Overall Comment about the target of these Bills.

The NT Aboriginal peoples and their communities remain the main target despite the use of the new term "disadvantaged Australians. The late Paul Hasluck attempted a same approach under the then *Welfare Ordinance 1953 (Cth)* that remove the term "Aboriginal" from the statute and replaced it with "certain persons who came within its ambit; meaning the targeted Aboriginal people were treated as 'wards of the State" – a intended status because of race denoting their "need of guardianship and tutelage." (cited Article: Russell McGregor –(James Cook University) "*Avoiding "Aborigines": Paul Hasluck and the Northern Territory Welfare Ordinance 1953"* Australian Journal of Politics and History, Volume 4, 2005. pp513-529).

Law is meant to be legitimate and within power; a functioning democratic Australian society depend on the law regulating its own self- integrity through our parliamentary system, and separation of powers and strict maintenance of a and confidence of the Australian peoples.

The confidence of the Australian public with the Commonwealth lawyers self regulating themselves to ensure both validity and within power, appears to become selective and cowering to policies when it comes to legislation on Indigenous Australians.

The challenge of the West Australian Government against the enactment of the *Native Title Act 1993 (Cth)* opened up the farce of attempting to colour policy as law.

The most basic understanding of the common law of Australia, which constitutionally is the sole realm of the judiciary (judges) was attempted by the Commonwealth lawyers to make the recent High Court declaration in the ***Mabo (***1992) case, that the existing ***sui generis*** [unique-one of a kind] native title rights can be recognised, in certain situations by the "common law of Australia," can be now a "law" of the parliament because the NTA says so in s12.

How could the most basic underpinnings of Australia's entire constitutional democracy entrusted to Commonwealth lawyers get it so wrong? The answer seems to be, at least to us, the Aboriginal peoples, ***"it was just a law about a race."***

The Commonwealth eagerness in the then s12 of *Native Title Act* was the only section of the NTA unanimously declared invalid (which is briefly reproduced further).

How then can Indigenous Australians expect to maintain confidence in the integrity of the parliamentary process which appears to be, even to a lay person's reading of these three Bills, are still laws about a race laws; no matter how coloured with "disadvantaged Australians?"

Because of being "race laws" extra scrutiny is required for both legitimacy and within power. As to the latter, we have strong concerns how effective this Senate "extra scrutiny" will be.

What is becoming the "norm" with laws about us (conveniently becoming targeted as a "race" and not fit for the same constitutional protection that applies to all other Australians because there exists a "race power" in the Australian Constitution (s51 (xxi)) is that for known or suspected lack of any specific head of constitutional power, parliamentary legislators "trawl" the constitution attempting to drag a "head of power" to justify race laws.

Like the Hasluck approach, attempting to validate his racial laws to a racial problem that he had power to make laws for, he viewed, like the "constitutional peg" that attempts to hold these three Bills together, stemming more from Aboriginal people constituted a "social problem" not a "racial problem."

Therefore, as it was assumed, there are no legal problems in law making race laws.

The Constitutional Pigeon Holes

The grant of power to the Federal Parliament in **s51(xxiiiA) of Australian Constitution** allows the Parliament to make laws with respect to:

> "the provision of maternity allowances, widow's pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (***but not so as to authorise any form of civil conscription***), benefits to students and family allowances".

The two simple question to be asked is:

- whether those in the scope of this section can be "compulsory conscripted" into being forced by having no choice to do the Commonwealth's bidding; and
- whether the law (Bills) are valid and subject to the Constitution.

Have those under its scope have choices of:

- Where they purchase their food and other basic items
- Where they line up to purchase food and other basic items when visiting large food outlets in Alice Springs
- Have any choices of what they purchase
- How and what legal entity a shop store owners in a community where the majority of peoples are under the scope of these three Bills have any choices in how they operate or what can be even sold.

S51(xxiiiA) of Australian Constitution

It is strongly our view, that All Australians, because of circumstance and not of race, that fall within payments unde the Commonwealth social welfare payments and constitutional powers of the Commonwealth to give those payments, are entitle also to non discriminatory laws.

The former retired Chief Justice of the High Court, the Hon Murry Gleeson, mentions the public purpose role of s51(xxiiiA) in his book *The Rule of Law and the Constitution,* complied judicial thoughts for the Boyer Lectures 2000 and states:

> **“What may be thought surprising, however, is that the prohibition [no civil conscription] only applies to civil conscription in relation to medical services**. [at p74.]

Not so these three Bills. They are laws about a race and “no choice” for the Aboriginal recipients that amount to the “prohibited civil conscription” because of race.

The former narrow reading that only professional “medical” and dental” persons are exempted can no longer be maintained in a contemporary reading of the Australian Constitution; class structures between the Australia peoples, if not in practice, but more in law, has not be legitimised either under the Australian Constitution or rule of law.

In the recent High Court case of *Wong v Commonwealth of Australia (2009)* the expression “civil conscription” was critical. The case is relevant for its background to s51(xxiiiA).

At [72] the Court noted that:

> The head of power itself was inserted by the *Constitution Alteration (Social Services)* 1946 (Cth) which was approved by the electors in a referendum conducted on 28 September 1946 in accordance with s 128 of the Constitution. Exceptionally, that referendum was carried nationally and in all six States**.**

The purpose of raising this recent case as being relevant to the new proposed Bills is broadly the power of social services as expressed in s51(xxiiiA) of Constitution provides the Federal Parliament source of authority to permissibly intrude into the lives of those who fall under its scope and in need of these services.

The prohibited provision applies across all noted but not limited to, social security needs and not isolated just because of placement.

It would be hard pressed to think that because one is a professional medical or dentist person, they are immune from forced coercive actions by the Commonwealth yet the others noted can be. It would be akin to introducing a “class system.”

Initially, it was those of the Aboriginal race targeted and by chance backwash, included others that happened to be living in certain prescribed geographical and usually remote Aboriginal townships or communities.

Now the proposed Bills, due to both public and International pressures, have added “blanket rules” over the whole Northern Territory to refer to “disadvantaged Australians” as if “race” as the target can somehow disappear due to the cleverness of the drafters.

In Constitutional invalidation cases, there obviously is no easy formula. That is because of the nature of the Australian Constitution itself; one generation may want to read the Constitution to suit their needs but cannot amend or escape the constitutional text itself.

The other critical turning points throughout this case was a return again to unsettled questions of constitutional interpretation of the heads of powers to the Federal Parliament; their text in a constitutional setting, meanings, character and purposes.

Most importantly, how the High Court goes about its business in examining the restriction on legislative power effected by the prohibition on measures amounting to "***any form of civil conscription***" is relevant to the practical impacts on certain members of the public living in the Northern Territory , being Aboriginal or now in the new proposed Bills, included to soften the obvious racial impacts of the initial legislative "Emergency intervention" everybody that comes within the scope of s51(xxiiiA).

Can Aboriginal peoples be "civilly conscripted" because of circumstances requiring welfare assistance from the Commonwealth? In other words, if there is NO CHOICE is this not a compulsory order amounting to "civil conscription?"

> **"It is difficult to imagine that the mere payment of the various forms of allowances, pensions, endowments and benefits could turn into a form of civil conscription.**
>
> (Kirby in Wong at [119])

Initially, after the successful 1946 referendum that now sources s51(xxiiiA) the central power granted to the commonwealth occupied the civil fields of medical and dental.

The introduction of s51 (xxiiiA) of Constitution in 1946 remained mostly uncontroversial, although in *General Practitioners Society v Commonwealth (1980)* professional members of pathology services took offence to having been forced to use a particular Commonwealth form (tried unsuccessfully to argue that it was a prohibited form of 'civil conscription") and some articles were wrote decrying the loss of constitutional protection, until *Wong* in 2009 – two years after the NT National Emergency Response Act 2007.

No one, apart from our Submission, at least to our knowledge, has raised the repugnant legal effects of s51(xxiiiA) against a race of Australians.

Though *Wong* did not involve all the classes of social security mentioned in s 51 (xxiiiA) or mention the NT intervention (which is no real surprise because it was not part of the relief sought by the plaintiff) the interpretation of this section is useful in its understanding of its legal effects of the NT intervention.

The NT intervention legislation and effects on a targeted race (Aboriginal peoples) was not raised at all in argument in *Wong* over the scope of s51 (xxiiiA) and even Kirby J missed its analogy to its current use on the Aboriginal peoples because of race. His Honour stated, not overly concerned about its "potential abuse" because "the provision of the applicable services needs to understood by reference to the accompanying services and:

> **"It is difficult to imagine that the mere payments of the various forms of allowances, pensions, endowment and benefits could turn into a form of "civil conscription."** [at para 119]

And

> " Thus par (xxiiiA) expanded greatly the powers of the federal Parliament and its potential functions and duties with respect to social services ***for all Australians."*** [at para 138]

Was the initial Australian Government June 2007 introduction of the Northern Territory Emergency Response (NTER) swag of unprecedented legislations, supposedly designed to protect Aboriginal children and Aboriginal women from harm, and with a bigger aim of "creating a better future for Indigenous people in the Northern Territory, not only done by valid laws but being "reasonably proportionate to the grant of power for that purpose?

Kirby J continued his analysis in Wong about this point:

> "It follows that, in arriving at an understanding about the express prohibition on "any form of civil conscription", stated in s 51(xxiiiA), it is necessary to accept that detailed provisions for the implementation of the services, and for their regulation and proper deployment, would not, of themselves, amount to "any form of civil conscription"**.** In so far as such regulation is necessary to, and inherent in, the provision of a wide range of "medical and dental services", ***and reasonably proportionate to the grant of power for that purpose,*** the stated constitutional prohibition would not, ***without more,*** be breached."
> [at para 140].

It is his Honour's limitation of what is ***reasonably proportionate to the grant of power for that purpose*** that our Submission raised argument to satisfy the *without more* criteria.

Race laws will always by their repugnant nature introduce other criteria why the *without more* criteria needs compulsory analysis. Without more is a constitutional signal from the judiciary that the usual constitutional norms are being breached and the onus is on those (meaning the Parliament) to raise why *without more* still makes their enactments valid.

Kirby J's reasoning is right because the without more is to provide **"*the due observance of these other constitutional norms designed to ensure the lawfulness and integrity of the expenditures of the Commonwealth*."** [at para 143]

See also article by Danuta Mendelson *Devaluation of a Constitutional Guarantee: The History of Section 51 (xxiiiA) of the Commonwealth Constitution,* Melbourne University law Review (1999) MULR 14.

Who would have imagined that s51(xxiiiA) could be applied solely because of race or interpreted as meaning that the words (***but not so as to authorise any form of civil conscription)*** would only apply to qualified "professionals" working in medical and dental services.

Kirby J could not think of a situation either.

By the narrow view in *Wong,* all other Australians under the scope and receiving assistance under any of the social security provisions of s51(xxiiiA) can be forced under compulsion of Commonwealth law that they can only be engaged in:

- How, where and what they spend their entitlements on,
- Must be of a race disguised as "disadvantaged Australian" because they happen to live in the Northern Territory
- Are somehow disjoined because of living in a "territory" from law being "subject to the Constitution

There is no mistaking on the 10 April 1946, in committee, that Menzies (the then Prime Minister championed and introduce personally the prohibition of medical and dental services in now s51 (xxiiiA) and its then intended interpretation.

Menzies is now respectfully passed on. His narrow approach to who benefits from the prohibition is also long passed. It would be illogical to consider a "professional" person with a degree had more constitutional protection against those others within the scope of s51(xxiiiA).

Two Ridiculous Recipients Scenario

Maternity allowances

- Because they satisfy the "disadvantaged Australian" by receiving social security payments under s51(xxiiiA) a law is passed that to continue payment, their child or children must front to a Social Security building once a month for verification for payments to continue.

- Members of the medial and dentist professions are exempt

Widow's pensions

- Because they satisfy the "disadvantaged Australian" by receiving social security payments under s51(xxiiiA) a law is passed that to continue payment, an inspection of their private dwelling must occur by an authorised officer of Social Security once a month for verification that the person is indeed a "widow".
- Members of the medical and dentist professions are exempt

And the same potential ridiculous scenarios for all the other heads of provisions under s51(xxiiiA).

Though it is not humorous when it is actually intended to "exempt" members of the Aboriginal race from not being civilly conscripted.

The point is once the Constitutional guarantee of (***but not so as to authorise any form of civil conscription***) is breached in the NT situation because of race, there are no limits of coercive regimes being introduced into any of the provisions of s51(xxiiiA).

Once there is no choice left for recipients under the scope of s51(xxiiiA) or only select recipients because of some narrow interpretation then society itself is at risk.

It would not be a law for the *peace and good government of the Commonwealth.*

The use of the Race Power supported by “special measures” will know no limit of governmental interference with the individual dignity and worth of a human being because they are a “race” under the Australian Constitution.

Regardless, it remains unescapable that race remains the dominant purpose for these new proposed coercive Bills. Those who come within its scope, to remain a recipient of the social security support, must abide by what the Commonwealth demands**; they have no choice;** and it is the Aboriginal race that will dominate the recipients.

That remains the intended target, object and purposes of the new proposed Bills.

If in a hypothetical remote Aboriginal community 100 per cent of the community on social security payments are Aboriginal and only includes one white person also on benefits under s51(xxiiiA), does this make the coercive regime “race neutral”?

I would doubt it would because of not only commonsense and logic, but the stated objects and purposes of the initial legislative intention. This is a race law about a race that selects after trawling a hopeful constitutional peg to validate Federal Parliament’s powers.

However, there are other parts of the Australian Constitution that cannot be ignored; nor International obligations regarding the protection of human dignity and values.

Once a targeted and “identified class” of Australian citizens are singled out for ‘special treatment” by any parliament, than that fact alone, should be enough to startle the courts.

In most cases of Australian history, that has occurred mainly by accident because unless a “challenge” is instigated against coercive legislations, then the enacted Act remains “lawful” until determined otherwise by the court. Even so, when it is very obvious that race is the sole criteria, judges still are not unanimous as they are too human.

As the judicial excuse proffered in *Mabo (No2*) unconvincingly stated that it was not the common law that dispossessed Indigenous Peoples but “unchallenged” Acts of parliament.

The constitutional query and potential challenge is whether the new Bills backed by coercive intrusive regulations that clearly impact, not only on the integrity and privacy of the individual, creating a separate ‘class” of Australians bound because of geographical and social circumstances (living in the Northern Territory and requiring the same social security entitlements of all other Australians), “seeks to erect too large an edifice of regulation, incapable of being supported by the constitutional text” of s51(xxiiiA).

Those under this coercive regimes might think so against those on the other side of the "gap" that relies more on "justification" of this new regime than whether it is legal; and such laws could not happen to them. Or could it?

The key issues are what is being forced onto the public by these new Bills and are they valid?

In *Wong*, Kirby J cited in the following extract judicial construction of s51(xxiiiA) and supports that approach:

> The shift in constitutional decisions
>
> 106. *Narrowing of constitutional approach*: An analysis of the decisions of this Court on s 51(xxiiiA) demonstrates that a very significant shift occurred in reasoning between the majority decision in the *BMA* case (from which Dixon J and McTiernan J dissented and the decision in *General Practitioners*. Clearly, in *BMA*, the majority judges took a broader view of the prohibition on "civil conscription" appearing in s 51(xxiiiA). Thus, in his reasons in *BMA*, Latham CJ said:
>
> "There could in my opinion be no more effective means of compulsion than is to be found in a legal provision that unless a person acts in a particular way he shall not be allowed to earn his living in the way, and possibly in the only way, in which he is qualified to earn a living.
>
> ... [I]n determining whether there is compulsion it is proper to consider not only the bare legal provision but also the effect of that provision in relation to the class of persons to whom it is applied in the actual economic and other circumstances of that class."
>
> 107. To similar effect, Webb J observed:
>
> "To require a person to do something which he may lawfully decline to do but only at the sacrifice of the whole or a substantial part of the means of his livelihood would, I think, be to subject him to practical compulsion amounting to conscription in the case of services required by Parliament to be rendered to the people. ***If Parliament cannot lawfully do this directly by legal means it cannot lawfully do it indirectly by creating a situation, as distinct from merely taking advantage of one, in which the individual is left no real choice but compliance."***
>
> [end of quote]

There is no real choice of welfare recipients under these three Bills in both how they receive their social security benefits, how they spend it and where they spend it.

There is no real choice in how a business (shop referred to as a "Community Store)

established under another Commonwealth entity) under these new proposed coercive Bills; in how the business structures its legal entity and how it operates through the normal constitution protection guarantee of s92 of Constitution.

The "protection" elements inherent in this new proposed coercive regime for the Commonwealth interest in Community Stores are unescapable and again begs the question that the Parliament "**seeks to erect too large an edifice of [protective] regulation, incapable of being supported by the constitutional text" of s92 of Constitution."**

The much broader constitutional issue is whether after Parliament is approved for the appropriation for expenditure under these Bills under s81 of the Constitution, it can pass further law in attempts to protect the same monies appropriated or attempt to recoup some of the monies paid out as entitlements across all the provisions of s51(xxiiiA) as they have to spend their social security **entitlements only at an approved Community Store (owned or regulated by another Government entity).**

Such a view of public funds in appropriation under s81 clearly must be suspect of being beyond power.

Constitutional Trawling

It is becoming more the norm today than before for legislators to trawl the Australian Constitution looking for validity. If it can not find a head of power directly, it attempts to "cobble" a number of heads of powers to achieve the desired policy outcome.

The constitutional trawling net commences looking for a head of power; the *Race Power i*s dragged from the bottom and is not still enough to secure power. The Bills are about a race and purport to legitimate legislation that is intended to be both racial discriminatory and separate treatment because of race must keep searching the bottom.

Special measures

There is the purported saving "special measures" under the *Racial Discrimination Act 1975 (Cth)* in s8(1) of RDA.

This "special measure dragged up by these Bills is meant to save the Bills from being invalid because that are meant to directly discriminate because of race. When it comes to whose view "beneficial" is and means immediately conjures other ethnocentric assumptions based on racial superiority. There can be no other explanation.

Special measures is apart from the most leaned on section to validate "special laws because of race" (mostly and only on the Aboriginal "race.") also the most misunderstood and misused section of an Act of parliament (the RDA) that the High Court, parliaments and legislators have had to deal with since federation under race laws and ratification of CERD.

It was no surprise that the fist Act passed in the new Federal parliament was to legislate the removal of a "race" from Australia, the South Seas Islanders, that were

mostly treated a "slave commodity" in early Australia and deliberately discriminate against the Chinese (the "yellow peril."

The Race Acts Following Federation in 1901 and 1906

[Extract from the author-manuscript version of this work - accessed from http://eprints.qut.edu.au Irvine, Helen J. (2004) **Sweet and sour: accounting for South Sea Islander labour at a North Queensland sugar mill in the late 1800s**. In *Proceedings 10th World Congress of Accounting Historians*, pages pp. 1-37, St Louis, Missouri and Oxford, Mississippi, USA [**with slight alteration to format**]

1. **1901**- ***Pacific Island Labourers Act(Commonwealth***)
   Described as one of the "darker aspects of Federation" (*Sugar Heritage News,* 2000, p. 2), the White Australia policy required the end of recruitment from 31 March 1904, and deportation of all South Sea Islanders by 31 December 1906, except ticket holders and those born in Australia, "a select 1,500 – 2,000 long-time residents" (Frost, 1996, p. 134).

   > [There was also the *Immigration Restriction Act 1901* aimed directly at stopping Chinese immigration]

2. **1906- *Pacific Island Labourers Amendment Act***
   Following a political campaign by Pacific Islanders to oppose the 1901 Act, the 1906 amendment act merely "liberalised the exemption categories" and deportation was complete by mid 1908, with around 2500 Pacific Islanders remaining in Australia, about 1,000 more than would have been permitted to stay under the original 1901 Act (*Pacific Island Labourers Act 1901*).

   [End of Extract]

The Failure of democracy

The High Court case "race power" of *Kartinyeri* (1998) failed to address that the scope of the single race power was also limited to the other enumerated sections of the Australian Constitution. This case confirmed that although parliament itself can decide to disadvantage or advantage because of race, the court only had some residual supervisory role that parliament does not make race laws "too manifest" (whatever that means).

As long as race laws are viewed as "appropriate and adapted to the reasons" why such a race law is required in the first place by parliament, the court apparently will let the law go through to the keeper. But if is "manifestly abusive" the High Court might have to act?

Because that question was not required to be answered in *Kartinyeri* or avoided except for dissent of Justice Kirby, the Court has shown its questionable adherence to being a "passive participant" in the Australian Constitution when it comes to laws made about a race.

The American Supreme Court has long ago rightfully reasoned that" race classifications by law "carry a danger of stigmatic harm…may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on….having no relation to individual worth." They are still struggling with race laws as new situations emerge.

The issue is that while a "race power" exists there can be no constitutional equality.

Race Laws

The Australian constitutional approach to "race laws" are supposed to contribute to the parliament's making laws "for the peace, order and good government of the Commonwealth **but subject to this Constitution.** We, the targeted race would seriously question that.

It is mainly these highlighted words that go missing when race laws reach the judiciary. By getting to that stage, parliament itself has already missed its responsibilities because of they are race laws made about a race.

The somewhat bizarre pictorial Govenor Davey's Proclamation to the Aborigines 1816 from Tasmania which shows small panels of equal treatment between black and white, nailed around trees and locally known meeting places where Aborigines gathered, is a stark reminder of the Constitutional failures of the "founding fathers."

That failure continues unchallenged in modern thought of an individual worth because of race.

The three Bills above are all subject to the Australian Constitution as a whole; at least that is our view; and the Constitution is no ordinary Act limited in interpretation as another enactment by Parliament.

It is to understood as applying to the needs and wants of a contemporary Australian society and the realisation that Australia is a nation comprised of many other races (that are not white).

The answer today should be unremarkably simple; it has no place.

Because racial issues remain at the forefront of these Bills, regardless of the blanket term being introduced of "disadvantaged Australians" and the initial NTER Act was a law about a race, International promises under the Convention for the Elimination on all Forms of Racial Discrimination (CERD) arises.

The RDA is sourced from this Convention. The meaning of the Convention is not tossed aside because a State party has both ratified the Convention and introduced domestic legislation that is to reflect the Convention as far as possible and not just aim to get close to its meaning.

Race Superiority

Race laws and race classifications are made on the obvious presumption that one race is inferior to another. Parliament needs a greater level of scrutiny because of the very irrelevance of these racial rationales. Senate inquiries are not enough if the Senate lacks a proper legal understanding of the effects of Bills on the individual.

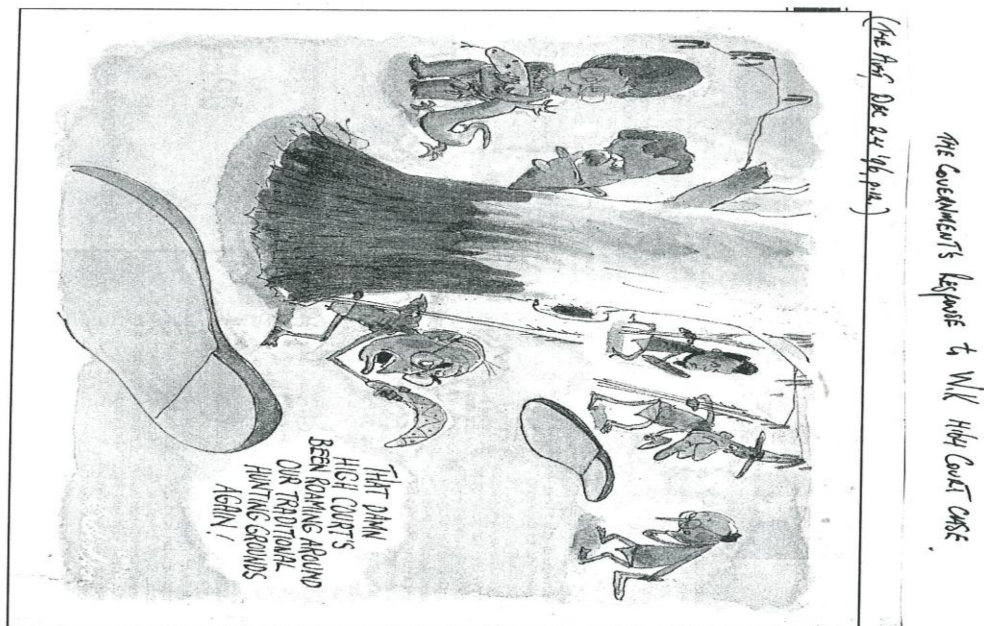
The Australian Constitution has never been "race neutral" and can only be if the "race power" is removed by referendum.

Submission Conclusion and Recommendation

1. The Three Bills are laws about a race of Australians and should be withdrawn; there is ample power to work with the NT government to address long term solutions without the need for "constitutional trawling."
2. The Three Bills are suspect because of s51 (xxiiiA) of Constitutional which 'compulsory conscripts mainly targeted Aboriginal Australians which is prohibited or "disadvantaged Australians. The "prohibition" is not now meant to only protect "professional' peoples in the medicine and dentist industries.
3. Previous legal arguments of the narrow scope of s51(xxiiiA) of Constitution applying to only professionals is an absurd reading because of the social reach and scope of all who are now able to come within its terms and read with s51(xxxix) (the incidental power) that provides ample power for the Commonwealth Executive of the carrying out of "enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation." (extracted as the Mason test formulation in the *AAP Case* (1975) 134 CLR 338 at 397.).
4. That is, all those who fall into the scope of s51(xxiiiA) are prohibited from any form of civil conscription ; even by race.
5. A simpler was of saying this is if there is **No Choice** there is civil conscription (with the usual riders if even on its face it could be seen a valid approach test within power of reasonable and proportional and the High Court's supervisory test role in race laws of not being "manifestly abusive.") Both tests are in our views meaningless.
6. It is our summary that there is No Choice and the three Bills lack constitutional validity under s51(xxiiiA); and if so

7. Offends s81 of Constitution which permits the appropriation of money from the Consolidated Revenue Fund “for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.
8. Public moneys can not be appropriated for unconstitutional purposes

The Three Bills require both independent scrutiny and rigorous legal analysis for their legitimacy before being enacted into law. A Senate Inquiry is not enough without some legal analysis independent from government. How then does the Constitutional race power under s51 (xxvi) of Constitution apply to the Australian people as a whole? Or will it continue to cheery pick the race power out of the Constitution to frighten off the judiciary.



“The invalidity of a law…. Cannot be made to depend on the opinion of the law-maker…..that the law, …is within the constitutional power upon which the law in question itself depends for its validity.”

[Fullagar J in Australian Communist Party v the Commonwealth 1951) 83 CLR 1 at p258.]

- The three Bills above are all subject to the Australian Constitution as a whole and all offend the "equal dignity and fundamental human rights of every person, his or her capacity, to participate in the life of the community, to contribute to society and to share in its benefits because of race.
- The three Bills offend the UN Convention (CERD) and other UN Conventions in relation to human rights by "entrenching" into Australian domestic law a new form of unlawful racial discrimination and structural inequality through "special measures" under the Racial Discrimination Act 1975 (Cth) that the Convention and RDA prohibits.
- The mere assertions that the laws are valid as "special measures" require increased and political legal scrutiny due to the current and historical misunderstandings and judicial application of s8(1) of RDA.
- The three Bills are beyond any constitutional incidental "reasonable proportionality "tests.
- Race cannot be used to validate indirectly laws that Parliament has no powers to do directly no matter how the disguised term of "disadvantaged Australian" is optimistically relied upon by Parliament to pretend that the three Bills are not intended to continue the initial target of race; being the Aboriginal peoples of the Northern Territory.

The three Bills will loose more than what parliaments hopes to gain by ignoring both the Constitution and advocating the repugnant "political opportunist" situation by race laws and outdated notions of racial superiority.

Reason being, accepting unchallenged that the Commonwealth has constitutional power to invent new power because of a stated "national emergency" invites for all time, potential abuse.

It is unarguable that the powers of the Commonwealth are constitutionally fenced under a federal system of government precisely for that potential; only through the referendum process can the Australian peoples utilise the Constitution as their "living document"- an interpretation long championed by the judiciary, though not unanimously. A lament that following the former High Court Judge, Justice Kirby, to the end of his judicial days.

Constitutional Trawling

A form of "constitutional trawling, that is, laying deep nets in attempts to rip up any constitutional pigeon hole to support new Aboriginal policies unable to be 'forced" on

to any other group of Australians. The legal issue in "constitutional trawling" is always not what is picked by chance or desire but what is missed.

It is indissoluble that all the Australian people, regardless of race, enjoy both the full protection of all fundamental rights promised by the Constitution and reinforced by the International community and representative democracy in Parliament; and racial discrimination, at least since the introduction of the *Racial Discrimination Act 1975 (Cth)* is unlawful in Australia- except as these three Bills announce, if you are an Australian "race" and "special measures" can be tagged from trawling.

This line of continued political thinking and practise has no place in a modern and contemporary society where race has no further part to play in the Australian Constitution and no place in a modern and contemporary Australian Constitution.

The International world watches in, we hope with dismay, as Australia "cripples itself" in continuing aspects of unrecoverable Indigenous colonial rule under guise of "We, the white people of Australia, know what is best for the problems of race."

The three Bills validity depend on convenient categories and constitutional "pigeon holes' to avoid constitutional invalidity. These are Parliament party policies without proper powers dressed to look like legislation whereas policy leads the legislation rather then the legislation leads policy.

The usual valid reasoning that accompanies new novel Bills cannot be replaced with "policy reasoning" to disguise known lack of power. In these situations of continuing the initial and false "national child abuse emergency" maintains a gross and deliberate political public fraud onto the Australian people.

As in Haydon J rightfully stated in his recent sole dissent in *Pape v Commissioner of Taxation* [2009] concerning the constitutionality of the Commonwealth to self claim that they alone had responsibility to manage the "national economy" in times of an "national economic emergency" (similar to the purported "national child abuse emergency- the justification of the initial Commonwealth response only in targeted remote Aboriginal communities in the Northern Territory):

> [542] ***It is a truism that the commonwealth legislation cannot "recite itself into validity."***

The words of the Constitution limiting or expanding the powers of the Parliament "subject to the Constitution" cannot be ignored even if Parliament has lost deliberately the sight of one true eye preferring its political opportunity one to remain wide open on its own policies.

This means that the constitutional powers of the commonwealth social welfare involvement and payment entitlements on all Australians that come within its scope are there because of social circumstances and not because of "race."

There are limits to just how far the Commonwealth can force people in need of the social welfare net to loose their human dignity by having no choice but to do the Commonwealth's bidding by sole distinction of race.

Australians will loose more from the introduction of these Three Bills than what Parliaments hopes to gain. Race laws have no place anymore for any secure Australian future.

If there are no limits to which Australians will constitute still, regardless of Australian citizenship, a “race” than the future remains chilly for all Australians not ‘white.”

Such absurd readings of our national and international fundamental human rights are repugnant and unlawful.

No one needs to be a lawyer to understand that.

Categories

1. The first category is the “justification category” in the public or national interest. How can a “race” be singled as the target for these Bills when the “problems” of political neglect and break down of personal responsibility of the individual are a national problem; a universal problem that exists throughout all humanity and all human beings. But somehow, the Aboriginal problem is so severe and life threatening, and required an urgent and coercive Constitutional approach, ignoring the opportunist political timing of the unfortunate term “intervention”.

   The direct overtones of racial superiority is hard to ignore.

   Take the vexing issue of access to porn; in whatever means is legally possible to access.

   What is good “porn” for other Australians not of the same race is now considered unacceptable to allow another “race” (Aboriginal) to have access to the same (and to make it clear, we are not advocating access because that involves “personal choice” which is still (no matter how distasteful to others- a fundamental human right of choice).

   There is no doubt though that child sexual abuse involves the perpetrator usually having in their home pornography.

   The hypocrisy is telling and obvious. For example, Canberra is not only the nation’s capital it is unquestionably the Capital of Porn and this industry is growing unchecked.

   3D porn is being introduced to a national growing market; sourced by credit cards and internet access unhindered to the market.

   Porn will be banned in targeted Aboriginal communities under these Bills “for their own good.” Yet the porn industries growth is secure outside the scope and reach of these three Bills.

   This is irrational and puritan thinking.

2. The second is the “special measures” category in that the Bills (where applicable) are supported by “special measures” (s8 (1) of RDA) coupled with the Race Power (s51(xxvi) of Constitution in attempts to avoid the direct effects of unlawful racial discrimination and other unlawful legal effects.

   This “pigeon hole” is necessary because of the unambiguous Parliamentary intended result of the three Bills and Parliamentary assertions that the three race law Bills are support by constitutional these “pigeon holes’. Assertions without power do not make it real.

3. The third problem of leaning on “race categories” is that the Race Power under s51(xxvi) of Constitution use is sourced when Parliamentary nationhood suffers illusions of “racial superiority.” Why else would one “race” consider both having the “power” and right to use that power against another group of Australians not of their “race.”

The Constitutional Pigeon Holes (and not limited to only these)

The following examples are noted as appearing to support the Parliament’s power to introduce and give legal effect to these three Bills:

- The Bills are supported by a narrow reading of s51(xxiiiA)
- The Bills are supported by the power of appropriation for expenditure of monies under s81 of Constitution.
- The Bills are supported by s51(xxvi) (the Race Power) which includes the External Affairs power.
- The Bills are a “special measure’.
- The Bills are supported s 122.
- The Bills are consistent with International human rights obligations

A. The Justification Category

The easiest part of drafting legislation we are told is the format; the hardest is to ensure validity balanced against Parliament desired policies. The second hard part is the words and terms which have a legislative life of their own usually enacted into Acts of Parliament; and in many cases follow their own history of interpretation unless a new meaning is clearly expressed and intended; or would be nonsensical if approached literally.

For example, take the existing s25 of Constitution which still announces that a “law” of the State can “disqualify- all persons of any race from voting at the elections for the numerous House of Parliament of the State, ***then, in reckoning the numbers of the peoples of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.***

New meanings to Constitutional terms and words cannot be conveniently used or implied if not “subject” to the rest of the Constitution; but what would the Commonwealth do if a rouge State attempted s25; throw unlawful racial discrimination at the State because of the Racial *Discrimination Act 1975 (Cth)*?

Would the rouge State lean on "special measures" to survive the RDA prohibition of unlawful racial discrimination?

When would a mere Act of Parliament [the RDA] trump the text and sovereignty of one of our States in the 'indissoluble" Australian Constitution under s25?

Answer, it may not. Commonwealth Constitutional trawling would be activated in attempt to justify federal power through s109 of Constitution to stop the State from enacting or invalidating such a racial act to stop that race from voting.

That seems simple enough if the Commonwealth could ignore s25 all together. But it cannot. The Commonwealth would have no power or implied incidental power to alter or ignore the plain text of s25. It is hoped that s25 never raises its repugnant head but hope is not a source of Constitutional power.

Cheery-picking constitutional meanings to suit the "living document" of the Constitutional is not unchecked by the Constitution itself. Nor can Parliament policy be given a constitutional status because the Constitution is mentioned as its source of power. It requires much more.

The Living Document

We do not subscribe too heavily on the theme "living document" of a modern Australian Constitution because these Bills reflect how open that fuzzy phrase can distract because of race and make us "unliving."

The Drafters of public policy sourced from the idea of law and other common law concepts and principles into legislation are usually aware of the obvious changing drafting traps:

> "legal concepts like other symbols of man's creativity are apt to posses a vitality of their own which may end up leading their authors instead of being led by them".
>
> [quote cited by Windeyer J in *Brooks v burn Phillip Tru*stee *(1969)*]

Windyer J, a long ago High Court judge, unremarkably reminds of a quote by an English judge from 1931 Lord Merrivale and that quote is the focus of our Submission:

> "We need not talk about public policy. I sympathize with the view which has been expressed by many learned judges as to the mischief veiling a legal procedure which cannot be justified by direct authority upon the assumption that it is required by the public interest. ***What is law and what is not law, are the real tests of public interest".***

Windyer J further went on to state that "public policy is a very unruly horse" and cautioned the drafter's use of convenient "categories" to fit "pigeon holes" to justify validity.

Our Submission concerns only some of the broader outlines of the three Bills above and comments on the constitutional powers or lack of.

To deal with every "provision" is a role that few members of the public have such capabilities.

However, because Acts of Parliament are "readable" these days, or supposed to be without traps for those not lawyers, the inquiring public can at least gain a basic understanding of the objects and purposes of an Act of Parliament; and like the interpretation of law, we as members of the Aboriginal community can easily identify the "mischief" of legislation under the "constitutional stealth" of race laws from long experience and logic. It is simple because these "race Acts" target us as the "mischief."

We know by long experience that "race laws" are sourced from this national self indulgence and unlawful thinking of racial superiority. There can no other reason.

The "indelible stain" because of Australia's treatment as rightfully stated by Brennan J from the Mabo case is still not even attempted to be either acknowledged or removed because the race power allows a spreading of the stain whenever Parliaments "deems it necessary".

These three Bills attempt to further darken that indelible stain.

There are not two "official laws" in this country "according to law" though we have long argues contrary to that blindness, and we do not expect Parliament to then enact laws mostly for political purposes that expressly provide for "two separate official laws" and treatment because of our race; and then purport to justify these race law through racial superiority as being "beneficial"; because another race deems it to be when in practice and legal effect it is plainly not.

How does having to stand in a separate line from others in an Alice Springs supermarket to buy food be "beneficial?"

The Equal but Separate American doctrine is being revised because of "race".

As to these three Bills, the Commonwealth Parliament does not even attempt to pretend that the Bills enact (if passed) and enforce the "separate line because of race (regardless of the use of the not so clever term "disadvantaged Australians).

Bogged

The Australian Constitution is bogged down as Australia still looks to the past for certainty that is not really at threat and that all their fears that make it possible to whenever Parliament 'deems it necessary" for whatever perceived threat (or policy) can be addressed through the race power for "any Australian race."

Or could they? Of course Parliament could not. They can if allowed unchallenged. That makes a mockery of the "living document" feel good constitutional tag; as the Constitution will only be "living" if you are not a "race."

The Test for Justification

The basic test for justification is to enact these same race laws over the whole country and then see how the public would react. Then there would be grounds for a National Emergency Response and Intervention because there would be a national riot.

Even the justification of colonial "peaceful settlement" into modern law and values are sourced from both the Race Power and "special measures" through the enactment of the *Native Title Act 1993 (Cth).*

But we return to our basic concerns as stated by Windyer:

> "***What is law and what is not law, are the real tests of public interest".***

B. The Special Measures Category

As to 'special measures" under the *Racial Discrimination Act 1975 (Cth*-the RDA) which are sourced from the UN Convention (CERD), Parliament assumes international support for their race laws will be automatic and welcome without disapproval.

International law for obvious reasons of State "territorial integrity" (meaning States retain their sovereign rights of domestic law making (or who would become a member of the UN if to be dictated to by such a body) allows States that have ratified CERD to have a "*margin of appreciation*" in how a country domesticates a UN Convention.

We have come to the view over the long years of Indigenous complaints to the UN system and being denied (till recently with the **UN Declaration on the Rights of Indigenous Peoples**) that International law should only be concerned with ensuring that Indigenous Peoples enjoy the three practical benefits of sustaining human life, needs and human dignity; these are:

- the basics of housing, education, employment
- without racial discrimination; and
- Enjoy the same political and Constitutional guarantees and individual protection according to law and developing common law of Australia.

As to the ultimate recognition of who we are as Indigenous Peoples and what rights we still have than having to "prove" it under another law (like native title) we will continue to argue peacefully with Australia under Constitution and according to law.

International law has been stagnant in these areas for good reasons of "real atrocities" of crimes against humanity where humans kill each other because of race or religion.

Australia, or colonial Australia is but a young country in an ancient land with an ancient people. There was always going to be difficulty. The Australian Constitution was seen as a 'cement" to take forward the new generations of all young Australians, and to date, apart from the obvious disputes continuing with us, ones that we are firm can be solved, Bills that depend on race and law to justify them have no place in that future.

The use and understanding of 'special measures" requires a brief reading of the High Court transcripts in the Western Australian challenge to the Commonwealth's enactment of the Native Title Act 1993 (Cth) in 1995 (the Native Title case).

The Commonwealth's legal team "warned" the High Court that is was for parliament alone to decide the parameters of what the Parliament considers to be an appropriate 'special measure" enactment. The Court had no role in what is a "political question".

The Judges on hearing this provocative challenge remained quite. They mostly looked on such a warning as a defect in the legal argument being put forth as Counsel leading the Commonwealth attempted, without conviction, to shake the Commonwealth sabre.

The key to approaching "special measures' is whether such measures are enacted to remove racial discrimination or to camouflage the "Equal by Separate" unlawful approach to a desired parliamentary outcome.

The Race Power

The broader notions of "human rights" that respects all peoples human entitlements is yet to become a norm in Australia; particularly when a Race Power (s51(xxi)sits unchallenged in a modern and contemporary "living" Australian Constitution.

It does not escape us, the Aboriginal Peoples of Australia, that this constitutional "Race Power" has only been used on us. Even Australia's other Indigenous Peoples, the Torres Strait Islanders, are not afforded a "race" status because others not of their "race" have determined that they are not.

This legislative racial superiority is current in any Commonwealth definition of Aboriginal or Torres Strait Islander. A glance at the *Native Title Act 1993 (Cth)* clearly continues the "unworthiness" of the Torres Strait Islander Peoples being identified as a "race". For example, note that in **S253 Definitions (NTA):**

> **Aboriginal**- means peoples of the ***Aboriginal race*** of Australia
>
> **Torres Strait Islander** –means a ***descendant of an indigenous inhabitant*** of the Torres Strait Islands.

Within The Life of this Nation

Make no mistake where our Submission is heading with these comments of reality; we are the Indigenous Peoples of Australia and our destiny and futures lie in the life of this nation as we know it and within the life of this nation; not separate or without it. Reconciliation still has a role to eventually paly.

Fiction, like the judicial discarding of *terra nullius* has no place either in the life of the law and in developing the common law of Australia. Race is a subjective fiction born from a time long passed under a Constitution. Indigenous Peoples are not.

Race Laws are made and designed solely from those of another race; supposedly for their benefit or disadvantage and well being because the Australian Constitution says so from a historical time that introduced race laws to stop another perceived race from "flooding the country'.

We have no doubt that the International community and CERD does not authorise such mere political and racial superiority assertions that do little to enforce the CERD's obligation to "speedily eliminate racial discrimination'.

Nor does the Racial Discrimination Act 1975 (Cth-the RDA) support such untrammelled powers against the dignity of human rights and values because of race attempted to disguised justification policy as law.

The race laws in the three Bills are said to be in part supported by lawful "special measures' are illogically considered temporary to satisfy one of the most crucial conditions of CERD because every 3 years Parliament elections are held and one Parliament cannot bind the other.

The original "special measure" High Court case in 1985 (*Gerhardy v Brown*) that now drives judicial interpretation of what is a 'special measure was unremarkably "tainted" by the lack of any "evidence" put forth about what was a "special measure" anyway. The High Court judges had to develop this new legal concept (unknown to common law and only sourced by a UN Convention (CERD) by judicial *dicta* (a judge's thoughts).

The three years of parliament that saves the "special measure' from being "permanent" stems from this case.

This is pure political and legal absurdity.

International Convention on the Elimination of All Forms of Racial Discrimination

Adopted and opened for signature and ratification

by General Assembly resolution2106 (XX)
of 21 December 1965

entry into force 4 January 1969, in accordance with Article 19

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have

pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, **without distinction as to race**, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that **everyone is entitled** to all the rights and freedoms set out therein, **without distinction of any kind, in particular as to race**, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, ***in whatever form and wherever they exist***, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) ***has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,***

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) ***solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations*** and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings ***on the grounds of race***, colour or ethnic origin ***is an obstacle*** to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by ***manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority*** or hatred, such as policies of apartheid, segregation or separation,

Resolved to ***adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices*** in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of Al l Forms of Racial Discrimination ***and to secure the earliest adoption of practical measures to that end,***

Have agreed as follows:

PART I

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, **however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.**

[end of extract]

The Racial Discrimination Act 1975 (Cth) was passed, as its preamble shows, to give effect to an international convention entitled the "International Convention on the Elimination of All Forms of Racial Discrimination" (the Convention- CERD) to which Australia is a party. The Commonwealth signed the Convention on 13 October 1966 and ratified it on 30 September 1975.

For an analysis of the history of the RDA sourced from CERD and “race” see:

ATTACHMENT A

Koowarta v Bjelke-Petersen [1982] HCA 27; (1982) 153 CLR 168 (11 May 1982)

HIGH COURT OF AUSTRALIA

KOOWARTA V. BJELKE-PETERSEN (1982) 153 CLR 168

Constitutional Law (Cth)

High Court of Australia
Gibbs C.J.(1), Stephen(2), Mason(3), Murphy(4), Aickin(5), Wilson(6) and Brennan(7) JJ.

CATCHWORDS

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - External affairs - Convention on Racial Discrimination - Implementation of treaty by legislation regulating conduct in Australia - Laws with respect to the people of any race for whom it is deemed necessary to make special laws - The Constitution(62 & 63 Vict. c. 12), s. 51 (xxvi), (xxix) - Racial Discrimination Act 1975 (Cth), ss. 9, 12, 24, 25.

Comment

Although there existed in this case a stated government policy of the then Queensland government that Aboriginal people would not be allowed to own large leaseholds in Queensland, the High Court narrowly validated the RDA and use of External Affairs power by 4-3.

> 'The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.

Who is a race?

See ATTACHMENT B

The case of *Commonwealth v Tasmania* (the Tasmanian Dam case) [1983] HCA 21; (1983) 158 CLR 1 (1 July 1983) and Brennan J's analysis of "race is still relevant to these three Bills.

Comment

The Dam case above was to be looked at in a developing period of the High out's jurisprudence in developing the common law of Australia and, by today's national population and multi racial makeup, offers only the real answer that the race power is now constitutionally emasculated by both experience, logic and developing International human rights obligations.

The legal thinking in Australia was only released from the chains of England from about the early 60's. Australian legal thinking was in this period in its infancy.

The legislative days of slavishly enacting unchallenged "racial social experiments" under the fragile cover of the Race Power in Australia mainly with Aboriginal peoples has long passed.

Or one would have thought so except for the introduction of these Three Bills.

Race Neutral in CERD

We would reinforce that the meaning of **Article 5 (d) of CERD: Other civil rights** affords without distinction or reference to "race" the constitutional guaranteed protection free from any coercive "civil conscription" that leaves no choice to the individual whatsoever under the scope of s51(xxiiiA) of Constitution to introduce compulsion and no choice because of race.

Those Other Civil Rights, as far as these three Bills are concerned, include constitutional social security rights without added distinction because of race.

The spectre of the Commonwealth introducing "lower social security payments" because of race, for whatever justification dreamed up, if these three Bills are passed, is not outside the reach of the Parliaments constitutional expanded powers (without the need to trouble the expensive process through s128 of Constitution (as to referendum).

To pretend to be able to do so unchallenged ignores the constitutional limitations on the plenary powers of the Executive and Powers of the Parliament:

> **s 51. The Parliament shall, *subject to this Constitution*, have power to make laws for the *peace, order and good government of the Commonwealth.***
>
> - ***subject to this Constitution; and***
> - ***for the peace, order and good government of the Commonwealth.***

These are limiting terms and not unfenced.

In all of the enumerated sections or paragraphs subjects included in s51(referred to as the *placita* of 51) it has long been recognised of the compulsory and coercive limits of "governmental interference" with individual "fundamental rights'.

The first question is whether any "race laws" can be enacted under the Constitution and the answer is "YES:" but ***subject to this Constitution.***

The second question is whether not only those "race laws" are supported (of which they could be because the Constitutional says they can) but more so, whether "race laws" are for the ***peace, order and good government of the Commonwealth.***

And the answer should not be determined solely on which side of the Gap one is standing but whether the laws are within power.

Monies appropriated from Consolidated Revenue fund within the meaning of the Constitution ‘for the purposes of the commonwealth” are both “subject to” the specific provision and constitution itself. That has always been thought till recent High Court cases to a given backed from settled principles of interpretation; but no more when terms such as “national emergency” are leant on for “justification” that is national wide and not isolated to “race.”

Child abuse and domestic violence on women are national problems- all subject to the Constitution for legislative remedies. There exists ample UN Conventions on both that have been since their ratification by Australia, ignored.

No to race laws

Obviously, we as the Aboriginal peoples would say no to any race law as Australia continues to confuse our inherent rights as Indigenous Peoples with laws about a “race”; yet clearly by the continuing use of the “race power” others not of our “race” would say yes.

Regardless of competing views; it is what the Australian Constitution says.

John Stuart Mill regarded the inherent freedom of the individual to “make choices” about one’s health. He stated:

> “The only purpose for which power can be rightfully exercised over any member of a civilized community, ***against his will***, is to government interference with one’s choice. His own good, either physical or moral, is not sufficient warrant”.
>
> [*On Liberty* (1859) and reproduced in Gerard Dworkin (ed) *Morality, Harm and the Law* (1994) at 9]

Of course, that statement is now qualified in certain legitimate situations of law making. The law is moved mostly by experience not logic. The compulsory wearing of seat belts in vehicle is a legitimate attempt to reduce both the harm suffered and later resulting costs of governmental funding required to address harms resulting from vehicle accidents.

It is legitimate purpose and within power because it is also “race neutral”. Not so with the proposed three Bills subject to our Submission; as without race being the dominant factor, none of these three Bills could be enacted across any other Australian state . Nor, because of the political fall out for the government attempting to, be even seen as possible.

The reason because of race

Ironically, current government policy on remote Aboriginal communities appears to be supporting such a similar policy of the then Queensland government in *Koowarta* that provoked this first challenge to both the validity of the RDA and use of the

Constitutional External Affairs powers to support the Federal Parliament to domesticate and enact laws sourced from a UN Convention.

That is, the Aboriginal race should no longer be able to live on their traditional lands because of remoteness and costs of services.

The question is not whether there will there be any challenges with these three Bills but whether any person, Aboriginal or otherwise, can find the resources to challenge the Bills? This then is all dependent on the parliamentary process. Will "race" laws govern the parliament? We hope it does not.

The current system and criteria required by the Attorney general's test funding would deny access to funding resources. Having to apply to the same political body that birthed the three Bills to challenge their validity seems helpless.

Eligibility Criteria

To be eligible for funding, a case must satisfy all of the following three criteria:

(a) a successful outcome in the case would directly benefit an identifiable sector of Indigenous Australians, rather than a single individual or small subsection or interest group

(b) the case has reasonable prospects of success, and

(c) the dominant purpose of the case is to test a point of law to resolve an important question affecting the rights of Indigenous Australians. The law in question may be a law of the Commonwealth or of a State or Territory.

King CJ, SA Supreme Court, opening address at the Commonwealth Legal Aid Conference, 1984 reinforces why Indigenous Australians seek our self determination through legislation and not have legislation determine this for us:

> *" We cannot be said to live under the rule of law, in the full meaning of that expression, unless all citizens are able to assert and defend their legal rights effectively and have access to the courts for that purpose.......If that professional assistance is denied to any citizen who reasonably needs it to assert or defend his legal rights, the rule of law in the society is to that extent deficient."*

How can Indigenous Peoples assert their rights against a Constitution that allows both the rule of law and full constitutional rights afforded to all other Australians who do not satisfy the category of "race" be denied to the Aboriginal "race?" Particularly in an Australian multi-racial population make up that has existed for years.

The Oath According to Law

Drafters of Bills are aware of the basics that their end results will possibly expose them to judicial scrutiny and challenges. They attempt "to get it right" in the Bill itself; bearing in mind the settled understanding of how the judiciary attempts to interpret their words and terms that are supported by the appropriate parliamentary powers.

The quote of Justice Brennan (as he then was) in his swearing in speech as Chief Justice of the Australian High Court on Friday, 21 April 1995 remain a relevant reminder to drafters attempt of formulating within powers of public policy to Parliaments:

> *" The Oath requires justice according to law ……the jurisdiction of the court is fixed by law and judgement must be rendered in accordance with the judicial method. The security which each of us has is the law. Sir Thomas More of the" man for All Seasons is surely right to put to Roper*
>
> *"This Country's planted thick with laws from coast to coast…and if you cut them down…d'you really think you could stand upright in the winds that would follow?"*

As the story goes, Sir Thomas says that he would rather give the devil the benefits of law for his own safety sake because once the laws were all cut down, and the devil turned, where would he hide)if he even could).

As to Brennan's thoughts on judicial methods, he states his approach that:

> *" Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at an even deeper level, the values that underlie the principle".*

And as Brennan further reminds, analogy, experience and logic have their part to play in the judicial method; and

> *"Justice is not done in public rallies. Nor can it be done by opinion polls or in the comment or correspondence columns of the journals….We are governed by the rule of law'*

When does say a third generation non-white immigrant that has become an Australian citizen not be still viewed still by Parliament as a "race" fodder potentially under the "scope" of the race power?

As noted, there would be no use applying for any Federal funding or other "professional assistance" so as to test the scope of a special measure or race power because current narrow government legal thought is that Parliament (which also includes states and territories under the RDA) are authorised by the Constitution and RDA to do so whenever they deem it necessary against a "race".

The Attorney General and his office is a cog of the government and its lack of independence from government has long been questioned.

Is not “***the rule of law in the society is to that extent deficient.”***

Racial Superiority

The broader constitutional interpretation of both the “race power” and ‘special measures” require both Parliament as a whole (meaning both houses) to apply a different human rights analysis approach to when justification of the use of these two should be made; reading the Constitutional as a whole with sight of International human rights developments that Australia is a State party to.

The Three Bills require both independent scrutiny and rigorous legal analysis for their legitimacy before being enacted into law. A Senate Inquiry is not enough without some legal analysis independent from government.

The Three Bills purports to continue unlawful racial superiority (because the Constitution says they can) supported only by justification of the public opinion polls.

Make no mistake of our views. Something had to break the uninterested years of government neglect in the NT Aboriginal communities from both the Commonwealth and NT government in the well known areas of social breakdown.

Individual lack of responsibility also dominated and contributed to the social breakdown.

There remains ample existing constitutional power to deal with such social breakdowns without throwing the Constitution out and lean on concerning “categories” and convenient “constitutional pegs” of “race laws” to cut down laws to get to the devils.

Race Law and Special measure

There should be no further wasted talks and wasted resources pretending a Bill of Rights enacted under ordinary statute or a mere Bill that says Parliament can only enact “beneficial laws “ under “special measures” can remove the constitutional stain of racial inequality and racial superiority that lies at the “deeper level” because of the race power in s51 (xxvi) of Constitution that supposedly gives untrammelled powers to parliament to activate at any time parliament deems it necessary against a “race” of people not of their own.

Such a grounded and historical outdated constitutional inequality value has no place in a contemporary Australian society and developing common law of Australia that is built and depends on multi racial harmony and unlawful racial discrimination to maintain those societies. The International community as a member State of the UN demand the same.

Again, it does not all depends on which side of the "gap" one is standing to "justify" these three Bills but whether it is real law:

"***What is law and what is not law, are the real tests of public interest".***

Race is not relevant

From our views, "race" is not relevant anymore in the Australian Constitution or developing common law of Australia and race laws are also inconsistent with being a member State of the United Nations Community; but no Parliament has attempted to delete s51 (xxvi).

The only way to stop making laws because of race is to stop making laws because of race; and if "race laws" as inherent in these three Bills, regardless of the Humpty Dumpty term "disadvantaged Australians" in an attempt to disguise and fool the public and judiciary that "race" is no longer the main target.

No mere Act of any parliament can easily dispatch or ignore the settled understanding and judicial construction of the "race power" or dismiss the Australian Constitution to the back of the room or alter its meaning. S128 of Constitution alone has such power.

The race power does not limit the legislative powers of Parliament to make good or bad laws because of race; somehow this narrow approach does not need to take into account the rest of the Australian Constitution.

The expressed enumerated powers of the Federal Parliament are 'subject to the Constitution" escapes the attention of both houses of Parliament.

The three Bills above are all subject to the Australian Constitution as a whole and all offend the "equal dignity of every person, his or her capacity, to participate in the life of the community, to contribute to society and to share in its benefits.

The three Bills offend the UN Convention (CERD) by "entrenching" into law a new form of racial discrimination and structural inequality through "special measures" that the Convention prohibits.

Because, as noted, racial issues and what would be unlawful racial discrimination are at the forefront, regardless of the blanket term being introduced of "disadvantaged Australians" and the initial NTER Act was a "special measures" law about a race, International promises and obligations under the Convention for the Elimination on all Forms of Racial Discrimination (CERD) arises.

The test for breaches is if laws passed are inconsistent with the promotion of the objects of CERD; mere Parliamentary assertions of the three Bills being "special measures" is not enough if the practical effects are to maintain a structural inequality because of race.

As the answer is clearly NO it begs the basic question of whether the "have no choice" coercive regime on only those who fall under the scope of S51 (xxiiiA) as "those" are also 'subject to the rest of the Constitution. To think otherwise would

punish by circumstances of need for social welfare, by applying automatically remove other Constitutional guarantees and individual protections . This is ludicrous.

Constitution Interpretation

Kirby J (as he then was) in *Wong* characteristically offered the Constitutional “living instrument” challenge to his Court:

> 73. the joint reasons in the Full Court of the Federal Court recognised that a preliminary question arose as to the approach to be taken to the interpretation of s51(xxiiiA). They asked whether the paragraph should be "approached from the viewpoint of a committed originalist or from that of one who accepts that the Constitution is a ***'living instrument'***, to be interpreted in light of the fact that its legitimacy stems from its 'original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'"
>
> 74. This was an important observation. It lies at the heart of the different approach that I take to the constitutional question presented by these appeals. In past authority this Court has accepted that, in resolving disputed questions concerning the meaning of the Constitution (and specifically in deriving the meaning of provisions adopted following amendments made under s128, it is legitimate for the decision-maker to consider, and give weight to, historical materials as they throw light on the resolution of such problems.
>
> 75. Nevertheless, such historical materials do not control the meaning of the constitutional language. Identifying that meaning is a task of legal analysis, not of historical research. In this case the reasons of other members of this Court (both in the language chosen and in their approach and emphasis) might be read as suggesting otherwise.
>
> It is for this reason that I write separately. I could not agree to an interpretation of s 51(xxiiiA) that treated the history surrounding the adoption of that paragraph as determinative of the meaning of the provision as it operates today. Not only would this be contrary to the general view I hold as to the proper approach to deriving constitutional meaning (and the approach ordinarily taken by this Court).
>
> It would also risk accepting a view of the paragraph that would be unjust to the appellants and to other persons whose interests are protected by the constitutional prohibition against laws that "authorize any form of civil conscription". That notion is one that necessarily changes and adapts to different times and circumstances.
>
> 76. When the proper approach to deriving the meaning of s 51(xxiiiA) is adopted (including by appropriate but limited use of the historical record explaining what was in the minds of the legislators and the electors when the paragraph was added to the Constitution), the same result is reached as is stated in other reasons.

Substantially, I agree in the analysis of Hayne, Crennan and Kiefel JJ. The provisions of the Act, as challenged in this Court, do not offend the prohibition on enacting "any form of civil conscription". The Full Court was correct to so decide. The appeals to this Court should be dismissed.

[End of extract]

The key to understanding the importance of this case is whether laws made under s51(xxiiiA) specifically targeted initially to anybody that is a member of the Aboriginal race, and now proposed supposedly to take in "everybody" that lives in the Northern territory, regardless of race (although the race power coupled with "special measures are still embedded in certain sections of proposed legislations) has the effect of being both "unjust" **and introducing the unlawful prohibiting form of forced civil conscription.**

There are two basic questions to be asked.

One not solely governed by legal questions and Two, questions of law determinative on the construction of the Constitution. Broken down to its simplest form, these are:

- Being "unjust" does not depend on what constitutional view one takes in interpreting s51(xxiiiA) or notions of concepts of what is "just" but the practical impacts on the daily lives of those targeted by these new proposed laws; it not a consideration of law but an incident of its interpretation;
- Does any of the provisions of the proposed legislations, designed exclusively for the Northern Territory because of the constitutional powers of the Federal Parliament can under s122 of Constitution, offend the prohibition on enacting "any form of civil conscription" because the "territory" is still disjoined and not subject to the Constitution.

The recent High Court case of *Griffiths* laid at least one troublesome section of the Constitution to rest by determining that ***just terms*** does apply.

It would be hard pressed not to now think that any provision of s51(xxiiiA) is not "subject to the Australian Constitution or the "***prohibition of civil conscription***."

The first of being "unjust" unremarkably contains subjective and objectives viewpoints depending on what side of the "gap" one is standing; the affluent and unaffected or the desperate and targeted member (mainly Aboriginal) that these new Bills are proposed for "disadvantaged Australians".

The court is not totally immune from the logic of life and constitutionally leaves the issue of justification to Parliament; with some wavering judicial line of whether such a law stretches over the "manifestly abusive" test of being "unjust" (whatever this

unhelpful phase is supposed to mean). Experience does show though that race laws have been validated before and mostly unchallenged; so why not do it again?

But when "unjust" laws are targeted because of race, then constitutional questions require answering of their legislative validity. The Court cannot become judicially blind to the fact of race laws no matter how distasteful the term "race laws" are. The Court's constitutional role is to ensure that such race laws are within the power of Parliament and no narrow reading of any of the sections of the Australian Constitution can now stand in a modern and contemporary Australian community.

To date, the Court, at least in our view, has been both unsettled and unconvincing in their construction of race laws that exclusively have been used on Australia's Indigenous Peoples; the Aboriginal and Torres Strait Islanders. Obviously, because of both geographical and by sheer numbers, race laws have been used mainly on the Aboriginal population or because of now doubtful plenary powers granted historically to the Federal Parliament under s122 of Constitution that purports to allow such laws into the Northern Territory without worry.

An example is the High Court's construction of the race power use in the legitimacy of the *Native Title Act 1993 (Cth)* resulting from the Court's own judgement in *Mabo* (1992) where Indigenous Peoples "native title" was said to still be intact and recognisable by the common law of Australia (in certain situations).

The Court accepted that the constitutional "race power" law making of the Federal Parliament in s51 (xxvi) of Constitution gave validity to the enactment of the ***Native Title Act*** but then went further in reinforcing the NTA by declaring by *obiter dicta* that the Act appeared to also be the "intention" of Parliament to be a "special measures" under s8(1) of the *Racial Discrimination Act 1975 (Cth)*; **not because a specific provision in the NTA actually says so but located in the Preamble of the NTA.**

The unshakeable faulty legal premise for the Court to, uninvited by legal argument, judicially reinforce the *Native Title Act* (a law about race) as a 'special measure" to avoid the unlawful racial discrimination because of the RDA and remains an indelible stain on the developing common law of Australia.

The question begging answers is how can there be racial discrimination because non-Aboriginal Australians do not have or enjoy any such right as native title? Where is the discrimination? The common law has long accepted well before 1788 that such a native title right can be accepted and recognised by the common law as not being inconsistent with the common law.

A glance at the leading judgement of Justice Brennan (as he was then) in the Mabo case of how historically common law (and International law) has shared the 'spoils and loot" of colonisation and accommodating native title rights is a must for any understanding of how the common law of Australia can even attempt to remove its own stain.

The issue is that race laws enacted by the Federal Parliament, and includes all other Australian parliaments of States and Territories are "subject to the Constitution" as a whole and not just a part of it.

The enactment of the *Racial Discrimination Act 1975 (Cth*) obligated Australia's promise to the International community to "***speedily eliminate racial discrimination …in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person***".

Does having to stand in a separate line at a shopping centre at Alice Springs because of race and the holder of a "Basic Card" and because there is no individual choice, really believe that the "separate line" promote Australia's International promise under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)?

The holders of a "Basic Card" is restricted to shop for food only at registered Commonwealth Community Stores and because there is no individual choice, promote Australia's International promise under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)? These Community Stores are referred to as "The Commonwealth Supermaket" backed by a protective Commonwealth legislative regime to protect its "interest.

In our view, as we have stated in every opportunity, the proposed Bills are considered by us to have a doubtful constitutional validity and offends CERD. The international and Australian promise is to 'speedily eliminate all forms of racial discrimination" and not to entrench new forms under both the camouflage of having constitutional powers under the race power to continually do so and further entrench racially discriminatory laws with a constitutional peg of being an allowable 'special measures" under the RDA sourced from same convention (CERD) that makes prohibits "all forms of racial discrimination".

The international exception that allows a country to fix its own domestic laws in line with both the intention and spirit of CERD, referred to as a "margin of appreciation" that does not require a mirror approach to UN Conventions but also does not encourage nor support processes that are plainly inconsistent with UN Conventions.

In a modern Constitution, there is no room for any provisions that allows laws to be made solely because of race and the use of "special measures' to avoid the reality of the Racial Discrimination Act 1975 (Cth) to validate race laws.

Does the answer solely depend on what side of the "gap" you are standing on or does the oft repeated constitutional guarantee of "according to law" have a role?

Can the Commonwealth Parliament get it wrong?

Of course, and it does.

The Common law and Parliament

When the Commonwealth legislatures and Parliament itself has to deal with Indigenous issues all predictable, historical and contemporary, fears arise. It is a peculiar phenomenon that send drafters of legislation too close to ensuring government policy is dressed up to look like real law.

All legal trainings and parliamentary concepts appeared to disappear in a panic. The Australian response to *Mabo* in 1992 set the tone for future conduct when *Wik* popped up in 1997. There was pandemonium akin to a national charge at windmills.

The most basic of understanding between common law and parliament were tossed optimistically onto the flames in haste to fix the *Mabo* native title issues.

It is pertinent to remind the Parliament and Senate of this period and then to look again closely at these new proposed Bills. It arose in the Western Australia challenge in 1995 to the whole newly enacted Native Title Act 1993 (Cth).(NTA).

The NTA passed all legislative requirements through both houses of Parliament. The following is the High Court's unanimous tossing of one of the most fundamental constitutional principles that s12 of NTA attempted to overthrow; the separation of powers:

Western Australia v Commonwealth [1995] HCA 47; (1995) EOC 92-687 (extracts); (1995) 69 ALJR 309; (1995) 183 CLR 373 (16 March 1995)

HIGH COURT OF AUSTRALIA

MASON CJ, BRENNAN, DEANE, TOOHEY, GAUDRON AND McHUGH JJ
[extract only]

7. The validity of s.12 of the Native Title Act

146. Section 12 of the Native Title Act reads as follows:
" Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, ***the force of a law of the Commonwealth***."

Section 12 does not in terms make a law in the sense of creating rights or imposing obligations. **It takes the common law as an entirety and purports to invest it with the force of a law of the Commonwealth. If s.12 be construed as an attempt to make the common law a law of the Commonwealth, the attempt encounters some constitutional obstacles.**

There can be no objection to the Commonwealth making a law by adopting as a law of the Commonwealth a text which emanates from a source other than the Parliament (330 Hooper v. Hooper [1955] HCA 15; (1955) 91 CLR 529 at 536-537. The law of the States that was picked up as a law of the Commonwealth in that case was statute

law, not common law. Where a State statute is thus picked up and enacted as a law of the Commonwealth, the common law which has affected the construction of the text or has attached doctrines to its operation continues to have the same effect on the law of the Commonwealth as it has or had on the law of the State subject to contrary provision.). In such a case the text becomes, by adoption, a law of the Commonwealth and operates as such. But the common law is not found in a text; its content is evidenced by judicial reasons for decision. Isaacs J explained in Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia(331 [1913] HCA 41; (1913) 17 CLR 261 at 275-276.)that it is the declaratory nature of a judgment (332 See also Waterside Workers' Federation of Australia v. JW. Alexander Ltd. [1918] HCA 56; (1918) 25 CLR 434 at 463; Reg. v. Kirby; Ex parte Boilermakers' Society of Australia ("the Boilermakers' Case") (1956) 94 CLR 254 at 281) that allows for the evolution of the common law:

"A prior decision does not constitute the law, but is only a judicial declaration as to what the law is. The declaration, unless that of a superior tribunal, may be wrong, in the opinion of those whose present function is to interpret and enforce the law".

In Giannarelli v. Wraith, Brennan J said (333 [1988] HCA 52; (1988) 165 CLR 543 at 584.):

" In the view of a court sitting at the present time, earlier decisions which are not binding upon it do not necessarily represent the common law of the earlier time, though they record the perception of the common law which was then current."

His Honour went on to say that if a court, because it perceives the common law to be different from what it was earlier perceived to be, so declares it, then effect will be given to that declaration as truly representing the common law.

147. In construing s.12, the "common law" must be understood either as a body of law created and defined by the courts or as a body of law which, having been declared by the courts at a particular time, may in truth be - and be subsequently declared to be - different. Whether the common law be understood by reference to its source in judicial reasons for decision or by reference to its content as developing from time to time, there are objections to its being treated as a law of the Commonwealth.

148. If the "common law" in s.12 is understood to be the body of law which the courts create and define, s.12 attempts to confer legislative power upon the judicial branch of government. That attempt must fail either because the Parliament cannot exercise the powers of the Courts or because the Courts cannot exercise the powers of the Parliament. As Dixon CJ, McTiernan, Fullagar and Kitto JJ said in The Boilermakers' Case (334 (1956) 94 CLR 254 at 296; see also 271-272, 289, 292.):

"it has been found impossible to escape the conviction that Chap.III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power ... and that Chap.III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it."

Under the Constitution, the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be (335.Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan [1931] HCA 34; [1931] HCA 34; (1931) 46 CLR 73 at 93; The Commonwealth v. Grunseit [1943] HCA 47; (1943) 67 CLR 58 at 66, 82-83.)

149. If one construes s.12 as importing the common law as an organic, developing but unwritten body of law, a further objection to validity arises. The Commonwealth relies on s.51(xxvi) and (xxix) to support s.12. It is common ground that s.51(xxvi) can support a law only if that law is one which the Parliament has deemed necessary for the people of a race.

The content of any such law is one which the Parliament must itself consider although a delegation to the Executive Government to make a law of a regulatory kind to implement an Act of the Parliament can find support in that paragraph. The common law relating to native title is not regulatory; it is substantive law the content of which is declared from time to time by the courts.

Mabo (No.2) is a dramatic example of how the declaration of the common law relating to native title can change when a new judicial examination is made of the basic legal principles which underlie a proposition earlier accepted. Ex hypothesi, when a court declares a change in the common law, the Parliament has not considered whether it is necessary to make that change as a special law for the people of a race.

The content of the common law will, in the ordinary course of events, change from time to time according to the changing perceptions of the courts. And the changes occur without reference to the Parliament in which is reposed the power to make special laws for the people of a race as the Parliament deems necessary.

150. If s.51(xxix) is relied on no different conclusion is reached. The municipal law relating to native title has no external element which might attract the support of the external affairs power. The common law may, it is true, find in international law concepts or values which may advantageously be used in the development of the common law, but the common law of native title is not developed in order to satisfy the obligations of a treaty and its operation is necessarily confined within Australia's boundaries.

151. If s.12 be construed as an attempt to make the common law a law of the Commonwealth, it is invalid either because it purports to confer legislative power on the courts or because the enactment of the common law relating to native title finds no constitutional support in s.51(xxvi) or (xxiv). A "law of the Commonwealth", as that term is used in the Constitution, cannot be the unwritten law. It is necessarily statute law, for the only power to make Commonwealth law is vested in the Parliament (336 Constitution s.1; see also Covering Clause 5 and ss.51 and 52).

But the laws of the Commonwealth operate in the milieu of the common law. As Sir Owen Dixon observed (337 "The Common Law as an Ultimate Constitutional Foundation", in Jesting Pilate, (1965) at 205.):
"We act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute".

A law of the Commonwealth may exclude, wholly or partially, the operation of the common law on a subject within its legislative power (338).

For example, s.6 of the Diplomatic Privileges and Immunities Act 1967 (Cth)) or it may confirm the operation of the common law on such a subject (339).

For example, s.5 of the Insurance (Agents and Brokers) Act 1984 (Cth).)or it may simply assume that the common law applies to the subject (340 For example, s.5 of the Bills of Exchange Act 1909 (Cth); see Stock Motor Ploughs Ltd. v. Forsyth [1932] HCA 40; (1932) 48 CLR 128 at 137-139.), as in truth it does unless excluded. But the common law is not itself a law of the Commonwealth. Section 4(1) of the Commonwealth Places (Application of Laws) Act 1970 (Cth) is an apparent but not real exception to this proposition. That sub-section reads:

" The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time."

Under s.4(1), the provisions of the laws of a State at a particular time are made laws of the Commonwealth for Commonwealth places at that time. The Commonwealth refers to those provisions, whether statutory or not, as a dictionary for reference in ascertaining the rights and duties under Commonwealth law within Commonwealth places at the particular time. Section 4(1) does not enact either the State statute law or the common law as a law of the Commonwealth.

152. Section 12 of the Native Title Act does not in terms enact the common law as a law of the Commonwealth. It purports to give the common law "the force of a law of the Commonwealth". Section 12 simply attempts to engage s.109 of the Constitution in order to make the common law immune from affection by a valid State law. But it is of the nature of common law and of legislative power that the common law is subject to affection by exercise of legislative power. If s.109 could be engaged by s.12 to preclude the affection of the common law by a State law, it would have destroyed some of the legislative power of the State confirmed by s.107 of the Constitution.

That is not the purpose of s.109.When s.109 is engaged, it does not diminish the legislative power of the State which has enacted the inconsistent law. Rather, s.109 operates only upon State laws that have been made in exercise of the legislative powers of the States confirmed by s.10.

If s.12 of the Native Title Act were to result in the withdrawal from Parliaments of the States of an effective legislative power to override the common law, it would have diminished the legislative power confirmed by s.107of the Constitution.

And that it cannot do.

153. In argument, it was said that s.12 was the necessary foundation for the investing of federal jurisdiction to hear and determine claims with respect to native title. As native title is a concept of the common law, a claim in respect of native title might be thought not to arise under a law of the Commonwealth. But an application in respect of native title under the Act (341 See ss.61, 74, 81.) is a claim in respect of the rights and interests defined as native title by s.223 and protected by s.11(1) subject to the provisions imported by s.11(2). Recognition of those rights and interests by the common law is an element of the statutory definition (342 s.223(1)(c).) of native title but the need to establish that element does not deny to an application the character of a claim made under a law of the Commonwealth.

154. Section 12 is invalid but its invalidity does not affect the validity of any other provision of the Native Title Act

[end of extract (with some format changes- extracted from www.austlii.edu.au)

Comment

The constitutional validity of these new proposed Bills must be dealt with by a more rigorous parliamentarian process that solely deals with some of the constitutional issues raised in our submission. It should not left to chance that a likely challenge will eventuate. These are:

- S51(xxiiiA)
- S81 of Constitution
- S92
- S10 of RDA
- S8(1) of RDA (special measures)
- others

If parliament can “constitutionally trawl” for legitimacy then so we who the three Bills are targeted at, trawl for constitutional invalidity.

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009

It is doubtful whether a mere enactment of Parliament can alter the long standing settled construction of the “race power” in s51(xxvi) of Constitution. This section does not limit any choice of Parliament to either use this race power to directly discriminate or benefit. A mere legislative Act to enforce only a beneficial use cannot top s128 of Constitution in how Australians alter their Constitution.

These questions should have been asked in the communities targeted by the three Bills. Policy is ineffective if far removed from those lives that new policy is meant to affect.

Yours truly,

Patrick Malone on behalf of the Board of Directors of AICA and most importantly, the many voices of our remote Aboriginal community members who are silenced by this parliamentary process.

Date: 1 February 2010

ATTACHMENT A

Koowarta v Bjelke-Petersen [1982] HCA 27; (1982) 153 CLR 168 (11 May 1982)

HIGH COURT OF AUSTRALIA

KOOWARTA V. BJELKE-PETERSEN (1982) 153 CLR 168

[Extract only and altered layout-footnotes omitted]

Gibbs CJ

[2] The Cabinet policy referred to in this statement was the reason, or the dominant reason, why the Cabinet decided that no consent should be given to the transfer of the lease to the Commission and why the second defendant refused to grant consent or permission for such transfer. In these circumstances (so it is alleged) the Cabinet, and the second-named defendant, acted contrary to the provisions of the Act, and unlawfully, in refusing to consent to the transfer of the lease to the Commission by reason of the Aboriginal race, colour or ethnic origin of the plaintiff or of the plaintiff and other members of the group as associate or associates of the Commission. In consequence of these matters the plaintiff has suffered loss, and loss of dignity, injury to feelings and humiliation. The plaintiff claims declarations, an injunction and damages

[3]. The defendants delivered a defence and demurrer. By their defence the defendants, besides putting in issue some of the plaintiff's allegations of fact, raised certain questions of law; they alleged that the Act is not a law of the kind mentioned in s. 51(xxvi) of the Constitution and is outside the legislative power of the Commonwealth and invalid.

The demurrer was based on the ground that the Act is invalid, and also on the ground that the plaintiff is not, within the meaning of the Act, a person aggrieved by the matters alleged in the statement of claim and does not otherwise have locus standi to bring the action. The paragraphs of the defence that raise those questions of law, and the demurrer, are the parts of the cause that have been removed into this Court. The provisions of the Act which it was claimed rendered unlawful the actions of the Minister and the Cabinet were ss. 9 and 12.

Although the defendants, by their defence and demurrer, claim that the Act is entirely invalid, it is apparent that for the purposes of this action it is unnecessary to decide upon the validity of any section of the Act other than s. 9 or s. 12.

[note that 'special measures in s8(1) of RDA was not raised in argument]

[5]. The Act was passed, as its preamble shows, to give effect to an international convention entitled the "International Convention on the Elimination of All Forms of Racial Discrimination" (the Convention) to which Australia is a party. The Commonwealth signed the Convention on 13 October 1966 and ratified it on 30 September 1975. By s. 7 of the Act, approval is given to the ratification.

A copy of the text of the Convention is set out in the schedule to the Act.

The preamble to the Convention refers, inter alia, to the Charter of the United Nations, the Universal Declaration of Human Rights and the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and recites (inter alia) that the States Parties to the Convention:

> "Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State, ... ***Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations***, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination, ...

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end", have agreed as follows. Article 1(1) provides:

> "In this Convention, the term 'racial discrimination' shall mean any distinction,

exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin ***which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."***

Article 2(1) provides (inter alia) as follows:

"States Parties condemn racial discrimination and undertake ***to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:***
. . .
(d) Each State Party shall prohibit *and bring to an end*, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;
. . . "

Article 5 commences with the following words:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to ***guarantee the right of everyone***, ***without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:"***

The article then sets out the rights to which it refers, including the following:

"(d) Other civil rights, in particular:

(v) The right to own property alone as well as in association with others;
. . .
(ix) The right to freedom of peaceful assembly and association;
. . .
(e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
. . .
(iii) The right to housing;

6. The Act contains, in s. 3(1), a number of definitions. Those relevant to the present case are the following:
"'dispose' includes sell, assign, lease, let, sub-lease, sub-let, license or mortgage, and also includes agree to dispose and grant consent to the disposal of "'relative', in relation to a person, means a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person".

Sub-sections (3) and (4) of s. 3 provide as follows:
"(3) For the purposes of this Act, refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure. (4) A reference in this Act to the doing of an act by a person includes a reference to the doing of an act by a person in association with other persons."

The provisions designed to prohibit racial discrimination are found in Pt II of the Act.

That part contains in s. 9 a general provision rendering any racial discrimination unlawful and in a number of sections, including s. 12, specific provisions which are intended to make particular forms of racial discrimination unlawful. The provisions of s. 9 and 12, so far as they are material, are as follows:

> "9.(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference ***based on race***, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, ***on an equal footing***, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(2) The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention.
. . .
(4) The succeeding provisions of this Part do not limit the generality of sub-section (1)."

> "12.(1) It is unlawful for a person, whether as a principal or agent -
> (a) to refuse or fail to dispose of any estate or interest in land, or any residential or business accommodation, to a second person;
> (b) to dispose of such an estate or interest or such accommodation to a second person on less favourable terms and conditions than those which are or would otherwise be offered;
> (c) to treat a second person who is seeking to acquire or has acquired such an estate or interest or such accommodation less favourably than other persons in the same circumstances;
> (d) to refuse to permit a second person to occupy any land or any residential or business accommodation; or
> (e) to terminate any estate or interest in land of a second person or the right of a second person to occupy any land or any residential or business accommodation,
>
> by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person."

Section 18 provides as follows:

> "A reference in this Part to the doing of an act by reason of the race, colour or national or ethnic origin of a person includes a reference to the doing of an act

> for two or more reasons that include the first-mentioned reason, provided that reason is the dominant reason for the doing of the act."

Part III of the Act deals inter alia with civil proceedings that may be brought under the Act. Section 24(1) provides as follows:

> "A person aggrieved by an act that he considers to have been unlawful by reason of a provision of Part II may subject to this section institute a proceeding in relation to the act by way of civil action in a court of competent jurisdiction for any one or more of the remedies specified in section 25."

The remedies specified in s. 25 include an injunction, an order directing the defendant to do a specified act and –

> "(d) damages against the defendant in respect of -
> (i) loss suffered by a person aggrieved by the relevant act, including loss of any benefit that that person might reasonably have been expected to obtain if the relevant act had not been done; and
> ***(ii) loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act . . . . "***

Sections 9 and 12 of the Racial Discrimination Act.

7. We are not directly called on to decide whether the refusal of the Minister to grant consent, approval or permission to the transfer was unlawful by reason of either s. 9 or s. 12. ***The parts of the first matter removed into this Court raise the question of the validity of those sections, not that of their meaning or application.***

However, if, as a matter of law, the refusal of the Minister was not unlawful by reason of s. 9 or s. 12, even on the assumption that those sections are valid, it would hardly be necessary, in Mr. Koowarta's action, to examine the question whether those sections are valid.

It does therefore seem desirable to consider whether either section is applicable to the facts alleged. There can of course be no doubt that a reason for the refusal of the Minister to consent to the transfer of the lease was the race, colour or ethnic origin of the Aborigines who, it was intended, would use the land the subject of the lease.

The refusal to grant consent to the transfer of the lease was a refusal to dispose of an estate or interest in land within s. 12: see the definition of "dispose" in s. 3(1).

However, the transfer to which consent was sought was a transfer to the Commission, and the question arises whether a refusal to dispose of an interest in land to a body **corporate can constitute a breach of s. 12**.

By s. 22(a) of the Acts Interpretation Act 1901 (Cth), as amended, in every Act, unless the contrary intention appears, "person" shall include a body corporate as well as an individual. Does a contrary intention appear in s. 12?

The provisions of that section reveal that the "second person" there mentioned must be capable either of having race, colour or national or ethnic origin, or of having a relative or associate.

A corporation is of course incapable of possessing race, colour or ethnic origin, but it can in my opinion be said to have a national origin - which would be the place where the corporation was incorporated: see Janson v. Driefontein Consolidated Mines Ltd (1902) AC 484, at pp 497, 501, 505 .

Further, although obviously a corporation cannot have a "relative" within the meaning given to that expression by s. 3(1) of the Act, it is possible, without undue straining of language, to say that a person can be an associate of a corporation.

According to the Shorter Oxford English Dictionary, "associate", when used as a substantive, means, "One who is united to another by community of interest, etc.; a partner, comrade, companion". Although obviously a corporation cannot have an associate in the sense of a comrade or companion, it seems to me possible to say that a person who is in business in partnership with a corporation, or who has some other community of interest uniting him with the corporation, is associated with it.

Provisions such as those of s. 12, which are intended to preserve and maintain freedom from discrimination, should be construed beneficially.

For that reason I would conclude that the provisions of s. 12 do not reveal an intention contrary to that indicated by s. 22(a) of the Acts Interpretation Act, and that a "second person" within the meaning of s. 12 may include a corporation. Whether Mr. Koowarta was an associate of the Commission would of course be a question of fact. If he was, the case would appear to fall within s. 12(1) of the Act.

8. However, it is doubtful whether s. 9 has any application to the facts alleged. That section is very widely drawn and its width produces considerable uncertainty as to its effect.

No doubt the refusal to consent to the transfer of the lease was the doing of an act (see s. 3(3)) and it was an act which involved a distinction based on race, colour or ethnic origin, because it was based on the Cabinet policy that drew a distinction between Aborigines and other persons in relation to the acquisition of large areas of additional freehold or leasehold land.

The question then is whether that act had the purpose or effect of nullifying or impairing the recognition, enjoyment or the exercise on an equal footing of any human right or fundamental freedom.

It was submitted by the learned Solicitor-General for Victoria that it is meaningless to speak of "human right or fundamental freedom", since our law does not classify rights or freedoms in that way.

However, I regard it as clear that "any human right" referred to in s. 9 includes rights of the kind specified in Art. 5 of the Convention.

Nevertheless the facts pleaded do not in my opinion reveal that the act of the Minister nullified or impaired the recognition, enjoyment or exercise of any of those rights by Mr. Koowarta.

It was submitted on behalf of Mr. Koowarta that the refusal to consent to the transfer of the lease impaired his exercise of the rights specified in pars. (d)(v) and (ix) and (e)(i) and (iii) of Art. 5.

It is impossible to say that the Minister, by refusing to consent to the transfer of the lease to the Commission, impaired Mr. Koowarta's right to freedom of peaceful assemby and association, his right to work or to the free choice of employment, or his right to housing.

A person must use his own rights in such a way that they do not interfere with those of another, and one who has a right to assemble peacefully and to associate with others, or a right to work or to free choice of employment, is not entitled to invade another's property for the purpose of giving effect to that right.

It would be to depart altogether from the ordinary sense of the words to say that a refusal to consent to the transfer of a lease of land impairs the enjoyment or exercise of the right to freedom of peaceful assembly and association, or the right to work and to the free choice of employment, of a person who wishes to use the land for the purpose of assembling, or associating with others, or working, there.

A more serious question is whether the refusal to consent to the transfer of the lease impaired the exercise of Mr. Koowarta's right to "own" property. The consent sought was to the transfer of the lease to the Commission, not to Mr. Koowarta.

If the Commission had acquired the lease, it had power, under s. 20 of the Aboriginal Land Fund Act 1974 (Cth), either to grant to an Aboriginal corporation an interest in land for the purpose of enabling the members of that corporation to occupy that land, or to grant to an Aboriginal land trust an interest in land for the purpose of enabling Aborigines to occupy that land.

It is not alleged in the statement of claim that Mr. Koowarta was a member of an Aboriginal corporation or that it was intended that he should be granted an interest in land by an Aboriginal land trust. Since the attempt by the Commission to acquire the lease was made at the request of Mr. Koowarta, for the purpose of enabling the land to be used by or for himself and other members of the group, it can perhaps be inferred that the Commission would have taken some action under s. 20 which would have had the consequence that Mr. Koowarta would be enabled to used the land.

However, it cannot be inferred that the Commission would have granted an interest to an Aboriginal land trust rather than to an Aboriginal corporation. It is not clear that a member of an Aboriginal corporation would have anything more than a licence to use the land.

Although the word "own" in Art. 5(d)(v) should no doubt be given a wide meaning, it seems to be going too far to hold that the right to "own" property includes a right to mere possession under a licence to occupy.

9. What I have said assumes that the "human right or fundamental freedom" with which we are concerned is that of Mr. Koowarta, rather than that of the Commission.

The reference in s. 9 to "human" rights, and in Art. 5 to "the right of everyone", suggest that those provisions are concerned with the rights of natural persons.

Indeed most of the rights mentioned in Art. 5 by their very nature could only be enjoyed by natural persons, but some, including the right to "own" property, could be enjoyed by a corporation.

The word "person" appears in s. 9(1) only with reference to the doer of the unlawful act; in this respect s. 9 differs from s. 12, and from the legislation considered in Attorney-General v. Antigua Times (1976) AC 16, at pp 24-26 , where the word refers to the person whose right is impaired.

The context provided by s. 9 and Art. 5 leads me to conclude that s. 9 is not intended to apply to the rights of artificial persons such as corporations.

STEPHEN J.

[Extract only]

3. I turn immediately to the constitutional questions, deferring for the moment my reasons for according him locus standi. An appreciation of the constitutional questions is aided by some indication of the circumstances in which Mr. Koowarta's action arises.

It is common ground that in 1975 the Aboriginal Land Fund Commission, a body corporate under Commonwealth legislation, contracted to buy a Crown leasehold pastoral property in northern Queensland; that it was a term of the contract and a consequence of the Land Act 1962 (Q.) that transfer of the Crown lease would require the permission of the State's Minister for Lands; that consent to that transfer was sought from but was refused by the Minister; and that a reason for his refusal was that the settled policy of the Queensland Government was to view unfavourably proposals to acquire "large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation". (at p208)

4. The Minister's refusal to consent to the transfer of this Crown leasehold led to Mr. Koowarta's action, in which he alleges that that refusal constituted a breach of provisions of the Racial Discrimination Act.

6. I turn first to par. (xxvi) of s.51[**the Race Power**].

The terms in which this grant of power is expressed are unusual. The content of the laws which may be made under it are left very much at large; they may be benevolent or repressive; ***they may be directed to any aspect of human activity***; so long as they

are with respect to the people of a race such as is described in par. (xxvi) they will be within power.

Most grants of power in s. 51 are defined in terms either of some class of activity, as with "trade and commerce with other countries" and "astronomical and meteorological observations", some common governmental power or function, as with "taxation", and "census and statistics", or some class of physical object, such as "lighthouses, lightships, beacons and buoys".

In all such cases the subject-matter of the grant of power is more or less apparent and identifiable on its face. However, a grant of legislative power defined only by reference to a particular class of persons for whom laws may be made under it is inherently less precise as to its permitted subject-matter; and when, as in par. (xxvi), the class is no more specific than "the people of any race", the class depending for further identification upon the legislature deeming it to be necessary to make special laws for its members, ***the content of the power is determined by one sole criterion, that laws which may be made under it must be special laws deemed necessary for the people of any race.***

7. Because the reference to "The people of any race" is qualified by the requirement that they should be such that it is deemed necessary to make special laws for them, ***they must possess some quality*** which calls for laws special to themselves.

This requirement is more than a mere qualification of the power; it also predicates a character which laws made under par.51 (xxvi) must possess:

> “they must be special laws, in the sense of having some special connexion with people of any race. It is true that the grant of power is not in terms confined to the making of special laws, but from the description of the laws which may be made under it - laws for those people of any race deemed in need of special laws, it follows that it is special laws and only special laws which fall within par. (xxvi). ***It cannot be that the grant becomes plenary and unrestricted once a need for special laws is deemed to exist; that need will not open the door to the enactment of other than special laws***”.

8. Although it is people of "any" race that are referred to, I regard the reference to ***special laws*** as confining what may be enacted under this paragraph to laws ***which are of their nature special to the people of a particular race.***

It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises; without this particular necessity as the occasion for the law, it will not be a special law such as s. 51 (xxvi) speaks of.

No doubt it may happen that two or more races will share particular problems within the Australian community and that this will make necessary the enactment of one law applying equally to those several races; such a law will not necessarily forfeit the character of a law under par. (xxvi) because it legislates for several races.

A law will, however, not possess that character if it legislates for all peoples of the Commonwealth, regardless of race, who happen to be confronted with or to present particular problems deemed to call for legislative action.

Nor will a law attain that character merely because the problem with which it deals is one of discrimination on the ground of race; it will not be enough that the law is one about race, the coincidence that its subject-matter happens to match one of the words in par. (xxvi) will not of itself bring it within power.

9. To be within power under par. (xxvi) a law must be special in the sense ***that it is the particular race, or races, for whom it legislates that gives rise to the occasion for its enactment.*** The Racial Discrimination Act is not such a law.

True, it legislates about race and proscribes discrimination upon the basis of race. But it is a perfectly general law, addressed to all persons regardless of their race and requiring that the members of all races shall be free from discrimination on account of race. It protects no particular race or races.

As its recitals attest, its purpose is to give effect to the International Convention, a copy of which is scheduled to the Act. That Convention, ***in its opening recitals, stresses the promotion of universal respect for human rights and fundamental freedoms for all without distinction; universality of application lies very much at its heart.***

The Act takes from the Convention this quality, thereby denying to it the character of a special law to which par. (xxvi) refers.

10. The fact that in current Australian conditions the dominant Anglo-Saxon and Celtic races (if indeed to employ such description conveys any sufficiently certain meaning) are in fact very much less likely to require protection against racial discrimination than are other races does not, in my view, suffice to make the Act one special to all those other races.

Were it possible to say that in this community only Aborigines faced the possibility of racial discrimination, an anti-discrimination law expressed in general terms might perhaps be seen to be no less a special law within par. (xxvi) than would a law expressly confined to the prohibition of discrimination against Aborigines.

The necessary special quality might perhaps be sufficiently attracted by facts dehors the legislation. Be that as it may, such an argument does not seem to me to be open in the present case.

11. It is for these reasons that I regard the Racial Discrimination Act as beyond the subject-matter of the grant of power in s. 51(xxvi).

32. It was in 1965 that the Assembly unanimously adopted the International Convention on the Elimination of All Forms of Racial Discrimination. Its origins in

1959 and its subsequent history are traced by Schwelb in an article in the International and Comparative Law Quarterly, vol. 15 (1966), 996, at pp. 997-1000.

The learned author's conclusion, at p. 1057, is of particular relevance.

It is that the provisions of the Convention:

> "represent the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races. With ever-increasing clarity this idea has emerged as the one which, more than any other, dominated the thoughts and actions of the post-World War II world. In our time, ***the idea of racial equality*** has acquired far greater force than its eighteenth-century companions of (personal) liberty and fraternity**.**
>
> ***The aim of racial equality*** has permeated the law-making, the standard-setting and the standard-applying activities of the United Nations family of organisations since 1945. (at p220)

33. The . . . Convention of 1965 (is) the core of the international conventional law on the subject" (emphasis added). The Convention was opened for signature on 21 December 1965 and entered into force on 2 January 1969. Australia ratified the Convention on 31 October 1975, by which time it had been ratified by over eighty nations of the world. (at p220)

34. This brief account of the international post-war developments in the area of racial discrimination is enough to show that the topic has become for Australia, in common with other nations, very much a part of its external affairs and hence a matter within the scope of s. 51(xxix). (at p220)

35. Even were Australia not a party to the Convention, this would not necessarily exclude the topic as a part of its external affairs. It was contended on behalf of the Commonwealth that, quite apart from the Convention, Australia has an international obligation to suppress all forms of racial discrimination because respect for human dignity and fundamental rights, and thus the norm of non-discrimination on the grounds of race, is now part of customary international law, as both created and evidenced by state practice and as expounded by jurists and eminent publicists. There is, in my view, much to be said for this submission and for the conclusion that, the Convention apart, the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs, so that legislation much in the present form of the Racial Discrimination Act would be supported by power conferred by s. 51 (xxix). As with slavery and genocide, the failure of a nation to take steps to suppress racial discrimination has become of immediate relevance to its relations within the international community. In New South Wales v. The Commonwealth (1975) 135 CLR, at p 450 I said that included in external affairs were "matters which are not consensual in character; conduct on the part of a nation, or of its nationals, which affects other nations and its relations with them". I then cited particular passages from the judgments in R. v. Sharkey [1949] HCA 46; (1949) 79 CLR 121 which provide instances of such non-consensual matters forming a part of Australia's external affairs. (at p221)

36. In the present cases it is not necessary to rely upon this aspect of the external affairs power since there exists a quite precise treaty obligation, on a subject of major importance in international relationships, which calls for domestic implementation within Australia. This in itself, without more, suffices to bring the Racial Discrimination Act within the terms of s. 51 (xxix). I mention in passing that in these cases it is common ground that the provisions of the Racial Discrimination Act now under challenge do give effect to those terms of the International Convention on the Elimination of All Forms of Racial Discrimination which Australia, as a party to the Convention, is bound to implement municipally. (at p221)

Mason J

[Extract only]

Application of the External Affairs Power to the Convention.

31. On the broad view which I take of the power it extends to the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. It is an international treaty to which Australia is a party which binds Australia in common with other nations to enact domestic legislation in pursuit of the common objective of the elimination of all forms of racial discrimination.

32. But I would go further and say that, even on the more cautious expression of the scope of the power by Dixon J. in Burgess, it would extend to the implementation of this Convention.

The recitals to the Convention reveal in an illuminating way the various elements which have led the parties to the Convention to co-operate in an endeavour to eliminate racial discrimination.

They show that racial discrimination is considered to be inconsistent with the ideals on which the Charter of the United Nations is based and with the principles enshrined in the Universal Declaration of Human Rights and that it is the target of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination. They contain a reaffirmation –

> ". . . that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State . ."

The recitals go on to express concern that racial discrimination is still in evidence in some areas of the world ***and that governmental policies are in some instances based on racial superiority*** or hatred, e.g. apartheid, segregation or separation.

They acknowledge that the parties, having resolved to adopt all necessary measures to eliminate racial discrimination and to prevent and combat racist doctrines and

practices, desired to implement the principles in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.

The point of all this, so it seems to me, is that the community of nations, or at least a very large number of them, are vigorously opposed to racial discrimination, not only on idealistic and humanitarian grounds, but also because racial discrimination is generally considered to be inimical to friendly and peaceful relations among nations and is a threat to peace and security among peoples.

33. In addition to the materials referred to in the recitals to the Convention there are the developments in international law to which Stephen J. has referred in his judgment, commencing with the provisions of the Charter of the United Nations.

These developments, taken together with the materials already referred to, establish beyond any doubt that there are solid and substantial grounds for the widespread international opposition ***to all forms*** ***of racial discrimination and that its elimination is a desirable, if not an essential, step for the maintenance of international peace and security.***

34. All the materials indicate that the United Nations consider racial discrimination to be abhorrent conduct which, posing a threat to international peace and security, should be eliminated.

At the level of international law the means chosen to attain this end was the formulation of the Convention. It imposes on each of the many parties to it an obligation to eliminate racial discrimination in its territory.

The failure of a party to fulfil its obligations becomes a matter of international discussion, disapproval, and perhaps action by way of enforcement. Viewed in this light, the subject-matter of the Convention is international in character.

35. It is conceded that, if the external affairs power extends to the Convention, the relevant provisions of the Act, s. 9 and s. 12, give effect to its provisions. I therefore conclude that the two sections are valid.

[End of case Extracts]

ATTACHMENT B

The case of *Commonwealth v Tasmania* (the Tasmanian Dam case) [1983] HCA 21; (1983) 158 CLR 1 (1 July 1983) and Brennan J's analysis of "race is still relevant to these three Bills.

Brennan J

[Extract only of Brennan J]

[77] Section 51(xxvi)of the Constitution was amended in 1967 by deleting the words "other than the aboriginal race in any State" from the original text which granted power to make laws with respect to "(t)he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:". No doubt par. (xxvi) in its original form was thought to authorize the making of laws discriminating adversely against particular racial groups; see Quick and Garran, The Annotated Constitution of the Australian **Commonwealth** 1901) p. 623.

The approval of the proposed law for the amendment of par. (xxvi) by deleting the words "other than the aboriginal race" was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the Racial Discrimination Act manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws.

78. Where Parliament seeks to confer a discriminatory benefit on the people of the Aboriginal race, par. (xxvi) does not place a limitation upon the nature of the benefits which a valid law may confer, and none should be implied. It was submitted that, as ss. 8 and 11 do not confer legal rights, powers or privileges upon Aboriginal people in addition to the legal rights, powers or privileges conferred upon the public generally, those provisions are not supported by par. (xxvi).

Is it sufficient that the ***discriminatory benefit*** is found in the special importance or significance which the people of a race attach to the rights, powers or privileges generally conferred? In Koowarta Stephen J. noted at p.643 that the "necessary special quality might perhaps be sufficiently attracted by facts dehors the legislation". The concept of "race" suggests the answer.

79. "Race" is not a term of art; it is not a precise concept; see Ealing London Borough Council v. Race Relations Board[1971] UKHL 3; ,(1972) A.C. 342, at p.362 per Lord Simon of Glaisdale. There is, of course, a biological element in the concept.

The UNESCO studies on race and racial discrimination reveal some difficulty in giving a precise definition even to this element.

Senor Hernan Santa Cruz, the Special Rapporteur on Racial Discrimination, in his report to the United Nations ("Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres" (1971), U.N. Document No. E/CN.4/Sub 2/307Rev.1, pp. 12-13) traces some of the findings of experts:

> "A conference of experts assembled in Moscow by UNESCO in August 1964 to give their views on the biological aspects of the race question, adopted a set of proposals on this subject. They stated inter alia that all men living today belong to a single species and are derived from a common stock (Art.I); that pure races in the sense of genetically homogeneous populations do not exist in the human species (Art,III); and that there is no national, religious, geographic, linguistic or cultural group which constitutes a race ipso facto (Art,XII).

The proposals concluded:
"The biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any scientific foundation.

". . .
"Popular notions of 'race', however, have frequently disregarded the scientific evidence. Prejudice and discrimination on the ground of race, colour or ethnic origin occur in a number of societies, where physical appearance - notably skin colour - and ethnic origin are accorded prime importance." (at p538)

80. A need to identify the biological element of the concept followed the enactment of a Race Relations Act in New Zealand and in England. In New Zealand the question arose in King-Ansell v. Police, (1979) 2 N.Z.L.R.531. Richardson J. said, at p.542:
". . . all four expressions 'race', 'colour', 'national origins' and 'ethnic origins' are concerned with antecedent rather than acquired characteristics.

> "It does not follow that the identifying characteristics must be genetically determined at birth. The ultimate genetic ancestry of any New Zealander is not susceptible to legal proof. Race is clearly used in its popular meaning."

81. His Honour discounted the importance of, if not the necessity for, scientific proof of the biological element:
"The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins." (at p538)

82. In England in Mandla v. Dowell Lee, (1983) 1 Q.B.1, Kerr L.J. in reference to the words "race or ethnic or national origins" said, at p.19:

". . . they clearly refer to human characteristics with which a person is born and which he or she cannot change, any more than the leopard can change his spots." (at p538)

83. Membership of a race imports a biological history or origin which is common to other members of the race, but Richardson J. is surely right in denying the possibility of proving ultimate genetic ancestry.

However, in my respectful opinion, I do not think his Honour was propounding his "real test" of common regard as being conclusive or exhaustive. Actual proof of descent from ancestors who were acknowledged members of the race or actual proof of descent from ancestors none of whom were members of the race is admissible to prove or to contradict, as the case may be, an assertion of membership of the race.

Though the biological element is, as Kerr L.J. pointed out, an essential element of membership of a race, it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race.

As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by par. (xxvi).

The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity.

Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.

84. A law which, on its face, does not discriminate in favour of the people of a race, may nevertheless be valid if it discriminates in favour of those people by its operation upon the subject matter to which it relates. ***That involves no departure from the ordinary processes of constitutional interpretation.***

The characterization of a law requires that the operation of the law be ascertained by reference to its terms and their application to the circumstances in which the law operates.

If the power under par. (xxvi) were restricted to a discriminatory conferring of legal rights or a discriminatory imposition of legal obligations on the people of a race, laws for the general protection of historical memorabilia, of religious or spiritual shrines or of cultural practices which are of particular significance to the people of particular races would not be valid.

The things which are a focus of the life of the race would lie outside the boundaries of a power which is expressed to authorize special laws for its people.

85. I would not construe par. (xxvi) as requiring the law to be "special" in its terms; it suffices that it is special in its operation.

Section 8 ensures that s. 11 is special in its operation.

It was argued that such a construction was impliedly rejected in Koowarta, for the proscribing of racial discrimination must surely have been a matter of special significance for the people of the Aboriginal race.

If racial discrimination were peculiarly a practice affecting Aborigines, there would be much force in the argument. But victims of racial discrimination may sadly be found in many races: the people of many races may say with Shylock (The Merchant of Venice, Act III, Scene I):

> "If you prick us, do we not bleed? if you tickle us, do we not laugh? if you poison us, do we not die? and if you wrong us, shall we not revenge?"

86. Section 11 of the Act operates only in protection or conservation of a site which is of particular significance to the people of the Aboriginal race (s.8(2)(b) and which is declared to be a site to which s.11 applies (s.8(3)). The support for these sections must be found in their operation in protection of a site of "particular significance".

The phrase "particular significance" in s. 8 cannot be precisely defined. All that can be said is that the site must be of a significance which is neither minimal nor ephemeral, and that the significance of the site may be found by the Aboriginal people in their history, in their religion or spiritual beliefs, or in their culture.

A group of whatever size who, having a common Aboriginal biological history, find the site to be of that significance are the relevant people of the Aboriginal race for whom the law is made.

To confine the legislative power conferred by par. (xxvi) so as to preclude it from dealing with situations that are of particular significance to the people of a given race merely because the statute on its face does not reveal its discriminatory operation would be to deny the power the high purpose which the Australian people intended when the people of the Aboriginal race were brought within the scope of its beneficial exercise.

87. Of course, an issue remains as to whether the sites proclaimed under s.8 are in truth sites of particular significance to the people of the Aboriginal race. That is a question of fact that can be resolved by evidence if need be. It is not appropriate to specify, by reference to the statement of contentions by the parties, what evidence will prove to be admissible.

88. A declaration of sites to which s. 11 applies was made on 26th May, 1983. Section 11 was proclaimed to apply to three sites: Kutikina Cave, Deena Reena Cave and the open archaeological site. The prohibitions contained in s.11 correspond broadly with the prohibitions contained in ss. 9(1) and 10(2) except that they are restricted in their application to specified sites. Section 11(1)(j) permits the prescribing of an act in relation to a particular site to which the section applies, following the pattern of ss. 9(1)(h) and 10(2)(m).

On 26th May, 1983, a regulation was made specifying for the purposes of s. 11(1)(j) Kutikina Cave, Deena Reena Cave and the open archaeological site. The regulation prohibited the doing of those acts that were prohibited by the regulations under ss.9(1)(h) and 10(2)(m), namely, the carrying out of works in the course of, preparatory to, or associated with the construction of the dam. The first two of these sites lie within the future HEC land and are presently part of the Wild Rivers Park. I assume that the third site lies within the same area. (at p539)

89. The protection of sites of particular significance to the Aboriginal people is a purpose which attracts the support of s. 51(xxvi).

But it is a question whether the prohibitions imposed by s. 11 are conducive to the fulfilment of that purpose. Difference considerations apply under s. 11 to those which apply under s. 9, for s. 11 applies only to specific sites that have the required significance for the Aboriginal people. The protection of particular sites from any physical interference might reasonably be regarded as conducive to maintaining their significance for the Aboriginal people, and ss.8 and 11 are therefore valid.

[End of Extract]

1 February 2010

The Hon Lindsay Tanner, MP
Minister for Finance
Parliament House
Canberra ACT 2600

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Dear Minister

The Foundation for Aboriginal and Islander Research Action (FAIRA) is deeply concerned by your assertion that Australia is not a racist country. A few simple examples easily reveal that Australia is extremely racist, in particular against the Aboriginal and Torres Strait Islander people as the first peoples of this country.

The Mabo decision by the High Court in 1992 established that Aboriginal and Torres Strait Islanders had lawful title to land - recognisable under British Common Law - at the time of colonisation and that the subsequent taking of the land without payment or compensation was a racist act. Colonial and Australian law overlooked the legal rights and racism was not made illegal until 1975 when the Racial Discrimination Act (RDA) came into force. However, the Parliament intentionally passed new laws in 1993 and 1998 to suspend the RDA to validate all land taken from the Aboriginal and Torres Strait Islander people between 1975 and 1996.

This is evidence that Australia is racist, and that the problem of racist acts by the Crown and the parliament, cannot be blamed upon a few 'bad apples' (unless of course your comment was aimed at the members of parliament).

From 1901 to 1967 the Constitution of Australia treated Aboriginal and Torres Strait Islanders as less-than-equal people in Australia. Since 1967 the Constitution has changed but it still fails to recognise rights of the indigenous peoples of Australia and still contains a 'race' power which does not a guarantee equal treatment of races.

This is evidence that Australia is racist.

In 2007 the parliament voted to again suspend the Racial Discrimination Act when it adopted the 'Northern Territory Intervention' laws to adversely affect the Aboriginal people of the Northern Territory. The RDA remains suspended. All major political parties have voted to implement this racist law. The current government has clearly failed for over two years since attaining control of government to reinstate equality for all people in Australia.

This is evidence that Australia is racist.

The international Committee on the Elimination of Racial Discrimination (CERD), the body established to adjudicate on the Convention on the Elimination of All Forms of Racial Discrimination, has examined Australia's reports regarding racial discrimination and consistently concluded that Australia is racially discriminating against the Aboriginal and Torres Strait Islander people. Over recent years adverse

findings by CERD against Australia's racism against the Aboriginal and Torres Strait Islander people have been recorded in 1989, 1993, 1998, 1999, 2006 and 2009.

This is evidence that Australia is racist.

Most alarmingly, Australia has refused to support the Durban Declaration from the World Conference on Racism in 2000, and refused to participate in the Durban Review Conference in 2009. This disregard for global efforts to address racism, arrogant attitude towards non-white countries, and contempt for all victims of racism in need of global support, gives further evidence of Australia's racism and cultural arrogance.

Your recent comments as a Minister of the government that Australia is not racist are either clearly made in complete ignorance of the facts, or are yet another piece of evidence that Aboriginal and Torres Strait Islander people do not exist in Australia's view of human rights .

You must correct your statement to fairly account for Australia's racism, and remove misconceptions regarding the human rights problems which continue to exist unabated in this country.

FAIRA asks you to account for racist laws recently adopted by the parliament and to justify the lack of action by parliament to use its constitutional powers to outlaw and otherwise eliminate rampant and manifest racism.

Respectfully

Les Malezer
Chairperson
FAIRA

Tanner says Australia is not racist

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AAP

Australia is not a racist country but there are Australians with racist views, Finance Minister Lindsay Tanner says.

Mr Tanner said there's no doubt Australia still had a problem due to a number of attacks on Indian students.

He said he lacked detailed information about attacks that supposedly were racially motivated, adding it was often the case the final story was quite different to initial reports.

"I wouldn't want to put a particular view. There is no doubt there is a problem for Australia here," he told ABC television.

"The prime minister has acted to work with the states to actually develop a response and to ensure that we are tackling the issue in a measured way.

"Australian is not a racist country but inevitably there are people in this country who hold racist views. And there are people who are violent.

"As in all nations, there are bad apples."

A spate of attacks on Indian students, especially in Melbourne, has strained relations with India which has said it is increasingly difficult to view such incidents as devoid of a racial motive.

Mr Tanner said the federal government was working overtime in concert with the states, particularly Victoria and NSW, to address these concerns.

"We are very conscious of the importance of Australia's image internationally and we are working hard to deal with these things," he said.

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