THE FEDERAL PARLIAMENT'S POWER TO MAKE LAWS "WITH RESPECT TO . . . . THE PEOPLE OF ANY RACE . . . ."

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Section 51 (xxvi) of the Commonwealth Constitution gives the Commonwealth Parliament 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".

This paper will attempt to outline the purposes of s. 51 (xxvi) and the difficulties associated with its interpretation. It will be suggested that s. 51 (xxvi) is, in part, one facet of the Commonwealth Parliament's powers in its dealings with the rest of the world. There has been little judicial comment on the provision. The parameters of the power must therefore be found from a consideration of its objects.

The forbearer of s. 51 (xxvi) first appeared in the draft of the Constitution considered at the Constitutional Convention held at Sydney in 1891. It empowered the Commonwealth Parliament to make laws with respect to:

> The affairs of any 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 power shall not extend to authorise legislation with respect to the aboriginal native race in Australia and the Maori race in New Zealand.

The words "not applicable to the general community" and "and the Maori race in New Zealand" were excised at the Conventions of 1897 to 1898. After New Zealand's withdrawal from the Federal movement the reference to Maoris became redundant. The phrase "not applicable to the general community" was deleted because the drafting committee thought that it was superfluous.[1] The Convention Debates reveal that the redrafting was aimed at clarifying the power[2] not at altering its ambit.

The provision in its original form was designed, in terms, to give the Commonwealth Parliament power to make laws:

1. With respect to any people of a particular race but not the Aboriginal race;

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[1] See generally, *Debates of the Australasian Federal Convention*, Melbourne (1898) 1 at 229; G. Sawer, "The Australian Constitution and the Australian Aborigine" (1966-67) 2 *Fed. L.R.* 17 at 19, 23.

[2] *Ibid.*

2. Which relate only to the affairs of that race, not the general community, and
3. Which are special in the sense that the law applies only to the people of the particular race, not the general community.

The Convention Debates did not dwell on s. 51 (xxvi). Sir Samuel Griffith suggested the power,[3] then contained in clause 53(1) of Chapter 1. Clause 53 (the equivalent of the present s. 52) gave the Commonwealth Parliament exclusive powers. The exclusivity of the special races power was questioned: it was thought that the States should have a concurrent power until the Commonwealth acted.[4] It was argued that the equivalent of the present s. 108 would preserve sufficient State power, even if the special races power was exclusive to the Commonwealth.[5] Eventually, the power was transferred to the present s. 51 to become a concurrent instead of an exclusive power.

Sir Samuel Griffith had argued that s. 51 (xxvi) should be made exclusive because "the introduction of an alien race in considerable numbers into any part of the Commonwealth is a danger to the whole of the Commonwealth, and upon these matters the Commonwealth should speak, and the Commonwealth alone".[6] Griffith's concern was of no moment. The Commonwealth Parliament's power to control incoming aliens existed under the immigration, aliens and external affairs powers. At the Melbourne convention in 1898 Bernard Wise suggested that Griffith's purpose would be met if the special races power was confined to circumstances in which the Commonwealth made an immigration law to achieve the results sought by Griffith at the 1891 Convention.[7]

Harrison Moore[8] regarded s. 51 (xxvi) as designed to enable the Commonwealth to pass laws concerning:

> . . . the Indian, Afghan and Syrian hawkers; the Chinese miners, laundrymen, market gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia.

Sir Samuel Griffith emphasised the need for "special" treatment as a precondition to the exercise of power under s. 51 (xxvi) when he observed that not only would it empower Commonwealth legislation directed towards Indian coolies and Polynesian labourers in Queensland but also "other groups needing special protection or contractual arrangements".[9] Quick and Garran[10] observed that the object of making these laws was:

> . . . to localise [the people forming part of a race] within defined

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[3] *National Australasian Convention Debates*, Adelaide (1897) at 832 *per* O'Connor.

[4] *National Australasian Convention Debates*, Sydney (1891) at 702 (*per* Deakin), 704 (*per* Griffith); *Debates of the Australasian Federal Convention*, Melbourne (1898) at 230 (*per* Deakin), 232 (*per* Barton).

[5] See *Ibid.*

[6] *National Australasian Convention Debates*, Sydney (1891) at 525.

[7] *Debates of the Australasian Federal Convention*, Melbourne (1898) 1 at 240.

[8] *The Constitution of the Commonwealth of Australia* (2nd ed. 1910) at 464. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 622.

[9] *National Australasian Convention Debates*, Sydney (1891) at 703.

[10] *Supra* n. 8.

> areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and to secure their return after a certain period to the country whence they came.

These observations illuminate the nexus between the race power and the aliens[11] and immigration[12] powers.

The early Convention Debates confirm the views of Quick and Garran and Harrison Moore. Sir Samuel Griffith, for instance, stated that:

> . . . what I have had more particularly in my own mind, was the immigration of coolies from British India, or any eastern people subject to civilised powers. The Dutch and English Governments in the east do not allow their people to emigrate to serve in any foreign country unless there is a special law made by the people of that country protecting them and affording special facilities for their going and coming . . . . I maintain that no state should be allowed, because the Federal Parliament did not choose to make a law on the subject, to allow the state to be flooded by such people as I have referred to.[13]

Barton noted that the placitum empowered the Commonwealth to legislate with respect to British subjects, not only aliens.[14] The power extends, in terms, not only to aliens but also to people who may be born in Australia. The Convention Debates leave unresolved the difficult question of why the provision should not be read so as to authorise the making of laws on almost any subject and applicable to the "majority race"—every person, say, of "Caucasian origin",[15] or people with dominant "Anglo-Saxon and Celtic" heritage.[16] Sawer[17] has noted that elimination of the phrase "not applicable to the general community" was unfortunate. While it formed part of the provision it would be difficult to regard the word "race" as referring to a majority of Australian residents, namely persons with Anglo-Saxon and Celtic heritage. After its deletion the history of the provision and a construction making the other express grants of power almost unnecessary are the only factors which suggest that the majority "race" is not a "race" within the ambit of the provision.

The placitum specifically excluded Commonwealth power to legislate with respect to Aboriginal people. This may have been insignificant if Quick and Garran were correct when they observed[18] that the object of the power was to enable the Commonwealth to control the geographic distribution of "aliens", to offer them special protection and to confine them within certain occupations. But Griffith's comment that the provision extended to groups—presumably including non-alien races—with special needs[19] suggests that the Aboriginal race was thought not to warrant Commonwealth control. It may have been that the Aboriginal race was

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[11] S. 51 (xix). Discussed below.
[12] S. 51 (xxvii). Discussed below.
[13] *National Australasian Convention Debates*, Sydney (1891) at 703.
[14] *Debates of the Australasian Federal Convention*, Melbourne (1898) at 229.
[15] Sawer, *supra* n. 1 at 23.
[16] *Koowarta* v. *Bjelke-Petersen* (1982) 56 A.L.J.R. 625 642 *per* Stephen, J.
[17] *Supra* n. 15.
[18] Quick and Garran, *supra* n. 8.
[19] *Supra* n. 9.

regarded as a dying species whose future needs did not require protection beyond that which the States would provide.[20]

The 1967 Amendment

Until 1967 s. 51 (xxvi) empowered the Commonwealth Parliament 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 words "other than the Aboriginal race in any State" were deleted by the Constitution Alteration (Aboriginals) Act 1967 (Cth.) following a referendum held on May 27, 1967.[21]

The Referendum 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"?[22]

Material made available to the public prior to the Referendum revealed that its purpose was:

> First, [to] remove words from our Constitution that many people think are discriminatory against the Aboriginal people. Second, [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 Parliament considers it necessary.[23]

The Parliamentary debates preceding the Referendum show that its principal object was to enable the Commonwealth to overcome an inequality in the treatment of Aboriginals in the States. For instance, it was said 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.[24]

Mr. E. G. Whitlam, who later became Prime Minister, saw the 1967 Act as giving the Commonwealth Parliament power to pass laws removing discrimination against Aboriginals and to grant the Aboriginal race "especially favourable treatment . . . to overcome the handicaps we have inflicted on them".[25] Of course, if the authors of secondary sources were correct, the 1967 Act also gave the Commonwealth Parliament the power to make laws which discriminate against people of the Aboriginal race.

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[20] Sawer, *supra* n. 1 at 18.

[21] The amendment had been mooted for many years. In 1929 a Royal Commission recommended that s. 51 (xxvi) not be amended to empower the Commonwealth Parliament to make laws with respect to aborigines: "we think that . . . the States are better equipped for *controlling* aborigines than the Commonwealth" (emphasis mine): *Report of the Royal Commission on the Constitution* (1929) at 270.

[22] Pamphlet entitled: *The Arguments for and against the Proposed Alteration together with a Statement Showing the Proposed Alteration* at 13.

[23] *Id.* 11.

[24] *Parliamentary Debates*, House of Representatives, March 1, 1967 at 280.

[25] *Parliamentary Debates*, House of Representatives, August 13, 1968 at 15.

The consequences of the 1967 Act may however extend beyond its purpose. Prior to the amendment the exclusion of Aboriginals from the ambit of power conferred by the provision (taken together with an acknowledgement that the words "not applicable to the general community" were deleted because they were regarded as superfluous) suggests that it was designed originally to empower the Commonwealth Parliament to make laws with respect to minority, immigrant races within Australia. The amendment enables the power to be used for a different purpose, namely to make laws with respect to non-immigrant people of a race within Australia.

A number of judges in *Commonwealth* v. *Tasmania*[26] regarded the 1967 Act as having clarified the meaning of the word "race". Murphy, J. observed that the 1967 Act made it clear that the placitum includes, as part of a requisite "race", Aboriginals and Torres Strait Islanders and every subdivision of those people.[27] With respect, the 1967 Act was not designed to nor did it deal with subdivisions of any race or with the definition of "race" although a mature consideration of the 1967 Act would inevitably lead to the conclusion that those persons who are members of the Australian Aboriginal race do come within the concept of "race" within s. 51 (xxvi). Brennan, J. regarded the 1967 Act as an "affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens would be at an end . . . ."[28] This implicitly acknowledges that a necessary result of the amended provision is to include Aboriginal citizens as a "race". His Honour of course is going one step further and adopting the possible political objectives of the amendment as justification for a legal conclusion. Deane, J. took a similar approach: a recognition that the Commonwealth Parliament is in a better position than the State Parliaments to benefit the people of the Aboriginal race. His Honour saw the exclusion of the Aboriginal race from s. 51 (xxvi) as a "fetter upon the legislative competence of the Commonwealth Parliament to pass necessary special laws for their [the Aboriginals'] benefit".[29] The other members of the Court did not comment upon the significance of the amendment.

While s. 51 (xxvi) existed in its unamended form the Commonwealth Parliament was arguably prevented – because of the negative implication within s. 51 (xxvi) – from making laws which dealt with Aboriginal persons. For instance, the Select Committee of the Commonwealth House of Representatives on the Voting Rights of Aboriginals feared that a law extending the franchise to Aboriginals in federal elections might be invalid because of an inference from the placitum.[30] This fear was probably without substance[31] as the exclusion of Aboriginals under s. 51 (xxvi) would not, on normal principles of characterization,[32] preclude the

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[26] (1983) 46 A.L.R. 625.

[27] *Id.* 737.

[28] *Id.* 791.

[29] *Id.* 816-817.

[30] *Report of the Select Committee of the Commonwealth House of Representatives on the Voting Rights of Aboriginals* (1961) F8478/61.

[31] See Sawer, *supra* n. 1 at 24-25.

[32] In particular where it is possible to characterise an Act in more than one way, the Court will accept the Act as valid if it is a reasonable exercise of power, even though it may be characterised in another manner not within Commonwealth legislative competence: e.g. *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373 (First Uniform Tax Case).

Commonwealth from making legislation which extended to and made specific provision for Aboriginals under other heads of power.[33]

The 1967 Act was the result of a change in community values. The public's response to the Referendum gave a "mandate" to the Commonwealth to make special laws relating to Aboriginals. It showed that the people felt that Aboriginal needs were best dealt with by a central government. This is, of course, at odds with the view adopted by the founding fathers.

The 1967 Act also represents an implicit change in the purpose of s. 51 (xxvi). In its original form it empowered legislation relating to "alien"—usually minority—races with special needs for assistance or control. Although the Aboriginal race may experience needs and problems similar to those experienced by "alien" races, it is not an "alien" race. If "race" originally meant "alien" race then to include Aboriginals within the ambit of the provision changes the nature of the power. It could simply have excluded a reference to race and be activated by any group with common interests experiencing special problems or expressing special needs. The inclusion and retention of a "race" as an activating criteria becomes an arbitrary jurisdictional fact to Commonwealth legislation.

Judicial Views

Section 51 (xxvi) had, until recently, avoided significant judicial comment. Fleeting references to the provision have not aided its interpretation.[34]

At least two Commonwealth Acts—the Aboriginal Affairs (Arrangements with the States) Act 1973 (Cth.) and the Racial Discrimination Act 1975 (Cth.)—are expressed to be based, *inter alia*, upon the special races power. The Aboriginal Affairs (Arrangements with the States) Act 1973 (Cth.) recites that:

> 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 Act has not been challenged.[35] However, the Racial Discrimination Act 1975 (Cth.) has been the subject of challenge in *Koowarta* v. *Bjelke-Petersen*.[36] It recited that "AND WHEREAS it is desirable, in pursuance of all relevant power of the Parliament, including, but not limited to, its powers to make laws with respect to external affairs, with

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[33] The argument that s. 51 (xxvi), by negative implication, precluded the Commonwealth Parliament, under any head of power, legislating to affect Aboriginals is dealt with at length and dismissed by Sawer, *supra* n. 1 at 31-35. Following the 1967 amendment, that discussion became barren.

[34] E.g. *Robtelmes* v. *Brenan* (1906) 4 C.L.R. 395 where Barton, J., (at 415) observed that the legislation sought to be impugned was within Commonwealth legislative competence under any three of four heads of power—one of which was the race power—but did not state which of the four heads of power would not justify the legislation; *Strickland* v. *Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468 at 507-508 where Menzies, J. asked rhetorically whether the Commonwealth Parliament could by a law under s. 51 (xxvi) govern all the trading activities of the people of a particular race.

[35] J. E. Eastick, "The Australian Aborigine: Full Commonwealth Responsibility under the Constitution" (1980) 12 *M.U.L.R.* 516 at 525-527, 528-531 identifies other legislation possibly based on s. 51 (xxvi) but not yet challenged.

[36] (1982) 56 A.L.J.R. 625.

respect to the people of any race for whom it is deemed necessary to make special laws, and with respect to immigration . . . ." *Koowarta* v. *Bjelke-Petersen*[37] represents the first significant judicial analysis of s. 51 (xxvi).

Koowarta v. *Bjelke-Petersen*[38]

Koowarta, a member of a group of Queensland Aboriginals, had requested the Aboriginal Land Fund Commission to acquire a Crown Lease over a pastoral holding in Queensland for use by him and other members of his group. The Commission contracted to purchase the lease. It applied to the Queensland Minister for Lands for his consent, which was required both under the Land Act, 1962 (Qld.) and the contract. The Minister refused his consent: the State Cabinet did not view favourably the acquisition of large areas of land by Aboriginals or Aboriginal groups in isolation. Koowarta sought declarations, an injunction and damages. He argued that the reason for the Minister's refusal was in breach of the Racial Discrimination Act 1975 (Cth.). Section 9(1) of that Act outlawed discriminatory acts based upon race and related characteristics which had the purpose or effect of impairing recognition or enjoyment of any human right or fundamental freedom in any field of public right including any right of the kind referred to in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Article 5 imposes an undertaking on a party to the Convention to prohibit racial discrimination and guarantee the right of everyone, without distinction as to race, to equality before the law (notably in the enjoyment of certain specified rights including "the right to own property"). Australia is a party to the Convention. By s. 12(1)(a) of the Racial Discrimination Act it is unlawful for a person to dispose of his interest in land to a second person on less favourable terms and conditions than those which would otherwise be offered by reason of the race, colour or national or ethnic origin of that second person. The State of Queensland submitted that the Racial Discrimination Act was unconstitutional.

A majority[39] of the High Court held that ss. 9 and 12 of the Racial Discrimination Act 1975 (Cth.) were laws with respect to "external affairs" within the meaning of the external affairs power[40] and were accordingly within Commonwealth power. Much of the argument and the Court's reasoning concerns the external affairs power. The Commonwealth, as an intervener, however, had also argued that the sections in questions were valid as an exercise of power under s. 51 (xxvi). The Court disagreed.[41]

Gibbs, C.J. held that ss. 9 and 12 of the Racial Discrimination Act 1975 (Cth.) prohibited discrimination generally on the ground of race, that is, they protected persons of any race from discriminatory action by reason of their race.[42] The Commonwealth had submitted that the sections were "special laws" because they selected as their subject the people of any race against whom discrimination on racial grounds is, or may be, practised.

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[37] *Ibid.*

[38] *Ibid.*

[39] Stephen, Mason, Murphy and Brennan, JJ.; Gibbs, C.J., Aickin and Wilson, JJ., dissenting.

[40] S. 51 (xxix).

[41] Gibbs, C.J., Stephen, Aickin, Wilson and Brennan, JJ.; Murphy, J., dissenting. Mason, J. did not comment on this point.

[42] *Supra* n. 36 at 631 ff.

The Chief Justice held that this argument gave insufficient weight to the words "for whom it is deemed necessary to make special laws": a law which applies to the people of all races is not a special law. The placitum was not to be construed as if it read simply "the people of all races". His Honour, therefore, held that the word "any" in the placitum is used in the sense of "no matter which":

> . . . the Parliament may deem it necessary to make special laws for the people of a particular race, no matter what the race. If the Parliament does deem that necessary, but not otherwise, it can make laws with respect to the people of that race. The opinion of Parliament that it is necessary to make a special law need not be evidenced by any express declaration to that effect. It may appear from the law itself. However, a law which applies equally to the people of all races is not a special law for the people of any one race. . . .[43]

His Honour found that ss. 9 and 12 of the Act dealt with discrimination against people of all races and thus were not laws with respect to "the people of any race for whom it is necessary to make special laws".

Aickin, J.,[44] expressly adopted the reasons given by the Chief Justice as, generally, did Wilson, J.[45]

Stephen, J. also found that the provisions in question did not protect any particular race and thus was not a special law.[46] Most heads of power in s. 51 are defined in terms of some class of activity, some common governmental power or function or some class of physical object. Section 51 (xxvi), however, is defined by reference to a particular class of persons. Stephen, J. noted that this is:

> . . . inherently less precise . . .; and when as in par. (26) the class is no more specific than "the people of any race", the class depending for further identification upon the legislature deeming it to be necessary to make special laws for its members, the content of the power is determined by one sole criterion, that laws which may be made under it must be special laws deemed necessary for the people of any race.[47]

His Honour found that the race in question must exhibit some special quality which calls for a law special to itself:—

> . . . [This] is more than a mere qualification of the power, it also predicates a character which laws made under par. (26) must possess; they must be special laws, in the sense of having some special connection with the people of any race. It is true that the grant of power is not in terms confined to the making of special laws, but from the description of the laws which may be made under it, the laws for those people of any race deemed in need of special laws, it follows that it is special laws and only special laws which fall in

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[43] *Id.* 632.
[44] *Id.* 657.
[45] *Id.* 657-658.
[46] *Id.* 642-643.
[47] *Id.* 642.

> par. (26). It cannot be that the grant becomes plenary and unrestricted once a need for special laws is deemed to exist; that need will not open the door to the enactment of other than special laws. I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises, without this particular necessity as the occasion for the law, it will not be a special law such as s. 51 (26) speaks of . . . . A law will . . . not possess that character if it legislates for all peoples of the Commonwealth, regardless of race, who happen to be confronted with or to present particular problems deemed to call for legislative action.[48]

Stephen, J. noted, also, that the "necessary special quality might perhaps be sufficiently attracted by facts dehors the legislation".[49] This observation is a significant addition to the learning on s. 51 (xxvi). It suggests that a law can be characterised as falling within s. 51 (xxvi) by reference to its operation.

Brennan, J. maintained that a law within s. 51 (xxvi) discriminates between the people of the race for whom the special laws are made and other people, whereas ss. 9 and 12 of the Act protected any person aggrieved by a contravention of the provisions, irrespective of his race or of the race of the person whose conduct is considered to have contravened these provisions. These provisions swept into their protection the people of all races, whether or not they were the people of a race for whom it was deemed necessary to make special laws.[50]

Mason and Murphy, JJ., felt that there was no need to discuss s. 51 (xxvi). The legislation in question, in their view, was supported by the external affairs power. Murphy, J. also commented, without giving any significant reasons, that the laws in question were nevertheless supported by s. 51 (xxvi).[51]

A majority of the judges in *Koowarta* make four points clear:

(1) The phrase "the people of any race" refers to the people of a particular race.
(2) To fall within s. 51 (xxvi) a law must not only be deemed necessary for the people of a particular race (a non-justiciable question), it must also be a special law for those people.
(3) A law which applies equally to the people of all races is not a special law.
(4) A law made under s. 51 (xxvi) can discriminate against or in favour of the people of a particular race.

Stephen, J. paid more attention than the other judges to the elements of a "special law". In summary his Honour observed that:—

1. The people of the particular race must possess some special quality which calls for laws special to themselves.

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[48] *Ibid.*
[49] *Id.* 643.
[50] *Id.* 665.
[51] *Id.* 656.

2. A "special law" must be special in the sense of having some special connection with the people of the particular race.
3. The law in question must be special to the people of the particular race.
4. The necessity for the law must arise from special needs, threats to or problems of the people of the particular race.

Each member of the Court who considered the question, either expressly or by implication, agreed that s. 51 (xxvi) does not grant a plenary power. It will always remain a question for the Court as to whether the law in question is a "special law".

Commonwealth v. *Tasmania*[52]

The Court's consideration of s. 51 (xxvi) in *Koowarta* v. *Bjelke-Petersen*[53] was re-assessed in *Commonwealth* v. *Tasmania*[54] (the *Dams* case). The State of Tasmania legislated to authorise the construction of a dam on the Gordon River in south-western Tasmania (the Gordon Below Franklin Scheme). The dam was to be built by the Hydro-Electric Commission of Tasmania, a corporation created by the Hydro-Electric Commission Act, 1944 (Tas.) and given various functions connected with the generation and distribution of electricity in Tasmania. The Commonwealth attempted to stop the Gordon Below Franklin Scheme. It legislated to prohibit the construction of the dam, and certain associated activities, without the consent of the relevant Commonwealth Minister. The prohibitions were contained in Regulations made pursuant to s. 69 of the National Park and Wildlife Conservation Act 1975 (Cth.) (the National Parks Act) and in the World Heritage Properties Conservation Act 1983 (Cth.) (the World Heritage Act). Regulations made under the National Parks Act specifically prohibited construction of the dam. The World Heritage Act applied more generally to prohibit clearing, excavation and building on any "identified property". "Identified property" was defined as property forming part of the cultural or natural heritage which had been submitted for inclusion in the World Heritage List pursuant to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, or which had been declared by regulation to form part of the cultural or natural heritage. Subsequent Regulations declared that the Act extended to the Kutinkina and Deena Reena Caves and the open archaeological sites. These areas contained Aboriginal artefacts of cultural importance. The substantive provisions were activated when the Governor-General was satisfied that the identified property was being or was likely to be damaged or destroyed. The prohibitions were applied to, *inter alia*, identified property the protection of which by Australia was a matter of international obligation and to identified property (for instance, the caves mentioned above) forming part of the distinctive heritage of the Australian nation, the protection of which was, by reason of the inadequacy of other alternatives, appropriately undertaken by the Commonwealth.

The substantial question before the Court was the constitutional validity

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[52] *Supra* n. 26.
[53] *Supra* n. 36.
[54] *Supra* n. 26.

of the Commonwealth legislation and regulations. The Commonwealth relied on various constitutional powers: s. 51 (xxvi) (the external affairs power), s. 51 (xx) (the corporations power: the H.E.C. was a trading corporation), and s. 51 (xxvi) (the race power). The Commonwealth also relied upon an implied power inherent in nationhood. In addition to denying these bases of constitutional power Tasmania argued that the Commonwealth had effected an acquisition of property otherwise than on just terms (in breach of s. 51 (xxxi)); that the Commonwealth had infringed s. 100 of the Constitution, which provides that the Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State to a reasonable use of the waters or rivers for conservation or irrigation; and that the Commonwealth had infringed an implied constitutional restriction that it should not exercise its powers so as to destroy the States or impair their capacity to function.

A majority of the Court[55] held that the Commonwealth had validly prevented construction of the dam. They relied upon the external affairs power, the trading corporations power and the special races power.

The Court dealt at length with a number of significant constitutional issues. This paper will confine itself to the Court's consideration of the special races power.

The majority held that the s. 51 (xxvi) was not limited to empowering legislation which gives special rights, affords special protection or imposes special duties on the people of a particular race. A law which protected the cultural heritage of the Aboriginal people was a "special law" for those people because of the particular significance they gave to that heritage. It was no objection that the protected sites were confined to those which also formed part of the world heritage and were thus of general significance. The minority held that a law which protected sites which had significance to all mankind was not a special law for the people of one race.

The meaning of "special law"

Tasmania contended that the legislation was not a "special law" for the people of the Aboriginal race.

Mason, J. accepted the views of Stephen, J. in *Koowarta*—the placitum was sufficiently broad to justify Commonwealth regulation and control of the people of any race if they represent a threat or problem to the general community and to protect people of a particular race if they need protection.[56] His Honour said:

> A law which protects the cultural heritage of the people of the Aboriginal race constitutes a special law for the purpose of par. (xxvi) because the protection of that cultural heritage meets a special need of that people . . . something which is of significance to mankind may have a special and deeper significance to a particular people because it forms part of the cultural heritage . . . an Aboriginal archaeological site which is part of the cultural heritage of people of the Aboriginal race has a special and deeper significance for Aboriginal people than it has for mankind generally . . . there is a

[55] Mason, Murphy, Brennan and Deane, JJ.; Gibbs, C.J., Wilson and Dawson, JJ., dissenting.
[56] *Supra* n. 26 at 718-719.

> special need to protect sites for them (the Aboriginals), a need which differs from, and in one sense transcends, the need to protect it for mankind.[57]

Murphy, J. observed that:

> . . . because of the attempted genocide of the Aboriginal race in Tasmania which extended to their customs, tribal structures and culture, a law *aimed at* the preservation, or the uncovering, of evidence about their history is a special law with respect to the people of that race. The law in question which provides for the protection and conservation of Aboriginal sites that are, or are within, world heritage sites, "the protection or conservation of which is of particular significance to the people of the Aboriginal race is" a law within s. 51(29) [*sic*]. I agree with the interpretation of "particular significance" given by Mr. Justice Brennan.[58]

It is of interest that his Honour adopts a purposive approach in assessing the validity of the legislation. This should be compared with the statement of Wilson, J., that "the motives which may have led the Parliament to enact the law are irrelevant to the task of characterization".[59]

Brennan, J. noted that the placitum does not require a law to be "special" in its terms: it suffices that it is special in its operation—in essence, adopting an observation of Stephen, J., in *Koowarta*—going beyond the terms of the legislation and considering its operation.[60] His Honour found that the law in question was in fact special in its operation, and that:

> . . . [This approach] involves no departure from the ordinary processes of constitutional interpretation. The characterization of a law requires that the operation of the law be ascertained by reference to its terms and their application to the circumstances in which the law operates.[61]

Brennan, J. referred to *Koowarta* and noted that on the facts of that case the proscribing of racial discrimination was not a matter of particular significance to the people of the Aboriginal race. His Honour applied this reasoning to the Act before him noting that it operated only in protection or conservation of a site which was of "particular significance" to the people of the Aboriginal race.[62]

Deane, J. said that:

> . . . a law for the protection and conservation of sites, if and only if, they are of significance to the people of mankind is the antithesis of a special law for the people of a particular race . . . . a law protecting [the Aboriginal sites] is, in one sense, a law for all Australians. It appears to me, however, on any approach to language, that a law whose operation is to protect and preserve sites of universal value

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[57] *Id.* 719.
[58] *Id.* 737-738 (my emphasis).
[59] *Id.* 755.
[60] *Id.* 793.
[61] *Ibid.*
[62] *Id.* 794.

> which are of particular importance to the Aboriginal people is also a special law for those people.[63]

It can properly be said, then, that the majority of the Court held the common view that the law was special for Aboriginal people because of its particular significance to that race over and above the significance of the law to the people of Australia generally.

Conversely, the minority found that the law in question was not a "special law" as the Aboriginal sites sought to be protected were of significance to mankind generally, not only to Aboriginal people. Gibbs, C.J., in an observation typical of the minority view, noted that:

> . . . the law would not be a special law for the people of the Aboriginal race only because the site contained artefacts and relics dating from prehistoric times, even though those artefacts and relics were left by the race which originally inhabited Tasmania. Artefacts and relics of such antiquity are of significance to all mankind; a law for their protection is not a special law for the people of any one race.[64]

In addition the Chief Justice held that a special law required the allocation of special rights or privileges or the imposition of special obligations. The Act gave no special rights or privileges to Aboriginal persons, nor did it impose any special obligations upon them.[65]

Dawson, J. recognised a distinction between a law which is specially for the people of a particular race and a law which has a special application to the people of a particular race.[66] If the law is one which is specially for the people of a particular race it is unlikely that the law is a "special law". In his Honour's view the mere fact that a law is more significant to people of a particular race than to others or is approved of by them to a greater extent than by others does not make the law a "special law" for those people.[67] Conversely, a law which has a special application to the people of a particular race by distinguishing between the people of the particular race and others in the rights which it confers or the obligations which it imposes is likely, in his Honour's view, to be a "special law".[68] His Honour found that the law in question was of general application and of significance to all, and as such was not a special law for the people of any race.

The meaning of " . . . with respect to . . . . the people of" any race

Tasmania submitted that a law aimed at protecting caves which housed Aboriginal relics was not a law "with respect to the people of" the Aboriginal race. The Commonwealth submitted that the relics and artefacts were part of the culture and heritage of the Aboriginal race and that the words "the people of" the Aboriginal race included their culture or heritage.

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[63] *Id.* 818.

[64] *Id.* 678. Wilson, J. at 757, did not differ in any significant respect from this part of the Chief Justice's judgment.

[65] *Id.* 677.

[66] *Id.* 855-856.

[67] *Id.* 856.

[68] *Ibid.*

The majority accepted the Commonwealth's submissions. The views of Mason, J. typify those of the majority:

> . . . the cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.[69]

His Honour added that a law which protects the cultural heritage of the people of the Aboriginal race constitutes a "special law" because the protection of that cultural heritage meets a special need of that people and that something which is of significance to mankind generally may have a special and deeper significance to the particular people because it forms part of their cultural heritage.[70] His Honour was therefore of the view that the two elements of the placitum should not be divorced. The two questions: is the law with respect to the people of the particular race, and is it a special law, may in certain circumstances, be governed by the same considerations.

Murphy, J. was of the view that the power authorised any law for the benefit, physical or mental, of the people of the race in question and that a law protecting the cultural heritage of a particular race is for the psychological benefit of the people of that race and therefore within power.[71] His Honour, however, reached this conclusion on the premise that the attempted genocide of the Aboriginal race in Tasmania raised special considerations concerning the preservation or uncovering of their history. Had there not been evolutionary problems of the Aboriginal race in Tasmania his Honour may not have determined that a law aimed at protecting their culture had a sufficient nexus with the people of the race or alternatively may not have been a special law.[72]

Brennan, J. observed that as the people of a race identify themselves, and are identified by others, by their common history, religion, spiritual beliefs and/or culture in addition to their biological origins and physical similarities, then "the kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity".[73]His Honour was of the view that any law which attaches to those things "which are a focus of the life of the race"[74] is a law with respect to "the people of" the race. His Honour included, within the reference "a focus of the life of the race", laws for the general protection of historical memorabilia, of religious or spiritual or of cultural practices which have particular significance to the people of the race.[75]

Deane, J. held that the phrase "the people of any race"[76] had a wide and non-technical meaning and that the relationship between the

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[69] *Id.* 719.
[70] *Ibid.*
[71] *Id.* 737.
[72] *Ibid.*
[73] *Id.* 793.
[74] *Ibid.*
[75] *Ibid.*
[76] *Id.* 817.

Aboriginal people and the lands which they occupy lies at the heart of the traditional Aboriginal culture and life.[77] His Honour emphasised that the words "with respect to" should not be neglected in considering the extent of legislative power conferred by s. 51: these words only require a "relevance to or connection with the subject assigned to the Commonwealth Parliament."[78] His Honour viewed the powers contained in s. 51 as authorising the Commonwealth Parliament to legislate with respect to the substance, and with reference to the full scope, of the grant of power.[79] In his Honour's view:

> . . . a law which protects those—and only those—endangered Aboriginal sites included in the "cultural heritage" which satisfy the requirement that they are of particular significance to people of the Aboriginal race is not only a law with respect to Aboriginal sites, it is a law of a character which comes within the primary scope of the grant of legislative power to make laws with respect to the people of any race to whom it is deemed necessary to make special laws. The reference to "people of any race" includes all that goes to make up the personality and identity of the people of a race: spirit, belief, knowledge, tradition and culture and spiritual heritage. A power to legislate "with respect to" people of a race includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting their property which has particular significance to that spiritual and cultural heritage.[80]

The minority, on the other hand, held that laws protecting the spiritual or cultural heritage of a particular people were not laws with respect to those people. Gibbs, C.J. held that the significance of the history of the relics and artefacts related to whether the law was a special law, not whether it was a law with respect to "people of" the race. It will be recalled that his Honour held that the law was not a special law because it had significance to all mankind, not especially to the people of the Aboriginal race. Deane, J. added nothing to the judgment of the Chief Justice on this point. Dawson, J. rested his judgment upon the fact that the law was not a special law.

Does s. 51 (xxvi) give power to discriminate both positively and negatively?

Section 51 (xxvi) was designed to achieve a grant of power enabling the Commonwealth to discriminate both positively and/or negatively against, or for the benefit of, the people of the chosen race. This dual function of s. 51 (xxvi) has been accepted by all those judges, excluding Murphy, J., who have considered the question.[81]

A power with respect to a particular race is a power to discriminate with respect to those people. Nowadays, the primary object of the power

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[77] *Id.* 818.

[78] *Id.* 819, his Honour quoting from *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55 at 77 *per* Dixon C.J., McTiernan, Webb and Kitto, JJ.

[79] *Id.* 819.

[80] *Id.* 819-820.

[81] *Supra* n. 36 at 631 (*per* Gibbs, C.J.), 642 (*per* Stephen, J.), 657 (*per* Wilson, J.). *Supra* n. 26 at 631-632 (*per* Gibbs, C.J.), 642 (*per* Stephen, J.), 657 (*per* Aickin, J., agreeing with Gibbs, C.J.), 657 (Wilson, J.), 665 (*quaere* Brennan, J.).

may well be to discriminate in favour of the people of a particular race[82] but this does not justify Murphy, J.'s view, expressed in *Koowarta*,[83] that:

> . . . in par. (26) "for" means "for the benefit of". It does not mean "with respect to", so as to enable laws intended to affect adversely the people of any race. If "with respect to" or some similar expression was intended, it would have been used, as it is in other parts of s. 51 (see the opening words and pars. (31) and (36)).

History, and the early commentators, support the view taken by Gibbs, C.J., in the *Dams Case*[84] that " 'for' in para. (xxvi) means 'with reference to' rather than 'for the benefit of'—it expresses purpose rather than advantage".

The Meaning of "Race"

The *Shorter Oxford English Dictionary* defines "race" to include "a group of persons . . . connected by common descent or origin, . . . a limited group of persons descended from a common ancestor, . . . a tribe, nation, or people, regarded as of common stock, . . . people . . . forming a distinct ethnical stock . . . ."[85]

The word "race" is not a term of art; "it is not a precise concept".[86] This difficulty in precision stems, in part, from the fact that "race" denotes a vague hierarchical concept—the human race representing the base and the family unit the apex. Every person is therefore a member of a number of races. Moreover, "race" commonly understood uses hierarchical parameters which are defined biologically. A race, it is submitted, may be equally determined by cultural or spiritual parameters.

Senor Hernan Santa Cruz, the Special Reporter on Racial Discriminations for UNESCO, in his report to the United Nations[87] recites some of the findings of experts:

> "A conference of experts assembled in Moscow by UNESCO in August 1964 to give their views on the biological aspects of the race question, adopted a set of proposals on this subject. They stated *inter alia* that all men living today belong to a single species and are derived from a common stock (Art. (I)); that pure races in the sense of genetically homogeneous populations do not exist in the human species (Art. (III)); and that there is no national, religious, geographic, linguistic or cultural group which constitutes a race *ipso facto* (Art. (XII)). The proposals concluded: "the biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any scientific foundation . . . .". Popular notions of "race", however, have fre-

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[82] *Supra* n. 26 at 791, *per* Brennan, J.
[83] *Supra* n. 36 at 656.
[84] *Supra* n. 26 at 677.
[85] At 1735-1736.
[86] *Supra* n. 26 at 791 *per* Brennan, J. See also *Ealing London Borough Council v. Race Relations Board* [1972] A.C. 342 at 362.
[87] *Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres* (1971) U.N. Document No. E/CN 4/Sub 2/307/Rev 1 at 12-13.

> quently disregarded the scientific evidence. Prejudice and discrimination on the ground of race, colour or ethnic origin occur in a number of societies, where physical appearance—notably skin colour—and ethnic origin are accorded prime importance.

The word "race" in s. 51 (xxvi) is arguably[88] used in its popular meaning as referring to antecedent rather than acquired characteristics. Brennan, J.,[89] in the *Dams Case*, referred to *King-Ansell* v. *Police*,[90] a case concerned with the Race Relations Act in New Zealand, where Richardson, J. regarded the real test as:

> . . . whether the individuals or the group regard themselves and are regarded by others in the community has having a particular historical identity in terms of their colour or racial, national or ethnic origins.[91]

Brennan, J. said that "membership of a race imports a biological history or origin which is common to other members of the race, but Richardson, J. is surely right in denying the possibility of proving ultimate genetic ancestory".[92]

Section 51 (xxvi), it is suggested, does not adopt a definition of race based on a subjective view by the persons who constitute the race of the limits of their race. Section 51 (xxvi) permits the Commonwealth to deem when a special law is necessary. As a corollary it is for the Commonwealth to determine what parameters are to be placed upon the race which it seeks to control or benefit. Quick and Garran[93] do not offer any explanation for their reference to s. 51 (xxvi) as catching persons of an "alien race". Wynes goes further and, also without explanation, treats s. 51 (xxvi) as catching aliens *viz.*, "foreigners not living under a government in a civilized sense".[94]

But the more difficult question is who are the members of a predetermined race. For instance, assume that the Commonwealth passes a law (which satisfies all the elements of the placitum) which grants a gift of $1,000 to each Aboriginal person. Assume further that an Aboriginal person seeks to claim an entitlement to the $1,000 but since birth that person had sought to disassociate himself from other Aboriginal persons and the Aboriginal culture and heritage. Applying the view of Kerr, L.J. in *Mandla* v. *Dowell Lee*[95] such a person would nevertheless always remain a member of the race. The Lord Justice, in reference to the English Race Relations Act and in particular to the words "race or ethnic or nation or origins", said " . . . they clearly refer to human characteristics with which a person is born and which he or she cannot change, any more than a leopard can change its spots".[96]

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[88] *Supra* n. 26 at 791-793 *per* Brennan, J.
[89] *Id.* 792.
[90] [1979] 2 N.Z.L.R. 531.
[91] *Id.* at 542.
[92] *Supra* n. 26 at 792.
[93] *Supra* n. 8.
[94] *Legislative, Executive and Judicial Powers in Australia* (3rd ed., 1962) 403. This observation was deleted in subsequent editions.
[95] [1983] 1 Q.B. 1.
[96] *Id.* at 19.

The biological element of "race" is not, it is submitted, conclusive or exhaustive in determining whether a person is a member of a race for the purposes of s. 51 (xxvi). This view is also supported by Brennan, J. in the *Dams Case*[97] where his Honour noted that such factors as common history, religion, spiritual beliefs or culture as well as biological origins and physical similarities go to determine whether or not a person is a member of a race. It is suggested that Brennan, J.'s view (which was similar to that of the other members of the majority in the *Dams Case*) could be taken one step further *viz.*, that the conduct of a person after birth is relevant in determining whether a person is a member of the race in question. If a person successfully disassociates himself culturally and physically (albeit not biologically) from the race then it is suggested that that person ceases to be a member of the race for the purpose of the placitum. It will be recalled that the placitum in the form first mooted at the pre-federation constitutional conventions, referred to " . . . the affairs of the people of any race . . . ." The words "the affairs of" were subsequently deleted; they were thought to be redundant. Insofar as s. 51 (xxvi), in its reference to "race", attempts to apply to "the affairs of the people of the race" then the provision demands a consideration of the conduct of persons after their biological traits are determined at birth. The words "the affairs of" suggest that the placitum is designed to touch the conduct of the people of the race. If a particular person, although biologically a member of the race, does not, by his conduct, assimilate his biological origins with the objectively perceived attributes of the particular race then the purpose of s. 51 (xxvi) is not achieved by including that person within the ambit of the particular race sought to be controlled or benefitted.

Is a "half-blood" Chinese person resident in Australia a member of the Chinese race in Australia? Even American law, after centuries of consideration of race and racism, is unable to provide a definitive answer to such a question.[98] The concept of "blood" is no solution. A typical and leading American precedent—*Plessy* v. *Ferguson*[99]—determined that the plaintiff be deemed "black" under Louisiana law even though he was seven-eighths Caucasian and his one-eighth African blood was not discernable. American law has tended to define race by reference to what race the person in question considers himself and by reference to the views of reasonable third persons.[100] This is the only realistic approach. Americans have recognised that the concept of "blood" is a subtle and misleading mystery—strictly speaking all blood types are found in all races.[101]

Americans have found the word "race" almost beyond precise definition.[102] It begs the further distinction between race and ethnic group, between race and social caste, between nurture and nature.[103] It is easier to ascribe differences between persons to biological heredity than

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[97] *Supra* n. 26 at 792-793.

[98] See e.g. D. A. Bell Jnr., *Race, Racism and American Law* (1973) Chapter 3.

[99] 163 U.S. 537, 16 S.Ct. 1138, 41 L. Ed. 256 (1896).

[100] See e.g. the discussion of legislation in *United States* v. *Flagler County School District*, 457 F. 2d 1402 (5th Cir. 1972).

[101] G. Allport, *The Nature of Prejudice* (1954) at 107-109.

[102] *Supra* n. 98.

[103] *Supra* n. 102.

to appearance, custom and values. The error in equating characteristics and heredity becomes clear from a study of the American Negro:

> Nothing seems plainer than the fact that [the Negro] is a member of the black race. Yet one anthropologist estimates that probably less than one-fourth of the Negroes in America are of unmixed descent . . . . In short the average American Negro is as much a white man as he is a black man. The label that we give is then half purely social invention. Many times we apply it to people whose *race* is mostly white.[104]

Keeping both this in mind and the object ascribed by the founding fathers to s. 51 (xxvi), the provision empowers the Commonwealth Parliament to legislate not with respect to races defined by reference to "blood" species but with respect to persons whose socially caste ethnic group is not dominantly Anglo-Saxon or Celtic. This, of course, is a significant step away from delimitation accordingly to strict biological race, but if the section was designed to define race biologically it would encompass all persons then resident in Australia whatever their social caste and would render the other express grants of power almost unnecessary. This is not to say that s. 51 (xxvi) excludes all biological considerations from the definition of race.

Racial Sub-Groups

Murphy, J. has observed that s. 51 (xxvi) empowers the Commonwealth Parliament to legislate with respect to every subdivision of Aboriginal persons and Torres Strait Islanders. To hold otherwise, in his Honour's view, would be to make a mockery of the 1967 amendment.[105] Deane, J. has expressed a similar view noting that the phrase "the people of any race" is "apposite to refer to any identifiable racial sub-group . . . ."[106]

This view is in accord with the object of the placitum. It empowers the Commonwealth to legislate, *inter alia*, to assist a needy sub-group of a particular race, eradicate a particular difficulty facing them or legislate to control the, say, unacceptable conduct of a sub-group of a race. The sub-group, seen in this light, need not be defined geographically.[107] Its parameters may also be defined culturally or biologically.

What is the nature of a sub-group of a race sufficient to attract legislative control or assistance under s. 51 (xxvi)? For instance, assuming the other elements of s. 51 (xxvi) are met, can the Commonwealth legislate under s. 51 (xxvi) to control the day to day activities of a particular hostel housing only recently immigrated, say, Vietnamese persons? Murphy, J. may not go so far as to permit the Commonwealth to legislate with respect to the hostel. Whilst his Honour did refer to "every subdivision" of a race, his Honour placed particular emphasis upon the 1967 amendment and the deletion of the words "the Aboriginal race in *any State*" (author's

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[104] *Ibid.* The use of the word "race" in the final sentence is question-begging; it implies that "blood" determines race, yet the thrust of the quotation is that "blood" is not a true assessment of "race" as generally understood.

[105] *Supra* n. 26 at 737.

[106] *Id.* 817.

[107] E.g. Tasmanian Aboriginals.

emphasis). His Honour, in indicating a willingness to allow legislation protecting Tasmanian Aboriginals, may not be going any further than defining the racial sub-groups by reference to States. Deane, J.'s judgment cannot be limited in this fashion. His Honour would enable the Commonwealth to legislate with respect to "any identifiable racial sub-group".

It is suggested that the answer lies in a consideration of the parameters of a sub-division of a race. A group of persons, of a particular race, is a subdivision which may attract Commonwealth legislation if the legislation is of particular significance to the race in its entirety within the bounds of Australia. If there was only one Vietnamese hostel in Australia, legislation benefitting the persons within the hostel would have such special significance. Similarly, if the hostel housed persons with unique yet diminishing attributes of the culture of the particular race. If the law does not have significance for the race in its entirety it is suggested that it is not a law with respect to "the people of" the race but merely a law with respect to a needy group of people whose interests are not identifiable with the interests of the people of the race in question and as such are not persons constituting members of the race for the purposes of s. 51 (xxvi).

Section 51 (xxvi) in its Constitutional Context

Section 51 (xxvi) does not exist in a vacuum. It sits alongside the naturalisation and aliens power[108] the immigration and emigration power,[109] the power relating to the influx of criminals,[110] the external affairs power[111] and the power concerning relations of the Commonwealth with Pacific Islanders.[112] These sections deal with the relationship between Australia and the rest of the world: control of persons coming into and leaving Australia, their activities whilst in Australia and dealing with other nations on behalf of Australia. The naturalisation and aliens and the immigration and emigration powers, as interpreted, directly affect the significance of the special races power.

Section 51 (xix) empowers the Commonwealth to make laws with respect to "naturalisation and aliens". An alien has been 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.[113] Despite the scant judicial comment upon this provision it is nevertheless clear that:

1. It includes the power to determine the conditions under which aliens may be admitted to Australia, the conditions under which they be permitted to remain and the conditions under which they may be deported.[114]
2. Parliament has *full* power over the subject of aliens.[115] Once an alien enters Australia the Commonwealth has power to control

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[108] S. 51 (xix).
[109] S. 51 (xxvii).
[110] S. 51 (xxviii).
[111] S. 51 (xxix).
[112] S. 51 (xxx).
[113] Quick and Garran, *supra* n. 8 at 599.
[114] *Robtelmes* v. *Brenan* (1906) 4 C.L.R. 395 esp. at 404 *per* Griffith, C.J.
[115] *Ex parte Walsh and Johnson: In re Yates* (1925) 37 C.L.R. 36.

his or her relationship with the Australian community including his or her removal from it.

Any person entering Australia as an alien and being a member of a race may therefore be the subject Commonwealth legislative control under either the aliens power or the race power. The Commonwealth Parliament's legislative competence under the aliens power appears to have a greater breadth than under the race power. It will be recalled that the special races power is not plenary; it demands the existence of a number of elements prior to its exercise other than merely that the person or group in question is a member of a race or is described as a race.

The immigration and emigration power also overlaps with the aliens power and the special races power. The immigration and emigration power however has been the subject of significant judicial exposition. However, it still is unclear whether an immigrant who enters Australia and settles into the Australian community remains a legitimate subject of Commonwealth legislative competence under s. 51 (xxvii).[116] If the power extends to encompass immigrants who have settled in Australia then it indeed represents a significant overlap with the race power. On the other hand, if Commonwealth legislative competence under the immigration power ceases once an immigrant is absorbed into the Australian community then the overlap is only short-term and relatively less significant.

It is unquestionable that apart from the right to prohibit immigration and the right to expel an immigrant, s. 51 (xxvii) encompasses the regulation of certain activities of immigrants prior to their absorption into the Australian community: "assistance to migrants and former migrants in housing, employment, health and welfare services would fall within the power".[117] But what of the power once the immigrant has been absorbed or settled into the Australian community? It has been held that a person ceases to fall within the ambit of the immigration power upon settlement into the Australian community.[118] On the other hand, a significant group of judicial lexicographers have observed that once a person is an immigrant he remains always an immigrant and as such is subject to Commonwealth power in respect of his activities within Australia pursuant to s. 51 (xix).[119] Should one adopt the view that the immigration power ceases to extend to persons once they settle in Australia then it is significant to determine at what time the immigrant can be regarded as having settled or absorbed into the Australian community. In an attempt to answer this question the courts have noted that an immigrant by his own act may give evidence that he has not settled into the community;[120] the community for its part may not have permitted the immigrant to begin to become a settler[121] or the community may not have accepted the immigrant as a

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[116] E.g. *Koon Wing Lau* v. *Calwell* (1949) 80 C.L.R. 533; *Ex parte Walsh and Johnson: In re Yates* (1925) 37 C.L.R. 36.

[117] *R.* v. *Director General of Social Welfare for Victoria: Ex parte Henry* (1974) 133 C.L.R. 369 at 386 *per* Murphy, J.

[118] *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.

[119] *Ex parte Walsh and Johnson: In re Yates* (1925) 37 C.L.R. 36 *per* Isaacs, J.; *Koon Wing Lau* v. *Calwell* (1949) 80 C.L.R. 533 *per* Latham, C.J., McTiernan and Webb, JJ.

[120] E.g. *R.* v. *Governor of the Metropolitan Gaol; Ex parte Molinari* (1961) 2 F.L.R. 477 at 497.

[121] E.g. *Ex parte Kwok Kwan Lee* (1971) 45 A.L.J.R. 312 at 313, *Koon Wing Lau* v. *Calwell* (1949) 80 C.L.R. 533 at 562-563.

settler, although the community did at one time permit the immigrant to begin on his road to settlement.[122] Interestingly, it has been noted that racial isolationism "does not of itself negative . . . [the immigrant's] absorption into this community"[123] although in *R.* v. *Governor of the Metropolitan Gaol; Ex parte Molinari*[124] it was held that an immigrant who had become absorbed in his own racial group had not settled into the Australian community. It is therefore possible to argue that an immigrant who isolates himself within his own racial community within Australia and does not assimilate into the Australian community may be the subject to Commonwealth legislation under both the immigration and the race powers.

Should the immigration power be extended to grant the Commonwealth legislative competence over immigrants even after they have settled into the Australian community it would, save for the requirement of a law pursuant to s. 51 (xxvi) being a "special law", render the race power obsolete.[125] It will be recalled that at its lowest level the definition of race embodied a biological determinant. If that remained the only determinent of a persons eligibility to a race it follows that all immigrants necessarily constitute or would be part of a race within the parameters of s. 51 (xxvi).[126]

Conclusion

Section 51 (xxvi) may well be the source of much Commonwealth legislation in the future. *Koowarta* and the *Dams Case* have drawn its parameters in such a fashion that the Commonwealth Parliament may proceed to legislate with certainty that its legislation is beyond question. At its narrowest, the provision empowers the Commonwealth Parliament to make laws which protect or control a race in need of assistance, protection or control. The degree of assistance, protection or control needed to activate the potential for legislation under s. 51 (xxvi) has not yet been considered judicially although the *Dams Case* implies that the line be drawn broadly—the protection of artefacts significant to the culture or heritage of a race or, possibly, a sub-race.

At its widest, to echo Sir Harry Gibbs in a recent extra-judicial comment,[127] the provision may allow the Commonwealth Parliament to enact a bill of rights for the people of a particular race. A bill of rights of this nature must of course be capable of description as a "special law" assisting, controlling or protecting a race in need of assistance, control or protection over and above that which is needed by Australians generally. Nevertheless, Gibbs' comments are significant as the Commonwealth had

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[122] See *Koon Wing Lau* v. *Calwell* (1949) 80 C.L.R. 533 at 577; *O'Keefe* v. *Calwell* (1949) 77 C.L.R. 261 at 276, 288; *R.* v. *Green; Ex parte Cheung Cheuk To* (1965) 113 C.L.R. 506 at 517.

[123] *Supra* n. 120.

[124] *Ibid.*

[125] Save for the ability of the Commonwealth to legislate under s. 51 (xxvi) with respect to aboriginal persons and other persons who are members of native races, or, at least, persons who fall within the ambit of "the people of a race" for the purposes of the section and who cannot be regarded as immigrants or aliens.

[126] Subject to the sole exception of the Australian born person emigrating then being treated as an immigrant upon his return to Australia: see *Donohue* v. *Wong Sau* (1925) 36 C.L.R. 404; *Potte* v. *Minahan* (1908) 7 C.L.R. 277 esp. at 289-290, 299, 306-307.

[127] "The Constitutional Protection of Human Rights" (1982) 9 *Monash L.R.* 1 at 9.

previously been regarded as incompetent to enact a bill of rights binding throughout Australia: no express power to do so had been conferred by the Constitution upon the Commonwealth.[128] In light of the *Dams Case*, the Commonwealth Parliament may also have power to enact a bill of rights binding generally throughout Australia under the external affairs power to give effect to an international convention to which Australia is a party and which provides for the recognition and enforcement of civil rights.

Australia is often said to be a multicultural society. The equation of culture and race—an equation permitted by the *Dams Case*—means that Australia can be described legally as a multiracial society. A large part of the population of any State may thus be subject to laws made under s. 51 (xxvi). The power, if broadly construed, may therefore operate as a significant inroad into the capacity of the States to control the day to day activities of their populace. In the final analysis the ambit of s. 51 (xxvi) may be limited only by the doctrine which prevents the Commonwealth legislating to impair the capacity of the States to function.

[128] Cf. Senator Evans, "Prospects and Problems of an Australian Bill of Rights" [1970-1973] *Australian Year Book of International Law* 1 esp. at 7.