A Revised Proposal for Indigenous Constitutional Recognition

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Abstract

In 2012, the Expert Panel on the Constitutional Recognition of Indigenous Australians handed down a report that recommended a number of changes to the Commonwealth Constitution to achieve constitutional recognition of Aboriginal and Torres Strait Islander peoples. This article provides a critical analysis of those recommendations, identifying difficulties, noting areas that need further development and suggesting positive changes. It seeks both to influence current debate and to provide a historic record of the issues that were under consideration during the development of a future constitutional amendment. Its primary focus is on symbolic recognition in a preamble, substantive recognition in a power to legislate with respect to Aboriginal and Torres Strait Islander peoples and a provision prohibiting racial discrimination.

I Introduction

The constitutional recognition of Aboriginal people and Torres Strait Islanders has been a work in progress for some years. It has formed part of election promises made by Prime Ministers John Howard,1 Kevin Rudd,2 Julia Gillard3 and Tony Abbott.4 Delivery of those promises has proved more challenging.

The first stage of implementing these promises was undertaken by the Expert Panel on the Constitutional Recognition of Indigenous Australians. It performed the major task of consulting communities across Australia and developing a number of proposals for constitutional change.5 The Expert Panel’s recommendations extended beyond symbolic recognition to substantive

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constitutional change. The changes it recommended included the removal of race-based provisions from the *Commonwealth Constitution*, the insertion of a power to make laws with respect to Aboriginal and Torres Strait Islander peoples and the inclusion of a general anti-racial discrimination provision in the *Constitution*. It therefore widened the narrative that would explain the referendum from one concerning recognition, to one that also included broader matters concerning race and racial discrimination.

The Expert Panel also undertook the extremely difficult task of first capturing in words the disparate ideas about what constitutional reforms should be made. With words now on a page, the next stage is to look critically at these proposals and further develop and revise them. This second stage of the development of these constitutional reform proposals is being undertaken by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. In July 2014, the Joint Select Committee handed down an Interim Report which has raised additional options that develop the original recommendations of the Expert Panel. It proposes to consult further upon these options before making a final report by June 2015. This article seeks to contribute to the work of the Joint Select Committee and public debate generally by providing a critical analysis of existing proposals and making further suggestions for constitutional change.

II Section 25

The Expert Panel’s first recommendation was that s 25 of the *Constitution* be repealed. The Joint Select Committee has also supported this recommendation. Section 25 reduces the representation of a state in the Commonwealth Parliament if a state disqualifies all persons of any race from voting at state elections. While it is often looked upon as a racist provision, because it contemplates the possibility of such discrimination at the state level, it is actually based upon the United States 14th amendment and was intended to be an anti-racial discrimination measure that discouraged such conduct at the state level.

The repeal of s 25 is, however, appropriate as part of an effort to remove race and the contemplation of race-based laws from the *Constitution*. Its role as a deterrent to discriminatory state action was never particularly effective and is no longer necessary.

Rather than leaving s 25 empty, consideration might be given to replacing it with a new provision that better fulfils its original role by preventing

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7 Ibid 6–7 [2.17].

discrimination based upon race in relation to voting. A new s 25 could be inserted along the following lines:

No one shall be disqualified by any law of the Commonwealth, a State or a Territory from voting in elections for the House of Representatives, the Senate or a House of a State or Territory legislature on account of his or her race or sex.

Such a provision would better implement the original intent behind s 25, while removing any taint of racial discrimination. It would reflect an acknowledgement of past discrimination in voting laws based on race and sex, while ensuring that such discrimination could not occur in the future. While the High Court has sought to imply a universal franchise from the Constitution in order to exclude any future possibility of exclusions from voting based upon race or sex, an express constitutional amendment that prohibited exclusion from voting on the ground of race or sex would have much greater democratic legitimacy due to its approval by a vote of the people in a referendum.

This suggested amendment does not, however, go so far as creating a positive right to vote, as this would raise additional problems, such as the determination of the minimum voting age, whether prisoners can vote, and other issues of qualification and disqualification that would distract from the purpose of the referendum. It would not prohibit qualification or disqualification on the ground of citizenship, as citizenship and nationality are different to race. It would be intended simply to provide some recognition and redress of past grievances with respect to voting laws and give comfort that they could not occur in the future.

In terms of implications that might be drawn from it by the High Court, this proposed s 25 would clarify s 24 by making clear that the process of direct choice by the people of their parliamentary representatives is by election. The High Court has previously relied upon s 25 of the Constitution to support such an implication, despite the fact that it only refers to elections at the state level. Hence, the insertion of this proposed amendment would continue to fulfil that role, but in a more accurate manner. As for an implication that the states and territories are to choose their legislative representatives by way of election, s 25 already contained such an implication in relation to the states, and it does not seem unreasonable to add it for those territories that have legislatures. In effect, this proposed replacement of s 25 would preserve the democratic implications of the provision, while removing any possible racist implications.

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9 Sex is included as sex and race were the primary categories for the exclusion of people from voting at the time of federation. Neither is regarded as acceptable today. Exclusion from voting on the ground of sex also affected Aboriginal women in those colonies where Aboriginal people otherwise had the right to vote. Inclusion of sex makes the measure more balanced and consistent with implications drawn by the High Court regarding a universal franchise: Roach v Electoral Commissioner (2007) 233 CLR 162.


In terms of its placement in ‘Chapter I, Part III—The House of Representatives’, the proposed provision goes beyond the House of Representatives to deal with the Senate, and the states and territories and would therefore, to that extent, more logically be placed elsewhere in the Constitution. Yet, it is still closely connected with the previous s 25, which was also directed at dealing with state action in imposing racial discrimination in voting laws, so it could be justified in its placement as a substitute for s 25.  

One problem with this proposal is that it reintroduces the word ‘race’ into the Constitution. This potentially conflicts with a narrative of removing ‘race’ from the Constitution (although there is a difference between prohibiting discrimination on the ground of race and permitting or acknowledging such discrimination). One way of avoiding the use of the term ‘race’ would be instead to prohibit disqualification of a person from voting ‘on account of his or her ethnicity or sex’. Ethnicity is based upon a shared history, culture and tradition, which may include shared language and religion. It is determined by birth or descent. Within the one ‘race’, there may be many ethnic groups, just as there are many separate Aboriginal and Torres Strait Islander peoples within the category of Indigenous Australians. The term is therefore broader and more accurate in application than ‘race’. The previous disqualification of ‘aboriginal natives of Australia Asia Africa or the Islands of the Pacific except New Zealand’ from voting at Commonwealth elections may well be more accurately characterised as one directed at ethnicity or ‘ethnic origins’, rather than race. The disadvantage of using ‘ethnicity’ rather than ‘race’, however, is that the term is less well known and understood, giving rise to a potential debate over its meaning and significance.

A further disadvantage of such a provision would be that it would involve the Commonwealth Constitution interfering with state and territory electoral laws. It might therefore be regarded as inappropriate on federalism grounds, even though the outcome of excluding discrimination in the franchise on the ground of race or sex is unobjectionable at all levels of government. Its viability would therefore very much depend on whether it had state and territory government support.

A final disadvantage would be that it might diffuse the narrative behind constitutional reform by raising unnecessary matters, distracting attention from the core issues. If this were likely to be the case, it would be better simply to repeal s 25, rather than to insert such a new provision in its stead. This would be a matter for assessment once the proposal had been publicly raised and discussed.

III  The Repeal of Section 51(xxvi)

Section 51(xxvi) of the Constitution originally gave the Commonwealth Parliament power to make laws with respect to:

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13 Note also that there are other anomalies in the placement of constitutional provisions, with s 116 being placed in ‘Chapter V—The States’, despite the fact that it is only directed at Commonwealth laws.

14 Commonwealth Franchise Act 1902 (Cth), s 4.
The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

The provision was intended to support laws that restricted, and in some cases protected people from different races who had migrated to Australia, including those who came as indentured labourers from the South Pacific. It was directed primarily at Japanese, Chinese and Indian immigrants and was intended to support laws such as those that restricted where they could live, confined them to particular occupations, gave them special protection and provided for their return to their home country after a certain period. Although the exclusion of Aboriginal people from s 51(xxvi) arguably protected them from such discriminatory laws, at least at the Commonwealth level, the provision began later to be seen as discriminatory against Aboriginal people, both due to the negative language used and because it excluded Aboriginal people from any benefits that might flow from special Commonwealth laws in relation to them.

In 1967, s 51(xxvi) was amended by a referendum that struck out the qualification ‘other than the aboriginal race in any State’. The assumption, which has occasionally been disputed, was that Aboriginal people, collectively or as separate peoples, fall within the category of ‘the people of any race’. While the focus of the 1967 campaign was directed at the making of laws for the benefit of Aboriginal people, the Cabinet, in approving the changes to be made by the referendum, had apparently sought to retain in s 51(xxvi) the capacity to enact adversely discriminatory laws. The Commonwealth Attorney-General noted in his submission to Cabinet that if Australia’s immigration policy was changed so as to admit the ‘entry of people who might create racial problems’, then it seemed ‘undesirable to deprive the Commonwealth of the power presently vested in it by s 51(xxvi)’.

While it was argued in Kartinyeri v Commonwealth that the 1967 amendment to s 51 (xxvi) had the effect of altering the provision so that it could only be used for the enactment of legislation that is for the benefit of Aboriginal people, this proposition was not adopted by the High Court. This was, according to Gummow and Hayne JJ, because no express or implied limitation was imposed upon the Commonwealth’s legislative power that required it to act only for the benefit of Aboriginal people. Gaudron J also pointed to the language and syntax of the amendment, noting that it simply removed an existing exception and had the effect of placing Aboriginal people ‘in precisely the same constitutional position as the people of other races’. Hence, s 51(xxvi) remains a power that can be used by

16 See the discussion in: Kartinyeri v Commonwealth (1998) 195 CLR 337, 377–9 (Gummow and Hayne JJ), 368 (Gaudron J), 395 (Kirby J) (‘Kartinyeri’).
17 Commonwealth Attorney-General, Confidential for Cabinet Submission No 46, Constitutional Amendment: Aborigines, National Archives of Australia A5842, 1967, 5 [12].
18 Of the six justices who handed down judgment in the case, only Kirby J accepted this argument: Kartinyeri (1998) 195 CLR 337, 407 [145], 413 [157]. Brennan CJ and McHugh J did not need to decide the point, so did not do so. The other three Justices rejected the argument.
19 Ibid 381–3 [90]–[94] (Gummow and Hayne JJ).
the Commonwealth to enact laws that discriminate against particular racial groups where it is deemed necessary to make special laws to do so.

The power to make laws with respect to a race of people is based upon assumptions about race that are no longer supportable or acceptable. First, there is great difficulty in defining a race and identifying those who comprise it. The notion that there is any scientific basis for race in biology or genes has been dispelled by recent DNA discoveries. As Chief Justice French has observed:

There is little dispute that as a scientific or biological term, ‘race’ is a meaningless category. Genetic differences between so-called races are swamped by differences between individuals within races. Nevertheless, the idea of ‘descent’ as a criterion of racial membership retains its cultural power in the construction of ‘race’.

The use of descent, physical characteristics, self-identification and community recognition as the means of identifying the members of a race has tended to lead to disputes about which of these characteristics is necessary or sufficient, and in what circumstances. Chief Justice French concluded that courts of law ‘are not good places to decide’ such issues.

Second, even if race instead can be defined in a social or cultural context, it is difficult to contend that all people of the same race have the same characteristics, needs or interests, in order to justify the making of laws specifically in relation to the people of a race, by virtue solely of their race. Dillon, for example, has argued that the focus should be ‘on need instead of race when addressing the problems of poverty, sickness, homelessness, education and unemployment’.

Accordingly, there are very strong arguments to remove the power in s 51(xxvi) of the Constitution for the Commonwealth Parliament to make special laws with respect to the ‘people of any race’. The Expert Panel recommended the

24 Skin-colour, hair and face-shape have previously been used as forms of visual identification of races. For controversy over ‘fair-skinned’ Aboriginal people, see Eatock v Bolt (2011) 197 FCR 261.
27 French, above n 23, 19.
28 Anthony Dillon, ‘Closing the gap must refocus’, The Australian (Sydney), 23 April 2012, 12.
repeal of s 51(xxvi). An additional advantage of such action would be to create a narrative to explain the constitutional change — namely, that, in addition to the recognition of Aboriginal and Torres Strait Islander peoples, it is also about removing race from the Constitution.

IV A Power to Make Laws with respect to Aboriginal and Torres Strait Islander Peoples

There are two main reasons for including in the Constitution a separate power for the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples. The first is that it is a substantive measure which provides the foundation for a preamble that fulfils the role of ‘recognising’ Aboriginal and Torres Strait Islander peoples in the Constitution. It provides the bridge between preambular recognition and the text of the Constitution.

The second reason is to ensure that the Commonwealth continues to have the legislative power to support laws on matters such as native title and the protection of sacred sites, which currently depend for their support on s 51(xxvi) of the Constitution.

The Expert Panel recommended the inclusion of a new s 51A that would provide:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

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

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

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

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

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

This is the core proposal made by the Expert Panel and the one to which the Joint Select Committee devoted the most discussion. While accepting that this

29 Expert Panel Report, above n 5, xviii. The Joint Select Committee, however, noted that a ‘policy question remains about whether there is popular support for Parliament having the power to make laws in order to benefit the people of any race, other than Aboriginal and Torres Strait Islander peoples’. It also contemplated the amendment of s 51(xxvi), rather than its repeal. See Joint Select Committee Interim Report, above n 6, 9 [2.24], 15 [2.41]–[2.42].


32 Joint Select Committee Interim Report, above n 6, 10–16 [2.28]–[2.43].
structure of a preamble attached to a substantive constitutional grant of power in a separate provision in the Constitution is the best approach, following is a discussion of how the preamble might be revised and how the substantive grant of power might be revised.

V Preamble Problems: Placement and Structure

One of the most impressive feats of the Expert Panel Report is its adroit avoidance of the many constitutional traps in preambular recognition of Aboriginal and Torres Strait Islander peoples.

Recognition in ‘the preamble of the Constitution’ tends to be the favoured option of those who are unfamiliar with the Constitution and who seek to achieve symbolic change, but not substantive change. The Constitution itself has no preamble. The preamble to which people commonly refer is the preamble to the British Act of Parliament, the Commonwealth of Australia Constitution Act 1900 (Imp), section 9 of which contains the Commonwealth Constitution. This preamble to an Act passed by the Westminster Parliament in July 1900 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:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

The preamble provides an explanation of why the Act was enacted and what it seeks to achieve. It is immediately followed by the words of enactment, which provide the source of authority for the enactment of the law and mark the starting point for the substantive provisions of the Act. The words of enactment are:

Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The word ‘therefore’ in the words of enactment connects the matters set out in the preamble with the enactment of the substance of the Act by the Westminster Parliament.

Sections 1 to 8 of the Act then follow. They are known as the ‘covering clauses’ and set out largely matters of interpretation and the scope of the application of the Act. Section 9 then provides: ‘The Constitution of the Commonwealth shall be as follows:’, which is followed by the table of contents and then the Commonwealth Constitution, commencing with s 1. There is no additional preamble to that Constitution.

There are a number of problems involved in amending the preamble to this British Act to provide for recognition of Aboriginal and Torres Strait Islander peoples. First, while a referendum may be used to amend the Constitution itself, it
is doubtful that it could be used to amend the preamble to this British Act of Parliament. Section 128 of the Constitution only applies the referendum method to alterations of ‘this Constitution’, not the British Act in which it is contained. While some have sought to imply such a power, in the absence of any other source of power to make the change, this is no longer necessary. Section 15 of the Australia Acts 1986 (Cth) and (UK) permits the amendment of the Statute of Westminster 1931 (Imp), which in turn would permit the amendment of the Commonwealth of Australia Constitution Act 1900 (Imp).36

Sub-section 15(1) of the Australia Acts permits such a change to be made by Commonwealth legislation passed at the request or with the concurrence of the parliaments of all the states. It states that, subject to s 15(3), such a change may only be made in this manner. While the effectiveness of s 15(3) remains contentious, it may also, as an alternative, permit the Commonwealth Parliament to legislate to amend the preamble to the Commonwealth of Australia Constitution Act 1900 (Imp), if a power to make such an amendment was conferred upon the Commonwealth Parliament by a referendum amending the Constitution. Neither method involves the direct amendment of the preamble by way of a referendum and the more legally secure method involves no referendum at all. Recognition, without the weight of support of the Australian people in a referendum, is likely to


35 Section 8 of the Statute of Westminster 1931 (Imp) preserves the Commonwealth of Australia Constitution Act 1900 (Imp) from repeal or amendment pursuant to any power granted in the Statute, such as s 2. However, if’s 8 were amended to permit such an amendment or repeal, it could occur.

36 Note, however, the question whether a preamble can be amended because it is not a substantive part of an Act. It is now generally accepted that a preamble may be amended and repealed: F A R Bennion, Bennion on Statutory Interpretation (Lexis Nexis, 5th ed, 2008), 733; Anne Winckel, ‘The Contextual Role of a Preamble in Statutory Interpretation’ (1999) 23 Melbourne University Law Review 184, 205.

be regarded as inadequate by Aboriginal people and Torres Strait Islanders, while the people as a whole are likely to feel cheated if they are denied the right to vote on the issue.

Second, the preamble is a historic statement of why the Act was enacted by the Lords Spiritual and Temporal and the Commons of the Westminster Parliament in 1900 and what they sought to achieve, namely an indissoluble Federal Commonwealth under the Crown and the Constitution that it established. While we might wish that Australia’s history was different, we cannot change it by amending the statement of intent in the preamble so that it recognises those who were not recognised at the time. To alter the preamble to attribute to the Westminster Parliament in 1900 recognition of Aboriginal and Torres Strait Islanders, their relationship with the land and waters of Australia and respect for their continuing cultures, languages and heritage, would be both misleading and inaccurate.

Third, if this preamble was to be given current relevance by the insertion of recognition of Aboriginal and Torres Strait Islander peoples, then this would open up the question of whether the rest of it should be updated as well. Should the reference to the Crown of the United Kingdom of Great Britain and Ireland, which no longer exists and has long ceased to govern Australia, be changed to the Crown of Australia? Is there still (if there ever was) humble reliance on the blessing of Almighty God? Should the Federal Commonwealth remain indissoluble? Should Western Australia be recognised, as it is not mentioned in the preamble, unlike the other states, because it had not yet agreed to join the Federation in July 1900? Turning the preamble into a jumble of historic statements and modern statements would render it incoherent, causing difficulties for how it ought to be applied, if at all, by the High Court in constitutional interpretation.

Fourth, what value is there for Aboriginal people and Torres Strait Islanders in being recognised in the preamble to a British Act of Parliament? They would still be excluded from the text of the Constitution and if Australia became a republic in the future, this preamble would most likely be discarded with the rest of the British Act. The symbolic effect of such recognition would be reduced as it

Note that recognition of Aboriginal people in most state Constitutions has been achieved without a referendum, with the consequence that most people do not know that it has occurred and its effectiveness has therefore proved limited.

Note the observation that ‘there is an expectation manifest in democratic principles and the rule of law that the preamble be changed via referendum’: Indigenous Law Centre ‘Constitutional Reform and Indigenous Peoples: Options for Amendment to the Australian Constitution’ (Research Brief No 3, University of New South Wales, 2011) 3.

Edmund Barton thought that ‘there are some occasions on which the invocation of the Deity is more reverently left out than made’ and that it was not for the framers of the Constitution to say whether voters were invoking the blessing of God or not when voting in the referendum. He concluded that ‘[w]e cannot say that the voters have invoked Divine guidance on the subject, even after that act has occurred; how much less can we say it now by way of prediction?’: Official Report of the National Australasian Convention Debates, Adelaide, 22 April 1897, 1186 (Edmund Barton).

At the time of the 1999 republic referendum, the Howard Government chose not to propose the repeal of the preamble and covering clauses of the Commonwealth of Australia Constitution Act 1900 (Imp), deciding instead simply not to reprint them with the revised Constitution, if the referendum had passed.
would not amount to recognition ‘in the Constitution’. It is doubtful, therefore, that such a form of recognition would be regarded as acceptable.

The alternative would be to introduce a new preamble into the Constitution itself, either before or after the table of contents. This would give rise to both problems of structure and content.

From a structural point of view, we would have the incongruity of two preambles, one in the Constitution itself and one in the Act that enacts the Constitution. How would a court interpret both of them and deal with any differences between them? Which would have priority? Could the two preambles be combined to give rise to implications that neither alone could support? If the new preamble were instead to be described as an ‘introductory statement’, what effect, if any, would this have on its legal status and its role in constitutional interpretation?

A preamble is normally placed before the words of enactment — it walks before the substantive provisions of the Act. This affects the use that the courts can make of a preamble. It does not have a positive or binding legal effect because it does not fall within the substance of the Act. It can only be used for interpretation in particular circumstances. However, a new preamble inserted into the Constitution itself would be after the words of enactment, and therefore fall within the substantive part of the Constitution, raising questions as to whether the High Court would interpret it differently.

Another problem is that a preamble is regarded as the key to the minds of those who enacted the relevant Act or Constitution. Its purpose is to reveal their intentions and provide a purpose or context to the Act or Constitution that they enacted. This purpose is undone when a preamble is inserted many decades later by those not involved in writing the Constitution. The Queensland Bar Association made this point in relation to the insertion of a preamble into the Queensland Constitution years after its enactment. It submitted:

A preamble itself was not considered necessary at the time when the Queensland Constitution was enacted. This preamble, if enacted would always be nothing more than an afterthought that may serve only to unsettle, in ways not readily predictable, the interpretation of provisions in the Queensland Constitution. It could never be, as in other constitutional

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42 See the proposal for an ‘introductory statement’: Joint Select Committee Interim Report, above n 6, 26 [2.83].
43 See, eg, George Winterton and Mark McKenna, ‘Two Preambles is Stretching the Mateship’, The Australian (Sydney), 22 April 1999, 13, where they stated that: ‘A Constitution with two preambles, contradictory in both substance and style, would be clumsy and confusing’.
45 Craven, above n 33, 85.
46 Note the ongoing debate as to whether a preamble can be used only where there is existing ambiguity, or whether it can be used as part of the context of the Act to aid in the interpretation of words of generality and to identify ambiguity. See the contrasting views of Gibbs CJ and Mason J in Wacando v Commonwealth (1981) 148 CLR 1, 15–16 (Gibbs CJ), 23 (Mason J). See also Winckel, above n 36; Anne Twomey, ‘The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians’ (2013) 62(3) International and Comparative Law Quarterly 317, 328–31.
instruments, a lofty statement of the ideals that had inspired a people to choose to be governed under the terms of that instrument.47

A new preamble would make sense if it was connected to a substantive amendment or amendments in the text of the Constitution. It could explain what those who made those changes intended by them. It could give the context to such changes and introduce them by showing the intention behind them. As Saunders has argued, a preamble should match the substance of the Constitution. If it does, there is no need for concern about how the preamble might be interpreted.48 Problems arise, however, where there is a disconnection between a newly inserted preamble and the substance of the Constitution. The insertion of a new preamble, without a change in the text of the Constitution, would most likely have the effect of altering the operation of existing constitutional provisions through the development of constitutional implications. This may be seen as a form of backdoor constitutional amendment that relies upon creative judges to use a new preamble to update or change the operation of substantive constitutional provisions in a way that the Australian people would not approve by way of referendum.

Of course a preamble could be constrained in its operation so that it cannot be applied in constitutional interpretation. This is the approach that the states have taken to the constitutional recognition of Aboriginal and Torres Strait Islander peoples.49 However, symbolic recognition that is not regarded worthy of substantive change often has a hollow ring to it. Roach summed up the position by observing:

The optimist would defend this use of preambles as an attempt to respect differences among the population even when one group’s interests are not really being addressed in the legislation. The pessimist would argue that acknowledgement of a group in a preamble that is not supported in the text of legislation is a recipe for disappointment and cynicism.50

The biggest issue, however, concerns the content of a new preamble. What else should be included in the new preamble beyond the recognition of Aboriginal and Torres Strait Islander peoples? This last question has the potential to create enormous controversy, with various groups and bodies, such as local government and ethnic communities, all seeking their own constitutional recognition as well as the inclusion of principles, common values and aspirations in the preamble.

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49 Constitution Act 1975 (Vic) s 1A(3); Constitution of Queensland 2001 (Qld) s 3A; Constitution Act 1902 (NSW) s 2(3); Constitution Act 1934 (SA) s 2(3). Note that the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 was introduced into the Western Australian Parliament on 11 June 2014. Unlike the other states, it does not have a clause that excludes its use in constitutional interpretation. However, as a Private Member’s Bill, it is unlikely to pass.
In 1999, Prime Minister Howard initiated a second referendum question on inserting a new preamble in the Constitution. It included references to Aborigines and Torres Strait Islanders, immigrants and those who defended the country in time of war. It also included vague references to freedom, tolerance, independence, individual dignity, the rule of law, support for achievement and equality of opportunity, which could potentially have been drawn upon to found all kinds of constitutional implications. As a consequence, a provision was also to be inserted in the body of the Constitution stating that the preamble was to have ‘no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth’.

This proposed preamble proved highly contentious in terms of what was included and excluded and failed miserably at referendum, being defeated in all states and achieving less than 39 per cent support overall. Understandably, the Expert Panel did not want a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples to be sidetracked by a debate about who and what should be included in a new preamble. It would distract from the narrative and purpose of the referendum, opening up wider battlefields in which supporters could be lost on different causes.

Equally, the Expert Panel rightly wanted to avoid the problems arising from: (a) a proposed preamble that could be seen as a ‘Trojan Horse’ for a bill of rights or for other broad constitutional implications that might be drawn from it by the High Court; or (b) a proposed preamble that was neutered by a separate provision declaring that it could not be used in any way and had no effect whatsoever.51 The first course would provoke people to vote against a referendum for fear of the potential consequences. The second course would provoke people to vote against it because it was perceived as ‘an empty gesture’,52 meaningless, tokenistic or hypocritical.53

The Expert Panel avoided all these pitfalls by proposing instead that a preamble be attached to a new constitutional provision, s 51A. In this manner, the Expert Panel both connected and confined the preamble’s application to a particular substantive provision. The proposed preambular statements would fulfil the proper role of a preamble of introducing and explaining the context in which the substantive provision was enacted. It would avoid concern about the content of the preamble affecting the interpretation of other parts of the Constitution or the creation of broad constitutional implications and would avoid the need for the insertion of a ‘no legal effect’ clause, as the preamble would be directly connected to a relevant substantive provision. It would fulfil the role of providing constitutional recognition of Aboriginal and Torres Strait Islander peoples, but it

52 Ibid 115.
would not be seen as tokenistic, as it would introduce a substantive change in the text of the Constitution.

VI Preamble Problems: Content and Effect

Two issues arise concerning the content of the proposed preamble to s 51A. The first concerns the second preambular declaration:

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

Consideration needs to be given to how this fits in with current requirements under native title law that Aboriginal and Torres Strait Islander claimants must be able to establish their continuing relationship with their traditional lands and waters. If the constitutional support for the *Native Title Act 1993* (Cth) were to move from s 51(xxvi) to a new s 51A, then it would be likely that it would be argued that any statutory or common law requirement that claimants establish their continuing links with their traditional lands and waters could no longer be supported in the face of the second preambular statement. This may or may not be the desired outcome, but in either case, voters should be made aware of its potential consequences. If it is an unintended outcome, then the preambular statement should be recast to avoid such an interpretation, if possible.

The second and more significant issue concerns the fourth preambular declaration:

**Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

This declaration is intended to fulfil the role of tempering the unrestricted grant of power to the Commonwealth Parliament in the substantive part of proposed s 51A. Concern was raised throughout the consultations undertaken by the Expert Panel that any power to make laws with respect to Aboriginal and Torres Strait Islander peoples should only be able to be used in a manner that is beneficial to them. The Expert Panel contended that this preambular statement ‘should ensure that the purpose of the power is apparent and would, as a matter of interpretation, be relevant to the scope given to the substantive power’. The Expert Panel considered that such use of the preamble ‘should not enable individual provisions in a broad scheme to be attacked as not beneficial if the law as a whole were able to be judged beneficial’. It seemed to assume that ‘advancement’ and ‘beneficial’ had the same meaning. Yet, ‘advancement’ in the sense used by the United Nations Committee on the Elimination of Racial Discrimination, means bringing a racial

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56 Ibid 151.
group up to the same level of enjoyment of human rights and fundamental freedoms as others. It is not simply directed at the giving of a ‘benefit’ to a group.

The term ‘advancement’ was adopted because it ‘is widely used in legal contexts, particularly in the area of trusts and testamentary provisions, and provides a legal criterion with which courts are familiar’. The term is used in art 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination regarding special measures taken for the sole purpose of securing adequate advancement of racial groups. From that original source, it is also applied by reference in the Racial Discrimination Act 1975 (Cth), as well as being directly used in the preamble to the Native Title Act 1993 (Cth) and s 11 of the Australian Human Rights Commission Act 1986 (Cth), all in the context of ‘special measures’.

There are three problems with this approach. First, it is possible that the courts would find that there was no ambiguity in the grant of power to make laws with respect Aboriginal and Torres Strait Islander peoples and that therefore no resort could be had to any preamble to resolve an ambiguity. Second, if the courts did accept that the preamble could be used to affect or limit the extent of the legislative power granted in s 51A, there are many uncertainties as to how they might apply the preamble. For example, it is unclear how they would interpret the meaning of advancement: whether all members of a ‘people’ must be the subject of advancement by the measure or just some; whether an Act overall must be for advancement, or each of its provisions; and the extent to which the preamble might have the effect of entrenching provisions until removed by a law that was for even greater advancement.

The third problem is of a social, rather than a legal, nature. An acknowledgement in the preamble to s 51A that there is a ‘need to secure the advancement of Aboriginal and Torres Strait Islander peoples’ sends out an unfortunate message to those who will not read this provision in its historical or international context. It can easily be misread as implying that Aboriginal and Torres Strait Islander peoples need advancement because they are backwards or in some way deficient. It may unintentionally provide the basis for schoolyard taunting of Aboriginal children and may inadvertently encourage racism by suggesting to school children, who will no doubt be taught about the constitutional change, that some races are less ‘advanced’ than others. Aboriginal young people have raised the concern that the use of the term ‘advancement’ ‘could freeze our socio-economic position in time, implying that Indigenous Australians will always

60 See also s 107 of the Higher Education Funding Act 1988 (Cth), which uses ‘adequate advancement’ in relation to special measures for members of a particular sex.
need to be “advanced”. They have also rejected the ‘historical trend of defining Indigeneity with the deficit language of disadvantage’.

While it is clear that the Expert Panel was using the term ‘advancement’ in the same sense used by the United Nations, namely bringing a racial group up to the same level of enjoyment of human rights and fundamental freedoms as others, it will not necessarily be read by everyone in this way. It would not be surprising if in 20–30 years’ time, people were complaining that such a statement in the Constitution was racist and a blot on the Constitution, just as s 25 is now read in that light, without an understanding of its relationship with the 14th amendment to the United States Constitution.

For these reasons, it would be preferable to exclude the fourth preambular statement about ‘advancement’ and instead concentrate upon limiting the scope of the grant of power by other means.

VII Subject-matter Powers rather than Race or Persons Powers

The Expert Panel recommended that the Commonwealth Parliament be given a power to make laws with respect to ‘Aboriginal and Torres Strait Islander peoples’. It is problematic on two grounds. First, it brings back into the Constitution the notion of enacting laws with respect to people identified solely by their race. It therefore undermines one of the strands of the narrative intended to support the referendum, being the removal of ‘race’ from the Constitution. As the Constitutional Commission concluded in 1988, ‘Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based’. If it is inappropriate for s 51(xxvi) to permit the enactment of laws for ‘the people of any race for whom it is deemed necessary to make special laws’, then it is equally inappropriate for the Parliament to have a power to make laws with respect to Aboriginal and Torres Strait Islander peoples by reference solely to their race.

This is not to say that the Commonwealth Parliament should be powerless when it comes to Aboriginal and Torres Strait Islander issues. Instead, one must look to identify what is special about Aboriginal and Torres Strait Islander peoples that justifies the enactment of Commonwealth legislation. The answer is that as the first peoples of Australia they have continuing rights, cultures and heritage that pre-existed British settlement. As these subject matters form part of Australia’s national legal system and its national history, heritage and cultural identity, it is

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63 Ibid 32.
64 This approach was taken by the Joint Select Committee, which removed the fourth preambular statement from its suggested formulations — see Joint Select Committee Interim Report, above n 6, 11 [2.32] Box 1, 12 [2.34] Box 2, 14 [2.39] Box 3, 26 [2.83].
65 Constitutional Commission, above n 31, vol 2, 711.
therefore appropriate that the Commonwealth should be able to legislate with respect to them. It is much harder to justify a Commonwealth power to make any law at all in relation to Aboriginal people and Torres Strait Islanders simply because they fall into that group, when the law itself has nothing to do with their place as Australia’s first people. A Commonwealth law directing Aboriginal people to tie their shoelaces in a particular way has nothing to do with their indigenous status and no relationship at all to national matters, yet it would be permitted under a power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

The second problem is that a power directed at persons, rather than subject matters, is too wide and has the potential to be used in a detrimental or oppressive manner, as was the original intent behind the race power in s 51(xxvi). Most powers in the Constitution are directed at transactions or activities (such as trade and commerce, borrowing money and banking) or subject matters (such as postal telegraphic, telephonic and other like services, quarantine, currency, weights and measures and pensions). Powers directed at natural or legal persons are few in number (‘persons powers’), but currently include aliens, corporations and the people of any race. The High Court’s judgment in the Work Choices Case has shown how extraordinarily wide a power with respect to legal persons can be, covering not only laws concerning what a legal person shall and shall not do, but also laws regulating the relationships between those persons and others. Persons powers leave open the possibility that the Parliament might enact a law along the lines that ‘Every alien shall …’ or ‘All people of the following races shall not …’. They are therefore dangerous and should be avoided.

A preferable approach would therefore be to ascertain those subjects in relation to which the Commonwealth presently relies upon the race power, which can be justified as being governed by national laws, rather than state laws, and which are related to the special status of Aboriginal and Torres Strait Islander peoples as being the first peoples of Australia. The grant of a legislative power to the Commonwealth could then be confined more appropriately to those subject matters. As noted above, these subject matters would most likely include the matters mentioned in the proposed preambular statement, being Aboriginal and Torres Strait Islander heritage, culture and languages and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters. This would ensure the continuation of the two primary pieces of Commonwealth legislation that concern Aboriginal and Torres Strait Islander

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66 Note also that in 1951 a referendum was held to insert into the Constitution a power to make laws with respect to ‘communists and communism’. This proposed power included a persons power so that it could be used oppressively with respect to people identified according to their political ideology. The referendum failed.


68 This example was used in Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468, 508 (Menzies J).

69 The reference to land and waters, rather than a specific reference to native title, is intended to be broad enough to pick up any future developments in this area that may arise out of court decisions.
peoples and currently rely on the race power, being the *Native Title Act 1993* (Cth) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

Such a provision could read along the following lines:

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

**Acknowledging** the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Recognising** the continuing cultures, languages and heritage 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 heritage, cultures and languages and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.\(^{70}\)

The advantage of such a constitutional head of power is that it is not a power to make a law with respect to ‘persons’, nor is it based solely upon ‘race’. It is instead directed at legal rights to land and waters that preceded British settlement of Australia and continue to exist across the nation. It is also directed at cultural and heritage matters that form fundamental parts of Australia’s history, identity and ongoing culture. Laws with respect to Aboriginal and Torres Strait Islander heritage, culture and language are not laws made solely for the benefit of particular racial groups — they are laws made for all Australians, as all are entitled to appreciate and value Australia’s indigenous history and culture.

It has been suggested that the ‘object of replacing the races power is not to alter the scope of federal or State power, but merely to remove discriminatory references to the concept of race’.\(^{71}\) Yet, the proposed repeal of s 51(xxvi) of the *Constitution* involves the deliberate removal of the Commonwealth’s power to make laws with respect to racial groups other than Aboriginal and Torres Strait Islander peoples. The point of that exercise is clearly to limit the Commonwealth’s powers so that it can no longer make laws with respect to people simply because of their race. Moreover, the proposal to confer on the Commonwealth Parliament power to make laws with respect to Aboriginal and Torres Strait Islander peoples grants a wider power to the Commonwealth than currently exists under s 51(xxvi).\(^{72}\) The Commonwealth Parliament’s current power is constrained by the requirement that it only enact ‘special laws’ for the people of any race ‘for whom it

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70 For a similarly worded version, see *Joint Select Committee Interim Report*, above n 6, 14 [2.39] Box 3.

71 Dixon and Williams, above n 58, 83.

72 See the recognition that s 51(xxvi) is not as broad as other persons powers, like the aliens power or the corporations power, because it is limited in its application to special laws that are deemed necessary: *Western Australia v Commonwealth* (1995) 183 CLR 373, 460–2 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (‘*Native Title Act Case*’); *Kartinyeri* (1998) 195 CLR 337, 378 [81] (Gummow and Hayne JJ); 411 [153] (Kirby J).
is deemed necessary’. The words ‘special’ and ‘necessary’ in s 51(xxvi) have been interpreted as a limit on the scope of the power.\(^{73}\) Justice Gaudron has contended that to rely upon s 51(xxvi) it must be 

*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”.\(^{74}\)

Her Honour saw the consequence as being 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’.\(^{75}\) For example, Gaudron J argued that race was irrelevant to citizenship and therefore the race power in s 51(xxvi) could not be used to revoke the citizenship of persons of particular races or to deny their human rights.\(^{76}\)

The conferral of a new power on the Commonwealth Parliament to make laws with respect to ‘Aboriginal and Torres Strait Islander peoples’ strips away these qualifications and expands the Commonwealth Parliament’s powers, allowing it to make *any* laws at all with respect to those peoples, regardless of whether or not they are relevant to any ‘difference’ relating to those peoples, subject to whatever anti-discrimination conditions might be imposed. That makes the Commonwealth’s power broader than it has ever been and permits it to legislate in relation to matters utterly irrelevant to the status of Aboriginal and Torres Strait Islander peoples as Australia’s first peoples.

Shifting from a persons power to a subject-matter power involves identifying what is really relevant to the status of Aboriginal and Torres Strait Islander peoples that should attract legislative power and excludes the power to enact laws that are irrelevant to their special status. The narrower scope of the power potentially eliminates many of the concerns expressed to the Expert Panel that the grant of power to the Commonwealth to legislate with respect to Aboriginal and Torres Strait Islander peoples may permit Commonwealth laws that intrude detrimentally in their lives. It limits the Commonwealth’s ability to legislate selectively for Aboriginal and Torres Strait Islander peoples in a way that imposes burdens on their daily lives that do not apply to others.

Two issues arise in relation to this proposal. First, is it too narrow and would it exclude Commonwealth power to make laws with respect to important matters? Second, should further measures be taken to try to ensure that laws with respect to native title and heritage, culture and language are not adverse in nature?

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73 Kartinyeri (1998) 195 CLR 337, 365–8 [39]–[46] (Gaudron J); 378–9 [82]–[83] (Gummow and Hayne JJ); 411–12 [153]–[155] (Kirby J). Note that significant deference is given to the Parliament with respect to determining necessity, but that the Court may invalidate laws that evince ‘manifest abuse’ of the limitations on the race power: Native Title Act Case (1995) 183 CLR 373, 460–2 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); Kartinyeri (1998) 195 CLR 337, 365 [38], 366–7 [42] (Gaudron J), 378 [82] (Gummow and Hayne JJ); but see the criticism by Kirby J of this test at 414–17 [159]–[165].


75 Ibid 366 [40] (Gaudron J).

76 Ibid.
VIII Does the Commonwealth Power Need to be Broader?

It may be that on further examination other subjects ought to be included in the Commonwealth’s head of power in s 51A. However, it should be noted that the Commonwealth already has many other powers under which it currently provides for Aboriginal people and Torres Strait Islanders.

A Welfare, Social Services and Human Rights

For example, the Commonwealth has powers with respect to welfare and benefits, such as unemployment benefits, benefits to students and family allowances. Just as the Commonwealth can already deal with the welfare needs of those who are disadvantaged and need assistance, it can do so for Aboriginal people and Torres Strait Islanders based upon need and disadvantage, without resorting to legislation by reference to race.

In any case, the Commonwealth currently funds and would continue to be able to fund extensive programs directed at Aboriginal people and Torres Strait Islanders regarding health, education and housing through grants under s 96 of the Constitution and associated agreements with the states. Current examples include the National Partnership Agreement on Indigenous Early Childhood Development, the National Partnership Agreement for Indigenous Economic Participation and the National Partnership Agreement on Remote Indigenous Housing. None of these are reliant upon the race power. Whatever issues arise in the future, the Commonwealth will always be able to deal with them through agreements with the states.

The Commonwealth also has power to make laws, under s 122 of the Constitution with respect to the territories, including the Northern Territory and Jervis Bay. This power supports the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth). Further, the Commonwealth has the power to grant statutory land rights with respect to Commonwealth places under s 52 of the Constitution.

The Commonwealth can also employ its external affairs power in s 51(xxix) of the Constitution to enact laws that implement provisions of treaties that Australia has ratified which are relevant to indigenous peoples and their rights and interests. These include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the International Convention on

77 Commonwealth Constitution s 51(xxiiiA).
79 See, eg, Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 30, which requires that indigenous children not be denied the right, ‘in community with other members of [their] group,’ to enjoy their own culture, to profess their religion or to use their own language.
the Elimination of All Forms of Racial Discrimination,\(^80\) particularly with regard to ‘special measures’.\(^81\)

It might be argued that while a narrow subject-matter based s 51A is sufficient for the moment, a broad power should be retained in case future needs arise that cannot currently be predicted. In particular, Aboriginal and Torres Strait Islander groups seek to ensure that the Commonwealth has the power to enact laws concerning customary law and ‘treaties’ or agreements with Aboriginal and Torres Strait Islander peoples. However, if a subject-matter based s 51A permitted the Commonwealth Parliament to make laws with respect to culture and heritage, that would include customary law. Further, the making of agreements would fall within the executive power in s 61 of the Constitution combined with the legislative incidental power in s 51(xxxix), which is sometimes known as the ‘nationhood power’.

It should also be remembered that the Commonwealth’s powers are not frozen and remain relatively fluid through the expansive application of the external affairs power. More power can be gained by the Commonwealth, if it needs or wishes it, through the ratification of relevant treaties with respect to indigenous peoples. For example, the ILO’s Indigenous and Tribal Peoples Convention includes provisions dealing with the application and preservation of indigenous customs, practices, customary laws and languages, as well as protection of their human rights, land rights, social security rights, health and education.\(^82\) The United Nations Declaration on the Rights of Indigenous Peoples,\(^83\) while not yet a binding treaty, is likely to develop into one in the future, providing even greater potential scope under the external affairs power for the Commonwealth to legislate with respect to Aboriginal and Torres Strait Islander peoples. A new s 51A that was confined to certain subject matters would therefore not incapacitate the Commonwealth from dealing with other subject matters relevant to Aboriginal and Torres Strait Islanders. While the point is likely to be made that some political parties are reluctant to rely on the external affairs power, so that its potential use should be discounted, it would seem likely that any government that is willing to enact laws imposing customary law or to enter into treaties with Aboriginal or Torres Strait Islander peoples would also be willing to rely on the external affairs power to support its ability to legislate to do so, if any additional legislative power were indeed needed.


\(^{81}\) Note the High Court’s observation in the Native Title Act Case (1995) 183 CLR 373, 483 that the Native Title Act 1983 (Cth) could be regarded as a ‘special measure’ under s 8 of the Racial Discrimination Act 1975 (Cth). However, that this observation arose in relation to the question of whether there was a discrepancy between the two Acts. The Court did not resolve whether or not s 51(xxix) supports laws that are special measures under the International Convention on the Elimination of All Forms of Racial Discrimination, art 1(4).


B The Representation of Aboriginal People and Torres Strait Islanders

The other main area in which the Commonwealth legislates with respect to Aboriginal people and Torres Strait Islanders, is with respect to their representation. This can be done through the establishment of representative organisations such as the Aboriginal and Torres Strait Islander Commission (ATSIC) or the National Congress of Australia’s First Peoples or through the establishment of ‘Native Title Representative Bodies’ or representative corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). The establishment of Native Title Representative Bodies would be incidental to a power to make laws with respect to ‘the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters’ and therefore covered by the proposed subject-matter based s 51A. This would also most likely support the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), at least to the extent that it provides the mechanism for establishing Registered Native Title Bodies Corporate or corporations related to traditional lands and waters.

The National Congress of Australia’s First Peoples is incorporated under the under the *Corporations Act 2001* (Cth) as a company limited by guarantee. There is no obvious reason why other bodies that represent the interests of Aboriginal people and Torres Strait Islanders could not be established as corporations or incorporated associations under existing laws. However, if it was desired to retain a separate system of incorporation for Aboriginal and Torres Strait Islander bodies, the state reference under s 51(xxxvii) of the *Constitution*, which supports the incorporation of bodies under the *Corporations Act 2001* (Cth), would appear to extend to the amendment of the Act to include a new part that deals specifically with indigenous corporations.84

As for national representative bodies, if they do not wish to be established as corporations, it is likely that their establishment as Commonwealth statutory bodies would be supported by the combination of s 64 of the *Constitution* and the incidental power in s 51(xxxix) of the *Constitution*, as is the case with other government statutory bodies.

C Aboriginal and Torres Strait Islander Affairs

If, despite the discussion above, it was regarded as necessary for the Commonwealth to have a broadly drafted head of power, then the use of a ‘persons power’ could still be avoided by instead conferring a power on the Commonwealth Parliament to make laws with respect to ‘Aboriginal and Torres Strait Islander affairs’. This would be a subject-matter power, rather than a persons power, and is in a familiar form, as the Commonwealth already has a power to make laws with

84 The states have referred to the Commonwealth the ‘matter’ of the ‘formation of corporations’. See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW), s 4. Amendments, however, do need agreement under the Corporations Agreement 2002 before they are enacted, if they otherwise fall outside the Commonwealth’s heads of power.
respect to ‘external affairs’. It would give the Commonwealth Parliament power to make laws in relation to a broad range of matters relevant to Aboriginal and Torres Strait Islander peoples, including heritage, culture, language and their relationship with traditional lands and waters, but would not be a power to make any law with respect to a group of people identified by race.

IX  A Purposive Power?

Is there a way to give Aboriginal and Torres Strait Islander peoples additional comfort that a Commonwealth power to make laws with respect to their heritage, culture and languages and their relationship with their traditional lands and waters, will not be used in a detrimental way? Any limit on the power that requires that its use be only for the benefit of Aboriginal and Torres Strait Islander peoples is problematic. It gives rise to problems of ‘ratcheting’ (ie that any beneficial law made under such a power may only be amended or repealed by an even more beneficial law\(^{85}\) and questions about who must benefit (some or all), how benefit is to be assessed (in relation to each provision or overall), what is beneficial (traditional or modern views; outback or city views) and who makes that assessment (the affected group, the Parliament or the judiciary).

Such an approach may also be more difficult to sell in a referendum. Those opposed to the referendum might fix upon ‘benefit’ to argue that it is discriminatory and unfair that the Commonwealth Parliament should be constrained to legislating beneficially in relation to Aboriginal and Torres Strait Islander peoples, but can legislate detrimentally in relation to everyone else. While the effectiveness of such an argument would be diminished by proposing a subject-matter power rather than a persons power, any distinguishing reference to benefit may still fan the flames of racial discontent.

The Expert Panel attempted to avoid these problems by using the term ‘advancement’ in a preamble to the grant of legislative power, to seek to influence the judicial interpretation of the scope of the power without expressly constraining it to beneficial legislation. This too, has its problems, as noted above.

A third alternative would be to phrase the power in such a way as to indicate to the High Court that the power is intended to be a purposive power. Purposive powers form a well-recognised category of legislative power with an accepted test that is applied by the courts to assess the validity of laws. Purposive powers include the defence power,\(^{86}\) the nationhood power,\(^{87}\) the aspect of the

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\(^{85}\) Note that while the argument in favour of ratcheting failed in *Kartinyeri* (1998) 195 CLR 337 because a majority found that a power to enact a law includes the power to repeal the law, this would not necessarily apply in relation to a new head of power if it were clearly intended to operate only in a beneficial manner.

\(^{86}\) *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 142 (Latham CJ), 185 (Dixon J), 253 (Fullagar J), 272–3 (Kitto J); *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 226 (McTiernan J); *Thomas v Mowbray* (2007) 233 CLR 307, 359 [135] (Gummow and Crennan JJ), 386 [227] (Kirby J), 508 [597] (Callinan J).

\(^{87}\) *Davis v Commonwealth* (1988) 166 CLR 79, 99–100 (Mason CJ, Deane and Gaudron JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 322 (Brennan J). Note, however, the fact that the High
external affairs power concerning the implementation of treaties,\textsuperscript{88} and possibly also the power to make laws with respect to elections.\textsuperscript{89}

Where a constitutional head of power concerns an ordinary subject matter, then the test is whether there is a sufficient connection between the law and the subject matter.\textsuperscript{90} No question of purpose comes into it. But where a head of power is regarded as purposive, a law that relies on that head of power must be tested by reference to the \textit{purpose} of the law, as discerned from its terms and operation, the facts to which it applies and the ‘circumstances which called it forth’,\textsuperscript{91} rather than the subject matter with which it deals.\textsuperscript{92} Does the purpose of the law conform with the purpose of the head of power?\textsuperscript{93} The test applied is a form of proportionality\textsuperscript{94} — whether the law is ‘reasonably capable of being regarded as appropriate and adapted’ to achieve the relevant purpose,\textsuperscript{95} such as the defence of the nation, the implementation of a treaty, the holding of a national celebration or the direct choice of the Houses of Parliament by the people.

If this approach were to be adopted, the substantive head of power could be framed along the following lines:

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 the purpose of preserving, protecting, developing or sustaining Aboriginal and Torres Strait Islander heritage, cultures and languages and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

This would not place any legal obligation on the Commonwealth to enact legislation to achieve these purposes, but if the Commonwealth Parliament decided to legislate in reliance upon s 51A, then the law would have to be reasonably capable of being regarded as appropriate and adapted to achieving the specified purpose. This would not, for example, completely rule out some forms of native

\textsuperscript{88} \textit{Victoria v Commonwealth} (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (‘Industrial Relations Act Case’).

\textsuperscript{89} \textit{Langer v Commonwealth} (1996) 186 CLR 302, 324–5 (Dawson J); \textit{Holmdahl v Australian Electoral Commission (No 2)} (2012) 277 FLR 101, 109 [23] (Gray J). Note that Gummow and Hayne JJ rejected the application of s 51(xxxvi) as a purposive power in \textit{Mulholland v Australian Electoral Commission} (2004) 220 CLR 181, 238–9 [159], but that Gummow and Bell JJ accepted that it was a purposive power in \textit{Rowe v Electoral Commissioner} (2010) 243 CLR 1, 60 [163], 61 [166].


\textsuperscript{91} \textit{Stenhouse v Coleman} (1944) 69 CLR 457, 471 (Dixon J); \textit{Polyukhovich v Commonwealth} (1991) 172 CLR 501, 592 (Brennan J) (‘War Crimes Act Case’).

\textsuperscript{92} \textit{Richardson v Forestry Commission} (1988) 164 CLR 261, 326 (Dawson J); \textit{Cunliffe v Commonwealth} (1994) 182 CLR 272, 323 (Brennan J).

\textsuperscript{93} \textit{Leask v Commonwealth} (1996) 187 CLR 579, 591 (Brennan CJ).

\textsuperscript{94} \textit{Davis v Commonwealth} (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ); \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1, 89 (Dawson J).

\textsuperscript{95} \textit{Re Tracey; Ex parte Ryan} (1989) 166 CLR 518, 597 (Gaudron J); \textit{War Crimes Act Case} (1991) 172 CLR 501, 592–3 (Brennan J); 684 (Toohey J), 697 (Gaudron J); \textit{Cunliffe v Commonwealth} (1994) 182 CLR 272, 322–3 (Brennan J); 355 (Dawson J); \textit{Leask v Commonwealth} (1996) 187 CLR 579, 591 (Brennan CJ), 605–6 (Dawson J); \textit{Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union} (2000) 203 CLR 346, 412 [204] (Gummow and Hayne JJ).
title extinguishment if, overall, the law was for the purpose of preserving, protecting, developing or supporting the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters (eg by establishing a statutory land rights regime). Nor would the courts strike down a law because the justices considered that there was a better way of achieving the purpose. The courts would be likely to continue to defer to the Parliament about the manner of achieving the purpose, as long as the law was one which was reasonably capable of being regarded as for the achievement of that purpose.

Whether or not such an attempt at limitation of the power should be imposed is a matter for further debate. It would be legally simpler and probably less contentious if the head of power referred just to the relevant subject matters without the express imposition of a purpose. However, if some kind of limitation on the head of power is politically necessary to gain the support of Aboriginal people and Torres Strait Islanders, then it is contended that this kind of limitation by reference to purpose, with its already established methods for a court to make the relevant assessment, would be preferable to one that requires the Commonwealth to make laws that are ‘beneficial’ or for ‘advancement’.

X  Proposed Section 116A

The most far-reaching of the recommendations of the Expert Panel is the insertion of proposed s 116A into the Constitution, which would provide:

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.

The provision is extremely broad, in that it applies to all levels of government, and would appear to affect not only the enactment of Commonwealth, state or territory laws, but also executive action. It is also narrow to the extent that it privileges one form of anti-discrimination, above all other forms, by constitutionalising it. This has the potential to unbalance the complex adjustments that are made between conflicting rights and interests by legislatures, giving one set of rights absolute protection against all others.

Laws that on their face apply to everyone, regardless of their race, may still be found to be racially discriminatory. For example, the High Court in Maloney v The Queen,97 held that a law concerning possession of alcohol on Palm Island — which

96 Compare s 15 of the Canadian Charter of Rights and Freedoms, upon which proposed s 116A appears to be modelled: Canada Act 1982 (UK) c 11, sch B (‘Canadian Charter of Rights and Freedoms’) s 15. The Canadian provision prohibits discrimination on the grounds of ‘race, national or ethnic origin, colour, religion, sex, age or mental or physical disability’.

97 (2013) 298 ALR 308.
was, on its face, racially neutral because it applied to all people on Palm Island, regardless of race — still amounted to racial discrimination because of its significantly greater impact upon Aboriginal people and Torres Strait Islanders, who comprised 90 per cent of the population of Palm Island. It was held to amount to ‘an operational discrimination notwithstanding the race-neutral language’ of the relevant law.

While the law in the Maloney case was later held to be valid, on the ground that it was a ‘special measure’, the case gives rise to questions about the wisdom of constitutionalising one form of anti-discrimination and giving it an overriding effect over all other rights and interests. For example, laws prohibiting female genital mutilation may apply on their face in a racially neutral way, but are likely only to have an impact upon persons of particular races or ethnic origins. Such laws might well be classified by a court as amounting to racial discrimination on the basis that they prohibit certain cultural practices of persons of particular races or ethnic origins. Normally, this would be overridden by concerns for the rights of women and the human rights of those affected by the practice. If proposed s 116A were inserted in the Constitution, it would give the sole and highest priority to the prohibition of racial discrimination, threatening the capacity to balance this against other human rights. While proposed s 116A provides an exception for 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’, it is unlikely that female genital mutilation would fall within this category. The ability of legislatures to balance conflicting rights, such as prohibiting practices of sex discrimination that may form part of the traditional culture of the people of particular races or ethnic groups, would be removed.

In practice, a further objection to proposed s 116A is that it opens up any referendum to much broader controversy, igniting other issues that have little or nothing to do with the constitutional recognition of Aboriginal and Torres Strait Islander peoples. For example, it would reopen the bill of rights controversy and the merits or demerits of constitutionalising rights. Those opposed to the constitutionalisation of rights — because it freezes rights, or because it gives too much power to the judiciary, or because it undermines the role of Parliament in adjusting between competing and conflicting rights — would be likely to oppose the referendum because of the application of proposed s 116A. Others are likely to object that it does not go far enough, because it is confined to race, colour and ethnic or national origin and does not include discrimination on the ground of sex

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98 Note also, however, the different terminology in s 10 of the Racial Discrimination Act 1975 (Cth), which might result in a different interpretation of proposed s 116A.

99 Maloney v The Queen (2013) 298 ALR 308, 321 [38] (French CJ). See also 332 [84] (Hayne J), 338 [112] (Crennan J), 348 [147] (Kiefel J), 361 [202] (Bell J), 405–6 [360]–[363] (Gageler J).

100 The Expert Panel received submissions that a general guarantee of non-discrimination on grounds such as age, gender, race, religion, culture, disability and sexuality be included. It did not recommend such a provision as it would ‘shift the focus of the national conversation away from constitutional recognition of Aboriginal and Torres Strait Islander peoples’: Expert Panel Report, above n 5, 171.
or age or disability or religious affiliation, and because it does not include other human rights.\footnote{101}

Proposed s 116A has the disadvantage of reintroducing the contested notion of ‘race’ into the Constitution.\footnote{102} It might also give rise to controversy over which groups are protected by it and which are not. For example, ‘ethnic origin’ has been held to include Jewish people, but not Muslims.\footnote{103} Uncertainty as to who is covered and on what grounds, and controversy about why some groups deserve constitutional protection and others do not, is likely to form part of the debate on the referendum, if proposed s 116A is included.

One of the reasons for including proposed s 116A was to cut down on the potential scope of the Commonwealth’s power in proposed s 51A to make laws with respect to Aboriginal and Torres Strait Islander peoples.\footnote{104} Proposed s 116A was to provide the extra insurance, if the preambular constraint did not work, that proposed s 51A could not be used in a discriminatory manner unless it was for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group. This, in itself, is potentially problematic, as arguably all laws enacted solely for the people of a particular race are ‘discriminatory’ in nature, with the consequence that the only laws that could be enacted under proposed s 51A would be those that met the terms of the exception in proposed s 116A(2),\footnote{105} because they were for the ‘purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group’. This may not necessarily cover all laws intended to be enacted under proposed s 51A or continue legislative support for existing laws enacted under s 51(xxvi). Must laws concerning native title rights be characterised as laws for the purpose of overcoming disadvantage or ameliorating discrimination, rather than simple recognition of existing legal rights? Similar issues have been raised in Canada.\footnote{106}

\footnote{101} It is not inconceivable that those who support Indigenous constitutional recognition might still vote it down on other grounds. The 1999 republic referendum was lost on the votes of people who favoured a republic, but wanted a different kind of republic or a different method of choosing the head of state. Care therefore needs to be taken not to open up unnecessary controversies that might lose supporters.


\footnote{103} See Miller v Wertheim [2002] FCAFC 156 (27 May 2002) [14]; Jones v Toben (2002) 71 ALD 629 645 [69]. The Supreme Court of the United Kingdom has reached the same conclusion: R (E) v Governing Body of JFS [2010] 2 AC 728. Sikhs have also been characterised as falling under ‘ethnic origin’ for the purposes of racial discrimination legislation: Mandla v Dowell Lee [1983] 2 AC 548.

\footnote{104} Expert Panel Report, above n 5, 151.

\footnote{105} Note the interpretative difficulties that have arisen in Canada concerning the relationship between the two subsections of the equivalent provision in the Canadian Charter of Rights and Freedoms. The Courts have spent much time considering whether s 15(2) of the Charter is an exception to s 15(1) or a clarification of the scope of s 15(1): Louise Parrott, ‘Considering Canadian Approaches to Equality in the context of Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’ (2013) 41 Federal Law Review 163. If the proposal to insert s 116A into the Commonwealth Constitution were to proceed, serious attention would need to be paid to the issues that have arisen in Canada and how to avoid the ambiguity in the connection between the two subsections.

\footnote{106} Parrott, above n 105, 172.
If the nature and scope of proposed s 51A were to change, as discussed above, so that it was a subject-matter power, rather than a general power to legislate with respect to Aboriginal and Torres Strait Islander peoples, then the need for the kind of limitation in proposed s 116A would be significantly reduced. Moreover, if a purposive power were used instead, then this would protect Aboriginal and Torres Strait Islander peoples from adversely discriminatory laws, as these would be unlikely to be regarded as reasonably capable of being seen as appropriate and adapted to fulfilling the relevant purpose.

The exclusion of proposed s 116A from the referendum debate would avoid the controversy over bills of rights and who is protected and who is not. It would allow the debate on the referendum to return to the core issues of the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution and the removal of race-based provisions from the Constitution. Supporters who might have otherwise been lost due to concerns about the constitutionalisation of rights, would be retained, boosting the chances of success of the referendum.

XI An Anti-discrimination Limitation on the Grant of Legislative Power

A further proposal that has been made is to replace proposed s 116A with an express limitation on the grant of legislative power in proposed s 51A, so that it provides that the Parliament has power to make laws with respect to ‘Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them’. The intention is to permit positive discrimination, by only prohibiting adverse discrimination.

Such a formulation has a number of advantages. First, it avoids the reinsertion of a reference to race in the Constitution and all the broader issues concerning who is covered and who is not. Second, it avoids the need to define ‘special measures’ or the type of exception set out in s 116A(2) which may otherwise be over-inclusive or under-inclusive. Third, it avoids any reliance on notions of ‘benefit’ or ‘advancement’, which, as noted above, can be problematic. Fourth, the problem about whether advantageous laws become frozen (because to repeal them would be contrary to advancement or amount to the removal of a benefit) would seem less likely to arise under this formulation because it would appear unlikely that a repealing law would be considered to discriminate adversely against Aboriginal and Torres Strait Islander peoples even if it removes a benefit.

This anti-discrimination measure, however, still raises some uncertainties given its blanket nature. How would it apply to laws concerning alcohol restrictions or income management? If such laws are found to discriminate against Aboriginal or Torres Strait Islander peoples by limiting rights to buy and possess alcohol or to spend one’s income as one wishes, would such laws be prohibited on the ground of adverse discrimination, even though they might be intended to protect certain sub-groups of such peoples, namely women and children, from

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107 Joint Select Committee Interim Report, above n 6, 11 [2.32] Box 1; Dixon and Williams, above n 58, 87.
harm? What about a law that authorises spending on a program to prevent truancy by Aboriginal students? It would certainly be discriminatory in nature if it did not apply to students of other races and it would arguably be adverse in its discrimination, to the extent that it imposes punitive measures that are not applied to others. Yet, the purpose is to improve the lives of young people by ensuring that they receive an adequate education. The essential problem is that discriminatory laws that apply adversely to some groups within Aboriginal and Torres Strait Islander peoples, may be for the long-term benefit or protection of other groups. It may be the case that a majority of the people concerned request the enactment of such laws, but that a blanket ban on adverse discrimination may prohibit their enactment.

Dixon and Williams have suggested that rather than using the word ‘peoples’ in the grant of power, it should be redrafted to refer to ‘Aboriginal and Torres Strait Islander people’, so that it clearly covers laws with respect to individuals and subgroups, such as women and children. This does not necessarily help, however, because a law that prohibits the possession of alcohol still discriminates adversely against some Aboriginal or Torres Strait Islander people, while being intended to aid other Aboriginal or Torres Strait Islander people. The provision does not appear to encompass any type of balancing test, unlike a purposive power.

A further question arises as to how it fits in with the other heads of power in the Constitution. The High Court has a tendency to read each head of power separately to its fullest extent. However, when a head of power contains an express prohibition or restriction, it is interpreted as affecting other heads of power. Hence, the words ‘but so as not to discriminate against them’ would most likely not be confined in their application to s 51A, but would also affect any Commonwealth law made under another head of power, as long as it could also be characterised as a law falling within s 51A. As a consequence, thought needs to be given to the potentially broad impact of such a provision and whether or not it would create any anomalies.

XII Proposed Section 127A

The Expert Panel proposed the insertion of a new s 127A that would provide:

Section 127A Recognition of languages

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

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.
It is unclear what this provision is intended to do. If it were simply a matter of the symbolic recognition of Aboriginal and Torres Strait Islander languages, then this could be achieved through the preamble of proposed s 51A, which already declares respect for the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

The fact that proposed s 127A is a substantive provision of the Constitution, however, suggests that it is intended to have a substantive effect, perhaps by serving as the textual foundation for constitutional implications. Perhaps it is hoped that in the future a court would develop a constitutional implication that ‘original’ languages must be taught in schools or cannot be excluded from schools, or that money must be spent to ensure their preservation and protection. On the other hand, implications might arise from the declaration of English as the national language. Wood has warned that it ‘might even be harmful to Indigenous interests if governments sought to rely on that provision to prevent the use, teaching or support for other languages, including Indigenous languages’.

The proposal to constitutionalise English as Australia’s national language has also proved controversial. While supporting stand-alone constitutional protection for Indigenous languages, Reilly has warned of the dangers of seeking to make English the national language, drawing on experience of such campaigns in the United States, which gave rise to ‘language vigilantism’ and the imposition of English literacy tests as a precondition for voting. He has argued that a provision such as proposed s 127A ‘reinforces the hegemony of a common culture, and emphasises the successful subjugation of Indigenous languages’. Reilly concluded that ‘juxtaposing recognition of Indigenous languages and recognition of English … risks relegating Indigenous languages to a secondary status’.

Finally, the uncertainty and ambiguity surrounding proposed s 127A may prove distracting in a referendum, and it may therefore be preferable that it be cut or be substituted by a preambular statement, unless a better explanation can be given for its role.

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110 Wood, above n 102, 160.
111 The Joint Select Committee took this approach, inserting a preambular statement ‘Acknowledging that the Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage’: Joint Select Committee Interim Report, above n 6, 11 [2.32] Box 1, 29 [2.93]–[2.94].
112 The Expert Panel regarded the provision as declaratory only and not giving ‘rise to implied rights or obligations that could lead to unintended consequences’: Expert Panel Report, above n 5, 132. However, it cannot be guaranteed that courts in the future would see it the same way.
113 Wood, above n 102, 160.
116 Reilly, above n 114, 352.
117 Ibid 343.
118 Ibid 361.
XIII Conclusion

Achieving constitutional reform in Australia is difficult. The trust of the Australian people must be obtained. They must feel confident that any proposed constitutional amendments have been very carefully analysed and considered and that they are not likely to give rise to unwanted consequences. That process of analysis and examination should not be limited to criticism, but should also include the contribution of positive proposals to achieve the desired end. The aim of this article has been to offer positive proposals which can be the subject of further discussion, debate and refinement.

A referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples starts off with one great advantage — the overwhelming goodwill of the Australian people. The challenge is to match that goodwill with well-considered and moderate proposals that the Australian people feel confident in and comfortable about supporting. The combination of goodwill and carefully considered measures will hopefully prove the best recipe for success.