

Dylan Lino
Melbourne Law School
The University of Melbourne
University Square
185 Pelham Street
Carlton VIC 3053

dlino@student.unimelb.edu.au

30 September 2011

Indigenous Constitutional Recognition Secretariat
Department of Families Housing Community Services and Indigenous Affairs
PO Box 7576
Canberra Business Centre ACT 2610

Submission to the Expert Panel on Constitutional Recognition of Indigenous Australians

I welcome the opportunity to make a submission to the Expert Panel on the important issue of constitutional recognition of Aboriginal and Torres Strait Islander people.

I am in the early stages of doctoral research at Melbourne Law School into federal constitutional reform and Aboriginal and Torres Strait Islander people. I am also involved in a research project on the same topic at the Indigenous Law Centre, University of New South Wales.

I have written this submission in my personal capacity – it does not necessarily represent the views of the organisations with which I am affiliated.

The focus of this submission is the ‘race power’ in s 51(xxvi) of the *Constitution*.

Sincerely,

Dylan Lino

Introduction

The Expert Panel has raised a number of reform possibilities concerning the race power. They are these:

- repeal the race power as a Commonwealth head of power;
- amend the race power so that it can only be used to make laws for the benefit or advancement of Aboriginal and Torres Strait Islander peoples and other racial groups;
- insert a new guarantee of non-discrimination and racial equality for all Australians in the *Constitution*; and
- create a new head of power authorising laws with respect to the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples.¹

In considering these reform possibilities raised by the Expert Panel, I will address four issues:

- whether the *Constitution* should contain a power – either the race power or a new Indigenous-specific power – that permits the Federal Parliament to make laws specifically about Aboriginal and Torres Strait Islander people;
- whether the race power should be replaced with an Indigenous-specific power;
- the consequences of repealing the race power and not replacing it with an Indigenous-specific power;
- placing limits on the power to make laws about Aboriginal and Torres Strait Islander people.

In summary, I argue as follows:

- the *Constitution* should contain a power permitting the Federal Parliament to make laws specifically about Aboriginal and Torres Strait Islander people;
- the race power should be replaced with an Indigenous-specific power;
- if the race power were repealed and not replaced with an Indigenous-specific power, this would deprive Parliament of the power to make some but not all laws in Indigenous affairs;
- as a minimum, the power to make laws about Indigenous people should be constitutionally limited by a new stand-alone provision, applicable to the Commonwealth, States and Territories, prohibiting racial discrimination and guaranteeing racial equality.

¹ Expert Panel on Constitutional Recognition of Indigenous Australians, ‘A National Conversation About Aboriginal and Torres Strait Islander Recognition’ (Discussion Paper, May 2011) 18.

I A Power to Make Laws about Indigenous People

A Overview

Australian governments, both State and Commonwealth, have long made laws specifically about Aboriginal and Torres Strait Islander people. These can be broadly traced through the different policy eras in Indigenous affairs, from ‘protection’, through to ‘assimilation’, ‘self-determination’, and the present (which might be called the ‘post-self-determination era’, for want of a more apt description). At the Commonwealth level, this lawmaking has taken place under a range of constitutional powers, including since 1967 the race power in s 51(xxvi). Though under the original *Constitution* the race power did not extend to ‘the aboriginal race in any State’ (a situation that changed with the 1967 referendum), the Federal Parliament still made a number of laws about Indigenous people between 1901 and 1967. Perhaps most significant – and, for those affected, the most detrimental and invasive – were the various ordinances, made in accordance with s 122 of the *Constitution*, directed towards the governance of Aboriginal people in the Northern Territory.² The other key laws made about Indigenous people before 1967 were a number of express provisions which prevented Indigenous people from receiving certain federal entitlements (eg, the federal right to vote, various social services benefits).³

Post-1967, numerous laws have been passed (and often amended and repealed) concerning Aboriginal and Torres Strait Islander people under the race power. These include the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (now the *Aboriginal and Torres Strait Islander Act 2005* (Cth)), the *Council for Aboriginal Reconciliation Act 1991* (Cth), the *Native Title Act 1993* (Cth), the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).⁴ In fact, it would appear that the race power has only ever been relied upon to make laws concerning Indigenous people and not other racial or cultural groups. Other powers that have been used to make federal laws with respect to Aboriginal and Torres Strait Islander people in recent years include s 122 (which supported the Northern Territory Intervention legislation), s 96 and s 51(xxiiiA).

Clearly, then, the Commonwealth Parliament *does* have power under the *Constitution*, in s 51(xxvi) and other provisions, to make laws specifically about Indigenous people, and it has used its power not infrequently. The question I want to address here is: *should* the Parliament have a particular power – either the race power or a new Indigenous-specific power – to make laws specifically about Aboriginal and Torres Strait Islander people? In short, my answer is that there are good reasons to retain such a power. To arrive at this conclusion, however, four issues need to be addressed:

² The ordinances were not made by the Federal Parliament itself but by the Federal Executive as delegated legislation, which was subject to parliamentary supervision.

³ See John Summers, ‘The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901–1967’ (Vision in Hindsight Research Paper No 10, Department of the Parliamentary Library, 31 October 2000); Sean Brennan and Zoe Craven, “Eventually They Get It All ...”: Government Management of Aboriginal Trust Money in New South Wales’ (Research Report, Indigenous Law Centre, 2006).

⁴ In the absence of judicial review of much of this legislation, it cannot be said definitively that all of this legislation – or every single provision in it – derives constitutional support from the race power.

equality and Indigenous difference, Indigenous sovereignty, federalism, and the appropriateness of governance by legislation.

It should be emphasised that this issue is separate from what sort of limits should be placed on the race power or an Indigenous-specific power.

B Equality and Indigenous Difference

On one view of the principle of equality, everyone should be treated the same, no matter what their racial, ethnic or cultural background. According to this ‘colour-blind’ understanding, the act of making racial distinctions is inherently discriminatory. In the case of laws made specifically about Indigenous people, the criticism would be that such laws of necessity either adversely impact Indigenous people by disadvantaging them *or* (and this is perhaps the more common contemporary criticism) benefit Indigenous people only and thereby constitute ‘reverse-discrimination’ against non-Indigenous people. On this view, it is inappropriate for the Federal Parliament to make laws about Indigenous people because this violates the egalitarian idea that everyone should be treated the same. Presumably, advocates of this view would like to see the race power repealed and not replaced by some other power to make laws specifically about Indigenous people.

As I see it, this understanding of equality is impoverished. Equality does not demand equal treatment in all circumstances; it requires that everyone be treated as an equal, that is, with equal concern and respect.⁵ Typically, this means that where people are alike in relevant ways they should be treated alike, and where they are different in relevant ways they should be treated differently in proportion to that difference.⁶ Where there are relevant factual differences between groups of people, treating those people with equal concern and respect demands that their differences be taken into account in an appropriate and proportionate manner. Under international law, for differential treatment of particular racial groups to be non-discriminatory and accord with the principle of equality, such treatment must be undertaken for legitimate purposes and must be proportionate to those purposes.⁷

To the extent that there are relevant factual differences between Indigenous people and other groups, then, it can be legitimate to take those differences into account, including through law. Without generalising about or essentialising the incredibly diverse Australian Aboriginal and Torres Strait Islander population, some differences that may be relevant to take into account in lawmaking are that Indigenous people:

- have a unique status as descendants of the first peoples of Australia, with certain concomitant claims or rights entailed by that status (eg, rights to land and heritage);

⁵ See Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 227.

⁶ See *South West Africa (Liberia v South Africa) (Judgment)* [1966] ICJ Rep 6, 305 (Judge Tanaka).

⁷ See, eg, Committee on the Elimination of Racial Discrimination, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, 57th sess, [8], UN Doc CERD/C/GC/32 (24 September 2009).

- are recognised as peoples under developing international law and state practice (including in Australia), with associated rights to self-determination;⁸
- are a cultural minority within the broader Australian polity;
- have been historically subjected to injustices by the state (for instance, issues surrounding dispossession, the Stolen Generations and stolen wages); and
- are, statistically speaking, the most disadvantaged group in Australia across a whole range of social and economic indicators.

Without a specific power in the *Constitution* like s 51(xxvi), it would not be possible for the Federal Parliament to make laws on many of these issues on a national basis. Accordingly, if we want the Federal Parliament to be able to take account of relevant Indigenous differences when making laws, it is desirable to retain the race power or create a new power to make laws about Aboriginal and Torres Strait Islander people.

C Indigenous Sovereignty

Some may raise an Indigenous sovereignty objection to the Federal Parliament making laws about Aboriginal and Torres Strait Islander people. Such a view holds that it is inappropriate for the Federal Parliament to make laws about Indigenous peoples because this represents an unjustified incursion upon sovereign and self-determining Indigenous polities. Those holding this view may seek that the race power be repealed and not replaced by an Indigenous-specific power, so that non-Indigenous sovereignty does not impinge upon Indigenous peoples. On my understanding, this view, at least in its absolute form (ie, the Australian Government should have no sovereignty over Indigenous people whatsoever), is not widespread amongst Aboriginal and Torres Strait Islander people or the non-Indigenous population, though it no doubt has adherents. That being said, I do not dismiss this aspiration to Indigenous sovereignty and self-determination, and more generally I think Indigenous peoples ought to have options for exercising greater self-governance where they so choose.

However, to insist that Indigenous sovereignty or self-determination should currently and of necessity exclude the exercise of Anglo-Australian sovereignty over Indigenous peoples is, I think, to ignore two interrelated present-day realities. First, for better or worse, Indigenous people are now to differing extents bound up within the wider Australian polity and society. Second, Aboriginal and Torres Strait Islander people are extremely diverse and have a variety of individual and collective aspirations, which are in part determined by their relationship with wider Australia.

As such, for many – perhaps a considerable majority – of Aboriginal and Torres Strait Islander people today, the establishment of Indigenous sovereignty (or sovereignties) wholly unencumbered by the Australian state is neither feasible nor desirable. Their lives – where they live and work, who their family and friends are, the various public and private services they receive – are inextricably interwoven with the social, political and economic fabric of broader Australia. For these people, the question is

⁸ The *Declaration on the Rights of Indigenous Peoples* explicitly recognises Indigenous groups as peoples and as having the right of self-determination: see art 3. Though Australia, Canada, the United States and New Zealand voted against the *Declaration* in the United Nations General Assembly (and were the only states to do so), all four countries have now changed their position and publicly endorsed the *Declaration*.

not *whether* they should be subject to non-Indigenous sovereignty, but *how* and to what *extent* such sovereignty should be exercised over them. Here it is worth recalling my earlier point that it can be legitimate for lawmaking to take account of Indigenous difference, and that the race power or an Indigenous-specific analogue of it may be necessary for such purposes.

For other Aboriginal and Torres Strait Islander peoples, total independence from the Australian state may nonetheless be feasible and desirable. Let us assume here that this is also a political possibility. Due to the entanglement of Indigenous and non-Indigenous polities and communities in Australia, any process of decolonisation or secession is bound to be messy and complex, and will require much more than a simple abdication of Anglo-Australian sovereignty over those Indigenous polities that demand independence. If this process is to be achieved by lawful rather than revolutionary means, it would most likely require legislative action by the Federal Parliament.⁹ To this extent, a specific head of power to make laws about Indigenous people may be of assistance or even necessary to any project of Indigenous independence, rather than antithetical to it.

In sum, a specific head of power to make laws about Indigenous people has something important to offer both those Indigenous groups who wish to remain a part of the Australian state and those who aspire to total independence from it.

D Federalism

A consideration of the powers given to the Federal Parliament needs also to take into account issues of federalism. Thus, while some people may not object to specific laws being made about Indigenous people, they may nevertheless object to such laws being made by the *Federal Parliament* (as distinct from the State parliaments). This federalist position was the general view of the *Constitution*'s framers, who felt that the governance of Indigenous people as a distinct group was a matter for the States and not the Commonwealth.¹⁰ The result was that Aboriginal people in the States were excluded from the scope of the race power. However, from the early years of federation this position came under attack. Ultimately it was roundly defeated in the 1967 referendum, the outcome being an acceptance that the Commonwealth and the States each should shoulder considerable responsibilities insofar as the governance of Aboriginal and Torres Strait Islander people is concerned.

Other federations have seen fit to assign governmental authority concerning Indigenous people to the federal level of government, in some cases exclusively. Under the *United States Constitution*, the 'Indian commerce clause' gives Congress the power to 'regulate commerce ... with the Indian Tribes', which has long been judicially construed as giving Congress exclusive and plenary power to make laws in

⁹ This is analogous to the processes which occasioned the achievement of 'responsible government' for the Australian colonies in the 19th century, and the Commonwealth's and States' legal independence from the United Kingdom in the 20th century. To varying degrees, these processes have relied upon the passage of legislation by the United Kingdom.

¹⁰ See Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) 2–5.

Indian affairs.¹¹ Canada's *Constitution Act 1867* similarly makes clear that exclusive legislative authority is vested in the Canadian Parliament with respect to 'Indians, and lands reserved for the Indians'.¹² More recently, the 1996 *South African Constitution* stipulates that concurrent power vests in the South African national and provincial parliaments in respect of 'Indigenous law and customary law' and '[c]ultural matters'.¹³

There are a number of sound reasons why the Federal Parliament ought to have specific lawmaking power in Indigenous affairs. Many of these were raised by those who campaigned for the race power to be amended in the 1967 referendum.¹⁴ They include the following:

- in some areas (for instance, where national uniformity or coordination is required or desirable) lawmaking in Indigenous affairs is more appropriate and effective on a national basis;
- the Commonwealth, not the States, is held accountable internationally for the treatment of Australia's first peoples;
- financially, the Commonwealth is better positioned than the States to make provision for Indigenous people's welfare;
- the Commonwealth has become increasingly involved in areas of traditional State responsibility that have a bearing on Indigenous people (eg, health, education, housing, lands, law and order); and
- the existence of a national lawmaking power concerning Indigenous people provides, by virtue of s 109, the legal opportunity for the Commonwealth to override discriminatory State laws.

Of course, this is not to deny the ongoing importance of the States – their responsibilities often have great significance for Indigenous people's wellbeing and interests. It is just to say that there are good reasons why the Federal Parliament ought to *also* have lawmaking power with respect to Aboriginal people and Torres Strait Islanders. As such, the retention of a national power to legislate specifically about Indigenous people can be defended on federalist grounds.

E Appropriateness of Governance by Legislation

Within the Australian political system, the task of governing the population is enabled primarily through the passage of legislation. Excepting the limited range of non-legislated executive powers, administration must be authorised by and carried out according to statute. And aside from the common law, the public laws enforced by the judiciary are parliamentary enactments (with the *Constitution* being a special type of enactment). It is this predominant form of legislative governance that is enshrined in relation to Aboriginal and Torres Strait Islander people when the Federal Parliament

¹¹ *United States Constitution* art I § 8. See Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, 2009) 57–9.

¹² *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, s 91(24). Provincial parliaments' capacities to pass laws concerning Indians are restricted: see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) 116.

¹³ *Constitution of the Republic of South Africa Act 1966* (South Africa) sch 4 pt A.

¹⁴ See generally See Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) chs 3–6.

is expressly given power to make laws about Aboriginal and Torres Strait Islander people. Governance by legislation (and administration according to legislation) has been the principal means of formally governing Indigenous people within the Anglo-Australian political system for over a century. Of course, for many millennia right through to the present, Indigenous people have also been governed under their own political and legal arrangements, but these are not the focus here.

Is this form of governing Indigenous people appropriate? It is certainly not ideal. Comprising only a very small proportion of the overall population, Indigenous people are generally at a significant disadvantage when it comes to influencing parliamentary outcomes. This occurs at the ballot box, where Indigenous voters routinely, though by no means uniformly, constitute an electoral minority whose concerns can be discounted or neglected by political parties. It also occurs within parliaments themselves, with the number of Indigenous members generally not even being proportionate to their small numbers in the general population. At the Commonwealth level, there have been only three Aboriginal parliamentarians since federation (Ken Wyatt, the first Aboriginal member of the House of Representatives, was elected in 2010) and no Torres Strait Islander parliamentarians. Indigenous political power can be influential in other ways – for instance, through lobbying and campaigns conducted by the organisations comprising the ‘Indigenous sector’¹⁵ – but ‘the problem of the three per cent Mouse versus the 97 per cent Elephant’¹⁶ remains. While governments may commit to processes of engagement and consultation with Aboriginal and Torres Strait Islander people in relation to the making of law and policy, the quality and level of such engagement varies and its occurrence is ultimately at the discretion of government. Indigenous stakeholders can have input into parliamentary deliberations; for instance, through the making of submissions to parliamentary committees. However, the impact and quality of such input may be substantially reduced through both an unreceptiveness to expressed Indigenous views and truncated committee processes. Each problem was clearly manifest in relation to the original Northern Territory Intervention legislation.

It is possible that alternative modes of governance would produce better or more just outcomes. In particular, outside of Australia Indigenous–state governance arrangements have for many centuries frequently taken a different form: formal negotiation and agreement-making between Indigenous peoples and government representatives. During the early days of settler-colonies, such agreement-making typically took place as a government-to-government exercise, from the non-Indigenous side as an incident of executive (or Crown) power. In recent decades in Australia, an incipient culture of agreement-making between Aboriginal and Torres Strait Islander peoples and other stakeholders (including governments) has developed (though generally under the auspices of legislation).¹⁷ Agreement-making allows Indigenous groups to have a much more direct say over how they are governed. It is

¹⁵ See Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal and Islander Australia* (UNSW Press, 2002).

¹⁶ Noel Pearson, ‘Reconciliation Must Come with the Republic’, *The Australian* (online), 14 January 2010 <<http://www.theaustralian.com.au/news/opinion/reconciliation-must-come-with-the-republic/story-e6frg6zo-1225818986734>>.

¹⁷ See, eg, Agreements, Treaties and Negotiated Settlements Project <<http://www.atns.net.au>>; Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (The Federation Press, 2006).

also conducive to the reaching and implementation of arrangements that are tailored to the circumstances of discrete and diverse Indigenous groups. It is these and other attractions that have led to advocacy for the insertion of an Indigenous–state agreement-making power within the *Constitution*, an option that has been raised by the Expert Panel.¹⁸ There is, in my opinion, a great deal to recommend the insertion of some sort of agreement-making power in the *Constitution*.

Nonetheless, governance by legislation, for all its drawbacks, is likely to be a necessary feature of the Indigenous affairs landscape for some time to come. Though the knowledge and expertise of Indigenous and non-Indigenous participants in negotiations has significantly increased over the last few decades,¹⁹ there is not yet an entrenched and dominant culture of agreement-making between Indigenous peoples and Australian governments. Some may say that this is precisely the problem that withdrawing lawmaking capability over Indigenous people from the Federal Parliament would be designed to address. However, in the current absence of widespread Indigenous–state agreement-making, the removal of federal legislative power in Indigenous affairs may leave an undesirable governance vacuum. Until we are confident that agreement-making is capable of standing alone as an Indigenous–state governance method, governance by legislation remains indispensable. Thus, while agreement-making should be encouraged and increased (including, for instance, through a new constitutional agreement-making power), the power to legislate should not be abandoned – at least not yet. Furthermore, the alternative modes of governance by legislation and agreement-making are not mutually exclusive. Lawmaking in Indigenous affairs may actually enable and facilitate agreement-making by, for instance, putting in place regimes by which Indigenous groups are able to take on legal form or under which negotiations can be structured. This is in fact the case with extant forms of agreement-making between Indigenous peoples and others in Australia. Finally, even within a context in which agreement-making is the predominant mode of Indigenous–state interaction, in some areas national lawmaking about Aboriginal and Torres Strait Islander people as a whole may still be necessary or desirable.

To sum up, while governance of Indigenous people by legislation is flawed and agreement-making has much to recommend it, lawmaking is presently a necessary means by which Indigenous people in Australia should be governed.

F Summary

In terms of taking account of Indigenous difference, accommodating Indigenous people’s diverse aspirations and relationships with Australian society, striking an appropriate federal balance in Indigenous affairs, and maintaining effective modes of governing Indigenous people, it makes sense to retain the race power or an Indigenous-specific analogue of it.

¹⁸ Expert Panel on Constitutional Recognition of Indigenous Australians, ‘A National Conversation About Aboriginal and Torres Strait Islander Recognition’ (Discussion Paper, May 2011) 19.

¹⁹ See, eg, Sean Brennan et al, *Treaty* (The Federation Press, 2005) 117.

II Replacing the Race Power with an Indigenous-Specific Power

If it is accepted that some constitutional head of power is needed to make laws specifically about Aboriginal and Torres Strait Islander people, the question then becomes whether or not the race power should be replaced by an Indigenous-specific power.

There are good reasons to replace the race power with an Indigenous-specific power. First, and most importantly, the concept of ‘race’ is, in the words of Chief Justice French, a ‘false taxonomy’,²⁰ which has its origins in offensive, anachronistic and incorrect biological understandings of social and cultural difference. It is true that the High Court has adopted a more contemporary and flexible understanding of ‘race’.²¹ This has enabled the passage of various Indigenous-specific laws that do not depend on the antiquated understandings of race based in blood quantum or evolutionary theory that were applied to Indigenous people in the past. The problem with ‘race’ is less in the application and more in the connotation: dealing with Indigenous people under the *Constitution* as a ‘race’ is not, in the eyes of many, an appropriate contemporary form of constitutional recognition.²² Second, the race power has, as far as I can gather, never been required to make laws about any racial groups other than Aboriginal and Torres Strait Islander people. Even in the heyday of the white Australia policy, other constitutional powers were more amenable to racially specific laws than the race power.²³ Beyond the case of Indigenous people, then, the race power has not been necessary and its removal would not be missed.

For these reasons, the race power should be replaced with a new power specific to Aboriginal and Torres Strait Islander people.

III Consequences of Repealing and not Replacing the Race Power

A number of consequences would flow if the race power were repealed and not replaced by an Indigenous-specific power. Some consequences would be undesirable for proponents of keeping such a power, but others would be problematic from the perspective of those who want the power removed. In short, it would no longer be possible for the Federal Parliament to make some Indigenous-specific laws, some existing laws would be rendered unconstitutional, and Indigenous-specific laws could still be made by the Federal Parliament in some areas and by the States and Territories.

²⁰ Justice Robert French, ‘The Race Power: A Constitutional Chimera’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 208.

²¹ See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 243–4 (Brennan J). There still remains a biological descent test, which many view as problematic. However, this test attaches not only to the judicial interpretation of ‘race’ but also to judicial understandings of Indigeneity. As such, replacing ‘race’ with Indigeneity does not solve the problem.

²² For a forceful and persuasive critique of ‘race’, see Marcia Langton, ‘Why We Need Constitutional Change to Recognise Australia’s First People’ (11 July – 7 August 2011) 7(7) *Voice 5* <<http://voice.unimelb.edu.au/sites/voice.unimelb.edu.au/files/VoiceJuly2011.pdf>>.

²³ See John Quick, *The Legislative Powers of the Commonwealth and the States of Australia* (Law Book, 1919) 508–9.

A Some Indigenous-Specific Laws Unable to be Made

Most obviously, deleting the race power would prevent the making of national laws concerning Aboriginal and Torres Strait Islander people in some areas. For laws that would depend solely on the race power or an Indigenous-specific power for constitutional validity, taking away that power would prevent the Federal Parliament from being able to make such laws. Without the race power, it would probably not be possible to make many of the national laws in Indigenous affairs that have been passed over the years since 1967. These include laws concerning:

- native title (*Native Title Act 1993* (Cth) and its various amending Acts, Wild Rivers (Environmental Management) Bill 2011 (Cth));
- land rights (*Aboriginal Land Fund Act 1974* (Cth), *Aboriginal Development Commission Act 1980* (Cth), *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth));
- Indigenous cultural heritage (*World Heritage Properties Conservation Act 1983* (Cth), *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth));
- Indigenous representative bodies (*Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), *Aboriginal and Torres Strait Islander Act 2005* (Cth));
- reconciliation (*Council for Aboriginal Reconciliation Act 1991* (Cth));
- the overriding of discriminatory State laws (*Aboriginal and Torres Strait Islanders (Queensland Discriminatory) Laws Act 1975* (Cth), *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978* (Cth), Wild Rivers (Environmental Management) Bill 2011 (Cth)),²⁴
- the transfer of functions, responsibilities and staff from State Indigenous affairs departments to the Commonwealth (*Aboriginal Affairs (Arrangements with the States) Act 1973* (Cth));
- some aspects of Indigenous welfare (*Aboriginal Enterprises (Assistance) Act 1968* (Cth), *Aboriginal Development Commission Act 1980* (Cth), *Coordinator-General for Remote Indigenous Services Act 2009* (Cth)); and
- possibly also Indigenous organisations (*Aboriginal Councils and Associations Act 1976* (Cth), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)).²⁵

From the perspective of many Indigenous and non-Indigenous people, there are undoubtedly problems – in a number of cases arguably even deep deficiencies – with the legislation made under the race power. However, the question is not whether federal lawmaking in Indigenous affairs can be improved, because undoubtedly it can and should (including through the imposition of new constitutional limitations on

²⁴ Possibly also *Racial Discrimination Act 1975* (Cth) s 10(3), which concerns laws facilitating the non-consensual management of Indigenous people's property.

²⁵ It is possible that laws in some of these areas might be made under the external affairs power (s 51(xxix)), though this is ultimately uncertain and would strain the bounds of settled doctrine. Laws about Indigenous organisations might possibly be made under the corporations power (s 51(ii)), though it would seem that reliance on the corporations power was not the Parliament's intention with respect to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth): see Department of Parliamentary Services, *Bills Digest*, No 82 of 2005–06, 31 January 2006, 7.

lawmaking power with respect to Indigenous people). Rather, the question is whether having a constitutional power to make laws in these areas is better than not having that power. As I have emphasised above, there are good reasons for retaining such a power.

B Some Existing Indigenous-Specific Laws Likely to Become Invalid

Repealing the race power would have ramifications not only for future lawmaking but also for the validity of numerous existing laws in Indigenous affairs. Many of those laws listed above would almost certainly be rendered unconstitutional if the race power were repealed. For some of these laws, a great deal of public and private activity depends on and takes place according to their terms. For instance, interactions, negotiations and agreements between the claimants and holders of native title and resource companies occur under the complex and comprehensive legal regime set out in the *Native Title Act 1993* (Cth), which the High Court has confirmed gains constitutional support from s 51(xxvi).²⁶ Another instance concerns the several thousand Indigenous corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), many of which are involved in service delivery for Indigenous people. If the race power were repealed, and the constitutionality of laws passed under it were made doubtful as a consequence, this would create substantial uncertainty for the individuals, groups and organisations whose activities are shaped by those laws. Even those who would like to see the race power repealed and not replaced ought to be mindful of these consequences.

C Some Indigenous-Specific Laws Could Still be Made

At the same time, it is clear that repeal of the race power would not prevent the making of all federal laws in Indigenous affairs. This is because Indigenous-specific laws may be referable to and valid under heads of power other than s 51(xxvi). Indeed, as noted earlier, prior to the extension of the race power to ‘the aboriginal race in any State’ in 1967, various laws specifically about Indigenous people were passed by the Federal Parliament.

In more recent decades, the most significant heads of power (other than the race power) used to make laws about or govern Aboriginal and Torres Strait Islander people are s 96 (the grants power) and s 122 (the Territories power). Section 96 has seen the provision of tied financial grants to the States with respect to their Indigenous residents. Most recently, and significantly, this has occurred through an array of National Partnerships and National Agreements (especially the National Indigenous Reform Agreement) that operate under the 2009 Intergovernmental Agreement on Federal Financial Relations.²⁷ In relation to s 122, the most renowned enactments

²⁶ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

²⁷ The governance arrangements pertaining to this intergovernmental regime are complex and consist largely of intergovernmental agreements supported by the *Federal Financial Relations Act 2009* (Cth), under which grants are made. See Australian Government, *2011–12 Australian Government Budget – Budget Paper No 3* (10 May 2011) Appendix A <<http://cache.treasury.gov.au/budget/2011-12/content/download/bp3.pdf>>; Ministerial Council for Federal Financial Relations, *National Partnerships – Indigenous* <http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/indigenous.aspx>; Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (13 February 2011) Ministerial Council for Federal Financial Relations

under this head of power are the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the Northern Territory Emergency Response legislation.²⁸ All of this government action in Indigenous affairs – and much more, including under a whole range of other heads of power – could occur even if the race power were repealed. Repeal of s 51(xxvi) would therefore be unable, on its own, to prevent laws being made by the Federal Parliament.

Finally, repeal of the race power would not affect the power of State and Territory parliaments to make laws about Aboriginal and Torres Strait Islander people. Subject to certain limitations, the parliaments of the States and Territories generally have plenary power to make laws for the ‘peace, order and good government’ of their jurisdictions. In the exercise of their power, the States and Territories have made numerous laws specifically about Indigenous people. This lawmaking capacity would be unaffected by repeal of the race power.

If those who object to the making of Indigenous-specific laws are serious about their objections, they would need to advocate a constitutional amendment beyond repealing the race power. Specifically, there would need to be inserted into the *Constitution* an explicit prohibition on the making of laws about Aboriginal and Torres Strait Islander people.²⁹ If the prohibition was to extend to the States and Territories as well as the Commonwealth, this would have to be expressly stated.

IV Placing Limits on the Race Power or an Indigenous-Specific Power

If it is accepted that the race power or an Indigenous-specific power should be retained, the next question to consider is whether or not additional express limits should be imposed upon the power so as to curtail its scope. The Expert Panel has suggested a number of limits that might be imposed upon the race power or an Indigenous-specific power:

- the explicit confinement of laws made under the power to those that are for the purpose of benefitting or advancing the group concerned;
- the insertion of a guarantee of non-discrimination and racial equality; and
- the creation of a new head of power to make laws about Indigenous people based on their culture, historical disadvantage and distinct status as descendants of the original owners and occupiers of Australia.³⁰

The broad intention of these kinds of reforms is to prevent laws being made about Indigenous people that discriminate against or disadvantage them. This is an

<http://www.federalfinancialrelations.gov.au/content/national_agreements.aspx>. Earlier use of s 96 in Indigenous affairs can be seen, for example, in the *State Grants (Aboriginal Advancement) Act 1968* (Cth).

²⁸ *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth). Aspects of these pieces of legislation would also likely be supported by other constitutional powers (in particular s 51(xiiiA)).

²⁹ Ironically, such a provision itself would be a law about Aboriginal and Torres Strait Islander people. But it would constitute the exception that proves (or makes) the rule.

³⁰ Expert Panel on Constitutional Recognition of Indigenous Australians, ‘A National Conversation About Aboriginal and Torres Strait Islander Recognition’ (Discussion Paper, May 2011) 18–19.

important and worthwhile aim. The question is how this can best be achieved and, in this respect, I make two suggestions.

First, the Expert Panel should be looking at imposing limits on all lawmaking about Aboriginal and Torres Strait Islander people at all levels of government, not simply lawmaking by the Federal Parliament under the race power or an Indigenous-specific power. Recall that the States and Territories generally have plenary lawmaking power, including in Indigenous affairs, and that the Federal Parliament can pass, and has passed, laws about Indigenous people under its other heads of power. In both cases, some of these laws have discriminated against or been detrimental to Indigenous people, so it is important that any new limits also apply to the States and Territories, and across all heads of power.

My second suggestion concerns the type of limits imposed. As a minimum, the limits should be targeted at preventing discrimination against Indigenous people while permitting laws to be made that are proportionate to relevant Indigenous differences. Serious thought should also be given to imposing a requirement that Indigenous-specific laws can only be passed after some level of consultation with the Indigenous people affected.

I discuss these two suggestions and ways of achieving them in more detail below.

A Limiting All Lawmaking in Indigenous Affairs

In order for a new constitutional limitation on power to constrain all lawmaking in Indigenous affairs at all levels of government, consideration must be given to where the limitation is placed and how it is worded. In terms of placement, there are two main options:

- placement of a constitutional limitation within the race power or an Indigenous-specific power; or
- placement of a constitutional limitation in a stand-alone provision, separate to the race power or an Indigenous-specific power.

While it would ultimately depend on the wording, placing a constitutional limitation in a stand-alone provision, outside the race power or an Indigenous-specific power, is more amenable to constraining all lawmaking in Indigenous affairs than placing a limitation within the race power or an Indigenous-specific power. Limitations contained within heads of power themselves do not necessarily constrain other heads of power and are unsuited to the task of constraining the States and Territories. Accordingly, I think that the insertion of a constitutional limitation external to the race power or an Indigenous-specific power is necessary. That being said, including limitations within the race power or an Indigenous-specific power *as well* might also be desirable as an added level of constitutional protection.

1 Placement of Limitation within the Power Itself

(a) Constraining Other Heads of Power

Whether the limits contained in one power constrain the scope of other powers depends on the wording of the limitation. The general approach of the High Court is that limits which form part of an affirmative grant of power do not limit the scope of other powers, whereas limits which expressly extract from or qualify a grant of power do limit other powers.³¹

Section 51(i), the trade and commerce power, provides a good example of a limit contained within an affirmative grant of power: it extends to ‘trade and commerce ... among the States’. The High Court has made clear that, in this aspect, the power extends only to interstate trade ('among the States') and does not enable the Parliament to pass laws with respect to intrastate trade (ie, trade within the boundaries of individual States).³² However, despite the Parliament being unable to regulate intrastate trade under s 51(i), it is open to the Parliament to regulate intrastate trade under its other constitutional powers, such as the corporations power (s 51(xx)).³³ In other words, the limit within the affirmative grant of power does not constrain other heads of power.

An example of an express qualification or restriction in a grant of power can be seen in s 51(xiii), the banking power. This provides power with respect to ‘banking, other than State banking’.³⁴ Because the limitation is framed in negative or restrictive terms ('other than State banking') that extract from a general area of power ('banking'), the High Court has said that the limitation acts to curtail Commonwealth legislative power generally, not only the banking power itself.³⁵ So, if a law made under, say, the corporations power could also be characterised as a law with respect to banking, that law could not extend to State banking.

That being said, the High Court has been reluctant to construe some powers as being constrained by the express restrictions contained in other heads of power. In particular, the grants power (s 96) and the Territories power (s 122), both of which are fairly sweeping in their language and subsequent judicial interpretation, have been resistant to the express limitations present in other powers.³⁶ To give one example, the High Court has held that the grants power is not constrained by the express restrictions in the taxation power (s 51(ii), which covers ‘taxation; but so as not to discriminate between States or parts of States’) or the bounties power (s 51(iii): ‘bounties ... but so that such bounties shall be uniform through the Commonwealth’).³⁷ Only recently has

³¹ This point and the following discussion draws on Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th ed, 2008) 34–7; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 5th ed, 2010) 754–9.

³² See, eg, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

³³ See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

³⁴ Note that the ‘other than State banking’ qualification itself is qualified, as subsequent words in the provision make clear that the power encompasses ‘State banking extending beyond the limits of the State concerned’.

³⁵ *Bourke v State Bank of New South Wales* (1990) 170 CLR 276.

³⁶ See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 5th ed, 2010) 234–52; 1097–1100.

³⁷ *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735.

the High Court confirmed that the Territories power is limited by the guarantee of just terms for the acquisition of property found in s 51(xxi),³⁸ and it would appear that s 96 is probably now similarly constrained.³⁹ Despite these developments, it cannot be taken for granted that express restrictions in heads of power necessarily extend to ss 96 and 122.

What are the implications of all of this for the Expert Panel and Indigenous constitutional reform? If we want to constrain all federal lawmaking in Indigenous affairs, as I think we should, any new limitation inserted within a head of power should be framed in negative terms and as an express restriction. This maximises the chance that the limitation will be construed as constraining Commonwealth legislative power generally. In order to increase the likelihood of the limitation constraining all other heads of power – especially ss 96 and 122 – express words should be inserted making clear the intention that the limitation applies to other heads of power as well.

Drawing on both the Expert Panel’s suggestions and some other ideas, I suggest the following forms of wording.

Limits inserted into the race power:

- ‘the people of any race, for whom it is deemed necessary to make special laws; *provided that such laws made under this or any other power are for the benefit or advancement of the people concerned*’ (not ‘the benefit or advancement of the people of any race ...’)
- ‘the people of any race, for whom it is deemed necessary to make special laws; *provided that such laws made under this or any other power do not discriminate against the people about whom such laws are made*’
- ‘the people of any race, for whom it is deemed necessary to make special laws; *provided that such laws made under this or any other power are made following adequate consultation with the people about whom such laws are made*,⁴⁰

Limits inserted into an Indigenous-specific power:

- ‘Aboriginal and Torres Strait Islander people, *provided that such laws made under this or any other power are with respect to Aboriginal and Torres Strait Islander people’s culture, historical disadvantage, or distinct status as descendants of the original owners and occupiers of Australia*’ (not ‘Aboriginal and Torres Strait Islander people’s culture, historical disadvantage, or distinct status as descendants of the original owners and occupiers of Australia’)

³⁸ *Wurridjal v Commonwealth* (2009) 237 CLR 309.

³⁹ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 [46] (French CJ, Gummow and Crennan JJ).

⁴⁰ I concede that the phraseology of this last limitation is repetitive and lawyerly. However, I think that, if it were framed differently – for instance, ‘following adequate consultation with the people concerned/affected’ – this might problematically extend the duty to consult beyond the Indigenous people concerned to other people who were impacted by the laws. My presumption is that the views of such people, unlike those of Indigenous people, are adequately represented in Parliament.

- ‘Aboriginal and Torres Strait Islander people, *provided that such laws made under this or any other power are with respect to recognising or protecting Aboriginal and Torres Strait Islander people’s culture, ameliorating or accommodating their historical disadvantage, or recognising or protecting their distinct status as descendants of the original owners and occupiers of Australia*’ (not ‘recognising or protecting Aboriginal and Torres Strait Islander people’s culture, ameliorating or accommodating their historical disadvantage, or recognising or protecting their distinct status as descendants of the original owners and occupiers of Australia’)
- ‘Aboriginal and Torres Strait Islander people; *provided that such laws made under this or any other power do not discriminate against Aboriginal and Torres Strait Islander people*’
- ‘Aboriginal and Torres Strait Islander people; *provided that such laws made under this or any other power are made following adequate consultation with the Aboriginal and Torres Strait Islander people about whom the laws are made*⁴¹

(b) Constraining the States and Territories

Even if new constitutional limitations were framed as express restrictions within a grant of power, they would not constrain the power of the State parliaments.⁴² Just as grants of power in the *Constitution* are made only to the Commonwealth (with the States retaining residual plenary power), limitations within those constitutionally enumerated powers only apply to the Commonwealth. It might be possible to include within the limitation express words indicating that the limitation also applies to State laws. However, this would be an awkward fit with the Australian constitutional schema under which enumerated powers and any limitations they contain are directed towards the Federal Parliament. As such, if we want to constrain State legislative power, the better option is to insert any new limitations in a stand-alone provision.

It is unclear whether express restrictions in heads of power would necessarily operate to constrain the self-governing Territories. The question of whether constitutional limitations constrain the laws made by Territory legislatures may be distinct from whether constitutional limitations constrain Commonwealth laws made for the Territories under s 122.⁴³ Again, it may be possible to make explicit in the wording of a limitation within a grant of power that the limitation also extends to the Territories, but such an approach would be odd given that grants of power focus on the Federal Parliament. Stand-alone limitations are therefore better suited to constraining laws made by the Territories.

⁴¹ See the previous footnote.

⁴² Note that, under s 109 of the *Constitution*, federal laws about Indigenous people made in accordance with any new constitutional limitations would render inconsistent State laws inoperative.

⁴³ See *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; *Kruger v Commonwealth* (1997) 190 CLR 1, 109, 123 (Gaudron J).

2 Placement of Limitation in a Stand-Alone Provision

(a) Constraining All Heads of Power

A stand-alone limitation is better suited to the task of constraining all heads of power than a limitation contained within a specific head of power. Of course, the precise scope and application of a stand-alone limitation would depend on, *inter alia*, how it was worded and where exactly in the *Constitution* it was placed. But because stand-alone limitations are typically not associated with any specific head of power, their application across Commonwealth legislative power in general is less open to question than limitations contained within individual heads of power. Accordingly, there is a very strong likelihood that any new stand-alone limitation worded in general terms would act as a constraint on Commonwealth legislative power across the *Constitution*. Key examples of stand-alone limitations on Commonwealth legislative power include ss 80 and 116.

Again, however, ss 96 and 122 may be problematic in this regard. While stand-alone limitations appear to have had a little more success in constraining ss 96 and 122 than limitations contained within individual powers, it cannot be assumed that any new stand-alone limitation would condition the scope of ss 96 and 122.⁴⁴

In order to ensure that a stand-alone limitation applied across all powers, including ss 96 and 122, the best approach would be to make this clear in the provision's wording. So, for instance, the provision might contain a clause stating that it applied to 'all areas in which the Parliament has the power to make laws, including but not limited to section 96 and section 122'.

The chapter of the *Constitution* in which any new stand-alone limitation was placed may also be important, especially in the absence of express words extending the limitation to all Commonwealth legislative power. Consider the following example. It is sometimes suggested that a constitutional prohibition against racial discrimination should be inserted in the place of the current s 25.⁴⁵ While s 25 is within Chapter I, which concerns the Federal Parliament and which enumerates most of the Commonwealth's legislative powers, s 96 is contained in Chapter IV and s 122 in Chapter VI. The remoteness of s 25 from ss 96 and 122 militates against a new s 25-based limitation constraining those powers, and might only be overcome by express words. An alternative would be to place a new stand-alone limitation in the 'States' chapter, Chapter V, alongside other limitations such as s 116. For instance, as an alternative to the constitutional changes made in 1967, Liberal MP William Wentworth proposed the insertion into Chapter V of a new s 117A prohibiting racially discriminatory laws.⁴⁶ While such positioning of a new limitation would likely apply

⁴⁴ See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 5th ed, 2010) 234–52; 1097–1100.

⁴⁵ For instance, Patrick Dodson is quoted as advocating this in Michael Gordon, 'One More Step to Reconciliation', *The Age* (Melbourne), 22 September 2011 <<http://www.theage.com.au/national/one-more-step-to-reconciliation-20110921-1kl5u.html>>.

⁴⁶ It provided:

Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin:

to s 96,⁴⁷ the danger is that a limitation situated in Chapter V might not, without clear words, constrain s 122. This is because Chapter V is primarily concerned with the position of the States and not with the Territories.⁴⁸ Arguably, the best place for any new stand-alone limitations on Commonwealth power would be in Chapter VII, the ‘Miscellaneous’ chapter, or in a new chapter altogether. Ultimately, however, all of these issues could be to a large extent circumvented by the inclusion of words making clear that any new limitation extended to all powers including ss 96 and 122.

(b) Constraining the States and Territories

A new stand-alone limitation could be extended to the States without great legal difficulty. Whereas State legislative power is not constrained by any limitations contained within existing Commonwealth heads of power, a number of stand-alone limitations extend to the States. For instance, s 92 of the *Constitution* applies by clear implication to the States (and by less-clear implication to the Commonwealth).⁴⁹ Section 117 also by clear implication applies to the States (though whether it applies to the Commonwealth remains unsettled).⁵⁰ The best way of ensuring that any new stand-alone limitation applies to the States would be to be explicit in the wording.

In the absence of express words, the chapter placement of a new stand-alone limitation would likely be significant. For instance, placement in Chapter I, concerning the Federal Parliament, would militate against a limitation being applied to the States, whereas placement in Chapter V, concerning the States, would work in favour of the limitation having a State application (but see the previous section for reservations on inserting a provision into Chapter V).

Similarly, a new stand-alone limitation could also be explicitly extended to the Territories. It cannot be taken for granted that, just because a constitutional limitation extends to Commonwealth laws made for the Territories under s 122, the constitutional limitation also extends to the laws made by self-governing Territory legislatures.⁵¹ Accordingly, to be sure that any new constitutional limitation applied to the laws made by the Territories, the most prudent approach would be to make this clear in the wording of the limitation.

Provided that this section shall not operate so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia.

See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 125 (William Wentworth) 123.

⁴⁷ Just as s 116 has been said to apply to s 96: see *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559.

⁴⁸ For reasoning along these lines which refused to extend the application of s 116 to s 122, see the comments of Dawson J (with which McHugh J agreed) in *Kruger v Commonwealth* (1997) 190 CLR 1, 60.

⁴⁹ Against earlier precedent, the application of s 92 to the Commonwealth was settled in *James v Commonwealth* (1936) 55 CLR 1.

⁵⁰ On whether s 117 applies to the Commonwealth, see *Leeth v Commonwealth* (1992) 174 CLR 455, 468 (Mason CJ, Dawson and McHugh JJ), 488 (Deane and Toohey JJ).

⁵¹ See *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; *Kruger v Commonwealth* (1997) 190 CLR 1, 109, 23 (Gaudron J).

B Types of Limitations and their Operation

Limitations imposed on lawmaking in Indigenous affairs may be of different types and targeted at different ends. The Expert Panel has generally proposed the insertion of content-based limitations on lawmaking power in Indigenous affairs (ie, limitations that affect the content of laws). However, while content-based restrictions are certainly of worth, the Expert Panel should also consider the imposition of procedural limitations on lawmaking about Aboriginal and Torres Strait Islander people. In particular, one valuable reform might be to require that, prior to the passage of laws with respect to Indigenous people, adequate consultation takes place with the Indigenous people affected.

1 Limitations on Legislative Content

Content-based limitations on legislative power impact on the content of laws. They may limit the content of laws by requiring that laws be (or not be) on particular *subject-matters* (eg, the subject-matter of ‘Aboriginal and Torres Strait Islander people’), or by requiring that laws meet particular *standards* (eg, equality, non-discrimination, benefit).

(a) Subject-Matter

Limitations on lawmaking may confine laws to particular topics or subjects. Subject-matter limitations are inherent within each affirmative grant of power, which define and delimit particular topics of Commonwealth legislative competence (eg, ‘marriage’, ‘census and statistics’). Subject-matter limitations may also be framed in negative terms, to denote impermissible areas of lawmaking – as, for instance, under the original race power, which covered ‘the people of any race, *other than the aboriginal race in any State*’.⁵² One of the Expert Panel’s ideas entails subject-matter limitations on legislative power, by stipulating that laws can be made only on the topics of Indigenous people’s culture, historical disadvantage or distinct status as descendants of the original owners and occupiers of Australia. Another subject-matter limitation would be inherent in replacing the race power with a power to make laws about ‘Aborigines and Torres Strait Islanders’, as recommended by the Constitutional Commission in 1988.⁵³

Subject-matter limitations entail a relatively low level of scrutiny by the courts. In determining whether a law is within power, a court must first construe the relevant head of power broadly, ‘with all the generality the words used admit’.⁵⁴ After then ascertaining the character of the law in question, the court must determine if there is a ‘sufficient connection’ between the law and the head of power. There is no inquiry undertaken into ‘the justice and wisdom of the law’ or ‘the degree to which the means

⁵² Such negative limitations do not necessarily need to be contained within a head of power but may be in a stand-alone provision. For instance, s 55 stipulates that laws imposing taxation can deal with that matter only, with any provisions on other matters being rendered ‘of no effect’.

⁵³ Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) vol 2, 707.

⁵⁴ *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225–6.

it adopts are necessary or desirable'.⁵⁵ So, for instance, it would open to the Federal Parliament under the banking power to make laws that prohibited banking altogether; however unwise from a policy perspective, such laws could still be characterised as having a sufficient connection to banking.⁵⁶

What are the implications for Indigenous constitutional reform? Ultimately, any new subject-matter limitations inserted through a new Indigenous-specific power would be unlikely to constrain Commonwealth legislative power in Indigenous affairs more than the race power.⁵⁷ Consider one of the ideas raised by the Expert Panel: a new power to make laws with respect to Indigenous people's culture, historical disadvantage or distinct status as descendants of the original owners and occupiers of Australia. There may be some issues with this wording, and the Expert Panel should give this issue close attention.⁵⁸ Nonetheless, construing the words broadly, it is difficult to come up with any laws in Indigenous affairs, existing or future, that would not have a sufficient connection with this power. This includes laws that are to Indigenous people's detriment. The power would almost certainly support, for example, laws that sanctioned the desecration of Indigenous culture (as under the *Hindmarsh Island Bridge Act 1997* (Cth)), laws that prohibited courts from considering historical disadvantage in sentencing Indigenous offenders, and laws that sought to extinguish Indigenous people's rights as descendants of the original owners and occupiers of the land (as under the *Native Title Act 1993* (Cth) and the *Native Title Amendment Act 1998* (Cth)). Equally, the power would support laws that protected Indigenous culture, sought to ameliorate or take account of historical disadvantage, or strengthened Indigenous rights. This does not mean that subject-matter limitations should be rejected, for they can serve other purposes, as I discuss in the following paragraphs. But it does mean that something more is needed to prevent laws that are discriminatory against or detrimental to Indigenous people.

An Indigenous-specific power of the kind raised by the Expert Panel might serve some valuable purposes aside from acting as a weak constraint on lawmaking in Indigenous affairs. First, a power to make laws about Indigenous people's culture, disadvantage and distinct status may provide a more appropriate and just form of constitutional recognition for Aboriginal and Torres Strait Islander people than exists currently. As it stands, Indigenous people are not mentioned at all in the *Constitution*, and are dealt with under the outmoded notion of 'race' in s 51(xxvi).

⁵⁵ *Grain Pool of WA v Commonwealth* (2000) 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁵⁶ *Bank of New South Wales v Commonwealth* ('Bank Nationalisation Case') (1948) 76 CLR 1.

⁵⁷ Indeed, given that the scope of the race power remains unsettled, including the extent to which it permits laws that are discriminatory or detrimental, the race power may constrain lawmaking in Indigenous affairs to a greater extent than an Indigenous-specific power.

⁵⁸ Some elements of the wording leave room for arguments to be made about the scope of the power in ways that may not be to Aboriginal and Torres Strait Islander people's advantage. For instance, to what extent does the notion of 'historical disadvantage' also cover 'contemporary disadvantage'? A more advisable wording might refer to 'historical and contemporary disadvantage', or simply just 'disadvantage'. Another example is the reference to Indigenous people being *descendants* of Australia's original owners and occupiers. It is at least arguable that this might constitutionalise biological descent as a criterion of Indigeneity. The descent aspect of Indigenous identity under Australian law has come in for strong criticism: see, eg, Loretta de Plevitz and Larry Croft, 'Aboriginality under the Microscope: The Biological Descent Test in Australian Law' (2003) 3 *Queensland University of Technology Law and Justice Journal* 105.

Second, by stipulating the specific areas in which federal laws about Indigenous people can be made, an Indigenous-specific power would point towards appropriate interpretations of any new limitations requiring Indigenous-specific laws to meet certain normative standards.⁵⁹ For instance, say that, along with a new Indigenous-specific power, a general prohibition on racial discrimination and a guarantee of racial equality were inserted into the *Constitution*. On some interpretations of non-discrimination and equality (which I discussed earlier), differential treatment of particular racial or ethnic groups is ruled out completely. In my view, the better interpretations of non-discrimination and equality permit differential treatment to occur, provided that it is proportionate to relevant differences that exist between racial or ethnic groups. A power to make laws about Indigenous people's culture, disadvantage and distinct status as Australia's original inhabitants spells out key relevant grounds of difference between Indigenous and non-Indigenous people. Because of this, it would favour interpretations of a prohibition on racial discrimination and a guarantee of racial equality that permit laws to be made which take account of and are proportionate to those areas of Indigenous difference.

It is true that the presence of a bare power to make laws about 'Aboriginal and Torres Strait Islander people' would also indicate to the courts that Indigenous-specific laws could be made without offending constitutional standards of non-discrimination and equality. But Indigenous-specific laws in which areas? Without stipulating in the power (or in a proviso to the provisions on equality and non-discrimination) the specific areas in which Indigenous-specific laws can be made, it would be up to the courts to determine the aspects of Indigenous difference on which legislation could be made without being racially discriminatory or unequal. Conceivably, the courts might say, for example, that only temporary measures to address Indigenous disadvantage are permissible, whereas regimes establishing and protecting enduring Indigenous rights (eg, to cultural heritage, to native title) are discriminatory and unconstitutional.⁶⁰ This would not be a desirable outcome.

(b) Standards

Limitations might also require that laws meet certain normative standards. The standards-based limitations suggested by the Expert Panel would require that laws made about Aboriginal and Torres Strait Islander people were for their benefit or advancement, did not discriminate against them (or other racial groups) on account of race, and/or did not deny equality to them (or other racial groups). Above I also suggested that other standards might be attached to an Indigenous-specific power:

⁵⁹ These areas of legislative competence might instead be stipulated in a clause contained in a stand-alone limitation. See, eg, George Williams's suggestion to insert a proviso in a prohibition on racial discrimination permitting laws that 'redress disadvantage, or recognise or protect the culture, identity and language of any group': George Williams, 'Recognising Indigenous Peoples in the Constitution: What the Constitution Should Say and How the Referendum Can be Won' (Land, Rights, Laws: Issues of Native Title Volume 5, Issues Paper No 1, Native Title Research Unit, September 2011) 7, 9.

⁶⁰ Cf the comments of Gaudron J when holding that, for legislation to be valid under the race power, it would need to be based on 'some difference pertaining to the people of the race involved or their circumstances'. For Gaudron J, *prima facie* the only relevant difference pertaining to Aboriginal people was their circumstances of disadvantage. However, she conceived disadvantage fairly broadly, saying it extended not only to the material socioeconomic circumstances of Indigenous people but also to the vulnerability of their culture. See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 365 [39], 367 [44] (Gaudron J).

laws made about Aboriginal and Torres Strait Islander people would need to be for the *recognition or protection* of their culture, the *amelioration or accommodation* of their historical disadvantage, or the *recognition or protection* of their distinct status as descendants of Australia's original inhabitants.⁶¹

While it ultimately depends on the particular standards adopted, the predominant way of interpreting standards-based limitations is to adopt a proportionality test of some sort. In the public law context, proportionality entails balancing 'the achievement of legitimate government ends [with] the protection of certain rights and interests from undue government regulation'.⁶² This is a higher level of judicial scrutiny than the 'sufficient connection' test associated with subject-matter limitations on power. There are two main areas in Australian constitutional law where proportionality arises: the task of characterisation under purposive heads of power, and the task of determining whether constitutional guarantees have been infringed.⁶³ Proportionality tests applied under constitutional guarantees appear to offer greater judicial scrutiny of legislation than proportionality tests applied pursuant to purposive heads of power.⁶⁴

In the context of Indigenous-related constitutional reform, any new standards-based limitation would almost certainly involve the adoption of a proportionality test. If the standard was included within a head of power – for instance, a new head of power authorising laws with respect to the benefit or advancement of Indigenous people – the courts may approach the issue as one of characterisation under a purposive head of power. If the standard was included in a stand-alone limitation – such as a prohibition on laws that are racially discriminatory – the courts would approach the issue as one of determining whether a constitutional guarantee has been infringed. Given that the latter would appear to entail a higher level of judicial scrutiny, it would likely offer better protection for Indigenous rights and interests. This is another reason for the adoption of stand-alone limitations over (or in addition to) limitations contained in heads of power.

Which standards to adopt? Which rights or interests to protect? In my view, standards of non-discrimination and equality on racial grounds are the best of those raised by the Expert Panel. Standards based on concepts of benefit or advancement have a paternalistic tone, and hark back to the language of the protection and assimilation eras, when discriminatory and detrimental laws were purportedly made to benefit or advance Aboriginal and Torres Strait Islander people. In terms of constitutional interpretation, standards of benefit and advancement are not as easily referable to international human rights norms as the concepts of non-discrimination and equality. Moreover, what can be characterised as being for the 'benefit' or 'advancement' of

⁶¹ See Part IVA1(a).

⁶² Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 5.

⁶³ Ibid.

⁶⁴ In the former case, the typical language is that the law must be *reasonably appropriate and adapted* to the achievement of a purpose consistent with the constitutional guarantee: see, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 [85] (Gummow, Kirby and Crennan JJ). In the latter case, the test seems to be less rigorous, generally requiring that the law be *reasonably capable of being considered as appropriate and adapted* to the achievement of a purpose within power: see, eg, *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). For a comparison of the two tests see *Richardson v Forestry Commission* (1996) 164 CLR 261, 312 (Deane J).

Indigenous people is arguably much broader than what is racially discriminatory against or unequal towards them. Chief Justice French suggested in 2003 that a ‘beneficial laws’ limitation might not even be justiciable, provided any laws concerned were ‘within the bounds of the arguably beneficial’.⁶⁵ Only ‘[e]xtreme cases not capable of characterisation as beneficial on any view might be justiciable’, such as ‘a law providing for the indefinite detention of members of a particular race’.⁶⁶ The other possible standards I have raised – the recognition or protection of Indigenous people’s culture or distinct status, and the amelioration or accommodation of Indigenous disadvantage – similarly do not correspond with human rights standards as clearly as non-discrimination and equality. They constitute multiple standards, which may be confusing and lead to undue legal complexity. They would also probably need to be contained within a grant of power. If this led to an understanding of the power concerned as purposive, rather than a view of the standards as constitutional guarantees, this may entail a lower level of judicial scrutiny. Accordingly, standards prohibiting racial discrimination and/or protecting racial equality would be the best standards to adopt.

2 Procedural Limitations

While content-based limitations have considerable value, the Expert Panel should also consider the insertion of procedural limitations on lawmaking about Aboriginal and Torres Strait Islander people. In particular, a limitation might be inserted into the *Constitution* requiring that, where laws are made with respect to Aboriginal or Torres Strait Islander people, there would have to be adequate consultation with the Indigenous people about whom the law is made.

Indigenous involvement or participation in lawmaking is important for both normative and practical reasons. From the normative side, it is a fundamental premise of democracy that the people themselves should have a say about how they are governed. The majoritarian institution of Parliament is the primary vehicle for democratic self-government under Australia’s constitutional arrangements. However, Indigenous people are a small minority of the population (and, within Parliament, an under-represented minority), and so are confronted with inherent structural barriers to having an appropriate say over the laws that govern them. It is increasingly recognised in international law that, in order to rectify this democratic deficit, additional mechanisms facilitating Indigenous participation may be required.⁶⁷ From a practical perspective, policies and laws are far less likely to succeed where they have not been developed with the participation of the people affected. As but one example, the need for Indigenous involvement in policy formulation and implementation has repeatedly been emphasised by the Productivity Commission in its regular reports into what works in overcoming Indigenous disadvantage.⁶⁸

⁶⁵ Justice Robert French, ‘The Race Power: A Constitutional Chimera’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 192.

⁶⁶ *Ibid* 210 n 76.

⁶⁷ In particular, art 13 of the *Declaration on the Rights of Indigenous Peoples* provides that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’

⁶⁸ See, eg, Steering Committee for the Review of Government Service Provision, ‘Overcoming Indigenous Disadvantage 2011: Key Indicators’ (Report, Productivity Commission, 2011) [3.16] <http://www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf>

The need for Indigenous participation in lawmaking could be partially aided by a constitutional requirement that adequate consultation with Indigenous people takes place prior to the passage of laws concerning them. What would constitute ‘adequate consultation’ would have to be judicially determined and would arguably depend on the laws and circumstances in question. Even if the standard was not particularly onerous, it would nonetheless require a greater amount of Indigenous participation and an additional level of deliberation than exists at present. The lack of Indigenous involvement in the lawmaking process has been a key critique, for reasons of both legitimacy and effectiveness, of measures like the Northern Territory Intervention.

It is possible that a constitutional prohibition on racial discrimination might itself import some requirement of consultation. Some of the domestic jurisprudence on the *Racial Discrimination Act 1975* (Cth), for instance, has emphasised the need for a degree of consultation with groups who are the targets or beneficiaries of ‘special measures’. However, the law is not settled on this issue,⁶⁹ and at any rate, its application to a constitutional prohibition on racial discrimination is uncertain. Moreover, special measures only encompass temporary measures that are designed to overcome existing disadvantages experienced by particular racial groups. In international law, they are distinct from the permanent rights that attach to particular groups, such as Indigenous right to land.⁷⁰ It is therefore unclear whether a consultation requirement under a prohibition on racial discrimination would attach to legislation about permanent Indigenous rights. For these reasons, a prohibition on racial discrimination cannot be relied upon to guarantee consultation with Indigenous people during the lawmaking process. To be sure that a minimum of Indigenous consultation is secure, an express guarantee of adequate consultation would have to be included.

⁶⁹ See *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J); *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, [78]–[82] (McMurdo P); *Morton v Queensland Police Service* [2010] QCA 160, [31] (McMurdo P), [114] (Chesterman J); cf *Bropho v Western Australia* [2007] FCA 519, [569] (Nicholson J); *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, [193]–[194] (Keane JA).

⁷⁰ The distinction between the two has been somewhat confused under Australian law. See *Gerhardy v Brown* (1985) 159 CLR 70; Wojciech Sadurski, ‘*Gerhardy v Brown* v The Concept of Discrimination: Reflections on the Landmark Case that Wasn’t’ (1986) 11 *Sydney Law Review* 5.