IN THE MATTER OF AN OPINION ON THE RECOMMENDATIONS MADE BY THE EXPERT PANEL ON THE CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

OPINION

Introduction and overview

1. On 16 January 2012, the report of the Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution* was presented to the (then) Prime Minister (the **Expert Report**). .

2. I have set out below my opinion as to the legal risks and uncertainties that might attend the Expert Panel's recommendations.

The Expert Report

3. The Expert Panel has recommended the repeal of s 51(xxvi) of the Constitution and the enactment of three new provisions, to be numbered s 51A, s 116A and s 127A.

4. Proposed s 51A provides:

> ***Section 51A Recognition of Aboriginal and Torres Strait Islander peoples***
>
> ***Recognising*** *that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;*
>
> ***Acknowledging*** *the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;*
>
> ***Respecting*** *the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;*
>
> ***Acknowledging*** *the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;*
>
> *the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.*

5. Proposed s 116A provides:

Section 116A Prohibition of Racial Discrimination

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

(2) 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.

6. Proposed s 127A provides:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

7. In making these recommendations, the Panel adopted four guiding principles, namely that the proposed amendments must:

   (a) contribute to a more unified and reconciled nation;

   (b) be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;

   (c) be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and

   (d) be technically and legally sound.

8. In considering the recommendations, I have focused on the legal risks and uncertainties that may attend the proposed amendments. These matters obviously have a bearing on the practical likelihood of the proposed amendments being successful at a referendum. However, I have not attempted to consider the broader merits of the proposals, or their political and social implications. Nothing I have written should be construed as any indication that I am critical in any way of the objectives of the proposed amendments, or of any of the guiding principles that gave rise to them.

Executive Summary

9. It is apparent that the recommendations of the Expert Panel were driven by two objectives: first, recognising Aboriginal Australians within the Constitution in an appropriate way; and secondly, including a constitutional prohibition on all forms of racial discrimination. One fundamental issue that arises is whether the pursuit of the second objective, particularly through a provision in the form of s 116A that is likely to have far-reaching consequences, will complicate or imperil the achievement of the first objective. This issue is one that must be resolved as a matter of public policy, having regard to the legal and practical risks and uncertainties that will attend the pursuit of the twin objectives.

10. Having carefully considered the Report, I have reached the following conclusions:

    (a) In its basic concept, the proposed s 51A provides an elegant solution to the problem of recognising Aboriginal and Torres Strait Islander peoples in the Constitution in a way that is legally, politically and socially significant, rather than simply symbolic. From an historical and structural perspective, the idea of combining a series of preambular statements with a section that confers a substantive head of legislative power with respect to Aboriginal and Torres Strait Islander peoples is far preferable to the alternative of enacting a preamble to the UK Act of Parliament, the *Commonwealth of Australia Constitution Act* 1900 (63 and 64 Victoria, Chp 12), s 9 of which contains the Australian Constitution. It is also to be preferred over the option of amending the Constitution so as to include a new section that does not go beyond a purely declaratory set of statements concerning Aboriginal and Torres Strait Islander peoples. As discussed more fully below, the preambular statements seem to be reasonable and appropriate, although they could be refined in several respects. As to the grant of legislative power, I agree with the Expert Panel's conclusion that the power should be expressed, broadly and simply, as a power to legislate "with respect to Aboriginal and Torres Strait Islander peoples". In my view, this is a better option than the options of conferring legislative power by reference to a discrete list of subject matters (e.g. the culture, heritage, customary entitlements and relationship with the land of Aboriginal and Torres Strait Islander peoples) or expressing the power purposively as a power to legislate "for the recognition or advancement of Aboriginal and Torres Strait Islander peoples" either generally or with respect to enumerated subject matters. There are, however, some refinements that

could be considered, both in relation to the drafting of the preambular statements and in relation to the grant of legislative power;

(b) I have reservations concerning the proposed enactment of s 116A. Substantial legal risks and uncertainties will attend the interpretation and enforcement of such a broadly stated provision. An express constitutional prohibition on all forms of racial discrimination will also have implications for the construction and application of s 51A itself.

(c) Some issues could arise from the proposed repeal of s 51(xxvi) and its replacement by s 51A. One alternative that may be worthy of consideration is the retention of s 51(xxvi) in a qualified form and the insertion of an additional provision in the form of s 51A. This approach would be designed to affirm the Commonwealth's power to make laws for the benefit and advancement of indigenous Australians, while at the same time avoiding any uncertainties arising from the repeal of s 51(xxvi).

(d) Proposed s 127A is purely declaratory. It is not a source of power and it is not expressed to be a constraint on the exercise of legislative power. On one view, its objectives will largely be achieved by the third limb in the preamble to the proposed s 51A.

11. I will address the proposed s 51A and s 116A first, as they lie at the heart of the Expert Panel's recommendations. Moreover, the issues that affect the recommended repeal of s 51(xxvi) are best considered after analysing the recommendations concerning s 51A and s 116A.

Section 51A

12. Broadly speaking, the form and structure of s 51A is well-conceived. The advantage of the preambular paragraphs in s 51A is that they place a statement of recognition of Aboriginal and Torres Strait Islanders in the Constitution, and moreover within a substantive provision of the Constitution. This amendment would give effect to the guiding principles identified by the Panel.

The Preambular Statements

13. The preamble would not be entirely symbolic. At the very least, it would have a significant impact on the interpretation of laws made under s 51A. It may also have a wider effect, having regard to standard interpretation principles.

14. The ordinary position is that a preamble to an Act cannot be used to cut down the enacting part of a statute that is clear and unambiguous, but nevertheless the preamble can be used as an aid to interpretation of the operative part of the statute. This follows because a preamble sheds light on the statutory purpose and object of the section: *Wacando v The Commonwealth* (1981) 148 CLR 1 at 23 per Mason J. These observations apply with greater force to s 51A because the preambular words have been incorporated as part of a substantive provision.

15. One possible outcome is that the power of Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples under s 51A will be construed in accordance with its preamble, and consequently will be limited to laws for the advancement of Aboriginal and Torres Strait Islander peoples. The other view is that, notwithstanding the preambular statements in s 51A, the operative part of the provision is wide enough to authorise laws which operate either to advantage or to disadvantage Aboriginal and Torres Strait Islander peoples. It is sobering to note that, in 1967, the repeal of the reference to Aboriginals in s 51(xxvi) was widely understood to have been intended to permit the Commonwealth to make laws benefitting Aboriginals. Yet the provision was later construed as permitting both discrimination in favour of, and discrimination against, indigenous Australians: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [27]-[32], [44] and [81]-[89]. On the whole, however, I consider that the preambular statements as currently drafted, or as refined and enlarged in the manner discussed below, should be effective to largely eliminate the risk that s 51A will be used to support laws which discriminate against indigenous Australians.

16. It is also possible that s 51A, including its preamble, may have some impact upon the interpretation given to other provisions in the Constitution. It might, for instance, be read as providing indirect support for the principle that legislation that could be read as diminishing basic civil rights should be read restrictively and protectively: *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [255] to [257].

17. Turning to the precise formulation of the statements in the preamble to s 51A, two points arise. They both concern the fourth preambular statement which acknowledges *"the need to secure the advancement of Aboriginal and Torres Strait Islander peoples".*

18. The proposed s 116A refers to "peoples", whereas s 51(xxvi) refers to *"the people of any race".* In *Kartinyeri* at [76] and [77], Gummow and Hayne JJ said that s 51(xxvi) was to be construed with all the generality of which the phrase "the people of any

race" admits; consequently, there was no reason why it should be read as if limited to all the people, rather than as including within its reach any members of the people so identified. Their Honours also pointed out that the state of authority in the High Court affirms that the phrase is "apposite to refer to any identifiable racial sub-group among Aboriginal Australians": The *Commonwealth v Tasmania* (1983) 158 CLR 1 at 274. These matters pose a question whether s 51A should use the expression "people" rather than "peoples" as presently proposed. Presumably, the word "peoples" is intended to reflect the diverse range of Aboriginal people and their cultures. Despite the difference in terminology, I expect that the word "peoples" will be construed in much the same way as "people", i.e. it will be interpreted so as to refer to all or any people falling within the broader class. Therefore, there is no compelling reason to depart from the language recommended by the Expert Panel. However, the word "people" has the advantage that it conforms more closely with natural and ordinary usages.

19. The fourth preambular statement refers to "the advancement of Aboriginal and Torres Strait Islander peoples". I understand that there is some concern within the Aboriginal community about the word "advancement". This arises from its historical usage in past contexts, such as the policies that led to the separation of Aboriginal children from their families and their relocation to other places. These sensitivities must be considered, but it is relevant to note that the word "advancement" has some advantages. It has a well-understood legal meaning, which should afford a reliable basis for the interpretation of that particular preambular statement. In addition, the word has been commonly used in this kind of context. It is, for instance, used in Article 1(4) of the Convention on the Elimination of all Forms of Racial Discrimination, in the preamble to the *Native Title Act* 1993, and in s 11 of the *Australian Human Rights Commission Act* 1986. If another formulation were to be preferred, I would suggest "the need to promote the interests of" as it has less baggage than phrases like "protect" or "benefit".

20. The final matter is that the fourth preambular statement could be expanded to include some of the concepts referred to in the proposed s 116A, especially if a decision is made not to proceed with s 116A. The precise changes that could be made to this preambular statement are discussed below, but might include reference to "the need to overcome the effects of past discrimination and disadvantage suffered by Aboriginal and Torres Strait Islander peoples".

The Grant of Legislative Power

21. As to the language used in the proposed s 51A to express the grant of legislative power, I prefer the language used in the Expert Panel's draft over other options. The other options would seem to be twofold. The first is to confer legislative power with respect to a list of enumerated subject matters, such as the heritage, culture, customary entitlements, language and relationship with the land of Aboriginal and Torres Strait Islander peoples. This kind of listing could conclude with a reference to "other like things". However, it is very difficult to arrive at a list of subject matters that is sufficiently comprehensive, or whose individual components are sufficiently certain, to be confident that it captures the full range of matters that may need to be the subject of legislation in future years. There is also an inherent difficulty with a catch-all expression such as "other like things", when the preceding list does not represent a single genus. In these circumstances, a court is likely to struggle to give a clear and definite meaning to the catch-all expression. The other option is to express the power as a purposive one, that is to say a power to make laws for the recognition or advancement of Aboriginal and Torres Strait Islander peoples, or for the benefit of Aboriginal and Torres Strait Islander peoples, or a similar formulation. The difficulty with a purposive formulation is that the draftsman is driven back to terms like "for the recognition and advancement" or "for the benefit of" either of Aboriginal people generally or of specific matters concerning Aboriginal people. All of these formulations may result in unintended limitations affecting the scope of the legislative power. Thus, at the end of the day, these other options are likely to end up as narrowing or limiting formulas, so that there will be a risk that they will not capture the type of laws that a future Parliament may wish to enact in the interests of Aboriginal and Torres Strait Islander peoples.

22. The Expert Panel's formulation is also to be preferred because, as a matter of principle, a grant of legislative power should be expressed in wide and simple terms. This is an appropriate course within s 51A because, to a significant extent, the interpretation of the grant of power will be controlled, or at least guided, by the preambular statements. The preambular statements can be drafted in such a way as to make it very unlikely that the grant of legislative power will hereafter be used to support the enactment of discriminatory laws that operate adversely to Aboriginal and Torres Strait Islander peoples. In particular, if some of the concepts from s 116A(2) were to be included in the fourth preambular statement, they should be effective to minimise or eliminate any risk that a wide grant of power will be used to enact laws that discriminate adversely against Aboriginal people.

An Additional Safeguard?

23. The question then arises whether a further safeguard to address these risk should be put in place by adding a phrase such as "but not so as to discriminate adversely against them" at the end of the currently proposed s 51A. Clearly, this safeguard would be unnecessary if the proposed s 116A were to be retained. But if the proposed s 116A is deleted from the proposals that go to referendum, the additional phrase could be added.

24. In contrast to the proposed s 116A, the additional phrase would not amount to a general constitutional guarantee against all racially discriminatory laws. However, even though it is expressed as a limit on the scope of the legislative power otherwise conferred by s 51A, it would take on greater constitutional significance if it were to be included in s 51A. This is because the High Court has recognised that similarly expressed limitations in particular paragraphs of s 51 of the Constitution can operate to impose limitations on the legislative power conferred by other paragraphs of s 51. In *Attorney-General v Schmidt* (1961) 105 CLR 361 at 371-372, Dixon CJ enunciated the governing principle as follows:

> "It is hardly necessary to say that when you have, as you do in par. (xxxi), 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."

25. The High Court applied this principle in *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285-289 in determining whether the words "other than State banking" in s 51(xiii) of the Constitution imposed a general limitation upon Commonwealth legislative power or merely confined the ambit of the banking power itself.

26. In *Bourke*, the Court concluded that the words "other than State banking" imposed a restriction upon Commonwealth legislative power generally rather than simply a limitation upon the ambit of s 51(xiii). As to the precise nature of that restriction, the Court said that it was confronted by a choice between two alternatives: first, that the Commonwealth was positively prohibited from making laws with respect to State banking; and secondly that Commonwealth power might simply not extend to the

enactment of laws which can be characterised as laws with respect to banking (whether or not they can also be characterised as laws with respect to other subject matters of legislative power) to the extent that those laws touch or concern State banking. In the result, the Court concluded at 288-289:

> *"The only satisfactory solution to this problem is to accept that there is no exclusive State power to make laws with respect to State banking. But the words of s 51(xiii) still require that, when the Commonwealth enacts a law which can be characterized as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking: see Fairfax v Federal Commissioner of Taxation (47). Put another way, the connexion with State banking must be "so insubstantial, tenuous or distant" that the law cannot be regarded as one with respect to State Banking: Melbourne Corporation (48). Of course these are the tests used in the familiar process of characterization. But they are employed in the context of an embracing Commonwealth power expressed as one to make laws with respect to State banking. So, if a law is not one with respect to banking, it is not subject to a restriction that it must not touch or concern State banking."*

27. In practical terms, therefore, the Court considered that the other paragraphs of s 51 could justify laws which impact upon State banking, so long as they were not laws which could be characterised as laws with respect to banking that touch or concern State banking.

28. Applying that approach to the additional phrase that might be added to s 51A, it would seem to have the effect of preventing the Commonwealth enacting a law under any of the other powers conferred by s 51 of the Constitution if the law can be characterised as a law with respect to Aboriginal and Torres Strait Islander peoples that discriminates adversely against them. The critical proposition is that the laws are capable of being so characterised. If so, it would not be to the point that they could also be characterised as laws with respect to another subject matter of legislative power.

29. The addition of the further phrase to s 51A would also have another consequence. It would immediately raise the question whether s 51(xxvi) could, or should, be retained. To do so may appear to be inconsistent with the safeguard added to s 51A. If s 51(xxvi) is to be retained, the more consistent approach would be to add a similar safeguard at the end of s 51(xxvi). This is considered more fully below.

Section 116A

30. The Expert Panel recommended the enactment of s 116A because it concluded that recognition of Aboriginal and Torres Strait Islander peoples will be incomplete without a constitutional prohibition of laws that discriminate on the basis of race.[1]

31. The Panel formed this view having reached a broader conclusion concerning discrimination:

> *"The Panel has concluded that there is widespread support in the Australian community for a constitutional amendment to entrench the prohibition of racial discrimination. By operation of the Racial Discrimination Act and section 109 of the Constitution, the States and Territories are already effectively subject to a constitutional prohibition on legislative or executive action which discriminates on the ground of race. The Commonwealth Parliament, on the other hand, is not."*

32. Plainly, these objectives are laudable, but the question that I think arises is whether the inclusion of a broad anti-discrimination provision in the Constitution in the form of s 116A is attended by legal risks and uncertainties that may adversely affect or complicate the objective of appropriately recognising Aboriginal and Torres Strait Islander peoples in the Constitution. These risks and uncertainties need to be evaluated in light of the fact that, as the Panel pointed out, there is already extensive Commonwealth and State legislation prohibiting legislative or executive action which discriminates on the ground of race.

33. Section 116A is likely to have wide-reaching application and be heavily litigated. The provision prohibits any legislative or executive action in which race, colour, or ethnic or national origin is a criterion for differential treatment. The provision may be used to strike down legislation or invalidate executive action. It might also be interpreted as giving an individual a private right of action against the Commonwealth, a State or Territory. In short, the provision may have very far-reaching consequences.

34. The proposed s 116A(1) prohibits discrimination without defining discrimination. This will lead to uncertainty as to its meaning and to the section being heavily litigated. The obvious analogue is s 92 of the Constitution, whose precise meaning was not clearly defined and remained uncertain and heavily litigated for approximately 80 years: *Cole v Whitfield* (1988) 165 CLR 360 and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318.

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[1] Section 6.5 at 167.

35. There is no proposal to define the term "discriminate" in s 116A(1). The meaning of this term depends upon its context, and it may include positive discrimination. There is an extensive international jurisprudence that explores and explains the concept of discrimination, and this jurisprudence will no doubt assist the High Court in giving meaning to the term. However, it is by no means certain that all aspects or dimensions of the meaning ascribed in the *Racial Discrimination Act* will be applied. It is, for instance, open to doubt whether the constitutional term would pick up concepts such as the "special measures" referred to in the Convention and in the *Racial Discrimination Act* 1975. It is more likely that, in the absence of any definition, the term will be given its ordinary meaning, albeit that is a meaning informed by contemporary practices and jurisprudence.

36. There is, in my opinion, a particular risk that the concept of discrimination in s 116A will not be construed consistently or co-extensively with the more detailed definitions that are found in the *Racial Discrimination Act* or in comparable legislation in other places.

37. The *Racial Discrimination Act* 1975 includes detailed provisions and some intricate legal concepts. It draws heavily upon the International Convention on the Elimination of all Forms of Racial Discrimination. The complexity of those provisions is apparent from reading decisions such as *Gerhardy v Brown* (1985) 159 CLR 70, *Western Australia v Ward* (2002) 213 CLR 1 and *Maloney v R* (2013) 298 ALR 308. The last mentioned case examined the difficulties that can arise in applying the concept of "special measures" in s 8(1) of the *Racial Discrimination Act*. It is difficult to envisage that all of the concepts, criteria and approaches that apply in the context of the *Racial Discrimination Act* will be replicated in construing a broad Constitutional provision such as the proposed s 116A.

38. Proposed s 116A contains two limbs: a broad prohibition on racial discrimination in sub-section (1), and an exception from that prohibition in sub-section (2). This exception protects laws or measures for the purposes of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting a cultures, languages, or heritage of any group. Sub-section (2) is not a source of power, simply a saving or exempting provision.

39. There is an obvious intersection between the proposed s 51A and the proposed s 116A. However, the proposed s 116A(2) permits the preferential treatment of any group – not just Aboriginal and Torres Strait Islander peoples. In addition, the second part of sub-section (2) (*"or protecting the cultures, languages or heritage of*

any group") is susceptible to a broad interpretation. In this context, it is worth recalling, as Gummow and Hayne JJ pointed out in *Kartinyeri* at [86] and [87], that the differential treatment of those upon whom the law operates by conferral of a right or benefit may also impose an obligation or disadvantage on others. As their Honours said, that which is to the advantage of some members of a race may be to the disadvantage of other members of that race or of another race. It is not difficult to envisage a law which a government considers to be within the scope of s 116A(2), but which members of one or other ethnic group affected by the law might regard as discriminatory.

40. Some uncertainty is bound to arise concerning the meaning and application of the terms used in s 116A(2). It may be that the High Court will construe s 116A(2) so that laws and measures intended to overcome disadvantage, ameliorate the effects of past discrimination, or protect the cultures of any group would not be struck down as discriminatory if the laws were reasonably adapted and proportionate to those ends. To some extent at least, the language used in s 116A(2) suggests that the temporal scope of a law may enter into its proper characterisation. At the very least, there must be a prospect that a requirement for laws to be of a temporary nature if they are to fall within s 116A(2) will be imported into the meaning of s 116A(2).

41. Tensions may arise between s 116A and laws enacted under s 51A. Section 116A is likely to be regarded as the dominant provision: it is a general constitutional prohibition, and proposed s 51A includes the words "subject to this Constitution".

42. The fact that the scope of proposed s 116A differs from that of s 51(xxvi) also means that there may be existing laws that would not be valid under s 116A. By way of example, the *Native Title Act* contains provisions that override Aboriginal entitlements, including the retrospective extinguishment of certain rights. These provisions may not fall within the category of laws that are saved by s 116A(2). Rather, they might fall within the prohibition in s 116A(1), and consequently would be affected by the proposed amendment.

43. One useful illustration of the way in which s 51A might interact with s 116A is provided by the *Northern Territory National Emergency Response Act* 2007 (Cth), which was later replaced by the *Stronger Futures in the Northern Territory Act* 2012 (Cth). The history of this legislation shows that laws intended to benefit Aboriginal communities may have detrimental outcomes that are seriously opposed by some communities and their advocates. In the context of s 51A alone, the High Court might not go beyond considering whether the laws were reasonably appropriate and

adapted to achieving their ends. But it is less clear what approach would be adopted if s 116A were to be enacted as well.

44. Proposed s 116A raises the risk of litigation challenging the validity of legislation such as the *Response Act* and the *Stronger Futures Act* on the ground that they are discriminatory and, therefore, arguably outside the power conferred by s 51A. It is difficult to be confident that litigation of this kind will be satisfactorily resolved by the High Court, at least in the short term. Indeed, there must be a risk that s 116A would be interpreted so as to defeat measures that segments of the community, or Parliament, considered to be measures for the advancement of Aboriginal communities.

45. In my opinion, the proposed enactment of s 116A may complicate the objective of recognising Aboriginal and Torres Strait Islander peoples in an appropriate way within the Constitution. In view of the fact that racial discrimination is already comprehensively prohibited by Commonwealth and State legislation, there is a serious question whether this risk is worth running. Under existing legislation, applications can be made to the Courts to strike down Commonwealth legislation that is alleged to be discriminatory within the meaning of the *Racial Discrimination Act* 1975. Similarly, State and Territory legislation can also be challenged in this way, in reliance upon s 9 of the *Racial Discrimination Act* coupled with s 109 of the Constitution.

46. More generally, the potential intersections between s 51A and s 116A are likely to complicate Parliament's power to create laws for Aboriginal and Torres Strait Islander peoples. For a law to be valid, it must fall within the broad power conferred by s 51A, perhaps as limited by its preamble, and it must not offend against the prohibition on discrimination in s 116A(1). Alternatively, if it offends against that prohibition, the question will arise whether it falls within the exception in s 116A(2). If s 51(xxvi) is to be repealed and s 116A enacted because they are regarded as a package that is needed to address the risk of racially discriminatory laws, then the amendments would also remove Parliament's power to make laws that may be beneficial to, or protective of, the people of any race other than Aboriginal and Torres Strait Islanders. The precise way these provisions interact in relation to any particular fact situation may be such as to give rise to unintended consequences.

The repeal of s 51(xxvi)

47. There are understandable reasons why the Expert Panel proposed the repeal of s 51(xxvi), which confers power to enact laws with respect to "the people of any race for whom it is deemed necessary to make special laws". Paragraph (xxvi) was included in s 51 specifically to support laws that discriminated against the members of particular races, including Chinese and South Pacific labourers that had come to Australia. It is therefore a vestige of racially discriminatory attitudes that were prevalent in Australia at an earlier point in its history. There are also problems with the term "race", in that it has an uncertain meaning and content: see, e.g., *Shaw v Wolf* (1999) 83 FCR 113.

48. Nonetheless, it is important to recall the more recent history of s 51(xxvi). Until 1967, the Aboriginal race was specifically excluded from the paragraph, but that exclusion was deleted as the result of a constitutional amendment that was approved at the 1967 referendum. The objective of the amendment was to ensure that the Commonwealth had power to make laws for the Aboriginal race, in the sense of benefiting the Aboriginal race.

49. Several important pieces of legislation are, to some extent at least, founded upon this beneficial aspect of paragraph (xxvi), including the *Native Title Act* 1993 and the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984. In addition, while the *Racial Discrimination Act* 1975 primarily relies upon the external affairs power, some provisions of that Act relating specifically to persons of Aboriginal or Torres Strait Islander heritage might be sustained under paragraph (xxvi).

50. The Panel considered whether the repeal of s 51(xxvi) might result in the invalidity of legislation previously enacted in reliance on it. The Panel's view, based on legal advice, was that the repeal of the *placitum* and its replacement by s 51A would not invalidate or require re-enactment of legislation originally passed in reliance on the *placitum*. In addition, the Panel considered that such laws would continue to be supported seamlessly by the new power.

51. In my opinion, the view expressed by the Panel is probably correct, but this does not mean that it is entirely free from uncertainty.

52. The text of the Constitution does not suggest that the repeal of the head of power will invalidate laws made under it. Section 51(xxvi) confers power upon the Parliament to make laws with respect to a specified subject matter so that, on a textual reading, its

repeal simply means that Parliament no longer has that power unless it is replaced by an equivalent or wider power.

53. The question of constitutionality that ordinarily arises is whether legislation was validly enacted under a head of power. The question is rarely raised whether Parliament could validly enact the legislation at the time of challenge. However, that issue was touched upon by Gaudron J in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [43]. Her Honour observed that the power conferred by s 51(xxvi) is premised on there being some matter or circumstance pertaining to the people of a particular race upon which the Parliament might reasonably conclude that there is a real and relevant difference necessitating the making of a special law. As a result, Gaudron J said that the scope of the power necessarily varies according to circumstances as they exist from time to time and that *"a law that is authorised by reference to circumstances existing at one time may lose its Constitutional support if circumstances change"*.

54. It follows that it is not entirely clear how the High Court would approach a question regarding the validity of existing Commonwealth legislation where the empowering provision of the Constitution no longer exists. There is no proposal to include saving provisions maintaining the validity of current laws enacted pursuant to the power conferred by s 51(xxvi). It is also doubtful that interpretative principles relevant to legislation or delegated legislation will be of much assistance. In that regard, s 7(2)(b) of the *Acts Interpretation Act* 1901 provides that the repeal or amendment of a Commonwealth Act does not affect the previous operation of the affected Act or anything done or suffered under that Act. On the other hand, while it may be less relevant, the general rule that applies to delegated legislation is that, in the absence of a saving provision, the repeal of a head of power will repeal the delegated power: see e.g. *Watson v Winch* [1916] 1 KB 688, *Bird v John Sharp & Sons Pty Ltd* (1942) 6 CLR 233.

55. This issue of continuity, that is to say whether the repeal of s 51(xxvi) would remove constitutional support for existing pieces of legislation, including certain provisions of the *Native Title Act*, is tied up with the Expert Panel's proposal to introduce a broad prohibition of racial discrimination in s 116A. At first blush, the wide power conferred by the new s 51A would provide ample continuity for existing legislation that affects Aboriginal and Torres Strait Islander peoples. However, its operation would be cut back by the provisions of s 116A. In particular, s 51A would not authorise laws that discriminate on grounds of race, unless the relevant laws fell within the scope of

s 116A(2). In these circumstances, laws that single out Aboriginal or Torres Strait Islander Peoples for special treatment might no longer be supported, unless they could be seen as reasonably appropriate and adapted to the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of the relevant group within the meaning of s 116A(2).

56. The prospect of s 51(xxvi) being used by the Commonwealth Parliament to enact laws that racially discriminate against Aboriginal and Torres Strait Islander Peoples is, I would hope, more theoretical than real. In *Kartinyeri*, the High Court Judges expressed differing views about the scope of s 51(xxvi). In their joint judgment, Brennan CJ and McHugh J thought that it was unnecessary to determine the nature or scope of the power conferred by s 51(xxvi) and did not do so. Gaudron J said at [43]-[45] that, although the power conferred by s 51(xxvi) was in terms wide enough to authorise laws which operate either to the advantage or disadvantage of the people of a particular race, it was difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid. Her Honour thought that it was especially difficult to conceive of this situation in relation to Aboriginal Australians. In the result, Gaudron J considered that, *prima facie*, only laws directed to remedying the disadvantage of Aboriginal and Torres Strait Islander peoples could be viewed as within the law making power of Parliament. In reaching this conclusion, Her Honour relied on the qualification to the race power that Parliament may make laws with respect to the people of any race *"for whom it is deemed necessary to make special laws".* In their joint judgment, Gummow and Hayne JJ considered that s 51(xxvi) is not confined to laws which do not discriminate against a race, and that a valid law may operate differently between members of a race: at [81]-[84]. The remaining member of the Court, Kirby J, concluded that s 51(xxvi) does not extend to the enactment of a detrimental and adversely discriminatory special law by reference to a people's race: [165] and [168].

57. One clear risk associated with the repeal of s 51(xxvi) is that it removes the power of Parliament to make laws that may be beneficial to the people of any race, aside from Aboriginal and Torres Strait Islanders who would have the benefit of the new proposed s 51A. There may come a time when it is necessary to use the power under s 51(xxvi) to protect a particular race other than Indigenous Australians. For instance, there may be a particular migrant group at risk or in need of protection, perhaps as a result of extraterritorial matters, or cultural issues that arise in Australia at some time in the future. The inability of the Commonwealth to be responsive in such a situation may be an unintended consequence of the proposal to repeal

s 51(xxvi). This would not be solved by recourse to s 116A(2) because it is not a source of power, simply an exception to the prohibition in s 116A(1).

58. To my mind, the fate of s 51(xxvi) is inextricably tied up with the proposed anti-discrimination provision. If the amendments to the Constitution are to include, in one form or another, a prohibition on racial discrimination, then it would be an odd thing to retain s 51(xxvi) rather than repeal it. On the other hand, if the amendments are to go forward without any provisions that are aimed at prohibiting or precluding racial discrimination either generally or against Aboriginal and Torres Strait Islander peoples in particular, then the retention of s 51(xxvi) in some form or another is worth considering. Likewise, if the proposed s 116A is to be deleted but the words "but not so as to discriminate adversely against them" are to be added at the end of s 51A, it may be worth considering the option of retaining s 51(xxvi) but adding a similar safeguarding phrase to it. That option would at least preserve the Parliament's power to make laws for the benefit of other racial groups. Indeed, given that Aboriginal and Torres Strait Islander peoples are to be the object of a separate legislative power in the new s 51A, they could be excluded from s 51(xxvi).

59. Adopting these thoughts, s 51(xxvi) could be amended to read as follows:

> *"(xxvi) The people of any race, other than Aboriginal and Torres Strait Islander people, for whom it is deemed necessary to make special laws, but not so as to discriminate adversely against them."*

In this form, s 51(xxvi) might be a sensible complement to s 51A. The choice of the words "discriminate adversely against them" is deliberate, not an unintended tautology. Those words, especially the adverb "adversely", are intended to work together with the amendments to the preambular statements so as to ensure that Parliament can enact special measures to overcome the problems and disadvantages suffered by indigenous people.

60. As discussed above, the concluding words of the amended s 51(xxvi) would have a reach that goes somewhat beyond paragraph (xxvi), in that they would prohibit discrimination against a racial group by any law that could be characterised as a law with respect to that group. But I do not regard this as a source of any difficulty or uncertainty.

Section 127A

61. The Panel recognised that the proposed s 127A is purely declaratory. It recommended its adoption for the following reasons:

> *Specifically, the Panel has concluded that recognition of Aboriginal and Torres Strait Islander languages as part of our national heritage gives appropriate recognition to the significance of those languages, especially for Aboriginal and Torres Strait Islander Australians, but for all other Australians as well. The Panel has also concluded that the recognition of English as the national language simply acknowledges the existing and undisputed position.*[2]

62. In making this recommendation, the Panel acknowledged that constitutional recognition of Aboriginal and Torres Strait Islander languages by means of s 127A would overlap with the question of the content of the statement of recognition and the conferral of a head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples. These issues are primarily to be addressed by the enactment of the proposed s 51A.

63. Nonetheless, the Panel considered that a separate languages provision would provide an important declaratory statement in relation to the importance of Aboriginal and Torres Strait Islander languages, without giving rise to implied rights or obligations that could lead to unintended consequences.[3]

64. My concerns about s 127A are purely practical ones. As I see it, the issue is whether the proposed s 127A will complicate the objective of recognising Aboriginal and Torres Strait Islander peoples in an appropriate way within the Constitution. The third passage in the preamble to s 51A already makes reference to "Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples". This provision largely achieves all that s 127A seeks to achieve, at least in relation to Aboriginal and Torres Strait Islander languages.

65. There must be some risk that s 127A will provoke unhelpful controversy insofar as it provides that the national language of the Commonwealth is English and that Aboriginal and Torres Strait Islander languages are a part of our national heritage. While the provision is declaratory, it is unclear what implications may attach to these two declarations.

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[2] Expert Panel Report, section 4.8, at p.131
[3] Expert Panel Report, section 4.8, at p.132

An Alternative Proposal

66. Having reviewed the Expert Panel Report, I have concluded that there is a simpler option that may be worthy of consideration. It involves the insertion of an additional provision in the form of a refined s 51A, and the abandonment of the proposals for the enactment of s 116A and s 127A.

67. Specifically, this option would revise s 51(xxvi) and s 51A as follows:

Section 51(xxvi)

"(xxvi) The people of any race, other than Aboriginal and Torres Strait Islander people, for whom it is deemed necessary to make special laws, but not so as to discriminate adversely against them."

Section 51A

Section 51A Recognition of Aboriginal and Torres Strait Islander people

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

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

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

Acknowledging the need to adopt measures to overcome the effects of past discrimination and disadvantage suffered by, and to promote the interests of, Aboriginal and Torres Strait Islander people;

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 people but not so as to discriminate adversely against them.
[my additions are highlighted]

This formulation uses the term "people", rather than "peoples".

68. The option builds on the Expert Panel's proposal in several ways. First, it incorporates some language from s 116A(2) in the preambular statements to s 51A. Secondly, it adds the phrase "but not so as to discriminate adversely against them" at the end of the revised s 51A. Thirdly, it substitutes the phrase "promote the interests of" for the words "secure the advancement of". Fourthly, it retains s 51(xxvi) in the amended form set out in paragraph 59 above, so that it excludes reference to Aboriginal and Torres Strait Islander people. Fifthly, s 51(xxvi) incorporates the same safeguard as the revised s 51A, that is to say the words "but not so as to discriminate adversely against them" have been added at the end of the amended s 51(xxvi).

69. I appreciate that this option probably does nothing to enlarge the scope of the legislative power, previously conferred by s 51(xxvi), to enact laws for the advancement of Aboriginal and Torres Strait Islander people. The possible qualification is that the introduction of s 51A may broaden the legislative power of the Parliament to the extent that Aboriginal and Torres Strait Islander people do not identify as a race. I note that the meaning of the term "race" as used in s 51(xxvi) is not static, nor is it a term of art: *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 243-244 per Brennan J.

70. Nonetheless, this option has several distinct advantages. First, it enables s 51(xxvi) and s 51A to operate together with greater coherence. Secondly, by incorporating the phrase "but not so as to discriminate adversely against them" at the end of each section, the proposal embraces the objective of non-discrimination in a limited but nonetheless appropriate way. This aspect of the proposal may be important in securing broad-based community support (including Aboriginal support) for the amendments. Thirdly, the combined effect of the preambular statements and a safeguard that is aimed at adverse discrimination should ensure that the Commonwealth Parliament has the power to enact special measures to promote or protect the interests of Aboriginal people.

71. If a policy decision were to be made to pursue the objective of recognising Aboriginal Australians within the Constitution, without including any provisions to address the risk of racially discriminatory laws, the foregoing option could be revised to achieve that result. The key element would be the enactment of s 51A in a form that incorporates language from the proposed s 116A(2) into the preambular statements in s 51A, without including the further phrase at the end.

72. As for s 51(xxvi), it could be repealed for the reasons given by the Expert Panel; it could be amended so that it returns to its pre-1967 form to avoid any overlap with s 51A; or it could be retained in its present form for the reasons discussed in paragraphs 50 to 59 above. If s 51(xxvi) were to be retained in its present form, it would overlap with s 51A, but that overlap would not give rise to any technical difficulty. To the extent that there is a significant overlap between them, the sections will be construed to give the greatest harmony and least inconsistency. It will not matter if a particular Act is valid under more than one head of Constitutional power. But, by avoiding the repeal of a provision, there would be two possible advantages: first, there would be no risk of the changes invalidating any current legislation; and secondly, the existence of both provisions would ensure that the Commonwealth's power is not unnecessarily or unintentionally circumscribed, particularly in relation to legislation with respect to any other race.

73. In summary, I consider that provisions along the lines of the first option discussed above would achieve the purpose of constitutional recognition with the least risk to existing enactments, in a way that is legally and technically sound, and, perhaps, in a manner that offers the greatest prospect of success at a referendum. There are, of course, other options that might be considered, but in my view the more attractive options are those that focus on the enactment of a new legislative power to make laws with respect to Aboriginal and Torres Strait Islander people.

11 June 2014

Neil J Young

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