia, so that it would not affect the operation of the immigration power, the aliens power and the external affairs power with regard to non-citizens.<sup>43</sup>

Thirdly, Bowen thought it might prevent any concession or advantage being given to the people of a particular race, as this would amount to discrimination against other races, as well as preventing the imposition of a disability. He pointed out that laws that are intended to be 'protective', but could not be regarded as 'advancement', would also be prohibited. Finally, he noted that the elimination of racial discrimination can only be achieved by changing minds and hearts, not by the statute book.<sup>44</sup>

<sup>39</sup> Commonwealth, *Constitutional Amendment – Aborigines – DECISION 79*, Cabinet Submission NAA: A5842 (January 1967) 4-5 [12].

<sup>40</sup> Ibid.

<sup>41</sup> Compare the argument made by Counsel for the Plaintiffs in *Kartinyeri* that the failure of the Wentworth Bill can be attributed to the anti-discrimination provision, instead of concern about the meaning of 'advancement' Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 13 (5 February 1998) 34.

<sup>42</sup> Commonwealth, above n 39, 5-6 [13].

<sup>43</sup> Commonwealth, above n 37, 124.

<sup>44</sup> Commonwealth, above n 39, 5-6 [13].

Bowen also raised with Cabinet the possibility of deleting the whole of s 51(xxvi). He concluded that this would be undesirable. He considered it important that the Commonwealth retain its power to legislate with respect to races both for their benefit and detriment. In particular, he noted that the race power could be used to enact legislation that would negate discriminatory state legislation. If a state enacted a law that discriminated against a race, the Commonwealth, under s 51(xxvi) could enact a law with respect to that race that was inconsistent with the state discriminatory law, rendering it ineffective under s 109 of the *Constitution*. Bowen thought that the Commonwealth should not give up such a power.

Bowen recommended to Cabinet that it agree to a referendum to omit the words 'other than the aboriginal race in any State' from s 51(xxvi) and to announce that if it succeeded, the states would still be responsible for the administration of laws with respect to Aboriginal people, but the Commonwealth would have a role of policy participation. On 22 February 1967 the Cabinet adopted the Attorney-General's recommendation.<sup>45</sup> It was on this basis that the referendum went forward.

Although these Cabinet documents were not put to the High Court in *Kartinyeri*, the Commonwealth did point to the Wentworth Bill and 'argued that had it been the purpose of the Parliament legally to forbid legislation detrimental to, or discriminatory against, Aboriginals, a group of Aboriginals or any other people on the ground of race, the Wentworth proposals (or some variant of them) would have been adopted. But they were not.'<sup>46</sup>

Justices Gummow and Hayne appeared to pick up this argument, observing:

The omission in the 1967 Act of any limitation, making specific reference to the provision of "benefits" to persons of the Aboriginal race, upon the operation of the amended s 51(xxvi), is consistent with a wish of the Parliament to avoid later definitional argument in the legislature and the courts as to the scope of its legislative power. That is the effect of what was achieved.<sup>47</sup>

#### IV THE INTERPRETATION OF PROPOSED S 51A

##### An orthodox textual analysis

Proposed s 51A would give the Commonwealth Parliament a power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. The power itself is not expressly qualified or limited to the benefit or advancement of those peoples. Nor is it qualified, as is the current s 51(xxvi) by a requirement that the law be 'special' and that it be 'deemed necessary'.

In *Kartinyeri*, Gummow and Hayne JJ noted that 'it is as well to recall that it is the constitutional text which must always be controlling'.<sup>48</sup> Kirby J also noted that it is 'the

<sup>45</sup> Commonwealth, Cabinet Decision No 79, 22 February 1967: NAA: A5842 46.

<sup>46</sup> *Kartinyeri* (1998) 195 CLR 337, 409 [148] (Kirby J).

<sup>47</sup> *Kartinyeri* (1998) 195 CLR 337, 383 [94] (Gummow and Hayne JJ).

<sup>48</sup> *Kartinyeri* (1998) 195 CLR 337, 381-2 [90] (Gummow and Hayne JJ). See also *Singh v Commonwealth* (2004) 222 CLR 322, [20] (McHugh J) 336-7 [51]; Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14(4) *Public Law Review* 234, 239-40; Dubler, above n 5, 461. Cf Malbon's criticism that the majority in *Kartinyeri* made a 'worrying retreat into textualism, leaving the jurisprudence of the race power in a dangerously vulnerable state': Justin Malbon, 'Avoiding the Hindmarsh

text (with its words and structure) which is the law to which the Court owes obedience' and that '[n]either the Court, nor individual Justices, are authorised to alter the essential meaning of that document'.<sup>49</sup> His Honour referred, approvingly, to the observation of Kentridge AJ of the Constitutional Court of South Africa where he said: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'<sup>50</sup>

Gummow and Hayne JJ pointed out in *Kartinyeri* that neither the *Constitution* as it stood after 1967, nor the amending Bill, contained any express or implied limitation on the Commonwealth's legislative power that it only be exercised for the 'benefit' of Aboriginal people.<sup>51</sup> Gaudron J observed that as 'a matter of language and syntax', the 1967 amendment 'did no more than remove the then existing exception or limitation on Commonwealth power with respect to the people of the Aboriginal race.' She observed that unless one went beyond language and syntax, this placed Aboriginal people 'in precisely the same constitutional position as the people of other races'.<sup>52</sup>

In a statement that is now particularly relevant to the proposed s 51A, Gaudron J added:

Were s 51(xxvi) simply a power to legislate with respect to "the people of any race", there would, in my view, be no doubt that Parliament might legislate in any way it chose so long as the law in question differentiated in some way with respect to the people of a particular race or dealt with some matter of "special significance or importance to the[m]".<sup>53</sup>

Surely the same would be said for s 51A? To the extent that it is a bald and unqualified grant of power to make laws with respect to Aboriginal and Torres Strait Islander peoples, then such laws may be as beneficial or adverse as the Parliament determines.

However, in addition to the grant of power in proposed s 51A, there is a preamble. This preamble:

- recognises first occupation of Australia by Aboriginal and Torres Strait Islander peoples;
- acknowledges their continuing relations with traditional lands and waters;
- offers respect towards their continuing cultures, languages and heritage; and
- acknowledges the 'need to secure the advancement of Aboriginal and Torres Strait Islander peoples'.

To what extent, if any, is this preamble intended to influence the interpretation of the grant of power in s 51A or even qualify its scope? The orthodox argument, employing both a textualist and originalist approach, would be that the framers of the amendment deliberately chose not to qualify the power. They could have included words that limited the power by providing that it could only be exercised for the

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Island Bridge Disaster: Interpreting the Race Power' (2003) 6 *Flinders Journal of Law Reform* 41, 44; see also Reilly, above n 10, 492–6.

<sup>49</sup> *Kartinyeri* (1998) 195 CLR 337, 399 [132] (Kirby J).

<sup>50</sup> *State v Zuma* [1995] 2 SARL 642, 652–3 (Kentridge AJ) quoted in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 399 [132] (Kirby J).

<sup>51</sup> *Kartinyeri* (1998) 195 CLR 337, 381–3 [90]–[94] (Gummow and Hayne JJ)

<sup>52</sup> *Kartinyeri* (1998) 195 CLR 337, 361 [29] (Gaudron J).

<sup>53</sup> *Kartinyeri* (1998) 195 CLR 337, 363 [34] (Gaudron J) (citations omitted). See also Kirby J at 411 [153] and Gummow and Hayne JJ at 378 [81].

benefit of Aboriginal and Torres Strait Islander peoples, but they deliberately chose not to do so. The reference to 'advancement' and other matters in the preamble is not prescriptive. It merely acknowledges a 'need' – it does not mandate action or limit power. It is simply public recognition of the history, culture and needs of Aboriginal and Torres Strait Islander peoples, no more.

On this view, the role of the preamble to s 51A would be to give public recognition of Aboriginal and Torres Strait Islander peoples in the *Constitution* and an indication to Parliament and the executive that consideration should be given to the need to secure the advancement of Aboriginal and Torres Strait Islander peoples. The power of the Parliament to legislate with respect to Aboriginal and Torres Strait Islander peoples would be plenary and not subject to any limitation.

### The Expert Panel's alternative analysis

The difficulty with the above orthodox interpretation is that the Expert Panel, which devised the form of s 51A, appears to have had a different view as to its operation. It is not yet clear what consideration the High Court would give to the Expert Panel's Report when interpreting any constitutional amendment that sprang from it. However, there is a reasonable argument that the Expert Panel would form one element of the 'framers' of this constitutional amendment, along with the Cabinet, the Parliament and the people. In any case, the Expert Panel's interpretation of how s 51A is intended to operate is likely to influence and inform public debate upon any referendum that were to introduce such a provision into the *Constitution*.<sup>54</sup>

The Expert Panel noted the High Court's judgment in *Kartinyeri* and the Court's decision to defer to Parliament's assessment of what it deems 'necessary',<sup>55</sup> subject to possible scrutiny for 'manifest abuse'. The Panel then went on to consider the High Court's likely interpretation of proposed s 51A in the following critical paragraphs:

Would the new 'section 51A' invite the courts to a significantly greater engagement with 'the merits' of legislation in determining whether it is authorised by the proposed new legislative power? There is clearly strong support for qualifying any new power to make laws for Aboriginal and Torres Strait Islander peoples so that its beneficial purpose is clear. Inevitably, to confine the power in this way may require a court to make judgments as to the purpose or effect of a law. Based on the Panel's legal advice, the preambular language proposed by the Panel for 'section 51A' would make it clear that a law passed pursuant to that power would be assessed according to whether, taken as a whole, it would operate broadly for the benefit of the group of people concerned, rather than whether each and every provision was beneficial or whether each and every member of the group benefited. The Panel does not believe that this would create any particular difficulty or uncertainty for Parliament, or create any real risk of excessive court challenges.

The Panel proposes use of the word 'advancement' in the preambular or introductory words to the new substantive power in 'section 51A', rather than in the power itself. This

<sup>54</sup> Note that in *Wong v Commonwealth* (2009) 236 CLR 573, French CJ and Gummow J observed at 583 [23] that while the history of a provision and the extrinsic materials concerning its development cannot be determinative of its construction and interpretation, they become more important where the clear meaning of a provision is not apparent on the face of the text. Note also Kirby J's comment at 605 [99] that while historical materials are helpful in providing context, it is a serious mistake to think of them as resolving meaning or controlling the interpretation of a provision.

<sup>55</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, above n 1, 150.

approach should ensure that the purpose of the power is apparent and would, as a matter of interpretation, be relevant to the scope given to the substantive power. The Panel considers that this approach would achieve a satisfactory balance between making the purpose of a law justiciable, and at the same time allowing a court to defer to legislative judgment. It should not enable individual provisions in a broad scheme to be attacked as not beneficial if the law as a whole were able to be judged beneficial.<sup>56</sup>

There are numerous assumptions in these paragraphs as to how a court would interpret s 51A. The first is that it would have regard to the preamble to determine the 'purpose' of the power. The second is that this 'purpose' would define the scope of the power and operate as a limitation on the Commonwealth's legislative power. The third is that the court would 'defer to legislative judgment' to a degree and that this deference would involve confining its assessment of the validity of the Bill to whether the law *as a whole* was 'beneficial', rather than individual provisions. The fourth assumption is that in making this assessment the court would consider whether the law was 'broadly for the benefit of the group concerned' rather than for every member of the group.

Some of these assumptions may be justified. Others are doubtful. All are contestable, leading to significant uncertainty as to the likely effect of s 51A.

## V THE ASSUMPTIONS UNDERLYING THE EXPERT PANEL'S ANALYSIS

### 1. Relevance of purpose in the absence of ambiguity

The rules of statutory interpretation concerning preambles are contentious and involve quite fine distinctions. The primary rule is that where there is ambiguity in the text of a statute, resort may be had to the preamble to clarify how the ambiguous provision should be interpreted. This is because the preamble can act as the 'key to open the minds of the makers of the Act and the mischiefs which they intended to redress'.<sup>57</sup> Where, however, there is no ambiguity, because the text is plain and clear, use cannot be made of the preamble in construing provisions.<sup>58</sup> The rule is set out clearly in the *Sussex Peerage Case*, where Lord Tindal CJ said:

If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean[s] of collecting the intention, to call in aid the ground and cause of the making of the statute, and to have recourse to the preamble.<sup>59</sup>

Contention arises, however, as to whether a preamble can be resorted to in order to ascertain whether there *is* an ambiguity, especially where the statutory provision contains general words which might be read more narrowly in the light of a preamble which revealed a particular parliamentary purpose. There are competing views on this

<sup>56</sup> Ibid 150-1 (citations omitted).

<sup>57</sup> *Stowel v Lord Zouch* (1816) 1 Plowden 352, 369; 75 ER 536, 560. See also J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney first published 1901, 1995 reprint) 284.

<sup>58</sup> *Powell v Kempton Park Racecourse Co Ltd* [1897] 2 QB 242, 299 (Chitty LJ).

<sup>59</sup> *The Sussex Peerage Case* (1844) 11 Cl & Fin 85, 143; 8 ER 1034, 1057 (Lord Tindal CJ). See also *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 339 (Griffith CJ).

point. Some have taken the view that no recourse can be had to the preamble at all where the words of the statute are plain and clear.<sup>60</sup> Others have taken the view that the preamble is part of a statute and that the statute should be read as a whole to determine its purpose. Purpose and context may then be used to interpret words of generality and identify ambiguity.<sup>61</sup> This approach involves a two-stage process. The preamble is first used to identify the purpose of the statute and in doing so, to identify any possible ambiguity in the words of the provision which might arise through a conflict between general words and the particular purpose. Once that ambiguity has been identified in stage one, then in stage two the orthodox rule, which allows the ambiguity to be clarified by reference to the preamble, is employed.<sup>62</sup>

These conflicting views are best illustrated by the judgments of Gibbs CJ and Mason J in *Wacando v Commonwealth*.<sup>63</sup> Gibbs CJ stated that although the preamble suggested that the section in question was intended to have a narrower meaning, 'if the words of the section are plain and unambiguous their meaning cannot be cut down by reference to the preamble'.<sup>64</sup>

In contrast Mason J argued:

It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object.<sup>65</sup>

<sup>60</sup> Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 85–8. See also *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 451; S G G Edgar, *Craies on Statute Law* (Sweet & Maxwell, London, 7<sup>th</sup> ed, 1971) 201–2: 'if the meaning of the enactment is clear and unequivocal without the preamble, the preamble can have no effect whatever'; *Re Application of Tan Boon Liat; Tan Boon Liat v Menteri Hal Ehwal Dalam Negri, Malaysia & Ors* [1976] 2 *Malayan Law Journal* 83, 85 (Abdoolcader J): 'Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it.'

<sup>61</sup> *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J); M Handler, B Leiter and C Handler, 'A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation' (1990) 12 *Cardozo Law Review* 117, 128; Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184, 187–91; Elmer A Driedger, *The Construction of Statutes*, (Butterworths, Toronto, 2<sup>nd</sup> ed, 1983) 146.

<sup>62</sup> See the distinction drawn by Anne Winckel between the contextual role of a preamble and its constructive role: Winckel, above n 61, 185.

<sup>63</sup> *Wacando v Commonwealth* (1981) 148 CLR 1. See also Heydon, above n 4, 16.

<sup>64</sup> *Wacando v Commonwealth* (1981) 148 CLR 1, 15–16 (Gibbs CJ). See also *Salkeld v Johnson* (1848) 2 Exch 256; 154 ER 487, 499, where it was stated by Pollock CB that while the preamble is undoubtedly part of the Act and may be used to explain it, 'it cannot control the enacting part, which may, and often does, go beyond the preamble'; *Powell v Kempton Park Racecourse Co* [1899] AC 143, 157 where the Earl of Halsbury stated that 'if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment'.

<sup>65</sup> *Wacando v The Commonwealth* (1981) 148 CLR 1, 23 (Mason J). See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2006), 153.

These conflicting views would be tested sharply by proposed s 51A. The words of the substantive provision would appear to be plain, clear and unambiguous. They confer on the Commonwealth Parliament power 'to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples'. This is a plenary power. The High Court has held that the words 'peace, order and good government' are not words of limitation and do not confer on the courts the power to strike down laws on the ground that they do not promote or secure the 'peace', 'order' or 'good government' of the nation.<sup>66</sup> Nor do the words 'peace, order and good government' permit a court to review the exercise of a legislative power on the ground of its 'reasonableness'.<sup>67</sup> As Kirby J has noted, the words 'peace, order and good government' are words of grant which should 'be given the widest possible operation, consistent with the vast variety of matters upon which such a legislature may be expected to exercise its powers'.<sup>68</sup>

The words 'with respect to' have always been interpreted as applying with their full generality. A power to make laws 'with respect to' a subject or person 'is as wide a legislative power as can be created'.<sup>69</sup> Unlike the race power, proposed s 51A does not even contain the words 'for whom it is deemed necessary to make special laws', excluding all possibility of an ambiguous use of 'for' or any implications that could otherwise be drawn from 'necessary' or 'special'.

The only words left then, from which to attempt to draw ambiguity, are 'Aboriginal and Torres Strait Islander peoples'. While the word 'peoples' might give rise to definitional uncertainties and perhaps implications drawn from the application of the term 'peoples' in international law,<sup>70</sup> the words are plainly and clearly directed at particular groups of people and there is no obvious textual hook in the terms of the grant of power for any implication that the power is limited to laws for the 'advancement' or 'benefit' of those groups. In short, there is no textual indication of 'ambiguity'.

Moreover, the High Court has constantly proclaimed that legislative grants of power 'should be construed with all the generality which the words used admit'.<sup>71</sup> The

<sup>66</sup> *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

<sup>67</sup> *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 408-9 [9] (Gaudron, McHugh, Gummow and Hayne JJ) and 424-5 [55] (Kirby J) rejecting the approach of the English Court of Appeal in *R v Secretary of State for the Foreign and Commonwealth Office; Ex parte Bancoult* [2011] QB 1067, [57] (Laws LJ) and [71] Gibbs J.

<sup>68</sup> *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 425 [55] (Kirby J).

<sup>69</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 186 (Latham CJ). See also *New South Wales v Commonwealth* (1990) 169 CLR 482, 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) and 506 (Deane J); *Re F; Ex parte F* (1986) 161 CLR 376, 388 (Mason and Deane JJ).

<sup>70</sup> See, eg, the right to 'self-determination' conferred upon 'peoples' by the *International Covenant on Civil and Political Rights*, and the controversy concerning the use of 'peoples' in the *Declaration on the Rights of Indigenous Peoples*: Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.

<sup>71</sup> *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ). See also *New South Wales v Commonwealth* (1990) 169 CLR 482, 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ); *Grain Pool (WA) v Commonwealth* (2000) 202

mere fact that a power might be abused has not been regarded by the High Court as being a good reason for giving it a narrowed meaning.<sup>72</sup>

On the other hand, the High Court could take the approach of Mason J in *Wacando*, taking into account the purpose of a provision, identified by reference to its preamble, in order to ascertain whether there is an ambiguity which can be resolved by reference to the preamble. But even if it did so, there are still substantial reasons, discussed in the following section, why it might not conclude that the reference to 'advancement' qualifies the scope of the legislative power conferred by s 51A.

## 2. 'Advancement' as a limitation on legislative power

Assuming, for present purposes, that the High Court would take into account the preamble to s 51A when determining the scope of the grant of power in s 51A, what might be the result?

First, the Court might legitimately interpret the preamble as not being intended to limit the conferral of legislative power at all. This is because the preamble, on its face, merely acknowledges a 'need' which Parliament may take into account in framing its legislation. It does not appear to impose a requirement to satisfy that need or only act in the exercise of the power conferred under s 51A in satisfaction of that need.

This approach is supported by reading all four paragraphs of the preamble together as a whole. There is nothing to suggest that the fourth paragraph of the recital has any status higher than the other three paragraphs which: (a) acknowledge the prior occupation of Australia by Aboriginal and Torres Strait Islander peoples; (b) acknowledge their relationship with their traditional lands and waters;<sup>73</sup> and (c) evince respect for 'the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples'. It would seem unlikely that the High Court would interpret these recitals differently, or that it would interpret the power granted in s 51A as confined to laws with respect to the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters and their continuing cultures, languages and heritage, but only where such laws secure their advancement. If so, for example, this might exclude the enactment of laws concerning health programs.

Apart from the way the preamble is expressed, other reasons why the High Court might shy away from interpreting 'advancement' as a limitation on Commonwealth legislative power include: (a) problems with the identification of what amounts to the 'advancement' of a people; (b) concern about adjudicating upon what are essentially political questions; and (c) problems with the potential entrenchment of measures for the 'advancement' of Aboriginal and Torres Straits Islander peoples.

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CLR 479, 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Singh v Commonwealth* (2004) 222 CLR 322, 384 [155] (Gummow, Hayne and Heydon JJ).

<sup>72</sup> *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43 [32] (Gleeson CJ, Gummow and Hayne JJ); *Kartinyeri* (1998) 195 CLR 337, 380-1 [87]-[88] (Gummow and Hayne JJ); *Singh v Commonwealth* (2004) 222 CLR 322, 384 [155] (Gummow, Hayne and Heydon JJ).

<sup>73</sup> Note that the acknowledgement of a 'continuing' relationship with 'traditional' lands and waters may be intended to affect native title laws – eg to avoid the need to prove such a continuing relationship, because it is recognised by the Constitution itself.



(a) *The meaning of 'advancement'*

The notion of 'advancement' arises in a similar context in relation to 'special measures' in art 1(4) of the *Convention on the Elimination of All Forms of Racial Discrimination*,<sup>74</sup> and is applied in the 'special measures' provision in s 8(1) of the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*'). A 'special measure' is one 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'. There is also a proviso that 'such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.' So they must be temporary measures.

The UN Committee on the Elimination of Racial Discrimination described the notion of advancement in the Convention as follows:

The notion of 'adequate advancement' in article 1, paragraph 4, implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination. Such disparities include but are not confined to persistent or structural disparities and de facto inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality.<sup>75</sup>

'Advancement', in this context, means bringing the group up to the same level of enjoyment of human rights and fundamental freedoms as others. How one assesses whether a measure is for the 'advancement' of a group would involve an assessment of the extent to which there are disparities in the enjoyment of human rights and fundamental freedoms affecting the group and an assessment of whether the measure is designed to alleviate those disparities. It is not simply the case of giving a 'benefit' to a group.

As Morris has noted, the 'question as to what constitutes benefit or advancement for the purposes of a legitimate special measure is highly subjective'.<sup>76</sup> For example, some might claim that laws permitting the removal of Aboriginal children from their parents, in circumstances where there is extreme poverty or abuse, amount to a special measure for their advancement, whereas others would argue that it is discrimination against them. Similar arguments can and have been made with respect to laws restricting alcohol consumption or access to pornography in Aboriginal communities.<sup>77</sup> It may be the case that laws that appear to be punitive and which remove rights from racial groups (such as the right to consume alcohol) are regarded

<sup>74</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

<sup>75</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*' 75<sup>th</sup> sess, UN Doc CERD/C/GC/32 (24 September 2009)

<sup>76</sup> Shireen Morris, 'Indigenous Constitutional Recognition, Non-Discrimination and Equality Before the Law – Why Reform is Necessary' (2011) 7(26) *Indigenous Law Bulletin* 7, 10. See also Geoffrey Lindell, 'The Races Power Problem: Other Observations' (1998) 9 *Public Law Review* 265, 275.

<sup>77</sup> See *Morton v Queensland Police Service* (2010) 240 FLR 269; and *R v Maloney* (2012) 262 FLR 172.

as laws for the advancement of persons within that racial group, such as women and children.<sup>78</sup>

Brennan J, in his judgment in *Gerhardy v Brown*, added a further element in his assessment of 'advancement':

A special measure must have the sole purpose of securing advancement, but what is "advancement"? To some extent, that is a matter of opinion formed with reference to the circumstances in which the measure is intended to operate. "Advancement" is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries.... The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.<sup>79</sup>

This view as to the need for the consent or support of the group the subject of the special measure has not been followed by lower courts. In cases of divided communities, achieving consent may be impossible and consultation can be extremely difficult. While courts have regarded prior consultation on special measures as highly desirable, they have held that it should not be regarded as a condition for the validity of special measures.<sup>80</sup> In *Bropho v Western Australia*, a law was held to be a special measure even though a number of the women whose interests and rights the law was intended to advance objected to its application.<sup>81</sup>

**(b) Avoidance of the making of political judgments**

The High Court has shown extreme reluctance to have thrust upon it the responsibility of making 'political value judgments'. This has been seen in cases concerning the application of the race power, in which the Court has sought to avoid making a political value judgment about the needs of the people of a race or the threats or problems that they face.<sup>82</sup> It has also been seen in cases concerning 'special measures' and whether they have been taken for the sole purpose of the 'advancement' of a racial group.<sup>83</sup> The Court regards itself as ill-equipped to make such assessments. This is because the adversarial court procedure is not suited to ensuring that the Court has all the appropriate evidence to make a fully informed assessment, unlike a Parliament.<sup>84</sup> It is also because there is no 'legal criteria' by which such an assessment can be made.<sup>85</sup>

It is therefore likely that the High Court will not be amenable to interpreting the reference to 'advancement' in the preamble to the proposed s 51A as imposing a

<sup>78</sup> *R v Maloney* (2012) 262 FLR 172, 194-5 [62] (McMurdo P); *Bropho v Western Australia* [2007] FCA 519, [577] (Nicholson J).

<sup>79</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J).

<sup>80</sup> *Bropho v Western Australia* [2007] FCA 519, [570] (Nicholson J); *Morton v Queensland Police Service* (2010) 240 FLR 269, 280 [31] (McMurdo P) and 298 [114] (Chesterman JA); *R v Maloney* (2012) 262 FLR 172, 205-6 [104] (Chesterman JA).

<sup>81</sup> *Bropho v Western Australia* [2007] FCA 519, [570] (Nicholson J).

<sup>82</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373, 460 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Kartinyeri* (1998) 195 CLR 337, 365 [38] (Gaudron J).

<sup>83</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 138 (Brennan J).

<sup>84</sup> *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

<sup>85</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 138 (Brennan J).

limitation on the legislative power of the Commonwealth, for this would require the assessment of the validity of laws by reference to an essentially political question.

(c) *The potential entrenchment of laws for 'advancement'*

In *Kartinyeri* it was argued that s 51(xxvi) could only support laws that were for the 'benefit' of Aboriginal people. One of the problems with restricting legislative power to the enactment of laws that are 'beneficial', is that unless some other rule applies, such laws would effectively become entrenched to the extent that any future law removing or limiting the benefit would not be beneficial and therefore not be supported by a head of power (unless another head of power could be found). This would have a ratchet effect – the only way to alter or repeal such laws would be to enact an amending or repealing law that was even *more* beneficial. Existing beneficial laws, even when they became outmoded or inappropriate, could not be amended or repealed unless some kind of greater benefit was provided.

In *Kartinyeri*, three Justices rejected this scenario by applying a further rule – that the power to enact a law includes the power to repeal it, subject to any manner and form constraint.<sup>86</sup> Brennan CJ and McHugh J stressed that one Parliament 'cannot deny or qualify the power of itself or of a later Parliament to exercise' the power to repeal or amend a law.<sup>87</sup> Their Honours agreed with the principle stated by Dawson J in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* that a 'law which effects the repeal of another law is not a law with respect to repeal; its subject-matter is the subject-matter of the law which is repealed.'<sup>88</sup> If this were so, however, it may well be argued that if the head of power were one to make laws with respect to the advancement of Aboriginal and Torres Strait Islander peoples, then the repeal of such a law would be within power as a law 'with respect to' the advancement of Aboriginal and Torres Strait Islander peoples, because it concerned their advancement by removing it. If taken more broadly, such an interpretation could undermine the point of the constraint.

Kirby J dissented on the issue of entrenchment. He concluded that:

The aphorism that "what Parliament may enact it may repeal" must give way to the principle that every law made by the Parliament under the Constitution must be clothed in the raiments of constitutional validity.<sup>89</sup>

Hence there is still some dispute upon this point. Moreover, while *Kartinyeri* dealt with repeal and a form of partial repeal which simply diminished the scope of the application of the beneficial law, it did not deal directly with an amendment which affected a benefit by changing the way it operated to make it less beneficial or which replaced an existing benefit with something more detrimental. The logic of the position taken by Brennan CJ and McHugh J in *Kartinyeri*, is that if the power were confined to the enactment of beneficial laws and Parliament wanted to create a less beneficial regime, it would have to repeal laws containing existing benefits and then set up a new regime which was overall beneficial, but less beneficial than the previous scheme, rather than simply amend the existing law to apply the new provisions. For example, if

<sup>86</sup> *Kartinyeri* (1998) 195 CLR 337, 358 [19] (Brennan CJ and McHugh J) and 368-70 [47]-[49] (Gaudron J).

<sup>87</sup> *Kartinyeri* (1998) 195 CLR 337, 357 [16] (Brennan CJ and McHugh J).

<sup>88</sup> *Kartinyeri* (1998) 195 CLR 337, 358 [19] (Brennan CJ and McHugh J), quoting *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 459 (Dawson J).

<sup>89</sup> *Kartinyeri* (1998) 195 CLR 337, 422 [175] (Kirby J).

s 51(xxvi) was a power to make laws that were only to the benefit of Aboriginal people, and if the *Native Title Act 1993* (Cth) ('*Native Title Act*'), as originally enacted, was regarded as a beneficial law, then if the 1998 amendments to that Act were not beneficial because they included the validation of additional extinguishment of native title, then that amending Act could not be validly enacted. Yet, it would have been valid instead to repeal the entire *Native Title Act* and then enact a new (lesser) regime to protect native title, as overall this would be more beneficial than no protection at all.<sup>90</sup>

This shows the serious structural problems and logical inconsistencies that arise from imposing a condition of 'benefit' on the power to enact laws. The use of the term 'advancement' may not be quite as bad, because a law may still be for the 'advancement' of a group, even if the level of the advancement is lower than existed previously (unlike 'benefit', which tends to be assessed against existing benefits and therefore has a ratchet effect). Nonetheless, because of all the complexities that arise concerning the repeal, partial repeal and amendment of a law enacted pursuant to a power that is limited to benefit or 'advancement', it is likely that the High Court would be reluctant to interpret the preamble to proposed s 51A in such a way as to give rise to all these problems.

### 3. Deference to the legislature and the assessment of overall benefit

If, despite the problems outlined above, the High Court interpreted s 51A as being confined to supporting laws for the advancement of Aboriginal and Torres Strait Islander peoples, then the next question is whether the courts will defer to the legislature in its assessment of whether a law is for the advancement of a people and whether the assessment of advancement will be based upon the entire scheme of the Act, rather than each particular provision, as assumed by the Expert Panel. This leads to the further assumption that the High Court will not hold a provision in an Act invalid even though it is not for the advancement of Aboriginal and Torres Strait Islander peoples and is supported by no other head of power, as long as the Act as a whole is one for their advancement.

#### (a) Deference to the legislature, objective tests and proportionality

One way for the High Court to avoid having to make a political value judgment concerning 'advancement' is to defer to the judgment of the legislature as to whether the law is for the advancement of Aboriginal and Torres Strait Islander peoples. This is what it has done in relation to the assessment of whether special laws are necessary for any race and the assessment of whether a special measure is for the advancement of a race. However, what kind of supervisory jurisdiction the High Court could exercise to prevent abuse of the power, or what kind of objective test it might apply to assess the Parliament's judgment, remains uncertain as a number of different approaches have been suggested in these cases, leaving the matter unsettled.

For example, in *Western Australia v Commonwealth*, six Justices concluded that any political value judgment concerning the necessity for making a special law with respect to a race must be made by the Parliament. They nevertheless left open the possibility

<sup>90</sup> Note also the argument put by the Solicitor-General of South Australia that the amending Act must be read with the principal Act when assessing benefit in order to avoid this absurd result: Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCA Trans 13 (6 February 1998) 48-9 (Mr Selway).

that the Court might retain some kind of supervisory jurisdiction to 'examine the question of necessity against the possibility of a manifest abuse of the races power'.<sup>91</sup>

In *Kartinyeri*, Gaudron J tried to balance the need for the Court to avoid having to make political value judgments against the need for it to assess the constitutional validity of laws, by giving to the Court the role of deciding whether the law is 'reasonably capable of being viewed as appropriate and adapted to a real and relevant difference which the Parliament might reasonably judge to exist'.<sup>92</sup> Gummow and Hayne JJ accepted that such judgments should be left to the Parliament to make, but noted that in the remote possibility of extreme legislation, other principles might apply that would permit the Court to strike it down.<sup>93</sup> Kirby J, however, was sceptical about the effectiveness of such judicial supervision in cases of 'manifest abuse' of the power and preferred, instead, to imply a limitation on the power so that it 'does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race'.<sup>94</sup>

In *Gerhardy v Brown*, Brennan J took the view that a court could not undertake the political assessment as to whether a law was for the 'advancement' of a group and had to rely upon the assessment made by the Parliament. He observed that there were no 'legal criteria' available to determine whether such a political assessment was correct and that a court could go 'no further than determining whether the political branch acted reasonably in making its assessment'.<sup>95</sup> Dawson J considered that it was for the legislature to decide, and provided that the law was capable of being regarded as for the advancement or protection of a racial group, it was not for the Court to inquire further.<sup>96</sup> Deane J went further, taking the view that a court could consider whether the measure could reasonably be considered as appropriate and adapted to achieving the sole purpose of advancement.<sup>97</sup> Mason J expressed some concern that part of the law was more stringent than necessary but thought that overall the entire regime was 'appropriate and adapted' to the requirements of a special measure.<sup>98</sup> Since *Gerhardy*, in cases concerning 'special measures' and 'advancement', the courts have generally taken the view that the assessment of 'advancement' is a political question and if it was reasonably open to the Parliament to take the view that its measure was for the advancement of the racial group in question, then a court should not inquire any further.<sup>99</sup>

<sup>91</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373, 460 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>92</sup> *Kartinyeri* (1998) 195 CLR 337, 368 [45] See also: 366-7 [41]-[42] (Gaudron J).

<sup>93</sup> *Kartinyeri* (1998) 195 CLR 337, 378-9 [82] and 381 [89] (Gummow and Hayne JJ).

<sup>94</sup> *Kartinyeri* (1998) 195 CLR 337, 411 [152]. See also 414-17 [159]-[165].

<sup>95</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 138 (Brennan J).

<sup>96</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 161-2 (Dawson J).

<sup>97</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 149 and 153 (Deane J).

<sup>98</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 105 (Mason J).

<sup>99</sup> *Morton v Queensland Police Service* (2010) 240 FLR 269, [32] (McMurdo P); *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing* [2010] QCA 37, [75] (McMurdo P) (although note that she also appeared to apply a proportionality test at [90]); [210]-[211] (Keane JA) (who rejected the application of a proportionality test as exalting judicial power over the legislature); and *Bropho v Western Australia* [2007] FCA 519, [573] (Nicholson J). Note, however, the far more comprehensive test set out by Bell J in *Lifestyle Communities Ltd (No 3) (Anti Discrimination)* [2009] VCAT 1869 at [266]: 'In summary, the purpose must be

On this basis, it is likely that if the High Court were to hold that the power in proposed s 51A to make laws was limited to laws for the advancement of the relevant 'people', then it would defer to Parliament's assessment that it was a law for the advancement of the 'people' concerned, but either:

- (a) decide for itself whether Parliament could 'reasonably' have made such an assessment;
- (b) decide for itself whether the law is 'reasonably capable of being viewed as appropriate and adapted' to achieving the object of the advancement of the 'people'; or
- (c) retain a supervisory jurisdiction to strike down the validity of a law that is a 'manifest abuse'<sup>100</sup> of the power.

Another possibility, however, is that the High Court might interpret the preambular reference to 'advancement' as converting what would otherwise be a subject-matter power in s 51A into a purposive power – that is, a power to make laws for the purpose of the advancement of Aboriginal and Torres Strait Islander peoples. If the High Court accepted that it was a purposive power,<sup>101</sup> then it would be likely to employ a proportionality test in ascertaining whether it had been validly exercised.<sup>102</sup> As Dawson J noted in *Leask v Commonwealth*:

To determine the validity of a law said to be supported by a purposive power, a court must ask whether it is a law for the specified purpose, and the court may have to inquire into whether the law goes further than is necessary to achieve that purpose. That is an exercise in proportionality.<sup>103</sup>

The relevant test as set out by Gaudron J in *Re Tracey; Ex parte Ryan* is whether the law 'is reasonably capable of being regarded as appropriate and adapted to the object

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necessary, genuine, objective and capable of justification by positive proof. Measures not reasonably likely to achieve the remedial purpose are not regarded as being for that purpose. Nor will measures which are a disproportionate means of achieving that end.' See also *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149, [47] and [61]–[62] where Crennan J took a subjective and objective approach, which also involved a proportionality test.

<sup>100</sup> Note Gageler's view that 'manifest abuse' will only arise 'where Parliament fails to form the necessary judgment at all or fails to form that judgment on rational grounds': Stephen Gageler, 'The Races Power Problem: The Case for Validity' (1998) 9 *Public Law Review* 270, 272. Compare Reilly's view that this test allows the court to rely on natural or moral authority to strike down a law that would otherwise be within power: Alex Reilly, above n 10, 497.

<sup>101</sup> Note the transcript in *Kartinyeri* which shows an attempt by counsel for the Plaintiff to argue that the race power was a purposive power because of the use of the word 'special', and McHugh J's objection that it could not be purposive because it was expressed in the passive voice: Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 13 (5 February 1998) 26.

<sup>102</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, 322 (Brennan J); *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 596–7 (Gaudron J); *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ).

<sup>103</sup> *Leask v Commonwealth* (1996) 187 CLR 579, 606 (Dawson J).

which gives the law in question its character as a law with respect to the relevant head of power'.<sup>104</sup> In the case of proposed s 51A, that object would be advancement.

In the case of purposive powers, there may still be a degree of deference to the assessment of the legislature, but the ultimate power to determine the validity of the law rests with the Court. The defence power in s 51(vi) of the *Constitution* provides a classic example. As Dixon J noted in *Stenhouse v Coleman*, the Court is not going to make its own judgment about the effectiveness of defence measures as this is a matter for the judgment of the Executive or the Parliament as the case may be. 'But great as must be the weight given to these considerations, it is finally the court which must form and act upon a judgment upon the question of whether the legislation, be it direct or be it subordinate, is a true exercise of the legislative power with respect to defence.'<sup>105</sup> This point was reinforced more recently by Brennan J in *Polyukhovich v Commonwealth*, where he concluded that '[t]he formation of the critical judgment as to whether the means adopted by a law are appropriate and adapted to serve defence purposes is entrusted to the Court'.<sup>106</sup>

Dixon J noted in *Stenhouse v Coleman* that 'purpose must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth'.<sup>107</sup> The test of purpose is an objective one – the Court will not take into account the subjective intention of legislators.<sup>108</sup>

A further possibility is that the Court might decide that there is an implied limitation on the Commonwealth's legislative power that it not 'discriminate' adversely against Aboriginal people and that in assessing whether there is discrimination of this kind, it will employ a proportionality test as it has done in relation to discrimination under ss 92,<sup>109</sup> 99<sup>110</sup> and 117<sup>111</sup> of the *Constitution*. The test would be 'whether the different treatment is reasonably capable of being seen as appropriate and adapted to a relevant difference'.<sup>112</sup>

**(b) Overall 'advancement', tacking and tipping points in assessment**

If the High Court held that 'advancement' qualifies the power to make laws with respect to Aboriginal and Torres Strait Islander peoples, the question would then arise as to whether every provision that is purportedly supported by this head of power must be for 'advancement' or whether the High Court would look at the scheme or Act

<sup>104</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 597 (Gaudron J); *Langer v Commonwealth* (1996) 186 CLR 302, 325 (Dawson J). Note, however, that this proportionality test for purposive powers was at its height during the Mason Court. Later cases concerning the defence power and the nationhood power, such as *Thomas v Mowbray* (2007) 233 CLR 307 and *Pape v Commissioner of Taxation* (2009) 238 CLR 1, while not overruling this test, have not applied it either.

<sup>105</sup> *Stenhouse v Coleman* (1944) 69 CLR 457, 470 (Dixon J).

<sup>106</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 593 (Brennan J).

<sup>107</sup> *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).

<sup>108</sup> *Byrnes v Kendle* (2011) 243 CLR 253, 283 [97] (Heydon and Crennan JJ).

<sup>109</sup> *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), 480 (Gaudron and McHugh JJ).

<sup>110</sup> *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, 424–25 [89]–[91] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

<sup>111</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, 571–3 (Gaudron J).

<sup>112</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, 574 (Gaudron J).

in its entirety for the purposes of the assessment of whether it was a law for the advancement of Aboriginal and Torres Strait Islander peoples. This is an important issue because in most cases any scheme will involve compromises. For example, in relation to native title, the *Native Title Act* protected ongoing native title rights but also validated the extinguishment of other native title rights.

Normally, the High Court will assess each challenged provision of a law to see whether or not it is supported by a head of power or is incidental to the exercise of a head of power. If it is not, it is invalid. If it is not severable from the rest of the Act, the entire Act may be held invalid.<sup>113</sup> Section 12 of the *Acts Interpretation Act 1901* (Cth) provides that '[e]very section of an Act shall have effect as a substantive enactment...'. Hence, there is a good case for the argument that if a provision of an Act was not supported by s 51A because it was not a law with respect to the 'advancement' of Aboriginal and Torres Strait Islander peoples, and it was not supported by any other head of power, then it would be invalid. In those circumstances, unless it could be severed, the entire Act would be invalid.

However, when it comes to amorphous assessments such as 'benefit' or 'advancement', the High Court might be inclined to have regard to the entire scheme of an Act. This might particularly be the case if the Court has deferred to the legislature's judgment of 'advancement' and is either applying a lesser test of whether the Parliament could 'reasonably' have come to that view, or a test of whether the law is reasonably capable of being seen as appropriate and adapted to the advancement of the people concerned. For example, in *Western Australia v Commonwealth* the High Court held that the *Native Title Act* was 'special' because it conferred 'a benefit protective of [the] native title [of Aboriginal and Torres Strait Islander people]',<sup>114</sup> even though the Act validated the extinguishment of native title in some cases by past acts. The overall scheme was to the benefit of Aboriginal people and Torres Strait Islanders.

Equally, in *Kartinyeri*, Gaudron J considered that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1998* (Cth) ('*Heritage Protection Act*'), as amended, remained a 'law for the protection and preservation of areas and objects of significance in accordance with Aboriginal tradition'<sup>115</sup> despite the reduction of the area of its application. She read the amending Act and the principal Act together in making this assessment. Kirby J, however, took a different view. He said that even if the *Heritage Protection Act* and the amending Act were read together as a composite enactment, it still discriminated against Aboriginal people in respect of the Hindmarsh Island Bridge area because the exception or exclusion operated against Aboriginal people by reference to their race.<sup>116</sup> It is unclear whether, as a consequence, he would then have also held that the *Heritage Protection Act* was invalid. It does appear, however, that he did not accept the 'overall benefit' argument and seemed to require that an Act, whether it be an amending Act or a principal Act, be wholly and completely for the benefit of the Aboriginal people. So the issue remains contentious.

<sup>113</sup> On severance, see: *Pidoto v Victoria* (1943) 68 CLR 87; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

<sup>114</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373, 462.

<sup>115</sup> *Kartinyeri* (1998) 195 CLR 337, 370 [49] (Gaudron J).

<sup>116</sup> *Kartinyeri* (1998) 195 CLR 337, 420-21 [172] (Kirby J).



A further concern might arise in relation to 'tacking'.<sup>117</sup> If a law must be for the advancement of Aboriginal peoples, and is assessed as being overall for their advancement, could this be used as cover for the tacking on of adversely discriminatory provisions which would take their validity from the overall assessment? This issue arose in *Vanstone v Clark*<sup>118</sup> in relation to 'special measures'. It was argued that the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('ATSIC Act') was a special measure for the advancement of Aboriginal and Torres Strait Islander people and that this shielded all provisions of the Act and any delegated legislation made under it from attack for breach of the *Racial Discrimination Act*. At first instance, Gray J held that even if the ATSIC Act amounted to a special measure, this did not exempt its individual provisions from being held to be inconsistent with the *Racial Discrimination Act*.<sup>119</sup> On appeal, Weinberg J agreed, observing:

In my view, this submission cannot be accepted. It involves a strained, if not perverse, reading of s 8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.<sup>120</sup>

Even if one accepts that the High Court will focus on whether an overall scheme is for 'advancement' rather than particular provisions, this gives rise to the further difficulty that what is for the 'advancement' of a group may change from time to time, with the potential that a law that was valid when enacted may lose its constitutional support over time with the change of circumstances.<sup>121</sup>

In addition, an amending Act, by adding detriment to a principal Act that was enacted for the advancement of Aboriginal and Torres Strait Islander peoples, might tip the balance so that it ceases to be a law for their advancement and loses the support of a head of power, becoming invalid. There was argument about this issue in *Kartinyeri*, although it was not resolved. Brennan CJ and McHugh J simply observed that it was 'not necessary to consider the hypothetical case postulated by Mr Jackson QC of a repealing or amending Act which so changed the character of an earlier Act as to deprive that Act of its constitutional support'.<sup>122</sup> Gaudron J seemed to go a little further noting that 'in the case of the amendment or partial repeal of a law enacted under s 51, a question may arise whether the law, as it stands after its alteration retains its character as a law with respect to a matter within Commonwealth legislative power'.<sup>123</sup> She concluded that the *Heritage Protection Act*, as amended, remained a law for the protection and preservation of areas and objects of significance to Aboriginal people and therefore continued to be a valid Act under s 51(xxvi).<sup>124</sup>

<sup>117</sup> The concept of tacking most commonly arises in relation to money bills where the Senate's powers are restricted. See s 55 of the *Constitution*.

<sup>118</sup> (2005) 147 FCR 299.

<sup>119</sup> *Clark v Vanstone* (2004) 211 ALR 412, 448-49 [115] (Gray J).

<sup>120</sup> *Vanstone v Clark* (2005) 147 FCR 299, 354 [209] (Weinberg J).

<sup>121</sup> A similar problem arises with the defence power, and Gaudron J also thought it arises in relation to the race power: *Kartinyeri* (1998) 195 CLR 337, 367 [43] (Gaudron J).

<sup>122</sup> *Kartinyeri* (1998) 195 CLR 337, 356 [15] (Brennan CJ and McHugh J).

<sup>123</sup> *Kartinyeri* (1998) 195 CLR 337, 368-9 [47] (Gaudron J).

<sup>124</sup> *Kartinyeri* (1998) 195 CLR 337, 370 [49] (Gaudron J).

On the whole, the High Court has been most reluctant to hold that a provision in an amending Act can render an entire principal Act invalid by changing its character or infecting it with some kind of constitutional error. In *Air Caledonie International v The Commonwealth*, for example, despite the express words of s 55 of the *Constitution*, the Court held that the principal Act remained valid and that it was the amending Act which was rendered invalid because it would have introduced a taxation measure into an Act which contained non-taxation provisions.<sup>125</sup> A similar approach was taken by the High Court in *Commissioner of Taxation (Cth) v Clyne*, regarding whether an amending Act could render a principal taxation Act invalid.<sup>126</sup> The principle is based upon presumed parliamentary intention – that the Parliament would not intend that any defect in its amending Act should render the principal Act invalid. It is likely, therefore, that if an amending Act would have the effect of rendering the principal Act invalid, the High Court would hold that the amending Act was itself invalid, so that it never had any effect upon the principal Act.

#### 4. Benefit/advancement of peoples, sub-groups and individuals

In *Kartinyeri*, it had been argued by the Plaintiffs that s 51(xxvi) only supported laws with respect to the whole race, not sub-groups of that race.<sup>127</sup> The Solicitor-General for NSW made a more sophisticated argument that a law may benefit only some members of a race, excluding others from the benefit, if the exclusion has a rational and proportionate connection with a legitimate governmental purpose.<sup>128</sup>

Neither argument was accepted by the Court. Gaudron, Gummow and Hayne JJ all noted that such arguments conflicted with the general principle that 'legislative power is to be construed with all the generality that its words permit'.<sup>129</sup> Gummow and Hayne JJ pointed to a statement in *Commonwealth v Tasmania* ('*Tasmanian Dam Case*') that the reference to the people of any race was 'apposite to refer to any identifiable racial sub-group among Australian Aboriginals'<sup>130</sup> and the fact that the validity of the *Native Title Act* was upheld despite the law being one that only affected the holders of native title, rather than all Aboriginal people.<sup>131</sup> They rejected the argument that laws under s 51(xxvi) had to apply to all people of the Aboriginal race, rather than sub-groups.<sup>132</sup> They also observed that '[o]nce it is accepted, as it has been, that a law may make provision for some only of a particular race, it follows that a valid law may operate differentially between members of that race.'<sup>133</sup>

<sup>125</sup> *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462.

<sup>126</sup> *Commissioner of Taxation v Clyne* (1958) 100 CLR 246, 267 (Dixon CJ). For another example, see *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, where even though the amending Act was required to be read as one with the principal Act, only the amending Act was held invalid.

<sup>127</sup> Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 13 (5 February 1998) 16–17 (Mr Spigelman).

<sup>128</sup> Transcript of Proceedings, *Kartinyeri v Commonwealth* [1998] HCATrans 13 (5 February 1998) 63–4 (Mr Katz).

<sup>129</sup> *Kartinyeri* (1998) 195 CLR 337, 368 [46] (Gaudron J) and 377 [76] (Gummow and Hayne JJ).

<sup>130</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J). See also: Eastick, above n 16, 519.

<sup>131</sup> *Kartinyeri* (1998) 195 CLR 337, 377–8 [77] (Gummow and Hayne JJ).

<sup>132</sup> *Kartinyeri* (1998) 195 CLR 337, 378 [78] (Gummow and Hayne JJ).

<sup>133</sup> *Kartinyeri* (1998) 195 CLR 337, 379 [84] (Gummow and Hayne JJ).

Gaudron J also concluded that to interpret s 51(xxvi) as supporting only laws with respect to *all* Aboriginal people 'would either require that the power not be used [where there is a genuine difference between people of the same race] or that it be used to treat all persons of the race in question differently from people of other races notwithstanding that the circumstances of some members of that race might be no different from the circumstances of those not affected by that law.'<sup>134</sup> Kirby J agreed that 'special laws' may be needed to address the needs of subgroups or particular categories of the people of a particular race. If not, the scope of the power would be unduly limited, and such a limitation 'ought not be accepted'.<sup>135</sup>

This highlights the problem that the circumstances of the people of a race (or indeed, a 'people') will not all be the same. Tying the notion of 'advancement' to that of 'race' or 'peoples' is inherently problematic, both from the point of view of ascertaining the membership of the group to which the law is directed and in identifying whether a law is for the 'advancement' of that group. Anthony Dillon, in discussing the Government policies addressed as 'closing the gap' between Aboriginal and non-Aboriginal Australians, has made the point that not all Aboriginal Australians are in the same position and not all need advancement:

There are many Aboriginal-identifying Australians who have a standard of living comparable to most other Australians in terms of health and access to modern services. In sum, they are not disadvantaged.

Perhaps the gap we should be focusing on is the one that separates Aboriginal Australians living in poverty and sickness from those who are, on many dimensions, indistinguishable from other Australians....

[W]hen it comes to allocating public funds for closing the gap between Aboriginal and non-Aboriginal people, perhaps we should start with closing the gap between those in most and those in least need within the Aboriginal-identifying population – even to the point of denying "special treatment" to non-needy Aboriginal people who claim such treatment simply on the basis of their Aboriginal identity....

To allocate resources on the basis of race identity alone is not helpful for many Aborigines who find themselves unable to even reach the bottom step of the ladder to a better life.

We need to focus on need instead of race when addressing the problems of poverty, sickness, homelessness, education and unemployment.<sup>136</sup>

Proposed s 51A would provide a power to make laws with respect to 'peoples' rather than individuals. This suggests that the law must be directed to particular identified 'peoples' or all Aboriginal and Torres Strait Islander 'peoples', rather than those individuals who are in the most need. It suggests that the membership of a 'people' must be identifiable and, assuming that advancement is taken to be a qualification on the legislative power, that advancement must be assessed in relation to each particular 'people' to which the law applies. This is likely to be a very difficult assessment to make, given the potential diversity of needs within a 'people'.

<sup>134</sup> *Kartinyeri* (1998) 195 CLR 337, 368 [46] (Gaudron J).

<sup>135</sup> *Kartinyeri* (1998) 195 CLR 337, 395 [122] (Kirby J).

<sup>136</sup> Anthony Dillon, 'Closing the Gap must Re-Focus', *The Australian* (Sydney), 23 April 2012, 12. A similar view has been expressed by Marcia Langton: Marcia Langton, 'Indigenous Exceptionalism and the Constitutional "race power"' (Speech delivered at the Melbourne Writers Festival, Melbourne, 26 August 2012) <<http://www.youmeunity.org.au/downloads/8f2d6396820886086f16.pdf>>.

### Relationship between s 51A and other heads of power

The Expert Panel also gave consideration to the question of how proposed s 51A would relate to other heads of power in the *Constitution*. The power is expressly made 'subject to this Constitution' as are the powers under s 51. The Expert Panel observed:

An issue raised during the Panel's legal consultations was whether a new power to legislate for the benefit of Aboriginal and Torres Strait Islander peoples would prevent other heads of power being used to enact laws applicable to them. On the basis of legal advice, the Panel does not consider that any express words would need to be included to make clear that laws enacted in reliance on other heads of power would apply on a non-discriminatory basis to Aboriginal and Torres Strait Islander Australians and all other Australians alike. Further, the Panel is satisfied that such a power would not enlarge Commonwealth powers beyond those already possessed under section 51(xxvi) and hence would not impact in any way on State powers.<sup>137</sup>

In particular, an issue may arise as to the relationship between proposed s 51A and s 122 of the *Constitution*, which gives the Commonwealth Parliament plenary power to make laws with respect to the territories. Would any implied limitation on the scope of proposed s 51A also apply as a limitation on s 122? The Expert Panel took the view that it would. It observed:

A further issue raised in legal consultations was whether the proposed new power in 'section 51A' would qualify or detract from the scope of the territories power in section 122 of the *Constitution*. In *Wurridjal v Commonwealth* the High Court held that the territories power in section 122 was constrained by section 51(xxvi) and the requirement for acquisition of property on just terms. The Court overruled its earlier unanimous 1969 decision in *Teori Tau v Commonwealth*. Accordingly, the Panel considers that there are reasonable arguments for concluding that the territories power in section 122 would also be interpreted to be constrained by 'section 51A'; that is, that the territories power would not be available to permit legislation to be enacted in respect of Aboriginal people in the Northern Territory that could not be validly enacted under 'section 51A'.<sup>138</sup>

The assumption therefore appears to be that the reference in the preamble to s 51A to the 'advancement' of Aboriginal and Torres Strait Islander peoples would not only act as a limitation on the legislative power conferred by that section but also as a form of universal constitutional 'guarantee' that qualifies the scope of s 122 (and other heads of power) so that a law enacted with respect to the territories could not apply to Aboriginal people unless it was for their advancement. This tenuous chain of reasoning was contradicted later in the Report where the Expert Panel explained that the reason for attaching these preambular words to proposed s 51A itself, rather than to s 51 or as a preamble to the whole of the *Constitution*, was to prevent their application to other provisions. The Panel observed that it:

[C]onsiders that "section 51A" with its own embedded preamble should prevent future interpreters of the *Constitution* from deploying the wording of the preamble to the new section so as to alter what would otherwise have been the meaning of other provisions in the *Constitution*.<sup>139</sup>

The Panel noted that proposed s 51A was not drafted in the same manner as s 51(xxvi) of the *Constitution* and that consideration might be given to amending s 122 to make it expressly subject to s 51A, so as to prevent s 122 being used to enact laws

<sup>137</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, above n 1, 151.

<sup>138</sup> *Ibid* 152 (citations omitted).

<sup>139</sup> *Ibid*.

that discriminated adversely against Aboriginal people in the territories. However, it also noted that a general anti-discrimination provision in proposed s 116A would limit s 122, alleviating any such concerns.<sup>140</sup>

In *Wurridjal v Commonwealth* ('*Wurridjal*') it had been argued that the Northern Territory legislation was the subject of dual characterisation. It could be characterised under the territories power in s 122 of the *Constitution* and as a special measure under the race power in s 51(xxvi).<sup>141</sup> According to the earlier case of *Teori Tau v Commonwealth*,<sup>142</sup> the power to make laws with respect to the territories was not subject to the 'just terms' requirements of s 51(xxxi), but the power to make special laws for the people of any race under s 51(xxvi) was subject to s 51(xxxi). In *Wurridjal*, the High Court reversed the prior authority of *Teori Tau*, so that s 122 was made subject to s 51(xxxi).<sup>143</sup> There was therefore no need to determine whether the laws in question could be supported by the race power. The point remains, however, that not all heads of power are subject to the same limitations.<sup>144</sup>

This issue also arose in the *NSW v Commonwealth* ('*Work Choices Case*').<sup>145</sup> There, Kirby J argued that words of limitation included in a head of power, such as 'other than State banking' in s 51(xiii), limit the scope of other constitutional heads of power.<sup>146</sup> Equally, guarantees within heads of power, such as the guarantee of just terms in s 51(xxxi) of the *Constitution*, may limit other heads of power.<sup>147</sup> He concluded that the conciliation and arbitration power in s 51(xxxv) of the *Constitution* should be treated as a guarantee and read as limiting the application of the corporations power in s 51(xx).<sup>148</sup> The majority of the High Court rejected this argument. Their Honours considered that a limit on a head of legislative power will only extend to affect other heads of power if it is a 'positive prohibition or restriction', and even then it is a matter for the Court to decide whether the limitation is intended to be of general application.<sup>149</sup> For example, the trade and commerce power in s 51(i) only extends to inter-state trade and overseas trade, but because there is no positive exclusion of intra-state trade, there is no limitation on other legislative powers, such as the corporations power, supporting laws with respect to intra-state trade. In contrast, the positive exclusion of 'state banking' in s 51(xiii) limits the corporations power in s 51(xx) so that it does not support laws with respect to financial corporations which concern 'State

<sup>140</sup> *Ibid.*

<sup>141</sup> *Wurridjal v Commonwealth* (2009) 237 CLR 309, 314 (argument by R Merkel QC).

<sup>142</sup> *Teori Tau v Commonwealth* (1969) 119 CLR 564 ('*Teori Tau*').

<sup>143</sup> *Wurridjal* (2009) 237 CLR 309, 359 [86] (French CJ), 388 [189] (Gummow and Hayne JJ) and 419 [287] (Kirby J).

<sup>144</sup> Note in particular that powers with respect to 'persons' such as the race power and the aliens power, tend not to be affected by limitations built in to other heads of power: Jennifer Eastick, above n 16, 521.

<sup>145</sup> (2006) 229 CLR 1.

<sup>146</sup> *Work Choices Case* (2006) 229 CLR 1, 208-9 [494]-[496] (Kirby J), relying on the authority of *Bourke v State Bank of New South Wales* (1990) 170 CLR 276.

<sup>147</sup> *Work Choices Case* (2006) 229 CLR 1, 211-13 [501]-[507] (Kirby J) relying on *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>148</sup> *Work Choices Case* (2006) 229 CLR 1, 214-220 [510]-[525] (Kirby J).

<sup>149</sup> *Work Choices Case* (2006) 229 CLR 1, 127 [219] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting from *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 285.

banking'. Their Honours concluded that s 51(xxxv), read as a whole, did not contain any 'positive prohibition or restriction' – it simply defines the scope of the power with respect to the conciliation and arbitration of inter-state disputes. Hence the question did not arise as to whether any positive prohibition might be of general application, affecting other heads of power.<sup>150</sup>

On this basis, the question would be whether the word 'advancement' in the preamble to proposed s 51A amounted to a positive prohibition or restriction on the head of power, rather than merely defining the scope of the power. On its face, it does not appear to be a positive prohibition or restriction and it is therefore unlikely that it would affect other heads of powers unless the court regarded the 'intention' behind the enactment of this provision as supporting such an outcome and was prepared to interpret s 51A as affecting other provisions of the *Constitution*.

## VI CONCLUSION

As can be seen from the above detailed discussion, the intention of the Expert Panel does not match the words that it has chosen for proposed s 51A. If a constitutional amendment were to be approved in this form, it would inevitably lead to difficulties in constitutional interpretation and potentially to unanticipated outcomes. Some advocates of reform may well intend to blur at the referendum stage any issues about how the proposed provision is intended to operate and to leave it to the High Court to resolve them in the future, in the expectation that the court is likely to be more liberal in its approach than the Australian people. However, from a democratic point of view, such an approach is unacceptable.

First, the words chosen for a constitutional amendment should, as far as possible, be consistent with what they are intended to achieve. Reliance should not be placed upon the High Court to re-write the provision through constitutional interpretation. Secondly, given the importance placed by Justices on the objective intent of those who enact the words of a constitutional provision, that intent should be made clear by those advocating the constitutional amendment and those responsible for its passage through the Parliament.

If 'advancement' is intended to be a qualification on the Commonwealth's *power* to enact laws with respect to Aboriginal and Torres Strait Islander peoples, rather than simply an indication to Parliament of the types of laws the people would like to see enacted, then this should be stated in the words which confer the power and the ramifications of it should be made clear. In particular, the second reading speech should address questions of what is meant by advancement, who assesses advancement and upon what criteria, the intended supervisory role of the courts and the extent to which laws enacted under this power may be amended, repealed or partially repealed if that affects or reduces the level of 'advancement' previously secured by the law. If the limitation in proposed s 51A is intended to affect the exercise of other constitutional powers, then this should also be made clear in the text of the *Constitution*.

Constitutional amendment is a serious business. If the intent of the Australian people in approving a constitutional amendment is to be taken into account at a later

<sup>150</sup> *Work Choices Case* (2006) 229 CLR 1, 127 [221] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

period when a court is interpreting the constitutional provision, then that intent should be clear and informed. The Australian people, prior to being asked to amend the *Constitution*, have the right to know what the proposed amendment is likely to do, how it will operate in practice and what its potential ramifications may be. It is only if these details are discussed in public and given general acceptance that a true 'intent' can be formed and the Australian people can fully exercise their constitutional responsibilities.

