HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

DOREEN KARTINYERI AND ANOR — PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA — DEFENDANT

Kartinyeri v The Commonwealth (A29/1997) [1998] HCA 22
1 April 1998

ORDER

1. *Order that the question reserved be answered as follows: on the facts pleaded in the Further Amended Statement of Claim and admitted in the Amended Defence, the question reserved for the consideration of the Full Court -*

   > *"Is the* Hindmarsh Island Bridge Act *1997 or any part thereof invalid in that it is not supported by s 51(xxvi) of the Constitution or any other head of Commonwealth legislative power?"*

   Answer: No.

2. *Order that the plaintiffs pay the defendant's costs.*

3. *Reserve the question of costs to be paid by the interveners and direct that any application made for an order against the interveners be made on notice filed and served within 14 days supported by written submissions, submissions in reply being filed within 10 days thereafter.*

Representation:

J J Spigelman QC and S W Tilmouth QC with S J Kenny and
G J Williams for the plaintiffs (instructed by Camatta Lempens Pty Ltd)

G Griffith QC with M A Perry and W A Harris for the defendant (instructed by Australian Government Solicitor)

Interveners:

R J Meadows QC with G R Donaldson intervening on behalf of the Attorney-General for Western Australia (instructed by Crown Solicitor for Western Australia)

B M Selway QC with M F Johns intervening on behalf of the Attorneys-General of South Australia and the Northern Territory (instructed by Crown Solicitor for South Australia and Solicitor for the Northern Territory)

L S Katz SC with R P L Lancaster intervening on behalf of the Attorney-General for New South Wales (instructed by Crown Solicitor for New South Wales)

D F Jackson QC with N Perram intervening on behalf of Kebaro Pty Ltd, Thomas Lincoln Chapman and Wendy Elizabeth Chapman (instructed by Lynch & Meyer)

R S McColl SC intervening on behalf of the Human Rights and Equal Opportunity Commission (instructed by S Roberts, Solicitor, Human Rights and Equal Opportunity Commission)

CATCHWORDS

Kartinyeri & Anor v The Commonwealth of Australia

Constitutional law (Cth) – Power of the Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws" – Nature and extent of power.

Constitutional law (Cth) – Characterisation – Amendment or partial repeal – Operation and effect.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), ss 3, 4, 9, 10, 11, 12, 13, 15, 16, 18, 21ZA, 22, 26.

The Constitution, ss 51(xxvi), 128.

Hindmarsh Island Bridge Act 1997 (Cth), ss 3, 4, Sched 1.

1 BRENNAN CJ AND McHUGH J. The plaintiffs, by their Further Amended Statement of Claim, seek a declaration that the *Hindmarsh Island Bridge Act* 1997 (Cth) ("the Bridge Act") is invalid. The Commonwealth by its Amended Defence admitted certain paragraphs of the Further Amended Statement of Claim. Pursuant to s 18 of the *Judiciary Act* 1903 (Cth), Brennan CJ made the following order:

> " On the facts pleaded in the Further Amended Statement of Claim and admitted in the Amended Defence annexed hereto, there be reserved for the consideration of the Full Court the following question:-
>
> [I]s the Hindmarsh Island Bridge Act 1997 or any part thereof invalid in that it is not supported by s 51(xxvi) of the Constitution or any other head of Commonwealth legislative power?"

The admitted paragraphs of the Further Amended Statement of Claim read as follows:

> "1. The Ngarrindjeri people are members of the Aboriginal race.
>
> 3. On 9 July 1994, in response to an application made by the Aboriginal Legal Rights Movement on behalf of the Lower Murray Aboriginal Heritage Committee, the Minister for Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia, made a declaration published in the Commonwealth of Australia Gazette (No S270) on 10 July 1994, under Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* ... that the area described in Schedule 1 thereof ('the said area') was a significant Aboriginal area under threat of injury or desecration within the meaning of the Act, and that for the preservation and protection of the said area the acts specified in Schedule 2 thereof must not be carried out in the said area for a period of 25 years from 10 July 1994. Schedule 1 and 2 to the said declaration provided respectively as follows:
>
> 'SCHEDULE 1
> AREA
>
> The area in the State of South Australia, County of Hindmarsh, Hundreds of Goolwa and Nangkita, and which is shown on Map Sheet No. 6626-3 published by AUSLIG, as bounded by a straight line between Australian Map Grid Coordinates Zone 54 299000 East 6068870 North thence south-east to 299650 East 6068360 North thence south-west to 299629 East 6068270 North thence north-west to 298959 East 6068750 North thence to rejoin at the commencement point.
>
> ...

SCHEDULE 2
PROHIBITED ACTS

Any act that will, or is likely to, injure or desecrate any part of the area described in Schedule 1, including:

(a) bulldozing, grading, drilling or excavating; and

(b) any act done for the purpose of constructing a bridge in any part of the area.'

4. By order of the Federal Court made on 15 February 1995 the declaration referred to in paragraph 3 hereof was set aside. Execution of the orders was stayed until further notice and the stay was lifted on 24 July 1996.

5. On the 19th day of December 1995 the plaintiffs, and others, applied to the Minister for Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia, for a declaration under Section 10 of the Act, inter alia, to protect and preserve the land and waters within the said area.

7. The application referred to in paragraph 5 above was made upon the grounds, inter alia, referred to in paragraph 6 above.[1]

8. The application referred to in paragraph 5 superseded the application referred to in paragraph 3.

9. On 22 December 1995 Senator Rosemary Crowley was designated to act on behalf of the said Minister for the purpose of determining the application referred to in paragraph 5 hereof under the Act. Letters from the solicitor acting for the applicants to Senator Crowley dated 4 and 11 January 1996 were treated as forming part of the application.

10. On or about 16 January 1996 the said Senator Crowley purported to nominate Justice Jane Hamilton Mathews as a Reporter pursuant to Section 10 of the Act.

11. On 6 September 1996 this Honourable Court declared that the nomination and/or appointment referred to in paragraph 10 hereof was

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1 Paragraph 6 pleaded that the area was of "high spiritual importance" and that "the building of a bridge therein would desecrate Ngarrindjeri traditions, beliefs and culture". Paragraph 6 was denied by the Amended Defence.

ineffective to authorise the said Justice Mathews to make a Report in satisfaction of Section 10(1)(c) of the Act.[2]

16. This matter is within the original jurisdiction of the Court as it is a matter arising under the *Constitution* and involves the interpretation of the *Constitution*."

In addition to the plaintiffs' claim for a declaration that the Bridge Act is invalid, they claim a declaration that the Bridge Act does not operate to prevent the determination of the application referred to in pars 5 and 9 from being determined under and in accordance with the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) ("the Heritage Protection Act").

The legislation

2 The purposes of the Heritage Protection Act are defined to be "the preservation and protection from injury or desecration of areas ... that are of particular significance to Aboriginals in accordance with Aboriginal tradition": s 4. Part II of the Act prescribes the general mechanism for fulfilling those purposes. The key provision is s 10 which empowers the Minister to make a declaration to preserve and protect significant Aboriginal areas. Sub-section (1) of s 10 reads:

" Where the Minister:

(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;

(b) is satisfied:

(i) that the area is a significant Aboriginal area; and

(ii) that it is under threat of injury or desecration;

(c) has received a report under subsection (4) in relation to the area from a person nominated by him and has considered the report and any representations attached to the report; and

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2 This decision is reported as *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

(d) has considered such other matters as he thinks relevant;

he may make a declaration in relation to the area."

Section 3(2) expounds the meaning of injury or desecration:

" For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

(a) in the case of an area:

(i) it is used or treated in a manner inconsistent with Aboriginal tradition;

(ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or

(iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

(b) in the case of an object - it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly."

Sub-sections (2), (3) and (4) of s 10 provide as follows:

" (2) Subject to this Part, a declaration under subsection (1) has effect for such period as is specified in the declaration.

(3) Before a person submits a report to the Minister for the purposes of paragraph (1)(c), he shall:

(a) publish, in the *Gazette*, and in a local newspaper, if any, circulating in any region concerned, a notice:

(i) stating the purpose of the application made under subsection (1) and the matters required to be dealt with in the report;

(ii) inviting interested persons to furnish representations in connection with the report by a specified date, being not less than 14 days after the date of publication of the notice in the *Gazette*; and

(iii) specifying an address to which such representations may be furnished; and

(b) give due consideration to any representations so furnished and, when submitting the report, attach them to the report.

(4) For the purposes of paragraph (1)(c), a report in relation to an area shall deal with the following matters:

(a) the particular significance of the area to Aboriginals;

(b) the nature and extent of the threat of injury to, or desecration of, the area;

(c) the extent of the area that should be protected;

(d) the prohibitions and restrictions to be made with respect to the area;

(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a);

(f) the duration of any declaration;

(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;

(h) such other matters (if any) as are prescribed."

An application in respect of an area may be made by or on behalf of any Aboriginal or group of Aboriginals whether or not the applicant has or the applicants have a particular connection with or responsibility for the area. The Minister has a discretion whether or not to make a declaration[3]. Section 15 requires a declaration to be laid before each House of Parliament which may disallow the declaration in the same way as it may disallow a regulation made

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3 See also s 16.

under a statutory power[4]. The Minister may revoke or vary a declaration at any time[5].

3 The entitlement to make an application confers no proprietary right on an applicant. Nor does the making of a declaration in respect of an area: it simply prescribes what is to be done or not done to protect and preserve the area from injury or desecration. And a declaration will cease to have effect when it expires, when a House of Parliament disallows it or when the Minister revokes it.

4 A contravention of a declaration made under Pt II in relation to a significant Aboriginal area is punishable as an offence: s 22(1). Part II (which includes s 10) is of general application, but Pt IIA prescribes a different regime applicable to areas of particular significance to Aboriginals in Victoria. Part IIA is itself inapplicable to any site, land, act or activity to which s 13 of the *Alcoa (Portland Aluminium Smelter) Act* 1980 (Vic) applies[6]. Thus the geographical operation of each of Pt II and Pt IIA is limited.

5 The paragraphs in the Further Amended Statement of Claim admitted in the Amended Defence show that the plaintiffs and others made an application on 19 December 1995 to the Minister for a declaration under s 10 of the Heritage Protection Act to protect and preserve land and waters within the area described in Sched 1 and that the Acting Minister failed validly to nominate a person under s 10 to report on the application. But for the provisions of the Bridge Act, it would be open to the Minister to nominate a person to make a report and for the Minister thereafter to consider making a declaration under s 10 in respect of that area. The Minister's receipt of a report is a condition precedent to his power to make a declaration under s 10[7].

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4 Section 15 applies the provisions of ss 48 (other than sub-ss (1)(a) and (b) and (2)), 48A, 48B, 49 and 50 of the *Acts Interpretation Act* 1901 (Cth) to declarations made under the Heritage Protection Act as though declarations were statutory regulations.

5 Section 33(3) of the *Acts Interpretation Act* and s 13(6) of the Heritage Protection Act.

6 Heritage Protection Act, s 21ZA.

7 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 18.

6 The Bridge Act provides, inter alia:

> **"4 Provisions facilitating construction etc of the bridge**
>
> (1) The Heritage Protection Act does not authorise the making of a declaration in relation to the preservation or protection of an area or object from any of the following activities:
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> (a) the construction of a bridge, and associated works (including approaches to the bridge), in the Hindmarsh Island bridge area;
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> (b) work or other activities in that area preparatory to, or associated with, that construction;
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> (c) maintenance on, or repairs to, the bridge and associated works;
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> (d) use of the bridge and associated works;
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> (e) the removal of materials from, or dumping of materials in, the pit area in connection with any of the activities mentioned in paragraphs (a),(b) and (c).
>
> (2) The Heritage Protection Act does not authorise the Minister to take any action after the commencement of this Act in relation to an application (whether made before or after the commencement of this Act) that relates (wholly or partly) to activity covered by paragraph (1)(a),(b),(c),(d) or (e)."

The "Hindmarsh Island bridge area" is defined[8] to include the area described in the schedule set out in par 3 of the Further Amended Statement of Claim. The Bridge Act commenced on 22 May 1997.

The character of the Bridge Act

7 In order to determine the validity of the Bridge Act, it is necessary in the first place to determine "its operation and effect (that is, to decide what the Act actually does)", as Latham CJ pointed out in *Bank of New South Wales v The Commonwealth* ("the *Bank Nationalisation Case*")[9]. The operation and effect

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8 Section 3 and Sched 1 cl 1.

9 (1948) 76 CLR 1 at 186.

of a law define its constitutional character, as Kitto J explained in *Fairfax v Federal Commissioner of Taxation*[10]:

> "Under [s 51] the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say *by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes*; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an inference so incidental as not in truth to affect its character?" (Emphasis added.)

To ascertain the nature of the rights, duties, powers and privileges which an Act changes, regulates or abolishes, its application to the circumstances in which it operates must be examined[11].

8 The operation and effect of the Bridge Act can be ascertained only by reference to the Heritage Protection Act, the operation of which it is expressed to affect. Section 4(2) of the Bridge Act denies the Minister the authority to make an appointment of a person to report under s 10 of the Heritage Protection Act where the application relates to an area within the Hindmarsh Island bridge area and seeks a declaration that would prohibit or restrict any of the activities specified in sub-pars (a), (b), (c), (d) or (e) of s 4(1) of the Bridge Act. Section 4(1) of the Bridge Act denies the Minister the authority to make a declaration preserving or protecting an area within the Hindmarsh Bridge area from any of the activities specified in that sub-section. That is to say, the Minister cannot make a declaration that has the effect of prohibiting or restricting the construction of a bridge in the Hindmarsh Island bridge area. The Bridge Act restricts the operation of Pt II of the Heritage Protection Act so that no step can be taken towards the making of a declaration that would prohibit or restrict the construction of a bridge in the Hindmarsh Island bridge area and no declaration to that effect can be made.

9 The Bridge Act is an instance of what F A R Bennion[12] calls "indirect express amendment". It effects a partial repeal of the Heritage Protection Act, albeit the

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10 (1965) 114 CLR 1 at 7.

11 *The Commonwealth v Tasmania. The Tasmanian Dam Case* (1983) 158 CLR 1 at 152, 245; see also *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 216; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 314-315; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369.

12 *Statutory Interpretation*, 3rd ed (1997) at 214.

text of the Heritage Protection Act is unchanged[13]. As Windeyer J said in *Mathieson v Burton*[14]:

> "For some purposes it may sometimes be relevant to distinguish between a repeal and an amendment, or a modification, as the latter is sometimes called. But an amendment which permanently reduces the ambit of any of the provisions of an Act involves a repeal of it in part. That is because after the amendment the statute no longer operates as it formerly did: and the only way by which a statute which has come into operation can cease to operate is by repeal, express or implied; or by its expiry in the case of a temporary statute; or by something that was made a condition of its continued operation coming to an end. An Act that excludes from the operation of a former Act some matter formerly within its purview thus repeals it pro tanto, that is to say 'in part'. Provisions of a later act which are inconsistent and irreconcilable with the provisions of a former Act dealing with the same subject matter are thus an implied repeal of them. That has been recognized in this Court since its early days: see *Goodwin v Phillips*[15]."

In determining the constitutional validity of an Act that reduces the ambit of an earlier Act, it is immaterial that the text of the earlier Act remains unchanged. It is the operation and effect in substance of the impugned Act which are relevant to its validity, whether or not the text of the earlier Act is changed.

10 The general provisions of Pt II of the Heritage Protection Act were restricted by Pt IIA. The Bridge Act further restricted the ambit of Pt II and to that extent repealed it. It is impossible to attribute a character to the Bridge Act as though that Act stood in isolation from the Act the ambit of which it reduces. Both Acts "are to be read together as a combined statement of the will of the legislature": *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd*[16]. Although it is the validity of the Bridge Act alone that is in issue, its constitutional validity is determined "by reference solely to the operation which the enactment has *if it be valid*"[17]. It is constitutionally erroneous to attempt to determine its validity before considering whether, if valid, it is effective to restrict the operation of the Heritage Protection Act. Reading the two Acts together, the will of the Parliament is that

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13 *Goodwin v Phillips* (1908) 7 CLR 1 at 7.

14 (1971) 124 CLR 1 at 10.

15 (1908) 7 CLR 1.

16 (1995) 184 CLR 453 at 463, 479. And see s 15 of the *Acts Interpretation Act*.

17 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J.

the operation of the Heritage Protection Act be restricted to the extent stated in the Bridge Act.

The legislative power to "make laws with respect to" a subject matter

11 As the only effect of the Bridge Act is partially to repeal the Heritage Protection Act, the constitutional question can be put in this way: given that the Parliament had power to enact Pt II of the Heritage Protection Act in exercise of the legislative power conferred by s 51(xxvi) of the Constitution, did the Parliament have power subsequently to restrict the operation of Pt II? (The validity of the Heritage Protection Act is accepted on all sides, and rightly so. The plaintiffs assert its validity in order to enforce it shorn of the restriction created by the Bridge Act.) Putting the question in another way, are the restrictions on the operation of Pt II of the Heritage Protection Act created by the Bridge Act so connected with the subject matter of power contained in s 51(xxvi) of the Constitution that the Bridge Act can properly be described as a law "with respect to ... the people of any race for whom it is deemed necessary to make special laws"? Whichever way the question be put, the answer is the same.

12 The legislative powers conferred on the Parliament by s 51 of the Constitution are plenary powers[18], that is to say, "subject to" any prohibition or limitation contained in the Constitution, the Parliament can "make laws with respect to" the several subject matters contained in s 51 in such terms, with such qualifications and with such limitations as it chooses[19]. The power "to make laws" is a power as ample as that described by Sir Edward Coke[20] and later adopted by Blackstone[21]:

> " Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds."

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18 *D'Emden v Pedder* (1904) 1 CLR 91 at 109-110; *R v Barger* (1908) 6 CLR 41 at 85; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 153; *British Coal Corporation v The King* [1935] AC 500 at 518.

19 *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37 at 74.

20 4 *Institutes of the Laws of England*, 36 (quoted from the 1797 edition).

21 *Blackstone's Commentaries*, 9th ed (1783), Bk 1 at 160.

Blackstone adds[22]:

> " The power and jurisdiction of parliament, says Sir Edward Coke[23], is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. ... It hath sovereign and uncontrolable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms."

13 The power to make laws includes a power to unmake them[24]. Thus the powers conferred on the Parliament under s 51 extend to the repeal, in part or in whole, of what the Parliament has validly enacted[25]. In *Deputy Commissioner of Taxation v Moorebank Pty Ltd*[26], Mason CJ, Brennan, Deane, Dawson and Gaudron JJ said in reference to s 64 of the *Judiciary Act*:

> "It is neither a constitutional provision nor an entrenched law. Its authority is that of an Act of the Parliament which can be expressly or impliedly amended or repealed, either wholly or in part, by a subsequent Act and whose application or operation to or with respect to cases falling within the

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22 *Blackstone's Commentaries*, 9th ed (1783), Bk 1 at 160.

23 4 Inst 36.

24 See *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 168; [1980] 1 All ER 529 at 551 cited by Dawson J in *Kable v DPP (NSW)* (1996) 189 CLR 51 at 75.

25 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 623, 636*; Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 107*; Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 74-75 per McHugh J; *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 at 743; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 at 597. Of course, a parliament whose powers of repeal or amendment are restricted by "manner and form" provisions must observe those provisions in order to exercise the power: *McCawley v The King* (1918) 26 CLR 9 at 54, 55; (1920) 28 CLR 106 at 115-116; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 422, 430 and see *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 618. But the powers conferred by s 51 of the Constitution are not subject to "manner and form" requirements.

26 *Deputy Commissioner of Taxation v Moorebank Pty Ltd; Deputy Commissioner of Taxation v DTR Securities Pty Ltd* (1988) 165 CLR 56 at 63.

> provisions of a subsequent Act will be excluded to the extent that such application or operation would be inconsistent with those subsequent statutory provisions: see, eg, *Goodwin v Phillips*[27]."

14 In *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd*[28], the Court said:

> "The will of a Parliament is expressed in a statute or Act of Parliament and it is the general conception of English law that what Parliament may enact it may repeal."

That must be so because, as Blackstone points out[29]:

> " An act of parliament ... cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation."

If the power to make a law did not include the power to repeal it, a law once enacted would be entrenched and beyond the power of the Parliament to revoke.

15 Once the true scope of the legislative powers conferred by s 51 are perceived, it is clear that the power which supports a valid Act supports an Act repealing it. To the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed unless there be some constitutional limitation on the power to effect the repeal in question. Similarly, a law which amends a valid law by modifying its operation will be supported unless there be some constitutional limitation on the power to effect the amendment. Thus in *Air Caledonie International v The Commonwealth*[30], the attempt to amend the *Migration Act* 1958 (Cth) by the *Migration Amendment Act* 1987 (Cth) failed because the amendment purported to insert a taxing provision in the principal Act contrary to s 55 of the Constitution. It is not necessary to consider the hypothetical case postulated by Mr Jackson QC of a repealing or amending Act which so

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27 (1908) 7 CLR 1 at 7.

28 (1964) 113 CLR 207 at 226.

29 *Blackstone's Commentaries*, 9th ed (1783), Bk 1 at 186.

30 (1988) 165 CLR 462 at 472.

changed the character of an earlier Act as to deprive that Act of its constitutional support[31].

16 The power to repeal a law may be exercised from time to time as the Parliament chooses. One Parliament cannot deny or qualify the power of itself or of a later Parliament to exercise that power. The Parliament cannot bind itself or its successor Parliaments not to amend the laws it makes[32]. Anson states the general rule[33]:

> " One thing no Parliament can do: the omnipotence of Parliament is available for change, but cannot stereotype rule or practice. Its power is a present power, and cannot be projected into the future so as to bind the same Parliament on a future day, or a future Parliament."

17 In the present case, the Parliament exercised its power under s 51(xxvi) to enact the Heritage Protection Act and it has had at all times the same power to amend or repeal that Act. As the Bridge Act has no effect or operation other than reducing the ambit of the Heritage Protection Act, s 51(xxvi) supports it. Approaching the question of validity in this way, the Bridge Act is valid.

18 The same result is reached by asking whether the Bridge Act has the character of a law "with respect to ... the people of any race for whom it is deemed necessary to make special laws". Here one looks to the connection between the operation and effect of the Bridge Act and the subject matter of the power invoked to support it. In *Grannall v Marrickville Margarine Pty Ltd*[34], Dixon CJ, McTiernan, Webb and Kitto JJ said:

> "The words 'with respect to' ought never be neglected in considering the extent of a legislative power conferred by s 51 or s 52. For what they require

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31 cf *Commissioner of Taxation v Clyne* (1958) 100 CLR 246; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

32 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 422; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 617*; Magrath v The Commonwealth* (1944) 69 CLR 156 at 169-170, 183; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 107*; Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 74-75; *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 at 743; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 at 597.

33 *Law and Custom of the Constitution*, (1909), vol 1 at 7.

34 (1955) 93 CLR 55 at 77.

> is a relevance to or connection with the subject assigned to the Commonwealth Parliament".

Of course, a connection may be "so insubstantial, tenuous or distant ... that [the law] ought not to be regarded as enacted with respect to the specified matter falling within the Commonwealth power" (to adopt the words of Dixon J in *Melbourne Corporation v The Commonwealth*[35]).

19 The only effect of the Bridge Act is partially to exclude the operation of the Heritage Protection Act in relation to the Hindmarsh Bridge area[36]. The Bridge Act, like Pt IIA of the Heritage Protection Act, limits the area to which Pt II applies. As Pt II of the Heritage Protection Act is a law with respect to the subject matter of s 51(xxvi), a law which governs the area of its operation has a direct connection with that subject matter. In the absence of any constitutional limitation on the power to repeal an earlier law, the true principle is stated by Dawson J in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]*[37]:

> "A law which effects the repeal of another law is not a law with respect to repeal; its subject-matter is the subject-matter of the law which is repealed."

Thus the Bridge Act is itself a law with respect to the subject matter of s 51(xxvi).

20 Once it is accepted that s 51(xxvi) is the power that supports Pt II of the Heritage Protection Act, an examination of the nature of the power conferred by s 51(xxvi) for the purpose of determining the validity of the Bridge Act is, in our respectful opinion, not only unnecessary but misleading. It is misleading because such an examination must proceed on either of two false assumptions: first, that a power to make a law under s 51 does not extend to the repeal of the law and, second, that a law which does no more than repeal a law may not possess the same character as the law repealed. It is not possible, in our opinion, to state the nature of the power conferred by s 51(xxvi) with judicial authority in a case where such a statement can be made only on an assumption that is false. The Bridge Act exhibits no feature to which it is necessary to apply one of the opposing views of s 51(xxvi) in order to answer the question reserved. The Bridge Act can have no character different from, and must have the same validity as, the Heritage Protection Act.

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35 (1947) 74 CLR 31 at 79; see also *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369 per McHugh J.

36 And the "pit area" defined in Sched 1 cl 2.

37 (1985) 159 CLR 351 at 459.

21 The answer to the question reserved is: No. In the absence of any contrary agreement, the plaintiffs will have to bear the costs. We would reserve the question whether any of the costs of the parties should be paid by the interveners and direct that any application made for an order against the interveners be made on notice filed and served within 14 days supported by written submissions, submissions in reply being filed within 10 days thereafter.

22 GAUDRON J. The plaintiffs are Aboriginal Australians. They are members of the Ngarrindjeri people. They commenced proceedings in this Court against the Commonwealth seeking, amongst other orders, a declaration that the *Hindmarsh Island Bridge Act* 1997 (Cth) ("the Bridge Act") is invalid. Pleadings were filed and, thereafter, the Chief Justice reserved for the consideration of the Full Court the question whether, on the facts admitted in those pleadings, "the [Bridge Act] or any part thereof [is] invalid in that it is not supported by s 51(xxvi) of the Constitution or any other head of Commonwealth legislative power"[38]. It is not in issue that, if not supported by s 51(xxvi), the Bridge Act is not supported by any other head of power.

23 It is necessary, in order to understand the operation of the Bridge Act, to refer to the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) ("the Heritage Protection Act"). So far as is presently relevant, ss 9 and 10 of that Act[39] confer a power on the responsible Minister to make emergency and other declarations containing "provisions for and in relation to the protection and preservation"[40] of areas which are "significant Aboriginal area[s]" and s 12 confers a power to make declarations for the protection and preservation of "significant Aboriginal object[s]"[41]. Section 3 of that Act defines "significant Aboriginal area" to mean, unless a contrary intention appears:

> "(a) an area of land in Australia or in or beneath Australian waters;
>
> (b) an area of water in Australia; or
>
> (c) an area of Australian waters;
>
> being an area of particular significance to Aboriginals in accordance with Aboriginal tradition."

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38 The question was reserved pursuant to s 18 of the *Judiciary Act* 1903 (Cth).

39 Sections 9(1)(b) and 10(1)(b) of the Heritage Protection Act. Section 9 enables emergency declarations to be made for a period specified in the declaration not exceeding 30 days which period may be extended so long as the extension period does not extend beyond 60 days from the day on which the declaration was made. A declaration under s 10 has effect for such period as is specified in the declaration: s 10(2).

40 Section 11(b) of the Heritage Protection Act.

41 Note that s 18 also confers power on authorised officers to make emergency declarations for a period not exceeding 48 hours with respect to significant Aboriginal areas and significant Aboriginal objects.

Similarly, s 3 defines "significant Aboriginal object" to mean "an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition". By s 22 it is an offence to contravene a provision of a declaration made in relation to a significant Aboriginal area (sub-s (1)) or a significant Aboriginal object (sub-s (2)).

24 The Bridge Act operates with respect to two distinct areas in South Australia, each described by metes and bounds in Sched 1 to that Act. The first area is referred to in the Act as the "Hindmarsh Island bridge area". In general terms, that is an area comprised of land adjoining the Lower Murray River and water in that river over which it is proposed to construct a bridge linking the north western bank of the Lower Murray River to Hindmarsh Island. The second area is referred to in the Act as the "pit area", apparently a nearby area from which it is proposed to remove materials for the purpose of constructing the bridge. The plaintiffs claim that both areas are "significant Aboriginal area[s]" for the purposes of the Heritage Protection Act and, in 1994, the Aboriginal Legal Rights Movement made application for their protection and preservation under that Act[42]. That application was still pending when the Bridge Act came into force.

25 The only substantive provision of the Bridge Act is s 4. It provides:

"(1) The Heritage Protection Act does not authorise the making of a declaration in relation to the preservation or protection of an area or object from any of the following activities:

(a) the construction of a bridge, and associated works (including approaches to the bridge), in the Hindmarsh Island bridge area;

(b) work or other activities in that area preparatory to, or associated with, that construction;

(c) maintenance on, or repairs to, the bridge and associated works;

(d) use of the bridge and associated works;

(e) the removal of materials from, or dumping of materials in, the pit area in connection with any of the activities mentioned in paragraphs (a), (b) and (c).

(2) The Heritage Protection Act does not authorise the Minister to take any action after the commencement of this Act in relation to an application

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42 The application was made on behalf of the Lower Murray Aboriginal Heritage Committee.

> (whether made before or after the commencement of this Act) that relates (wholly or partly) to activity covered by paragraph 1(a), (b), (c), (d) or (e)."

26 As already indicated, the question to be determined is whether the Bridge Act was validly enacted pursuant to s 51(xxvi) of the Constitution. That provision reads as follows:

> " The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> ...
>
> (xxvi) The people of any race~~, other than the aboriginal race in any State,~~ for whom it is deemed necessary to make special laws:
>
> ..."

The words "other than the aboriginal race in any State" were deleted from par (xxvi) by an Act styled the *Constitution Alteration (Aboriginals)* 1967, a law approved by the electors in accordance with s 128 of the Constitution.

27 Two arguments were advanced on behalf of the plaintiffs as to the meaning and operation of s 51(xxvi) of the Constitution. The first is that that paragraph does not authorise laws which distinguish or discriminate between members of a racial group. In this respect, it was put that the words "the people of any race" mean all people of a particular race, not some of them. The second is that s 51(xxvi) only authorises laws for the benefit of the people of a race or, in the alternative, for the benefit of the people of the Aboriginal race. It is convenient at this stage to deal with the latter argument for, in the view that I take, its consideration reveals the answer to the first.

28 Much of the argument directed to the proposition that s 51(xxvi) only authorises beneficial laws was based on the fact that the words "other than the aboriginal race in any State" were deleted in 1967 by a vote of the people in accordance with s 128 of the Constitution. In this regard, it was said that, by 1967, Australian values had so changed that it is to be taken that the amendment disclosed a constitutional intention that, thereafter, the power should extend only to beneficial laws. In the alternative, it was put that the amendment disclosed an intention to that effect in relation to laws with respect to Aboriginal Australians.

29 The 1967 amendment was one that might fairly be described in today's terms as a "minimalist amendment". As a matter of language and syntax, it did no more than remove the then existing exception or limitation on Commonwealth power

with respect to the people of the Aboriginal race. And unless something other than language and syntax is to be taken into account, it operated to place them in precisely the same constitutional position as the people of other races.

30 The "Yes" case for the 1967 referendum[43] identified two purposes attending the proposed law, which upon its approval in accordance with s 128 of the Constitution, deleted the words "other than the aboriginal race in any State" from s 51(xxvi) of the Constitution[44]. The first was to "remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against

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43 In 1967, the *Referendum (Constitution Alteration) Act* 1906 (Cth) (since repealed by s 145 of the *Referendum (Machinery Provisions) Act* 1984 (Cth)) provided in s 6A(I)(a) that:

> " [if] within nine weeks after the passage of [a] proposed law through both Houses there is forwarded to the Chief Electoral Officer-
>
> (a) an argument in favour of the proposed law ... authorized by a majority of those members of both Houses of the Parliament who voted for the proposed law; or
>
> (b) an argument against the proposed law ... authorized by a majority of those members of both Houses of the Parliament who voted against the proposed law,
>
> the Chief Electoral Officer shall, within two months after the expiry of those nine weeks, and not later than two weeks after the issue of the writ [issued by the Governor-General for the submission of the proposed law to the electors], cause to be printed and posted to each elector ... a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution."

On 23 February 1967, Prime Minister Holt advised the House of Representatives of the Federal Government's intention to propose a referendum for the approval of the *Constitution Alteration (Aboriginals) Bill* 1967. On 8 March 1967, the Opposition advised in the Senate that it would support the Bill without alteration. The referendum for approval of the Bill was held on 27 May 1967. Because the Bill was passed unanimously by both Houses of Parliament, only a "Yes" case was distributed to electors pursuant to s 6A(I)(a).

44 The electors' approval of *Constitution Alteration (Aboriginals)* 1967 at the referendum also resulted in the repeal of s 127 of the Constitution which provided that "[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

people of the aboriginal race"[45]. The other was "to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live"[46]. Given the limited nature of the purposes thus disclosed and given, also, that as a matter of language and syntax, the amendment was apt to achieve those purposes, and only those purposes, it is not possible, in my view, to treat s 51(xxvi) as limited to laws which benefit Aboriginal Australians if it is not similarly limited with respect to the people of other races.

31 If, prior to 1967, s 51(xxvi) extended to authorise laws which were not for the benefit of the people of a particular race, it is difficult to see that the 1967 amendment which, as already indicated, simply removed the exception or limitation which then existed could have altered that position. However, two matters were advanced in support of the proposition that it did. The first was that, by 1967, international standards and community values were such that racial discrimination was not to be tolerated. The second was that it was intended by the electors that the amendment would enable the Parliament to legislate for the benefit of Aboriginal people and only for their benefit. Given the terms of the "Yes" case to which reference has already been made, it is doubtful whether the intention of the electorate was as stated. However, that issue may be put to one side.

32 Whatever the international standards and community values in 1967 and whatever the intention of those voting in the 1967 referendum, the bare deletion of an exception or limitation on power is not, in my view, capable of effecting a curtailment of power. On the contrary, the consequence of an amendment of that kind is to augment power. Accordingly, if, prior to 1967, s 51(xxvi) authorised special laws which were not for the benefit of the people of a particular race, the referendum did not, in my view, alter that position.

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45 *Constitution Alteration (Aboriginals)* 1967*: Argument in favour of the proposed law,* in *The Commonwealth of Australia, Referendums to be held on Saturday, 27th May, 1967 on the Proposed Laws for the alteration of the Constitution entitled - Constitution Alteration (Parliament) 1967 and Constitution Alteration (Aboriginals) 1967* at 11, Commonwealth Government Printer, Canberra. The official "Yes" case also provided that "[t]he proposed alteration of this section will ... remove words from our Constitution that *many people think are discriminatory against the aboriginal people* (emphasis added)" at 11.

46 *Constitution Alteration (Aboriginals)* 1967*: Argument in favour of the proposed law,* in *The Commonwealth of Australia, Referendums to be held on Saturday, 27th May, 1967 on the Proposed Laws for the alteration of the Constitution entitled - Constitution Alteration (Parliament) 1967 and Constitution Alteration (Aboriginals) 1967* at 11, Commonwealth Government Printer, Canberra.

33 There are two matters with respect to s 51(xxvi) which are beyond controversy. The first is that the debates of the Constitutional Conventions relevant to the provision which ultimately became s 51(xxvi)[47] reveal an understanding that it would authorise laws which discriminated against people of "coloured races"[48] and "alien races"[49]. The second is that s 51(xxvi) does not simply confer power to legislate with respect to "the people of any race". It confers power to legislate with respect to "the people of any race for whom it is deemed necessary to make special laws".

34 Were s 51(xxvi) simply a power to legislate with respect to "the people of any race", there would, in my view, be no doubt that Parliament might legislate in any way it chose so long as the law in question differentiated in some way with respect to the people of a particular race[50] or dealt with some matter of "special significance or importance to the[m]"[51]. However, the words "for whom it is deemed necessary to make special laws" must be given some operation. And they

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47 The "Draft of a Bill to Constitute the Commonwealth of Australia" debated in Melbourne in 1898 proposed a cl 53(I) in the following terms:

> " The Parliament shall, subject to the provisions of this Constitution, have exclusive powers to make laws for the peace, order, and good government of the Commonwealth with respect to the following matters:-
>
> I The affairs of the people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the affairs of the aboriginal native race in any State".

48 An expression used by Sir John Forrest, Dr Quick and Mr Kingston at the 1898 Convention: see *Official Record of the Debates of the Australasian Federal Convention*, 3rd Session (Melbourne), 20 January to 17 March 1898, vol I at 240, 246, 248.

49 An expression used by Mr Howe and Mr Symon at the 1898 Convention: see *Official Record of the Debates of the Australasian Federal Convention*, 3rd Session (Melbourne), 20 January to 17 March 1898, vol I at 250, 251, 251-252.

50 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186 per Gibbs CJ, 245 per Wilson J, 261 per Brennan J.

51 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 461 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ referring in fn 323 to *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and noting in fn 324 that "[i]t was on this point, not on the point of differential operation ... that the minority in the *Tasmanian Dam Case* denied the support of s 51(xxvi)".

can only operate to impose some limit on what would otherwise be the scope of s 51(xxvi).

35 In the main, the view that s 51(xxvi) is not simply a power to pass laws with respect to "the people of any race" has found expression in terms reflected in the argument in this case, namely, that s 51(xxvi) is confined to laws for the benefit of the people of the race for whom those laws are enacted. Thus, for example, in *Koowarta v Bjelke-Petersen*, Murphy J expressed the view that "[i]n par (xxvi) 'for' means 'for the benefit of' ... not ... 'with respect to'"[52]. And in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*), Brennan J referred to the 1967 amendment of s 51(xxvi) and said that it was "an affirmation of the will of the Australian people ... that the primary object of the power is beneficial"[53].

36 As already indicated, the 1967 referendum did not, in my view, alter the nature of the power conferred by s 51(xxvi) of the Constitution. Moreover, the amendment, consisting, as it did, of the removal of an exception or limitation, discloses nothing as to the nature of that power. And although I expressed the view in *Chu Kheng Lim v Minister for Immigration*[54] that there was much to commend the view that, in s 51(xxvi), "for" means "for the benefit of", that view cannot be maintained in the face of the constitutional debates earlier referred to. Even so, the words "for whom it is deemed necessary to make special laws" must

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52 (1982) 153 CLR 168 at 242. Murphy J expressed the same view of the scope of s 51(xxvi) in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 180 stating that "[s 51(xxvi)] ... authorizes any law for the benefit, physical or mental, of the people of the race for whom Parliament deems it necessary to pass special laws". Similarly, at 245-246 Brennan J adverted to "the high purpose which the Australian people intended when the people of the Aboriginal race were brought within the scope of [s 51(xxvi)'s] *beneficial exercise*" (emphasis added). At 273 Deane J said that "[s]ince 1967, [s 51(xxvi)] has included a power to make laws *benefiting the people of the Aboriginal race*" (emphasis added); cf also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56 per Gaudron J. However, the contrary view, that s 51(xxvi) supports the enactment either of beneficial or detrimental laws in relation to Aboriginal people, has also been expressed: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186 per Gibbs CJ, 209 per Stephen J, 245 per Wilson J; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 110 per Gibbs CJ.

53 (1983) 158 CLR 1 at 242; cf at 273 where Deane J referred to the 1967 referendum and said that "[t]he power conferred by s 51(xxvi) remains a general power to pass laws discriminating against or benefiting the people of any race."

54 (1992) 176 CLR 1 at 56.

be given some operation and, as already indicated, they can only operate as a limit to the power conferred by s 51(xxvi).

37 In *Western Australia v The Commonwealth* (*Native Title Act Case*)[55], the notion that the Court might be required to form a "political value judgment" to determine whether a law was special for the purposes of s 51(xxvi) was emphatically rejected. That notion was suggested by the observation of Stephen J in *Koowarta v Bjelke-Petersen*[56] that, if the Parliament is to enact a law under that paragraph, "[i]t must be because of [the] special needs [of the people of a particular race] or because of the special threat or problem which they present that the necessity for the law arises". However, it was pointed out in the *Native Title Act Case* that "'[s]pecial' qualifies 'law' [and] does not relate to necessity" with the consequence that the "special quality" of the law in question is to be "ascertained by reference to its differential operation upon the people of a particular race"[57].

38 It was also held in the *Native Title Act Case* that the "evaluation of the needs of the people of a race or of the threats or problems that confronted them in order to determine whether the law was, or could be deemed to be, 'necessary'" was for the Parliament for, otherwise, this Court "would be required to form a political value judgment". However, the question was left open whether there was "some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse"[58]. For the moment, that question may be put to one side. It is sufficient to observe that, if the question arises, it is for this Court to determine whether a law is one that is properly characterised as a law with respect to "the people of any race for whom it is deemed necessary to make special laws".

39 The criterion for the exercise of power under s 51(xxvi) is that it be deemed necessary - not expedient or appropriate - to make a law which provides differently for the people of a particular race or, if it is a law of general application, one which deals with something of "special significance or importance to the people of [that] particular race"[59]. Clearly, it is for the Parliament to deem it necessary to make a law of that kind. To form a view as to that necessity, however, there must be some difference pertaining to the people of the race involved or their circumstances or, at least, some material upon which the Parliament might reasonably form a

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55 (1995) 183 CLR 373 at 460.

56 (1982) 153 CLR 168 at 210.

57 (1995) 183 CLR 373 at 460-461 citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186 per Gibbs CJ, 245 per Wilson J and 261 per Brennan J.

58 *Native Title Act Case* (1995) 183 CLR 373 at 460.

59 *Native Title Act Case* (1995) 183 CLR 373 at 461.

political judgment that there is a difference of that kind. Were it otherwise, the words "for whom it is deemed necessary to make special laws" would have no operation and s 51(xxvi) would simply be a power to make laws for the people of any race.

40 Once it is accepted that the power conferred by s 51(xxvi) may only be exercised if there is some material upon which the Parliament might reasonably form a judgment that there is a difference necessitating some special legislative measure, two things follow. The first is that s 51(xxvi) does not authorise special laws affecting rights and obligations in areas in which there is no relevant difference between the people of the race to whom the law is directed and the people of other races. A simple example will suffice. Rights deriving from citizenship inhere in the individual by reason of his or her membership of the Australian body politic and not by reason of any other consideration, including race. To put the matter in terms which reflect the jurisprudence that has developed with respect to anti-discrimination law, race is simply irrelevant to the existence or exercise of rights associated with citizenship. So, too, it is irrelevant to the question of continued membership of the Australian body politic. Consequently, s 51(xxvi) will not support a law depriving people of a particular racial group of their citizenship or their rights as citizens. And race is equally irrelevant to the enjoyment of those rights which are generally described as human rights and which are taken to inhere in each and every person by reason of his or her membership of the human race.

41 The second matter which flows from the requirement that there be some matter or circumstance upon which the Parliament might reasonably form the judgment that there is some difference pertaining to the people of a particular race which necessitates some special law is that the law must be reasonably capable of being viewed as appropriate and adapted to the difference asserted. A similar view was expressed by Deane and Toohey JJ in *Leeth v The Commonwealth*[60], it being said by their Honours that s 51(xxvi) authorises "discriminatory treatment of members of [a particular race] to the extent which is reasonably capable of being seen as appropriate and adapted to the circumstance of that membership". Although they did not explain why that was so, the requirement flows, in my view, from the need for there to be some material or circumstance from which it might reasonably be concluded by the Parliament that there is some difference necessitating a special law. Unless the law in question is reasonably capable of being viewed as appropriate and adapted to the difference which is claimed, it could not be concluded that the Parliament formed the view that there was such a difference.

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60 (1992) 174 CLR 455 at 489.

42 I have attempted to explain the need for a law to be reasonably capable of being viewed as appropriate and adapted to some difference which the Parliament might reasonably judge to exist by reference to the language of s 51(xxvi). However, the matter may also be expressed in terms used in the *Native Title Act Case*[61]. A law which deals differently with the people of a particular race and which is not reasonably capable of being viewed as appropriate and adapted to a difference of the kind indicated has no rational basis and is, thus, a "manifest abuse of the races power"[62]. So, too, it would be irrational and, thus, a manifest abuse of the races power if Parliament were to enact a law requiring or providing for the different treatment of the people of a particular race if it could not reasonably form the view that there was some difference requiring their different treatment.

43 Because the power conferred by s 51(xxvi) of the Constitution is premised on there being some matter or circumstance pertaining to the people of a particular race upon which the Parliament might reasonably conclude that there is a real and relevant difference necessitating the making of a special law, its scope necessarily varies according to circumstances as they exist from time to time. In this respect the power conferred by par (xxvi) is not unlike the power conferred by s 51(vi) to legislate with respect to defence[63]. And as with the defence power, a law that is authorised by reference to circumstances existing at one time may lose its constitutional support if circumstances change.

44 Although the power conferred by s 51(xxvi) is, in terms, wide enough to authorise laws which operate either to the advantage or disadvantage of the people of a particular race, it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid. It is even more difficult to conceive of a present circumstance pertaining to Aboriginal

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61 (1995) 183 CLR 373.

62 (1995) 183 CLR 373 at 460; *Gerhardy v Brown* (1985) 159 CLR 70 at 138-139 per Brennan J.

63 See with respect to the changing scope of the defence power, *Farey v Burvett* (1916) 21 CLR 433 at 441-443 per Griffith CJ, 453-455 per Isaacs J; *Andrews v Howell* (1941) 65 CLR 255 at 278 per Dixon J, 287 per McTiernan J; *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 161-163 per Williams J; *Victorian Chamber of Manufactures v The Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 347 at 399-400 per Williams J; *Stenhouse v Coleman* (1944) 69 CLR 457 at 471-472 per Dixon J; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 195, 197, 199 per Dixon J, 207 per McTiernan J, 222-223, 227 per Williams J, 253-255 per Fullagar J, 273-274 per Kitto J; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 596-597 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 484 per Brennan and Toohey JJ.

Australians which could support a law operating to their disadvantage. To put the matter another way, prima facie, at least, the circumstances which presently pertain to Aboriginal Australians are circumstances of serious disadvantage, which disadvantages include their material circumstances and the vulnerability of their culture[64]. And prima facie, at least, only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances.

45 Notwithstanding that it is difficult to envisage circumstances in which a law which operated to the disadvantage of the people of a racial minority might validly be enacted under s 51(xxvi) of the Constitution, the test of constitutional validity is not whether it is a beneficial law. Rather, the test is whether the law in question is reasonably capable of being viewed as appropriate and adapted to a real and relevant difference which the Parliament might reasonably judge to exist. It is the application of that test to today's circumstances, so far as they are known, that leads to the conclusion that prima facie, at least, s 51(xxvi) presently only authorises laws which operate to the benefit of Aboriginal Australians.

46 Once it is accepted, as, in my view, it must be, that s 51(xxvi) can only be exercised if the Parliament can reasonably conclude that there is some real and relevant difference necessitating the making of a special law, the argument that it only authorises laws which operate with respect to all persons of the race in question must fail. Not only would that construction infringe the basic rule that a grant of legislative power is to be construed with all the generality that its words permit[65], it would conflict with the very nature of the power conferred by s 51(xxvi). A construction of that kind would either require that the power not be used or that it be used to treat all persons of the race in question differently from people of other races notwithstanding that the circumstances of some members of that race might be no different from the circumstances of those not affected by that law. In either event, s 51(xxvi) would be productive of false or irrational discrimination: in the former case, that would occur because laws would not be passed to deal with genuine difference; in the latter case it would occur because the law would require different treatment even though there was no relevant difference. Section 51(xxvi), however, is directed to legitimate discrimination

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64 As indicated earlier, a matter dealt with by the Heritage Protection Act and also by ss 8 and 11 of the *World Heritage Properties Conservation Act* 1983 (Cth), considered in *The Tasmanian Dam Case* (1983) 158 CLR 1.

65 *The Jumbunna Coal Mine, No Liability v The Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

based on real and relevant difference or, at least, some real and relevant difference that Parliament might reasonably judge to exist.

47 The mere fact that the power conferred by s 51(xxvi) of the Constitution is limited in the manner indicated does not provide an answer to the question reserved by the Chief Justice. That is because the power conferred by s 51 of the Constitution "to make laws for the peace, order, and good government of the Commonwealth with respect to" the matters therein specified is, "subject to this Constitution", a plenary power to legislate with respect to those matters[66]. Subject to two matters shortly to be mentioned, a plenary power to legislate on some topic or with respect to some subject-matter carries with it the power to repeal or amend existing laws on that topic or with respect to that subject-matter[67]. The first qualification to that proposition is that that power is subject to any validly enacted applicable manner and form requirement[68]. The second is that, in the case of the amendment or partial repeal of a law enacted under s 51, a question may arise whether the law, as it stands after its alteration, retains its character as a law with respect to a matter within Commonwealth legislative power.

48 The plaintiffs contend that, as the Bridge Act does not, in terms, purport to repeal or amend any existing Commonwealth law, its validity is to be determined on the basis that it stands separate and apart from any such law, including the

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66 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

67 *Goodwin v Phillips* (1908) 7 CLR 1 at 7 per Griffith CJ; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 430 per Dixon J, 433 per McTiernan J; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 617-618 per Latham CJ, 623 per Starke J, 633, 633-634 per Evatt J, 636 per McTiernan J; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 107 per Latham CJ; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 226 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ; *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 63 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 74-75 per McHugh J; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 75 per Dawson J, citing *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 168; [1980] 1 All ER 529 at 551 per Lord Scarman.

68 *McCawley v The King* (1918) 26 CLR 9 at 52, 54, 55 per Isaacs and Rich JJ; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 417-418, 421 per Rich J, 424 per Starke J, 430, 431-432 per Dixon J, 443 per McTiernan J; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 618 per Latham CJ, 625 per Dixon J, 636 per McTiernan J.

Heritage Protection Act. Were the Bridge Act a separate enactment which, for example, purported to forbid a State Minister from making a declaration under State law having the same or similar effect as a declaration under the Heritage Protection Act, it would be difficult, if not impossible, to conceive of a present difference which the Parliament might reasonably judge to exist between the Ngarrindjeri people and people of other races so as to necessitate that particular law. But the Bridge Act does not affect a State law. It affects a Commonwealth law, namely, the Heritage Protection Act and it affects it by limiting its field of operation. Because it limits the field in which the Heritage Protection Act operates, it operates, to that extent, to repeal that Act[69].

49 The validity of the Heritage Protection Act is not in question. And in the view that I take, there is no reason to doubt that, at all relevant times, it has been, and continues to be a valid law under s 51(xxvi) of the Constitution. And subject to the qualifications previously mentioned, s 51(xxvi) not only authorises the Heritage Protection Act but, also, authorises its partial repeal. The first qualification is of no relevance for there is no manner and form requirement with respect to the repeal or amendment of the Heritage Protection Act. (And I very much doubt whether the legislative power of the Parliament extends to the enactment of a requirement of that kind, whether pursuant to s 51(xxvi) or any other head of legislative power.) So far as concerns the second qualification, the Heritage Protection Act as amended by the Bridge Act remains a law for the protection and preservation of areas and objects of significance in accordance with Aboriginal tradition and, for the reasons already given, continues to be a valid enactment under s 51(xxvi).

50 The question reserved by the Chief Justice should be answered "No".

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69 *Goodwin v Phillips* (1908) 7 CLR 1 at 7 per Griffith CJ; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 625 per Dixon J; *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 275-276 per Fullagar J; *Mathieson v Burton* (1971) 124 CLR 1 at 10-11 per Windeyer J; *South Australia v Tanner* (1989) 166 CLR 161 at 171 per Wilson, Dawson, Toohey and Gaudron JJ; cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 75 per McHugh J.

51 GUMMOW AND HAYNE JJ. In this action, the Chief Justice, acting pursuant to s 18 of the *Judiciary Act* 1903 (Cth), has reserved a question for the consideration of the Full Court. The question asks whether, on the facts pleaded in the further amended statement of claim and admitted in the amended defence, the *Hindmarsh Island Bridge Act* 1997 (Cth) ("the Bridge Act") or any part thereof is invalid in that it is not supported by s 51(xxvi) of the Constitution or any other head of Commonwealth legislative power. In argument before the Full Court, reliance has been placed only upon s 51(xxvi).

52 Section 51(xxvi) of the Constitution states:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> ...
>
> (xxvi) The people of any race~~, other than the aboriginal race in any State,~~ for whom it is deemed necessary to make special laws:".

The words ", other than the aboriginal race in any State," were omitted upon the coming into force on 10 August 1967 of the statute given the short title *Constitution Alteration (Aboriginals)* 1967 (Cth). That statute ("the 1967 Act") was enacted by the Parliament with the approval of the electors as required by the manner and form provisions of s 128 of the Constitution. The electors were consulted in accordance with the procedures laid down by the *Referendum (Constitution Alteration) Act* 1906 (Cth) ("the Referendum Act")[70]. Section 2 of the 1967 Act stated:

> "The Constitution is altered by omitting from paragraph (xxvi) of section 51 the words ', other than the aboriginal race in any State,'."

53 The Bridge Act commenced on 22 May 1997. It applies to two areas in the County of Hindmarsh in the State of South Australia. They are defined respectively as the "Hindmarsh Island bridge area" and the "pit area". Section 4 of the Bridge Act makes special provision with respect to the operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) ("the Heritage Protection Act") in relation to those areas. First, it is stated that the Heritage Protection Act "does not authorise" the making of a declaration in relation to the preservation or protection of an area or object from certain activities, in particular the construction of a bridge (the Bridge Act, s 4(1)). Further, the Heritage Protection Act "does not authorise" the Minister to take any action in

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70 Repealed by s 145 of the *Referendum (Machinery Provisions) Act* 1984 (Cth).

relation to an application thereunder that relates, wholly or partly, to those activities (the Bridge Act, s 4(2)).

54 It is admitted on the pleadings that the Ngarrindjeri people are members of the Aboriginal race. There is an issue on the pleadings (so the matter cannot be assumed by the Full Court) whether the areas to which the Bridge Act applies are of a high spiritual importance to the Ngarrindjeri people and whether the building of a bridge would desecrate their traditions, beliefs and culture. On 19 December 1995, the plaintiffs and others applied for a declaration under s 10 of the Heritage Protection Act to protect and preserve the land and waters within the area in question ("the plaintiffs' application"). If valid, the Bridge Act "does not authorise" the taking by the Minister of any action in relation to the plaintiffs' application.

55 The question before the Full Court is whether the Bridge Act is supported by s 51(xxvi) of the Constitution. There is no question before the Full Court concerning the validity of the Heritage Protection Act. If the Bridge Act be invalid, the operation of the Heritage Protection Act has continued unaffected by it.

Basic propositions

56 Before turning to consider the validity of the Bridge Act, it is convenient to restate several basic propositions. The first is that there is no general requirement that Commonwealth laws should have a uniform operation throughout the Commonwealth, nor is there any general impediment to the Parliament distinguishing between the different needs or responsibilities of different people or different localities[71]. Examples of legislation founded upon s 51(xxvi) which are limited in this way are the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act* 1975 (Cth) and the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act* 1978 (Cth). These statutes, as is apparent from their titles, were concerned with particular states of affairs in Queensland.

57 Secondly, in the judgment of the Court in *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd*, it was said[72]:

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71 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467, 489.

72 (1964) 113 CLR 207 at 226. See also *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 617-618; *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 647; *Deputy Commissioner of Taxation v Moorebank Pty Ltd*

(Footnote continues on next page)

"The will of a Parliament is expressed in a statute or Act of Parliament and it is the general conception of English law that what Parliament may enact it may repeal."

The Commonwealth and those supporting the validity of the Bridge Act seek to characterise it as an illustration of this proposition.

58 Thirdly, in determining the character of a law such as the Bridge Act, it is appropriate to take the steps indicated by Kitto J in *Fairfax v Federal Commissioner of Taxation* to identify the nature of the "rights, duties, powers and privileges" which the statute "changes, regulates or abolishes"[73]. In the present case, the Bridge Act changes, regulates or abolishes certain rights, duties, powers and privileges created by the Heritage Protection Act. This is apparent from the text of the central provision of the Bridge Act, s 4, which states:

"(1) The Heritage Protection Act does not authorise the making of a declaration in relation to the preservation or protection of an area or object from any of the following activities:

(a) the construction of a bridge, and associated works (including approaches to the bridge), in the Hindmarsh Island bridge area;

(b) work or other activities in that area preparatory to, or associated with, that construction;

(c) maintenance on, or repairs to, the bridge and associated works;

(d) use of the bridge and associated works;

(e) the removal of materials from, or dumping of materials in, the pit area in connection with any of the activities mentioned in paragraphs (a), (b) and (c).

(2) The Heritage Protection Act does not authorise the Minister to take any action after the commencement of this Act in relation to an application (whether made before or after the commencement of this Act) that

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(1988) 165 CLR 55 at 62-63; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 74-75.

73 (1965) 114 CLR 1 at 7. See also *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 334, 337, 351-352; *Leask v The Commonwealth* (1996) 187 CLR 579 at 590-591, 634.

relates (wholly or partly) to activity covered by paragraph (1)(a), (b), (c), (d) or (e)."

The Heritage Protection Act

59 It is convenient to refer to various provisions of the Heritage Protection Act in order better to appreciate the impact of the later statute upon the earlier statute. Section 4 of the Heritage Protection Act states:

> "The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."

The term "Aboriginal" is defined in s 3(1) as meaning "a member of the Aboriginal race of Australia" and including "a descendant of the indigenous inhabitants of the Torres Strait Islands". "Aboriginal tradition" is defined in s 3(1) as meaning:

> "the body of traditions, observances, customs and beliefs of Aboriginals generally *or of a particular community or group of Aboriginals*, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships". (emphasis added)

60 Sections 10 and 12 provide for the receipt by the Minister of applications "by or on behalf of an Aboriginal or a group of Aboriginals" which seek the preservation or protection from injury or desecration of, respectively, a specified area, or a specified object or class of objects[74]. The Minister is empowered to make a declaration in certain circumstances, including satisfaction that the area is "a significant Aboriginal area" which is under threat of injury or desecration, and that the object is "a significant Aboriginal object" under threat of injury or desecration. The phrases "significant Aboriginal area" and "significant Aboriginal object" refer respectively to areas of particular significance to Aboriginals in accordance with Aboriginal tradition and objects, including Aboriginal remains, of particular significance to Aboriginals in accordance with Aboriginal tradition (s 3(1)).

61 Section 10(1) of the Heritage Protection Act states:

> "Where the Minister:

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74 Section 9 empowers the Minister to make emergency declarations in respect of a specified area, with effect for a limited period. For present purposes, no special considerations arise from s 9.

(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;

(b) is satisfied:

(i) that the area is a significant Aboriginal area; and

(ii) that it is under threat of injury or desecration;

(c) has received a report under subsection (4) in relation to the area from a person nominated by him and has considered the report and any representations attached to the report; and

(d) has considered such other matters as he thinks relevant;

he may make a declaration in relation to the area."

62 It follows that before the power of the Minister under s 10 to make the declaration sought on the plaintiffs' application was exercisable, it would have been necessary (as a "condition precedent"[75]) for the Minister to have received a report under s 10(4) which dealt with various matters. These matters included the effects the making of the declaration might have on the proprietary or pecuniary interests of persons other than those Aboriginals who sought preservation or protection of the special area (s 10(1)(c), (4)(e)).

63 Declarations have effect for such period as is specified therein (ss 10(2), 12(2)). However, any declaration is subject to the requirement that it be laid before each House of the Parliament and be subject to disallowance by either House. That is the effect of the adaptation of s 48 of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") by s 15 of the Heritage Protection Act.

64 A declaration in relation to an area shall describe it with sufficient particulars to enable the identification of the area and contain provisions "for and in relation to the protection and preservation of the area from injury or desecration" (s 11). Section 12 imposes corresponding requirements with respect to declarations in relation to objects (s 12(3)). Section 3(2) states:

"For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

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75 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 18.

(a) in the case of an area:

(i) it is used or treated in a manner inconsistent with Aboriginal tradition;

(ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or

(iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

(b) in the case of an object - it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly."

It will be recalled from the definition of "Aboriginal tradition" in s 3(1) that it extends to the traditions, observances, customs and beliefs of a particular community or group of Aboriginals. A person who contravenes a provision of a declaration is guilty of an offence (s 22) and, on the application of the Minister, the Federal Court of Australia may enjoin conduct which constitutes or would constitute a contravention of a declaration (s 26).

65 Section 4(1) of the Bridge Act withdraws from the Minister the powers otherwise conferred by s 10 (and by s 12) of the Heritage Protection Act to make a declaration in relation to the preservation or protection of an area (or object) from the activities listed in s 4(1). Section 4(2) has a distinct, but related, operation. It removes from the Minister the power to take any action in respect of applications which concern activities listed in any of pars (a)-(e) of s 4(1). Section 4(2) applies both to applications made after the commencement of the Bridge Act on 22 May 1997 and to applications, such as the plaintiffs' application, which were then pending. In this latter operation upon the plaintiffs' application, s 4(2) made express provision which was "exhaustive" and left no room for any application of the Interpretation Act, s 8, even if it were possible otherwise to bring the application within its terms[76].

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76 See *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 at 161-162.

Amendment and repeal

66 With particular reference to the pending application, there was much attention in submissions to what was perceived as an issue whether the Bridge Act amended the Heritage Protection Act or partially repealed it. This suggested, or assumed, a false dichotomy.

67 In ordinary usage (apart from any special statutory meaning) to amend a statute "is to alter its legal meaning"[77], in particular its territorial, temporal or personal dimension[78]. An amendment may take the form of, or include, a repeal. Thus, if a section is deleted it can be said that it has been repealed whilst the statute itself has been amended[79]. Amendment may be effected by implication where, although the later statute contains no textual identification of the earlier law, "actual contrariety is clearly apparent"[80].

68 The earlier statute also will be amended by a law which does not identify the text it amends but produces the need to conflate the two texts to arrive at the combined legal meaning[81]. The Bridge Act is such a law. On its face, s 4 of the Bridge Act changes what otherwise would be the continued operation of the Heritage Protection Act. Yet the Bridge Act does not specify any particular provision of the Heritage Protection Act the operation of which it qualifies. Hence the need for textual conflation in the above sense.

69 In this way, the Bridge Act is to be "construed as part of" the Heritage Protection Act, as indicated by s 15 of the Interpretation Act[82]. However, the Bridge Act is not within that class of statutes which makes textual changes to the

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77 Bennion, *Statutory Interpretation*, 3rd ed (1997) at 210.

78 Bennion, *Statutory Interpretation*, 3rd ed (1997) at 130.

79 Bennion, *Statutory Interpretation*, 3rd ed (1997) at 211.

80 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 275; *South Australia v Tanner* (1989) 166 CLR 161 at 171.

81 Bennion, *Statutory Interpretation*, 3rd ed (1997) at 214. See also *Austereo Ltd v Trade Practices Commission* (1993) 41 FCR 1 at 11-13; 115 ALR 15 at 23-25.

82 Section 15 provides that every Act amending another Act shall, unless the contrary intention appears, be construed with such other Act and as part of it.

principal statute, so that it is "exhausted" upon its commencement and the incorporation of those textual changes[83].

70 These considerations may bear upon but cannot dictate the course of inquiry as to the validity of the Bridge Act. If it be invalid, then there is no scope for the process of conflation referred to above.

The operation of the Bridge Act

71 Questions which might have arisen with respect to the standing after the commencement of the Bridge Act of the then pending plaintiffs' application were avoided by the special provision in s 4(2) of the Bridge Act. In this sense, the plaintiffs accurately identified the Bridge Act as removing their procedural rights in respect of their pending application. The broader or, as it was put in argument, the "substantive" operation of s 4 was that in sub-s (1). This had the effect of removing the authority the Minister would have had on the compliance with the requirements spelled out in s 10(1) and s 12(1) respectively of the Heritage Protection Act to make a declaration in relation to the preservation or protection of an area or object from the activities detailed in pars (a)-(e) of s 4(1).

72 The Bridge Act curtails the operation of another law of the Commonwealth, not the enjoyment of any substantive common law rights. It demonstrates the general proposition referred to earlier in these reasons that what the Parliament may enact it may repeal[84]. First, the Bridge Act limits in a particular respect the declaration-making authority of the Minister under the Heritage Protection Act. Further, the Bridge Act removes any privilege conferred by the Heritage Protection Act upon Aboriginals or Aboriginal groups who applied or might apply seeking such declaration in respect of areas or objects in the Hindmarsh Island bridge area or the pit area, as defined in the Bridge Act. This is the character of the Bridge Act in the sense identified in *Fairfax v Federal Commissioner of Taxation*[85].

Validity of the Bridge Act

73 The question then is whether the Bridge Act, characterised in this way, so operates that it can be said to be connected to the head of power in s 51(xxvi). If a connection exists, then the law will be "with respect to" that head of power unless

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83 See *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 471.

84 cf *Allpike v The Commonwealth* (1948) 77 CLR 62 at 69, 76-77; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 245, 256, 263-265; *Commonwealth of Australia v WMC Resources Ltd* [1998] HCA 8 at 17-18, 134-142, 182-198.

85 (1965) 114 CLR 1 at 7.

the connection is so insubstantial, tenuous or distant that the law cannot sensibly be described as a law with respect to that head of power[86].

74 The first submission by the plaintiffs was that the Bridge Act lacked "a sufficient level of generality" to found support by s 51(xxvi). This was because, whilst the Ngarrindjeri people are members of the Aboriginal race, they do not constitute the entirety of that race, and s 51(xxvi) requires a law to answer the description "with respect to ... [t]he people of any race", not with respect to some only of the people of any race.

75 The construction of s 51(xxvi) for which the plaintiffs contend would cripple the reach of the legislative power to deal with social, economic or other conditions which particularly afflicted certain members or groups of Aboriginals. It also would imperil the validity of the Heritage Protection Act itself. In that statute, the central definition of "Aboriginal tradition" has the consequence that the purpose of the statute spelled out in s 4 is to preserve and protect the body of traditions, observances, customs and beliefs not only of Aboriginals generally but also of a particular community or group of Aboriginals which relate to particular areas.

76 The legislative power is to be construed with all the generality of which the phrase "the people of any race" admits[87]. That being so, why should the phrase "the people ..." be read as if limited to "all the people", rather than as including within the reach of the power any members of that class identified by the expression "the people of" the race in question?

77 The state of authority in this Court affirms that the phrase is "apposite to refer to any identifiable racial sub-group among Australian Aboriginals"[88]. The *Native Title Act Case*[89] was determined on the basis that those for whom the *Native Title Act* (1993) (Cth) was a "special" law were those Aboriginal and Torres Strait

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86 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 314; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602, 621, 634.

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

88 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 274.

89 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

Islanders who were holders of native title[90], and that it was not essential to determine whether the statute conferred a benefit upon all the people of those races.

78 The first submission by the plaintiffs should not be accepted.

79 The plaintiffs further submitted that the word "special" gave to s 51(xxvi) a "fluctuating content" and a "purposive aspect" like the defence power. This meant that the permissible purpose of the Bridge Act must be one which did not "discriminate against" the Aboriginal race. The plaintiffs eschewed the suggestion that the benefits conferred by the Heritage Protection Act, once conferred upon them, were "constitutionalised" and insusceptible of any repeal. However, they contended that the Bridge Act inflicted upon the Ngarrindjeri people a discriminatory detriment by loss of the opportunity to obtain the declaration under s 10 of the Heritage Protection Act which was sought by the plaintiffs' application. The plaintiffs were supported by the Attorney-General for New South Wales. He submitted that the federal concurrent legislative power was limited such that the exclusion by the Bridge Act of some members of the Aboriginal race from the benefits of the earlier statute would be invalid unless there was "a rational and proportionate connection between that exclusion and [some] legitimate governmental purpose".

80 These submissions should be rejected.

81 It is true that "unlike the aliens power or the corporations power", s 51(xxvi) "is not expressed to be a power to make laws simply with respect to persons of a designated character"[91]. A law will only answer the constitutional description in s 51(xxvi) if it (i) is "deemed necessary" (ii) that "special laws" (iii) be made for "the people of any race".

82 The term "deem" may mean "to judge or reach a conclusion about something"[92]. Here, the judgment as to what is "deemed necessary" is that of the Parliament[93]. Nevertheless, it may be that the character of a law purportedly based upon s 51(xxvi) will be denied to a law enacted in "manifest abuse" of that power of judgment[94]. Even if such a restraint (in addition to those stated or implied elsewhere in the Constitution, such as in s 51(xxxi)) exists there is no occasion for

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90 (1995) 183 CLR 373 at 462.

91 *Native Title Act Case* (1995) 183 CLR 373 at 460.

92 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65.

93 *Native Title Act Case* (1995) 183 CLR 373 at 460-461.

94 *Native Title Act Case* (1995) 183 CLR 373 at 460.

its application to the Bridge Act. The scope of the Heritage Protection Act was such that, if the various conditions required by that law were satisfied, the Minister might, upon application, have made declarations under ss 10 and 12 with respect to the Hindmarsh Island bridge area and the pit area. Such a declaration would have been subject to disallowance by either legislative chamber, as s 15 contemplated. There is no "manifest abuse" of its power of legislative judgment for the Parliament to accelerate matters by determining that, in respect of particular areas, the Ministerial power of declaration was withdrawn. It was for the Parliament to make its assessment of the circumstances which led it to deem it necessary to enact the Bridge Act[95].

83 The requirement that the Bridge Act be "special" does not relate to the matter of necessity. The presence of the special quality of the Bridge Act is to be ascertained "by reference to its differential operation upon the people of a particular race"[96]. Here, "the people of a particular race" are those spoken of in s 4 of the Heritage Protection Act. They are those Aboriginals and particular communities or groups of Aboriginals for whom areas or objects to which the Heritage Protection Act applied were of particular significance in accordance with Aboriginal tradition. In respect of areas and objects within the Hindmarsh Island bridge area and the pit area, the Bridge Act withdrew the potentiality of that special protection which would flow from declarations by the Minister and would continue for the life of such declarations.

84 As just indicated, "differential operation" is that which gives to any law based upon s 51(xxvi) its character as a "special" law. Once it is accepted, as it has been, that a law may make provision for some only of a particular race, it follows that a valid law may operate differentially between members of that race. That is the situation with the Bridge Act. Moreover, as was said in the joint judgment in the *Native Title Act Case*[97]:

> "A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race."

Here, the Bridge Act imposes a disadvantage, of the nature identified above, with respect to areas and objects within the Hindmarsh Island bridge area and the pit

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95 The circumstances were set out in the Second Reading Speech in the House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1996 at 5802-5803.

96 *Native Title Act Case* (1995) 183 CLR 373 at 460-461 citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186, 245, 261.

97 (1995) 183 CLR 373 at 461.

area. The disadvantage is in the contraction of the field of operation of the Heritage Protection Act, itself a law which is to be taken as supported by s 51(xxvi).

85 Although they disclaimed any such submission, the position assumed by the plaintiffs in denying the validity of the Bridge Act would deny to the Parliament the competence to limit the scope of a special law by a subsequent legislative determination that something less than the original measure was necessary. The Parliament might make that judgment for various reasons, including changes in the circumstances which had led it to enact that original special law.

86 It is true, but not to the point, that the differential treatment of those upon whom the law operates by conferral of a right or benefit may also impose an obligation or disadvantage upon others. In various provisions of the Constitution, notably ss 51(ii), 102 and 117, the terms "discriminate" and "discrimination" appear. Further, it was settled in *Cole v Whitfield*[98] that the general hallmark of measures which contravene s 92 is their effect as discriminatory, in a protectionest sense, against interstate trade and commerce. The judicial exegis in this Court upon "discrimination" in constitutional law[99] largely has been concerned with its meaning as a restriction, in one or other of the above senses, upon legislative power. Section 51(xxvi) stands in a different position. The requirement of differential operation, spelled out from the use of the phrase "special laws", is a criterion of validity not a cause of invalidity. It is "of the essence of" a law supported by s 51(xxvi) "that it discriminates between the people of the race for whom the special laws are made and other people"[100].

87 The differential operation of the one law may, upon its obverse and reverse, withdraw or create benefits. That which is to the advantage of some members of a race may be to the disadvantage of other members of that race or of another race. Extreme examples, given particularly the lessons of history (including that of this country), may be imagined. But such apprehensions cannot, in accordance with received doctrine, control what otherwise is the meaning to be given today to heads of federal legislative power.

88 Thus, in the *Territorial Senators Case*[101], Mason J spoke of "the grim spectre conjured up by the plaintiffs of a Parliament swamping the Senate with senators

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98 (1988) 165 CLR 360.

99 See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-571; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478; *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 at 485-486, 494-495.

100 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 261.

101 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271.

from the Territories, thereby reducing the representation of the States disproportionately to that of an ineffective minority in the chamber". This was to disregard the assumption "which we should now make, that Parliament will act responsibly in the exercise of its powers". In the same case, Jacobs J spoke against the construction of the words of the Constitution "by some distorting possibility"[102].

89 However, three further points may briefly be made. First, as a matter of construction, a legislative intention to interfere with fundamental common law rights, freedoms and immunities must be "clearly manifested by unmistakable and unambiguous language"[103]. Secondly, the doctrine of *Marbury v Madison*[104] ensures that courts exercising the judicial power of the Commonwealth determine whether the legislature and the executive act within their constitutional powers[105]. Thirdly, the occasion has yet to arise for consideration of all that may follow from Dixon J's statement that the Constitution[106]:

> "is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."

The 1967 Act

90 It was submitted that the circumstances surrounding the passage of the 1967 Act and its submission to the electors under s 128 of the Constitution favoured, if

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102 (1976) 134 CLR 201 at 275. See also *Queensland v The Commonwealth* (1977) 139 CLR 585 at 604-605.

103 *Coco v The Queen* (1994) 179 CLR 427 at 437. See also *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 467-468; *R v Home Secretary; Ex parte Pierson* [1997] 3 WLR 492 at 506-507; [1997] 3 All ER 577 at 592.

104 1 Cranch 137 (1803) [5 US 87].

105 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35; *Harris v Caladine* (1991) 172 CLR 84 at 134-135.

106 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193. See also *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818 at 824-825, 827-830; 145 ALR 96 at 104-106, 108-112; and cf *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.

they did not require, a construction of s 51(xxvi) in its amended form which would support only those special laws which were for the "benefit" of the indigenous races. Reliance was placed, in particular, upon the statement by Deane J in *The Tasmanian Dam Case*[107]:

> "The power conferred by s 51(xxvi) remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967, that power has included a power to make laws benefiting the people of the Aboriginal race."

Another interpretation of the events of 1967 is that, whilst the purpose of the 1967 Act was to ensure that the Parliament could legislate beneficially in respect of the indigenous races, this was implemented by including them within the generality of the power in s 51(xxvi). Moreover, it is as well to recall that it is the constitutional text which must always be controlling.

91 The text is not limited by any implication such as that contended for by the plaintiffs[108]. This is so whether one has regard alone to the terms of the Constitution after the 1967 Act took effect or also to that statute. The circumstances surrounding the enactment of the 1967 Act, assuming regard may properly be had to them, may indicate an aspiration of the legislature and the electors to provide federal legislative powers to advance the situation of persons of the Aboriginal race. But it does not follow that this was implemented by a change to the constitutional text which was hedged by limitations unexpressed therein.

92 The bill for the 1967 Act did not attract any opposition in Parliament so as to lead to the distribution to each elector of an argument against the proposed law by the Chief Electoral Officer. Section 6A of the Referendum Act provided for the distribution of "yes" and "no" cases authorised by a majority of those members of both Houses of Parliament who voted for and against the proposed law. Only a "yes" case was authorised and distributed to each elector. It stated that the proposed alteration of s 51(xxvi) would do two things and continued[109]:

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107 (1983) 158 CLR 1 at 273.

108 *McGinty v Western Australia* (1996) 186 CLR 140 at 169-170.

109 Chief Electoral Officer Commonwealth, *The Arguments For and Against the Proposed Alterations Together with a Statement Showing the Proposed Alterations*, 6 April 1967 at 11.

"First, it will remove words from our Constitution that many people think are discriminatory against the Aboriginal people.

Second, it will make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary.

This cannot be done at present because, as the Constitution stands, the Commonwealth Parliament has no power, except in the Territories, to make laws with respect to people of the Aboriginal race as such.

This would not mean that the States would automatically lose their existing powers. What is intended is that the National Parliament could make laws, if it thought fit, relating to Aboriginals - as it can about many other matters on which the States also have power to legislate. The Commonwealth's object will be to co-operate with the States to ensure that together we act in the best interests of the Aboriginal people of Australia."

93 The treatment in the "yes" case of the proposed alteration to the power of the Commonwealth legislature emphasised considerations of federalism. It did not speak of other limitations upon the nature of the special laws beyond confirming that they might apply to the people of the Aboriginal race "wherever they may live" rather than be limited to the Territories. Further, the proposed law took its form after the expression of learned opinion that complete repeal of s 51(xxvi) would have been preferable to any amendment intended to extend to the Aboriginals "its possible benefits"[110].

94 The omission in the 1967 Act of any limitation, making specific reference to the provision of "benefits" to persons of the Aboriginal race, upon the operation of the amended s 51(xxvi), is consistent with a wish of the Parliament to avoid later definitional argument in the legislature and the courts as to the scope of its legislative power. That is the effect of what was achieved.

International law

95 There has been some discussion in the decisions of the Supreme Courts of the United States and of Canada of the significance of what might be called international norms for the construction and application of the bills of rights which in the United States and Canada restrain the exercise of legislative and executive

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110 Sawer, "The Australian Constitution and the Australian Aborigine", (1966) 2 *Federal Law Review* 17 at 35.

power. In *Stanford v Kentucky*[111], Scalia J, delivering the majority judgment, emphasised that it was *American* contemporary conceptions which informed any dispute as to the Eighth Amendment's proscription of cruel and unusual punishments[112]. On the other hand, it appears that the Supreme Court of Canada has had regard to international human rights laws which did not bind Canada itself[113]. The attitude in the United States may be influenced by principles of popular sovereignty, separation of powers and "majoritarian democracy", which treat international legal norms as unresponsive to the American electorate[114].

96 One of the interveners[115] referred to the discussion by Gibbs CJ in *Koowarta v Bjelke-Petersen* of the human rights clauses in the Charter of the United Nations, in particular Arts 1(3), 13, 55(c), 56 and 62[116]. Gibbs CJ said[117]:

> "The preponderance of opinion appears to favour the view that the obligation upon members of the United Nations to protect human rights and fundamental freedoms is of a legal character, although the machinery for enforcement is imperfect and the rights and freedoms protected are not clearly defined."

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111 492 US 361 (1989).

112 492 US 361 at 369, fn 1 (1989).

113 See *R v Rahey* [1987] 1 SCR 588 at 633; Hogg, *Constitutional Law of Canada*, 3rd ed (1992) at 824; Bayefsky and Fitzpatrick, "International Human Rights Law in United States Courts: A Comparative Perspective", (1992) 14 *Michigan Journal of International Law* 1 at 80-82.

114 Bayefsky and Fitzpatrick, "International Human Rights Law in United States Courts: A Comparative Perspective", (1992) 14 *Michigan Journal of International Law* 1 at 82-89; Brilmayer, "Federalism, State Authority and the Preemptive Power of International Law", [1994] *Supreme Court Review* 295 at 307-308, 322-326, 329-332.

115 The Human Rights and Equal Opportunity Commission.

116 The text of the Charter is the Schedule to the *Charter of the United Nations Act* 1945 (Cth).

117 (1982) 153 CLR 168 at 204.

The intervener went on to submit that the Constitution was to be construed in accordance with international law comprising not only treaties to which Australia is a party but also customary law obligations[118].

97 It has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law[119]. On the other hand, the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law[120].

98 Further, it has long been established that the legislative powers of the Parliament given by the Constitution itself stand in a special position. In *Polites v The Commonwealth*[121], the immediate question was whether s 13A of the *National Security Act* 1939 (Cth) authorised the making of regulations which imposed upon aliens, in common with British subjects, a duty to serve against the enemy outside Australia. The Court accepted[122], as a rule of customary international law, that, speaking generally, one nation was not allowed to compel the nationals of a third country, without its consent, to fight in a war with a second country[123]. The Court held that the Parliament had evinced an intention to give to the executive an unqualified discretion to call up aliens. What is particularly significant for present purposes is the fate in *Polites* of the further submission that the power in s 51(vi)

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118 As to the requirements for the creation of the customary law obligation, see *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 559-560.

119 *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

120 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204.

121 (1945) 70 CLR 60.

122 (1945) 70 CLR 60 at 70, 74, 76, 77, 79, 80.

123 The accuracy, at the time, of that perception of customary international law has been disputed, at least as regards aliens who were permanent residents of the conscripting state: Shearer, "The Relationship Between International Law and Domestic Law" in Opeskin and Rothwell (eds), *International Law and Australian Federalism*, (1997) at 48-49, n 60; O'Connell, *International Law*, 2nd ed (1970), vol 2 at 703-705.

of the Constitution should be read as subject to the same restriction derived from customary international law. Dixon J said[124]:

> "The contention that s 51(vi) of the Constitution should be read as subject to the same implication, in my opinion, ought not to be countenanced. The purpose of Part V of Chapter I of the Constitution is to confer upon an autonomous government plenary legislative power over the assigned subjects. Within the matters placed under its authority, the power of the Parliament was intended to be supreme and to construe it down by reference to the presumption is to apply to the establishment of legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is none the less a constitution."

99 More recently, in *Horta v The Commonwealth*[125], the Court rejected the submission that the legislation giving effect to a treaty with the Republic of Indonesia was invalid because the treaty was inconsistent with or in breach of Australia's obligations under customary international law or one or more international Conventions to which Australia is a party[126]. The judgment of the whole Court affirmed that no provision of the Constitution confines the legislative power with respect to "External affairs" to the enactment of laws which are consistent with, or which relate to treaties or matters which are consistent with, the requirements of international law[127].

100 Counsel for the plaintiffs eschewed any direct adoption of the submissions by the intervener. They directed attention to the 1967 Act itself and submitted that, as with any other law passed by the Parliament, if capable of a construction consistent with Australia's then international legal obligations, it should be so construed. However, a proposed law for the alteration of the Constitution passed in accordance with the special manner and form provisions of s 128 differs in character and quality from laws passed under the heads of power in ss 51 and 52. Upon the satisfaction of the requirements of s 128, culminating in the presentation to the Governor-General for the Queen's Assent, the proposed law is spent and by force of s 128 the Constitution itself is altered. "Its only operative effect [was] to

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124 (1945) 70 CLR 60 at 78. See also at 69 per Latham CJ, 74 per Rich J, 75 per Starke J, 79 per McTiernan J, 82-83 per Williams J; cf *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 424.

125 (1994) 181 CLR 183.

126 (1994) 181 CLR 183 at 195.

127 (1994) 181 CLR 183 at 195.

alter the Constitution, that and no more"[128]. In *Sankey v Whitlam*, Gibbs ACJ said[129]:

> "Assuming that a law passed in accordance with s 128 for the alteration of the Constitution can be described as a law of the Commonwealth, the alteration, when it takes effect, becomes part of the Constitution - part of the fundamental law from which the Parliament of the Commonwealth derives its legislative power - and can no longer be regarded merely as an exercise of the legislative power of the Commonwealth."

101 The Bridge Act is to be interpreted and applied in conformity and not in conflict with any relevant established rules of international law only in so far as its language permits. That language is unambiguous. It was in that setting that submissions were made as to the scope of the legislative power in exercise of which the Bridge Act was enacted. In essence, the submissions sought to apply a rule for the construction of legislation passed in the exercise of the legislative power to limit the content of the legislative power itself. Such an attempt failed in *Polites* and in *Horta* and it should fail here.

Conclusion

102 The question reserved should be answered in the negative. The plaintiffs should pay the costs of the defendant of the question reserved. The position with respect to the interveners should be dealt with as proposed by the Chief Justice and McHugh J.

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128 *Sankey v Whitlam* (1978) 142 CLR 1 at 75 per Stephen J.

129 (1978) 142 CLR 1 at 31; cf at 92-93 per Mason J, 104-105 per Aickin J.

103 KIRBY J. This case is about the race power in s 51(xxvi) ("par (xxvi)") of the Australian Constitution. The essential issue is whether the paragraph permits the making of a special law which is detrimental to, and discriminates adversely against, a group of Aboriginal Australians solely by reference to their race. That paragraph has had comparatively little attention. No holding of this Court determines the outcome of these proceedings.

104 The constitutional issue arises on a question reserved for the opinion of the Full Court by order of Brennan CJ[130]. That question asks whether, on the facts pleaded and admitted, the *Hindmarsh Island Bridge Act* 1997 (Cth) ("the Bridge Act") or any part of that Act is invalid as not supported by s 51(xxvi) or any other head of power. No other head being propounded, the scope of the race power is thus tendered to the Court for elucidation.

Protracted challenges to the Hindmarsh Island Bridge

105 In order to understand the proceedings, it is helpful to have regard to the uncontested background of the dispute. Mrs Doreen Kartinyeri and Mr Neville Gollan (the plaintiffs) are members of the Ngarrindjeri people who, it is conceded, are members of the Aboriginal race. Following a proposal to develop tourist facilities on Hindmarsh Island in South Australia, and to build a bridge from the mainland to afford access to that development, an organisation on behalf of a group of Aboriginal people applied to the then federal Minister for Aboriginal and Torres Strait Islander Affairs ("the Minister") for a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) ("the Heritage Protection Act"). The application claimed that the area affected by the proposed bridge and development constituted a significant Aboriginal area under threat of injury or desecration. The organisation sought a declaration under the Heritage Protection Act, in effect, to restrain, for a period of twenty-five years, the activities necessary for the building of the bridge. Following receipt of a report under the Act from Professor Cheryl Saunders, on 9 July 1994, the Minister made such a declaration.

106 The aftermath of this action has been protracted litigation. These proceedings represent the latest stage. In February 1995, the Federal Court of Australia quashed the Minister's declaration[131]. An appeal to the Full Court was unsuccessful[132]. The plaintiffs and other applicants then made a fresh application to the Minister. The

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130 The order was made on 3 September 1997 pursuant to the *Judiciary Act* 1903 (Cth), s 18.

131 *Chapman v Tickner* (1995) 55 FCR 316.

132 *Tickner v Chapman* (1995) 57 FCR 451.

response was the nomination of Justice Jane Mathews, a judge of the Federal Court of Australia, to act as a Reporter pursuant to the Heritage Protection Act. A challenge to the validity of the appointment of Justice Mathews was upheld by this Court[133]. The Court's order meant that Justice Mathews' report, although subsequently tabled in the Senate[134], cannot be relied upon under the Heritage Protection Act. The plaintiffs' application has, therefore, never been validly and conclusively determined in accordance with that Act.

107 Contemporaneously with the events described above, another group of Aboriginals contested the claims made by the plaintiffs for the Ngarrindjeri people. The government of South Australia appointed a Royal Commission to investigate the claims. Various challenges, mostly unsuccessful, were mounted against the establishment of that Commission and against aspects of its proceedings[135]. Ultimately, the Royal Commissioner reported adversely to the plaintiffs' interests[136].

108 Following a change in the government of the Commonwealth, concern was expressed about the costs already incurred in the successive inquiries under the Heritage Protection Act, the delays involved and the further delays projected, with consequent uncertainty, if the procedures of that Act were once again set in train. A Bill was introduced into the Parliament which became the Bridge Act. It was designed, in effect, to terminate the plaintiffs' pursuit of their rights under the Heritage Protection Act and to prevent any further such applications.

109 The plaintiffs commenced proceedings in this Court seeking a declaration that the Bridge Act was invalid so that it did not operate to prevent the

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133 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

134 Senate, *Parliamentary Debates* (Hansard), 17 September 1996 at 3532.

135 *Aboriginal Legal Rights Movement v South Australia* unreported, Supreme Court of South Australia, 26 July 1995; *Aboriginal Legal Rights v SA (No 1)* (1995) 64 SASR 551; *Aboriginal Legal Rights v SA (No 2)* (1995) 64 SASR 558; *Aboriginal Legal Rights v SA (No 3)* (1995) 64 SASR 566.

136 South Australia, *Report of the Hindmarsh Island Bridge Royal Commission* (1995); cf Mead, *A Royal Omission. A critical summary of the evidence given in the Hindmarsh Island Bridge Royal Commission with an alternative Report* (1995); Harris, "The narrative of Law in the Hindmarsh Island Royal Commission" (1996) 14(2) *Law in Context* 115; Tehan, "A tale of two cultures" (1996) 21 *Alternative Law Journal* 10; Tehan, "To Be or Not To Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage" (1996) 15 *University of Tasmania Law Journal* 267 at 298-301.

determination of their application in accordance with the Heritage Protection Act. This led to the reference to the Full Court of the constitutional question which now falls to be answered.

The relevant legislation

110 The scheme of the Heritage Protection Act is straightforward. Its long title declares that it is "[a]n Act to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes". The purposes of the Act are stated to be "the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition"[137]. "Aboriginal" is defined to mean, relevantly, "a member of the Aboriginal race of Australia"[138]. The Act is stated to have effect "subject to the obligations of Australia under international law"[139]. Provision is made for the Minister to make "Emergency declarations" if satisfied that an area is "a significant Aboriginal area" and is "under serious and immediate threat of injury or desecration"[140]. Such declarations have force for a limited time only[141]. For longer effect, the Minister's declaration must conform to s 10. This presupposes receipt and consideration of a report from a Reporter nominated by the Minister[142]. In such a case, a declaration has effect for such period as is specified in it[143].

111 To enforce the Heritage Protection Act, criminal offences and penalties are provided in the case of any contravention of a declaration made under the Act[144]. The Federal Court is empowered to grant an injunction to restrain conduct which

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137 s 4.

138 s 3(1). The definition of "Aboriginal" also includes "a descendant of the indigenous inhabitants of the Torres Strait Islands".

139 s 8(2).

140 s 9(1).

141 ss 9(2) and (3).

142 s 10(1)(c).

143 s 10(2).

144 For the purposes of Pt II, s 22. Declarations made under Pt IIA are punishable pursuant to s 21H of the Act.

would contravene the Act[145] including an interim injunction pending determination of an application[146]. Provision is also made for compensation by the Commonwealth where any declaration would result in the acquisition of property from a person otherwise than on just terms[147] and for legal assistance[148]. The Act contains a special part (Pt IIA) inserted in 1987[149] dealing separately with the preservation of Aboriginal cultural property in Victoria. In respect of that part there is a special exemption[150] relating to "any site, land, act or activity" to which the *Alcoa (Portland Aluminium Smelter) Act* 1980 (Vic), s 13 applies.

112 The Bridge Act, by its long title, is described as one "to facilitate the construction of the Hindmarsh Island bridge, and for related purposes". Its operative provision bears the heading "Provisions facilitating construction etc. of the bridge"[151]. It states that the Heritage Protection Act "does not authorise the making of a declaration in relation to the preservation or protection of an area or object" from any of a number of identified activities. These include the construction of the bridge, associated work, maintenance, use of the bridge and removal and dumping of material in connection with the previous activities[152].

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145 s 26(1).

146 s 26(2).

147 s 28.

148 s 30.

149 By *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act* 1987 (Cth), s 7; cf Tehan, "To Be or Not To Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage" (1996) 15 *University of Tasmania Law Journal* 267 at 282.

150 s 21ZA.

151 s 4. The terms of the section appear in the reasons of Brennan CJ.

152 s 4(1).

The section also provides[153] that the Heritage Protection Act does not authorise the Minister "to take any action after the commencement of this Act in relation to an application (whether made before or after the commencement of this Act) that relates (wholly or partly) to activity covered by" the foregoing provisions.

113 The Ministerial speech introducing the Bill which became the Act stated that its object was to prevent the Heritage Protection Act "from further impeding the building of the Hindmarsh Island Bridge"[154]. It would not affect the Heritage Protection Act in respect of applications for protection made by members of the local indigenous community relating to sites in other parts of Hindmarsh Island or by indigenous people elsewhere in Australia. The Minister declared that the government had "not lightly made the decision to prepare special legislation to enable the Hindmarsh Island Bridge to be built"[155]. It had considered appointing another Reporter. It had rejected that course because "there would be no guarantee of a satisfactory outcome, and potentially further substantive costs to the taxpayer"[156].

The interveners

114 The submissions of the plaintiffs were generally supported by the State of New South Wales. Aspects of their submissions were supported by the Human Rights and Equal Opportunity Commission which was allowed to intervene. The Commonwealth had the general support of the States of South Australia and Western Australia and the Northern Territory. It was also supported by Mr Thomas Chapman, Mrs Wendy Chapman and Kebaro Pty Ltd ("the Kebaro interests") who were granted leave to intervene on two bases: first that they stood to be adversely affected by a fresh ministerial declaration under the Heritage Protection Act, and secondly that the argument they sought to advance, whilst being broadly similar to that of the Commonwealth, carried a different emphasis. They supported the Commonwealth on each of the principal points in its submission.

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153 s 4(2).

154 House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1996 at 5802.

155 House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1996 at 5803.

156 House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1996 at 5803.

The main issues

115 A number of issues arise from the arguments addressed to the Court:

1. *The subgroup point*: The plaintiffs' first attack on the validity of the Bridge Act raised an issue of characterisation. The plaintiffs contended that that Act, properly analysed, was a law with respect to the Ngarrindjeri people or some only of them. It was thus a law with respect to a subgroup of members of the Aboriginal race and not, as par (xxvi) required, the people of any race.

2. *The discriminatory law point*: The plaintiffs alternatively contended that the Bridge Act was invalid on the ground that par (xxvi) requires that any law enacted in reliance upon it must be for the benefit or advancement of the people of any race (or not detrimental to or discriminatory against such people). Properly characterised, the Bridge Act fell outside these prerequisites. It was a law designed to deprive people of the given race of legal rights which they would otherwise enjoy. It was thus of no benefit to them. Instead, it was detrimental to, and discriminatory against, them.

3. *The Aboriginal benefit point*: As an alternative to the discriminatory law point, the plaintiffs argued that, having regard to its history, par (xxvi) was to be understood as supporting special laws for the Aboriginal people only where they were for their benefit or advancement. Whatever its meaning as a head of power for the making of laws with respect to the people of any other race, it would not support a law (as it was argued the Bridge Act was) which was not for the benefit of people of the Aboriginal race but detrimental to them.

4. *The interpretive principle point*: The differences between the parties were enlarged by the conflicting submissions concerning the relevance (if any) of international human rights law in relation to discrimination on the ground of race as it was said to impinge upon the construction of par (xxvi). The Human Rights and Equal Opportunity Commission urged that the ambiguous terms of par (xxvi) should be construed, so far as possible, to conform both with international customary law relevant to racial discrimination and with Australia's international obligations under treaties, ratified by Australia, which expressed the applicable international law on this topic. The Commonwealth submitted that the Commission had overstated the use that might be made of international human rights norms. For the Commonwealth, par (xxvi) was not ambiguous. International law was therefore irrelevant to its interpretation. Some of the interveners went further. In particular, South Australia submitted that this argument represented an impermissible attempt to cloak the executive government of the Commonwealth, through its powers to ratify treaties on behalf of Australia, with a capacity to alter the meaning of the Constitution. It will be necessary to return to these submissions. They

raise once again the interpretative principle which I expressed in *Newcrest Mining v The Commonwealth*[157].

5. *The repeal/amendment point*: The Commonwealth and the supporting interveners submitted that the Bridge Act was to be properly classified as a partial repeal of, or amendment to, the Heritage Protection Act. As such, its constitutional validity was to be determined by reference to the provisions of the Heritage Protection Act. The Bridge Act was valid because it constituted no more than an alteration to the Heritage Protection Act which everyone accepted was a valid law made under par (xxvi). The plaintiffs initially argued that the Bridge Act was to be judged on its own terms. As a fallback position, the plaintiffs, in relation to this point, embraced a submission of New South Wales. This was to the effect that, if the Bridge Act were to be treated as a partial repeal or amendment of the Heritage Protection Act, its validity was to be determined by reading the two Acts together, as one composite enactment. This hypothetical statute, they argued, would be constitutionally invalid. Either way, the result would be the same. The Bridge Act was unconstitutional.

116 It is appropriate to note in passing that no party suggested that s 117 of the Constitution had direct application in this case. That section provides that a subject of the Queen, resident in any State, "shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were ... resident in such other State". The scope of this guarantee[158] and the question of whether it restricts the operation of par (xxvi)[159] in a relevant way, can therefore be left for another day.

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157 (1997) 71 ALJR 1346 at 1423-1426; 147 ALR 42 at 147-151.

158 See *Street v Queensland Bar Association* (1989) 168 CLR 461 at 485, 503-504; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487-488; cf Detmold, "The New Constitutional Law" (1994) 16 *Sydney Law Review* 228 at 234-235.

159 On the relationship between powers and constitutional guarantees, see *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-484; *Newcrest Mining v The Commonwealth* (1997) 71 ALJR 1346 at 1355, 1364, 1377, 1421; 147 ALR 42 at 54, 63, 84, 144.

Common ground

117 Notwithstanding the foregoing points of controversy, there was common ground between the parties about a large number of matters:

1. It was accepted for the plaintiffs that in 1901, par (xxvi), as it then stood, might have authorised legislation which was either beneficial or detrimental to the people of any race[160]. At that time, the paragraph included the exception which was deleted following an alteration of the Constitution in 1967. The words removed were "other than the aboriginal race in any State". No law could be cited where the power conferred by par (xxvi) had been exercised before 1967[161]. However, since that time, the power has been regularly used in the making of laws, including the Heritage Protection Act, for the people of the Aboriginal race. No one could point to an Australian law, made by the Parliament, reliant on par (xxvi), which was enacted to the detriment of, or to discriminate against, persons on the grounds of their race.

2. The plaintiffs accepted that the Parliament was entitled to repeal or amend the Heritage Protection Act. Their contention that an Act made under par (xxvi) must be for the benefit or advancement of the people of a race did not extend to suggesting that, once benefits were granted or advancement enacted, these could not be withdrawn or changed. Such a view of the power would effectively constitutionalise any such enactment, thus rendering it incapable of ready amendment. Acceptance of this position clarified, to my way of thinking, the substance of the plaintiffs' submission about the meaning of the power. It was, as they ultimately accepted (and as New South Wales endorsed it) a prohibition on detrimental or adversely discriminatory legislation. This was their essential complaint against the Bridge Act. It invoked par (xxvi) to work a specific detriment upon, and adverse discrimination against, the plaintiffs by reference to their race. It was this suggested meaning of par (xxvi) with which the Commonwealth joined issue.

3. No party or intervener sought to argue that, where a law was supported by reference to par (xxvi), consideration of whether it was "necessary to make special laws" for people on the ground of "race" was placed entirely outside judicial scrutiny. Whilst it would be for the Parliament, in the first place, to do the deeming contemplated by the paragraph, neither the Commonwealth nor those who supported its submissions denied that the necessity to make

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160 Submissions of the Plaintiffs, par 10.

161 The *Pacific Island Labourers Act* 1901 (Cth) appears to have been enacted under s 51(xix) of the Constitution; cf Pengelley, "The Hindmarsh Island Bridge Act" (1998) 20 *Sydney Law Review* 144 at 146, n 18.

special laws or, indeed, the characterisation of a law as falling within the power was, ultimately, a matter for this Court. By reference to what the Court said in *Western Australia v The Commonwealth (Native Title Act Case)*[162], it was accepted that the Court retained a residual supervisory power. Notwithstanding parliamentary deeming, the Court could hold that there was, in truth, no necessity to make a special law for the people of a race under the race power. Various epithets of restraint were suggested to describe the "extreme case" which alone would warrant judicial intervention on this basis. The Commonwealth agreed, as a theoretical possibility, that a law to exterminate members of a particular race would invite invalidity. Western Australia suggested that a case that would authorise the intervention would be one in which the law was "so outrageous so as to be completely unacceptable". For South Australia a test of *mala fides* was propounded or one involving "manifest abuse"[163] of the power. Those who supported its validity urged that the Bridge Act fell far short of these epithets. They argued that the Court was, therefore, not entitled to substitute its opinion for that of the Parliament.

4. In its written submissions, the Commonwealth suggested, faintly, that it might have been open to the Parliament to conclude, in the case of the Bridge Act, that a special law was necessary for the benefit of the Aboriginal people, including the Ngarrindjeri, in order to settle a divisive dispute between conflicting factions[164] evident in the earlier court proceedings. However, it was not seriously pressed that the Bridge Act was for the benefit of the people of a race or deemed necessary for their benefit as a special law. The plaintiffs argued that the real benefit of the Bridge Act is made plain by its long title and its operative provision[165] - that it is for the benefit of those concerned to see the construction of the bridge without the impediments caused by the Heritage Protection Act. Counsel for the Kebaro interests very properly conceded that the Bridge Act altered adversely the position of the plaintiffs. He accepted that, to that extent, there was discrimination against Aboriginals. The Bridge Act took away from them rights which they would otherwise enjoy as people of the Aboriginal race.

5. Although there were differences about whether par (xxvi) was ambiguous and, if it was, as to the use that might be made of the Convention Debates of

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162 (1995) 183 CLR 373 at 460.

163 cf *Native Title Act Case* (1995) 183 CLR 373 at 460.

164 Submissions of the Commonwealth, par 2.6.

165 s 4; cf Pengelley, "The Hindmarsh Island Bridge Act" (1998) 20 *Sydney Law Review* 144.

the 1890s, Parliamentary debates of the 1960s and materials prepared for the 1967 referendum, no objection was raised by any party to the Court's going to these materials in order to secure a general understanding of the purpose of the race power in its original form and the object of the constitutional alteration approved at referendum in 1967. For the Commonwealth, it was accepted that such alteration amounted to a "very important symbolic event" having the "primary object" of conferring additional powers on the Parliament to make special laws for the benefit of Aboriginal people in a State by reference to their race. Where the parties differed was upon whether this purpose was a mere aspiration or whether, after 1967, it confined the ambit of the power, either generally in relation to all "people of any race" or specially in relation to the people of the Aboriginal race.

The subgroup point

118 It is convenient first to deal with the plaintiffs' argument that par (xxvi) requires that a law made under its provisions must be characterised as one for the people of a race as a whole and does not support a law characterised as one for a particular subgroup of that race. Because the Bridge Act, whether read alone or in conjunction with the Heritage Protection Act, could be viewed, if at all, as one only with respect to the Ngarrindjeri group or tribe (or perhaps even a smaller section of that group), it was not, so the plaintiffs argued, a law with respect to "[t]he people of any race" as par (xxvi) contemplated.

119 The plaintiffs argued thus. The Heritage Protection Act, properly characterised, was addressed to Aboriginals throughout Australia, although special provisions were made in it with respect to Victoria on the basis that, in that State, the Minister could delegate powers conferred by the Heritage Protection Act to the State Minister or designated officers[166]. By way of contrast, the Bridge Act, by reason of its terms[167], would change, regulate or abolish rights, duties, powers and privileges affecting all Aboriginal people - with a

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166 Heritage Protection Act, s 21B(1). Such delegation does not prevent the exercise of power by the Federal Minister. See s 21B(6).

167 s 4.

particular impact upon members of the Ngarrindjeri group[168] or that section of that group (such as the plaintiffs) who, before the commencement of the Bridge Act, had made an application under the Heritage Protection Act[169].

120 For the plaintiffs, the concept of "race" in par (xxvi) was necessarily wider than any subgroup or section of the people of any race. The race power assumed the existence of a common "biological history or origin"[170]. A people were linked by biological factors (in conjunction with other social phenomena) according to which they would identify themselves as the people of a given race. Unless such a broad view of the essential characteristic of "race" were taken in relation to par (xxvi), the plaintiffs argued that everyone in Australia would be the people of a given race[171]. The phrase would then be robbed of any real constitutional content. The plaintiffs drew a distinction between the characterisation of a law measured against par (xxvi) and a particular order made under such a law. The law itself, they said, had to be characterised with respect to the entire people of any race. A particular order under the law (such as a declaration under the Heritage Protection Act) might well be for the benefit or advancement of a specified group or section of such people. In support of these arguments the plaintiffs pointed to the use of the definite article ("*[t]he* people of any race"). They submitted that this made it clear that the power was confined to the making of laws with respect to all of *the* people. Not a small segment of them.

121 There is no substance in this argument. As a textual matter, the definite article at the beginning of par (xxvi) is to be read as part of a provision which contemplates the making of "special laws". Of their nature, such laws may need to address subgroups or particular categories of a given people defined by reference to their race. In the case of Aboriginal Australians, so defined, the paragraph would obviously extend to the making of "special laws" with respect to rural Aboriginals, Aboriginal children, Aboriginal health in particular places, Aboriginals in disadvantaged areas and so on. The reference to "special laws" in par (xxvi) denies a construction of par (xxvi) which confines the power to the making of laws of total generality[172]. Such a construction would seriously narrow the ambit of par (xxvi). It would limit its utility to address the special problems of

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168 s 4(1). Adapting the words of Kitto J in *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7.

169 s 4(2).

170 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 244 per Brennan J. Both parties accepted this definition of "race".

171 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 210 per Stephen J.

172 cf *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186-187, 209, 244-245, 261.

subgroups defined by reference to race. In accordance with orthodox rules governing the construction of a grant of legislative power, such a limitation ought not be accepted.

122 The authority of this Court is against the plaintiffs' construction. A number of opinions have been stated to the effect that the power extends to the making of special laws for subdivisions[173] or identifiable subgroups[174] of a people defined by reference to their [Aboriginal] race[175].

123 The Commonwealth argued that the Bridge Act, read with s 10(1)(a) of the Heritage Protection Act was, in any case, a law with respect to all of the people of the Aboriginal race who might otherwise have been entitled to make application to the Minister under the Heritage Protection Act. In the view which I take of the ambit of the power in par (xxvi), and in the way in which the question reserved has been confined, it is unnecessary to examine this argument. Assuming, for the purposes of characterising the Bridge Act that it is properly seen as a law with respect to the Ngarrindjeri subgroup of the people of the Aboriginal race (or a section of them) it is still a law with respect to the people of a race as those words are used in par (xxvi). The contrary submission is rejected. It is necessary, therefore, to turn to the scope of the power in par (xxvi).

Race power: authority of the Court

124 Although there has not been a holding of the Court on the prerequisites of par (xxvi), relevant *dicta* appear in the opinions of members of the Court written since its amendment. Several of those who have expressed a view have been of the opinion that the power in par (xxvi) is for the benefit, and not the detriment, of people by reference to their race, specifically in legislation enacted for the indigenous people of Australia.

125 In *Koowarta v Bjelke-Petersen*[176], Murphy J was of the opinion that the word "for" in par (xxvi) meant "for the benefit of". It did not mean "with respect to" so as "to enable laws intended to affect adversely the people of any race"[177].

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173 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 180 per Murphy J.

174 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 274 per Deane J.

175 See also *Gerhardy v Brown* (1985) 159 CLR 70 at 100, 107, 111, 117-118, where the Court considered par (xxvi) in relation to the Pitjantjatjaraku people.

176 (1982) 153 CLR 168 at 242.

177 Contrast Murphy J's earlier opinion in *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 622 (dealing with ss 116 and 122). See also

(Footnote continues on next page)

His Honour drew attention to the contrast between the use of the word "for" in the paragraph and the use of the phrase "with respect to" in the opening words of s 51 itself. In the same case, Gibbs CJ[178] expressed the opinion that the power in par (xxvi) extended to the making of laws which discriminated against, as well as in favour, of the people of a particular race. His Honour so held by reference to the history of the original purposes of the paragraph as explained in Quick and Garran's *Annotated Constitution of the Australian Commonwealth*[179]. However, the conclusions reached by Gibbs CJ and Murphy J were both *obiter dicta*. Even if the *Racial Discrimination Act* 1975 (Cth), there challenged, was not supported by the external affairs power[180], it was clearly made, and made only, for the benefit and protection of people by reference to their race.

126 In *The Commonwealth v Tasmania (The Tasmanian Dam Case)*[181], some of the provisions of the *World Heritage Properties Conservation Act* 1983 (Cth) there challenged, were supported as special laws for the people of the Aboriginal race. A majority of the Court[182] held that a number, at least, of the impugned provisions were within the power[183]. Gibbs CJ, in dissent, stated his view that

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Kruger v The Commonwealth (1997) 71 ALJR 991 at 1000, 1007, 1021; 146 ALR 126 at 138, 148, 167, where the contrary view was expressed in relation to s 122.

178 (1982) 153 CLR 168 at 186.

179 (1901) at 623. He also referred to the article by Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 20.

180 As Gibbs CJ concluded: (1982) 153 CLR 168 at 203.

181 (1983) 158 CLR 1.

182 Mason, Murphy, Brennan and Deane JJ; Gibbs CJ, Wilson and Dawson JJ dissenting.

183 The Commonwealth submitted that ss 8, 11, 13(2) and 14(5) could be supported by the race power. The majority held that only ss 8 and 11 were so supported.

"for" in par (xxvi) meant "with reference to" rather than "for the benefit of"[184]. However, his Honour conceded that this opinion was "not particularly relevant in the present case"[185]. Wilson J found that, to satisfy par (xxvi), a law had, of its nature, to be discriminatory in one sense because it needed to be "special"[186]. However, his Honour left undetermined the question now for decision. Murphy J, on the other hand, was emphatic that the power was controlled by a requirement of benefit[187]:

> "A broad reading of this power is that it authorises any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass special laws ... To hold otherwise would be to make a mockery of the decision of the people to delete from s 51(xxvi) the words 'other than the aboriginal race in any State' (*Constitution Alteration (Aboriginals) Act* 1967 (Cth)) which was manifestly done so that Parliament could legislate for the maintenance, protection and advancement of the Aboriginal people."

Referring to the context, Murphy J described the background of disadvantage and brutalisation necessary to understand the amendment of the race power and how it appears in the Constitution today.

127 In the opinion of Brennan J in *The Tasmanian Dam Case* the history of the 1967 amendment of par (xxvi) was considered important to extracting its meaning[188]:

> "No doubt par (xxvi) in its original form was thought to authorise the making of laws discriminating adversely against particular racial groups ... 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

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184 (1983) 158 CLR 1 at 110.

185 (1983) 158 CLR 1 at 110.

186 (1983) 158 CLR 1 at 203, citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 245. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 209-210 per Stephen J, approved in *Native Title Act Case* (1995) 183 CLR 373 at 460.

187 (1983) 158 CLR 1 at 180.

188 (1983) 153 CLR 168 at 242. See also *Gerhardy v Brown* (1985) 159 CLR 70 at 138.

purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws."

128 In his reasons, Deane J[189] described the way in which the exclusion of the Aboriginal race from the original paragraph had the effect of protecting them from the danger of adverse discrimination on the ground of race[190]. But his Honour went on to state that, with the passage of time, such exclusion "came to be seen as a fetter upon the legislative competence of the Commonwealth Parliament to pass necessary special laws for their [ie Aboriginal] *benefit*"[191]. Their inclusion in the power was thus for the making of "laws *benefiting* the people of the Aboriginal race"[192].

129 In *Chu Kheng Lim v Minister for Immigration*[193], Gaudron J commented that the view that par (xxvi) "only authorises laws for the benefit of the race concerned" had "much to commend it". Her Honour referred to the opinion that "for" in the paragraph meant "for the benefit of" and not "with respect to"[194].

130 The most recent examination of the question appears in the *Native Title Act Case*[195]. There the Court did not have to resolve the question now before us. This was because, once again, the Act under scrutiny undoubtedly answered the description as one for the benefit and protection of Aboriginal people by reference to their race. It enacted no detriment to them nor any discrimination against them. A number of indications appear in the joint judgment[196] which might suggest a view that the power in par (xxvi) is not confined to one to be used solely for the advantage, and never for the detriment, of people according to race. Thus, the joint judgment describes the "special quality" required of a law conforming to par (xxvi) as appearing "when the law confers a right or benefit *or imposes an obligation or*

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189 (1983) 158 CLR 1 at 272.

190 Citing Harrison Moore, *The Constitution of the Commonwealth of Australia,* 2nd ed (1910) at 464.

191 (1983) 158 CLR 1 at 273 (emphasis added).

192 (1983) 158 CLR 1 at 273 (emphasis added).

193 (1992) 176 CLR 1 at 56.

194 See also *Kruger v The Commonwealth* (1997) 71 ALJR 991 at 1035; 146 ALR 126 at 187.

195 (1995) 183 CLR 373.

196 Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

disadvantage especially on the people of a particular race"[197]. Their Honours cited the opinion of Mason J in *The Tasmanian Dam Case* where his Honour had referred to the paragraph as being in its terms "wide enough to enable the Parliament (a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community, and (b) to protect the people of a race in the event that it is necessary to protect them"[198]. The further reference to the views of Brennan J and of Deane J in *The Tasmanian Dam Case,* extracted there, do not include their Honours' suggestions that the power, following the constitutional alteration in 1967, might be limited, as mentioned above.

131 In the end it is impossible to derive from the foregoing decisions any sure conclusion as to the scope of par (xxvi) - whether it is confined to the benefit of the people of any race or to laws which do not adversely discriminate against them; or, at least in the case of people of the Aboriginal race, is restricted to the making of laws for their benefit. Differing views have been expressed. Several have been favourable to the plaintiffs' submissions. Some have not. It is now necessary to resolve the differences.

General approach to construction

132 Because of the relatively unexplored territory of constitutional amendment which par (xxvi) presents, much attention was paid in the submissions, both to the permissible methodology of deriving the meaning of the paragraph and to the principles which should govern the Court's approach. I leave aside at this stage what I have called the interpretative principle point. I shall return to this later in these reasons. For the moment, it is sufficient to note the following general rules:

1. The duty of the Court is to the Constitution. Neither the Court, nor individual Justices, are authorised to alter the essential meaning of that document[199]. The Court itself is created by the Constitution which is expressed in a form the text of which cannot be altered except with the authority of the electors qualified to vote[200]. It is the text (with its words and structure) which is the

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197 (1995) 183 CLR 373 at 461 (emphasis added).

198 (1995) 183 CLR 373 at 461, citing from (1983) 158 CLR 1 at 158; and see at 180 per Murphy J.

199 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143 per Brennan J.

200 Constitution, s 128; cf *King v Jones* (1972) 128 CLR 221 at 229 per Barwick CJ.

law to which the Court owes obedience[201]. In the Constitutional Court of South Africa, Kentridge AJ[202] has recently described the judicial task of interpretation of a written constitution[203]:

> "[I]t cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean ... If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

This emphasis upon the text of the document is beneficial. It tames the creative imagination of those who might be fired by the suggested requirements of changing times or by the perceived needs of justice in a particular case[204]. The text is the law. It may be elaborated by the most ample construction[205], as is appropriate to a grant of legislative power in a relatively inflexible fundamental law intended to provide indefinitely the legal foundation for the government of the Australian people. But judicial interpretation of the Constitution risks the loss of legitimacy if it shifts its ultimate focus of attention away from the text and structure of the document[206].

2. Assertions that the meaning given to words in the Australian Constitution cannot be altered from that which those words bore when they were settled a hundred years ago have given rise to confusing (and possibly inaccurate) claims that the "connotation" of a word in the constitutional text remains the

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201 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 83; *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 577; *Newcrest Mining v The Commonwealth* (1997) 71 ALJR 1346 at 1423-1424; 147 ALR 42 at 147; cf Tribe and Dorf, *On Reading the Constitution* (1991) at 11.

202 With whom the other ten members of the Court agreed.

203 *State v Zuma* [1995] 2 SALR 642 at 652-653; [1995] 1 LRC 145 at 156; cited with approval by the Privy Council in *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* [1995] 3 LRC 494 at 500; cf "The Commonwealth Through the Case Law: Unity in Diversity" (1997) 23 *Commonwealth Law Bulletin* 601 at 605-606.

204 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143.

205 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81.

206 *McGinty v Western Australia* (1996) 186 CLR 140 at 168.

same whereas its "denotation" may expand over time[207]. Attempts of this kind to offer linguistic explanations of the judicial function in giving meaning to the language of the Constitution may be less convincing than a candid acknowledgment that, sometimes, words themselves acquire new meaning from new circumstances. The very application of broad language to changing facts demands a measure of accommodation[208]. Moreover, new, and completely unpredictable matters may arise which, when measured against the text, are held to fall within a given head of power[209]. Each generation reads the Constitution in the light of accumulated experience. Each finds in the sparse words ideas and applications that earlier generations would not have imagined simply because circumstances, experience and common knowledge did not then require it[210]. Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself[211] and the changes in the international community to which the Australian community must, in turn, accommodate. Add to these considerations the special ambiguity of the English language, in which the document is written, occasioned by its unique fusion of Germanic and Latin sources, and it should not be surprising that constitutional interpretation in Australia, over time, has involved changes in the understanding and exposition of the words used. Constitutional interpretation is no mechanical task. The Constitution is no ordinary statute.

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207 For example *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267 per Windeyer J.

208 Zines, *The High Court and the Constitution*, 4th ed (1997) at 17-22.

209 *Lansell v Lansell* (1964) 110 CLR 353 at 366, 369, 370; cf *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 294.

210 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396-397; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 197. As an example, it is unconvincing to suggest that the words "chosen by the people" in ss 7 and 24 of the Constitution would today, or ever again, be construed to exclude adult women from the suffrage. Yet, in 1901, in respect of most of Australia, it was so construed: see *McGinty v Western Australia* (1996) 186 CLR 140 at 166-167. Similarly, s 51(xxxv) providing for power in respect of industrial disputes "extending beyond the limits of any one State" would not have been read in 1901 with the awareness of the log of claims procedure which greatly extended its ambit: *Attorney-General (Qld) v Riordan* (1997) 71 ALJR 1173 at 1191-1192; 146 ALR 445 at 470-471.

211 *Cheatle v The Queen* (1993) 177 CLR 541 at 560; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 173-174.

3. In former times, this Court was resistant to the use of historical materials, such as the Convention Debates, to help elaborate and explain the text. Its then practice can be traced to the previously fashionable rules governing the construction of the language of statutes combined with the former view of the Australian Constitution as nothing more than a statute of the Imperial Parliament, deriving its legitimacy from that source alone. In the context of par (xxvi), Professor Geoffrey Sawer lamented a refusal of access to the history of the paragraph, as in the Convention Debates. He declared that the history was unusually helpful in the case of this power[212]. The Court has now abandoned its former self-denial. It regularly looks at the Convention Debates[213]. It was taken to them in this case. But here, unusually, there was a later amendment to the paragraph under scrutiny. Conflicting submissions were received on the use (if any) that might be had of the Parliamentary debates which preceded the amendment. There were like differences about the relevant referendum materials put to the electors for their approval. In such a case, the Parliamentary debates, and the referendum materials, may be used in the same way as the Court now uses the Convention Debates. This is to understand the cause which occasioned the amendment of the Constitution and to help resolve ambiguities in the resulting text. The search is not for the private intentions of the Members of Parliament who spoke in the debates. Nor is it for the undiscoverable subjective intentions of the electors involved in the exceptional law-making process required by s 128 of the Constitution. It is to help to derive the meaning of the Constitution, where amended, on the basis of a thorough understanding of the reasons for the amendment and of the means by which it came about. I therefore turn to the history of the process. For the view which I take of the effect of the amendment in 1967, it is necessary to understand its purpose and to know the history that lay behind it.

History of the original race power

133 When the Australian Constitutional Conventions gathered in the 1890s they had no model before them upon which to base a race power. On the contrary, in July 1868, the United States of America had adopted the Fourteenth amendment

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212 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 27.

213 See for example *Cole v Whitfield* (1988) 165 CLR 360 at 385. In *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 565, Dawson J referred in support of his reasons to the history of proposals at referendum to enlarge the conciliation and arbitration power.

to its Constitution. This provided that "all persons" born or naturalised in the United States were citizens and that[214]:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

As Quick and Garran[215] were aware, the word "persons" had in 1886 been held to require equal protection of the laws of the United States without regard to race, colour or nationality[216].

134 The *British North America Act* 1867 (Imp)[217] also contained no equivalent race power for the Canadian federation. However, it did contain the power to legislate in relation to "Naturalization and Aliens"[218]. This power also appears in par (xix) of the Australian Constitution. In Canada, that power was exclusive to the federal Parliament. In 1899, the Privy Council had held that it rendered invalid a Provincial statute disqualifying Chinese aliens from working underground in mines[219].

135 Paragraph (xxvi), in its original form, should be understood in the context of attitudes to race and to "White Australia" which were common amongst the settlers represented in the Conventions and constituting the electors of the federating

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214 s 1.

215 *The Annotated Constitution of the Australian Commonwealth* (1901) at 622-623.

216 *Yick Wo v Hopkins* 118 US 356 (1886). A San Francisco ordinance which permitted licensees to conduct laundries was implemented to deny licences to Chinese applicants. The ordinance was held to be unconstitutional. Quick and Garran contrasted par (xxvi) suggesting that, in Australia, such a law could be made under the paragraph and could not be successfully challenged: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 623.

217 30 Vic c 3. Now the *Constitution Act* 1867: see *Canada Act* 1982 (Imp), Sched B.

218 s 91(25).

219 *Union Colliery Company of British Columbia v Bryden* [1899] AC 580; cf Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 463.

colonies. In the original draft Constitution Bill of 1891, the proposal was for a grant of exclusive legislative power to the Federal Parliament with respect to[220]:

> "The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the aboriginal native race in Australia and the Maori race in New Zealand".

There is uncertainty as to the initial purpose of including this power and proposing that it be exclusive to the Federal Parliament. The provision was Sir Samuel Griffith's idea[221], and it has been suggested[222] that it was based upon the unhappy experiences of Queensland with "blackbirding". This was the practice by which people from the Pacific Islands had been snatched from their homes and sold into a form of slavery in the Queensland sugar farms. Whether its inclusion was out of a concern for the victims of such activities, a desire to exclude the States from control over them or to provide the Federal Parliament with powers, in addition to the proposed power over aliens, to deal with possible unrest and expulsion, is not entirely clear. The Convention Debates, particularly those of the Melbourne Convention of 1898, show that some delegates wanted to retain power for the States, and to permit the Federal Parliament to enact, laws far from beneficial for people of minority races (such as Chinese in factories and shops[223], "Asiatic or African ... miner[s]"[224] and so on). However, other delegates regarded the prospect

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220 cl 53(1); cf *Official Record of the Debates of the Australasian Convention* (Sydney), 3 April 1891 at 701-704.

221 *Official Record of the Debates of the Australasian Convention* (Adelaide), 19 April 1897 at 832.

222 By the Hon Arthur Calwell: see House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1964 at 1902; cf Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith GCMG PC* (1939) at 38-39; *Pacific Island Labourers Amendment Act* 1885, s 11 (Q) (an Act, sponsored by Griffith, aimed at ending "blackbirding" in Queensland from 1890 onwards).

223 *Official Record of the Debates of the Australasian Convention* (Melbourne), 27 January 1898 at 236.

224 *Official Record of the Debates of the Australasian Convention* (Melbourne), 27 January 1898 at 240.

of discriminatory legislation on the part of the new federal polity as "disgraceful"[225] and "degrading to us and our citizenship"[226].

136 As finally adopted, the power in par (xxvi) was not restricted, in terms, to securing the benefit or advancement of the people of a given race. In the historical context of that time such protective purposes would have been possible, eg in the case of the "kanakas" in Queensland. But so also would laws detrimental to, or discriminatory against, such people. The exclusion from the paragraph of power with respect to "the aboriginal race in any State" appears principally to have been designed to leave their regulation to the States. It may have had the effect of protecting them from any risk of the misuse of the race power by the new Federal Parliament[227]. This view of the exclusion of Aboriginals from the power was to recur in the Parliamentary debates leading to the amendment of the Constitution in 1967.

Moves to enlarge federal powers for Aboriginals

137 Before 1967, there was one earlier proposal to afford power to the Parliament to legislate with respect to Aboriginals. Such a power was included in the 1944 "fourteen powers proposal"[228]. It failed to secure the approval of the electors at referendum.

138 In 1959 a Constitutional Review Committee was established by the Parliament. One of the issues it considered was whether the Federal Parliament should have an express power to make laws with respect to Aboriginals. The

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225 *Official Record of the Debates of the Australasian Convention* (Melbourne), 28 January 1898 at 247.

226 *Official Record of the Debates of the Australasian Convention* (Melbourne), 28 January 1898 at 250.

227 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 23.

228 Constitution Alteration (Post-war Reconstruction and Democratic Rights) Bill 1944 (Cth), cl 2. This proposed affording such a power to the Federal Parliament for five years from the end of World War Two. It was approved by the electors in Western Australia and South Australia but failed in all other States and failed to secure a majority of votes nationally: Blackshield and Williams, *Australian Constitutional Law and Theory,* 2nd ed (1998) at 1186.

Committee recommended the deletion of s 127 of the Constitution[229]. That section provided that

> "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

However, the Committee reached no agreement on the grant of special legislative powers with respect to Aboriginals[230]. In the result, a large number of petitions were presented to the Federal Parliament urging the deletion of s 127 and the amendment of par (xxvi)[231]. Whatever the original intention of these constitutional provisions, and whatever may have been the initial protective effect of the exclusion of people of the Aboriginal race from the race power, by the late 1950s, both in and out of the Federal Parliament, commentators were viewing ss 51(xxvi) and 127 (containing as they did the only references to Australian Aboriginals in the Constitution) as negative and discriminatory, needing amendment.

139 In 1964, the Leader of the Opposition (Mr Calwell) introduced a measure for the alteration of the Constitution to remove the exclusion of Aboriginals from

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229 Commonwealth, *Report from the Joint Committee on Constitutional Review* (1959) at par 398.

230 Commonwealth, *Report from the Joint Committee on Constitutional Review* (1959) at par 397; cf House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1964 at 1908-1909.

231 See for example House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1957 at 1301, 17 September 1958 at 1299, 23 September 1958 at 1475, 24 September 1958 at 1549, 25 September 1958 at 1623, 8 April 1959 at 977, 21 April 1959 at 1361, 13 May 1959 at 2095, 14 May 1959 at 2169, 4 December 1962 at 2833, 5 December 1962 at 2923, 6 December 1962 at 3029, 26 March 1963 at 3, 27 March 1963 at 59, 4 April 1963 at 430, 9 April 1963 at 473, 30 April 1963 at 807, 23 May 1963 at 1741, 14 August 1963 at 81, 15 August 1963 at 161, 20 August 1963 at 269, 21 August 1963 at 337, 27 August 1963 at 493, 28 August 1963 at 561, 29 August 1963 at 625, 10 September 1963 at 739, 11 September 1963 at 817 (presented by the Prime Minister), 12 September 1963 at 919, 18 September 1963 at 1097, 19 September 1963 at 1165, 24 September 1963 at 1261, 25 September 1963 at 1331, 8 October 1963 at 1505, 9 October 1963 at 1579, 10 October 1963 at 1649, 16 October 1963 at 1831, 17 October 1963 at 1917, 22 October 1963 at 2029, 23 October 1963 at 2117, 24 October 1963 at 2191, 29 October 1963 at 2369, 30 October 1963 at 2453, 27 February 1964 at 89, 5 March 1964 at 281, 5 May 1964 at 1483, 14 May 1964 at 1895, 20 May 1964 at 2113; Senate, *Parliamentary Debates* (Hansard), 9 April 1963 at 6, 7 May 1963 at 249.

par (xxvi) and to delete s 127[232]. He called attention to possible United Nations criticism that the Constitution was "discriminating against" the Aboriginal people[233]. The Federal Attorney-General (Mr Snedden) affirmed that all parliamentarians felt that "there should be no discrimination against aboriginal natives of Australia"[234]. He warned that the proposed change to par (xxvi) created the potential for "discrimination ... whether for *or against* the aborigines"[235], in response to which Mr Calwell affirmed his view that the amendment would only be beneficial for Aboriginal Australians[236]. The Bill was ultimately defeated.

140 In 1965, the Government introduced the Constitution Alteration (Repeal of Section 127) Bill 1965 (Cth). The Prime Minister (Sir Robert Menzies) justified the exclusion of any amendment to par (xxvi) on the ground that to include the Aboriginal people in the race power would not be in their best interests[237]. However, although the Bill was passed by both Houses, the Government decided not to put it to referendum.

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232 Constitution Alteration (Aborigines) Bill 1964 (Cth).

233 House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1964 at 1904.

234 House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1964 at 1905.

235 House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1964 at 1907 (emphasis added). The views of the Prime Minister (Sir Robert Menzies) were also to the same effect: House of Representatives, *Parliamentary Debates* (Hansard), 1 April 1965 at 533-534.

236 House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1964 at 1907.

237 House of Representatives, *Parliamentary Debates* (Hansard), 11 November 1965 at 2639.

141 In March 1966, Mr W C Wentworth (later the first Australian Minister for Aboriginal Affairs[238]) introduced a Private Member's Bill[239] to amend the Constitution to substitute for the race power in par (xxvi) a new provision[240]:

> "The advancement of the aboriginal natives of the Commonwealth of Australia".

Mr Wentworth also proposed a new s 117A of the Constitution. This would forbid the Commonwealth and the States from making or maintaining any law which subjected any person born or naturalised within the Commonwealth "to any discrimination or disability within the Commonwealth by reason of his racial origin". The proposal contained a proviso that the section should not operate "so as to preclude the making of laws for the specific benefit of the aboriginal natives of the Commonwealth of Australia"[241]. One of the reasons given by Mr Wentworth for his amendments was his concern that the deletion of the exclusion of people of the Aboriginal race from par (xxvi) could leave them open to "discrimination ... adverse or favourable". He suggested that the "power for favourable discrimination" was needed; but that there should not be a "power for unfavourable discrimination"[242]. His Bill was supported by the Opposition[243], but it ultimately lapsed[244].

The 1967 referendum

142 Instead, on 1 March 1967, a new Prime Minister (Mr Holt) introduced the Constitution Alteration (Aboriginals) Bill 1967 (Cth). He explained that the government had been influenced by the "popular impression" that the words "other

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238 From 1968-1972.

239 Constitution Alteration (Aborigines) Bill 1966 (Cth). The Second Reading Speech appears in House of Representatives, *Parliamentary Debates* (Hansard), 10 March 1966 at 121-125; cf House of Representatives, *Parliamentary Debates* (Hansard), 23 November 1965 at 3068-3072.

240 Constitution Alteration (Aborigines) Bill 1966 (Cth), cl 2.

241 Constitution Alteration (Aborigines) Bill 1966 (Cth), cl 3.

242 House of Representatives, *Parliamentary Debates* (Hansard), 10 March 1966 at 123.

243 House of Representatives, *Parliamentary Debates* (Hansard), 10 March 1966 at 130.

244 See House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1967 at 278.

than the aboriginal race in any State" in par (xxvi) "are discriminatory"[245]. This was a view which the government believed to be erroneous. But it was deeply rooted. It required amendment of the Constitution in a way that would give the Parliament the power to make special laws for Aboriginals which, with cooperation with the States, would "secure the widest measure of agreement with respect to Aboriginal *advancement*"[246].

143 The Government's Bill was supported by the Leader of the Opposition (Mr Whitlam). He referred to the many disadvantages which Australian Aboriginals had suffered and which needed positive federal initiatives[247]. It was also supported by Mr Wentworth. He expressed the opinion that some discrimination was necessary in relation to Aboriginals but "it should be favourable, not unfavourable"[248]. The Bill passed through the House of Representatives without a single dissenting vote[249].

144 In the Senate, the Minister responsible for the Bill (Senator Henty) repeated what had been said by the Prime Minister[250]. The Leader of the Opposition in the Senate, Senator Murphy, met directly the argument that the exclusion of Aboriginals from par (xxvi) had been intended to be beneficial for them. He said[251]:

> "The simple fact is that they are different from other persons and that they do need special laws. They themselves believe that they need special laws. In this proposed law there is *no suggestion of any intended discrimination in respect of Aboriginals except a discrimination in their favour*."

The Bill was also approved by the Senate without a single dissenting vote[252].

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245 House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1967 at 263.

246 House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1967 at 263 (emphasis added).

247 House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1967 at 279.

248 House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1967 at 281.

249 House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1967 at 287.

250 Senate, *Parliamentary Debates* (Hansard), 2 March 1967 at 235-236.

251 Senate, *Parliamentary Debates* (Hansard), 8 March 1967 at 359 (emphasis added).

252 Senate, *Parliamentary Debates* (Hansard), 8 March 1967 at 372.

145 There having been no opposition within the Parliament to the proposed alterations to the Constitution, it was necessary, in the procedures which followed, to prepare only the argument in favour of the proposed law to be distributed in pamphlet form to the electors[253]. The case for the "yes" vote authorised by the Prime Minister, the Leader of the Australian Country Party and the Leader of the Opposition addressed the amendments to par (xxvi) and s 127 which were to be put before the electors as a single proposal. The case, relevantly, argued[254]:

> "The purposes of these proposed amendments ... are to remove any ground for the belief that, as at present worded, the Constitution *discriminates in some ways against* people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Commonwealth Parliament considers this desirable or necessary. ... The Commonwealth's object will be to co-operate with the States to ensure that *together we act in the best interests of the Aboriginal people of Australia*".

In relation to the proposed amendment to s 127, the written case said[255]:

> "Our personal sense of justice, our commonsense, and our international reputation in a world in which racial issues are being highlighted every day, require that we get rid of this out-moded provision ... The simple truth is that Section 127 is completely *out of harmony with our national attitudes and modern thinking*. It has no place in our Constitution in this age."

146 In addition to the foregoing statutory argument the leaders of all of the major Australian political parties issued statements supporting the amendment to par (xxvi) and the repeal of s 127. The Prime Minister (Mr Holt), in his statement said that it was not acceptable to the Australian people that the national Parliament "should not have power to make special laws for the people of the Aboriginal race, *where that is in their best interests*"[256]. For the Federal Opposition, Mr Whitlam stated that the then provisions of the Constitution were "discriminatory". He pointed out the need to assist Aboriginal communities in the realms of housing, education and health, and stated that the Commonwealth must "accept that

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253 *Referendum (Constitution Alteration) Act* 1906 (Cth), s 6A(1) (since repealed). See now the *Referendum (Machinery Provisions) Act* 1984 (Cth), ss 11(1) and (2).

254 Commonwealth Electoral Office, "Referendums to be held on Saturday, 27th May, 1967" (1967) at 11 (emphasis added).

255 Commonwealth Electoral Office, "Referendums to be held on Saturday, 27th May, 1967" (1967) at 12 (emphasis added).

256 See *Smoke Signals,* May 1967 at 6.

responsibility on behalf of Aboriginals". It was also vital, he argued, to remove the excuse "for Australia's failure to adopt many international conventions affecting the welfare of Aborigines"[257]. For the Australian Country Party, its Deputy Leader, Mr Anthony, explained that the amendment to the Constitution "would give the Commonwealth Government, for the first time, power to make special laws *for the benefit of* the Aboriginal people throughout Australia"[258]. For the Australian Democratic Labor Party, Senator Gair titled his statement "End Discrimination - Vote 'Yes'" and explained that his Party had "adopted the slogan 'Vote Yes for Aboriginal Rights'"[259]. There was not the slightest hint whatsoever in any of the substantial referendum materials placed before this Court that what was proposed to the Australian electors was an amendment to the Constitution to empower the Parliament to enact laws detrimental to, or discriminatory against, the people of any race, still less the people of the Aboriginal race.

147 The referendum was put on 27 May 1967. It was overwhelmingly approved[260]. In the history of Australian constitutional referenda, no other such vote has come close to the unique political and popular consensus demonstrated in the 1967 referendum on Aborigines.

Arguments for the validity of the impugned law

148 The Commonwealth disputed the relevance of any of the foregoing history. In its submission, the meaning of par (xxvi) had to be found exclusively on the face of the Constitution in the language in which it was expressed. At most, the history explained the hopes and aspirations of the politicians and of the Australian people. But these could no more control the meaning to be ascribed to the language of the Constitution than could equivalent extrinsic materials determine the meaning of an ordinary statute[261]. Attention was drawn to the contrast between Mr Wentworth's successive proposals and the amendments to the Constitution eventually adopted. The Commonwealth argued that had it been the purpose of the Parliament legally to forbid legislation detrimental to, or discriminatory against, Aboriginals, a group of Aboriginals or any other people on the ground of

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257 See *Smoke Signals,* May 1967 at 7.

258 See *Smoke Signals,* May 1967 at 8 (emphasis added).

259 See *Smoke Signals,* May 1967 at 9.

260 In addition to gaining majority support in every State, the proposal received 89.3% of votes (and 90.8% of valid votes) nationally. This was over 10% more than any other referendum before or since. See Blackshield and Williams, *Australian Constitutional Law and Theory,* 2nd ed (1998) at 1186.

261 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

race, the Wentworth proposals (or some variant of them) would have been adopted. But they were not.

149 In addressing the arguments of the parties, it is essential to acknowledge the force of the submissions put for the Commonwealth and the supporting interveners. They rested principally upon the language of the power conferred by par (xxvi) and upon the ordinary rule that such language should not be given a narrow or limited operation but one broad and large so as to meet all possible legislative eventualities. Historically, the power was apparently intended, at the time of Federation, to extend to legislation detrimental to, and discriminatory against the people of any race (other than the Aboriginal race). The deletion of the exception left, so it was argued, the essential character of the power unchanged. Most readers of the Constitution would be unaware of the Convention and Parliamentary debates. In time, few would be aware of the arguments at the 1967 referendum. They would have before them only the head of power expressed in par (xxvi). The Commonwealth argued that, even if contemporary and future readers chanced to study the historical material, they would find much in the Conventions and some in the Parliamentary debates which was ambivalent. Particular statements could be found which acknowledged the possibility that the race power might, perhaps rarely and exceptionally, be used to support legislation detrimental to, or discriminatory against, a people (including, after amendment, Aboriginal people) on the ground of their race.

150 So far as the text of the paragraph was concerned, the Commonwealth urged the adoption of the view that the requirement that a law with respect to the people of any race "for" whom it was deemed necessary to make laws meant no more than "in respect of" (or "with reference to"[262]) whom such laws were deemed necessary. The word "deemed" clearly postulated that the Parliament would do the deeming. Whilst the courts might retain a power to supervise legislative abuse[263], the highly charged and potentially politicised issues of racial legislation[264], and the assessment of whether a law was for the benefit or detriment of a particular race, should be left to the Parliament accountable to the people. It should not be

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262 Relying on Gibbs J in *The Tasmanian Dam Case* (1983) 158 CLR 1 at 110.

263 A concession made by the Commonwealth. See *Native Title Act Case* (1995) 183 CLR 373 at 460. See also *The Tasmanian Dam Case* (1983) 158 CLR 1 at 202 per Wilson J.

264 It was pointed out that, to the extent that federal power was limited to the making of laws of benefit to or not discriminatory against people on the ground of race, this would expand the scope of the power of the States under the Constitution to enact detrimental or discriminatory laws. However such laws would be subject to the *Racial Discrimination Act* 1975 (Cth) and the operation of s 109 of the Constitution.

assumed by the courts which were not accountable. According to the Commonwealth, to adopt the qualification urged by the plaintiffs would involve the courts, and ultimately this Court, in the invidious task of evaluating detriment and adverse discrimination which the terms of par (xxvi) expressly assigned to the Parliament. For example, a law to prohibit ceremonial circumcision amongst Australian Aboriginals[265] might invoke much debate. It might resist ready classification on the beneficial/detrimental scale. The adjective "special" qualified the "laws". It was equally applicable to laws which were for the benefit or advancement of the people of a race as to laws detrimental to, or discriminatory against, such people. The word "special" connoted, in the context of par (xxvi) that the law would be discriminatory. It did not necessarily establish that the discrimination had to be beneficial or non-detrimental. Attention was also drawn to the exemption in the Heritage Protection Act relating to the Portland Aluminium Smelter[266], the validity of which had not been tested.

151 The suggested danger of the misuse of the race power to enact laws seriously detrimental and prejudicial to the people of any race in Australia (including Aboriginals) could be met, so it was argued, by the reserve jurisdiction mentioned by the Court in the *Native Title Act Case*[267]. But that had no application here. It was open to the Parliament, against the background of delay, cost and adverse reports in the public domain, to judge that the comparatively small detriment and adverse discrimination against the plaintiffs' rights reflected in the Bridge Act was outweighed by the public interest in allowing the Hindmarsh Bridge development to go ahead without further interference from applications under the Heritage Protection Act.

152 I acknowledge the force of these arguments. For a time they held me. However, I have concluded that the race power in par (xxvi) of s 51 of the Constitution does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race. My reasons are in part textual and contextual; in part affected by the inadequacy of the exceptional "manifest abuse" test; in part influenced by the history of the power which I have outlined and in part affected by the common assumptions against the background of which the Australian Constitution must be read today, aided by the interpretative principle to which I

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265 An example suggested by counsel for the Kebaro interests.

266 s 21ZA referring to the *Alcoa (Portland Aluminium Smelter) Act* 1980 (Vic), s 13.

267 (1995) 183 CLR 373 at 460.

referred in *Newcrest Mining v The Commonwealth*[268]. Let me explain these points in turn:

Textual and contextual indications of non-discrimination

153 No authority of this Court requires the rejection of the plaintiffs' submission about the meaning of par (xxvi). It is therefore necessary to start the elucidation of its requirements with the text, viewed in its context. First, the power is not simply to make laws with respect to "[t]he people of any race". In this regard par (xxvi) is to be contrasted with par (xix) which affords such a plenary power, relevantly, with respect to "aliens". In par (xxvi), words have been added which must have work to do. They are intended to send signals of meaning to the reader of the paragraph. The requirement that laws made under par (xxvi) by reference to race should be "deemed necessary" and should be "special" cannot be dismissed as mere surplusage. In a constitutional text noted for its brevity, the additional words must clearly have the purpose of putting a limitation on what would otherwise be an unbridled race power.

154 It may be assumed that the drafters of par (xxvi) would have been aware of the sharply divided opinions which were evident in the Conventions: some of the delegates viewing detrimental or adversely discriminatory laws by the new Parliament as "disgraceful". On the face of things, therefore, the stated pre-conditions to the use of the race power were intended to indicate a brake on legislation with respect to "the people of any race". All people in the Commonwealth were people of a "race". Most of the settlers would probably, in 1901, have regarded themselves as people of the British race or, perhaps, Caucasians. Clearly, a race power for "special" laws was not intended to have application to them.

155 Secondly, the words of qualification in par (xxvi) must be read as a composite idea. The parts combine to impose a control on the laws which may be made under the paragraph. As a matter of language, the words are consistent with an operation that is non-detrimental and has no adverse discrimination about it. This is particularly so if the structure, purpose and other features of the Constitution support that meaning. The word "for" is ambiguous. It could mean "for the benefit of". Or it could mean "in respect of". The history of the power in its original form tends to favour the latter meaning. However, a textual argument against that meaning is that, where the framers of the Constitution intended that idea, it was so expressed. Thus it was done in pars (xxxi), (xxxvi) ("in respect of"); in par (xxii) ("in relation thereto"); and in par (xxxii) ("with respect to"). The test of necessity in par (xxvi) is a strong one. It is to be distinguished from advisability, expedience or advantage. Its presence in par (xxvi) indicates that a particular *need* might

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268 (1997) 71 ALJR 1346 at 1423-1426; 147 ALR 42 at 147-151.

enliven the *necessity* to make a special law. It has been held by this Court, and was conceded by the Commonwealth, that ultimately and in "extreme cases" the existence of such necessity was justiciable[269]. Various formulae were urged to emphasise the severe limits of the jurisdiction to review the posited necessity. But in my view, the legislation contested here is subject to judicial review. There appears nothing in the agreed facts about the Ngarrindjeri, or the section of them constituted by the plaintiffs, which calls forth the power in par (xxvi) on the ground of necessity by reference to the race of such people. The only necessity evident in the facts (and stated in the long title to the Bridge Act) is the necessity "to facilitate the construction of the [bridge]". The fact that any law made under the race power must be deemed "necessary" and must answer to the description of "special" marks such a law out from all other laws that may be made by the Parliament. It tenders to the Parliament, and ultimately to this Court, criteria of limitation which must be given meaning according to the understanding of the Constitution read today.

156 Other paragraphs of s 51 contain concepts, the content of which has varied during the history of the Commonwealth because they are read with different eyes at different times in the light of different necessities. The clearest example is par (vi) which relates to the defence of the Commonwealth. Quite apart from the fact that the words "naval" and "military" have been enlarged to embrace the airforce, the reach of the power has expanded and contracted as changing times of war and peace have necessitated[270]. It is therefore unsurprising that we, who look at par (xxvi) in 1998, read the adjectival clause which qualifies the power of the Parliament to make laws with respect to "the people of any race" informed by the experience of a century of federal government. In that century the concept of what it is, in the nature of law, that may be deemed "necessary" and in a "special" form for the people of a race, by reference to race, cannot, and should not, be understood as it might have been in 1901. Such a static notion of constitutional interpretation completely misunderstands the function which is being performed.

157 Thirdly, a crucial element in the history of the constitutional text is the amendment of par (xxvi) in 1967. Because there have been so few amendments to the Australian Constitution, it has not hitherto been necessary to develop a theory of the approach to be taken to the meaning of the text where a provision is altered. In deriving the meaning of the altered provision, conventional rules of statutory construction permit a court to take into account the legislative change. But this is much more important in elucidating a constitutional text. This is

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269 *Native Title Act Case* (1995) 183 CLR 373 at 462.

270 *Farey v Burvett* (1916) 21 CLR 433 at 442; *Jenkins v The Commonwealth* (1947) 74 CLR 400 at 405; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 206-207; *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 218, 226.

especially so in Australia because of the necessity, exceptionally, to involve the electors of the Commonwealth in the law-making process. That step requires that this Court, to understand the amendment, should appreciate, and give weight to, the purpose of the change. The stated purpose here was to remove two provisions in the Constitution which, it had ultimately been concluded, discriminated against Australian Aboriginals. Whatever the initial object of the original exception to par (xxvi), by the time that the words were removed, the amendment did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws. It was the will of the Australian Parliament and people that the race power should be significantly altered. If the Constitution were not to be changed to provide the power to make laws with respect to the advancement of Aboriginal people and to forbid discrimination on racial grounds (as Mr Wentworth had proposed), it was to be altered, at least, to remove their exclusion from the Parliament's law-making power in order that the Parliament might have the power to make special laws with respect to them. To construe the resulting power in par (xxvi) as authorising the making of laws detrimental to, and discriminatory against, people on the ground of race, and specifically Aboriginal race, would be a complete denial of the clear and unanimous object of the Parliament in proposing the amendment to par (xxvi). It would amount to a refusal to acknowledge the unprecedented support for the change, evident in the vote of the electors of Australia. This Court should take notice of the history of the amendment and the circumstances surrounding it in giving meaning to the amended paragraph.

158 Fourthly, although the source and application of the protection from adverse discrimination on the ground of race differs in the United States of America[271], it is helpful to consider the approach of that country's Supreme Court to such laws. There, legislation that enacts detrimental discrimination on such grounds is considered "constitutionally suspect"[272]. Such enactments will therefore be subject to the "most rigid scrutiny"[273], and held to be "justifiable only by the weightiest of considerations"[274]. The Court will not simply rely on the view of the relevant legislature as to the purpose or effect of the challenged law[275]. Arguments

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271 The protection is grounded in the Fourteenth Amendment, which by its terms applies only to State laws (though a similar limitation has been held to apply to federal legislation: *Gibson v Mississippi* 162 US 565 at 591 (1896)).

272 *Bolling v Sharpe* 347 US 497 at 499 (1954).

273 *Korematsu v United States* 323 US 214 at 216 (1944).

274 *Washington v Davis* 426 US 229 at 242 (1976).

275 See also *McLaughlin v Florida* 379 US 184 at 191-192 (1964); *Loving v Virginia* 388 US 1 at 9 (1967); *Richmond v J A Croson Co* 488 US 469 at 500 (1989); Scalia

(Footnote continues on next page)

of inconvenience and potential political embarrassment for the Court fall on deaf judicial ears in that country. It is no different in Australia although the constitutional foundations are different. This Court, of its function, often finds itself required to make difficult decisions which have large economic, social and political consequences[276].

Unworkability of the "manifest abuse" test

159 In order to explain why the Australian Parliament could not, under the Constitution, enact racist laws such as those made in Germany during the Third Reich and in South Africa during apartheid - a result by inference accepted as totally alien to the character and meaning of our Constitution - counsel for the Commonwealth argued that it was enough that this Court retained a supervisory jurisdiction although one limited to invalidity of laws in cases where the Parliament's reliance upon par (xxvi) was a "manifest abuse"[277] of that power. Such a test has found favour with some of the Justices in this case. As I understand the test of "manifest abuse", it is to be confined to legislation which the Court considers to be "extreme", "outrageous" or "completely unacceptable". In evaluating whether such a test is a legally viable, and therefore an acceptable, one, it is instructive to examine how, in practice, a law that has an adverse discriminatory effect may not at first appear, on its face, to constitute a "manifest abuse" or an "outrageous" exercise of the enabling power.

160 Take first the former laws of South Africa, which illustrate this point most clearly. The principal legislative manifestation of apartheid was the *Group Areas Act*[278]. It categorised the population according to racial "groups"[279]. It provided

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"Federal Constitutional Guarantees of Individual Rights in the United States of America" in Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (1994) 57 at 86-88; Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991* (1997) at 100; cf *Canada (A G) v Mossop* [1993] 1 SCR 554 at 645-646 per L'Heureux-Dubé J.

276 *Ha v New South Wales* (1997) 71 ALJR 1080 at 1090; 146 ALR 355 at 368 is a recent example; but there are many.

277 Pursuant to the point reserved in the *Native Title Act Case* (1995) 183 CLR 373 at 460.

278 Although such legislation was first enacted in 1950, the following section references are to the *Group Areas Act* 1966, being the last surviving *Group Areas Act* under the apartheid system.

279 s 12(1). The "groups" were "white", "Bantu", and "coloured".

for the proclamation of "controlled areas" in relation to a particular group[280]. It forbade members of other groups owning[281] or occupying[282] land within them. However, the legislation did not, on its face, actually differentiate between particular groups. All three groups were prohibited from acquiring land in certain areas. Yet, in effect, whilst the legislation obliged major relocation of "Bantus" and "coloureds", it had very few consequences for "whites"[283]. How could such a law, or one having similarities to it, be said to be, on its face, a "manifest abuse"? Doubtless it did have, and its equivalent would have, persuasive defenders arguing that it was open to the Parliament to deem such a special law to be necessary.

161 A similar conclusion could be reached in relation to other legislation enacted by the South African Parliament under apartheid. The *Prohibition of Mixed Marriages Act*[284] (which banned marriages between "Europeans" and "non-Europeans"[285]) and the *Immorality Act*[286] (which prohibited sexual contact between "whites" and "coloureds"[287]) applied equally to all racial groups[288].

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280 s 23.

281 ss 13, 27.

282 s 26.

283 International Commission of Jurists, *South Africa: Human Rights and the Rule of Law* (1988) at 17; Platzky and Walker, *The Surplus People: Forced Removals in South Africa* (1985) at 99-100; cf Cassese, *Human Rights in a Changing World* (1990) at 108.

284 Enacted in 1949.

285 s 1.

286 Whilst the prohibition was first introduced in 1950, the section reference below is to the *Immorality Act* 1957, being the last such Act to survive under the apartheid system.

287 s 16.

288 See also *Population Registration Act* (1950) (SAfr); *Reservation of Separate Amenities Act* 1953 (SAfr). Certain pieces of legislation were, however, discriminatory on their face as well as in their effect, eg *Native Trust and Land Act* 1936 (SAfr); *Black (Urban Areas) Consolidation Act* (1945) (SAfr) (as amended by the *Native Laws Amendment Act* 1952 (SAfr)); *Natives (Abolition of Passes and Coordination of Documents) Act* 1952 (SAfr).

162 Likewise, it is difficult to be sure that some of the early legislation enacted by the Third Reich would be struck down under the "manifest abuse" test. For example, the first anti-Semitic law enacted by the regime[289], the *Law for the Restoration of the Professional Civil Service* 1933 (Ger)[290], provided that civil servants of "non-Aryan" descent were to be retired. Arguably, on its face, this would be insufficient to amount to a "manifest abuse"[291]. Australian employment laws have frequently contained provisions requiring certain public servants to be Australian citizens or British subjects - most of those being of the Caucasian race. Yet in Germany this power was immediately used to dismiss thousands of Germans of the Jewish race from their posts[292]. Such statutes, beginning with apparently innocuous provisions, laid the ground for worse to follow. They formed the precursors for more abhorrent legislation during the subsequent decade[293].

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289 Noakes and Pridham (eds), *Nazism 1919-1945: A History in Documents and Eyewitness Accounts* (1988), vol 1 at 527.

290 Art 3. See Noakes and Pridham (eds), *Nazism 1919-1945: A History in Documents and Eyewitness Accounts* (1988), vol 1 at 224.

291 In *Oppenheimer v Cattermole* [1976] AC 249 at 278, the majority in the House of Lords characterised a German decree depriving Jews of their citizenship as "so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all". But what of a law which required retirement from employment on the grounds of race. Would it be classified as a "manifest abuse" or permissible discrimination?

292 Hilberg, *The Destruction of the European Jews* (1985) at 83, 86.

293 In 1935, the *Law for the Protection of German Blood and Honour* restricted marriage, personal relationships and employment by Jews (Tatz, "Racism, Responsibility, and Reparation: South Africa, Germany, and Australia" (1985) 31 *Australian Journal of Politics and History* 162 at 165). Later that year, a decree defined a Jew as a "non-citizen" (Fraser, "Law Before Auschwitz: Aryan and Jew in the Nazi Rechtsstaat" in Cheah, Fraser and Grbich (eds) *Thinking Through the Body of the Law* (1996) at 66). In 1938, legislation disbarring all Jewish lawyers was enacted (Fernandez, "The Law, Lawyers and the Courts in Nazi Germany" (1985) 1 *South African Journal on Human Rights* 124 at 128). After 1938 laws for the registration of Jewish property were made. After 1940 laws for the sequestration of such property in Poland were made. People of the Jewish race were excluded from compensation for war damage before a worse fate befell most of them (Taylor, *The Anatomy of the Nuremberg Trials. A Personal Memoir* (1992) at 340).

163 Laws such as those set out above would, now, be expressly forbidden by the constitutions of both Germany[294] and South Africa[295]. Yet, in Australia, if s 51(xxvi) of the Constitution permits all discriminatory legislation on the grounds of race excepting that which amounts to a "manifest abuse", many of the provisions which would be universally condemned as intolerably racist in character would be perfectly valid under the Commonwealth's propositions. The criterion of "manifest abuse" is inherently unstable. The experience of racist laws in Germany under the Third Reich and South Africa under apartheid was that of gradually escalating discrimination. Such has also been the experience of other places where adverse racial discrimination has been achieved with the help of the law. By the time a stage of "manifest abuse" and "outrage" is reached, courts have generally lost the capacity to influence or check such laws. A more stable and effective criterion is required for validity under par (xxvi). It should be one apt to the words and character of the Australian Constitution; but also to the shared experience of the Australian people that lay behind the amendment of par (xxvi) in 1967.

164 The laws of Germany and South Africa to which I have referred provide part of the context in which par (xxvi) is now understood by Australians and should be construed by this Court. I do not accept that in late twentieth century Australia that paragraph supports detrimental and adversely discriminatory laws when the provision is read against the history of racism during this century and the 1967 referendum in Australia intended to address that history. When they voted in that referendum, the electors of this country were generally aware of that history. They knew the defects in past Australian laws and policies. And they would have known that the offensive legal regimes in Germany during the Third Reich and South Africa under apartheid were not the laws of uncivilised countries. Both in Germany and in South Africa the special laws enacted would probably have been regarded as unthinkable but a decade before they were made. They stand as a warning to us in the elaboration of our Constitution.

165 The purpose of the race power in the Australian Constitution, as I read it, is therefore quite different from that urged for the Commonwealth. It permits special laws for people on the grounds of their race. But not so as adversely and detrimentally to discriminate against such people on that ground.

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294 Basic Law of the Federal Republic of Germany, Article 3.3 ["Nobody shall be prejudiced or favoured because of their sex, birth, race, language, national or social origin, faith, religion or political opinions."]

295 Constitution of the Republic of South Africa, s 9(3) ["The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."]

The interpretative principle point

166 The conclusion just stated is reinforced when resort is had to the interpretative principle to which I have earlier referred. Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights[296]. Such an approach has, in recent years, found favour in New Zealand - where Cooke P (as Lord Cooke of Thorndon then was) has referred to the "duty of the judiciary to interpret and apply national constitutions ... in the light of the universality of human rights"[297]. Likewise, in interpreting the Canadian Charter of Rights and Freedoms, that country's Supreme Court has frequently had regard to international instruments[298]. To do so does not involve the spectre, portrayed by some submissions in these proceedings, of mechanically applying international treaties, made by the Executive Government of the Commonwealth, and perhaps unincorporated, to distort the meaning of the Constitution. It does not authorise the creation of ambiguities by reference to international law where none exist. It is not a means for remaking the Constitution without the "irksome" involvement of the people required by s 128[299]. There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it[300]. But that is not the question here. Cases which establish that rule are irrelevant to the present problem. Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human

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296 *Newcrest Mining v The Commonwealth* (1997) 71 ALJR 1346 at 1423; 147 ALR 42 at 147.

297 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

298 See for example *R v Oakes* [1986] 1 SCR 103 at 120-121; *R v Smith* [1987] 1 SCR 1045 at 1061; *Edmonton Journal v Attorney-General for Alberta* [1989] 2 SCR 1326 at 1374, 1377-1378. See also Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 *Supreme Court Law Review* 287; Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265; Schabas, *International Human Rights Law and the Canadian Charter* (1991); Hogg, *Constitutional Law in Canada*, 3rd ed (1992) at 822-824.

299 cf *Industrial Relations Act Case* (1996) 187 CLR 416 at 565 per Dawson J.

300 *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 79; *Horta v The Commonwealth* (1994) 181 CLR 183 at 195.

dignity[301]. Such violations are ordinarily forbidden by the common law and every other statute of this land is read, in the case of ambiguity, to avoid so far as possible such a result[302]. In the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights[303]. Where there is ambiguity in the common law or a statute, it is legitimate to have regard to international law[304]. Likewise, the Australian Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community[305].

167 If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the

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301 cf *Kruger v The Commonwealth* (1997) 71 ALJR 991 at 1037; 146 ALR 126 at 190.

302 *Coco v The Queen* (1994) 179 CLR 427 at 436-437, 446.

303 See Fitzgerald, "International Human Rights and the High Court of Australia" (1994) 1 *James Cook University Law Review* 78.

304 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Dietrich v The Queen* (1992) 177 CLR 292 at 306, 321; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287. A similar approach has been adopted in the United Kingdom: *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283; *R v Home Secretary, Ex parte Brind* [1991] 1 AC 696 at 761; *Derbyshire CC v Times Newspapers* [1992] QB 770 at 830; in New Zealand: *Tavita v Minister for Immigration* [1994] 2 NZLR 257 at 266; and in Canada: *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences* [1943] SCR 208 at 249; *Schavernoch v Foreign Claims Compensation* [1982] 1 SCR 1092 at 1098.

305 *Newcrest Mining v The Commonwealth* (1997) 71 ALJR 1346 at 1424; 147 ALR 42 at 148.

basis of race[306]. I consider that Judge Tanaka was correct, in the International Court of Justice, when he declared that:[307]

> "[T]he norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law".

Against the background of the developments of international law, which, in turn, respond to recent historical abuses by the medium of law, it is appropriate to return to a scrutiny of par (xxvi). The Commonwealth says that the paragraph is not ambiguous and that it permits detrimental and adversely discriminatory law-making in Australia on the basis of race. Whilst, as I have indicated, a number of factors incline me against the view favoured by the Commonwealth, the arguments presented and the divergent approaches taken by members of this Court do, I think, make it abundantly clear that par (xxvi) is ambiguous. Therefore, the final consideration which reinforces my conclusion is the resolute steps taken by international law to forbid and prevent detriment to, and adverse discrimination against, people by reference to their race.

The alternative submission

168 Whatever else it permits, par (xxvi) does not extend to the enactment of detrimental and adversely discriminatory special laws by reference to a people's race. This conclusion is sufficient to uphold the plaintiffs' claim for relief. It is unnecessary to examine the alternative submission that under par (xxvi) Aboriginal Australians are in a specially protected position. I would dispose of the constitutional question on a basis which construes the Constitution as making no distinction between the races, for that is now the form in which the paragraph appears and the principle which the foregoing analysis upholds.

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306 See United Nations Charter 1945, Arts 1(3), 55(c), 56; Universal Declaration of Human Rights 1948, Art 2; International Convention on the Elimination of all forms of Racial Discrimination 1965, Arts 1(1), 1(4), 2, 6; International Covenant on Civil and Political Rights 1966, Art 2(1); International Covenant on Economic, Social and Cultural Rights 1966, Art 2(2); Declaration on Race and Racial Prejudice 1978, Art 9(1). Australia signed the International Convention on the Elimination of all forms of Racial Discrimination on 13 October 1966, ie at the time of the parliamentary debates which led to the amendment of par (xxvi) of the Constitution. Australia ratified the Convention on 30 September 1975. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204-206; *Gerhardy v Brown* (1985) 159 CLR 70 at 124-125.

307 *South West Africa Cases (Second Phase)* [1966] ICJR 3 at 293.

The repeal/amendment point

169 I come finally to the repeal/amendment point. In my view, it must be approached with a clear understanding of the prohibition on the use of par (xxvi) to enact laws which are detrimental or discriminatory on the ground of race.

170 The plaintiffs, New South Wales and the Commonwealth argued three distinct approaches to the classification of the Bridge Act - each of which, when allied with their preferred approach to the construction of par (xxvi), produced particular results. The plaintiffs' primary submission was that the Bridge Act was simply to be considered on its own terms. Alternatively, they adopted a submission of New South Wales - that the issue was to be determined by hypothesising that the Heritage Protection Act, as purportedly amended by the Bridge Act, had been enacted as a composite statute. The Commonwealth and the supporting interveners argued that the Bridge Act was to be approached on the basis that it repealed in part, or amended, the Heritage Protection Act - requiring the Court to examine only the constitutionality of the Heritage Protection Act.

171 On the view which I take of the scope of par (xxvi), each of these approaches meets the same result. The Bridge Act is invalid. I turn first to the plaintiffs' primary submission - that the constitutionality of the Bridge Act was to be found within the "four corners" of that Act. In *South Australia v The Commonwealth*[308], Latham CJ observed:

> "Parliament, when it passes an Act, either has power to pass that Act or has not power to pass that Act. In the former case it is plain that the enactment of other valid legislation cannot affect the validity of the first-mentioned Act if that Act is left unchanged. The enactment of other legislation which is shown to be invalid equally cannot have any effect upon the first-mentioned valid Act, because the other legislative action is completely nugatory and the valid Act simply remains valid."

From this perspective, the result could not be clearer. The Bridge Act itself is, in substance, detrimental to all Aboriginals, as it removes their opportunity of making an application under the Heritage Protection Act in regard to the Hindmarsh Island Bridge area. This has a particularly telling impact on the Ngarrindjeri people, and hence on the plaintiffs. Such a result is necessarily produced by the Bridge Act, which specifically removes the power of the Minister to authorise such a declaration[309].

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308 (1942) 65 CLR 373 at 411.

309 s 4.

172 The second approach is to consider the Heritage Protection Act and the Bridge Act as a composite enactment. This view conforms with the holding of the Supreme Court of the United States in *Gregg Dyeing Co v Query*[310]:

> "The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether ... through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power."

Reading the Heritage Protection Act and the Bridge Act together, the same result is reached. Such a hypothetical composite enactment discriminates against all Aboriginals in respect of the Hindmarsh Island Bridge area[311]. This exception, or exclusion, operates against Aboriginal people (and, in particular, the Ngarrindjeri people) by reference solely to their race.

173 The third approach, favoured by the Commonwealth, is to consider the Bridge Act as merely a repealing or amending statute, whose constitutionality turns on that of the principal Act, being the Heritage Protection Act. Initially, this requires determination of whether the Bridge Act repeals or amends the Heritage Protection Act.

174 From the early days of this Court[312], it has been recognised that a later Act may sometimes effect an implied repeal (or amendment) of an earlier one by dealing with a subject matter in a way which is irreconcilable, or inconsistent, with the provisions of an earlier Act. Whether a repeal or amendment is made is thus not dependent upon the use of a particular legislative formula[313] any more than the constitutionality of a statute is decided by the "badge" of the verbal description which the statute wears[314]. However, care must be taken in the use of observations made by the Court as to the character of a law as a "repeal" or "amendment" having

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310 286 US 472 at 480 (1932); cf *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 479.

311 Defined in Sched 1 of the Bridge Act.

312 *Goodwin v Phillips* (1908) 7 CLR 1 at 7.

313 *Mathieson v Burton* (1971) 124 CLR 1 at 10-11.

314 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7.

regard to the different contexts in which the question may be raised[315]. Absolute statements should be avoided for they are likely to produce error[316].

175 In the case of the Bridge Act, there is no textual modification and no express statement of a parliamentary purpose to amend or repeal the earlier law. It effects an "indirect express amendment"[317] of the Heritage Protection Act. The Commonwealth therefore argued that, under the maxim "what Parliament may enact it may repeal"[318], if the Heritage Protection Act is constitutionally valid (as was conceded by all parties), the Bridge Act must also be valid[319]. There is undoubtedly some force in this argument. But in my view, the maxim cannot be sustained in the face of a constitutional provision that does not permit laws made to the detriment of, or which discriminate against, a people by reference to their race. The aphorism that "what Parliament may enact it may repeal" must give way to the principle that every law made by the Parliament under the Constitution must be clothed in the raiments of constitutional validity[320]. Were it otherwise, repeal or amendment could easily become a stratagem adopted by a legislature eager to circumvent the proper scrutiny of constitutional validity. The repeal/amendment point, therefore, fails.

Conclusion and orders

176 The Bridge Act does not answer to the description of a law with respect to the people of any race for whom it is deemed necessary to make special laws. It is a special law; that is true. But it is detrimental to, and adversely discriminatory against, people of the Aboriginal race of Australia by reference to their race. As such it falls outside the class of laws which the race power in the Australian Constitution permits. No other head of power being propounded to support the validity of the Bridge Act, it is wholly unconstitutional.

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315 Commonly, it derives importance from legislation governing statutory interpretation which preserves acquired rights in the event of "repeal" of an earlier statute: *Mathieson v Burton* (1971) 124 CLR 1; *Beaumont v Yeomans* (1934) 34 SR (NSW) 562 at 568-569.

316 As Windeyer J confessed in *Mathieson v Burton* (1971) 124 CLR 1 at 14.

317 Bennion, *Statutory Interpretation*, 3rd ed (1997) at 214.

318 *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 226.

319 See *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 472.

320 cf *South Australia v The Commonwealth* (1942) 65 CLR 373 at 411 per Latham CJ.

177 The question should be answered: Yes. The Commonwealth should pay the plaintiffs' costs.