A NATIONAL ABORIGINAL POLICY?

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I. INTRODUCTION

The High Court's decision in *Mabo v Queensland (No 2)*[1] has set a substantial problem in public policy for Australian governments - federal, state and territory. The decision established that "[n]ative title to land survived the Crown's acquisition of sovereignty and radical title";[2] that this title may have been extinguished by the alienation of Crown land (through grants of freehold or leasehold) or by the appropriation, on the part of the Crown, of land to its own use;[3] and that those Aboriginal people who can establish continuity in their traditional links with land, being land which the Crown has not alienated or appropriated to its own use, will

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1 (1992) 175 CLR 1.

2 *Ibid* at 69.

3 *Ibid* at 71.

have good title to that land against all the world.[4] While the impact of these propositions on competing interests in Australian land is necessarily limited, the decision has provided Aboriginal people with a legal basis on which their claims to a share in this country may stand: with a stroke of the judicial pen, the power of Aboriginal people has been transformed.

Australian governments are, of course, essentially European institutions - constructed in the image of British institutions, dominated by majoritarian interests and imbued with the Eurocentric values of progress, development and consumption. And therein lies the problem of *Mabo*: an interest, of undetermined dimensions, constructed on values which are likely to compete with those Eurocentric values, has been created. Some accommodation between the interests must be worked out. The working out could be left to the processes of litigation and negotiation; but the political pressures on governments to develop and impose a resolution between the competing interests are almost certainly irresistible.

Events during June 1993 demonstrated that, if left to themselves, the state and territory governments would adopt a range of resolutions of the issue, and that some of those resolutions would at least run the risk of conflict with s 10(1) of the *Racial Discrimination Act* 1975 (Cth) - conflict of the type which undid Queensland's attempt to forestall the result in *Mabo*, the *Queensland Coast Islands Declaratory Act* 1985 (Qld).[5]

With the prospect of a chaotic series of regional responses to *Mabo*, it is not surprising that the Commonwealth has committed itself to developing and legislating a national response - one that will provide a legal framework for the recognition of native title to land; achieve an accommodation with other interests in land; and provide a secure base for investment and development. And, given the combative and posturing nature of political relations within our federation, it is also not surprising that some state governments have indicated that a Commonwealth legislative initiative will be challenged in the High Court.

What is the constitutional basis on which the Commonwealth could construct national land rights legislation? How broad is the Commonwealth's legislative power in the area of Aboriginal affairs? The answer to that question depends largely (although not exclusively)[6] on the scope of the 'race' power, expressed in s 51(xxvi) of the Commonwealth Constitution.

From the adoption of the Commonwealth Constitution on 1 January 1901 until the passage of the *Constitution Alteration (Aboriginals)* 1967, s 51(xxvi) of the Constitution gave to the Commonwealth Parliament "power to make laws for the

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4 *Ibid* at 59-60.

5 See *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

6 In relation to the Northern Territory, of course, the Commonwealth Parliament has a plenary power under s 122 of the Commonwealth Constitution.

peace, order, and good government of the Commonwealth with respect to...[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws". The exclusion of Aborigines from this 'special laws' power may have reflected the ethnocentric view of the 19th century political men who drafted the Constitution "that the Aborigines were a dying race whose future was unimportant";[7] or it may be explicable on the basis that the provision was intended to enable the Commonwealth "to deal with the people of any alien race after they have entered the Commonwealth"[8] so that it supplemented the aliens power, s 51(xix), and the immigration power, s 51(xxviii). Whatever the reason for the exclusion of Aboriginal people from s 51(xxvi), the result was effectively to endorse "the status quo of local colonial oppression or neglect",[9] and to leave to the states the responsibility for the remnants of Aboriginal society.[10]

Despite its apparent exclusion from Aboriginal policy, the Commonwealth's assumption of control over the Northern Territory in 1911 led it to play a substantial role in the area.[11] Abortive attempts were made to formalise national powers in Aboriginal affairs in 1929, 1937, 1944 (when a proposal to alter the Constitution was rejected at a referendum) and 1948.[12] It was back-bench pressure for an active Commonwealth role which eventually persuaded the Holt Liberal Government to sponsor a Bill to alter the Constitution by repealing s 127[13] and deleting the excluding references to Aborigines in s 51(xxvi).[14] The alterations were passed through both Houses of Parliament without opposition and approved by overwhelming majorities at a referendum on 27 May 1967.[15]

Following the alteration, s 51(xxvi) now authorises the Commonwealth Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". Notwithstanding the simplicity (even crudity) of the provision's expression, it would seem that it gives the Commonwealth a comprehensive power to legislate on matters that affect the Aboriginal people of Australia. The broad-brush expression of the provision (it

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7 G Sawer "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 17-18.

8 J Quick and RR Garran *The Annotated Constitution of the Australian Commonwealth* (1901) p 622.

9 F Brennan and J Crawford "Aboriginality, Recognition and Australian Law: Where to from Here?" (1990) 1 *Public Law Review* 53 at 53.

10 CD Rowley *Outcasts in White Australia* (1971) pp 41-61.

11 The factors which led to the Commonwealth's adoption of a leading role in Aboriginal affairs, and the developments leading up to the 1967 referendum to alter s 51(xxvi), are described in P Hanks "Aborigines and Government" in P Hanks and B Keon-Cohen (eds) *Aborigines and the Law* (1984) pp 19, 21-3.

12 *Ibid* pp 21-2.

13 Which precluded the counting of "aboriginal natives" in any national census of the population.

14 *Constitution Alteration (Aboriginals)* 1967.

15 The vote was 5,183,133 in favour of the alteration and 527,007 against: Commonwealth Bureau of Census and Statistics *Official Year Book of the Commonwealth of Australia, No 54* (1968) p 66.

refers to "the people of any race" - and, one might ask, who could be excluded from that description?)[16] has not obscured the historical fact that the primary focus of s 51(xxvi) is the Aboriginal people.[17]

II. THE ABORIGINAL 'RACE'

A central difficulty of s 51(xxvi) is its use of the term 'race'. 'Race' is a social construct with no necessary biological basis. It refers to those:

> ...human groups that are *socially* defined...on the basis of real or imagined physical characteristics which are believed to be both innate and intrinsically related to moral, intellectual and other non-physical attributes and abilities.[18]

The problem which the concept presents is the development of an appropriate definition of any particular 'race' for the purposes of s 51(xxvi). The *Oxford English Dictionary* offers a variety of definitions of the word 'race', referring to "common descent or origin", or being "regarded as of common stock" or "belonging to a particular people or ethnic stock". These definitions suggest either a genetic approach or an approach based on cultural perceptions; but the two approaches are by no means compatible. For example, there is a perception, indicated by the Commonwealth Government's definition of Aborigines, that a person is an Aborigine if that person is of Aboriginal descent, identifies as an Aborigine and is accepted by her or his community as an Aborigine.[19] But that person may be descended from a variety of racial or ethnic groups; so that, adopting a strict genealogical approach, that person could be treated as a member of some other race. This conflict would become particularly acute if, for example, the right of a person to claim membership of a group of Aboriginal people who claimed an interest in land was challenged.[20]

The conflict can be seen in the contrast between the meaning attributed to 'Aborigines' and 'the Aboriginal race' at the turn of the century and current definitions of those terms. Attorney-General Alfred Deakin advised, as early as 29 August 1901, that "'half-castes' are not 'aboriginal natives' within the meaning of [s 127]",[21] an opinion endorsed by Attorney-General Isaac Isaacs in October 1905

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16 Note 7 *supra* at 23.

17 In *Koowarta v Bjelke-Petersen* note 53 *infra* at 186 Gibbs CJ said: "The words 'other than the aboriginal race in any State' were deleted by constitutional amendment in 1967. It is now competent for the Parliament to make special laws with respect to the people of the Aboriginal race."

18 MC Hartwig "Aborigines and Racism; an Historical Perspective" in FS Stevens (ed) *Racism: The Australian Experience* (1972) vol 2 p 11.

19 See text at note 24 *infra*.

20 A point alluded to by Gibbs CJ in *Koowarta v Bjelke-Petersen* note 53 *infra* at 187.

21 Australian Attorney-General's Department *Opinions of the Attorneys-General of the Commonwealth of Australia* (1981) p 24.

and repeated in each Census Report from 1911 to 1966.[22] The genealogical approach to defining Aborigines persisted for another 60 years after the 1911 census. For example, the Commonwealth Electoral Office, on legal advice, applied s 39 of the *Commonwealth Electoral Act* 1918 (which, until 1962, disqualified an 'Aboriginal native' from voting) against those in whom Aboriginal descent was preponderant.[23]

More recently, the Commonwealth Government has adopted an approach in which social attitudes and self-perception are as important as genealogical descent. The *Year Book Australia 1980* contained the following definition:

> For the purpose of administering various programs designed to benefit Aboriginals, the Department of Aboriginal Affairs and the Commonwealth departments and agencies define an 'Aboriginal' or 'Torres Strait Islander' as a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he lives.[24]

This definition acknowledges that 'race' is essentially a social construct; and that, by itself, a genealogical definition of 'Aborigine' is inadequate as a means of identifying those people who are members of Aboriginal society. More recently, it was endorsed by the Federal Court of Australia when interpreting the term 'Aboriginal' appearing in the Letters Patent of a Royal Commission:[25] "[T]he weight of authority", said Pincus J, "is against the adoption of a merely genetic notion of the meaning of the word 'Aboriginal' and favours the following of ordinary usage", relying on "social factors such as self-recognition as Aboriginal and recognition by the Aboriginal community".[26]

The view that a biological approach to the definition of a race could not be exhaustive was expressed by Brennan J in *Commonwealth v Tasmania*, the *Tasmanian Dam* case.[27] While the biological element was essential, he said:

> ...it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race.[28]

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22 LR Smith *The Aboriginal Population of Australia* (1980) p 32.
23 Australian House of Representatives *Voting Rights of Aborigines* Parliamentary Paper No 1/1961 at [33].
24 Australian Bureau of Statistics *Year Book Australia 1980* (1980) p 51.
25 *Queensland v Wyvill* (1989) 90 ALR 611.
26 *Ibid* at 617.
27 (1983) 158 CLR 1.
28 *Ibid* at 244.

And Deane J explicitly adopted "the conventional meanings" of 'Australian Aboriginal' - "a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal".[29]

These views were taken up by the Full Federal Court in *Attorney-General (Commonwealth) v Queensland*.[30] Considering the meaning of the term 'Aboriginal' in the Letters Patent establishing a Royal Commission, Jenkinson J said that the common usage of that term was applied to a person who was descended, or thought possibly to be descended, from "the people who occupied Australia before British settlement".[31] Spender J said that the term referred to those who were descended, in whole or in part, from the people indigenous to Australia, prior to European settlement in 1788.[32] Where a person had an uncertain claim to genetic descent, the person's conduct and the attitude of the Aboriginal community would influence the question whether the person lay within or outside the concept of an 'Aboriginal'.[33]

III. THE SCOPE OF s 51(XXVI)

The grant of power in s 51(xxvi) is expressed in "unusual" terms:[34] other powers listed in s 51 give the Parliament power to legislate with respect to some specified activity ('trade and commerce'), governmental function ('taxation') or physical object ('lighthouses'). But s 51(xxvi) defines the scope of the power by reference to a class of people. So the power in s 51(xxvi) appears very broad - legislation which confers legal rights or immunities on Aborigines or which imposes legal liabilities or restrictions on them would be regarded as "laws...with respect to...the people of [the Aboriginal] race ..."[35]

Murphy J suggested, in *Koowarta v Bjelke-Petersen*, that s 51(xxvi) could only support laws "for the benefit of" the people of a race and not laws which would "affect adversely" those people.[36] But that view was rejected by other justices in that case. Stephen J declared that laws made under s 51(xxvi) "may be benevolent

29 *Ibid* at 274.

30 (1990) 94 ALR 515.

31 *Ibid* at 517.

32 *Ibid* at 523.

33 *Ibid* at 518 per Jenkinson J. See also per Spender J at 523-4.

34 *Koowarta v Bjelke-Petersen* note 53 *infra* at 209 per Stephen J.

35 Compare Justice Kitto's remarks in *Fairfax v Commissioner of Taxation* (1965) 114 CLR 1 at 7: "Under [s 51] the question is always one of subject-matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say, by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes". See also Justice Mason's emphasis on the 'direct legal operation' of a challenged law on the subject matter of a legislative power ('corporations') in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 204.

36 Note 53 *infra* at 242.

or repressive," a view supported by two other justices.[37] On the other hand, Brennan J indicated, in the *Tasmanian Dam* case, substantial support for the view of Murphy J - in the words of Brennan J the 1967 alteration to s 51(xxvi) affirmed "that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial".[38]

In *Leeth v Commonwealth*,[39] Deane and Toohey JJ made the neutral point that s 51(xxvi) "necessarily authorizes discriminatory treatment of members [of a particular race] to the extent which is reasonably capable of being seen as appropriate and adapted to the circumstances of that membership".[40]

The High Court's decision in the *Tasmanian Dam* case emphasised the broad scope of s 51(xxvi). According to a majority of the Court,[41] ss 8 and 11 of the *World Heritage Properties Conservation Act* 1983 (Cth) were within the power granted by s 51(xxvi). The sections protected, from an interference, any nominated site which was both part of Australia's cultural and natural heritage and of particular significance to the people of the Aboriginal race.

Even on the relatively narrow approach of the justices who dissented, s 51(xxvi) would allow the Commonwealth Parliament to confer rights and impose duties on Aborigines or on other persons in relation to their dealings with Aborigines.[42] The defect in ss 8 and 11, these justices maintained, was that the sections did not regulate the rights of Aborigines but prevented the use, by any person, of selected areas of land. But the majority of the Court was prepared to extend s 51(xxvi) considerably further: not only could a Commonwealth law deal with Aboriginal people, it could also deal with their cultural heritage. As Mason J expressed it:

> ...the cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers powers to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.[43]

Brennan J indicated a similarly broad scope for s 51(xxvi). Because members of a race are identified partly by a common genetic background and partly by common history, religion and culture, he said, a s 51(xxvi) law could confer on the members of a race:

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37 *Ibid* at 209 per Stephen J; at 186 per Gibbs CJ; at 244 per Wilson J.

38 Note 27 *supra* at 242. See also *ibid* at 273 per Deane J.

39 (1992) 174 CLR 455.

40 *Ibid* at 489. Their observation was neutral in the sense that they did not indicate whether the discrimination must be benign.

41 Mason, Murphy, Brennan and Deane JJ.

42 See, for example, note 27 *supra* at 109-10 per Gibbs CJ.

43 *Ibid* at 159.

> ...benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; the historical, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the people of any race in any of these aspects of their grouped life falls within the power.[44]

Looking at the opening words of s 51(xxvi), therefore, it seems that the power which it gives to the Commonwealth Parliament is a broad one - in Justice Mason's description of s 51(xxvi), "a comprehensive power". It would support legislation conferring protection or immunity from discrimination on Aboriginal people,[45] as Gibbs CJ and Wilson J explicitly conceded in the *Koowarta* case.[46] It would support legislation declaring that the rights of Aboriginal people should be determined by reference to a comprehensive code based on Aboriginal customary law.[47] It would support legislation protecting Aboriginal 'sacred sites' (as the majority decided in the *Tasmanian Dam* case)[48] or cultural artefacts.[49] It would support legislation establishing consultative and administrative bodies which are representative of Aboriginal people.[50] Why should it not support legislation granting to Aboriginal people special property rights to reflect their historical title in and present claims to the land of Australia[51] (although the complications raised by s 51(xxxi) would need to be addressed in such legislation)?[52]

However, the opening words of s 51(xxvi) are qualified: the laws made by the Parliament must relate to "any race for whom it is deemed necessary to make special laws". In *Koowarta v Bjelke-Petersen*,[53] a majority of the High Court held that one consequence of this qualification was that any law made by the Parliament under s 51(xxvi) must be a 'special law';[54] the legislation must be selective. Consequently, it was held, ss 9 and 12 of the *Racial Discrimination Act* 1975 (Cth) could not be supported by s 51(xxvi) because these sections "prohibit

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44 *Ibid* at 244.

45 As in the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act* 1975 (Cth).

46 Note 53 *infra* at 186 per Gibbs CJ; at 245 per Wilson J.

47 As recommended by the Australian Law Reform Commission in its Report No 31 *Aboriginal Customary Law* (1986) vol 2 pp 251-73.

48 Note 27 *supra*.

49 As in the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1987 (Cth).

50 As in the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth).

51 As would be effected if the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) were extended beyond the Northern Territory.

52 Section 51(xxxi), which gives the Commonwealth Parliament power to make laws with respect to the acquisition of property 'on just terms', has been read by the High Court as a substantial constraint on the Parliament's power to interfere with rights of property: *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-2.

53 (1982) 153 CLR 168.

54 *Ibid* at 187 per Gibbs CJ, with whom Aickin J agreed; at 210 per Stephen J; at 244 per Wilson J.

discrimination generally on the ground of race; that is, they protect the persons of any race from discriminatory action by reason of their race".[55]

This requirement of selectivity was accepted by all the court in the *Tasmanian Dam* case:[56] the minority claimed that the provisions of the *World Heritage Properties Conservation Act* 1983 (Cth) protecting 'Aboriginal sites' were not 'special laws' because the Act chose, as the areas to be protected, areas which were also part of the nation's cultural and natural heritage and so served the interest of a "wider constituency, the whole of mankind". But the majority justices held that the "special and deeper significance for Aboriginal people" of an Aboriginal archaeological site was enough to make a law protecting that site a 'special law' - while the law was 'a law for all Australians', it was a 'special law' for the Aboriginal people. There was "a special need to protect the sites for [Aborigines], a need which differs from, and in one sense transcends, the need to protect it for mankind."[57]

In *Koowarta v Bjelke-Petersen*,[58] Gibbs CJ declared that the 'necessity' for a law passed under s 51(xxvi) was to be settled by Parliament:

> The Parliament may deem it necessary to make special laws for the people of a particular race, no matter what the race. If the Parliament does deem that necessary, but not otherwise, it can make laws with respect to the people of that race. The opinion of Parliament that it is necessary to make a special law need not be evidenced by an express declaration to that effect; it may appear from the law itself.[59]

That view was also expressed, in the *Tasmanian Dam* case,[60] by Murphy and Dawson JJ. The latter Justice drew the obvious distinction between the 'necessity' for the law and the law's 'special' character:

> Whilst Parliament may deem a law to be necessary for the people of any race and so satisfy one of the requirements of s 51(xxvi), it cannot by so doing determine that the law is a special law for those people and so preclude any examination of its legislative power...[61]

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55 *Ibid* at 186 per Gibbs CJ.
56 Note 27 *supra*.
57 *Ibid* at 159 per Mason J.
58 Note 53 *supra*.
59 *Ibid* at 187. See also at 245 per Wilson J.
60 Note 27 *supra*.
61 *Ibid* at 319. See also at 180 per Murphy J.

IV. A COMPREHENSIVE POWER

In conclusion, therefore, the Commonwealth Parliament would almost certainly be conceded the power under s 51(xxvi) to enact laws, regarded by the Parliament as necessary, which operated to confer special rights, immunities, privileges, powers, obligations or disabilities upon those people who are, because of their descent and their social identity, Aboriginal people. If a person affected by the legal operation of the law (in a way not shared by other members of the community), whether positively or adversely, is an Aborigine, then the law would be supported by s 51(xxvi). The fact that the law might affect the legal rights and liabilities of other people as well (because of those other people's relationship to or dealings with Aborigines) would not undermine the validity of a s 51(xxvi) law.

The view that s 51(xxvi) is a wide ranging power was expressed by the Senate Standing Committee on Constitutional and Legal Affairs in 1983. In the course of endorsing the proposition that the Commonwealth Parliament could legislate so as to establish a compact with Aboriginal people, the Committee offered examples of laws which would be supported by the provision:

> These could include, for example, laws dealing with the language and culture of Aboriginal communities; laws for the protection of Aboriginal sacred sites and artefacts; laws recognising and giving effect to Aboriginal law; and laws protecting language rights so as to guarantee the assistance of interpreters to Aboriginal people involved with police, the courts or government departments.[62]

A similarly broad view of s 51(xxvi), as giving the Commonwealth "plenary (though concurrent) power to make laws with respect to Aboriginals and Torres Strait Islanders who reside in Queensland", was expressed by the same Committee in 1978.[63] The same view has been expressed by every commentator who has considered the issue.[64]

What appears to be required to bring a law within s 51(xxvi) is that the law attach some legal benefit or burden to members of a particular race - that is, that the law discriminate by reference to membership of a class and that class be identified as a 'race'. Seen in this way, the 'race' power stands with the aliens

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62 Australian Senate Standing Committee on Constitutional and Legal Affairs *Two Hundred Years Later...* (1983) p 92.

63 Australian Senate, Standing Committee on Constitutional and Legal Affairs *Report on Aboriginals and Torres Strait Islanders on Queensland Reserves* (1979) p 3.

64 See, for example, J Eastick "The Australian Aborigine: Full Commonwealth Responsibility Under the Constitution" (1980) 12 *Melbourne University Law Review* 516 at 540; G Forrester "Aboriginal Land Rights: The Constitutional Bases of the Present Regime" (1986) 15 *Melbourne University Law Review* 737 at 738-41; H Gibbs "The Constitutional Protection of Human Rights" (1982) 9 *Monash University Law Review* 1 at 9; G Lindell "The Corporations and Races Power" (1983) 14 *Federal Law Review* 219 at 243-52; Sadler "The Federal Parliament's Power to Make Laws 'With Respect to...the People of any Race'" (1985) 10 *Sydney Law Review* 591.

power, s 51(xix), and the corporations power, s 51(xx), as sources of comprehensive power to legislate with respect to all aspects of and all matters affecting the identified (natural and artificial) persons. The analogy with the aliens power may be seen as too redolent of past (and, it must be confessed, some contemporary) attitudes to 'outsiders'.[65] But the analogy with that power and the corporations power at least allows us to grasp that s 51(xxvi) is a power with respect to identified persons rather than some subject matter or activity - just as the aliens power is one which will support legislation dealing with non-citizens;[66] and the corporations power is one which will support legislation imposing benefits or obligations on a particular artificial person, a trading, financial or foreign corporation,[67] the subject matter of the power being 'persons, not activities'.[68]

In the *Tasmanian Dam* case, Deane J referred to a passage from *Grannall v Marrickville Margarine Pty Ltd*[69] in support of his statement that s 51(xxvi) should be approached with regard "to the full scope of the grant of legislative power", and his conclusion was:

> The reference to 'people of any race' includes all that goes to make up the personality and identity of the people of a race: spirit, belief, knowledge, tradition and cultural and spiritual heritage.[70]

Expressed in those terms, it can be seen that the power is far-reaching. As Garth Nettheim acknowledged,[71] the potential of s 51(xxvi) will probably reduce the Commonwealth's use of other heads of power as it seeks to put Aboriginal policies into practice.

To return to the question posed by the decision in *Mabo*, the far-reaching nature of the power conferred by s 51(xxiv) would permit the Commonwealth Parliament to construct national land rights legislation, which addressed the interests of those affected by the High Court's decision. The Parliament could legislate to clarify the process by which native title to land can be established, the criteria by which a continuing association with land is to be established, the interaction between native

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65 Readers may care to reflect, here, on the grotesque statements attributed to allegedly responsible political leaders in June and July 1993, as they struggled to manipulate a confused public response to *Mabo* - comments which constructed, for public consumption, the Aborigine as 'the other', the alien, the threatening invader of the white Australian 'fortress suburbia'.

66 See *Robtelmes v Brennan* (1906) 4 CLR 395 at 404; *Ex parte Walsh v Johnson; In re Yates* (1925) 37 CLR 36 at 132-3; *Pochi v Macphee* (1982) 151 CLR 101; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

67 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* note 35 *supra* at 207-8; *Fencott v Muller* (1983) 152 CLR 570 at 599.

68 Note 53 *supra* at 148.

69 (1955) 93 CLR 55 at 77 per Dixon CJ.

70 Note 27 *supra* at 276.

71 G Nettheim "The Relevance of International Law", in P Hanks and B Keon-Cohen (eds) *Aborigines and the Law* (1984) p 64.

titles and mineral interests and the balance between the rights attached to native title and the rights attached to freehold, leasehold and Crown lands. Because legislation addressing those issues would confer rights on people of the Aboriginal race, or define the incidents of rights of those people as pronounced by the High Court in *Mabo*, or narrow those rights, it would be a law with respect to the people of the Aboriginal race and so within s 51(xxvi).

The major problems facing the construction of national land rights legislation are not the lack of a constitutional base on which to construct the legislation. The problems would be generated by two constraints on Commonwealth legislative power: the constitutional imperative that any law which provides for the acquisition of property must do so on 'just terms'[72] and the requirement that only courts constituted under Chapter III of the Constitution may exercise the judicial power of the Commonwealth.[73]

These inhibitions present complex challenges to the drafting of Federal legislation which would address and attempt to resolve the policy issues left by *Mabo*. A declaration of the nature and incidents of native title and its relationship to other interests in land is almost certain to be perceived by one interest or another to involve a diminution (and therefore an acquisition) of property, and will require the provision of fair compensation. And any process which involves an authoritative declaration of property interests will involve an exercise of judicial power, and so demand that the process be executed by a court.[74]

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72 Commonwealth Constitution

73 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

74 Some of these problems may be avoided if the States can be persuaded to enact complementary legislation.