THE 'RACE' POWER IN SECTION 51(XXVI) OF THE *CONSTITUTION*

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I Introduction

In this article, I first consider the discriminatory origins of the *Australian Constitution* generally, and section 51(xxvi) in particular. This is because, in my view, the case for the removal of section 51(xxvi), and its replacement with a particular head of power with respect to Aboriginal and Torres Strait Islander peoples, can best be fully comprehended once it is appreciated that the birth of the nation was attended by racially discriminatory sentiment. A reading of the Constitutional Convention debates of the 1890s makes clear that the framers intended section 51(xxvi) to be a source of power for the enactment by the Commonwealth Parliament of racially discriminatory laws with respect to the people 'of any race … for whom it is deemed necessary to make special laws'. Those people were those of 'coloured races'. The 'aboriginal natives' were beyond the reach of the discriminatory head of Commonwealth power.

Second, I consider a number of early calls for change to section 51(xxvi), in particular for the removal of the exclusion of Aboriginal and Torres Strait Islander people from the legislative reach of the Commonwealth Parliament. Third, the results of the 1967 referendum are considered; and fourth, post-1967 developments concerning the interpretation of section 51(xxvi) as amended in 1967.

Fifth, a critique of the concept of 'race' is provided. In contemporary practice and scholarship, it is widely accepted that 'race' is socially constructed, imprecise, arbitrary and incapable of definition or scientific demonstration. This has implications for the retention of section 51(xxvi) in its current form.

Sixth, options for the amendments of section 51(xxvi), and a number of the issues and risks which arise in relation to those options, are canvassed. Seventh, and finally, by way of post-script, the final recommendations made by the Expert Panel on Constitutional Recognition of Indigenous Australians in relation to section 51(xxvi) in its report, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, which was presented to the Prime Minister on 16 January 2012, are reviewed.

II The Discriminatory Origins of the *Constitution*, and Section 51(xxvi)

The *Australian Constitution* grew out of moves towards a federation of the six self-governing colonies in the nineteenth century. Prior to Federation in 1901, ultimate power over the colonies – New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania – rested with the United Kingdom Parliament at Westminster. During the 1890s, a series of conferences was held to discuss federation. In 1895, the six premiers of the Australian colonies agreed to establish a new Constitutional Convention by popular vote. The convention met over the course of a year during 1897 and 1898. The *Constitution* was approved in referendums held between 1898 and 1900. After ratification by five of the colonies (all except Western Australia)[1], it was presented as a Bill to the Imperial Parliament with an Address to Queen Victoria, requesting its enactment. In 1901, in their *Annotated Constitution of the Australian Commonwealth*, Quick and Garran described the *Constitution* as 'represent[ing] the aspirations of the Australian people in the direction of nationhood, so far as is consistent and in harmony with the solidarity of the Empire'.[2]

The *Constitution* is contained in clause 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9, a statute of the United Kingdom Parliament. The first

eight clauses, the 'covering clauses', contain introductory, explanatory and consequential provisions. The Imperial Act also contains a short Preamble, which provides:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

The Preamble makes no reference to Aboriginal people. Nor does it refer to the people of the Torres Strait Islands, which had been annexed in 1879 by the British colony of Queensland. The only two references to Aboriginal people in the body of the *Constitution* were couched in language of exclusion:

> 9A First, Commonwealth Parliament was denied power to make laws with respect to people of 'the aboriginal race in any State'. Section 51(xxvi), the so-called 'race power', conferred on Parliament the power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.
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> 9B Second, section 127 provided: '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.[3]

In the original draft constitution of 1891, the proposal for what was to become section 51(xxvi) was for a grant of exclusive legislative power to the Commonwealth Parliament with respect to:

> 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.[4]

At that time, New Zealand was a potential member of an Australasian nation-state that might also have included Fiji and other Pacific islands. The course of debate suggests that Australia's first chief justice, Sir Samuel Griffith, proposed the clause. He explained:

> What I have had more particularly in my own mind was the immigration of coolies from British India, or any eastern people subject to civilised powers. … I maintain that no state should be allowed, because the federal parliament did not chose to make a law on the 80 subject, to be flooded by such people as I have referred to.[5]

As Geoffrey Sawer has commented, everything Samuel Griffith was concerned about could have been achieved under the immigration, aliens and external affairs powers. However, the Convention debates make clear that the power was regarded as important by the framers of the *Constitution*.[6] In 1898, Edmund Barton, Australia's first prime minister and a founding justice of the High Court of Australia, commented that the race power was necessary so that 'the moment the Commonwealth obtains any legislative power at all it should have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[7] Arguing against a Commonwealth head of power, the future premier of Western Australia, Sir John Forrest, contended:

> We have made a law that no Asiatic or African alien can get a miner's right or do any gold mining. Does the Convention wish to take away from us, or, at any rate, not to give us, the power to continue to legislate in that direction? … We also provide that no Asiatic or African alien shall go on a township on our goldfields. These are local matters which I think should not be taken from the control of the state Parliament.[8]

John Forrest also observed that '[i]t is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it but still it is so.'[9] A South Australian delegate, James Howe, commented: 'I think the cry throughout Australia will be that our first duty is to ourselves, and that we should as far as possible make Australia a home for Australians and the British race alone.'[10] John Reid, a future premier of New South Wales and fourth prime minister of Australia, agreed with Forrest that it was 'certainly a very serious question whether the internal management of these coloured persons, once they have arrived in a state, should be taken away from the state'.[11] He was prepared, however, to give that power to the Commonwealth because 'it might be desirable that there should be uniform laws in regard to those persons, who are more or less unfortunate persons when they arrive here'.[12]

The current Chief Justice of Australia, the Hon Robert French, has observed extra-curially that the provision which became section 51(xxvi) was directed to the 'control, restriction, protection and possible repatriation of people of "coloured races" living in Australia'.[13] The sounds of the battles recorded in the race power are 'the sounds of an out-dated, false and harmful taxonomy of humanity'.[14] Sawer has commented that the Convention debates in relation to section 51(xxvi) 'reveal only too clearly a widespread attitude of white superiority to all coloured peoples, and ready acceptance of the view that the welfare of such people in Australia was of little importance'.[15]

The tenor of the Convention debates, with the exception of the contributions from a notable few, including Dr John Quick, Charles Kingston and Josiah Symon, indicated a desire for laws applying discriminatory controls to 'coloured races'. Both Quick and Kingston wanted to keep the 'coloured races' out. However, both urged that, once admitted, they should be treated fairly and given all the privileges of Australian citizenship.[16] Kingston, in particular, expressed the view that if 'coloured' people were to be admitted to Australia, they should be admitted as citizens and enjoy all the rights and privileges of Australian citizenship:

> if you do not like these people you should keep them out, but if you do admit them you should treat them fairly – admit them as citizens entitled to all the rights and privileges of Australian citizenship. … We have got those coloured people who are here now; we have admitted them, and I do trust that we shall treat them fairly. And I have always set my face against special legislation subjecting them [to] particular disabilities … I think it is a mistake to emphasize these distinctions … [17]

French has commented that this must have seemed a radically liberal view at the time.[18] Likewise the view of Josiah Symon, who argued in Melbourne that '[i]t is monstrous to put a brand on these people once you admit them. It is degrading to us and to our citizenship to do such a thing. If we say they are fit to be admitted amongst us, we ought not to degrade them by putting on them a brand of inferiority.'[19]

In relation to other 'races', the records of the Conventions reveal that some provisions suggested for inclusion in the *Constitution* were rejected so that the states could continue to enact legislation that discriminated on racial grounds. For example, the Tasmanian Attorney-General, Andrew Inglis Clark, who was acquainted with American constitutional jurisprudence, suggested a due process provision similar to the guarantee of 'equal protection of the laws' in the Fourteenth Amendment to the *Constitution of the United States*.[20] The Fourteenth Amendment, adopted in July 1868, provided that all persons born or naturalised in the United States were citizens and that:

> 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.

In 1886, the word 'persons' had been held to require equal protection of the laws of the United States without regard to race, colour or nationality.[21] The proposed Tasmanian amendment read:

> The citizens to each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of the citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.[22]

The proposal was rejected by 24 votes to 17. Instead, a section 117 was proposed to provide that a person shall not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other state. In relation to this compromise, Victorian delegate Henry Higgins (later a justice of the High Court) confirmed at the Melbourne Convention in 1898 that 'we want a discrimination based on colour'.[23]

In their 1901 *Annotated Constitution*, Quick and Garran said of the race power:

> it enables the Parliament to deal with people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special

> protection and secure their return after a certain period to the country whence they came.[24]

Sawer has referred to the introduction of the unfortunate expression 'alien race' in Quick and Garran's *Annotated Constitution*, and suggested that they probably did not mean 'alien' in any precise sense of nationality under law, 'but merely people of a "race" considered *different from* the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc. etc.) mixture from the United Kingdom, which formed the main Australia stock'.[25]

In 1910, Harrison Moore wrote that section 51(xxvi) was intended to enable the Commonwealth to pass the sort of laws which before 1900 had been passed by many states concerning 'the Indian, Afghan, and Syrian hawkers; the Chinese miners, laundrymen, market-gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia'.[26] Such laws were designed 'to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came'.[27]

On any view, the intended reach of section 51(xxvi) was not the regulation of the affairs of the 'aboriginal natives'. In 1966, Sawer commented that, notwithstanding that the Constitutional Conventions 'contained many men who were in general sensitive, humane, and conscious of those less fortunate sections of the community', no delegate appears to have suggested 'even in passing that there might be some national obligation to Australia's earliest inhabitants'.[28] A review of the records of the time suggests no consideration by those who were to form Australia's first national government of the possible significance of section 51(xxvi) for Aboriginal and Torres Strait Islander peoples.[29] There was no discussion of their exclusion from the scope of the power, and no acknowledgment of any place for them in the nation created by the *Constitution*. In this respect, among others, the race power in the *Australian Constitution* differed markedly from the constitutions of the United States and Canada, which made express reference to Indigenous 'Indians'.[30]

For the most part, Aboriginal and Torres Strait Islander people were not able to vote for delegates to the Constitutional Conventions.[31] During the 1890s, it was only in South Australia that Aboriginal people were placed on electoral rolls and able to vote for delegates.[32] There appears to be no evidence that Aboriginal or Torres Strait Islander persons participated in the Conventions or played any role in the drafting of the *Constitution*.

This exclusion from the framing of the nation's *Constitution* continued a pattern of marginalisation and systematic discrimination, the consequences of which endure today. As Megan Davis and Dylan Lino have commented, '[t]here is a sense that, beginning with their exclusion from the constitutional drafting process in the late 19th century, Aboriginal and Torres Strait Islander people have on the whole been marginalised by both the terms and effect of the Constitution.'[33]

III Calls for Change to Section 51(xxvi)

From as early as 1910, there were calls to amend the *Constitution* to provide the Commonwealth with power to make laws with respect to Aboriginal people. For example, in 1910, the Australian Board of Missions called on 'Federal and State Governments to agree on a scheme by which all responsibility for safeguarding the human and civil rights of the aborigines should be undertaken by the Federal Government'.[34] In 1913, the Australian Association for the Advancement of Science made a similar proposal. In 1928, the Association for the Protection of Native Races submitted to the Royal Commission on the Constitution that 'the Constitution be amended so as to give the Federal Government the supreme control of all Aborigines'. In 1929, a majority of the Royal Commission on the Constitution (1927–29) referred to the testimony of 'a great number of witnesses' about the need to give increased attention to Aboriginal people.[35] The majority recognised that the effect of the treatment of Aboriginal people on the reputation of Australia furnished a powerful argument for the transfer of power to the Commonwealth, but recommended against amending section 51(xxvi) 'mainly on the ground that the States were still better equipped than the Commonwealth to attend to the special needs of the aborigines within their territories'.

In 1959, a Joint Parliamentary Committee on Constitutional Review unanimously recommended the repeal of section 127, but did not reach agreement on the grant of legislative power with respect to Aboriginal people.[36] The Joint Parliamentary Committee also recommended the repeal of section 25.[37] In

1961, the Federal Conference of the Australian Labor Party, at the instigation of Kim Beazley, Sr, resolved that section 127 be repealed and the exclusion of Aboriginal people under section 51(xxvi) be removed.

In 1964, the leader of the Labor Opposition, Arthur Calwell, introduced the Constitution Alteration (Aborigines) Bill to remove the exclusionary words 'other than the aboriginal race in any State' from section 51(xxvi) and to delete section 127. Calwell called attention to possible United Nations criticism that the *Constitution* was 'discriminating against' the Aboriginal people.[38] The Attorney-General, Billy Snedden, affirmed that all parliamentarians felt that 'there should be no discrimination against aboriginal natives of Australia'. He warned that the proposed change to section 51(xxvi) created the potential for 'discrimination … whether for or against the aborigines'. In response, Calwell affirmed his view that the amendment would only be beneficial for Aboriginal Australians.[39] The Bill lapsed when Parliament dissolved.[40]

In 1965, Prime Minister Robert Menzies introduced the Constitution Alteration (Repeal of Section 127) Bill for a referendum for the removal of section 127. Menzies opposed the amendments to section 51(xxvi) on the ground that to include Aborigines in the race power would not be in their 'best interests', although he was sympathetic to the notion of repealing that section altogether.[41] While the Bill passed both Houses, it was not put to referendum.

In March 1966, William 'Billy' Wentworth, the Liberal Member for Mackellar and later Australia's first Minister for Aboriginal Affairs, introduced a private member's bill to repeal section 51(xxvi), and instead to confer on the Commonwealth Parliament power to make laws 'for the advancement of the Aboriginal natives of the Commonwealth of Australia'.[42] Clause 3 of the proposal contained a proviso that the section should not operate 'so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia'. Wentworth cited a concern that the deletion of the exclusion of people of the 'Aboriginal race' from section 51(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'.[43] While the Bill passed both Houses of Parliament, it ultimately lapsed and did not go to referendum.[44]

In 1966, with the prospect of a referendum within the life of the 25th Parliament in sight, Geoffrey Sawer warned presciently that having regard to 'the dubious origins of [section 51(xxvi)] and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would be preferable to any amendments intended to extend its possible benefits to the Aborigines.'[45]

IV The 1967 Amendment to Section 51(xxvi)

On 1 March 1967, Prime Minister Harold Holt introduced the Constitution Alteration (Aboriginals) Bill, which proposed the deletion of words 'other than the Aboriginal race in any State' from section 51(xxvi), as well as the deletion of section 127. The amendment would give Parliament power to make special laws for Aboriginal people which, with the cooperation of the states, would 'secure the widest measure of agreement with respect to Aboriginal advancement'.[46]

The leader of the Opposition, Gough Whitlam, supported the Bill, and it passed both Houses of Parliament without a dissenting voice. In the House of Representatives, Billy Wentworth commented that some discrimination was necessary in relation to Aboriginal people, but 'it should be favorable, not unfavorable'.[47] In the Senate, the Minister responsible for the Bill, Senator Norman Henty, repeated what had been said by the Prime Minister.[48] The leader of the Opposition in the Senate, Senator Lionel Murphy, said:

> 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.[49]

There having been no opposition within the Parliament to the proposed alterations to the *Constitution*, it was necessary to prepare only an argument in favour of the proposed law. The case for the 'Yes' vote, authorised by the Prime Minister, the leader of the Australian Country Party and the leader of the Opposition, argued:

> 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.[50]

The referendum was put on 27 May 1967. In addition to gaining majority support in every state, the proposal received 90.8 per cent of valid votes nationally. This remains the largest majority for any referendum proposal ever held in Australia, before or since.[51]

The results of the 1967 referendum were twofold. First, section 127 was repealed. Aboriginal natives were no longer excluded from being counted in the numbers of people of the Commonwealth or a State. By 1967, all Aboriginal people had the right to vote in federal and state elections. Accordingly, there was no longer any basis for excluding them from the calculations of quotas for the constitution of the House of Representatives under section 24 of the *Constitution*, and no other relevant purpose for section 127.[52] The removal of the prohibition on counting Aboriginal people in the population statistics, and the existence of census data from 1971 in relation to the demographics of the Aboriginal and Torres Strait Islander population, has enabled the calculation of key health and other socioeconomic indicators, such as infant mortality rates and life expectancy.

Second, the words 'other than the aboriginal race' were deleted from section 51(xxvi), thereby enabling the Commonwealth Parliament to legislate for people of any race, including Aboriginal and Torres Strait Islander people. Significant post-1967 legislation enacted by the Commonwealth Parliament in reliance on section 51(xxvi) has included the *Aboriginal Land Rights (Northern Territory) Act 1976*, the *World Heritage Properties Conservation Act 1983*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, the *Native Title Act 1993*, and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

V Post-1967 Developments

With the 1967 referendum, Aboriginal and Torres Strait Islander people ceased to be mentioned at all in the *Constitution*. The referendum raised the question of how to move beyond non-recognition to appropriate recognition of Aboriginal and Torres Strait Islander peoples in the *Constitution*.

The 1967 referendum also raised the judicial interpretation of section 51(xxvi) as amended. The debate leading up to the 1967 referendum suggests that it was generally assumed that the purpose of the amendment to section 51(xxvi) was to confer on the Commonwealth Parliament power to make laws for the benefit of Aboriginal and Torres Strait Islander people. However, in 1983 in *Commonwealth v Tasmania*,[53] Mason J held that the power enabled Parliament to make laws '(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 there is a need to protect them'. This echoed the earlier judgment of Stephen J in *Koowarta v Bjelke-Petersen*,[54] in which his Honour held that the power enabled laws because of both 'the special needs' of the people of a particular race, as well as 'the special threat or problem they present'.[55]

In 1988, in its *Final Report*, the Constitutional Commission noted that until section 51(xxvi) was amended in 1967, Parliament could 'pass special and discriminating laws' relating to the people of any race. The Commission referred to a number of decisions in recent years in which judges had observed that laws made under section 51(xxvi) 'may validly discriminate against, as well as in favour of, the people of a particular race'. The Constitutional Commission concluded:

> It is inappropriate to retain section 51 (xxvi.) because the purposes for which, historically, it was inserted no longer apply in this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based. The attitudes now officially adopted to discrimination on the basis of race are in striking contrast to those which motivated the Framers of the Constitution. It is appropriate that the change in attitude be reflected in the omission of section 51 (xxvi.).[56]

The Constitutional Commission considered it unnecessary to retain section 51(xxvi) 'for the purposes of regulating such things as the entry and activities of aliens in Australia or the confinement of people who might reasonably be suspected of acting contrary to Australia's interests'. Other legislative powers provided ample support for any laws directed at protecting Australians from any activities or groups which were not in the national interest.[57]

Together with the recommendation for the omission of section 51(xxvi),[58] the Constitutional Commission recommended the 'insertion of a new paragraph (xxvi)

which would give the Commonwealth Parliament express power to make laws with respect to those groups of people who are, or are descended from, the Indigenous inhabitants of different parts of Australia.'[59] The recommendation was made because:

(a) the nation as a whole has a responsibility for Aboriginal and Torres Strait Islander people; and
(b) the new power would avoid some of the uncertainty arising from, and concern about, the wording of the existing power.[60]

The Constitutional Commission observed that approval of such alteration of section 51(xxvi) would retain the spirit, and make explicit the meaning, of the alteration made in 1967, which Brennan J has described as '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'.[61]

Writing extra-curially in 2003, French provided a detailed overview of post 1967 High Court jurisprudence in relation to section 51(xxvi), culminating in *Kartinyeri v Commonwealth*, the so-called *Hindmarsh Island Bridge* decision. The Chief Justice commented that as construed by a now substantial body of High Court jurisprudence, there is nothing in section 51(xxvi), 'other than the possibility of a limiting principle of uncertain scope, to prevent its adverse application to Australian citizens simply on the basis of their race'. It followed that there is 'little likelihood of any reversal of the now reasonably established proposition that the power may be used to discriminate against or for the benefit of the people of any race'.[62]

The Chief Justice concluded by adopting the recommendation of the Constitutional Commission in 1988 that the race power be replaced by a provision empowering the Commonwealth Parliament to make laws with respect to Aboriginal and Torres Strait Islander people: 'Such laws are based not on race but on the special place of those peoples in the history of the nation'.[63]

VI The Problematic Notion of 'Race'

In considering the case for the repeal of section 51(xxvi), it is significant to recall that paragraph (xxvi) confers power to make laws by reference to the concept of 'race'. In contemporary practice and scholarship, the dominant view among biological scientists, anthropologists and social theorists is that the concept of 'race' is socially constructed, imprecise, arbitrary and incapable of definition or scientific demonstration.[64] In Australia, Marcia Langton has commented:

> the rapid accumulation of evidence concerning the genetic variation in and between human populations has led to the recognition that there are likely to be more similarities between people of different groups, traditionally called 'races', than between members of 185 these races … the criteria for the division of the world's population into 'races'—skin, hair and eye colour, and a few other physiological characteristics … were associated, without any scientific evidence, with social characteristics.[65]

Langton concludes that 'there is no reliable evidence that any physical reality conforms to the notions of "race" … assumed in our language and our legal doctrines and texts', and that 'many Australians, including some influential academics, are not aware that the concept of "race" has been rejected by most reputable scientists and social scientists as a valid marker of human physiological and other social differences'.[66] In 1964, the anthropologist Ashley Montagu, who conducted research with Aboriginal groups in the 1930s, described 'race' as 'man's most dangerous myth':

> The myth of race refers not to the fact that physically distinguishable populations of humans exist, but rather to the belief that races are significant populations or peoples whose physical differences are innately linked with significant differences in mental capacities, and that these innate hierarchical differences are measurable by the cultural achievements of such populations, as well as by standardised intelligence (IQ) tests. This belief is thoroughly and dangerously unsound.[67]

A 1948 United Nations Economic and Social Council resolution called upon the United Nations Economic, Social and Cultural Organisation ('UNESCO') to consider the timeliness of 'proposing and recommending the general adoption of a programme of dissemination of scientific facts designed to bring about the disappearance of that which is commonly called race prejudice'.[68] UNESCO subsequently initiated a program 'to study and collect scientific materials concerning questions of race'.[69] The results of the work of experts convened by UNESCO were summarised in four statements on the question of 'race' adopted between 1950

and 1967.[70] The 1950 *Statement by Experts on Race Problems* argued that:

> National, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups: and the cultural traits of such groups have no demonstrated genetic connexion with racial traits. Because serious errors of this kind are habitually committed when the term 'race' is used in popular parlance, it would be better when speaking of human races to drop the term 'race' altogether and speak of *ethnic groups*.[71]

The 1951 *Statement on Race* noted, among other things, that the available scientific material did not justify the conclusion that inherited genetic differences are a major factor in producing the differences between the cultures and cultural achievements of different peoples or groups. It did indicate, on the contrary, 'that a major factor in explaining such differences is the cultural experience which each group has undergone'.[72] The 1964 *Proposals on the Biological Aspects of Race*, adopted in Moscow, concluded that '[t]he peoples of the world today appear to possess equal biological potentialities for attaining any civilizational level', and that differences in the achievements of different peoples 'must be attributed solely to their cultural history'.[73] Neither in the field of hereditary potentialities concerning the overall intelligence and the capacity for cultural development, nor in that of physical traits, was there any justification for the concept of 'inferior' and 'superior' races. The 1967 *Statement on Race and Racial Prejudice*, adopted at a fourth multidisciplinary experts' meeting convened by UNESCO in Paris, described the genesis of racist theories and racial prejudice. The statement confirmed that the 'human problems' arising from so-called 'race relations' were social in origin rather than biological. A basic problem was racism, 'namely, antisocial beliefs and acts which are based on the fallacy that discriminatory inter-group relations are justifiable on biological grounds.'[74]

In 1978, the General Conference of UNESCO adopted the *Declaration on Race and Racial Prejudice*.[75] The *Declaration* provides in article 1(1) that: 'All human beings belong to a single species and are descended from a common stock. They are born equal in dignity and rights and all form an integral part of humanity.' Article 1(4) provides that: 'All peoples of the world 165 possess equal faculties for attaining the highest level in intellectual, technical, social, economic, cultural and political development.' Article 1(5) affirms that: 'The differences between the achievements of the different peoples are entirely attributable to geographical, historical, political, economic, social and cultural factors.'

Contemporary anthropological theory suggests that race is culturally and socially constructed.[76] It is 'not a self-evident and natural category',[77] but rather a dynamic and unstable construct that has changed and been used differently over time and from place to place. Current research suggests that much of the visible variation among people from different places is due to adaptation to local conditions (such as disease or climate) that does not correlate to other characteristics or broad racial categories, or to fundamental attributes such as ability or personality.[78] The most significant recent development that has influenced scientific thinking about the biological concept of race is the mapping of the human genome. Scientists have collected data about the genetic constitutions of populations around the world in an effort to provide the link between ancestry and patterns of disease. Michael Bamshad and Steve Olson have concluded that traits affected by natural selection may be poor predictors of group membership, and may imply genetic relatedness when, in fact, little exists.[79]

Increasingly, contemporary scholarship on race relations has focused on 'the way race serves power relations, rather than in the concept of race per se'.[80] A National Roundtable of the Australian Psychological Society and Australian Indigenous Psychologists Association concluded that 'racism against Aboriginal and Torres Strait Islander peoples exists in various forms and in all systems in Australia today' and is having 'a destructive impact on Aboriginal and Torres Strait Islander peoples' education, health and wellbeing, well beyond its immediate impact'. Accordingly, although the concept of 'race' is incapable of scientific definition or demonstration, in Australia (as elsewhere), it persists as a social construct and a powerful and persistent focus of social identity and exclusion, and remains a constitutionally available ground for legislation.

VII Options for the Amendment of Section 51(xxvi)

It follows that any discussion of constitutional recognition of Indigenous Australians must involve consideration of the removal of the so-called 'race' power in section 51(xxvi) in its current form, and of more appropriate approaches as suggested by, amongst others, the Constitutional Commission and the Hon Robert French. In my view, there is a compelling case for the repeal altogether of section

51(xxvi) which, as the High Court has confirmed, retains its original discriminatory character, and provides a source of power for racially discriminatory legislation to address the special threats or problems constituted by persons of a particular race for the general community. Such a provision is inconsistent with Australia's international obligations, and has no place in a modern constitution.

It is not the case that the repeal of section 51(xxvi) would remove protection provided to other ethnic national and linguistic groups within multicultural Australia. Rather, its removal would enhance protection of other ethnic national and linguistic groups by withdrawing power to enact racially discriminatory legislation. Its removal would leave available to the Commonwealth Parliament, inter alia, the external affairs power – and through it the *International Convention on the Elimination of All Forms of Racial Discrimination*[81] – as a source of power for the enactment of non-discriminatory laws in respect of other groups. Nor is it the case that the repeal of section 51(xxvi) would deprive the Commonwealth Parliament of power to make laws to protect Australians from activities and groups not in the national interest.[82] Sawer commented in 1966, everything Sir Samuel Griffith was concerned about in 1891 when he first proposed the clause that became section 51(xxvi) could have been achieved under the immigration power in section 51(xxvii) and the external affairs power in section 51(xxix)[83] (as well as the aliens power in section 51(xix), and section 51(xxviii), relating to the influx of criminals).

There would arise, however, a need to confer a new head of power to legislate with respect to Aboriginal and Torres Strait Islander peoples. The risk of the removal of section 51(xxvi), without the conferral of a new head of power, is that beneficial laws might no longer be supported by a grant of legislative competence and might no longer be able to be validly enacted by the Commonwealth Parliament in certain areas. Since 1967, the Commonwealth Parliament has enacted laws pursuant to section 51(xxvi) specifically applicable to Aboriginal and Torres Strait Islander Australians in the areas of cultural heritage, corporations and native title. Without a specific head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples, then apart from the territories power in section 122, the grants power in section 96 and a referral of power to the Commonwealth by the states, there remains only the external affairs power as a source of federal legislative competence.

Accordingly, there is in my view a considerable risk that the external affairs power, used to support the *Racial Discrimination Act 1975* (Cth) so as to give effect to *ICERD*, would not support the range of laws that can currently be enacted in reliance on section 51(xxvi) to benefit Aboriginal and Torres Strait Islander peoples. In particular, the concept of 'special measures' under articles 1(4) and 2(2) of *ICERD* does not support measures which lead to the maintenance of separate rights for different racial groups and which are continued after the objectives for which they were taken have been achieved. Further, *ICERD* does not enumerate the particular rights of Indigenous peoples, in contrast to the *United Nations Declaration on the Rights of Indigenous Peoples*.[84] Unlike *ICERD*, the *UNDRIP* is a declaration of the General Assembly, not a treaty to which Australia is a party. Hence, there are untested questions about the extent to which the external affairs power can be used as a 'hook' in relation to matters of international concern, as opposed to international obligation.[85]

It follows that if the repeal and replacement of section 51(xxvi) were proposed as separate referendum questions, there would be a risk that one could be accepted and the other rejected, leaving either two powers or none. To avoid such an unfortunate outcome, the repeal of the race power and the insertion of a new head of power, in my view, should be proposed in a single referendum question.

VIII A Power to Make Laws 'With Respect to Aboriginal and Torres Strait Islander Peoples'

In my view, the preferred option, consistent with the proposal of the Constitutional Commission and the Hon Robert French, would be to replace section 51(xxvi) with a power of Commonwealth Parliament to make laws 'with respect to Aboriginal and Torres Strait Islander peoples'. Such laws would be based not on race, rather, as French has suggested, 'on the special place of those peoples in the history of the nation'. The one difference between this proposal and that put forward by the Constitutional Commission and French is use of language of 'peoples', conformably with international legal usage and legislation such as the *Native Title Act 1993* (Cth) and the since repealed *Aboriginal and Torres Strait Islander Commission Act 1990* (Cth).

Some have expressed concern that replacing section 51(xxvi) with a new power to make laws with respect to Aboriginal and Torres Strait Islander peoples would leave open the

possibility of a future High Court holding that such power permits the making of laws detrimental to, or discriminatory against, Aboriginal and Torres Strait Islander peoples. In order to address such concerns, there have been various proposals for a new head of power with respect to 'laws beneficial to Aboriginal and Torres Strait Islander peoples' or with respect to 'laws for the benefit of Aboriginal and Torres Strait Islander peoples', or the like, to make clear that the constitutional text is confined by an express limitation. A similar approach was proposed by the Rights Committee which reported to the Constitutional Commission, however was not adopted by the Commission.[86]

A difficulty with such approach is that it leaves for later argument as to the scope of the Commonwealth Parliament's legislative power. However, the contrary view is that this would be a necessary consequence of a decision by the Australian people in a constitutional referendum that there be *judicial* protection of the rights and interests of Aboriginal and Torres Strait Islander peoples, and that the powers of Commonwealth Parliament with respect to Indigenous Australians be limited in accordance with international standards. In my view, the insertion of a general guarantee of racial equality or racial non-discrimination could achieve the same result. Thus, one option would be to subject a power to legislate with respect to Aboriginal and Torres Strait Islander peoples to a general racial equality or non-discrimination guarantee.

The insertion of a general guarantee of racial equality or racial non-discrimination would not only confirm that the power to make laws with respect to Aboriginal and Torres Strait Islander peoples is confined to laws advantageous to them based on recognition of their special place in the history of the nation. It could also be expressed to secure protection of those rights which have been negotiated or recognised in the past (such as land rights, native title rights, heritage protection rights), but also those which might be negotiated or recognised in the future (for example, through agreements and decisions of the High Court). In this regard it is to be recalled that the Constitutional Commission also recommended a guarantee against discrimination on various grounds including race (not, however, a general guarantee of equality).[87] As Geoffrey Lindell points out in his article for this special issue, the concept of equality was seen by the Constitutional Commission as provoking long-standing and continuing controversies in countries which had such a guarantee, whereas discrimination was a judicially workable and manageable concept with which courts are used to dealing. Lindell's wise words of caution are to be contrasted with Hilary Charlesworth's and Andrea Durbach's arguments for the inclusion of an equality guarantee in the *Constitution*, which would draw upon relevant jurisprudential developments since 1988 – both international and comparative – and which might lead to a settling of some of the controversies to which the Commission referred.

A further significant matter to consider in connection with proposals for a racial equality or non-discrimination guarantee is that it is one thing to prevent the singling out of Aboriginal and Torres Strait Islander people for adverse treatment by a general guarantee of racial equality or non-discrimination, but quite another to ensure that special or advantageous or beneficial treatment is not susceptible to invalidation on the ground of infringing such a general guarantee. It is beyond the remit of this article to consider the different approaches which can and have been adopted by the courts in different countries to the interpretation of broadly expressed equality guarantees. It suffices to note that an approach of substantive equality is to be contrasted with a jurisprudence of formal equality. In the present context, there is a risk that such a guarantee could be called in aid by those seeking to challenge the validity of both conventional 'special measures' designed to address the socio-economic disadvantage of Aboriginal and Torres Strait Islander Australians, as well as positive measures designed to protect the cultures, languages and heritage of Aboriginal and Torres Strait Islander Australians.

In my opinion, such risk needs to be carefully considered, and could be reduced if not avoided altogether by a number of textual expedients. First, the constitutional conferral of power could be confined by an express limitation, as discussed above. Second, the power to make laws with respect to Aboriginal and Torres Strait Islander peoples could be part and parcel of an equality or non-discrimination guarantee. Thus it could not be argued that the power to make laws conferring special or advantageous or beneficial treatment on Aboriginal and Torres Strait Islander peoples was eliminated by such general guarantee. A variation of such an approach was proposed by the 1988 Constitutional Commission, and has been adopted in the constitutions and laws of inter alia Canada, India, South Africa and Aotearoa/New Zealand. An exception for positive measures to promote a level playing field is a standard feature of non-discrimination and equality provisions around the world. Third, a non-derogation clause

similar to section 25 of the Canadian Constitution could be adopted. The non-derogation clause in section 25 creates an exemption to the *Canadian Charter of Rights and Freedoms* (which forms Part I of the *Constitution Act 1982*). Section 25 confirms that the Charter's guarantee of certain rights and freedoms should not be construed so as to derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada. A similar provision might provide that '[T]he guarantee of racial equality and prohibition of racial discrimination should not be construed to derogate from any rights that pertain to Aboriginal and Torres Strait Islander peoples.' The second and third of the textual expedients would not be mutually exclusive.

IX Postscript: The Expert Panel's Recommendations

The above discussion of options for direction was presented at the workshop convened by the Indigenous Law Centre on 1 July 2011. In the event, the approach to section 51(xxvi) adopted by the Expert Panel in its January 2012 report[88] to the Prime Minister was one which consisted of a number of features.

First, as discussed in chapter 5.4 of the report, the Panel recommended the repeal of section 51(xxvi), and a new grant of legislative competence, called 'section 51A' conferring on Parliament power to make laws 'for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples'.

Second, as discussed in chapter 4.7 of the report, the Panel recommended that the new 'section 51A' have its own introductory and explanatory preamble. The Panel considered that the advantage of having a preamble element as part and parcel of 'section 51A' was the avoidance of unintended consequences. By separating the new provision, and especially its preamble element, from the existing section 51, the approach would ensure that the preamble element applies specifically and peculiarly to the new 'section 51A' legislative power, and prevent future interpreters of the Constitution from deploying the wording of the preamble to the new section so as to alter what would otherwise have been the meaning of other provisions in the *Constitution*. As discussed in chapter 4 of the report, the Panel considered that the legal risks of a 'section 51A' with its own preamble were fewer than the risks associated with some of the obvious alternatives, such as a preamble in section 51, a preamble at the head of the *Constitution*, or any attempt to amend the Preamble to the Imperial *Commonwealth of Australia Constitution Act*.

Third, as discussed in chapter 5.4 of the report, the Panel proposed use of the word 'advancement' in the preambular words to the new substantive power in 'section 51A', rather than in the power itself. The Panel considered that such an approach should ensure that the beneficial purpose was apparent.

Fourth, as discussed in chapter 6.5 of the report, the Panel concluded that recognition of Aboriginal and Torres Strait Islander peoples would be incomplete without a constitutional prohibition of laws that discriminate on the basis of race, extending to both legislative and executive action. The racial non-discrimination provision proposed by the Panel, called 'section 116A' included an exception for 'special measures' in order to save positive laws and measures designed to address socio-economic disadvantage on the basis of need (that is, of Aboriginal and Torres Strait Islander and other Australians alike), as well as extending beyond addressing disadvantage, and saving laws and executive actions designed to protect cultures, languages and heritage. According to the Panel, such an approach would reduce the need to qualify the power in the preambular language to 'section 51A'.[89]

Sections 51A and 116A, as recommended by the Panel, provide as follows:

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

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

Section 116A Prohibition of racial discrimination

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

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.[90]

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1 At the time the British Parliament enacted the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9, Western Australia had not decided whether to join the Commonwealth. On 31 July 1900, the people of Western Australia voted at a referendum to join the Commonwealth of Australia.

2 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1910) at vii.

3 On the background to s 127, see Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, especially at 25–30.

4 *Official Record of the Debates of the Australasian Convention*, Sydney, 2 April 1891, 701–4.

5 Ibid 703.

6 Sawer, above n 3, 22.

7 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 228–9.

8 *Ibid* 240–1.

9 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 666.

10 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 251.

11 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 241.

12 Ibid.

13 Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 180.

14 Ibid 181.

15 Sawer, above n 3, 18.

16 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 246–7 (Charles Kingston), 245–246 (John Quick).

17 Ibid 246–7 (Charles Kingston).

18 French, above n 13, 184.

19 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898 250 (Josiah Symon).

20 The text of the proposed provision can be found in ch V, cl 17 of the draft: see Quick and Garran, above n 2, 953.

21 In *Yick Wo v Hopkins*, 118 US 356 (1886), a San Francisco ordinance that denied licences to conduct laundries to Chinese applicants was held to be unconstitutional. Quick and Garran contrasted this with *Australian Constitution* s 51(xxvi), suggesting that in Australia such a law could have been made, and would not have been successfully challenged: Quick and Garran, above n 2, 623.

22 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 679. See also J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 230.

23 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1801.

24 Quick and Garran, above n 2, 622.

25 Sawer, above n 3, 19 (emphasis in original).

26 Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 464.

27 Quick and Garran, above n 2, 622.

28 Sawer, above n 3, 17–18.

29 Ibid 20; French, above n 13, 185.

30 *United States Constitution* art 1, s 8(3); *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3, s 91(24). See also French, above n 13, 185.

31 George Williams, 'The Races Power and the 1967 Referendum' (2007) 11(SE) *Australian Indigenous Law Review* 8.

32 See Frank Brennan, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia* (Constitutional Centenary Foundation, 1994) 6.

33 Megan Davis and Dylan Lino, 'Constitutional Reform and Indigenous Peoples' (2010) 7(19) *Indigenous Law Bulletin* 3, 16–18.

34 APNR Records, University of Sydney Archives, MSS55, series 6, quoted by Bain Attwood and Andrew Markus, *The 1967 Referendum or When Aborigines Didn't Get the Vote* (Aboriginal Studies Press, 1997) 5.

35 French, above n 13, 186.

36 Sawer, above n 3, 35.

37 See Brian Costar, 'Odious and Outmoded? Race and Section 25 of the Constitution' in John Chesterman and David Philips (eds), *Selective Democracy: Race, Gender and the Australian Vote* (Melbourne Publishing Group, 2003) 94.

38 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1964, 1904. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 405 [139] (Kirby J) (*Kartinyeri*).

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1964, 1905–7.

40 French, above n 13, 188.

41 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 1965, 2639. See also *Kartinyeri* (1998) 195 CLR 337, 405 [140] (Kirby J).

42 Constitution Alteration (Aborigines) Bill 1966 (Cth). For the introduction of the Bill, see Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 123 (William Wentworth).

43 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 123. See also *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 406 [141] (Kirby J).

44 French, above n 13, 188; Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 130; Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, 278.

45 Sawer, above n 3, 35.

46 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, 263.

47 Ibid 281.

48 Commonwealth, *Parliamentary Debates*, Senate, 2 March 1967, 235–6.

49 Commonwealth, *Parliamentary Debates*, Senate, 8 March 1967, 359.

50 Commonwealth Electoral Office, Australia, 'Referendums to Be Held on Saturday, 27th May, 1967' (Pamphlet, 1967) 11, cited in *Kartinyeri* (1998) 195 CLR 337, [145] (Kirby J).

51 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2006) 181.

52 Ibid.

53 (1983) 158 CLR 1, 158 ('*Tasmanian Dam Case*'). The passage was cited with approval by the High Court in *Western Australia v Commonwealth* (1995) 183 CLR 373, 461.

54 (1982) 153 CLR 168.

55 Ibid 210.

56 Commonwealth, Constitutional Commission, *Final Report* (1988) vol 2, 711 [10.372] ('*Final Report of the Constitutional Commission*').

57 Ibid 711 [10.373].

58 Ibid 710 [10.371].

59 Ibid vol 1, 55.

60 Ibid.

61 *Tasmanian Dam Case* (1983) 158 CLR 1, 242 [77]. See also *Final Report of the Constitutional Commission*, above n 56, 718 [10.405].

62 French, above n 13, 206.

63 Ibid 208.

64 See discussion in Anne-Marie Mooney Cotter, *Race Matters: An International Legal Analysis of Race Discrimination* (Ashgate, 2006) 6–8.

65 Marcia Langton, 'Why "Race" Is a Central Idea in Australia's Construction of the Idea of a Nation' (1999) 18 *Australian Cultural History* 22, 26.

66 Ibid.

67 Ashley Montagu (ed), *The Concept of Race* (Free Press, 1964).

68 *Report of the Second Session of the Commission on Human Rights*, ESC Res 116, UN ESCOR, 6th sess, UN Doc E/749 (1–2 March 1948) annex B, 17.

69 United Nations Educational, Scientific and Cultural Organization, *The Programme of UNESCO in 1950*, 4th sess, UN Doc UNESCO/4 C/Resolutions (November 1949) 22.

70 United Nations Educational, Scientific and Cultural Organization, *Four Statements on the Race Question* (1969).

71 United Nations Educational, Scientific and Cultural Organization, *Statement by Experts on Race Problems*, UN Doc UNESCO/SS/1 (20 July 1950) [6] (emphasis in original).

72 United Nations Educational, Scientific and Cultural Organization, *Statement on Race*, UN Doc UNESCO/WS/111.69 (21 November 1951) [6].

73 United Nations Educational, Scientific and Cultural Organization, *Proposals on the Biological Aspects of Race*, UN Doc UNESCO/SS/Race (18 August 1964) [13].

74 United Nations Educational, Scientific and Cultural Organization, *Statement on Race and Racial Prejudice*, UN Doc UNESCO/SHC/CS/122/4 Rev (18–26 September 1967) [4].

75 United Nations Educational, Scientific and Cultural Organization, *Declaration on Race and Racial Prejudice*, 20th sess, 37th plen mtg,

UN Doc UNESCO/20 C/Resolutions/3/1.1/2 (27 November 1978).

76 See, eg, Barry Morris, 'Racism, Egalitarianism and Aborigines' in Gillian Cowlishaw and Barry Morris (eds), *Race Matters*: *Indigenous Australians and 'Our' Society* (Aboriginal Studies Press, 1997) 161, 164.

77 Barry Morris and Gillian Cowlishaw, 'Cultural Racism' in Gillian Cowlishaw and Barry Morris (eds), *Race Matters*: *Indigenous Australians and 'Our' Society* (Aboriginal Studies Press, 1997) 1, 3.

78 See American Anthropological Association, 'Statement on Race' published in (1998) 100 *American Anthropologist* 712, cited in Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) 168–9 [5.1.2.7].

79 Michael J Bamshad and Steve E Olson, 'Does Race Exist?' (2003) 289(6) *Scientific American 78.*

80 Morris and Cowlishaw, above n 77, 3.

81 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*').

82 See in this regard *Final Report of the Constitutional Commission*, above n 56, vol 2, 710–11 [10.371]–[10.373].

83 Sawer, above n 3, 22.

84 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*').

85 A related issue is whether the repeal of s 51(xxvi) (together with the insertion of a new head of power) might result in the invalidity of legislation previously enacted in reliance on it. Whilst the better view is that repeal and replacement would not invalidate or require re-enactment of legislation originally passed in reliance on s 51(xxvi), a savings clause or a general omnibus bill re-enacting existing legislation might remove any residual doubt.

86 *Final Report of the Constitutional Commission*, above n 56, vol 2, 720 [10.410].

87 Ibid vol 1, ch 9.

88 Expert Panel on the Recognition of Indigenous Australians in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) <http://www.youmeunity.org.au>.

89 Ibid 151.

90 Ibid 230–1.