OPINION ON THE EFFECT OF PROPOSED AMENDMENTS TO THE COMMONWEALTH CONSTITUTION ON CERTAIN COMMONWEALTH LAWS

OPINION

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Attention:
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OPINION

Overview

1. The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (**Committee**) is inquiring into steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition.

2. As part of that inquiry, the Committee is considering the possibility of amending the Commonwealth Constitution to proscribe racial discrimination.

3. In preparing this opinion, we have been provided with the text of two examples of possible clauses each designed to effect a form of constitutional prohibition on racial discrimination. The Committee could ultimately consider other forms of text, and the questions we have been asked are not confined to particular proposed text.

4. One of the examples with which we have been provided is that recommended by the Expert Panel on Constitutional Recognition of Indigenous Australians. The Expert Panel recommended the repeal of the existing s 51(xxvi) of the Constitution (the "race power") and the insertion of two new provisions to the following effect (**First Proposal**):

> ***51A Recognition of Aboriginal and Torres Strait Islander peoples***
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> ***Recognising*** *that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;*
>
> ***Acknowledging*** *the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;*
>
> ***Respecting*** *the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;*
>
> ***Acknowledging*** *the need to secure the advancement of Aboriginal and Torres Strait Islander peoples,*

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

116A Prohibition of racial discrimination

(a) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(b) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.[1]

5. The second example with which we have been provided is a proposal that would repeal s 51(xxvi) and replace it with a new placitum in s 51 to the following effect (**Second Proposal**):

> [The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to...] *Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.*

6. The Committee has been considering the effect which proposed amendments of these kinds might have on the *Native Title Act 1993* (Cth) (***NTA***).

7. In this context, we have been briefed to advise on whether insertion of a form of non-discrimination clause in the Constitution might put at risk the constitutional validity of various parts of the *NTA*.

8. We have also been asked to draw the Committee's attention to other Commonwealth laws that occur to us potentially to be affected by the insertion of a clause effecting a prohibition against racial discrimination into the Constitution.

9. Our summary answers to the questions we have been asked are as follows.

> ***Would the insertion of a clause to prevent discrimination on the grounds of race, colour or ethnic or national origin, or to enable the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples but not so as to discriminate against them put at risk the constitutional validity of:***

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[1] We assume that the reference to "Subsection (1)" is a reference to "Paragraph (a)".

Q1. Divisions 2 and 2A of the NTA, which operate to validate past and intermediate past acts?

A1. Yes, although the degree of risk would depend on many factors that cannot be predicted, including the final terms of any constitutional amendment and the context in which it falls to be construed.

Q2. s 7 of the NTA, which operates to limit the operation of the Racial Discrimination Act 1975 (Cth)?

A2. No. Section 7 of the NTA is an interpretive provision. It does not by itself impose burdens or confer benefits and so would be unlikely to be affected by any constitutional prohibition on racial discrimination.

Q3. the payment of compensation for extinguishment or impairment of native title rights and interests under the NTA?

A3. Yes, if the "past act" and "intermediate period act" validation regime in Divisions 2 and 2A of the NTA were rendered invalid, it is likely that the compensation regime in those Divisions would be inseverable.

Q4. provisions of the NTA that are considered "special measures", including the right to negotiate provisions?

*A4. It is unlikely that parts of the NTA that have the purpose or character of positively discriminating in favour of Aboriginal and Torres Strait Islander persons would be rendered invalid by the insertion into the Constitution of a clause effecting a form of protection against racial discrimination of the kind presently under consideration (a **constitutional racial discrimination protection**).*

Q5. any other existing Commonwealth legislation made in reliance upon s 51(xxvi)?

A5. We are not aware of any other Commonwealth laws that would be at risk of invalidity. Later in this opinion, we set out the kinds of characteristics that increase the risk that a law would engage a constitutional racial discrimination protection. Much will depend on the terms of any constitutional amendment and the context in which it falls to be construed.

10. These answers should be understood in the context that the questions we have been asked are framed at a high level of generality, without a fixed final wording for any non-discrimination provision and without any extrinsic materials (such as referendum pamphlets), which a court might

use to construe any provision if it were to be incorporated into the Constitution.

Observations on the operation of the proposed amendments

Generally

11. A constitutional racial discrimination protection could be broader or narrower. The starting point for identifying the possible effect of such a protection is to ascertain the protection's possible meaning and scope. The example clauses with which we have been provided leave many questions regarding the breadth of the discrimination protection to subsequent judicial determination.

12. In the following paragraphs, we identify the kinds of questions that the draft clauses leave unanswered.[2] We also chart some of the answers that

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[2] In addition to the questions we consider below, the scope of the protection could be fundamentally affected by the following considerations:

(1) *State action*: Will the discrimination protection apply only vertically in the sense that it applies only to affect conduct fairly traceable to government? Or is the protection also capable of applying horizontally, so as to affect the relations of private individuals between themselves? Consistently with Australian constitutional doctrine, there is a reasonable prospect that the courts would find that for the most part the protection applied only vertically. However, we note that the question is not completely answered by limiting the objects of the prohibition to the Commonwealth, States and Territories as the First Proposal does. Many statutes give individuals rights against other individuals. Also, the common law – such as the law of tort – affects individuals' relations as between each other. The common law is declared and developed by the judiciary; so if the anti-discrimination protection binds the judiciary, it could conceivably affect relations between private individuals.

(2) *Levels of government: Commonwealth, State or Territory*: Some constitutional limitations (such as the religious protections in s 116) apply only to the Commonwealth; others (such as the implied freedom of political communication) apply to all levels of government. The First Proposal is clearly intended to apply to the Commonwealth, States and Territories. The Second Proposal is in terms limited to the Commonwealth. This means it is unlikely to apply to the States. There would, however, be a question as to whether it applied to limit the power of the Territories and of the Commonwealth when making laws with respect to the government of the Territories. The question would be whether the power in s 51(xxvi) "abstracted" from the Commonwealth's other legislative powers – and particularly its power under s 122 to make laws for the government of any territory – on which the Commonwealth relies, for example, to enact the territory self-government statutes. That would depend on factors such as whether the courts perceived the

courts might give to those questions. We do so, in part, to identify the assumptions we make when considering the effect of a racial discrimination prohibition on the *NTA* and other Commonwealth statutes. We also do so to explain why our opinion as to the effect of the proposed amendments must be high level and provisional.

To which organs of government and to what kinds of public power will the anti-discrimination protections apply?

13. Will any racial discrimination protection apply to the Parliament, Executive and Judiciary, or some only of those organs of government? Also, will any racial discrimination protection apply to the exercise of legislative, executive and judicial power?

14. The First Proposal in terms applies to the Commonwealth, States and Territories. It would be a question of construction as to whether it was intended to apply to each of the organs of government and to each of the kinds of public power. On its face, given its breadth, the text is apt to cover all the organs of government and all the kinds of public power. This said, the carve-out for "laws or measures" in proposed s 116A(b) may suggest that the proposed prohibition in s 116A(a) is intended to apply only to the exercise of legislative and administrative power exercised by Parliament and the Executive.

15. The Second Proposal appears to be limited to the exercise of legislative power by the Commonwealth Parliament. It would, therefore, not apply directly to the Executive or Judiciary or to the exercise of executive or judicial power. However, it could apply indirectly to those organs and those kinds of power. For example, if the source of executive power were a statute enacted under the proposed s 51(xxvi), that statute could not authorise conduct that is properly characterised as adverse discrimination against Aboriginal and Torres Strait Islander peoples.

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discrimination protection in s 51(xxvi) to be a safeguard, restriction or qualification that was intended to apply beyond laws that depended exclusively on s 51(xxvi) for their validity – and particularly whether it was intended to apply to the Territories power in s 122.

Will s 51(xxvi) abstract from other heads of power?

16. The Second Proposal contemplates a carve-out of laws that discriminate adversely against Aboriginal and Torres Strait Islander peoples from a positive power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

17. This raises a question that we have briefly discussed in footnote 0: would the proposed s 51(xxvi) "abstract" from other heads of power? Put another way, if a Commonwealth law were a law with respect to Aboriginal and Torres Strait Islander peoples, could it only be valid if it did not discriminate adversely against them? Is that so even if the law was also a law with respect to another head of power?

18. The ordinary rule is that the heads of legislative power in s 51 of the Constitution do not limit each other – so, even if one head of power is expressed so as not to extend to a specific subject matter, that does not mean that another head of power should be read down so as not to permit the making of a law on that subject matter. The High Court has, however, recognised an exception to that ordinary rule. The exception has been described in the following way:[3]

> [W]*hen you have... an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification.*

19. The High Court has not settled on the criteria that identify when a limitation on a positive head of power constitutes a "safeguard, restriction or qualification" of the relevant kind. The principle has been applied to hold, for example, that the just terms safeguard for the acquisition of

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3 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-2 per Dixon CJ.

property (s 51(xxxi))[4] and the restriction on not legislating with respect to State banking (s 51(xiii))[5] abstract from other heads of power.

20. There is a reasonable prospect that the carve-out suggested in the Second Proposal would constitute a "safeguard, restriction or qualification" of the relevant kind such that Commonwealth Parliament could only enact a law with respect to Aboriginal and Torres Strait Islander peoples if the law did not discriminate adversely against them.

What is discrimination: discrimination in form, purpose and substance

21. Both the First Proposal and the Second Proposal have at their heart the concept of discrimination. The concept of discrimination arises in a variety of constitutional and statutory contexts, in Australia and other jurisdictions, as well as under international law. There is no one settled understanding of what constitutes "discrimination" and what does not.

22. A discrimination protection could prohibit measures which:

    a) in form or terms discriminated;

    b) had a discriminatory purpose; and/or

    c) discriminated in their practical effect or operation.

23. In our opinion, there is a reasonable prospect that a constitutional racial discrimination prohibition would be understood to be capable of being engaged by all three of these kinds of discrimination. It is very difficult to see the courts considering that a measure that adopted a facially discriminatory criterion of operation (that is, (a)) or had a racially discriminatory purpose (that is, (b)) would not *prima facie* be a discriminatory measure.

24. There is also a reasonable prospect that the courts would consider that some laws that had a discriminatory practical effect or operation could engage a constitutional racial discrimination protection. That would be

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4 See, for example, *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [55] per Gummow, Kirby, Hayne, Heydon and Crennan JJ).

5 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

consistent with the High Court's views that constitutional limitations in general,[6] other discrimination prohibitions in the Constitution[7] and the *Racial Discrimination Act 1975* (Cth) (the ***RDA***)[8] are concerned with substance as well as form. This said, it is possible that the discrimination protection could be interpreted in a more confined way. For example, the reference in the First Proposal to discrimination *on the grounds of* various characteristics could support an argument that the protection applies only to laws that discriminate on their face or in their legal purpose.

25. Even if the prohibition applied to exercises of power that discriminated in their practical effect or operation – often called indirect discrimination – there would remain large questions as to how grave the disparate impact of the law needed to be before it would constitute discrimination. There would also remain large questions as to the process by which the court assesses whether a law in fact has a disparate impact of the relevant kind.

26. Further, if the racial discrimination protection applied to laws that had a discriminatory purpose, there would likely be arguments as to the level of the purpose that was sufficient to validate the law. For example, when a legal norm depends on the existence of a purpose, it is sometimes sufficient if the relevant purpose is only *a* purpose;[9] on other occasions, the proscribed purpose must be able to be characterised as being the *substantial*,[10] *predominant*[11] or even *sole*[12] purpose of the challenged legislation or action. In addition, there would be a question as to whether a law's practical effect could affect courts' determination of the law's purpose: the High Court has, for example, not settled whether a law's effect can

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6 See, for example, *Ha v New South Wales* (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ.

7 See, for example, *Cole v Whitfield* (1988) 165 CLR 360 at 408 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron (re section 92).

8 See, for example, *Maloney v The Queen* (2013) 298 ALR 308 at [11] per French CJ, [78] per Hayne J, [112] per Crennan J, [148] per Kiefel J, [204] per Bell J.

9 See, eg, *Kruger v The Commonwealth* (1997) 190 CLR 1 at 86 per Toohey J, 133 per Gaudron J (re section 116 of the Constitution).

10 See, for example, *Thompson v Council of the Municipality of Randwick* (1950) 81 CLR 87 at 106 per Williams, Webb and Kitto JJ) (improper purposes in administrative law).

11 See, for example, *Williams v Spautz* (1992) 174 CLR 509 at 529 per Mason CJ, Dawson, Toohey and McHugh JJ (abuse of process).

12 See, for example, *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 579 per Barwick CJ (re section 116 of the Constitution).

guide the determination of a law's purpose under s 116 of the Constitution.[13]

What is discrimination: burdens and benefits

27. A discrimination protection could apply only to the discriminatory imposition of *burdens*, or it could apply to the discriminatory conferral of *benefits*. The distinction between burdens and benefits can be difficult to draw in some contexts.

28. If the protection applied to discriminatory burdens, there would be a question as to whether it applied to burdens on any kind of freedom or whether it applied only to burdens on fundamental rights and freedoms. Subsection 9(1) of the *RDA* is an example of a racial discrimination protection that applies only to nullifications or impairments of a limited range of freedoms.

29. If the protection applied to discriminatory benefits, this would raise difficult questions as to the effect of a breach. Is the effect to invalidate measure conferring the benefit? Or, is the effect to ensure that the benefit is also applied to the class of persons discriminated against? Subsection 10(1) of the *RDA* operates in the latter way, but the same may not follow if text akin to that in the proposed amendments were incorporated in the Constitution for reasons we turn to below.

What is discrimination: distinctions and differences

30. "Discrimination" ordinarily connotes a distinction or difference, and that ordinary connotation would likely apply to any constitutional racial discrimination protection. However, there would remain a large question as to what *kinds* of distinctions or differences the protection proscribed.

31. In *Bayside City Council v Telstra Corporation Limited* (2004) 216 CLR 595 at [40], Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said that:

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[13] See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 86 per Toohey J, 161 per Gummow J; *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 604 per Gibbs J, 617 per Mason J.

> [Discrimination] *involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified.*

32. It is possible that a constitutional racial discrimination protection would in a very general sense be construed with this sense of discrimination in mind. The ideas that this passage captures are:

    a) a measure is *prima facie* discriminatory if it erects or causes a difference between two classes of persons; but

    b) the measure may not be discriminatory or may be justified it has some permissible, non-discriminatory explanation.

33. The first of these ideas raises difficult questions – which apply in many areas of discrimination law – as to how to select the "comparator" class. Is the effect of the law on a class to be compared, for example, to the effect of the law on society generally or on some sub-set of society? And, if only a sub-set of society, how is that sub-set to be identified?

34. The second of the ideas suggests that a measure which, though it *prima facie* erects a difference, may – if it has a permissible non-discriminatory justification – nevertheless not constitute "discrimination" or "adverse discrimination" or may constitute a special measure or may otherwise be justified. Either way, it is likely that a racial discrimination protection would not be understood to prohibit measures just because they have a disparate impact; courts are likely to develop some means of saving laws that have a sufficient connection to a permissible government purpose.

35. That would then raise the question of what criterion to apply to assess whether the law has a sufficient connection. Australian courts have developed a range of tools to assess whether a law which, though burdening a constitutional right or freedom, ought to be valid because it has an acceptable explanation. These tools have similarities to the tools developed in other jurisdictions to achieve the same purpose, but they are affected by the Australian constitutional and legal context and culture. There is a reasonable prospect that Australian courts, in applying a

constitutional racial discrimination protection, would develop a kind of "proportionality" test to distinguish valid from invalid laws. Australian courts and judges already apply proportionality-style tests in the context of other constitutional discrimination protections, such as s 92 (freedom of interstate trade)[14] and s 117 (no discrimination based on State residence).[15] On such a test, a law that had the practical effect of distinguishing between persons of different races, would nevertheless be valid if it was proportionate to an end that was non-discriminatory and otherwise legitimate.

36. The kinds of factors that might bear on the inquiry into proportionality could include:

a) the severity of the disparate impact;

b) the importance of any right or freedom burdened by the law;

c) whether the law advanced its asserted purpose and, if so, the degree to which it advanced it;

d) whether the relevant government purpose could be readily achieved by non-discriminatory measures; and

e) the importance of the measure's asserted purpose.

37. It would be difficult to predict how these kinds of factors would apply to a given measure. It would often depend on the evidence received by the court in a particular case.

Race, colour or ethnic or national origin

38. A central question in the operation of any constitutional racial discrimination protection would, of course, be the identification of what constituted "race" or any other suspect characteristics, such as colour, or ethnic or national origin, which engaged the protection.

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[14] See, for example, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [101]-[113] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

[15] See, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-511 per Brennan J, 548 per 572-575 per Gaudron J. Note also *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [66] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

39. The First Proposal is expressed to prohibit discrimination on the grounds of "race, colour or ethnic or national origin". Those terms are used in ss 10 to 13 of the *RDA* and may be given a meaning consistent with the received understanding of those terms in the *RDA*.[16] The Second Proposal incorporates an effective prohibition of discrimination against "Aboriginal and Torres Strait Islander Peoples".

40. Under the First Proposal, the Second Proposal or indeed any constitutional racial discrimination protection, there are likely to be hard cases at the margins. In particular, the courts would need to determine the extent to which characteristics that are chosen or cultural or contingent or changeable, rather than essential or inherited or immutable, are capable of giving rise to a protected characteristic.

41. We note that neither the First Proposal nor the Second Proposal include a protection against discrimination on the basis of *nationality* or *citizenship*. They, therefore, seem inapt to apply to laws that discriminatorily apply to or affect a class of persons based on the members of the class being non-citizens.

Special measures

42. The First Proposal includes an express "special measures-style" exception. The purpose of that exception is to permit what is sometimes called "positive discrimination" or "affirmative action": laws that discriminate, but do so with the purpose or effect of lifting up disadvantaged classes.

43. The Second Proposal does not include an express special measures style exception, but an exception of that kind may in effect be incorporated by the reference to *adverse* discrimination: that reference may be inapt to pick up positive discrimination.

44. The meaning and effect of any "special measures-style" exception is likely to raise many similar issues to those we have canvassed in discussing the permutations of "discrimination" in paragraphs 30 to 37. Is it sufficient if the measure *has* the relevant permissible purpose, or must it also be

[16] Such an outcome is contemplated in the Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) at 171.

proportionate to that purpose? If the criterion is one of purpose, what degree of purpose is sufficient? If the criterion includes an inquiry into proportionality, what are the contours of that inquiry? Who bears the onus of showing that a law is a measure of the kind covered by the exception? The authorities on s 8(1) of the *RDA*, which concerns "special measures", will no doubt provide a useful guide to the courts; but the courts would not be bound to apply that jurisprudence.

45. In the case of the First Proposal, there would also be questions regarding the construction of the identified permissible ends: "overcoming disadvantage", "ameliorating the effects of past discrimination", "protecting the cultures, languages or heritage of any group". Those are all likely to have contestable meanings.

Remedies, and positive and negative rights

46. Ordinarily, in Australian constitutional law, if a measure is contrary to the Constitution, it is invalid. If the measure is a law, the law can ordinarily then be disobeyed without sanction.[17] If the measure is an exercise of administrative power, it will generally have no effect at law.[18] Moreover, if the measure is the exercise of an administrative power that involves physical actions, a person affected may have a tortious remedy (by reason of the purported exercise of the power being unlawful and the conduct involved constituting the commission of a tort). However, unlike some other constitutional systems, Australian constitutional law has not recognised a remedy of damages for breach of the Constitution or for breach of constitutional rights.[19]

47. On the current jurisprudence, absent express provision in a constitutional amendment, it is unlikely that Australian courts would interpret a racial

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17 See, for example, *South Australia v The Commonwealth* (1942) 65 CLR 373 at 408 per Latham CJ.

18 See, for example, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

19 See *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1 at 46-7 per Brennan CJ, 93 per Toohey J, 124-126 per Gaudron J, 146-148 per Gummow J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

discrimination protection so as to furnish a damages remedy directly conferred by the Constitution. That does not mean that a person who was discriminated against by a measure could not obtain monetary relief. For example, if, in purportedly implementing or acting on a discriminatory law, the government or a private individual were to trespass on property, the discriminatory law would afford no defence to a claim of trespass, and an owner of the property may be able to obtain damages for the trespass. Tort law may, for example, be capable of affording a remedy to holders of native title.

48. Australian constitutional law has, for the most part, not recognised that the Constitution can create positive rights as distinct from negative rights.[20] For example, Australian constitutional law has not recognised that individuals have positive rights in the sense of *rights to* economic and social outcomes.

49. The identification of the remedies for breach of any constitutional racial discrimination protection is partly intertwined with the questions we identified above in footnote 2: would the racial discrimination protection apply to the exercise of judicial power and, particularly, to the development of the common law? Ordinarily, the common law conforms to the Constitution. One possible effect of a constitutional racial discrimination protection is that, if statutes are not adequately protecting against racial discrimination, courts would perceive a need to identify common law norms and remedies to redress discrimination. The development of common law rights and remedies to "top up" the rights of disadvantaged racial groups may then help ensure the validity of statutes that would otherwise be struck down for discriminatorily conferring rights.

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[20] See, for example, *Levy v State of Victoria* (1997) 189 CLR 579 at 622 per McHugh J, in the context of the implied freedom of political communication: "The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters …". See also, eg, *Unions NSW v State of New South Wales* (2013) 304 ALR 266 at [109]-[111] per Keane J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 148 per Brennan J.

50. As s 10(1) of the *RDA* shows, it can be important to identify the remedies for breach of a discrimination protection. If the government discriminatorily confers a benefit, is the remedy invalidity (such that the benefit is validly conferred on no one) or is the remedy the extension of the benefit to everyone? Aside from circumstances where a statute appearing to confer a discriminatory benefit can be read so as not to have a discriminatory operation, Australian courts may be reluctant to adopt the approach taken by s 10(1) of the *RDA*. They may take the view that extending the operation of a statutory provision, as distinct from cutting it down, is not an appropriate exercise of judicial power. Also, the approach taken by s 10(1) of the *RDA* could see the constitutional racial discrimination protection taking on the characteristics of a positive right, rather than the negative rights with which Australian courts are much more familiar.

Retrospective operation

51. The example texts we have been provided do not contain any "transitional" provisions. In determining their effect, a critical question will be the extent to which they apply retrospectively. The kinds of questions that could be expected to arise include, do the protections apply to:

    a) affect the validity of existing statutes;

    b) affect the validity of the exercise of legislative power, such as the making of regulations, under existing statutes;

    c) affect the validity of the exercise of administrative power under existing statutes;

    d) affect rights, such as proprietary rights, which have already arisen under existing statutes or existing exercises of administrative or judicial power;

    e) affect the outcome of pending judicial proceedings?

52. The answer to these questions is, of course, centrally important to the questions we have been asked. If the constitutional racial discrimination

protection has *no* retrospective operation, in the sense that it does not affect the validity of any existing statutes or the exercise of any power under existing statutes, then it will not affect any of the provisions of the *NTA* which we have been asked to consider. Neither will it affect the validity of any other existing Commonwealth laws, although it could possibly affect amendments to those laws (and, conceivably, the power to amend existing laws).

Summary

53. We have attempted, in the preceding observations, to show that the text of the possible amendments to the Constitution raise many questions. There are sufficient permutations that it is not possible to predict with any real certainty how they might be applied by the courts.

54. For the purposes of the balance of this opinion, we assume that a constitutional racial discrimination protection would involve at least the following general characteristics:

a) it would apply "retrospectively" in the sense of applying to affect the validity of laws enacted prior to any constitutional amendment, at least if the validity of those laws was relied on in future judicial proceedings;

b) it would apply to any exercise of Commonwealth legislative power, including the Territories power;

c) a law would be *prima facie* "discriminatory" in the relevant sense if it in terms, purpose or substantial effect erected or caused a distinction between persons of one or more races (in particular, Aboriginal and Torres Strait Islander peoples) but not persons of other races;

d) a law which is *prima facie* "discriminatory" may nevertheless not fall foul of the prohibition if it is proportionate to a legitimate and non-discriminatory purpose or it otherwise has an acceptable justification;

e) courts would adopt the ordinary approach to invalidity under the Australian Constitution. Unless they can discern a clear parliamentary intention to extend the operation of a law beyond its ordinary meaning, they will not "save" a law that falls foul of the prohibition by extending benefits to the class discriminated against by the law. The law will instead be invalid.

55. Built into these assumptions are the ambiguities we have identified at paragraphs 21 to 37.

Effect on the *NTA*

What might the effect of a constitutional racial discrimination protection be on Divisions 2 and 2A of the NTA?

56. Divisions 2 ("past acts") and 2A ("intermediate periods acts") of Part 2 of the *NTA* are intended to validate acts done by the Commonwealth, States and Territories that occurred before 1 January 1994 (in the case of past acts) or between 1 January 1994 and 23 December 1996 (in the case of intermediate period acts).

57. The Divisions were intended to overcome concerns:

a) in the case of the Commonwealth (and, perhaps, the Territories), that, contrary to s 51(xxxi) of the Constitution, it or they might have purported to extinguish or impede the exercise of native title rights and interests without affording just terms; and

b) particularly in the case of the States and Territories, they might have purported to extinguish or impede the exercise of native title rights and interests contrary to the *RDA*.[21]

58. At a high level, the two Divisions:

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[21] The effect of the *RDA* was expressed in the following way in *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 418: the *RDA* "precludes both a bare legislative extinguishment of native title and any discrimination against the holders of native title which adversely affects their enjoyment of their title in comparison with the enjoyment by other title holders of their title".

a) operate (or operated) on governmental acts to the extent that they were invalid because of the existence of native title;

b) purport to validate (or have validated) those acts; and

c) confer on the native title holders an entitlement to compensation for impairment of those rights.

59. The validation prescribed by Divisions 2 and 2A of the *NTA* is affected by s 7 of the Act, which provides:

> *(1) This Act is intended to be read and construed subject to the provisions of the* Racial Discrimination Act 1975.
>
> *(2) Subsection (1) means only that:*
>
> *(a) the provisions of the Racial Discrimination Act 1975 apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and*
>
> *(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the Racial Discrimination Act 1975 if that construction would remove the ambiguity.*
>
> *(3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.*

60. In *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***), the High Court described one effect of s 7(3) in the following way:[22]

> *The significance of s 7(3) is to make it clear that, notwithstanding the continued paramountcy of the RDA stated in the earlier sub-sections, the effect of the validation achieved by the NTA is to displace the invalidity which otherwise flowed from the operation of the RDA.*

61. Subsection 7(3), therefore, appears to have been understood by the High Court to have "exempted" the validation regime in Divisions 2 and 2A from the provisions of the *RDA*.

62. If a constitutional racial discrimination protection of the kinds set out in the First Proposal and Second Proposal were included in the Constitution, it would not be possible for the Commonwealth Parliament

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[22] At [99] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

to deem laws to be exempt from that protection. The Constitution would override the purported deeming.

63. In our opinion, it is possible that the introduction into the Constitution of a retrospective racial discrimination protection could affect the validity of Divisions 2 and 2A of the *NTA*. We reach that conclusion in the following way.

64. First, because of the definitions of "past act" (s 228) and "intermediate period act" (s 232A), the effect of Divisions 2 and 2A is to validate acts that interfered with native title and to validate those acts only to the extent that they were invalid because of that interference. Those Divisions do not, for example, apply to validate acts that were invalid because they interfered with proprietary rights other than native title.

65. Secondly, native title holders are characteristically of a particular race, colour or ethnic or national origin. It follows that a law that singles out – in form or substance – holders of native title for special treatment may discriminate on the basis of race, colour or ethnic or national origin. Reasoning of that kind underlay the High Court's decision in *Mabo v Queensland* (1988) 166 CLR 186 ***(Mabo (No 1))***.[23]

66. Thirdly, because Divisions 2 and 2A of the *NTA* single out for special validation acts affecting native title, only acts affecting native title and only to the extent that they are invalid by reason of that interference, they may be taken to discriminate on the basis of race, colour or ethnic or national origin.

67. Fourthly, it is unlikely that the courts would consider the erection of a distinction between native title and other kinds of proprietary rights to be permissible merely because of the inherent vulnerability of native title to extinguishment. An argument of that kind was in effect rejected by the High Court in *Ward* at [121].

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[23] In *Mabo (No 1)*, the High Court held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) was inconsistent with the *RDA*. The Queensland Act purported to extinguish without compensation native title rights and interests in or over the Murray Islands, while confirming the validity of all non-native title rights and interests in the land.

68. Fifthly, the fact that the *NTA* validates acts interfering with native title, but confers an entitlement to compensation on native title holders, would not necessarily save the Divisions. In *Mabo (No 1)*,[24] the fact that State legislation purported to interfere with native title *without providing compensation* played some role in the High Courts' views that the State laws were invalid. However, it would not follow that a law would not impermissibly discriminate if, though differentially interfering with native title, it afforded compensation to those affected.

69. In *Western Australia v The Commonwealth* (1995) 183 CLR 373 (***Native Title Act Case***), the High Court at 437 explained the effect of the *Racial Discrimination Act* as follows:

> *If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorise expropriation of property characteristically held by the "persons of a particular race" for purposes additional to those generally justifying expropriation or on less stringent conditions (including lesser compensation) is inconsistent with s 10(1) of the* Racial Discrimination Act.

70. This suggests that both the *purposes* of the expropriation and the *conditions* of the expropriation must be non-discriminatory. The provision of just terms goes to the latter, but not the former.

71. The questions would become:

a) what is the purpose of Divisions 2 and 2A of the *NTA*?

b) is that purpose non-discriminatory and otherwise legitimate?

c) is the regime proportionate to that purpose?

72. It is conceivable that these questions could be answered in a way which would mean that Divisions 2 and 2A would fall foul of a constitutional racial discrimination protection.

73. In saying this, we do not suggest that Divisions 2 and 2A would necessarily be invalid nor that they are likely to be invalid. The

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[24] See at 231-232 per Deane J.

Commonwealth would be able to argue that Divisions 2 and 2A had a legitimate and non-racially discriminatory purpose of protecting the interests of those who acquired proprietary interests in good faith and without notice; and that the Divisions are proportionate to that purpose, particularly in circumstances where they contemplate the granting of compensation to affected native title holders. The prospects of that argument would of course depend in part on how the courts articulate the criteria by which invalidity under any racial discrimination protection is to be assessed.

74. We note also that the effect of a constitutional racial discrimination protection on Divisions 2 and 2A depends on the extent to which the protection is retrospective. One potential view is that Divisions 2 and 2A are "spent": their legal operation was, on a one-off basis, to validate past acts and intermediate period acts. If a constitutional racial discrimination protection were to apply only to government measures having a legal operation on or after the commencement of the protection, there may be no intersection between the constitutional protection and the one-off operation of Divisions 2 and 2A. The prospects of such an argument would depend, amongst other things, on the final text of the constitutional protection.

What might the effect of a constitutional racial discrimination protection be on s 7 of the NTA*?*

75. We have set out the terms of s 7 in paragraph 59 above. The High Court explained in *Ward* that s 7 has at least two operations. Aside from the operation described in paragraph 60,[25]

> ... [o]*ne effect of this section is that, contrary to what otherwise might follow from the fact that the* NTA *is a later Act of the federal Parliament, the* NTA *is not to be taken as repealing the* RDA *to any extent.*

76. Whether s 7 has other operations has not been conclusively determined.[26]

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[25] There is some question as to whether that result would have followed irrespective of section 7(3): see *The Native Title Act Case* at 484.

[26] See *Ward* at [97] per Gleeson CJ, Gaudron, Gummow and Hayne JJ: "[i]t is unnecessary to consider whether s 7 may have other operations".

77. In our opinion, a constitutional racial discrimination protection is unlikely to affect the validity of s 7 of the *NTA*. We hold this opinion for the following reasons.

78. First, s 7 is in effect an interpretive provision. It identifies how apparent inconsistencies between two laws of the Commonwealth Parliament – the *RDA* and the *NTA* – are to be resolved. It resolves that inconsistency, for the most part, in favour of the *RDA*. Section 7 does not in itself operate to confer benefits or impose burdens that might engage some racial discrimination prohibition: benefits and burdens are conferred or imposed by the substantive provisions of the *RDA* and the *NTA*, and so it is those other provisions that might ultimately be affected by the racial discrimination protection.

79. Secondly, in relation to ss 7(1)-(2), these subsections identify an intention that, subject to s 7(3), the provisions of the *RDA* should, irrespective of the *NTA*, be given the full meaning they bear on their face. That legislative intention would only raise the possibility of invalidity if the relevant provisions of the *RDA* were inconsistent with a constitutional racial discrimination protection. That eventuality seems unlikely.

80. Thirdly, in respect of s 7(3), the subsection operates to identify an intention to displace the operation of the *RDA*. That legislative intention would appear to raise the possibility of invalidity only if the constitutional racial discrimination protection had the effect of constitutionally entrenching the *RDA*. The courts are unlikely to give a constitutional provision such an operation. Ordinarily, Parliament can repeal what it has enacted: see, for example, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [15], [20] per Brennan CJ and McHugh J, [47], [49] per Gaudron J. A constitutional racial discrimination protection is more likely to operate as a constitutional bedrock: rather than operating indirectly to invalidate legislation by entrenching the *RDA* and ensuring that the *RDA* prevails over inconsistent measures, such a provision is likely to operate directly upon legislation to invalidate it.

What might the effect of a constitutional racial discrimination protection be on the payment of compensation for extinguishment or impairment of native title rights and interests under the NTA?

81. As set out in paragraph 5858.c), Divisions 2 and 2A of the *NTA* create an entitlement to compensation in native title holders whose native title rights and interests are affected by the validation provisions.

82. Several questions arise in considering the effect of a constitutional racial discrimination protection on those compensation provisions. A general caveat applies to our answers to these questions: we express only an opinion as to risks to the compensation regime that *might* arise, we do not suggest that these risks are likely to eventuate nor even that there is a reasonable possibility that they might eventuate. Much would depend on the final wording of a constitutional racial discrimination protection, the context in which that protection falls to be construed and the interpretation that the courts give to the protection.

83. First, if the validation provisions of Divisions 2 and 2A were invalidated by the racial discrimination protection, would the compensation provisions be inseverable such that they fall with the validation provisions? Whether the compensation provisions are severable ultimately depends on Parliament's objective intention: did Parliament intend the compensation provisions to stand without the validation provisions? Parliament presumptively intends provisions of a law to remain operative despite the invalidity of a connected provision.[27] However, that presumption can be refuted if "some positive indication of interdependence appears from the text, context, content or subject matter of the provisions": *Frazer Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 127 per Dixon J.

84. There would be a reasonable prospect that the compensation provisions would be considered to be inseverable from the validation provisions. In a sense, the compensation provisions are ancillary to and ameliorative of the validation provisions. If the validation provisions fall, then so may the

[27] See, eg, *Acts Interpretation Act 1901* (Cth) s 15A.

ancillary provisions: see, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 108 per Gaudron J, 144 per Gummow J.

85. On the other hand, courts could take the view that the compensation provisions are severable, at least so that they are not inoperative *ab initio*, but only inoperative from the date of the constitutional amendment. That is, Parliament may be taken to have intended that the compensation provisions survive invalidity at least so far as they historically authorised payment of compensation to persons at a time when there was an honest and well-founded belief that the persons' native title rights and interests had been interfered with.

86. Secondly, irrespective of the invalidity of the validation provisions in Divisions 2 and 2A, might the compensation provisions be invalid because they confer a discriminatory benefit on Aboriginal and Torres Strait Islander peoples?

87. The point would be that the compensation provisions authorise the conferral of a benefit on a class of persons who, characteristically, have a particular race, colour or ethnic or national origin. That may *prima facie* constitute discrimination, at least within the meaning of the First Proposal.

88. Much would depend on how courts construe any ultimate constitutional racial discrimination protection, but there would seem to be a reasonable prospect that the courts would not consider that providing money to Aboriginal and Torres Strait Islander peoples as compensation for interference with their native title rights and interests constituted impermissible racial discrimination. A court may consider the compensation to be proportionate to the legitimate end of redressing harm to proprietary rights – and so either not discriminatory or, if discriminatory, sufficiently justified. Alternatively, a court may consider the compensation to be a justified special measure, designed to ameliorate the effects of past discrimination against native title holders.

89. Thirdly, again irrespective of the invalidity of the validation provisions in Divisions 2 and 2A, might the compensation regime be invalid because it

imposes a discriminatory burden on Aboriginal and Torres Strait Islander peoples?

90. The point would be that the compensation regime established by the *NTA*:

a) imposes special procedural obstacles on the obtaining of compensation payable under Divisions 2, 2A, 2B, 3 and 4 of Pt 2 of the *NTA*; and

b) therefore, imposes procedural obstacles on a class of persons who characteristically are of a particular race, colour or ethnic or national origin in circumstances where those obstacles are not faced by other relevantly comparable classes of persons who claim compensation for interference with their proprietary rights.

91. The kinds of procedural obstacles faced by claimants under the *NTA* compensation regime include that an application for compensation can only be made to the Federal Court by a registered native title body corporate or a person or persons authorised by all the persons who claim to be entitled to the compensation: *NTA* s 60(1).

92. Whether such procedural obstacles effected invalid discrimination would likely depend on the principles courts develop to determine the appropriate comparator class and whether the Commonwealth could identify an acceptable explanation for the special procedural obstacles (for example, the need to avoid a multiplicity of native title compensation proceedings).

93. If the procedural obstacles effected invalid discrimination, there is a reasonable prospect that they could be severed without the substance of the compensation regime falling.

94. Finally, we note that, if the compensation provisions were rendered invalid or inoperative, the right of persons who had received compensation to retain those moneys would likely depend on the operation of the law of restitution and the extent to which the constitutional amendment operated retrospectively.

What might the effect of a constitutional racial discrimination protection be on provisions of the NTA *that are considered "special measures", including the right to negotiate provisions?*

Generally

95. Is there a risk that provisions of the *NTA* that *positively discriminate* in favour of Aboriginal and Torres Strait Islander peoples might be rendered invalid by a constitutional racial discrimination protection? At a very general level, the risk is likely to be relatively low, but much would depend on the final terms of the protection and the context in which it was to be applied.

96. It can be noted that, in the *Native Title Act Case*, an argument was put to the High Court that the *NTA* was inoperative because, by positively discriminating in favour of Aboriginal and Torres Strait Islander peoples, it fell foul of the *RDA*. In responding to that argument, the High Court said at 483-4:

> *The* Native Title Act *was said to discriminate in favour of Aborigines and Torres Strait Islanders and thus to offend the* Racial Discrimination Act. *As s 7(1) preserved the operation of the* Racial Discrimination Act*, so the argument ran, the offending provisions of the* Native Title Act *"must be regarded as inoperative". The argument encounters considerable obstacles. In the first place, it is not easy to detect any inconsistency between the* Native Title Act *and the* Racial Discrimination Act. *The* Native Title Act *provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of holders of native title. In regulating those competing rights and obligations, the* Native Title Act *adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title. But if there were any discrepancy in the operation of the two Acts, the* Native Title Act *can be regarded either as a special measure under s 8 of the* Racial Discrimination Act *or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the* Racial Discrimination Act *or the International Convention on the Elimination of All Forms of Racial Discrimination.*

97. We turn now to considering the right to negotiate provisions and other parts of the *NTA* which might be considered to constitute positive discrimination.

The right to negotiate provisions

98. The right to negotiate provisions in Sub-Div P of Div 3 of the *NTA* operate, at a high level, in the following way. If a "future act" (as defined in s 233 of the *NTA*) affects native title, then it only does so validly if there has first been a negotiation process with interested parties (which includes native title claimants).

99. The effect of the right to negotiate provisions is to confer on native title claimants a special procedural benefit and to confer on native title holders a special immunity from valid interference with their native title. The High Court has described the procedural benefit so conferred as a "valuable right": *Fejo v Northern Territory* (1998) 165 CLR 96 at [25] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. It can be assumed that, characteristically, native title claimants and native title holders will be of a particular race, colour or ethnic or national origin. A court may, therefore, take the view that the provisions are *prima facie* discriminatory. That would in part depend on whether any constitutional amendment was construed so as to apply to discriminatory benefits.

100. Even so, there would seem to be a reasonable prospect that the right to negotiate provisions would not fall foul of any constitutional racial discrimination protection. A court could take the view that the provisions are proportionate to the end of redressing historical disadvantage suffered by Aboriginal and Torres Strait Islander peoples, including because of the special vulnerability of native title to interference. A court could also take the view that the provisions are, for that reason, special measures. Alternatively, a court could take the view that the provisions are proportionate to the end of protecting the native title rights and interests of native title holders – although that would raise a question as to whether that end was a legitimate, non-discriminatory end. In the case of the Second Proposal, the court could take the view, guided by similar considerations to those set out earlier in this paragraph, that the provisions, though laws with respect to Aboriginal and Torres Strait Islander peoples, *do not adversely discriminate against them*. In any case, the central question will be the nature of any criteria that the courts develop to

distinguish laws which, though discriminatory in one sense, nevertheless have an acceptable explanation or do not effect adverse discrimination.

Other provisions of the NTA

101. The *NTA* is a statute that regulates a kind of property that is characteristically held by Aboriginal and Torres Strait Islander peoples. In doing so, it necessarily confers some rights, privileges and immunities on a class that characteristically includes Aboriginal and Torres Strait Islander peoples, which are not held by other classes of persons or by the community generally.[28] The right to negotiate provisions are just one example of those rights, privileges and immunities. Others include the recognition and protection of native title and immunity of native title from extinguishment or affection except in certain circumstances.

102. The question we have been asked in this advice is expressed at a high level of generality: how might a constitutional racial discrimination protection affect provisions of the *NTA* that might be considered to be special measures? The answer we give accordingly must be expressed at a high level of generality. Noting the High Court's observations in the *Native Title Act Case* set out at paragraph 96 above, and for similar reasons to those we have set out in paragraph 100, there is a reasonable prospect that parts of the *NTA* which can be characterised as positively discriminating in favour of Aboriginal and Torres Strait Islander persons would not be invalidated by a constitutional racial discrimination protection. In saying this, we also note that, in *R v Kapp* [2008] 2 SCR 483, the Canadian Supreme Court upheld as a kind of special measure, the conferral of special proprietary rights on indigenous Canadians.

103. We note also that, in addition to including a racial discrimination prohibition, the Committee is considering the repeal of the current "race" power. In the *Native Title Act Case*, the High Court held that the *NTA* was

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[28] A factual proposition of that kind underlay the High Court's holding in the *Native Title Act Case* that the *Native Title Act* was supported by the races power. See, for example, at 462: "... the *Native Title Act* is 'special' in that it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title (the 'people of any race') a benefit protective of their native title. Perhaps the Act confers a benefit on all the people of those races. The special quality of the law thus appears".

positively supported by the race power. In our opinion, the proposal to replace the race power with a power authorising the making of laws "with respect to Aboriginal and Torres Strait Islander peoples" would be likely to provide sufficient positive support for the *NTA*. Failing that, parts of the *NTA*, would arguably be capable of being supported by other heads of power, including the external affairs power.

104. Care would need to be taken to ensure that no laws relied upon only the race power and related to races other than Aboriginal and Torres Strait Islander peoples. If such laws existed, the repeal of the current race power might remove the legislative power to repeal or amend such laws.

Effect on other Commonwealth laws

105. We have not been asked to identify all the possible laws that could conceivably be affected by a constitutional racial discrimination protection. However, having regard to the parameters we have set out in paragraph 54, it is possible to identify some features that might bring a law within the scope of such a racial discrimination protection.

106. Those features include that the law adopts race as the criterion of its operation or that the law adopts a criterion of operation that characteristically includes members of a particular race, colour or national or ethnic origin.

107. Laws that have these features might include laws designed to advance the interests of Aboriginal and Torres Strait Islander persons, such as the *Aboriginal and Torres Strait Islander Act 2005* (Cth) and the *Indigenous Education (Targeted Assistance) Act 2000* (Cth). As with the *NTA*, there is a reasonable prospect that such statutes would either not be considered to discriminate or adversely discriminate, would be considered to have an acceptable explanation or would be considered to constitute a special measure.

108. We note that laws that may have the second of the features identified in paragraph 106 also include laws that depend, for their validity, on the Commonwealth's aliens or immigration powers. Many provisions of the *Migration Act 1958* (Cth) fall into that category. The status of being an alien or an immigrant may characteristically identify that a person is not of a

particular race, colour or ethnic origin. Assessing whether a constitutional racial discrimination protection was capable of applying to laws of that kind would depend on the extent to which the protection was construed to extend to disparate impacts on racial groups. Even if such laws were capable of being discriminatory in the relevant sense, there would likely be a reasonable prospect that the courts would find laws adopting alienage or immigration as their criterion to have an acceptable non-racially discriminatory explanation.

We so advise.

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24 June 2014