THE AUSTRALIAN ABORIGINE: FULL COMMONWEALTH RESPONSIBILITY UNDER THE CONSTITUTION

By Jennifer E. Eastick*

> [O]n 27 May 1967, the people of Australia, in the most massive expression of the general will ever known in this country, gave this Parliament the power to pass laws for the welfare of Aboriginals. The referendum was not designed merely to remove discrimination against Aboriginals; its purpose was to give the National Parliament and the National Government authority to grant especially favourable treatment to them to overcome the handicaps we have inflicted on them.[1]

> The legislative powers of the Commonwealth are controlled by the terms of the grant, both as regards area and subject matter, but within those terms they are plenary. Any restriction or limitation upon the grant must be found in the Constitution.[2]

> [U]ncertainty as to the extent of Constitutional power should never of itself be a reason for opposing an otherwise worthwhile legislative exercise of power; nor should it prevent a government, properly advised, treading where angels of constitutional probity have formerly feared to tread. The High Court, as we know, will readily give us the answer.[3]

INTRODUCTION

In 1975, the Queensland Parliament enacted the Aurukun Associates Agreement Act, which provided, *inter alia*, that an agreement between the Queensland Premier and three mining companies[4] 'shall have the force of law as though the Agreement were an enactment of this Act'.[5] The agreement which ensued provided for the mining of bauxite on the Aurukun Aboriginal reserve, of which the Director of Aboriginal and Islander Advancement (Queensland) was trustee. There was inadequate provision for compensation to the aboriginal people of the Aurukun State for damage to their environment and the disruption of their tribal life; the Director having negotiated payment to himself as trustee 'on behalf of Aborigines' of three per cent of the net profit of the companies from their

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1 Whitlam E.G., Australia, *Parliamentary Debates*, House of Representatives, 13 August 1968, 15.

2 Joske P. E., *Australian Federal Government* (1976) 48.

3 Ellicott R. J., Australia, *Parliamentary Debates*, House of Representatives, 4 December 1974, 4524; quoted in Evans G., (ed.) *Labor and the Constitution 1972-1975* (1977) 25.

4 Tipperary Corporation, Billiton Aluminium Australia and Aluminium Pechiney Holdings Pty Ltd.

5 S. 3.

mining operations on the reserve, the question arose 'as trustee for which Aborigines'.

The Director's power to negotiate such an agreement for entry onto a Reserve was derived from the Aborigines Act 1971 (Qld) which provided *inter alia*:

> An agreement shall provide for such terms and conditions as the parties thereto agree upon, and may include provision for participation by the trustee or any other persons in the profits of the mining venture or ventures to be carried on in the reserve, if the permit is granted, for the benefit of Aborigines resident on the reserve, or other Aborigines as the agreement provides.[6]

The argument advanced on behalf of the Aurukun people was that the Director was in breach of his fiduciary duty to the residents of the Reserve by failing to consider their interests properly in the negotiation of the Aurukun Associates Agreement, more particularly because there was no requirement that any of the profit share be applied for the benefit of the Aurukun, but could be expended entirely for the benefit of Aborigines elsewhere in the State.

The argument succeeded in the Supreme Court of Queensland[7] but was subsequently reversed on appeal to the Privy Council,[8] their Lordships specifically stating their concurrence with the dissenting judgment of Kneipp J. in that 'ss. 29 and 30 of the Aborigines Act of 1971 constituted statutory authority for the acts alleged by the statement of claim to be in breach of trust'.[9]

Further episodes in the struggle of the Aurukun against the State Government are documented *infra*, and lead one to ponder the likely outcome of a confrontation between the Commonwealth and a State over the treatment of Aborigines.

It is conceivable that it would not be beyond the power of the Commonwealth to take control of all activities relating to Aborigines and their lands, particularly where those lands contain considerable mineral resources, to provide for the protection of sacred sites, for fair compensation for entry onto reserves, and an equitable system of profit sharing for the benefit of the aboriginal people.

This article argues the above proposition which, it seems, will almost inevitably be tested in the not too distant future. If it can be ascertained that there are no feasible restrictions on the Commonwealth's power to legislate 'with respect to . . . [t]he people of any race for whom it is deemed necessary to make special laws'[10] the proposition is established. There being no express limitation[11] one must look to the wording of the Consti-

[6] S. 30(2).
[7] Lucas and Douglas JJ., Kneipp J. dissenting.
[8] *The Corporation of the Director of Aboriginal and Islanders Advancement v. Peinkinna & Ors* (1978) 52 A.L.J.R. 286.
[9] *Ibid*. 289.
[10] The Constitution s. 51(xxvi).
[11] Save 'subject to this Constitution'.

tutional provision, to analogous heads of power and to judicial ingenuity to discover restraints upon this particular power. Thus analogies will be drawn with the two other heads of constitutional power which relate, not to *activities* but to *persons*.[12]

THE SECTION BEFORE AMENDMENT

Section 51(xxvi) of the Constitution originally appeared in the draft Commonwealth Bill of 1891 as an exclusive power of the proposed Commonwealth Parliament, which

> shall, subject to the provisions of this Constitution, have full power and authority to make all such laws as it thinks necessary for the peace, order and good government of the Commonwealth, with respect to all or any of the matters following, that is to say. . . . The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this legislation shall not extend to authorize legislation with respect to the affairs of the aboriginal native race in Australia and the Maori race in New Zealand.[13]

It is clear that the purpose of the section, in so far as the Aboriginal people were concerned, was to specifically exclude them from the ambit of the power to make discriminatory laws, as it was intended that the Commonwealth should be able so to legislate.

Discriminatory legislation had been passed by various colonies prior to Federation;[14] Quick and Garran claim that the section was designed to apply to

> the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.[15]

If these motives are correctly reported, application of laws made under the section would have little relevance to Aboriginal people, and so their exclusion from the clause would be largely redundant. The reference to the Maori people became superfluous when New Zealand withdrew from the Conventions prior to the 1897 session.

It has also been suggested that the Aborigine was excluded from the ambit of the Commonwealth legislative power as a dying species whose future need not require protection beyond that which the States would provide.[16] This thesis was based in part on an underestimation of the size of the black population. This view apparently still pertained in 1929, when the Royal Commission on the Constitution reported:

> We do not recommend that section 51(xxvi) be amended so as to empower the Commonwealth Parliament to make laws with respect to aborigines. We recognize

[12] S. 51(xix) — naturalization and aliens; s. 51(xx) — corporations.
[13] Clause 53(1).
[14] Moore W. H., *Constitution of the Commonwealth of Australia* (2nd ed. 1910) 464.
[15] Quick J. and Garran R. R., *The Annotated Constitution of the Australian Commonwealth* (1901; reprinted 1976) 622.
[16] Sawer G., 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17.

> that the effect of the treatment of aborigines on the reputation of Australia furnishes a powerful argument for a transference of control to the Commonwealth. But we think that on the whole the States are better equipped for *controlling* aborigines than the Commonwealth. The States control the police and the lands. . . .[17]

By the 1898 session in Melbourne, the sub-clause had achieved its present form as a concurrent power of both the Commonwealth and the States, and the qualification placed upon the 'special laws' that they be 'not applicable to the general public' had been removed as redundant. The section now provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: . . . The people of any race for whom it is deemed necessary to make special laws.

THE MEANING OF 'RACE'

It is worth noting here that had the phrase 'not applicable to the general community' remained, certain difficulties in interpreting the present section might have been avoided. Had the qualification upon 'special laws' survived, it would have provided a gloss upon the application of the word 'race' which is not defined in the section. It is left to the discretion of Parliament which 'races' require special legislation. It is not anticipated that the power would be used, for example, to legislate with respect to the 'Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (*etc. etc.*) mixture, derived from the United Kingdom, which formed the main Australian stock'.[18] If this racial grouping constituted the 'general community' it would not have been open to Parliament to legislate for such a group.

Race has been defined as 'a group of persons . . . connected by common descent or origin'.[19] This obviously would include our United Kingdom stock. The Shorter Oxford Dictionary also defines race as 'a tribe, nation, or people regarded as of common stock',[20] and as 'the fact or condition of belonging to a particular people or ethnic stock; the qualities *etc.* resulting from this'.[21]

These definitions indicate a wide possible application of laws with respect to the people of any race in section 51(xxvi); it would appear that there is *prima facie* a power to legislate for the Aboriginal people in general, or for a particular tribe, in all matters incidental to the fact of belonging to the Aboriginal people, or operating upon the Aboriginal people as distinct from the general community. Leaving aside the over-

[17] Australia, *Report of the Royal Commission on the Constitution* (1929) 270. Emphasis added by this author.

[18] Sawer, *op. cit.* 19.

[19] *Shorter Oxford English Dictionary* (3rd ed. 1973) 1735.

[20] *Ibid.* It may be argued that those of less than full blood are not to be regarded as of a common stock. Joske argues that '[t]here being no definition of race, probably all members of a race are included, whether they be of the whole blood or otherwise' (*op. cit.* 200).

[21] *Shorter Oxford English Dictionary* (3rd ed. 1973) 1736.

riding qualification that laws made in reliance on the particular head of power be made 'subject to this Constitution', the only apparent limitation in the section is that it be 'deemed necessary' to make such special laws: such deeming is surely implicit in the action of the legislature in enacting legislation which is to operate upon the people of a 'race'. It will be necessary, therefore, to seek potential limitations elsewhere, and not in the plain words of the section.

JUDICIAL COMMENT

It would appear that the section was not relied upon to support Commonwealth legislation at any time prior to the 1967 referendum, although there has been judicial mention of the section in a limited number of cases. In *Robtelmes v. Brenan*,[22] the High Court considered whether section 8 of the Pacific Island Labourers Act 1901 (Cth) was a valid law of the Commonwealth. The section provided for the deportation, after a certain date, of Pacific Island labourers who were not employed under an agreement for service. The section was held to be a valid law of the Commonwealth. The Court, Griffith C.J., Barton and O'Connor JJ., found the section to be supported by the 'aliens' power, section 51(xix) of the Constitution.[23] Both Griffith C.J. and O'Connor J. based their decisions exclusively on section 51(xix), but Barton J. also considered that the section was a valid exercise of the immigration[24] and external affairs[25] powers, and adverted to the possibility that it could also be supported by section 51(xxvi). He referred to the

> powers given under the Constitution, which have been referred to in argument, and which seem to me sufficient to cover the matter. Those are the powers — particularly with reference to aliens — in the 19th sub-section of section 51, and also possibly the power in sub-section 26, and I think more clearly the powers as to immigration and external affairs in sub-sections 27 and 29. As to three of those powers I am of opinion that they may be well exercised by legislation of this kind and that as, under the decision of the Privy Council in *Hodge v. The Queen*[26] the powers given are plenary within their ambit, it is within these powers to pass legislation, however harsh and restrictive it may seem, and as to that it is not the province of a Court of Justice to inquire, where the law is clear. This legislation, I think, is perfectly competent within the meaning of three at least of those four powers.[27]

There is no explanation for His Honour's decision that at least three of the four heads of power are plenary, and so the case unfortunately adds little to the interpretation of the section, and is far more memorable for statements on the scope of the other heads of power there referred to. But his comments can in no way be interpreted as a decision that the section in question is not a plenary grant of power.

[22] (1906) 4 C.L.R. 395.
[23] *Ibid.* 404 *per* Griffith C.J.; 415 *per* Barton J.; 420 *per* O'Connor J.
[24] S. 51(xxvii).
[25] S. 51(xxix).
[26] (1886) 9 App. Cas. 117.
[27] (1906) 4 C.L.R. 395, 415.

It may well be that, if any heads of power are to be considered plenary, then all must be so considered, subject to the proviso that no restriction upon the exercise of that power can be found elsewhere in the Constitution.

Menzies J. stated the problem, without advancing a solution, in *Strickland v. Rocla Concrete Pipes Ltd.*[28] In considering the scope of section 51(xx), the 'corporations' power, he said:

> [I]t is only in pars. (xix), (xx) and (xxvi) that the subject matter is persons. Each of these paragraphs presents its own problems. For instance, can Parliament, by legislation under par. (xix), provide widowers' pensions for aliens notwithstanding that par. (xxiiiA) does not authorize the provision of widowers' pensions? Again, could Parliament, by a law under par. (xxvi), make, if it thought necessary, laws governing all the trading activities of people of particular races? Again, could Parliament, notwithstanding the limitations in par. (xxxv), make a law for the settlement of industrial disputes between corporations and their employees in the course of inter-State trade? In a measure the very generality of a subject matter defined by reference to persons of a particular description provokes the question whether it is intended that the Parliament should have the power to make any laws outside constitutional prohibitions with regard to persons of these descriptions. Is any law commencing 'Every alien shall . . .' a valid law? I do not think it is necessary here to determine whether the Attorney-General's affirmative submission is correct because all we are here concerned with is a law relating to the trading of trading corporations formed within Australia. *Prima facie* such a law is within power.[29]

I have quoted this lengthy paragraph from the judgment of Menzies J., as it states clearly the question facing the Court, which it is submitted must be answered in the affirmative; for what is the alternative? Person powers would surely be redundant if the competence of the federal legislature was limited to the subject matter of other heads of power. Once an Act may be characterized as supported by such a head of power, even if also supportable under other heads of power, the permissible scope of the person power logically must not be limited to Acts authorized elsewhere in the Constitution. Such Acts simply should not breach another section, for example by imposing religious observance in contravention of section 116.

THE GRANT OF POWER

Before proceeding to consider the scope of the power to legislate for Aborigines, there is the threshold question to resolve as to whether the referendum did effect a grant of power to make laws for such people.

The question put to the electorate

The voter was asked:

> Do you approve the proposed law for the alteration of the Constitution entitled — 'An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population'?[30]

[28] (1971) 124 C.L.R. 468.
[29] *Ibid.* 507-8.
[30] *The Arguments for and against the Proposed Alteration together with a Statement Showing the Proposed Alteration* 13.

The purpose of the proposed amendment was two-fold:

> First, it will remove words from our Constitution that many people think are discriminatory against the Aboriginal people.
> Second, it will make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary.[31]

Throughout the debates on the proposed amendment, it was a matter of concern that 'the policy of the Federal Government in regard to those Aboriginals in the Northern Territory has on the whole been at least as beneficial as, and I would think more beneficial and more substantial than, the policies adopted by any of the States'.[32] Inequality in the treatment of the Aboriginal people in Territory and States was widely accepted as a basis for Constitutional reform.

These arguments were accepted by the people in the referendum held on 27 May 1967, and gave a clear mandate to the Parliament to make such laws as it saw fit, even though this raised the possibility of the over-rule of State laws if inconsistent with Federal legislation. It was subsequently considered necessary to expressly over-ride certain discriminatory provisions of Acts of the Queensland Parliament by use of the section 109 inconsistency provision.

Previous use of 'deletion' as a grant of power

Prior to 1910, section 105 of the Constitution provided that:

> The Parliament may take over from the States their public debts *as existing at the establishment of the Commonwealth*, or a proportion thereof. . . .[33]

The 1910 referendum approved the deletion of the emphasized words, thus granting Parliament the power to assume debts *not* pre-existing. Thus, the deletion of the phrase 'as existing at the establishment of the Commonwealth' effected a grant of power to deal with debts previously excluded from power. The analogy with the 1967 referendum is clear; the deletion of the phrase 'other than the aboriginal race in any State' must effect a grant of power to make laws for that previously excluded.

The validity of the 1910 amendment was not litigated, and has been accepted by commentators.[34] A use of power may by struck down as *ultra vires* after a length of time, for

> [t]ime does not run in favour of the validity of legislation. If it is *ultra vires* it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. At best, lateness in an attack upon the constitutionality of a statute is but reason for exercising special caution in examining the arguments by which the attack is supported.[35]

[31] *Ibid.* 11.

[32] Wentworth W., Australia, *Parliamentary Debates*, House of Representatives, 1 March 1967, 280.

[33] Emphasis added by this author.

[34] *E.g.* Howard C., *Australian Federal Constitutional Law* (2nd ed. 1972) 507; Greenwood G., *The Future of Australian Federalism* (2nd ed. 1976) 111; Solomon D., *Australia's Government and Parliament* (1973) 127.

[35] *Grace Bros Pty Ltd v. The Commonwealth* (1946) 72 C.L.R. 269, 289 *per* Dixon J.

However, unchallenged laws of the State of Queensland were relied upon by Barton J. in *Robtelmes v. Brenan*[36] to support the validity of section 8 of the Pacific Island Labourers Act 1901:

> If one looks to the Pacific Islanders Act 1880, to which I have referred during the argument, or to the Act of 1892, one sees that [the subject matter of the section] is a matter that the legislature of Queensland has provided for in unchallenged laws, which have been the foundation of the Commonwealth legislation.[37]

If one also considers the political realities in Australia today, one finds the States ever vigilant for expansions of Commonwealth power. The State of Queensland, potentially a vexatious litigant, did not challenge the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth), an Act, as discussed *infra*, based solely on the head of power in question. Had there been a possibility that the grant of power was not effected by the referendum, one would have expected such direct interference with the legislation of the State of Queensland with respect to Aborigines to have provoked an immediate challenge. It did not. In fact, the reverse occurred: the validity of a later Commonwealth Act having direct effect on Queensland Aborigines and over-riding State laws[38] must have been considered valid by the State of Queensland as it was immediately avoided by State legislation altering the status of the subject people.

It would appear, therefore, that failure to challenge laws made under section 51(xxvi) relating to Aborigines in the States may be regarded as implicit recognition of those laws, and hence the grant of power.

USE OF THE POWER SINCE 1967

An examination of Commonwealth Acts passed since 1967 which affect the Aboriginal people should establish the scope presently accorded by the Australian legislature to the head of power under discussion. Before attempting to determine by which heads of power the Acts are supported, however, it may be wise to comment briefly on the characterization of Commonwealth Statutes, if such a task may be performed in so perfunctory a manner.

Although the term 'characterization' applies generally to determining the validity of Commonwealth laws 'with respect to' a head of power, it is necessary to this discussion to establish whether a law, if a valid exercise of the section 122 power, for example, can also be a law with respect to the people of any race.

This is particularly relevant in view of the present status of section 122. Section 122 has been held to be a plenary power, unfettered by restrictions

[36] *Supra.*
[37] *Ibid.* 416 *per* Barton J.
[38] Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 (Cth).

found elsewhere in the Constitution.[39] The inconsistency under consideration was the representation in the Senate of the Territories, section 7 providing for the representation of the States, and section 122 providing that 'the Parliament may make laws for the government of any territory . . . and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit'. If section 7 was the definitive statement of the composition of the Senate, then the Parliament's power under section 122 would be limited. It was held that section 122 stood outside the federal structure, being a 'proviso or exception' to section 7.[40] Thus if there are limitations on the exercise of section 51(xxvi), the Commonwealth may still have greater power to legislate for Aborigines in the Territories, by virtue of the plenary power in section 122, than in the States, a clear contravention of the intent of the 1967 referendum.

Despite the early case of *R. v. Barger*[41] in which the 'substance' and 'form' distinction was formulated,[42] the subsequent cases[43] appear to have established a principle of characterization of a Statute as a valid exercise of power if its legal effect may reasonably bring it within a head of power. Where it is possible to characterize an Act in more than one way, the Court will accept the Act as valid if it is a reasonable exercise of a head of power, even though it may also be characterized in another way so as to invalidate it. The Court will have regard to whether 'duties, obligations or liabilities which are extraneous to the power'[44] are imposed.

Thus where an Act may be validated under more than one head of power, it will add little to our understanding of the scope of section 51(xxvi), and must be virtually excluded from the discussion.

Aboriginal Affairs (Arrangements with the States) Act 1973 (Cth)

This Act specifically recites the head of power under which it is enacted:

> Whereas by reason of an amendment made to the Constitution in the year 1967, certain powers to make laws for the benefit of the Aboriginal people of Australia in the States became vested in the Parliament.

The second recital proclaims that

> the Australian Government, after consultation with the Governments of the States . . . will assume increased responsibilities for the development of the

[39] *W.A. v. The Commonwealth* (1976) 134 C.L.R. 201. *W.A. v. Australian National Airlines Commission* (1976) 12 A.L.R. 17.

[40] This phrase was accepted and applied in *Attorney-General (N.S.W.)* ex rel. *McKellar v. The Commonwealth* (1977) 51 A.L.J.R. 328.

[41] (1908) 6 C.L.R. 41.

[42] *Barger* was in *form* a law with respect to taxation: an excise was imposed on certain manufactures which was removable if certain labour conditions were met. Thus the law was in *substance* a law with respect to an area not within the legislative competence of the Commonwealth.

[43] *S.A. v. The Commonwealth (First Uniform Tax* case*)* (1942) 65 C.L.R. 373; *Fairfax v. F.C.T.* (1965) 114 C.L.R. 1.

[44] (1965) 114 C.L.R. 1, 16 *per* Taylor J.

> Aboriginal people of Australia including responsibilities for the planning, co-ordination and financing of such activities as are designed to promote the economic, social and cultural advancement of that people and are at present the responsibilities of the States and their authorities.

One can but assume that the continued reference to 'agreement' and 'consultation' indicates a desire not to legislate outright for control of certain areas, which could have led to protracted litigation, and delayed the implementation of long-needed schemes for the advancement of the Aboriginal people in the States. The Act relates principally to the right of a 'State employee' who 'performs duties concerned with Aboriginal Affairs' to elect to transfer to the Australian Public Service.[45] The Act further provides that

> [t]he Governor-General may enter into an arrangement with the Governor of a State with respect to Aboriginal affairs[46]

the term 'arrangement' not being defined in the Act. Presumably the refusal of a State to co-operate would precipitate legislation under section 51(xxvi) to achieve the result desired to be reached by this rather circuitous path of negotiation, for there is not compulsion or penalty in the Act. The Act is therefore of little assistance in determining the extent of section 51(xxvi), as it makes provision for the voluntary surrender of State power regarding Aboriginal Affairs policy to the Commonwealth.

Agreements have been reached with New South Wales, Victoria, South Australia and Western Australia for transfer of the responsibility for policy departments to the Commonwealth. Tasmania had no Department of Aboriginal Affairs. Queensland has consistently refused to co-operate, and the Commonwealth has established an office in that State staffed by Commonwealth public servants.[47]

Aboriginal Loans Commission Act 1974 (Cth)

In this Act the Commonwealth made no attempt to 'recite itself into power'[48] although the Act clearly applies to Aborigines in the States, Aboriginal being defined as 'an indigenous inhabitant of Australia, and includes an indigenous inhabitant of the Torres Strait Islands'.[49] An Aboriginal Enterprises Fund is established[50] '[f]or the purposes of enabling Aboriginals to engage in business enterprises that are likely to become, or continue to be, successful'.[51] The result achieved by the Act could have been reached in other ways, but may fairly be viewed as a clear use of the

[45] S. 3(1).
[46] S. 5(1).
[47] Australia, *Report of the Department of Aboriginal Affairs* (1974-5) 9.
[48] McTiernan J. has warned against this: 'The Constitution does not allow the judicature to concede the principle that the Parliament can conclusively "recite itself" into power'. *Australian Communist Party v. The Commonwealth* (1951) 83 C.L.R. 1, 205-6.
[49] S. 5.
[50] S. 18.
[51] S. 20(1).

section 51(xxvi) power, to incorporate into one Act what would otherwise have had to be achieved either through Appropriation, *A.A.P.* style,[52] or by providing section 96 grants to the States, and establishing the Commission only in the Territory. There is no other apparent head of power under which the provisions could be supported, and thus the Act must be characterized as a use of the section 51(xxvi) power.

Aboriginal Land Fund Act 1974 (Cth)

The Act is designed to assist Aboriginal Communities to acquire land outside Aboriginal Reserves, and establishes a Commission similar in structure to that established under the Aboriginal Loans Commission Act. The Commission may grant to an Aboriginal Corporation[53] or an Aboriginal Land Trust[54] an interest in land,[55] or the money to acquire such land.[56] The acquisition power of the Commission is limited by section 21(1) of the Act to acquisition by agreement, and not on a compulsory basis. However, the Commission could doubtless acquire 'by agreement' land which had been acquired by the Commonwealth, in accordance with section 51(xxxi) of the Constitution, although the actual 'purpose of the Commonwealth' to be defined may be one of the 'serious problems still to be faced' with this section.[57]

It appears from an examination of the Acts passed that the Commonwealth power to legislate for the 'people of any race' may be extremely broad: the provision of loans; assistance with business enterprises and the acquisition of land for Aboriginal occupation, and these will be the 'purposes of the Commonwealth' when related to section 51(xxxi). A necessary restriction on the acquisition from a State or a person within a State, but not a Territory[58] is that the acquisition be on 'just terms'. The provisions of section 51(xxxi) are considered to over-ride the combined effect of any other head of power and section 51(xxxix):[59]

> The decisions of this Court show that if par. (xxxi) had been absent from the Constitution many of the paragraphs of s. 51, either alone or with the aid of par. (xxxix), would have been interpreted as extending to legislation for the acquisition of land or other property for use in carrying out or giving effect to legislation enacted under such powers. The same decisions, however, show that in the presence in s. 51 of par. (xxxi) those paragraphs should not be so interpreted but should be read as depending for the acquisition of property for such a purpose upon the legislative power conferred by par. (xxxi) subject, as it is, to the condition that the acquisition must be on just terms.[60]

[52] See *Victoria v. The Commonwealth (A.A.P.* case*)* (1975) 134 C.L.R. 388.
[53] Defined in s. 3 of the Act.
[54] *Ibid.*
[55] S. 20.
[56] S. 19.
[57] *Nelungaloo Pty Ltd v. The Commonwealth* (1952) 85 C.L.R. 545, 600 *per* Kitto J.
[58] *Tau v. The Commonwealth* (1969) 119 C.L.R. 564.
[59] The 'incidental' power.
[60] Re *Dohnert Muller Schmidt & Co.* (1961) 105 C.L.R. 361, 371 *per* Dixon J.

The Statute here in question opens considerable possibilities for the acquisition of land by the Commonwealth or the Commission for the purposes of mining in a manner acceptable to the Aboriginal people. In discussing the meaning of the phrase 'for the purposes of the Commonwealth' in section 51(xxxi) of the Constitution, it should be pointed out that, in relation to appropriation, the same phrase has been held to extend to any purpose which may be lawfully determined by the Commonwealth Parliament.[61] Would it be interpreted more narrowly when encountered in relation to the acquisition power? Is the phrase 'for whom it is deemed necessary to make special laws', in section 51(xxvi), of similar effect? If so, the phrase in section 51(xxvi) 'for whom it is deemed necessary to make special laws' must surely be given an equally broad interpretation, that is that it is a matter solely for the Parliament to determine.

Racial Discrimination Act 1975 (Cth)

> *AND WHEREAS* it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration.

Section 51(xxix), the external affairs power, is cited in order to incorporate into the Act the ratification of a United Nations' Convention on 'The Elimination of all Forms of Racial Discrimination' opened for signature on 21 December 1965. It is unusual for the Commonwealth to ratify a Convention where certain matters covered impinge upon areas of State jurisdiction, hence the use of the external affairs power. The Commonwealth, being the national entity, is entitled to conclude international treaties and conventions. Accordingly, the Racial Discrimination Act states, *inter alia*:

> This Act binds Australia and each State . . .[62]

and

> Approval is given to ratification by Australia of the Convention.[63]

The recital quoted above refers to the immigration power, which is to be discussed; it is sufficient here to note that the power extends at least to the absorption of the immigrant into the Australian community, and may there overlap with either or both of the naturalization and aliens power,[64] and the special race power.[65]

But the special race power does not necessarily overlap the other powers, as a member of a special race need not be an immigrant or an alien. Accordingly, one of the provisions of the Act goes far beyond the possible scope of either other power, in fact to the specific provision that:

[61] *Victoria v. The Commonwealth (A.A.P.* case) (1975) 134 C.L.R. 388.
[62] S. 6.
[63] S. 7.
[64] Constitution s. 51 (xix).
[65] S. 51 (xxvi).

> [w]here a law contains a provision that —
> (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
> (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander,
> not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provisions shall be deemed to be a provision in relation to which subsection (1) applies. . . .[66]

Sub-section 10(1) overcomes laws of Australia, a State or a Territory which restrict the rights of persons of a particular race *etc.*, by declaring that such persons shall enjoy equal rights with persons not of that race.

Section 6 of the Racial Discrimination Act provides that 'nothing in this Act renders Australia or a State liable to be prosecuted for an offence'. What then would be the remedy for the breach by a State, for example, of section 10? The remedy must lie with the Australian Parliament enacting legislation which is inconsistent with, and which therefore over-rides, the State law. Such was certainly the Commonwealth reaction, for, shortly after the Racial Discrimination Act came into force, the Aboriginal and Torres Strait Islander (Queensland Discriminatory Laws) Act 1975 (Cth) received the Royal Assent.

Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)

Section 5 of this Act follows, in general, the provisions of section 10(3) of the Racial Discrimination Act:

> (1) Subject to sub-section (2), any property in Queensland of an Aboriginal or Islander shall not be managed by another person without the consent of the Aboriginal or Islander, and any consent given by an Aboriginal or Islander, whether given before or after the commencement of this Act, to the management by another person of his property may be withdrawn by the Aboriginal or Islander at any time.
> (2) Sub-section (1) does not apply to or in relation to the management of property in accordance with any law of Queensland or Australia that applies generally without regard to the race, colour, or national or ethnic origin of persons.

This directly negates the provisions of section 38 of the Aborigines Act 1971 (Qld) and section 62 of the Torres Strait Islanders Act 1971 (Qld) which permitted a district officer to 'take possession of, retain, invest, sell, or otherwise dispose of' the property of an Aboriginal or Islander, and to receive 'in his own name . . . any property to which that person is or becomes entitled'.[67]

Nettheim observes that

> [n]o narrow view has been taken of the word 'property' and the most common

[66] S. 10(3).

[67] These provisions are rather fatuously gathered under the title 'Assistance Sought by Aborigines' in the Queensland Acts. One must, however, give the Queensland draftsman credit for the use throughout the Act of the word 'Aborigine' and not the mis-use of the adjective 'Aboriginal' as a noun as in the Commonwealth Acts.

use of the power, authorised by 1965 regulation 97, has been to require that wages of Aborigines and Islanders be paid by employers directly to the district officer.[68]

This then indicates a very broad interpretation of the race connection in section 51(xxvi) of the Constitution; it extends to the prevention of interference with the property of a person of another race, even where such interference was authorized by a State Act. The Act also contains provisions as to entering and residing on reserves,[69] conduct of Aborigines and Islanders on reserves,[70] right to representation in and appeal from legal proceedings in a Court established for a reserve,[71] directions to work on a reserve,[72] and terms and conditions of employment in Queensland generally.[73]

It has been held that a Commonwealth law with respect to intrastate conditions of labour is *ultra vires* and therefore invalid,[74] even though the law was capable of characterization also as a law with respect to taxation. As has been discussed previously, the attitude of the Court to a question of characterization has altered dramatically, and the *Barger* case is probably no longer good law; even so, the provision as to terms and conditions of employment, and wage rates,[75] would seem to indicate that Parliament considers the scope of the power in section 51(xxvi) to be virtually unlimited, providing only that its application is specifically to the people of another race.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

This Act, applying as it does to the Northern Territory only, in no way extends our understanding of the section under consideration, it being capable of being characterized as an exercise of the territories power, section 122. It is however interesting to note that, on the subject of mining interests, the Act stops short of granting actual ownership of mineral resources to the Aboriginal people; in this the recommendations of the Land Rights Commissioner, Mr Justice Woodward, have been followed.[76]

[68] Nettheim G., *Outlawed: Queensland's Aborigines and Islanders and the Rule of Law* (1973) 67.
[69] S. 6.
[70] S. 7.
[71] S. 9.
[72] S. 10.
[73] S. 11.
[74] *R. v. Barger* (1908) 6 C.L.R. 41.
[75] S. 11.
[76] 'I have stopped short of recommending Aboriginal ownership of minerals for several reasons. The chief of these is my belief in the general approach adopted in this country that minerals belong to all the people. I think Aborigines should have special rights and special compensations because they stand to lose so much more by the industrial invasion of their traditional lands and their privacy than other citizens would lose in similar circumstances. But this does not justify a claim to ownership . . . [T]he whole of Australian mining law is based on the assumption that minerals belong to the Crown. To provide otherwise in a particular case could well create problems and sorting these problems out could delay necessary legislation.' Australia, *Second Report of the Aboriginal Land Rights Commission* (April 1974) 115.

Aboriginal Councils and Associations Act 1976 (Cth)

This legislation has sprung from the recommendations of the Aboriginal Land Rights Commissioner, Mr Justice Woodward.[77] It is not limited to the Northern Territory, as is the Land Rights legislation, and the argument that the Land Rights legislation is an exercise of the section 122 power is thus inapplicable; the Act is clearly an exercise of the section 51(xxvi) power, there being no other possible source. The Act provides for the incorporation of Aboriginal Associations, some of which may fall within the section 51(xx) power, as being 'trading and financial corporations formed within the limits of the Commonwealth', but not all will comply with this description. Also, the reference is to a corporation already formed, and not to the formation thereof:

> [C]orporations to come within the legislative reach of the Commonwealth must be corporations already existing. It is not a power to create corporations. When such a power was intended to be given it was expressly mentioned as in paragraph (xiii) [of s. 51 of the Constitution].[78]

Hence the Commonwealth may not be able to legislate for a uniform Company Law code, but here has assumed the responsibility for establishing a register of Aboriginal Corporations, whether trading or financial or otherwise. The Act will clearly over-ride State laws on the incorporation of associations, where these would, but for this enactment, have applied to an Aboriginal, as to any other, association. On registration, a certificate of incorporation is to be issued, at which time the association becomes a body corporate with perpetual succession, and shall have a common seal.[79] Thus the Commonwealth has relied upon section 51(xxvi) to provide for the incorporation of Associations, in the face of the arguments in *Huddart Parker*, since confirmed,[80] on the extent of the corporations power.

Leaving aside any discussion as to whether *Huddart Parker* remains good law, or whether the Commonwealth could legislate for a uniform company code or not, it is clear that the corporations power will only support legislation in respect of 'trading and financial corporations'.

Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 (Cth)

This Act was again a direct interference with the relationship between the Aboriginal and Islander people in Queensland and the government of

[77] Australia, *First Report of the Aboriginal Land Rights Commission* (July 1973) 52.

[78] *Huddart, Parker and Co. v. Moorehead* (1909) 8 C.L.R. 330, 393 *per* Isaacs J. All five justices in the case agreed on this point: 348 *per* Griffith C.J.; 362 *per* Barton J.; 371 *per* O'Connor J.; 412 *per* Higgins J.

[79] S. 46.

[80] *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R. 1; *Insurance Commissioner v. Associated Dominions Insurance Society Ltd* (1953) 89 C.L.R. 78; *cf. dicta* of the Chief Justice in *R. v. Trade Practices Tribunal; ex parte St George County Council* (1974) 130 C.L.R. 533, 536.

that State. It forms the next instalment in the saga of the Aurukun and Mornington Island people, in their struggle for their lands. Briefly the Act provided that, in certain circumstances, the responsible Commonwealth Minister could declare that a reserve or community was one to which the Act applied, at which time the reserve or community would become self-managing, and no longer subject to directions made pursuant to the Aborigines Act or the Torres Strait Islanders Act. By-laws in force under either of the Queensland Acts ceased to have any effect in relation to a Reserve or Community brought under the operation of the Commonwealth Act.

Such legislation could only be based on section 51(xxvi) of the constitution.

Unfortunately, for the Aurukun and Mornington Islanders, their victory was shortlived: the legislature of Queensland promptly passed the Local Government (Aboriginal Lands) Act 1978 (Qld), which constituted the Local Government areas of Aurukun and Mornington, thus abolishing the reserves and removing the inhabitants from the ambit of the Commonwealth Act.

The Commonwealth took no further action, and avoided a further confrontation, but the skirmish once again opened the question of whether the Commonwealth could have acquired the lands, to which the answer should be affirmative, and whether such acquisition need be on 'just terms', that is, whether the extent of section 51(xxvi) would be sufficiently broad to enable it to over-ride the effect of section 51(xxxi). The answer to that problem is moot, but as discussed above, one would expect section 51(xxxi) to be interpreted again so as to over-ride the effect of any other head of power.

Summary of Legislation to Date

The attitude of the Commonwealth to the power granted in 1967 is obviously that it is a plenary power; the Aboriginal Affairs (Arrangements with the States) Act 1973 (Cth) implies that the Commonwealth will, by arrangement, assume responsibility for whatever proportion of the existing State jurisdiction on Aboriginal Affairs it wishes. It is clear that the Commonwealth views section 51(xxvi) as meaning 'once Parliament deems Aborigines to be a race to whom special laws should apply, it can enact a law, without reference to any other head of power, which will be valid if it creates duties and obligations on the part of the Aboriginal people, or, of those dealing with them'. All of the foregoing statutes may be fairly characterized as laws with respect to Aborigines, and their scope is extremely wide. Hence the enactment to overcome discriminatory State laws, and the establishment of a system for the incorporation of Aboriginal associations. There is apparently no authority for or against such an

interpretation of the section, but, in that it is left to Parliament to determine for which people it is deemed necessary to make special laws (and, by implication, what those 'special laws' may be) an examination of the interpretation of a like provision may be useful, in particular, as mentioned above, the extent of the expression 'for the purposes of the Commonwealth' in sections 81 and 51(xxxi).

The view was first expressed in the *Pharmaceutical Benefits* case[81] that it was a matter for the Parliament alone to determine the 'purposes of the Commonwealth':

> [I]n my opinion, the Commonwealth Parliament has a general, and not a limited, power of appropriation of public moneys. It is general in the sense that it is for the Parliament to determine whether or not a particular purpose shall be adopted as a purpose of the Commonwealth . . . it is the Commonwealth Parliament, and not any court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as providing for the expenditure of money for such purposes.[82]

This view was not that of the majority, Starke and Williams JJ. taking a very narrow view that the purposes must be found 'within the four corners of the Constitution'[83] or must be 'matters in respect of which [the Commonwealth] can make laws by virtue of the Constitution', or 'the exercise of executive and judicial functions vested in the Commonwealth by the Constitution or by any other Act'.[84] Dixon J. allowed that Federal legislative power 'necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of functions of a national government,[85] but found the Pharmaceutical Benefits Act 1944 (Cth) *ultra vires* the Commonwealth Parliament.[86]

The view of Latham C.J. and McTiernan J. was supported by three of the seven judges in *Victoria v. The Commonwealth*[87] two of those three being part of the majority. McTiernan J. specifically adopted the words of Latham C.J. quoted above, finding the instant matter not justiciable, as 'within the field of politics not of law'.[88] Mason J. found the appropriation valid as an exercise of the unfettered power in section 81,[89] but also held the expenditure of the funds so appropriated to be 'outside the realm of the executive power of the Commonwealth'. Murphy J. agreed that 'Parliament is the authority to determine what purposes are the purposes of the Commonwealth'.[90] These three judgments are clear support for the

[81] *Attorney-General (Vic.)* ex rel. *Dale v. The Commonwealth* (1945) 71 C.L.R. 237.
[82] *Ibid.* 254-6 *per* Latham C.J., McTiernan J. concurring in this view.
[83] *Ibid.* 282 *per* Williams J.
[84] *Ibid.* 266 *per* Starke J.
[85] *Ibid.* 269 *per* Dixon J.
[86] *Ibid.* 272 *per* Dixon J.; Rich J. agreed.
[87] (1975) 134 C.L.R. 338.
[88] *Ibid.* 369-70.
[89] *Ibid.* 400.
[90] *Ibid.* 417.

view that there is an unfettered power to appropriate 'for the purposes of the Commonwealth'.

Jacobs J. found himself with the majority, on different grounds. Whereas both Barwick C.J. and Gibbs J. considered the criterion of validity to be whether the appropriation was for a purpose which would fall within their idea of legislative power of the Commonwealth, and held that in this case it did not,[91] Jacobs J. appears to have found the limits of legislative power to be broad enough to encompass the A.A.P. Plan appropriation. There is much confusion caused by this judgment; the head-note to the Australian Law Journal Reports includes Jacobs J. as entirely with the majority, presumably misled by the comment 'the Appropriation is a matter internal to the Government'.[92] One is tempted to accept this view, as one cannot be completely certain whether he is saying 'this Appropriation is within legislative power and therefore valid', or 'all Appropriations must be within legislative power to be valid'. The view may also be taken that he found the matter not justiciable.[93] Stephen J. found it unnecessary to pronounce upon the validity of the Act, as he denied *locus standi* to either the State, or the Attorney-General of the State to question the 'mode of expenditure of federal revenue unless it be associated with some claim to surplus revenue under s. 94 of the Constitution'.[94]

Thus for our present purposes there is authority, albeit divided, for the proposition that 'for the purposes of the Commonwealth' bestows upon the Australian Parliament an unfettered discretion to determine such purposes, even though the phrase is capable of a much narrower interpretation. The deeming provision in section 51(xxvi) appears to be far less capable of narrow interpretation, save by application of the phrase 'subject to this Constitution' in section 51. This must import at least the restriction that the special laws be enacted validly, and in accordance with the provisions of Chapter I. In view of the interpretation of section 122 as standing outside the general structure, and not being read down to accommodate the earlier sections, one may prophesy that the Court would also hold that such sections as section 106, and section 92 must be observed in exercising the legislative power of the Commonwealth under section 51(xxvi).[95]

Having thus canvassed the use of the power to date, and found it unlikely that an interpretation of the plain words of the section, would be found to include a restriction on the use of the power other than that laws

[91] *Ibid.* 360-3 *per* Barwick J.; 373-5 *per* Gibbs J.

[92] *Ibid.* 410.

[93] Crommelin M. and Evans G., 'Explorations and Adventures with Commonwealth Powers'; in Evans G. (ed.), *Labor and the Constitution* (1977) 42.

[94] (1975) 134 C.L.R. 338, 387.

[95] Section 106 saves the provisions of the State Constitutions; section 92 provides that intercourse between the States shall be free.

made thereunder be 'subject to this Constitution', it is necessary to seek restrictions by implication from other heads of power.

IMPLIED LIMITATIONS

On the application of section 51 (xxvi) Wynes comments:

> There is some doubt as to what the paragraph in its original form was intended to cover, but this has now become an academic question. The power being with reference to persons, Parliament may localize, restrict, confine to certain occupations, or grant special protection to any such persons.[96]

In enumerating the powers which do relate to persons, the 'immigration and emigration' power would be *prima facie* excluded,[97] a conclusion in which Wynes concurs as 'where persons or things are intended as subjects of power under the Constitution, they are expressly indicated'.[98] He cites here Fisheries,[99] Currency,[1] Aliens,[2] Corporations[3] and Special Races.[4] Difficulties arise in separating the application of laws with respect to aliens, and with respect to immigration, so there will be, of necessity, a discussion of both powers.

Section 51(xix) — Naturalization and Aliens

> In English law an alien may be variously defined as a person who owes allegiance to a foreign State, who is born out of the jurisdiction of the Queen, or who is not a British subject.[5]

There is little judicial comment on the extent of this power. In *Robtelmes v. Brenan*,[6] the expulsion of an alien was considered. It was accepted law that no alien could demand entry to a State,[7] and that 'one of the rights reserved by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien'.[8] Robtelmes had lawfully entered the country under the Pacific Island Immigration Act (Qld), and sought to have sections of the Pacific Islands Labourers Act 1901 (Cth), authorizing his deportation, set aside as unconstitutional. In holding the sections to be valid, all three judges relied upon the aliens power:

> The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions

[96] Wynes W. A., *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 304. 'Confine to certain occupations' would now breach the Racial Discrimination Act 1975 (Cth).
[97] See *R. v. MacFarlane (the Irish Envoys Case)* (1923) 32 C.L.R. 518, 574 *per* Higgins J.
[98] Wynes, *op. cit.* 307.
[99] S. 51 (x).
[1] S. 51 (xii).
[2] S. 51 (xix).
[3] S. 51 (xx).
[4] S. 51 (xxvi).
[5] Quick and Garran, *op. cit.* 599.
[6] (1906) 4 C.L.R. 395.
[7] *Musgrove v. Chun Teeong Toy* [1891] A.C. 272.
[8] *Attorney-General for Canada v. Cain & Gilhula* [1906] A.C. 542, 543.

> under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it.[9]

It appears from this interpretation that once someone can be characterized as an alien, Parliament has full power to legislate on any aspect of the alien's relationship with the Australian community, including his or her removal from it. Starke J. took this view in *Ex parte Walsh v. Johnson; In re Yates*:[10]

> [I]t would be a valid law, in my opinion, if the Parliament provided that any alien who in the opinion of the Minister was an undesirable resident of Australia might be deported: it would be valid because Parliament has full power over the subject of aliens.[11]

This view appears to be in line with the attitude taken particularly by the Labor Governments of 1972-1975, to the power to legislate for Aborigines.

It is worth noting here that although the power with respect to immigration and emigration is not strictly a person power,[12] many enactments will operate upon the person who has migrated, or is in the process of migrating. The theoretical limits of the power are, accordingly, germane to a discussion of the extent of the person powers in general.

Clearly prohibition of the entry of any alien person into Australia would be a valid exercise of both the immigration and aliens powers; however, since not all intending immigrants are aliens but may be British subjects,[13] there is hence an overlap of a certain area of these powers.

It has been held that a person ceases to fall within the ambit of the immigration power upon absorption into the Australian community.[14] The Commonwealth could, however, prevent the absorption of a migrant into the community by the device of issuing a series of temporary entry permits.[15] The migrant would thus remain within the ambit of one or other of the powers.

Aside from the right to prohibit and the right to expel, the power would appear to encompass the regulation of certain activities of immigrants prior to the time of 'absorption':

> Assistance to migrants and former migrants in housing, employment, health and welfare services would fall within the power.[16]

[9] (1906) 4 C.L.R. 395, 404 *per* Griffith C.J.

[10] (1925) 37 C.L.R. 36.

[11] *Ibid.* 132-3 *per* Starke J.

[12] Joske, however, claims that '[t]he immigration power is of considerable width and can apply to persons coming into the country from abroad from the moment of their entry until the time when they become integrated as members of the Australian community' *op. cit.* 190.

[13] *Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533. *R. v. Green; ex parte Cheung Cheuk To* (1965) 113 C.L.R. 506.

[14] *R. v. Director-General of Social Welfare for Victoria; ex parte Henry* (1974) 133 C.L.R. 369; *Ex parte Walsh and Johnson: In re Yates* (1925) 37 C.L.R. 36, 65 *per* Knox C.J.; *cf.* the broad view held by a small group of the judges that 'once an immigrant, always an immigrant' *Walsh and Johnson op. cit.* 81 *per* Isaacs J.

[15] *R. v. Green, ex parte Cheung Cheuk To* (1965) 113 C.L.R. 506.

[16] *Henrys'* Case (1974) 133 C.L.R. 369, 386 *per* Murphy J.

This is an interesting comment, in view of the limited Constitutional power to legislate on these matters for the community in general,[17] but even so does not conflict with the scope so far revealed of powers which operate upon persons, rather than activities or purposes. It is reminiscent of the provision in the Aboriginals and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) as to conditions of labour within the State, an area excluded from Commonwealth legislative competence when applied to the community as a whole. One may go so far as to say at this point that the aspect of personality in a legislative power completely transcends other constitutional restrictions on legislative power; this is, it seems, the only rational interpretation, since, if each person power was to be read as subject to the other heads of legislative power, then the person powers would be largely redundant. This is particularly relevant to the section 51(xxvi) power; the other powers under discussion make special provision for persons who are *not* members of the Australian community but are aliens, or immigrants not yet absorbed into the community. The people of another race are not necessarily excluded from the general community, especially where the Australian Aborigine is concerned, but are members of the Australian community for whom special laws are deemed necessary because of their race. It is not a provision for people in a special position *vis-à-vis* the community, but special people for whom laws are deemed necessary, by virtue of their being a member of a special race. This then must remove them from the constitutional restrictions on legislation for the general communuity, that is, that Parliament cannot enlarge one head of power so as to acquire power to legislate in an area barred by another constitutional provision; their race is the sole determinant of the applicability of the special laws, which must be capable of enactment otherwise than in conformity with other legislative restrictions. That was the reason for the Constitutional amendment.

The scope of the immigration power is thus of greater value to this discussion than the aliens power, on which so little comment has been made. The power extends to the regulation of the activities of migrants at least until absorption into the community, and possibly beyond that time. Legislation is valid in areas not otherwise within the competence of the Commonwealth, subject to the proviso that there is a sufficient connection with the act of immigration, such as the provision of suitable housing, financial assistance and employment.

If this is applied by analogy to the section 51(xxvi) power, one finds that the limitation to be imposed upon the scope of that power would be likely, at most, to be a restriction to a direct connection between the legislation and the race of the person involved. Thus there is the aliens

[17] Welfare service ss. 51(xxiii) and (xxiiiA). In employment the Commonwealth is limited by the terms of s. 51(xxxv).

power, which appears to be plenary, and the immigration power, which may be limited if related to the act of immigration, but if relating to the immigrant can be construed broadly, and perhaps maintain the immigrant always within the ambit of the power.

Much time has been spent on the aliens and immigration powers, as it is considered that there is a far greater similarity between these powers and section 51(xxvi), than there is between that section and the corporations power,[18] the only other person power. There is no expressed limitation on the aliens power, and only the expansive expression 'for whom it is deemed necessary to make special laws', upon the race power, which expression, it is argued, cannot be construed as a restriction on the exercise by Parliament of its own discretionary power.

Section 51(xx) — Corporations

Section 51(xx) has led to interpretative problems due to the characterization of corporations so as to fall either within or outside the express limitations to 'foreign' corporations, and to 'trading and financial corporations formed within the limits of the Commonwealth'.

One of the earliest cases on the scope of the corporations power can be largely ignored as turning upon the now apparently defunct ground of implied prohibition of interference with State reserve power.[19]

The only judgment handed down in *Huddart, Parker & Co. Pty Ltd v. Moorehead*[20] not disapproved in *Strickland v. Rocla Concrete Pipes*[21] was that of Isaacs J. On the extent of the corporations power, he said:

> [I]t is a separate and independent power complete in itself, and additional to the commerce power. The commerce power is exercisable wherever that subject exists, whether individuals or corporations are engaged in it. The power over corporations is exercisable wherever these specific *objects* are found, irrespective of whether they are engaged in foreign or Inter-State commerce, or commerce confined to a single State. Next, it is clear that the power is to operate only on corporations of a certain kind, namely, foreign trading, and financial corporations. . . . The federal power was sufficiently limited by specific enumeration, and there is no need to place further limits on the words of the legislature.[22]

At a later point:

> [The corporations power] views the beings upon which it is to operate in their relations to outsiders, or, in other words, in the actual exercise of their corporate powers, and entrusts to *the Commonwealth Parliament the regulation of the corporations in their transactions with or as affecting the public.*[23]

Two aspects of this interpretation are of interest.

[18] S. 51(xx).
[19] The implied prohibition doctrine allegedly died with the decision in *The Amalgamated Society of Engineers v. The Adelaide Steamship Co.* (1920) 28 C.L.R. 129, which stated *inter alia* that Commonwealth powers were to be interpreted in the ordinary sense, without recourse to the doctrine on reserved State powers.
[20] (1909) 8 C.L.R. 330.
[21] (1971) 124 C.L.R. 468.
[22] (1909) 8 C.L.R. 330, 393. Emphasis added by this author.
[23] *Ibid.* 395. Emphasis added by this author.

Firstly, Isaacs J.'s conclusion that it is up to Parliament to decide in what manner corporations are to be regulated, within the given limits, echoes the conclusion reached as to the extent of the 'deeming' provision in section 51(xxvi). His Honour reached his conclusion in the absence of any enlarging phrases such as 'for the purposes of the Commonwealth', or 'deemed necessary', which would have been themselves capable of the interpretation that Parliament alone is to decide what comes within this power.

Secondly, the restriction imposed that the power does not go to the regulation of purely internal matters may be viewed in more than one way. If one considers the plain words of this comment, it could be an implied restriction on the extent of other person powers. It would probably prevent the provision of, for example, housing for aliens, as not being a matter involving the relationship of aliens to the community; but the provision of such services has been the subject of judicial and academic comment since the decision of Isaacs J. The restriction would probably affect Commonwealth intervention in the organization of Aboriginal Land Trusts, but not the negotiations between the Aboriginal people and prospective exploiters of mineral resources on Aboriginal lands, as this would constitute a transaction 'with or as affecting the public'. This potential restriction has been mentioned in passing, although I should not expect it to be transported to other person powers without similar reasons to those expressed by Isaacs J., and coloured by the implied immunity doctrine.

Several interesting comments, albeit *obiter*, were made during the course of the judgments in *Concrete Pipes*.[24] Section 35 of the Trade Practices Act 1965 (Cth) defined an 'examinable agreement' between persons,[25] details of which were to be provided to the Commissioner of Trade Practices on pain of penalty.[26] The sections were struck down as not within a head of Commonwealth legislative power, although the Court conceded that the corporations power would permit legislation on purely intrastate trading activities of corporations.[27] The difficulty with the decisions in *Concrete Pipes* is that the Court will not admit an extension of the power beyond the trading and financial activities of constitutional corporations. Barwick C.J., for example, construed laws regulating the trading activities of such corporations as valid laws, dealing 'with the very heart of the purpose for which the corporation was formed, for whether a trading or financial corporation, by assumption, its purpose is to trade'.[28] However, it now appears that, if the trading operations of the

[24] (1971) 124 C.L.R. 468.
[25] This is thus not limited to corporate persons.
[26] Ss. 41, 42 and 43.
[27] *Huddart Parker* (1909) 8 C.L.R. 330, 407 *per* Isaacs J.; 416 *per* Higgins J.
[28] (1971) 124 C.L.R. 468, 489.

corporation are 'merely incidental or ancillary to the fulfilment of its main purpose' it does not have the character of a trading corporation.[29]

There appears no logical reason for the restriction of the legislative power, once a corporation is found to be a constitutional corporation. It appears that foreign corporations will be treated as covered by a full plenary power, there being no constitutional qualification upon the grant.[30] But there is also no constitutional restriction upon the trading and financial corporation: there is no constitutional limit to the trading and financial activities of the corporation, and the argument may be put that the limit implied in *Concrete Pipes* is a throw-back to the implied immunity doctrine.

The regulation of trading and financial corporations is thus only settled in one aspect, that is that the Commonwealth power must at least comprise the power to regulate the trading activities of such corporations. There has since been a glimmer of hope in the *St. George County Council* case[31] that the rigid restrictions on the Commonwealth may be eased. The section had previously been held not to apply to the incorporation of associations, but only to corporations once formed.[32] In *St. George* the Chief Justice stated that, in his opinion, the insidious 'formed' in section 51(xx) 'serves to require local incorporation, the locality being any part of Australia'.[33] This was not the only element of interest in the case. The majority which held that the council was not a trading corporation within the constitutional meaning, despite its retailing of appliances, comprised McTiernan, Menzies and Gibbs JJ. Of these three, only Gibbs J. remains on the Court. Both judges in the minority, Barwick C.J. and Stephen J., who held that the council was a trading corporation, remain. The future of the case may therefore be considered as doubtful. Unfortunately, the eagerly awaited *C.L.M. Holdings* decision[34] was not of the far-reaching effect which had been prophesied. The Court did, however, uphold as valid the drafting technique employed in the Trade Practices Act 1974 (Cth), which Act carefully followed the *Concrete Pipes* guidelines and thus avoided the sudden demise accorded its predecessor.

It thus appears that the decisions to date on the corporations power have been coloured both by the wording of the Constitution, and by barely concealed concern with the powers of the States. There would be no logical bar to the Court holding that, once a corporation may be characterized as a constitutional corporation, that is a trading, financial or foreign corporation, then the Commonwealth has a plenary power to legislate for that

[29] *Ex parte St George County Council* (1974) 130 C.L.R. 533, 562 *per* Gibbs J.
[30] *Concrete Pipes* (1971) 124 C.L.R. 468, 489-91.
[31] (1974) 130 C.L.R. 533, 536 *per* Barwick C.J.
[32] *Huddart Parker* (1909) 8 C.L.R. 330.
[33] (1974) 130 C.L.R. 533, 542.
[34] (1977) 51 A.L.J.R. 362.

corporation. In addition, there is the possibility that a future attempt to introduce uniform Companies legislation would not be defeated, if the view of the Chief Justice prevails. Certainly he would be supported by Murphy J., one would assume, as the latter, when Attorney-General for the Commonwealth, frequently supported such legislation.

CONCLUSION

There would appear to be one limitation upon the exercise of the Commonwealth's legislative power under section 51(xxvi) of the Constitution, which limitation is expressed to be that laws made be otherwise 'subject to this Constitution'. There is, subject to this qualification, an unfettered discretion in the Parliament to make laws which have a connection with the race of the person on whom they operate.

The limit imposed by the qualification would probably be that an acquisition of lands in a state could not be made without it being on 'just terms'. The High Court has not to date shown such centralist tendencies as to lead one to believe that a law which was otherwise would be held to be valid. But could not the Commonwealth legislate to overcome, for example, the Queensland Act which constitutes the Shires of Aurukun and Mornington, by constituting Commonwealth reserves? Such is the logical extent of the power granted by referendum in 1967. Such also appeared to be the view taken by the Government, particularly during the period of legislative zeal, 1972-1975, when forays were made into areas of legislation specifically barred to the Commonwealth under other heads of power, under the auspices of the power to legislate for Aborigines.

Further, an examination of the other person powers reveals no logical limitations; the findings on the corporations power in particular appear to be based on judicial timidity and not constitutional restriction. In addition, the major decisions on the corporations power have arisen in the area of Restrictive Trade Practices legislation, and have been beset by discussions of drafting problems, not strictly applicable to the other heads of power. The most interesting area of the Trade Practices legislation is the extension of prohibited conduct to natural persons dealing with corporations; there appears to be no reason for this procedure not to be adopted in regulating the dealings of either natural persons or corporations with Aboriginal Communities, under the provisions of section 51(xxvi).

So, to paraphrase Menzies J., the answer to the question 'Is any law commencing "no Aborigine shall . . ." a valid law?' would be 'yes'; as it would be to an enquiry 'Is any law commencing "no person in dealing with an Aborigine shall . . ." a valid law?'

POSTSCRIPT†

As has been stated, this article was written in response to the situation

† This postscript is dated June 13, 1980.

which developed in relation to the claims of the Aboriginal people of Aurukun, Queensland, to maintain their homeland free from interference. It examines possible restraints upon the power of the Australian Government to legislate for Aborigines, even in the face of opposition from the government of the State in which those Aborigines are located. It dismisses potential restraints as having no Constitutional basis.

Confrontation similar to that in Queensland has been seen recently in Western Australia, having erupted during the week of Easter at Noonkanbah, in particular. In true Christian spirit, the government of the State has, through its apparently most vocal spokesman, declared its intention to mine regardless of Aboriginal claims. Having been reported as stating that the whole state of Western Australia was the subject of Aboriginal mythology, the Minister for Cultural Affairs, Mr William Grayden, reportedly continued:[35]

> It is for this reason that the West Australian Government is spelling out its position now so that it is clear to all that it does not accept such claims and obstructions as valid reasons to prevent mineral exploration.

What protection is available to the Aboriginal people under the State law? The Aboriginal Heritage Act 1974 proclaims itself to be:

> An Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.

But the power vested in the Trustees of the West Australian Museum in administering the Act is a right to make recommendations to the Governor-in-Council for the declaration of a site as a protected area,[36] and the Governor-in-Council has a mere discretionary power to declare an area so to be. A person aggrieved by such a declaration may object[37] (although no such right is granted to the aggrieved Aborigine) and an objection to the aforesaid responsible Minister would surely produce a most predictable result.

Consider, for example, the reported comments of the Minister on the status of the Aboriginal people of his State:[38]

> The history of the world has been a series of conquests. Land rights for the indigenous population formed no part of such occupations.

Does this not fly in the face of the admittedly oft criticized judgment of Mr Justice Blackburn in *Milirrpum v. Nabalco*[39] in which his Honour found himself bound to apply the settled Privy Council authority of *Cooper v. Stuart*[40] that 'Australia came into the category of a settled or occupied colony', rather than a conquered land? How may such flagrant

[35] *The National Times* 13-19 April 1980 5.
[36] S. 18(2)(a).
[37] S. 21.
[38] *The National Times* 13-19 April 1980 5.
[39] (1971) 17 F.L.R. 141, 242.
[40] (1889) 14 App. Cas. 286.

disdain for the authority of the law be tolerated by the Australian Parliament which, it is submitted, has the power to defuse this situation by direct legislation? Are we to assume that both the State Governments involved and the Australian Government are influenced by the same vested interests in determining how one may balance the 'national interest' against the claim of a deliberately depressed sector of the population?

In considering whether to act, and how to act, can a federal government of any political persuasion fail to be moved to sympathetic and sensitive consideration of the plight of the Aboriginal people in attempting to preserve their relationship with the land, having read the graphic account of the reaction of a group of Aboriginal people to coming upon one of their sacred sites which had been all but destroyed:

> When they saw the desecration of the site they were physically sick. They were vomiting. They felt that a part of them had been killed, destroyed, and they were afraid.[41]

Must the so-called 'national interest' only be served by aggression?

[41] *The Age* 11 April 1980, 5.