Constitutional and Judicial Recognition of Aboriginal and Torres Strait Islander Peoples: The Migration of Foundational Ideas from Canada to Australia

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July 2012

A thesis submitted for the degree of Doctorate of Juridical Science of
The Australian National University
Signed Statement

This thesis is my own original work.

Pages 147–170 (Sections C–E of ‘Impetuses for a Non-Discrimination Guarantee’) and 170–188 (‘Scope of a Non-Discrimination Guarantee’) are modified versions of papers I submitted for assessment in the ANU College of Law postgraduate coursework subjects ‘LAWS8016 Comparative Constitutional Law’ and ‘LAWS8175 Citizenship Law in Context’ as part of my Doctorate of Juridical Science.

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Acknowledgments

I would like to commence by thanking Professor Kim Rubenstein, the chair of my supervisory panel, for her support. I am indebted to her suggestions along with those of the other members of my panel, Associate Professor Anthony Connolly and Dr Lisa Strelein.

I would also like to thank my partner, Dorian Serrier, and my parents, Keith and Kathy Parrott, who have always been behind my educational endeavours in one way or another. Leonie Young also merits thanks for her encouragement and assistance in proofreading the final manuscript.

I would also like to acknowledge the Attorney-General’s Department and the Australian Government Solicitor who provided me with study assistance at various periods throughout my candidature. Although I currently work in the Office of Constitutional Law in the Attorney-General’s Department, I have only referred to publicly available information in this thesis and the views expressed are my own and not those of the Australian Government.
Constitutional and Judicial Recognition of Aboriginal and Torres Strait Islander Peoples: The Migration of Foundational Ideas from Canada to Australia

Abstract

Ideas that are migrating from Canada are already guiding advocates who seek greater judicial and constitutional recognition of Aboriginal and Torres Strait Islander peoples. However, there is a need for a conceptual framework through which to approach the lessons that can be learned from Canada in this area. Inspired by The Migration of Constitutional Ideas, an edited work by Sujit Choudhry, in this thesis I argue that by thinking about the migration and transplantation of foundational ideas and by differentiating between four ‘modes’ of migration (arguments of counsel, judicial determinations, academic critique and constitutional reform deliberations), it is possible to better understand some of the processes that are at play. In particular, by adopting the terminology of the ‘migration’ and ‘transplantation’ of ‘foundational’ ideas, I aim to demonstrate that it is dangerous to transplant foundational ideas, whether derived from the common law or constitutional law, without other ideas (particularly in relation to implications) also migrating.

This thesis is a response to two distinct but related topics: ‘Topic 1 — The Potential for Judicial Recognition of Indigenous Self-Government Rights: The Migration of Foundational Ideas from Canada to Australia’ and ‘Topic 2 — Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, the Race Power and an Anti-Discrimination Guarantee: Contemplating Canadian Approaches to Equality’.

Through these two topics I examine two of the recognised modes of recognition — judicial and constitutional — and focus on two discrete types of recognition — self-government and non-discrimination — and the lessons that can be learned from Canada.

In response to the first topic I consider the extent to which foundational ideas are migrating from Canada to Australia in the field of Indigenous self-government rights and whether these ideas could be used in Australian courts. In response to the second topic I consider the extent to which Canadian experiences may assist when exploring the potential implications of prohibiting discrimination in the Australian Constitution.
and when examining the various options that are available. As far as the migration of foundational ideas from Canada is concerned, in Topic 1 my starting point is to consider what could be learned from the Canadian jurisprudence in order to understand the ideas that have migrated or could potentially migrate to Australia. In contrast, in Topic 2 I start with an appraisal of the lack of recognition of Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* and the perceived problems with s 51(xxvi) (the ‘race power’), and in so doing I consider what benefits (modified) Canadian transplants may offer, if any.
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THESIS INTRODUCTION

Ideas that are migrating from Canada are already guiding advocates who seek greater judicial and constitutional recognition of Aboriginal and Torres Strait Islander peoples. However, there is a need for a conceptual framework through which to approach the lessons that can be learned from Canada in this area. Inspired by *The Migration of Constitutional Ideas*, an edited work by Sujit Choudhry,¹ in this thesis I argue that by thinking about the migration and transplantation of foundational ideas and by differentiating between four ‘modes’ of migration (arguments of counsel, judicial determinations, academic critique and constitutional reform deliberations), it is possible to better understand some of the processes that are at play. In particular, by adopting the terminology of the ‘migration’ and ‘transplantation’ of ‘foundational’ ideas, I aim to demonstrate that it is dangerous to transplant foundational ideas, whether derived from the common law or constitutional law, without other ideas (particularly in relation to implications) also migrating.

I develop this thesis in response to two distinct but related topics: ‘Topic 1 — The Potential for Judicial Recognition of Indigenous Self-Government Rights: The Migration of Foundational Ideas from Canada to Australia’ and ‘Topic 2 — Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, the Race Power and an Anti-Discrimination Guarantee: Contemplating Canadian Approaches to Equality’.

Through these two topics I examine two of the recognised modes of recognition — judicial and constitutional — and focus on two discrete types of recognition — self-government and non-discrimination — and the lessons that can be learned from Canada. In addition, these two topics involve examination of two distinct types of foundational ideas — common law and constitutional.

My examination of these topics is intended to contribute to a broader body of work that considers the manner in which legal ideas migrate from one nation to another² and

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examines the extent to which these processes can and are occurring in the field of Aboriginal rights.\(^3\) The approach of this thesis differs from existing approaches, however, by exploring the two identified areas of law that might benefit from migration theory: self-government through judicial recognition and modes of constitutional recognition. Although I treat these two topics separately, I bring them together in the thesis conclusion in order to draw some broader conclusions about transplantation and migration. I end on a note of caution in relation to transplantation as well as in relation to strategic decisions about court versus political action.

The central question being addressed in this thesis is: to what extent is it dangerous to transplant foundational ideas without consideration of broader ideas (particularly concerning the implications of transplantation) also migrating? Appreciation of this risk should not detract from the fact that the migration of foundational ideas — whether through the deliberations and arguments of counsel, judicial decisions, academic critique or constitutional reform — can be an invaluable decision-making tool for advocates (even if merely to decide when to proceed with caution). It is also possible that advocates might in turn contribute to one or more of the four modes of migration.

After outlining in the introduction the ways in which I modify Choudhry’s framework, in response to Topic 1, I consider the extent to which foundational ideas are migrating from Canada to Australia in the field of Indigenous self-government rights (particularly the right to regulate and control cultural practices) and whether these ideas could be used in Australian courts. In response to Topic 2, I consider the extent to which Canadian experiences may assist when exploring the potential implications of prohibiting discrimination in the *Australian Constitution* and when examining the various options that are available. As far as the migration of foundational ideas from Canada is concerned, in Topic 1 my starting point is to consider what could be learned

from the Canadian jurisprudence in order to understand the ideas that have migrated or could potentially migrate to Australia. In contrast, in Topic 2, I start with an appraisal of the lack of recognition of Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* and the perceived problems with s 51(xxvi) (the ‘race power’), and in so doing I consider what benefits (modified) Canadian transplants may offer, if any. Throughout my intention is to demonstrate that the migration of foundational ideas can be an invaluable decision-making tool for advocates. This tool could be particularly useful to those who are considering whether to seek certain types of judicial or constitutional recognition.

In response to Topic 1, I highlight that before following in Canadian footsteps to seek the incremental (and hence limited) recognition of rights to regulate and control the manner in which cultural practices are carried out (on the basis of shared common law justifications for self-government rights), advocates will need to weigh up the potential benefits against the time and cost commitment of going before the courts. Given the limitations inherent in the piecemeal nature of judicial recognition of self-government rights and the difficulty of achieving such recognition (as will be illustrated by the Canadian case law), the importance of weighing up the various risks cannot be overstated. The risks involved might mean that advocates devote their time elsewhere; for example, towards the cause of achieving constitutional recognition (which might involve an agreement-making power through which self-government rights could be furthered).

In my exploration of Topic 2 my aim is to demonstrate that when considering whether the *Australian Constitution* should be amended to insert a prohibition on racial-discrimination, Australian legal analysis has the potential to be enriched by looking abroad to countries like Canada, especially when identifying or discounting options and exploring potential legal implications. Canadian jurisprudence is particularly informative because it highlights the risk that focusing on non-discrimination could overshadow the Aboriginal rights dimensions underlying many calls for recognition. If such risks are better appreciated, it is hoped that advocates would be better placed to make informed choices.
A Choudhry’s Framework

In his introductory chapter to *The Migration of Constitutional Ideas*, Choudhry considers the ‘increasing use of comparative and international law — both described as “foreign” to the US constitutional order — in its constitutional decisions over the previous decade’. Choudhry dubs this practice ‘the migration of constitutional ideas’. He first draws on the heated debate between Justices Stephen Breyer and Antonin Scalia to demonstrate that many questions regarding the methodology of constitutional migration and its normative underpinnings remain unanswered: in particular, ‘how’ exactly should foreign law be considered and ‘why and under what circumstances’ should courts engage with it at all. On the one hand, Justice Breyer has stated extracurially that ‘[i]f I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something’. Justice Scalia, on the other hand, has been at pains to point out that the discussion of foreign case law is ‘meaningless’ and ‘dangerous dicta’ because ‘foreign views’ are not relevant to the interpretation of the US Constitution. Moreover, the citation of comparative case law ‘lends itself to manipulation’ and the imposition of judicial policy preferences. As Choudhry explains, ‘comparative engagement feeds into fears regarding judicial activism’. Particularly if one takes an originalist approach to constitutional interpretation, as Justice Scalia does, foreign law — whether comparative or international — is irrelevant, with the exception of old English law which served as the backdrop for the framing of the constitutional text.

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5 Ibid.
6 Ibid 14.
7 Ibid 5.
10 Choudhry, above n 4, 7.
11 Ibid 6.
12 Ibid.
After outlining the ‘ongoing jurisprudential drama’ between Justices Breyer and Scalia, Choudhry explains how the migration of constitutional ideas still remains relatively unexplored ‘in the vast and growing literature on comparative constitutional law’. While ‘[d]etailed case studies of common issues across a small set of legal orders have consisted of static comparisons of different constitutional systems’, they ‘have not examined how and why constitutional ideas have migrated across systems’. Choudhry also considers the metaphors that are widespread in comparative constitutional law, particularly ‘transplants’ and ‘borrowing’, and outlines the deficiencies of each; for example, legal rules are being more deeply transformed than the metaphor of transplants is capable of conveying and borrowing inaccurately connotes ownership on the part of a ‘lender’:

Moreover, borrowing implies both that ideas are a positive influence and that they must be used ‘as is’, without significant modification or adaptation. But the metaphor of migration explicitly opens the door to a wider range of uses of constitutional ideas, and for outcomes of the process of comparative engagement.

By focusing on the increasing use of comparative and international law by the courts, Choudhry concentrates on one distinct mode of migration. However, he also recognises that:

The migration of constitutional ideas occurs at various stages in the life-cycle of modern constitutions. The use of foreign law in constitutional interpretation is but one

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13 Ibid 1.
14 Ibid 16.
15 Ibid.
17 As Choudhry points out, ‘[t]he dominance of this metaphor was confirmed by the devotion of a symposium to constitutional borrowing in the leading journal in the field, the *International Journal of Constitutional Law*: Choudhry, above n 4, 20, citing (2003) 1 *International Journal of Constitutional Law* 177–324.
18 Choudhry, above n 4, 19.
example. Another is the use of foreign constitutions as models in the process of constitution-making.20

Yet another use, as discussed in Topic 2, is constitution-amendment. As Walker further explains, ‘the migration of constitutional ideas’ can refer to

all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.21

‘Migration’ is a fluid concept which ‘is said to capture more accurately the complex dynamic of cross-constitutional exchanges’.22 In addition, ‘[u]nlike other terms current in comparativist literature such as “borrowing”, or “transplant” or “cross-fertilization”, it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred’.23 Given these benefits, unlike those who have chosen to use the various metaphors interchangeably,24 I have principally adopted the concept of migration in order to be guided to the greatest extent possible by ideas that are migrating from Canada in the field of Indigenous rights. I intend to demonstrate that merely transplanting or transferring common law or constitutional concepts without the accompanying migration of ideas about potential benefits and pitfalls is a risky endeavour. However, in order to provide a more suitable framework for this project, I have modified Choudhry’s terminology in a few significant respects,

22 Perju, above n 21, 1307.
23 Walker, above n 21, 320.
24 Perju, for example, explains that ‘[s]ince disagreement about words does not suspend the need to use them, in the rest of this chapter I use the metaphors of borrowing and transplants, interchangeably. When that lens is too limiting, as it will be at times, I switch to the migration lens. … I do not use the migration metaphor as the default in order to emphasize the continuity between the study of interactions in private and public law’: Perju, above n 21, 1308. It is interesting to also note, as Perju points out at 1307, that ‘the shift from borrowing to migration mirrors a similar shift in comparative law from transplant to “circulation”’. 
as explained below. It is my hope that in doing so I am rising to the task set by Choudhry:

[T]he practice of comparative constitutional law has outgrown the conceptual apparatus that legal actors use to make sense of it. It is the responsibility of the bench, the bar, and the academy to respond. 25

Like Choudhry I recognise that ‘[t]o recast our theories of comparative constitutional law, we must ... turn to a detailed study of constitutional practice’ and this thesis makes a contribution to that detailed study of constitutional practice. 26

B A New Framework: The Migration and Transplantation of Foundational Ideas

In contrast to Choudhry, my development of his work regarding migration of ideas is to broaden the baseline and refer to the migration of ‘foundational’ ideas rather than ‘constitutional’ ideas to make it clear that I am going beyond comparative constitutional law to encompass ‘common law’ ideas. I use this more encompassing term because it enables those interested in the use of Choudhry’s contribution to draw out the similarities between the use advocates can make of both common law and constitutional thinking from Canada. The focus on common law ideas in Topic 1 also means that many of the barriers imposed by theories of constitutional interpretation, such as originalism (discussed above in relation to Justice Scalia’s arguments) do not apply.

By drawing on both common law and constitutional ideas under the general rubric of ‘foundational’ ideas and by examining the migration of these ideas through the two topics chosen as case studies, I am able to contribute to the growing literature in this area by identifying parallels and differences. As explained above 27 this conceptual framework enables me to answer the central and important question this thesis grapples with: is it true for both common law and constitutional ideas that it is dangerous for ideas to be transplanted without other ideas also migrating?

Unlike Choudhry, who focuses on the courts’ use of comparative and international law and essentially includes the concepts of transplantation and borrowing in the concept of

25 Choudhry, above n 4, 10.
26 Ibid 25.
27 See page 10 above.
I consider ‘transplantation’ to involve the deliberate adoption or modification of the approach of another jurisdiction as a means of reform (which is considered in Topic 2); whereas I use ‘migration’ in a looser sense — specifically, by looking at how foundational ideas move from one jurisdiction to another in the arguments of counsel, judicial determinations, academic critique and constitutional reform deliberations. While I do not deny that the transplantation of ideas is a subset within the migration of ideas, I think ‘transplantation’ is a useful label to describe a more specific practice. The transplantation of constitutional ideas from Canada to Australia could include, for example, the amendment of the Australian Constitution to insert a provision similar to s 15 of the Canadian Charter of Rights and Freedoms. While constitutional reform is not the focus of Topic 1, it is worth noting that the more ideas migrate, the more feasible transplantation may become.

If the migration of foundational ideas precedes any (modified) transplant, it may also be possible to make inroads into the transplants debate in comparative constitutional law. One of the issues that is considered by critics to be inherent in the concept of ‘legal transplants’ is that ‘[l]egal transplants could only occur if both the rule and its context could be transferred between legal systems, an exceedingly unlikely prospect ... In its new context ... it becomes a different rule’. The initial focus of the transplants debate was comparative private law. As Perju explains, the debate quickly became ‘deadlocked in a polarized contest between scholars arguing that transplants can be found everywhere and other scholars who proclaimed legal transplants impossible because law is embedded in culture and cultures cannot be transplanted’. While it might be that the rules and context existing in both Canadian and Australian Indigenous law are more transferrable than in other areas of law, potentially making transplantation more than an ‘exceedingly unlikely prospect’, the pitfalls that transplants can entail due to various

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28 Ibid 21.
29 Canada Act 1982 (UK) c 11, sch B pt I (‘Canadian Charter of Rights and Freedoms’).
30 Choudhry, above n 4, 17, referring to the reasoning of Legrand, above n 16, 55–65.
31 Perju, above n 21, 1305–6.
32 Choudhry, above n 4, 17.
issues such as misunderstandings or misguided experimentalism should not be looked upon lightly.\textsuperscript{33}

The terminology of ‘transplants’ can also suggest a mechanistic process,\textsuperscript{34} which has led some scholars to prefer the metaphor of ‘borrowing’ in relation to constitutional transplants. However, given this metaphor carries connotations of borrowing/returning and ownership/consent,\textsuperscript{35} I have preferred to focus on the more dynamic relationship between migration and transplantation. The interrelationship between the migration and transplantation of foundational ideas could also arise where provisions have been transplanted in the past, which could give rise to greater justification for judicial and other uses of comparative law. However, even slight differences can be decisive.\textsuperscript{36} Conversely, depending on the extent to which ideas migrate and in what forms (indeed, in some cases ideas may migrate without necessarily being adopted at that point in time), significant convergence in approaches may occur without the need for direct transplantation.

C ‘Modes’ of Migration from One Jurisdiction to Another

Ideas can migrate in numerous ways, including through the following ‘modes’ of migration:

- the arguments of counsel;
- judicial determinations;
- academic critique; and
- constitutional reform deliberations.

\textsuperscript{33} For a list of the ‘dangers associated with borrowing in the constitutional context’ see Perju, above n 21, 1306.

\textsuperscript{34} Ibid 1307.

\textsuperscript{35} See above n 19 (and the accompanying text) and Perju, above n 21, 1307.

\textsuperscript{36} Consider, for example, the emphasis placed on the differences in wording between s 116 of the \textit{Australian Constitution} and the First Amendment of the \textit{United States Constitution} in \textit{Attorney-General (Vic) ex rel Black v Commonwealth} (1981) 146 CLR 559, 578 (Barwick CJ), 598 (Gibbs J), 609 (Stephen J), 615 (Mason J), 652 (Wilson J).
1 Arguments of Counsel

The role played by counsel in identifying arguments that can be made before the courts that are influenced by overseas developments could easily be overlooked. As the then Solicitor-General of the Commonwealth, Stephen Gageler SC, explained in 2009, he always has an eye to developments occurring abroad.\(^{37}\) However, the role of counsel in contributing to the migration of ideas is often difficult to track. This is particularly the case in Australia, where submissions made to the High Court have only been made available online since the start of 2011.\(^{38}\) Before that time, High Court judgments and their accompanying headnotes were the main indication of role played by counsel in the migration of ideas. In some judgments overseas authority is merely mentioned in order to be rejected in response to the invitations of counsel. However, this is not always expressly stated.\(^{39}\)

2 Judicial Determinations

It is often appreciated that many innovative court judgments, such as *Mabo v Queensland [No 2]*,\(^{40}\) overtly rely on overseas precedents. However, attention is less often paid to the migration of ideas when overseas decisions are considered but do not have a determinative effect on the outcome of a case. Indirect influences are even harder to track down given most judges of higher appellate courts are well-conversed in developments happening abroad but may not even appreciate themselves the subtle influences such decisions are having on their own thinking. Brian Slattery, for example, has identified cases in Canada where it appears that judges have drawn on overseas decisions for inspiration, such as the US case of *Worcester v Georgia*,\(^{41}\) without referring to it by name.\(^{42}\) In addition, the migration of ideas in judicial decisions does

\(^{37}\) Stephen Gageler, ‘Comparative Constitutional Law in the Courts: an Advocate’s Perspective’ (Speech delivered at the International and Comparative Perspectives on Constitutional Law Conference, The University of Melbourne, 27 November 2009).

\(^{38}\) Following the insertion of r 44.07 to the *High Court Rules 2004* (Cth).

\(^{39}\) See, eg, the references listed in above n 36.

\(^{40}\) (1992) 175 CLR 1 (‘*Mabo [No 2]*’).

\(^{41}\) 31 US (6 Pet) 515 (1832).

\(^{42}\) See Brian Slattery’s remarks regarding *R v Symonds* in Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Native Law Centre, 1983) 44.
not only occur in the one direction or in a linear fashion. For example, *Mabo [No 2]* relied on developments in other jurisdictions and has since been cited abroad.\(^{43}\)

As mentioned above, the use of comparative law in judicial determinations has been well documented, particularly following the notorious debate between Justices Scalia and Breyer in the United States.\(^{44}\) In Australia, in a survey undertaken of the percentage of High Court decisions citing Canadian cases, four per cent of High Court decisions in 1903–10 cited Canadian cases, which gradually increased until the last period surveyed, 1991–99, during which 37 per cent of High Court decisions cited Canadian cases.\(^{45}\)

Sir Anthony Mason has described the use of comparative law in judicial determinations as being ‘a more general kind’ of ‘constitutional importation’:

> It stands to reason that a court, faced with a problem that has been decided by a court of another jurisdiction against a background of provisions that are indistinguishable or similar, will look at the decision of the court of the other jurisdiction. Whether the decision is persuasive depends upon the quality of the reasoning on which the decision is based. If the decision is persuasive, it may be invoked, but not as an authority for it has no authoritative value. Its value, apart from the persuasive quality of the reasoning, is simply that another court, faced with the same problem, has answered it in the same way.\(^{46}\)

‘The value of judicial resort to comparative law’, according to Sir Anthony Mason, ‘lies in small rather than large inputs’:

> Comparative law may offer a clearer, crisper formulation of a principle or of a standard than the formulation approved in one’s own jurisdiction, even if there is little difference in the substance of the competing formulations. Or it may be that the comparative approach


\(^{45}\) During this period 41 per cent cited cases from the United States and 88 per cent cited English cases. The statistics for the Canadian cases include Privy Council appeals: Bruce Topperwein, ‘Foreign Precedents’ in Michael Coper, Tony Blackshield, George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, first published 2001, 2007 online ed).

\(^{46}\) Mason, above n 2.
offers a different perspective, one which admits of a new factor becoming relevant in answering the problem in hand.\(^4^7\)

Given the value of ‘crisper formulations’, whether they be argued by counsel or endorsed by judges in reliance on overseas experience, much of the focus of Topic 1 is the extent to which foundational ideas from Canada about self-government rights (particularly when conceptualised as the right to regulate and control cultural practices) offer a valuable new perspective to a shared issue.

3 Academic Critique

Due to the dearth of court cases in some areas such as Indigenous self-government rights, academic literature often provides the most comprehensive exploration of certain foundational ideas. It will therefore be explored in depth throughout this thesis (which itself is an example of this mode of migration). As discussed below with respect to the interrelationship between the four modes of migration, academic critique has a direct effect on the other modes: counsel rely on academic commentary and many journal articles are written by practicing barristers; academic critique not only provides a critical perspective of the judicial decisions handed down to date but also provides material that can help develop ideas to be used in court;\(^4^8\) and academic contributions are an important component of constitutional reform deliberations, whether by way of participating on expert panels\(^4^9\) or writing submissions.\(^5^0\)

\(^{47}\) Ibid.

\(^{48}\) An example of this is the reliance placed on Henry Reynolds, *The Law of the Land* (Penguin, 1987) in *Mabo [No 2]* (1992) 175 CLR 1, 107 nn 310 and 314 (Deane and Gaudron JJ) and 142 n 410 (Toohey J).


\(^{50}\) See, eg, the list of submissions to the Expert Panel on Constitutional Recognition of Indigenous Australians which includes prominent constitutional law academics such as Professor Anne Twomey and Professor George Williams: ibid 244–63.
The process of constitutional reform involves the work of advisory bodies (traditionally constituted as commissions or conventions but more recently as expert panels), law reform bodies, departmental policy officers, government legal advisers and ultimately the Parliament (including through its committees). In the context of identifying proposals for constitutional reform, overseas developments are often taken into consideration, as illustrated by the work of the Expert Panel established by the Australian Government to consult and report back on options for the constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Report of the Expert Panel dedicates an entire chapter to ‘comparative and international recognition’. Perhaps for reasons not too dissimilar to those underling my preference for focusing on Canada (see further below), the Report of the Expert Panel also notes that ‘[t]he most commonly referenced comparative example of recognition at consultations and in submissions was Canada’.

The focus of the last substantive section of Topic 1 and most of Topic 2 will be the lessons that can be learned from Canada whether through the migration of foundational ideas more generally or when examining the feasibility of transplants for the purposes of constitutional reform.

D Interrelationships between the Four Modes

There is considerable overlap between the four ways in which ideas migrate — they are not independent processes. As outlined above, most if not all mention of overseas developments in the decisions of the High Court can be traced to the arguments of counsel. In turn, the High Court’s treatment of these developments may become the object of academic critique. Conversely, judicial decisions and the submissions of counsel may refer to or rely on academic learning, whether from within the jurisdiction or abroad. In extra-curial writing judges may also consciously contribute to the

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53 Ibid 52.

54 See, eg, Fejo v Northern Territory (1998) 195 CLR 96, 149 n 231 (Kirby J) (‘Fejo’), Wurridjal v Commonwealth (2009) 237 CLR 309, 407 n 379 (Kirby J) and Northern Territory v Arnhem Land
migration of ideas. However, it is not always possible to trace exactly how ideas are migrating given it may occur ‘through silent absorption rather than express citation’.

Another illustration of how the modes interact is that deficiencies highlighted by the first three processes could lead to a perceived need to amend the Constitution, perhaps in line with overseas developments. This in turn could lead to further examination by practitioners, the judiciary and academia and in some cases could lead to further constitutional reform (indeed recent proposals for reforming s 51(xxvi), as explored in Topic 2, can be regarded as a revisiting of the 1967 referendum).

Despite the multiplicity of possible interactions, the overlap between the four ‘modes’ could be more prevalent than is currently the case, especially in the area of Indigenous self-government rights. As Wilkins observes, ‘[i]t is striking that the judicial and the academic opinion about the inherent right have diverged so conspicuously, and that these streams of opinion have seemed to give one another so little weight’. Judicial and academic opinion has also diverged more generally on the question of the utility of looking abroad.

E The Migration of Foundational Ideas from Canada

1 Why Canada?

Canada is an obvious choice for comparison with Australia given it also has an Indigenous population, a common British heritage and a federal system. There is also jurisprudence available on the two topics I have chosen (self-government rights and non-discrimination). However, throughout I have tried to be careful not to view Canadian developments through rose-coloured glasses. Indeed, there sometimes appears

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58 See especially the discussion of the debate between Justices Stephen Breyer and Antonin Scalia in Choudhry, above n 4, 1.
to be a disjunct between the praise of Canadian approaches in Australia and the self-criticism sometimes expressed on the opposite side of the Pacific. It may well be that the greatest utility in looking to Canada is to enable decision-makers to be in a position to better identify potential pitfalls for Australia.

2 Barriers to the Migration of Ideas from Canada

Common justifications for the outright rejection of Canadian developments in Australia include the lack of treaty rights or a bill of rights.

(a) Canadian Constitutional Exceptionalism?

Through Australian eyes, the Canadian Charter of Rights and Freedoms might be regarded as setting out an exceptional or unique approach to Indigenous rights (which I call ‘constitutional exceptionalism’). However, despite the fact that Australia does not have an equivalent to the Canadian Charter of Rights and Freedoms at the federal level, in the field of common law Indigenous rights this may not necessarily exclude Canadian developments from consideration. That said, the aboriginal right of self-government in Canada is thought of in terms of a constitutional entitlement rather than as an incident of common law native title (which, as examined in this thesis, is a possible approach to take in Australia).

Several provisions of the Constitution Act 1982 were designed to meet the demands of aboriginal peoples. These include a guarantee of ‘existing aboriginal and treaty rights’ in s 35, a non-derogation provision (s 25, which makes it clear that the Canadian Charter of Rights and Freedoms is not to be construed as derogating from ‘any

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60 Indeed, bills of rights are a contentious topic in Australia. See eg Julian Leeser and Ryan Haddrick (eds), Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights (The Menzies Research Centre, 2009) contra George Williams, A Charter of Rights for Australia (UNSW Press, 3rd ed, 2007).

61 Canada Act 1982 (UK) c 11, sch B (‘Constitution Act 1982’).

62 Whether or not the compromises were successful or not is another matter. According to Tully, ‘[r]ather than uniting the citizens on a constitution that transcends cultural diversity, [the Charter] has fostered disunity’: Tully, above n 59, 7.
aboriginal, treaty or other rights of freedoms that pertain to the aboriginal peoples of Canada’) and a commitment to further constitutional discussions (s 37). 63

Section 35 of the Constitution Act 1982 provides, in full, as follows: 64

  Recognition of existing aboriginal and treaty rights

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

  Definition of ‘aboriginal peoples of Canada’

(2) In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.

  Land claims agreements

(3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.

  Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Given s 35(1) recognises ‘existing’ Aboriginal rights, the origin of self-government rights which are capable of recognition in Canada is evidently not s 35(1) itself. Arguably, their recognition therefore does not necessarily depend on s 35(1) (but, of course, it is facilitated by it).

As Castles and Gill have pointed out, the Canadian cases

arose in the context of giving content to the concept of ‘aboriginal right’ in section 35(1) of the Canadian Constitution Act 1982. But this does not appear to have been regarded by the Canadian judges as creating a substantial difference between the legal recognition of ‘aboriginal rights’ in Canada compared to Australia under general principles. ... Clearly, as these cases show, the Canadian Constitutional recognition of

63 Section 37 was repealed in 1983, as discussed on page 69 below.

64 Subsections 35(3) and (4) were added by the Constitution Amendment Proclamation 1983, RSC 1985, Appendix II, No 46 (‘Constitution Amendment Proclamation 1983’).
aboriginal rights has provided a special reason for reaching these decisions. But like the United States decision making that dates back for more than 150 years, these rulings also encompass an acknowledgement of the rights of Indigenous peoples that have deep roots within the same principles that the majority of the High Court of Australia espoused in *Mabo [No. 2]*.65

Similarly, Macklem explains:

By recognizing and affirming existing Aboriginal and treaty rights, subsection 35(1) provides explicit textual support for the proposition that Aboriginal people possess a unique constitutional status in Canadian law. Moreover, the fact that Aboriginal and treaty rights are ‘recognized and affirmed,’ as opposed to created or conferred, implies that such rights owe their existence not to subsection 35(1) but to some other source of law.66

The existence of s 35(1) in Canada should therefore not automatically exclude Canadian jurisprudence from consideration in Australia. (The effect of the *Charter* provisions will be considered further in relation to Topic 2.) It might actually be the case that proponents of recognition of self-government rights (when understood as incrementally recognising rights to regulate and control the manner in which cultural practices are carried out) in Australia face an easier challenge if recognition is to occur at the level of a common law right, making Canadian judicial reluctance67 less relevant to the Australian context.68

Even if it is accepted that Aboriginal rights do not depend on the *Constitution Act 1982* for their existence, s 35 has played an important role in ‘ground[ing] subsequent Aboriginal law jurisprudence in Canada’69 and protecting Aboriginal rights from

67 See pages 43–57 below for the summary of the Canadian case law.
68 I would like to thank one of the anonymous examiners for making this point.
69 McLachlin, above n 55, 106. In addition, in Australia native title ‘remains a common-law concept and, as such, might not be equally susceptible to the kind of purposive interpretation that drives the interpretation of s 35(1) by Canadian courts’: at 106.
unjustifiable interference by the federal and provincial governments. This difference may therefore lead to diverging approaches with respect to the extinguishment of self-government rights.

Issues of extinguishment aside, even without Australia taking a constitutional reform route that mirrors the one taken in Canada, it is possible that there will be significant convergence in approaches between the two jurisdictions without the need for direct transplantation. In any event, s 35 of the Constitution Act 1982 should not be regarded as an outright barrier to the migration of foundational ideas between Canada and Australia.

(b) The Lack of Treaty Rights in Australia

The lack of treaties in Australia and the differences in the way in which sovereignty was acquired are sometimes identified as barriers to the migration of ideas from Canada. Unlike Canada, Australia is striking in the fact that there is no treaty, of any description, between Aboriginal and Torres Strait Islander peoples and the Crown. Although treaties can lead to the renunciation of rights, they can also play an important role in protecting rights. As Macklem explains, treaty rights ‘typically protected interests associated with cultural, territorial, and self-government rights, but … are predicated on successful negotiations with the Crown’. These rights have never been negotiated in Australia.

While this means that the Canadian treaty cases, as well as arguments made on the basis of implications from treaties and other Canadian foundational documents, are of limited relevance in Australia, there is a wealth of cases dealing with common law ‘Aboriginal title’ and ‘Aboriginal rights’, particularly originating in British Columbia.

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71 Young, The Trouble with Tradition, above n 3, 33.


74 Despite the fact that the Supreme Court of Canada first confirmed the existence of Aboriginal title as a concept in Canadian common law in 1973 in Calder v Attorney-General of British Columbia [1973] SCR 313, as at 1 March 2012 no First Nation has proven Aboriginal title in Canada’s courts. This may soon be
on which advocates can draw. That being said, the existence of treaty rights in Canada may explain the different trajectory of the common law in both countries. For example, ‘when native title was found to exist as part of the common law in Canada, its extension to hunting and fishing rights was readily accepted because treaties had always emphasised the inter-relationship between land and the livelihood of Indigenous people’. In contrast, it was not until 2 July 2010 that an Australian court recognised the native title right to take fish for commercial purposes.

(c) The Impact of Statutory Native Title on the Migration of Ideas

As Pearson explains:

What the High Court has decided is that it will draw a line between the Australian law on native title after the enactment of the Native Title Act and the body of North American and British colonial case law which has dealt with native title over the past two centuries, and which informed and underpinned the decision in Mabo.

The distinction drawn between common law native title and statutory native title under the Native Title Act 1993 (Cth) (‘Native Title Act’) is becoming, to use Strelein’s terminology, ‘increasingly explicit’. Technically, the last ‘common law’ native title case was Yanner v Eaton in 1999.

corrected. In Tsilhqot’in Nation v British Columbia [2007] BCSC 1700 Vickers J said in obiter that although he was not able to make a declaration of Tsilhqot’in Aboriginal title for procedural reasons, he was of the opinion that Tsilhqot’in Aboriginal title does exist: see page 55 below. Tsilhqot’in Nation was appealed to the British Columbia Court of Appeal and was heard on 15–22 November 2010. As at 1 March 2012 the decision is still pending: see also Tsilhqot’in Nation, ‘Submission to Canada’s 19th and 20th Periodic Reports’, Submission to the Committee on the Elimination of Racial Discrimination, January 2012, [17] <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/Tsilhqotin_Canada80.pdf>.

75 Sean Brennan et al, above n 3, 99. However, the Canadian courts have stopped short at the open accumulation of wealth, by limiting the right to trade to a right to enjoy a moderate livelihood from the commercial exploitation of the resources: Lisa Strelein, ‘“A Comfortable Existence”: Commercial Fishing and the Concept of Tradition in Native Title’ (2002) 5 Balayi: Culture, Law and Colonialism 94.


79 (1999) 201 CLR 351 (‘Yanner’).

The distinction between common law native title and statutory native title gives rise to numerous issues:

First, what impact has the NTA had on common law native title? That is, may the common law still develop separately, or does the NTA permanently change the common law of native title? Second, would the Courts take a different view if they were working without the statutory net of the NTA?81

If the Native Title Act permanently changes the common law of native title, this may affect the ability of a court to determine that certain ‘self-government’ rights are an incident of native title in a particular case, and thus is an issue that would need to be tested in the courts.

It is at least arguable that the recognition of self-government rights that are an incident of native title (i.e., the right to regulate and control the manner in which a native title right or interest is carried out) is not prevented by s 223 of the Native Title Act. Section 223(1) provides as follows:

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Rather than s 223 preventing the recognition of self-government rights that are an incident of native title, it may be that these rights are one of the aspects of native title that are either not addressed or are left ambiguous in the Native Title Act.82

81 Ibid 50.
82 As Behrendt, Cunneen and Libesman explain, various issues were left unresolved or are ambiguous in Mabo [No 2] and the Native Title Act. These issues include: ‘the nature and extent of rights recognised within the rubric of native title; whether native title is a bundle of rights which can be recognised and extinguished bit by bit or if it encompasses an underlying title; how native title is extinguished and in what circumstances extinguishment is permanent; and how and in what circumstances native title can
Though, of course, claims for the recognition of rights to regulate and control the manner in which cultural practices are carried out that are not ‘in relation to land or waters’ could only be brought under the common law and not under the Native Title Act due to the terms of s 223. As explained in Commonwealth v Yarmirr:

the rights and interests with which the Act deals may be communal, group or individual rights and interests. They are described as rights and interests in relation to land or waters. They are rights and interests which must have three characteristics (s 223). First, they are possessed under the traditional laws acknowledged, and the traditional customs observed, by the peoples concerned. Secondly, those peoples, by those laws and customs, must have a ‘connection’ with the land or waters. Thirdly, the rights and interests must be recognised by the common law of Australia.83

A further difficulty with the Native Title Act was highlighted in Western Australia v Ward:

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.84

However, it may still be open to applicants to bring a common law native title case and/or a ‘self-government’ case as opposed to an application under the Native Title Act. Indeed, a case for the recognition of rights of regulation or control that extend to cultural rights and interests other than those in relation to land could be made on the basis of the common law justifications discussed in Topic 1.85

Throughout Topic 1, these three potential barriers to the migration of ideas (Canadian constitutional exceptionalism, the lack of treaty rights, and statutory native title) will inform my approach, but they will do little more than that. Despite the fact that these

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83 (2001) 208 CLR 1, 37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (‘Yarmirr’) (emphasis in original).
84 (2002) 213 CLR 1, 65 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (‘Ward’).
85 See particularly page 40.
issues add a layer of complexity when Canadian developments are considered, they do not appear to be insurmountable barriers that would justify the outright rejection of Canadian approaches.
TOPIC 1 — THE POTENTIAL FOR JUDICIAL RECOGNITION OF INDIGENOUS SELF-GOVERNMENT RIGHTS: THE MIGRATION OF FOUNDATIONAL IDEAS FROM CANADA TO AUSTRALIA

I INTRODUCTION

The recognition of indigenous customary title to land and waters in Australia has been part of Australia’s constitutional history, constitutional in the ‘C’ and ‘c’ senses. That is not surprising for it has involved fundamental questions about the basis on which Australia was colonised in the 18th century, the relationships between the law of the colonies, the communal law of England, the provisions of the written Constitution that came into existence in 1901 and the law and custom of the indigenous inhabitants.86

Is judicial recognition of Indigenous self-government rights likely to become part of Australia’s constitutional history alongside judicial recognition of Indigenous customary title? In particular, is there scope for judicial recognition of something akin to self-government rights by building on the small incremental steps already taken in Canada? In the first part of Topic 1, I have set out to explore these possibilities and the foundational ideas that could migrate from Canada by considering the arguments that could be made when the issue of Indigenous self-government comes before the Australian courts. My intention is for this exploration to shed light on the likely limitations of judicial recognition (judicial determinations being the second mode of migration identified above),87 which may involve incrementally recognising rights to regulate and control the manner in which cultural practices (especially those in relation to land) are carried out.

I begin by considering the way in which self-government rights have been conceptualised in Canadian scholarship and judicial decisions. This is followed by a discussion of the state of the law in Australia and an exploration of how self-government rights could be conceptualised as part of the Australian common law. This discussion will draw on the first three modes of migration by touching on the arguments that could be made by counsel, the judiciary and academia in reliance on foundational


87 See page 19 above.
ideas that have migrated and could continue to migrate from Canada. In the last chapter of Topic 1, I identify the constitutional reform proposals (constitutional reform deliberations being the fourth mode of migration) that have been advanced in Australia and Canada which relate to self-government rights and I contemplate how these proposals could affect whether and how common law self-government rights are recognised by Australian courts.

This topic relates to my central thesis that it is dangerous to transplant foundational ideas without other ideas (particularly in relation to implications) also migrating in several ways. By predicting the likelihood that the incremental recognition of rights to regulate and control the manner in which cultural practices are carried out will be of necessity a limited form of recognition, I highlight the key implications of drawing on various foundational common law ideas, particularly those explored by academics in Canada.

It is likely that common law self-government rights would be limited to rights and interests created prior to the acquisition of sovereignty and as such would be subject to strict continuity tests and would be susceptible to extinguishment. Given the limited nature of such rights, this might mean that the right to regulate cultural practices only extends to those practices that are compatible with the historical and modern exercise of Crown sovereignty. If native title is the starting point for any exploration of these issues in Australia, these rights are also likely to be confined to those rights connected to land and waters. However, in time, there may be potential for recognition of rights of regulation or control to extend to other cultural rights and interests on the basis of the common law justifications identified, which are equally applicable in Canada and Australia — allowing for the migration of ideas from one country to the other (and back again).

Given the limitations inherent in the piecemeal nature of judicial recognition, the first step for advocates in this area will be to decide whether the potential benefits outweigh the time and cost commitment of going before the courts. In this regard the migration of foundations ideas is an invaluable decision-making tool for advocates. In order to make an informed assessment, counsel would need to weigh up the potential implications and advise their clients accordingly. If assessments of the implications have also migrated
from another jurisdiction such as Canada, this will be a much easier feat. Making such an assessment without considering potential limitations (including those that can be gleaned thanks to insights gained from Canada) could result in the assessment being inaccurately made. Seeking to transplant foundational ideas from abroad, particularly through court processes, without understanding the potential limitations of such an approach, risks raising false hopes and diverting attention away from other avenues for change.

A The Role of the Courts

In relation to Topic 1 my preference is to focus on how Indigenous self-government rights could be advocated in the courts given the current political climate in Australia (particularly due to prevailing attitudes with respect to rights) is not favourable to legislative or constitutional change in the area of self-government rights; as explained in Chapter VI, the Expert Panel established by the Australian Government to consult and report back on options for the constitutional recognition of Aboriginal and Torres Strait Islander peoples did not make any recommendations in relation to self-government, or for that matter, agreement-making and sovereignty related issues, which the Report of the Expert Panel explored in some depth.88

The courts also have an important role in our democratic system and can operate as a framework for change,89 particularly in the field of Indigenous rights.90 Although my starting point is to consider the arguments that could be made if the issue of self-government rights were to come before the courts, I endeavour not to lose sight of the shortcomings of judicial intervention. This is an issue that has received a lot of attention in Canada. The likelihood that only narrow assertions of specific self-government rights will be considered by the courts on a case by case basis has even led some to conclude that there is a disincentive to going to the courts.91 As Monahan points out, ‘[w]hen

89 For the discussion of the use of law for political and social purposes see Carol Harlow and Richard Rawlings, Pressure through Law (Routledge, 1992).
every case turns on its own facts, the potential risks and rewards of litigation are very difficult to estimate accurately’.92 However, this needs to be counterbalanced by the consideration that ‘if you are entitled to assume that a court will give you at least part of what you are asking for, litigation seems a pretty attractive option’.93 These debates and warnings from Canada can be informative for an Australian audience. Before picking and choosing from Canadian foundational ideas, the surrounding debates should be assessed and taken into consideration.

Due to time and cost commitments and the likelihood of a narrow result, it is understandable if political solutions as opposed to judicial ones are preferred.94 In addition, as Russell explains, ‘judicial wins come with a downside — a reminder of the subordinate place of native societies within the larger settler societies in which they are embedded, and of their dependence on the courts that pronounce upon their rights in that larger society’.95

Hogg has also identified a practical dilemma. On the one hand, ‘if the aboriginal right of self-government is defined too narrowly by the Court, the bargaining power of aboriginal nations will be impaired, and the incentive of governments to reach agreements will be reduced’.96 The nations in question are also dependent on the courts, as a result.97 On the other hand, governments may lose incentive to negotiate if matters are not pursued through the courts.98

As well as the shortcomings of judicial intervention, there is a downside to relying on comparative law arguments. Some courts may be reluctant to intervene or undertake comparative engagement, perhaps for fear of being labelled ‘activist’. As Choudhry

92 Patrick Monahan, ‘The Road Ahead: Negotiation or Litigation?’, in Owen Lippert (ed), Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision (Fraser Institute, 2000) 521, 525.
93 Ibid.
94 Moodie, above n 91, 21.
95 Ibid.
97 Russell, above n 90, 247.
98 Moodie, above n 91, 21 n 90.
explains, ‘comparative engagement feeds into fears regarding judicial activism’. 99

Indeed, Binnie J’s judgment in *Mitchell v Minister of National Revenue*, 100 has been described by Moodie as ‘a classic example of creative judicial law-making’. 101 Another fear often expressed, at least in the United States context, which is also somewhat ironic in the context of this thesis, is that ‘the migration of constitutional ideas ... facilitates the erosion of US sovereignty by the forces of globalization’. 102

As far as Canada is concerned, much time has passed since the issue of self-government first arose — so much so that it is possible that some judges have started to implicitly acknowledge that it is likely that the self-government issue will not be settled politically across all of Canada 103 and ‘as much as the Court would like to continue side-stepping the issue, it will not be able to do so forever’. 104 It may be only a matter of time before the High Court of Australia is also required to consider the issue.

B  The Role of Lawyers

If a case were to be argued before the courts, counsel would need to ensure that they have informed instructions. In particular, they would need to clearly explain the importance of what might otherwise appear to be esoteric points. Numerous questions would arise. In which court should a claim be brought? 105 Should a lawyer advise a client to go down this track? And what are the views of other Indigenous groups?

Lawyers should also be aware of the constraints imposed on Indigenous peoples when forced to rely on lawyers to present arguments in legal terms. As Tully explains, even when groups can speak directly, ‘they are constrained to present their demands in the

99 Choudhry, above n 4, 6.
101 Moodie, above n 91, 30.
102 Choudhry, above n 4, 7.
103 That said, a few agreements have been entered into in some parts of Canada that may be classified as self-government agreements, including the Nisga’a Agreement (discussed below from page 51) and the Government of Canada officially recognises the inherent right of self-government: see below n 319.
104 Moodie, above n 91, 31.
105 There is much to be said for the benefits of taking native title claims through the lower courts which are best placed to examine the evidence before claims come before higher appellate courts. One of the lessons learned from *Coe v Commonwealth [No 1]* (1979) 53 ALJR 403 and *Coe v Commonwealth [No 2]* (1993) 68 ALJR 110 is that there are pitfalls in bringing a matter in the original jurisdiction of the High Court.
normative vocabulary available to them … even though these terms may distort or misdescribe the claim they would wish to make if it were expressed in their own languages’. 106

In addition, lawyers should bear in mind that resorting to common law doctrines to advance a case for Indigenous self-government rights could be seen as a concession of the authority or legitimacy of a state’s exercise of power over the people in question. However, as McNeil has pointed out, ‘legitimacy and reality can be two different things’ 107 and there may be no escaping the fact that ‘Crown sovereignty is a reality, despite the fact that it was probably acquired illegitimately’. 108

Out of necessity, my starting point will therefore be the ‘reality’ of Crown sovereignty, which the courts are unlikely to question. From there I will consider what inroads can be made in Australian courts by learning from the Canadian experience of advancing self-government arguments.

C Advocating the Use of Comparative Law

Inspired by The Migration of Constitutional Ideas, 109 with respect to Topic 1, I consider the extent to which foundational ideas have migrated or could potentially migrate from Canada to Australia in the field of Indigenous self-government rights and whether these ideas could be used in Australian courts.

From the outset, I have felt the need to defend my preference for advocating the use of comparative law in the courts. As Simon Young laments in The Trouble with Tradition, one of the most notable aspects of contemporary Australian law in the field of Indigenous rights jurisprudence is its disinterest in comparative analogy:

The Australian doctrine did begin with some overt reliance on overseas development — the fact of Australia’s legal isolation and the principles of key foreign decisions played a central role in the High Court’s extrication of the Australian law from its murky


108 Ibid.

109 Choudhry, above n 1.
history. However, Australia’s participation in the global exchange was always somewhat selective and circumspect, and general dismissals of the overseas developments gradually become more common, and in the High Court, more abrupt.\footnote{110}{Young, *The Trouble with Tradition*, above n 3, 33 (citations omitted).}

Although there are numerous explanations for this tendency in Australian native title law — ranging from the differences in the manner in which sovereignty was acquired to Australia’s late entry into the field,\footnote{111}{Ibid.} which was quickly followed by the taking of a statutory route\footnote{112}{See pages 28–38 above.} — it is a common mistake to assume that the law of a given time and place develops independently of how the law has developed elsewhere.\footnote{113}{James Gordley, ‘Comparative Law and Legal History’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 753, 763.} It would also be a mistake to completely disregard the common colonial past of countries such as Australia and Canada, where ‘British constitutional traditions and common law continue to have a peculiar hold over the legal imagination of each country’.\footnote{114}{Patrick Macklem, ‘Indigenous Peoples and the Canadian Constitution: Lessons for Australia’ (1994) 5 *Public Law Review* 11, 12.} Both countries also shed formal British ties in ‘an ambivalent, cautious manner’.\footnote{115}{Ibid. See also Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, 2005).} Given there are common justifications for the recognition of rights akin to ‘self-government’ in each country,\footnote{116}{See especially the discussion from page 40 below.} there is a strong case for allowing foundational ideas to migrate between the two jurisdictions.

In Chapters II–IV I focus on the first three modes of migration (the arguments of counsel, judicial determinations and academic critique) before finally considering the fourth mode (constitutional reform) in Chapters V–VI.

**II CONCEPTUALISING SELF-GOVERNMENT**

**A Sovereignty v Self-Government**

The vocabulary of ‘self-government’ may be more easily assumed in Canada and Australia (particularly if limited to the incremental recognition of a particular group’s...
right to regulate and control the manner in which a cultural practice is carried out) than the vocabulary of ‘sovereignty’ or ‘self-determination’ which is often met with hostility.

In the case of Canada, Moodie argues that:

certain manifestations of Canadian sovereignty are here to stay. These include such things as controlling the national borders; participating in global military, peacekeeping and aid missions; maintaining monetary and fiscal policies, currency controls and diplomatic arrangements and initiatives. Such manifestations of Canadian sovereignty reflect the nation’s modern persona and place in the international community, and are thus as much a reflection of Aboriginal Canada as non-Aboriginal Canada. Further I suggest that most Aboriginal people likely would not care much about these things ...

Rather, in his view, the focus is and should be primarily internal: on health, welfare and cultural integrity.

Moodie therefore asserts:

While the legal basis of Canadian sovereignty is admittedly dubious, the question has to be asked whether there is anything worthwhile to be gained from spending time and energy trying to usurp those modern manifestations of Canadian sovereignty that have a dominant external projection (such as global peacekeeping), and/ or are relatively innocuous, and of more or less impartial application to all citizens (such as monetary policy).

In contrast to sovereignty, self-government rights may be conceptualised as including the authority of a particular group to safeguard and develop the group’s language,

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118 See, eg, the discussion in Council for Aboriginal Reconciliation, Recognising Aboriginal and Torres Strait Islander Rights (2000) 14 and Larissa Behrendt, Achieving Social Justice: Indigenous Rights and Australia’s Future (Federation Press, 2003) 87. In an effort to reconcile state sovereignty with the sovereignty of Indigenous peoples the concepts of ‘merged sovereignties’ and ‘shared sovereignty’ have taken favour with many in Canada following the Royal Commission on Aboriginal Peoples: see, eg, Paul Chartrand, ‘Reconciling Indigenous Peoples’ Sovereignty and State Sovereignty’ (Australian Institute of Aboriginal and Torres Strait Islander Studies Research Discussion Paper, Number 26, September 2009).

119 Moodie, above n 91, 33.

120 Ibid.

121 Ibid 34.
culture, identity, institutions and traditions, in addition to the authority to maintain and strengthen the group’s relationships with the land, water and the environment. These rights may be linked to the recognition of native title or Aboriginal title but this need not necessarily be the case.

In advocating self-government rights in Australia, regard is likely to be had to the common justifications advanced in Canada. Macklem, for example, identifies ‘four complex social facts’ that could be used to justify the special relationship of Indigenous groups with the State (three of which apply to Australia):

First, Aboriginal people belong to distinctive cultures that were and continue to be threatened by non-Aboriginal beliefs, philosophies, and ways of life. Second, prior to European contact, Aboriginal people lived in and occupied vast portions of North America. Third, before European contact, Aboriginal people not only occupied North America, they occupied sovereign authority over persons and territory. Fourth, Aboriginal people participated and continue to participate in a treaty process with the Crown.

Although speaking in the context of the Commonwealth reaching an agreement with Aboriginal and Torres Strait Islander peoples, Chief Justice Robert French also draws on a number of these factors, notably ‘their historical relationship with their country and their prior occupancy of the continent’, not to mention the fact that ‘there are those who have maintained and asserted their traditional rights to the present time’.

Regard might also be had to the debate in Canada about whether self-government rights are inherent or contingent (ie depending on state action). However, this debate has

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122 This conceptualisation is taken from the Draft Legal Text released in connection with the Charlottetown Accord, cited in Macklem, Indigenous Difference, above n 66, 28.
been without ‘definitive result’\textsuperscript{126} and may be of limited utility in Australia.\textsuperscript{127} As Moodie summarises, the proponents of the inherent rights approach draw on ‘historical research and analysis, positive international law and basic principles of justice to substantiate a position that inherent Aboriginal sovereignty is legitimate and viable’.\textsuperscript{128} Others, most notably Isaac, have responded in scathing terms:

The court has accepted Canadian sovereignty as a legal and political reality. It does so not on the basis that European nations are superior, but rather that Canadian sovereignty is a well-established fact ... Any recognition of aboriginal sovereignty must take place within the existing legal and constitutional framework. Once this is recognized, aboriginal sovereignty becomes the wrong term to use because sovereignty denotes a form of absolute power. Both inherent rights theory and absolute sovereignty are based upon notions of absolute power. Inherent aboriginal rights are not dependent upon the state and are, therefore, absolute. The use of this type of language is not productive. It aims for the unattainable not only at law but also politically. ... Of course, in order for a right of self-government to work, outside of absolute sovereignty, the federal and provincial governments must support such a right with solid funding and infrastructure support.\textsuperscript{129}

I consider that Isaac’s view is one that is likely to hold considerable sway in Australia were it to migrate as far as the courts given the reluctance of the High Court to interrogate Crown sovereignty. Moreover, by avoiding terminology that the courts are likely to be uncomfortable interrogating, I believe that it will be easier to go to the heart of what, in practical terms, is being sought.

\textsuperscript{126} Moodie, above n 91, 25.

\textsuperscript{127} It is interesting to note that in \textit{Campbell}, discussed at page 51 below, Williamson J avoided using the term ‘inherent’. In Moodie’s view, by carefully demarcating between ‘aboriginal self-government’ on the one hand and ‘sovereignty’ and ‘absolute power’ on the other, Williamson J has realised ‘an intriguing blend of the “inherent” and “contingent” approaches to Aboriginal rights, applied to achieve a pragmatic result.’: Moodie, above n 91, 27.

\textsuperscript{128} Moodie, above n 91, 23.

B  Defining ‘Self-Government’

There are numerous ways of conceptualising or defining Indigenous self-government rights. Given the current state of the law in Australia, my preference is for advocating the incremental recognition of a particular group’s right to regulate and control the manner in which a cultural practice is carried out. This is similar to an approach explored by Monahan, which I believe has the potential to migrate from Canada to Australia — and not just through this thesis.

The incremental recognition of a particular group’s right to regulate and control the manner in which a cultural practice is carried out could be achieved by linking the right to other native title rights or interests, in a similar vein to what McNeil has explored in Canada. McNeil’s hope is that linking rights of self-government to other Aboriginal and treaty rights, especially Aboriginal title to land, will provide ‘a real opportunity’ for Indigenous peoples to assert jurisdiction over their traditional territories.

In the Canadian context, numerous definitions of ‘self-government’ and ‘self-government rights’ have been proposed. On the basis of the case law, for example, Macklem defines ‘Aboriginal self-government’ as ‘a right to make laws in relation to customs, practices, and traditions integral to the distinctive culture of the Aboriginal nation and in relation to the use of reserve lands and lands subject to Aboriginal title’. The ‘inherent right of self-government’ was also defined in the Charlottetown Accord of 1992 as including the authority of ‘duly constituted legislative bodies of the Aboriginal peoples … to safeguard and develop their languages, cultures, economies, identities, institutions and traditions’. However, as a survey of the Canadian case law

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130 As Moodie explains: ‘Precisely what constitutes Aboriginal self-government is virtually impossible to pin down. The concept may have almost as many meanings as it has proponents.’: Moodie, above n 91, 4.


133 Ibid 5.


135 An ‘inherent right’ or ‘power’ can be contrasted to self-government powers exercised by many First Nations under the Indian Act, RSC 1985, which ‘in contrast to the USA, have been conceptualised as a delegated rather than an inherent power’: Charters, above n 3, 174.

136 Monahan, Constitutional Law, above n 131, 466.
indicates, the way in which self-government rights are conceptualised may depend on the facts of the case.

III STATE OF THE LAW IN CANADA

Explorations of Indigenous self-government rights in Canada invariably refer to the landmark court decisions of R v Pamajewon and Delgamuukw v British Columbia. However, the significance of these judgments, along with the ones preceding them, is heavily contested. The ways in which they constrain future self-government claims is also slowly coming to light in recent decisions of the Supreme Court of Canada and the British Columbia Supreme Court.

A Calder

The Supreme Court of Canada first confirmed the existence of Aboriginal title as a concept in Canadian common law in 1973 in Calder v Attorney-General of British Columbia. Although Aboriginal title was not proven by the appellants who were members of the Nisga’a nation, Calder is considered to be a ground breaking judgment as it was the first time that the Supreme Court ‘emphatically rejected the argument that the mere assertion of sovereignty by the European powers in North America was necessarily incompatible with the survival and continuation of aboriginal rights’.

B Guerin

The Supreme Court’s reasoning in Guerin v The Queen (which arose out of a controversy surrounding the lease of lands of the Musqueam Indian Band to the Shaughnessy Heights Golf Club of Vancouver) shed greater light on the effect of Crown sovereignty. As explained by Moodie, the Court made various assumptions:

1. That there can only be one sovereign power within a given ‘nation’;
2. That a change in sovereignty, and/or in governmental control, can occur through various

137 [1996] 2 SCR 821 (‘Pamajewon’).
138 [1997] 3 SCR 1010 (‘Delgamuukw’).
139 [1973] SCR 313 (‘Calder’).
140 As explained in Mitchell v Minister for National Revenue [2001] 1 SCR 911, 954 (Binnie J). For discussion about the significance of the Calder decision see Hamar Foster, Heather Raven and Jeremy Webber (eds), Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights (University of British Columbia Press, 2007).
141 [1984] 2 SCR 335 (‘Guerin’).
means, and in fact had occurred in Canada as between the Aboriginal sovereign power and the subsequent British sovereign power; and (3) that a ‘change in sovereignty,’ in the sense of overall governmental control, does not necessarily drag with it full control of the land over which the governmental control is exercised.\textsuperscript{142}

There was also no interest on the part of the Court in scrutinising the general sovereign power of the Crown.\textsuperscript{143} As will be discussed below, the conclusions drawn in relation to sovereign power in Guerin are in many respects similar to those drawn in Mabo [No 2]\textsuperscript{144} and Yorta Yorta\textsuperscript{145} in Australia.\textsuperscript{146}

C Sparrow

In \textit{R v Sparrow} a member of the Musqueam Band in British Columba was found to have been fishing with a drift net that was longer than had been permitted by the band’s food fishing licence.\textsuperscript{147} While the Supreme Court ultimately ordered that a new trial be held, the decision provides guidance on how s 35(1) should be interpreted.

The ‘contingent rights approach’ taken by the Court (which means, broadly, that the rights depend on state action) has been heavily criticised. According to Ash and Macklem, by taking this approach the ‘Court severely curtailed the possibility that s 35(1) includes an aboriginal right to sovereignty and rendered fragile s 35(1)’s embrace of a constitutional right to self-government’.\textsuperscript{148}

The Court also found that ‘there was from the outset never any doubt that sovereignty and legislative power, and the underlying title, to such lands vested in the Crown’.\textsuperscript{149} Such a finding seems to preclude self-government — unless, of course, self-government rights amount to something less than ‘legislative power’.

\textsuperscript{142} Moodie, above n 91, 17.
\textsuperscript{143} Ibid 18.
\textsuperscript{144} (1992) 175 CLR 1.
\textsuperscript{145} \textit{Members of the Yorta Yorta Aboriginal Community v Victoria} (2002) 214 CLR 422, 443–4 (‘Yorta Yorta’).
\textsuperscript{146} See the discussion entitled ‘No Parallel “Law-Making System”’ on pages 63–65 below.
\textsuperscript{147} [1990] 1 SCR 1075 (‘Sparrow’).
\textsuperscript{149} [1990] 1 SCR 1075, 1103 (emphasis added).
D Van der Peet

*R v Van der Peet* involved a claim, which was ultimately unsuccessful, by the Sto:lo Nation in British Columbia to an Aboriginal right to fish for the purposes of trade or sale.\(^{150}\) Despite the fact that *Van der Peet* is more well known for establishing the ‘distinctive practices’ test for determining if an Aboriginal right exists,\(^{151}\) some critics regard the case to be significant in terms of self-government arguments.

In *Van der Peet* Lamer CJ referred with approval to American and Australian authority, namely *Worcester v Georgia*\(^{152}\) and *Mabo [No 2]*,\(^{153}\) in deciding that Aboriginal rights arise from the ‘social organization and distinctive cultures of Aboriginal peoples’.\(^{154}\) While the potential use of such arguments in Australia is explored below, it is worth noting at this point that the reliance Lamer CJ placed on *Mabo [No 2]* in making such a finding, which could in turn be used in Australia, demonstrates the potentially circular nature of the migration of foundational ideas. In addition, although the US ‘domestic dependent nations’ approach has been rejected in Australia,\(^{155}\) it is possible that relevant cases such as *Worcester v Georgia* will be viewed in a more positive light in Australia when considered through the lens of Canadian jurisprudence, effectively giving rise to a global dialogue.\(^{156}\)

From Lamer CJ’s comments regarding the social organisation of Aboriginal peoples, Monahan argues that it follows that ‘Aboriginal rights at common law must include some form of right to self-government’.\(^{157}\) This is because:

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\(^{150}\) [1996] 2 SCR 507 (‘*Van der Peet*’).

\(^{151}\) In the words of Lamer CJ, in order to be an ‘Aboriginal right’ protected by s 35(1) of the *Constitution Act 1982* ‘an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right’: [1996] 2 SCR 507, 549.

\(^{152}\) 31 US (6 Pet) 515 (1832).

\(^{153}\) (1992) 175 CLR 1.

\(^{154}\) [1996] 2 SCR 507, 511.

\(^{155}\) See page 61 below.

\(^{156}\) As Choudhry explains, ‘[d]ialogical interpretation in constitutional adjudication is an example of the type of comparative engagement that lies outside the framework of constitutional borrowing, but which falls within the scope of the migration of constitutional ideas’: Choudhry, above n 4, 22.

\(^{157}\) Monahan, *Constitutional Law*, above n 131, 468.
Self-government is the very embodiment of the social organization and cultural identity of Aboriginal peoples, providing the context and the foundation for a social order in which certain practices, customs, and traditions can develop and flourish.\textsuperscript{158}

Hence, according to Monahan:

What \textit{Van der Peet} implies, in short, is that Aboriginal rights do not merely consist of the right to perform certain identifiable activities but must also encompass the right to regulate and control (or govern) the manner in which those activities are carried out.\textsuperscript{159}

However, others have stressed the limiting nature of the analysis of the Court in \textit{Van der Peet}.\textsuperscript{160} Moodie, for example, emphasises the importance placed on crown sovereignty.\textsuperscript{161} As Moodie explains, for Lamer CJ ‘the doctrine of aboriginal rights exists, and is recognized and affirmed by s 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here ....’.\textsuperscript{162} However, Lamer CJ did not interrogate crown sovereignty. Rather, his Honour considered s 35(1) to involve ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’.\textsuperscript{163}

\section*{E Pamajewon}

In \textit{Pamajewon}, a case which arose out of criminal convictions related to gambling activities on a reserve, the Eagle Lake First Nation’s characterisation of its claim as an assertion of a broad right to manage the use of its reserve lands was rejected by the Supreme Court.\textsuperscript{164} As Lamer CJ explained, this would ‘cast the Court’s inquiry at a level of excessive generality’.\textsuperscript{165} Instead, the claim was said to involve the assertion of a narrow right to participate in and regulate high stakes gambling on the reserve.\textsuperscript{166} Although the Supreme Court assumed that a right to self-government existed (for the

\footnotesize{\begin{itemize}
  \item \textsuperscript{158} Ibid.
  \item \textsuperscript{159} Ibid.
  \item \textsuperscript{160} Moodie, above n 91, 19–20.
  \item \textsuperscript{161} Ibid 19.
  \item \textsuperscript{162} Ibid 19 citing \textit{Van der Peet} [1996] 2 SCR 507, 547 (Moodie’s emphasis).
  \item \textsuperscript{163} [1996] 2 SCR 507, 539.
  \item \textsuperscript{164} [1996] 2 SCR 821.
  \item \textsuperscript{165} Ibid 834.
  \item \textsuperscript{166} See also Macklem, \textit{Indigenous Difference}, above n 66, 173.
\end{itemize}}
sake of analysis), the Court held that the gambling activities in question did not satisfy the Van der Peet ‘distinctive practices’ test, which was the relevant test at the time. As a result, the appellants’ claim failed.

Some go as far as saying the Pamajewon decision was a ‘setback’, which fragments the right of self-government. However, it is also possible to view the decision in a more positive light given the Court approached the right of self-government as a free-standing right, which might be a promise of things to come — if, that is, the Court is forced to consider the issue. As Moodie points out, the way in which the Supreme Court ‘deftly sidestepped’ the issue of self-government in this case, and has since avoided ‘tackling it head-on’, is evidence that it is something in which the Court would prefer not to become ‘entangled’.

F Delgamuukw

The next case to attempt to make out a claim to self-government was Delgamuukw, in which the Gitxsan and Wet’suwet’en asserted that pre-existing Aboriginal rights and title had not been extinguished in their traditional territory in British Columbia. However, once again the Supreme Court decided that ‘this is not the right case for the Court to lay down the legal principles to guide future litigation’. Although other aspects of the appellants’ claim were successful, ultimately the errors of the trial judge made it impossible for the Court to determine whether the self-government claim had

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167 See also Monahan, Constitutional Law, above n 131, 468.

168 The capacity of this test to accommodate cultural evolution has been critically assessed in a number of articles: see Simon Young, ‘Native Title in Canada and Australia post Tsilhqot’in: Shared Thinking or Ships in the Night?’ (2009) 4(2) Rights, Laws: Issues of Native Title 1, 5 n 28.


170 As McNeil observes, ‘[t]he Pamajewon approach has made it very impractical, if not impossible, for First Nations to prove an Aboriginal right of self-government in Canadian courts. The approach fragments the right of self-government into little bits of jurisdiction, places an unreasonable burden of proof on First Nations, and is ultimately very costly.’: McNeil, ‘What is the Inherent Right of Self-Government?’, above n 70, 4.

171 Ibid 3.

172 Moodie, above n 91, 18. See, also, McHugh, Aboriginal Societies and the Common Law, above n 3. McHugh describes the attitude of the Canadian courts as ‘non-committal’: at 388.


174 Ibid 1114 (Lamer CJ).
been made out.\textsuperscript{175} The Court left the matter for a future trial, which never eventuated given the matter was settled out of court.

In the British Columbia Supreme Court, McEachern CJ had reached the following conclusion:

\begin{quote}
After much consideration, I am driven to find that jurisdiction and sovereignty are such absolute concepts that there is no halfway house ... Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any court to award.\textsuperscript{176}
\end{quote}

McEachern CJ also found that ‘all legislative jurisdiction was divided between Canada and the province and there was no room for aboriginal sovereignty which would be recognized by the law or by the courts’.\textsuperscript{177}

On appeal to the Supreme Court, the parties gave the self-government issue less weight, perhaps acknowledging, as Lamer CJ suggested, that it was not the ‘right case’.\textsuperscript{178} In Lamer CJ’s view, ‘[t]he broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government’.\textsuperscript{179} Unlike the \textit{Report of the Royal Commission on Aboriginal Peoples}, which devotes 277 pages to the issue, Lamer CJ explained that the Court ‘received little in the way of submissions that would help us to grapple with these difficult and central issues’.\textsuperscript{180} It was therefore found to be ‘imprudent’ to step into ‘the breach’.\textsuperscript{181}

\textsuperscript{175} Ibid.

\textsuperscript{176} \textit{Delgamuukw v British Columbia} (1991) 79 DLR (4th) 185, 454 (emphasis added).

\textsuperscript{177} Ibid 453. See also \textit{Delgamuukw v British Columbia} (1993) 104 DLR (4th) 470, 520 (Macfarlane JA). In the British Columbia Court of Appeal, Lambert JA, in contrast to Macfarlane JA, found that there was no inconsistency between the distribution of powers in the \textit{Constitution Act 1867 (Imp)}, 30 & 31 Vict, c 3 and an Aboriginal right of self-government. This was because the self-government claim of the Gitksan and Wet’suwet’en was not a claim to exercise exclusive or paramount legislative power within their territories: see Kent McNeil, \textit{Emerging Justice?: Essays on Indigenous Rights in Canada and Australia} (Native Law Centre, 2001) 83.

\textsuperscript{178} [1997] 3 SCR 1010, 1115.

\textsuperscript{179} Ibid.

\textsuperscript{180} Ibid.

\textsuperscript{181} Ibid.
Despite this, Lamer CJ made various statements that have since been seized by commentators and counsel alike.\textsuperscript{182} Drawing on Pamajewon, Lamer CJ again noted (by way of obiter) that ‘rights to self-government, if they existed, cannot be framed in excessively general terms’.\textsuperscript{183} Lamer CJ also asserted, in terms reminiscent of Brennan J’s ‘skeleton of principle’ in Mabo [No 2],\textsuperscript{184} that the accommodation of Aboriginal claims and perspectives ‘must be done in a manner which does not strain “the Canadian legal and constitutional structure”’.\textsuperscript{185}

Monahan claims that like Van der Peet, Delgamuukw implies ‘that the historic use and occupation of land by Aboriginal peoples must include some form of legal protection for self-government’.\textsuperscript{186} In so finding, Monahan draws on the following aspects of Lamer CJ’s judgment:

- the explanation of the source of Aboriginal title as the ‘relationship between the common law and pre-existing systems of Aboriginal law’;\textsuperscript{187} and
- the description of Aboriginal title as being held communally (with decisions with respect to the land being made by the community in question).\textsuperscript{188}

Similarly, in McNeil’s view, by accepting that Aboriginal nations have legal personality which gives them the capacity to hold property and by recognising the decision-making authority of those nations, Lamer CJ implicitly acknowledges the inherent right of self-government.\textsuperscript{189} In an oft-cited passage Lamer CJ explained:

\begin{quote}
Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are
\end{quote}

\textsuperscript{182} See especially the discussion of Tsilhqot’in Nation at pages 55–57 below.

\textsuperscript{183} [1997] 3 SCR 1010, 1114.

\textsuperscript{184} (1992) 175 CLR 1, 30.


\textsuperscript{186} Monahan, Constitutional Law, above n 131, 467.

\textsuperscript{187} Ibid 468. See Delgamuukw [1997] 3 SCR 1010, 1098.

\textsuperscript{188} Monahan, Constitutional Law, above n 131, 468. See Delgamuukw [1997] 3 SCR 1010, 1082.

\textsuperscript{189} McNeil, Emerging Justice?, above n 177, 122.
also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.\(^{190}\)

In addition, Lamer CJ emphasised the way in which Aboriginal title ‘encompasses the *right to choose* to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples’.\(^{191}\) A distinction was drawn here, which will be of limited consequence in Australia,\(^{192}\) between Aboriginal title and Aboriginal rights: ‘aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The Aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component’\(^{193}\).

Like Monahan and McNeil, Macklem claims that ‘*Delgamuukw* contemplates the very possibility that *Pamajewon* sought to foreclose: a First Nation successfully asserting a broad Aboriginal right to regulate and engage in economic activity on reserve lands unrelated to traditional patterns of territorial use and enjoyment’.\(^{194}\) This may be taking an overly optimistic outlook, but Macklem’s characterisation of how the two cases can be read together is more constrained:

*Delgamuukw* and *Pamajewon* suggest that the *Canadian Constitution* recognizes and affirms an inherent Aboriginal right of self-government — specifically, a right to make laws in relation to customs, practices, and traditions integral to the distinctive culture of the Aboriginal nation and in relation to the use of reserve lands and lands subject to Aboriginal title.\(^{195}\)

\(^{190}\) [1997] 3 SCR 1010, 1082–3 [115]. Russell similarly concludes that the Court’s ‘insistence on the communal nature of Aboriginal has an important implication for self-government. Because Aboriginal title is a collective right to land held by all members of an Aboriginal nation, “[d]ecisions with respect to that land are also made by that community.” Making decisions about the care and use of land is a fundamental activity of government’: Russell, ‘High Courts and the Rights of Aboriginal Peoples’, above n 97, 272 (citations omitted).

\(^{191}\) [1997] 3 SCR 1010, 1111–12 (emphasis added).

\(^{192}\) In Australia there is no equivalent to the Aboriginal title/Aboriginal rights dichotomy. Lamer CJ’s statements also relate to the fiduciary duties of the Crown which have not been recognised in Australia. As Lamer CJ goes on to explain, ‘[t]his aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands’: [1997] 3 SCR 1010, 1113.

\(^{193}\) [1997] 3 SCR 1010, 1113.


\(^{195}\) Ibid.
Others, such as Moodie, view Delgamuukw and Pamajewon in a less positive light, considering that after these cases there was a likelihood of narrow results, while Borrows has criticised the Supreme Court of Canada for failing to interrogate Crown sovereignty.

G Campbell

Subsequent decisions of the lower courts have made room for greater optimism. The Campbell v British Columbia (Attorney-General) decision arose from the controversy surrounding the Nisga’a Agreement, which was signed in 1998 by the Nisga’a, British Columbia and Canada. The Agreement, which only recognises Nisga’a ownership of eight to nine per cent of the lands claimed, recognises the authority of the Nisga’a Lisims Government and the Nisga’a Village Governments.

As Russell explains:

This system of Nisga’a governance has jurisdiction over a wide range of matters, including public order, environmental protection, education, health, social welfare, language and culture. In most areas of law-making, federal and provincial laws prevail over Nisga’a law. But in matters essential to their collective life as a people or nation, including management of their own lands, their Constitution, citizenship in the Nisga’a nation, the maintenance and fostering of their language and culture, Nisga’a laws prevail over conflicting federal or provincial laws.

In Russell’s view, this amounts, in effect, to recognising the Nisga’a as having ‘a share of sovereign law-making authority in Canada’.

The ratification process to the Nisga’a Agreement was not smooth sailing. A majority of just over 50 per cent was achieved in the Nisga’a referendum, due to many members of

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196 Moodie, above n 91, 21. See also n 108 above.


198 (2000) 189 DLR (4th) 333 (‘Campbell’).


200 Ibid.

201 Ibid.
the Nisga’a Nation opposing the agreement because, in their view, it surrendered too much of the Nisga’a land and sovereignty. They were also opposed to the clause stating that the Agreement was ‘the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga’a nation’.202

On the other side of the fence, the Liberals, who were in opposition at the time, objected to the primacy of Nisga’a laws in the areas discussed above. The government’s supporters in the Senate also closely examined the Agreement’s implications for Canadian sovereignty. It was therefore not until early 2000 that ratification was completed.203

The Nisga’a Agreement was challenged in the courts by Gordon Campbell, the British Columbia Liberal leader, with the support of two former justices of the Supreme Court of Canada, on the grounds that it unconstitutionally recognised Nisga’a sovereignty.204

One of the arguments made in Campbell was that ss 91 and 92 of the Constitution Act 1867205 ‘exhaustively’ distributed legislative power between the Parliament and legislative assemblies.206 Further, legislative power could not be abrogated by those governments without constitutional amendment.207

Williamson J of the British Columbia Supreme Court rejected the arguments and found the Agreement to be constitutionally valid.208 His Honour held that the Constitution Act 1867 did not exhaustively distribute legislative power as there was a ‘gap’ into which the ‘diminished but not extinguished power of self-government which remained with the Nisga’a people in 1982’ could fit.209 As Williamson J explains:

Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be

202 Ibid.
203 Ibid.
204 Ibid 182–3.
205 Constitution Act 1867 (Imp), 30 & 31 Vict, c 3 (‘Constitution Act 1867’).
209 Ibid 376.
replaced or modified by the negotiation of a treaty. Post–1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga’a Final Agreement does the latter expressly.210

To the Australian observer this statement highlights two things: first, the significance of the Constitution Act 1982 when it comes to the extinguishment of self-government rights; and secondly, the way in which treaties can be used to advance self-government rights.

Williamson J held that a ‘limited right’ to self-government can be constitutionally protected by s 35(1).211 As Moodie explains:

While Williamson J determined that a right to self-government exists (at least for the Nisga’a people), and is protected by s 35(1) of the Constitution Act, 1982, he was careful to say that it is a ‘limited form of self-government which remained with the Nisga’a after the assertion of sovereignty,’ and that ‘the Nisga’a government ... does not have absolute or sovereign powers.’212

Williamson J also remarked that ‘the right to determine the appropriate use of the land to which an aboriginal nation holds title is inextricably bound up with that title’.213 This statement has been drawn upon in subsequent litigation214 and could be used in a similar fashion in Australia. Williamson J ultimately found that ‘the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by s 35’.215

H Mitchell

Mitchell v Minister for National Revenue arose out of a situation where a citizen of the Haudenosaunee (Iroquois) Confederacy brought goods from New York State into

211 Ibid 355.
214 See the discussion of Tsilhqot’ in Nation v British Columbia [2007] BCSC 1700 at pages 55–57 below.
215 Ibid.
Canada without paying Canadian custom duties. In his defence, the respondent invoked an Aboriginal right to take goods across the border.\textsuperscript{216}

The Supreme Court dismissed the claim, finding that the right had not been proven. While McLachlin CJ found it unnecessary to rule on the applicability of the sovereign incompatibility principle, which had been argued by the federal government, she remarked in \textit{obiter} that ‘s 35(1) of the Constitution Act 1982 extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty’.\textsuperscript{217} McLachlin CJ then declined to ‘comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s 35(1) until such time as it is necessary for the Court to resolve this issue’\textsuperscript{218} — perhaps in ‘a continuing hope that things will sort themselves out in the political arena’.\textsuperscript{219}

In contrast, Binnie J’s judgment (agreed to by Major J and concurring in result with McLachlin CJ’s majority judgment) explicitly invoked the sovereign incompatibility principle’. Binnie J held that the ‘international trade/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty’.\textsuperscript{220} However, Binnie J emphasised that the doctrine should be ‘sparingly applied’\textsuperscript{221} and ‘with caution’.\textsuperscript{222}

Binnie J also evidenced apparent support for the idea of ‘merged’ or ‘shared’ sovereignty advanced by the Royal Commission on Aboriginal Peoples, by quoting directly from the Commission.\textsuperscript{223} Binnie J explained that ‘[m]erged sovereignty asserts

\textsuperscript{216} [2001] 1 SCR 911 (‘\textit{Mitchell}’).
\textsuperscript{217} Ibid 952–3.
\textsuperscript{218} Ibid 954.
\textsuperscript{219} Moodie, above n 91, 29.
\textsuperscript{220} [2001] 1 SCR 911, 990–1.
\textsuperscript{221} Ibid 987.
\textsuperscript{222} Ibid 986 (emphasis in original).
\textsuperscript{223} Ibid 977. While the ‘governments are sovereign within their respective spheres’, ‘many of their powers are shared in practice and may be exercised by more than one order of government’: Canada, \textit{Report on the Royal Commission on Aboriginal Peoples} (1996) vol 2, 240–1. On the influence of the report see: David Stack, ‘The First Decade of RCAP’s Influence on Aboriginal Law’ (2007) 70 Saskatchewan Law Review 143. See also Chartrand, above n 118.
that First Nations were not wholly subordinated to non-aboriginal sovereignty but over
time became merger partners’. 224 This is because:

If the principle of ‘merged sovereignty’ articulated by the Royal Commission on
Aboriginal Peoples is to have any true meaning, it must include at least the idea that
aboriginal and non-aboriginal Canadians together form a sovereign entity with a
measure of common purpose and united effort. It is this new entity, as inheritor of the
historical attributes of sovereignty, with which existing aboriginal and treaty rights must
be reconciled. 225

Moreover, ‘Aboriginal peoples do not stand in opposition to, nor are they subjugated
by, Canadian sovereignty. They are part of it.’ 226

I  Tsilhqot’in Nation

In the 2007 British Columbia Supreme Court decision Tsilhqot’in Nation v British
Columbia the plaintiff, Chief Roger William, sought declarations of Tsilhqot’in
Aboriginal title in a part of the Cariboo-Chilcotin region of British Columbia. 227 The
action was provoked by proposed forestry activities in Tachelach’ed and the Trapline
Territory. The trial of the matter lasted 339 days and the final argument of the plaintiff
amounts to some 979 pages. 228 Although commentary on the case has focused on other
issues, such as continuity and the test for Aboriginal title, 229 Tsilhqot’in Nation also
provides an indication of the form in which self-government rights may be advanced in
the future — and it is in this form that such ideas may migrate (and perhaps
permanently settle) in Australia.

225 Ibid 977 (emphasis in original).
226 Ibid 981.
227 [2007] BCSC 1700 (‘Tsilhqot’in Nation’).
228 Young, ‘Native Title in Canada and Australia post Tsilhqot’in’, above n 168.
229 See, eg, Jack Woodward, Pat Hutchings and Leigh Anne Baker, ‘Rejection of the “Postage Stamp”
Approach to Aboriginal Title: The Tsilhqot’in Nation Decision’ (Unpublished paper, Woodward &
Company, 18 January 2008) <http://www.woodwardandcompany.com/media/pdfs/jack-postagestamp-
cle-2008.pdf>; Young, ‘Native Title in Canada and Australia post Tsilhqot’in’, above n 168.
The plaintiffs submitted that the content of the Tsilhqot’in Aboriginal title included ‘the right to determine the use of Aboriginal title lands’:\(^\textit{230}\)

Aboriginal title confers the right to determine the uses to which the lands will be put. Because Aboriginal title vests communally, it is the Aboriginal community that is entitled to decide how the lands will be used. Accordingly, unlike other real property interests, Aboriginal title vests in a collective as the legal personality required to hold and control the use of property in its own right.\(^\textit{231}\)

The authorities cited for this proposition were the passages of \textit{Delgamuukw} referred to above\(^\textit{232}\) and McNeil’s work on self-government rights,\(^\textit{233}\) which emphasise the communal nature of Aboriginal title and the right to choose to what uses land can be put.

The plaintiffs further argued, relying on the passages from Williamson J’s judgment in \textit{Campbell} extracted above,\(^\textit{234}\) that the ‘authority to decide the appropriate use of the lands held subject to Aboriginal title is governmental in nature’\(^\textit{235}\).

The content of the Aboriginal title was not ultimately decided by the court due to procedural irregularities,\(^\textit{236}\) so the ‘right to determine the use of Aboriginal title lands’, which can be seen as a species of self-government right, was not the subject of the decision. However, Vickers J stated in obiter that ‘[t]itle encompasses the right to determine how land will be used and how forests will be managed in the claim area’\(^\textit{237}\).

The decision was on appeal at the time of writing. It therefore remains to be seen whether Vickers J’s opinion that Tsilhqot’in Aboriginal title does exist will be upheld so as to extend to ‘the right to determine the use of Aboriginal lands’.

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\(^{231}\) Ibid.


\(^{234}\) See (2000) 189 DLR (4\textsuperscript{th}) 333, 367 discussed from page 51 above.

\(^{235}\) William, above n 230, 134.

\(^{236}\) See [2007] BCSC 1700 [129].

\(^{237}\) Ibid [1134]. See also at [1048].
If, in time, the ‘right to determine the use of Aboriginal lands’ is tested, there will then be an even greater wealth of Canadian material on which Australian advocates can draw.

IV  **STATE OF THE LAW IN AUSTRALIA**

In *Thorpe v Commonwealth (No 3)* Kirby J reflected on the state of the law in Australia. In his view, *Mabo (No 2)*[^238] and *Wik Peoples v Queensland*[^239] demonstrate that:

sometimes Australian law ... is not precisely what might earlier have been expected or predicted. Australian law at this time is in the process of a measure of re-adjustment, arising out of the appreciation ... of injustices which statute and common law earlier occasioned to Australia’s indigenous peoples.[^240]

The full extent of this re-adjustment, particularly whether it will encompass self-government rights, is yet to be determined. It may be that through the migration of foundational ideas from Canada, Australian courts will be forced ‘to identify and challenge the assumptions’ underlying Australian law.[^241]

While ‘the common law of native title as enunciated in *Mabo (No 2)* did not involve any yielding of sovereignty’,[^242] as French explains, this is not the end of the matter:

The acquisition of that sovereignty, however, did not operate directly upon the traditional laws and customs of indigenous people or the relationship with land and waters to which they give rise. The common law in its recognition of those traditional relationships with land does not do so. ... Recognition can be regarded as the outcome of the application of the rules under which certain rights arising at common law are ascertained which are vested in an indigenous community by virtue of its relationship to land or waters. Extinguishment by executive or legislative action is the result of the exercise of the non-indigenous sovereignty which bars or qualifies common law recognition. Importantly it has

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[^239]: (1996) 187 CLR 1 (‘*Wik*’).
[^240]: (1997) 71 ALJR 767, 775.
[^241]: Choudhry, above n 4, 24.
[^242]: French, ‘Native Title — A Constitutional Shift’, above n 86, 142. Rather, ‘[i]t rested on the non-justiciable proposition that the Crown acquired sovereignty over the land upon its annexation of the Australian colonies’: at 142.
nothing to say about traditional law or custom or the relationship of Aboriginal people to their land.\textsuperscript{243}

In my view, it remains to be seen whether a right to regulate and control the manner in which a cultural practice is carried out (particularly practices relating to land) is a ‘right arising at common law’, which can be vested in an Indigenous community by virtue of its status as a self-governing entity before colonisation. However, to bring such an argument, first it is necessary to contend with numerous High Court statements that could be construed against the recognition of self-government rights by the Australian common law.\textsuperscript{244}

A  Coe [No 1]

Paul Thomas Coe brought an action in 1978 in the original jurisdiction of the High Court, seeking to sue the Commonwealth of Australia ‘on behalf of the Aboriginal community and nation of Australia’.\textsuperscript{245} The original Statement of Claim stated that ‘[t]he Plaintiff is a member of the Wiradjeri Tribe and has authority from this and from other tribes and the whole aboriginal community and nation to bring this action’.\textsuperscript{246} Coe [No 1] involved an appeal from Mason J’s decision refusing the application to amend the statement of claim. The appeal was dismissed by a bench of four justices of the High Court.

As summarised by Gibbs J, the amended statement of claim pleaded that ‘[t]here is an aboriginal nation which, before European settlement, enjoyed exclusive sovereignty over the whole of Australia, and which still has sovereignty’.\textsuperscript{247}

Gibbs J found:

\textsuperscript{243} Ibid (emphasis added).

\textsuperscript{244} My focus is on High Court statements. Although early decisions of the New South Wales Supreme Court appear to have been sympathetic to such claims, there was soon to be an about turn in the jurisprudence: see, eg, \textit{R v Ballard} (Unreported, Supreme Court of NSW, Forbes CJ and Dowling J, 13 June 1829) and \textit{R v Bonjon} (Unreported, Supreme Court of NSW, Willis J, 16 September 1841); \textit{contra} \textit{R v Murrell} (Unreported, Supreme Court of NSW, Forbes CJ, Dowling and Burton JJ, 11 April 1836) and the decision of the Privy Council, \textit{Cooper v Stuart} (1889) 14 App Cas 286.

\textsuperscript{245} Coe \textit{v} Commonwealth [No 1] (1979) 53 ALJR 403 (‘Coe [No 1]’).

\textsuperscript{246} Ibid 404.

\textsuperscript{247} Ibid 407.
it is not possible to say ... that the aboriginal people of Australia are organised as a ‘distinct political society separated from others,’ or that they have been uniformly treated as a state ... They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.  

Jacobs J similarly held that disputing the validity of the Crown’s claim to sovereignty ‘are not matters of municipal law but of the law of nations and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged’. However, in partial dissent, Jacobs J (with Murphy J agreeing) found that those allegations that were not ‘based on a denial of the sovereignty of the British, and now the Australian, Crown’ could proceed:

It has been submitted on behalf of the Commonwealth that this second branch of the proposed statement of claim is also a claim to a sovereignty vested in the aboriginal nation adverse to the sovereignty of the Commonwealth. But that cannot be correct in view of the allegation in par 21A that the claims of Cook and Phillip on behalf of the British Crown established in Australia the laws, customs, benefits and usages of the common law. Then in par 11X it is alleged that the proclamations set out in par 21A entitled the plaintiff and the aboriginal people to the continuation of the proprietary and/or possessory and other rights which they had prior to 1770 unless taken away by bilateral treaty, lawful compensation and/or lawful international intervention. The substance of this allegation is that the common law entitled the aboriginal people to the continuation of ‘the proprietary and/or possessory rights’ which they had prior to 1770. The reference to the manner in which the rights may be lost is not the substance of the matter alleged. Paragraph 12X then alleges that (inter alios) servants and agents of the Commonwealth have unlawfully and contrary to the common law dispossessed certain of the aboriginal people of certain of their rights, privileges, interests, claims and entitlements in respect of their lands. The presence in the Statement of Claim of these allegations is not consistent with the Commonwealth’s

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248 Ibid 408 (emphasis added). As discussed at page 69 above, Gibbs J incorrectly characterises ‘the aboriginal people of Australia’ as a homogenous group.

249 Ibid 410.
contention that the whole Statement of Claim is based on a denial of the sovereignty of the British, and now the Australian, Crown.  

This may be an indication that self-government claims that are not based on a denial of Crown sovereignty are more likely to be permitted to proceed.

B Mabo [No 2]

It is often remarked that in the landmark decision of Mabo [No 2] ‘terra nullius’ was overturned in relation to property but not in relation to sovereignty. There are several reasons for this. In the first place, the counsel for the Murray Islanders who brought the claim steered well clear of the issue of sovereignty, perhaps on an understanding that for tactical and other reasons it would be important not to ask too much of the High Court. Rather, what was sought (and ultimately granted by the High Court) was a declaration of rights to the use and enjoyment of the traditional lands in question.

There is no doubt that the High Court would not have looked favourably on a challenge to Crown sovereignty. In any event, the High Court took the opportunity to make it clear that the British acquisition of sovereignty could not be contested in domestic courts. As put simply by Coombs, ‘[t]hat judgment cannot be disputed’. In addition, Brennan J infamously held that ‘[a]lthough this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the skeleton of principle’.

Despite the fact that Mabo [No 2] affirmed that Crown sovereignty cannot be questioned before the High Court, the framework for the recognition of native title set

250 Ibid 411 (emphasis added).
251 The legal justification for settlement which roughly translates from the Latin to ‘land belonging to no one’.
253 (1992) 175 CLR 1, 31–2 (Brennan J), 79 (Deane and Gaudron JJ) and 130 (Dawson J). All that could be done was to determine ‘the consequences of an acquisition [of sovereignty] under municipal law’: at 32 (Brennan J).
255 (1992) 175 CLR 1, 30.
down in the case could be applied to self-government rights (especially those taking the form of rights to regulate and control the manner in which a cultural practice is carried out). As Brennan J explains:

Native title has its origins in and is given its content by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.\textsuperscript{256}

Similarly, Deane and Gaudron JJ were of the view that there was room for ‘the continued operation of some local laws and customs among the native people and even the incorporation of some of those laws and customs as part of the common law’.\textsuperscript{257}

This can be conceptualised in terms of two partially overlapping circles (one representing the common law and the other traditional laws and customs) in which the small area of overlap depicts common law native title or, in the case of self-government rights, those rights capable of recognition by the common law. Whether this overlap can only be in relation to land is something that will need to be tested in the courts.

C Coe [No 2]

In the hope that \textit{Mabo [No 2]} had opened the door to sovereignty claims, Isabel Coe instituted new proceedings in the High Court. The first ground addressed in the statement of claim was described as the ‘sovereignty claim’ and involved pleadings that ‘the Wiradjuri are a sovereign nation of people’, or, in the alternative ‘a domestic dependent nation’ or ‘a free and independent people’.\textsuperscript{258} In \textit{Coe [No 2]} Mason J heard the applications of the Commonwealth and New South Wales in relation to the statement of claim and ordered that it be struck out.

It appears likely that the way in which \textit{Coe [No 1]} and \textit{Coe [No 2]} were argued affected the High Court’s consideration of the issues. However, even if the claims are reconceptualised, various difficulties can be identified through considering the

\begin{footnotes}
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\item[256] Ibid 82.
\item[257] Ibid 79. See also Lisa Strelein, \textit{Compromised Jurisprudence: Native Title Cases Since Mabo} (Aboriginal Studies Press, 2\textsuperscript{nd} ed, 2009) 127.
\item[258] \textit{Coe [No 2]} v \textit{Commonwealth} (1993) 68 ALJR 110, 112 (‘\textit{Coe [No 2]’}).
\end{footnotes}
judgments of the High Court. In particular, the following statement of Mason CJ in *Coe [No 2]* needs to be taken into consideration:

*Mabo [No 2]* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are ‘a domestic dependent nation’ entitled to self government and full rights … or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.  

In my view, it would therefore need to be demonstrated that the right to regulate and control the manner in which a cultural practice is carried out is a right ‘created or recognised by … the common law’.

D Walker

The context in which such arguments are attempted may have a lot of bearing on how they are developed and ultimately received. In *Walker v New South Wales* the plaintiff had been charged ‘with an offence against the laws of New South Wales which allegedly occurred at Nimbin, a place said to be within the area of the Bandjalang “nation” of Aboriginal people’. In the statement of claim it was alleged that ‘the common law is only valid in its application to Aboriginal people to the extent to which it has been accepted by them’ and ‘[t]he Parliaments of the Commonwealth of Australia and of the States lack the power to legislate in a manner affecting aboriginal people without the request and consent of the aboriginal people’.

In response to these allegations, Mason CJ held:

There is nothing in the recent decision in *Mabo v Queensland [No 2]* to support the notion that the Parliaments of the Commonwealth and New South Wales lack legislative competence to regulate or affect the rights of Aboriginal people, or the notion that the application of Commonwealth or State laws to Aboriginal people is in any way subject to

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259 Ibid 115.
260 (1994) 182 CLR 45, 47–48 (Mason CJ) (‘Walker’).
261 Ibid 48.
their acceptance, adoption, request or consent. Such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people. Indeed, *Mabo [No 2]* rejected that suggestion. ... English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo [No 2]* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.262

It thus appears that it would be best to avoid the criminal context when choosing a suitable vehicle to make out a claim for self-government.

E  *No Parallel ‘Law-Making System’*

It was made clear in *Mabo [No 2]* that Crown sovereignty cannot be questioned. Later native title cases arguably went further, by specifically rejecting any prospect of a ‘parallel law-making system’263 or a ‘dual system of laws’.264 As Lisa Strelein explains, ‘the courts have struggled with the juxtaposition of recognising the existence of a normative system, as a matter of fact, and denying its authority as part of the law of Australia’.265

The logic behind this position has been questioned, including by Marcia Langton:

So how can it be explained that native title to land that pre-existed sovereignty and survived it, as the High Court of Australia explained, has been recognised, and yet the full body of ancestral Indigenous Australian laws and jurisdiction are deemed by a narrow, historically distorted notion of sovereignty to be incapable of recognition.266

Although arguments that the *Australian Constitution* exhaustively distributes legislative power are even less tenable in Australia than in Canada,267 a parallel ‘law-making

262 Ibid.
265 Strelein, *Compromised Jurisprudence*, above n 257, 126.
267 See, eg, *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185, 453 (McEachern CJ) discussed above at page 48. See also *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, 520 (Macfarlane JA). This argument was also attempted but rejected in *Campbell* (2000) 189 DLR (4th) 333 as discussed above from page 51. See particularly at 376 (Williamson J).
system’ has been rejected by some judges — not due to the constitutional framework but on the basis of the acquisition of sovereignty. Notably, in Ward the joint judgment stressed that ‘[t]he assertion of sovereignty marked the imposition of a new source of authority over the land’ and in Yorta Yorta, Gleeson CJ, Gummow and Hayne JJ held that ‘what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty’.

In response to these findings it could be argued that a particular group’s right to regulate and control the manner in which a cultural practice is carried out does not constitute an all-encompassing ‘parallel law-making system’. Rather the rights derive from traditional laws and customs that are recognised by the common law, which can be conceptualised in terms of two partially overlapping circles. The word ‘thereafter’ could also be stressed to run the argument that there is room to recognise self-government rights deriving from pre-colonisation laws and customs.

The importance placed on the date of acquisition of sovereignty was explained by the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time:

The basis for limiting native title to the recognition of rights and interests and not the laws and customs from which these emanate can be found in this paragraph [in Yorta Yorta]. The monopoly on law-making held by the new sovereign renders the law-making capacity of the Indigenous legal system defunct upon sovereignty being acquired. For this reason the recognition of native title rights and interests is limited to those created prior to the acquisition of sovereignty ...

If self-government rights are limited to those created prior to the acquisition of sovereignty, it is conceded that this will mean that self-government rights, like native

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268 (2002) 213 CLR 1, 94 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
270 This is similar to the conception of native title discussed above at page 61. See also Mabo [No 2] (1992) 175 CLR 1, 79 (Deane and Gaudron JJ). In Mabo [No 2] Deane and Gaudron JJ were of the view that there was room for ‘the continued operation of some local laws and customs among the native people and even the incorporation of some of those laws and customs as part of the common law’: at 79.
title, will be to some extent ‘frozen in time’. However, the courts may be guided by
native title law, finding in kind that claimants must demonstrate observation of
traditional law and custom that has had ‘continuous existence and vitality since
sovereignty’.

F Commercial Fishing

In the recent decision of Akiba v Queensland [No 3] one of the native title rights
recognised by Finn J was the native title right to take fish for commercial purposes. It
is interesting to compare this case with Mason v Tritton when considering the type of
case that is likely to provide a suitable vehicle for seeking recognition of a common law
right yet to be recognised by a particular court — though it may be that in some cases
the issue will arise out of necessity and not out of choice.

In Akiba v Queensland [No 3], like Mabo [No 2], the applicants had evidence of
traditional land ownership based on a system of exclusive individual rights. In contrast,
the defendant in Mason v Tritton claimed a traditional right to fish coastal waters near
Dalmeny without having significant proof of a recognised system of rules or the content
of the rules and whether the defendant was bound by them. The differences between
these cases, along with the outcome in Walker, illustrate that a case brought by way

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272 See, eg, the discussion in Kirsten Anker, ‘Law in the Present Tense: Tradition and Cultural Continuity
in Members of the Yorta Yorta Aboriginal Community v Victoria’ (2004) 28 Melbourne University Law
Review 1; Ben Golder, ‘Law, History, Colonialism: An Orientalist Reading of Australian Native Title
Law’ (2004) 9 Deakin Law Review 41. For a discussion about the situation in Canada see Borrows, above
n 59, 56–76 (Borrows’ chapter is entitled ‘Frozen Rights in Canada: Constitutional Interpretation and the
Trickster’).


274 (2010) 204 FCR 1. This decision was appealed to the Full Federal Court: Commonwealth v Akiba
(2012) 204 FCR 260. An application for special leave to appeal to the High Court was filed on 11 April
2012. At the time of submission of this thesis the special leave application had not been heard.

275 (1994) 34 NSWLR 572.

276 See Justice Bruce Debelle, ‘Aboriginal Customary Law and the Common Law’ in Elliott Johnston,
Martin Hinton and Daryle Rigney (eds), Indigenous Australians and the Law (Routledge Cavendish, 2nd ed,
2008) 85, 106.

277 Cf Yanner (1999) 201 CLR 351. However, the result of this decision can largely by attributed to what
was then s 211 of the NTA, which stepped as an overriding Commonwealth law, providing a form of
‘native title immunity’ from the permit scheme at issue: See Sean Brennan, ‘High Court Upholds Bush
Tucker Rights’ (Research Note No 11, Parliament of Australia, Parliamentary Library, Laws and Bills
of a defence is less likely to provide a suitable vehicle for advancing ‘new’ common law rights.

The following statement of Young J in *Mason v Tritton*, which refers to Brennan J’s judgment in *Mabo [No 2]* is also of interest:

> At 51 of Brennan J’s judgment, his Honour seemed to have left open the question as to whether non-proprietary (in the sense that that term is technically used in Australian law) rights of native peoples might exist and survive a change in sovereignty, but limited his analysis to the law of property.278

While it is difficult to tell whether the High Court is likely to recognise self-government rights which extend to rights involving the regulation and control of cultural practices not related to property, this statement makes the interesting point that these issues were left open by *Mabo [No 2]*. It nevertheless appears prudent to first seek recognition of self-government rights as an incident of specific native title rights and interests, unless a new framework for conceptualising Indigenous rights is introduced into the *Australian Constitution*; for example, through the inclusion of an agreement-making power, which will be discussed in Chapter V.

G **Drawing on Ideas Migrating from Canada to Frame Arguments in Australian Courts**

It appears that most mention of overseas developments in High Court judgments regarding Indigenous rights can be traced to the submissions of the parties. A search of ‘Austlii’, 279 for example, reveals that 39 of the High Court transcripts available online refer to ‘*Delgamuukw*’.280 The arguments of counsel and/or applicants are thus an important mode of constitutional migration, as identified above.281 However, these references to *Delgamuukw* only go so far. They have not been used extensively to frame common law arguments and ultimately references by the High Court to *Delgamuukw*

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278 (1993) 70 ACrimR 28, 32.

279 Australasian Legal Information Institute <www.austlii.edu.au>. The search was last conducted on 1 September 2010.


281 See page 19 above.
have been few and far between. Indeed, a search for references to ‘Delgamuukw’ in High Court decisions is revealing. The decisions of either the Supreme Court of Canada, the British Columbia Court of Appeal or the British Columbia Supreme Court have only been mentioned in seven High Court decisions. There have also been notable silences. For example, there are no references to Delgamuukw in Yorta Yorta, which Pearson describes as ‘astounding’.

The arguments of counsel have been closely scrutinised by the courts. Notably in Coe [No 1], Coe [No 2] and Walker, recourse was made to overseas developments in argument, particularly the US concept of domestic dependent nations. However, these arguments were ultimately rejected by the High Court.

The question I am posing is whether transplanting common law claims from Canada regarding self-government rights to regulate and control Indigenous cultural practices should be attempted by counsel in Australia. It is at least possible that the arguments made in Coe [No 1], Coe [No 2] and Walker, may be more successful if they are reconceptualised by drawing on Canadian developments. In Walker, for example, the statement of claim alleged that the common law is only valid in its application to aboriginal people to the extent that it has been accepted by them; parliaments cannot legislate in a manner affecting aboriginal people without consent. In a short decision, which left little room for a comparative law exploration, Mason CJ concluded:

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282 Australasian Legal Information Institute <www.austlii.edu.au>. The search was last conducted on 1 March 2012.
283 Delgamuukw [1997] 3 SCR 1010.
288 Pearson, above n 77, 12.
289 (1979) 53 ALJR 403.
290 (1993) 68 ALJR 110.
292 Ibid 48.
‘Couched as they are in terms of the legislative incapacity of the Commonwealth and State Parliaments, those pleadings are untenable’. 293

What if self-government claims were couched in other terms (for example, if conceptualised as a right to regulate and control the manner in which a cultural practice is carried out)? I realise that this may mean that less is demanded of the courts, but perhaps gaining some ‘judicial’ ground is better than none. By advocating reliance on the Canadian authorities, no criticism is intended of the counsel in Walker. 294 Walker was heard in 1994 and the Canadian decisions which I am going to draw on, particularly Delagmuukw, 295 were handed down years later. It may be that common law thinking has since moved on.

One possibility that has already been tested is for submissions to adopt the US concept of ‘domestic dependent nations’. This term originates in the decision of Marshall CJ in Cherokee Nation v Georgia. 296 Relying in part on the ‘Indian Commerce Clause’ (art 1 § 8 cl 3, which provides that Congress may ‘regulate commerce with foreign nations, and among the several states, and with the Indian tribes’) Marshall CJ found that although the Cherokee did not enjoy foreign nationhood, they were a ‘domestic dependent nation’. As they fell within the borders of the United States and under its superior sovereignty, Marshall found that Indian nations were both ‘domestic’ and ‘dependent’, but as a nation, they enjoyed a degree of statehood. The concept of ‘domestic dependent nations’ was developed in subsequent cases, including Worcester v Georgia. 297 However, as P G McHugh explains, since the 1830s ‘the vestigial sovereignty set out by the Marshall court was limited hierarchically as well as geographically’. 298

293 Ibid.
294 (1994) 182 CLR 45.
296 30 US (5 Pet) 1 (1831).
297 31 US 515 (1832).
In any event, relying on US authority was tried and rejected in *Coe [No 1]* and *Coe [No 2]*. While there may be some room to reopen these decisions, due to the factually incorrect or irrelevant distinctions drawn (such as Gibbs J’s characterisation of one supposedly homogenous group as ‘the aboriginal people of Australia’), the Court is likely to regard the matter as settled, especially given the Court made it clear in *Mabo [No 2]* that British acquisition of sovereignty could not be contested in domestic courts. Writing extra-curially, Chief Justice Robert French has indicated that arguments going to the heart of sovereignty are unlikely to be accepted.

Another possibility, which is my focus, is to adopt arguments attempted in Canada, but the difficulty for the moment is that these arguments are yet to be fully tested there. Given this means that the ideas that are migrating from Canada in respect to the first two modes (the arguments of counsel and judicial determinations) are as yet incomplete, I next turn to consider the mode of constitutional reform.

V  **CONSTITUTIONAL REFORM PROPOSALS FOR ABORIGINAL SELF-GOVERNMENT IN CANADA**

A  **Constitutional Conferences**

As discussed above, self-government rights have never been expressly recognised in the Canadian Constitution. This was not, however, for want of trying. At numerous constitutional conferences, that were constitutionally required to be held, the issue was discussed.

The first such conference was mandated by s 37 of the *Constitution Act 1982*. As originally enacted, s 37 provided as follows:

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada,

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299 *Coe [No 1]* (1979) 53 ALJR 403, 408.
300 See above n 253.
301 French, ‘Native Title — A Constitutional Shift’, above n 86, 126.
including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

This provision was repealed and replaced by s 37.1 by the Constitution Amendment Proclamation 1983. At the conference of first ministers held in March 1983 that preceded this change, representatives of the First Nations also agreed to changes to ss 25 and 35. 302

Until its repeal in 1987, s 37.1 provided as follows:

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

The conferences mandated by s 37.1 were held in 1985 and 1987. At these conferences agreement again could not be reached on language that would expressly recognise a right of Aboriginal self-government. 303

302 See pages 24 and 158.

Despite these fall-backs, at the March 1983 conference agreement was reached on the wording of a new s 35.1:

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the ‘Constitution Act, 1867’, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

This change was significant. According to Hogg:

Through s 35.1, the aboriginal peoples have gained entry to the constitutional amendment process. This privilege is accorded to no other group outside government, which emphasizes that the special status of the aboriginal peoples is now firmly accepted in Canada.304

B Charlottetown Accord of 1992

Hogg, who was one of the legal advisers to the Assembly of First Nations in the discussions leading to the Charlottetown Accord of 1992,305 provides the following summary of the proposals that related to self-government:

The Charlottetown Accord of 1992 proposed an elaborate set of new constitutional provisions respecting aboriginal peoples. A new section 35.1 would recognize that the aboriginal peoples of Canada ‘have the inherent right of self-government within Canada’. This right would not be enforceable in the courts for a period of five years, during which time (as well as afterwards) the federal and provincial governments would be committed to the negotiation of self-government agreements. The self-government agreements would be enforceable, and they would create treaty rights that were protected by s 35. The Charter of Rights would apply to the institutions of self-government. These provisions were supplemented by ancillary provisions that

304 Ibid vol 1, 812.
305 See further page 108 below.
attempted to give some definition to aboriginal self-government and to set up the framework for a ‘political accord’ that would guide the process of self-government negotiations.\(^{306}\)

To an outside observer the word ‘elaborate’ seems apposite to describe what was involved. The utility of simply appreciating the number of technical and other issues that self-government agreements could give rise to, especially in a federal system such as Canada or Australia, cannot be overstated.

One of the issues that quickly arose for consideration was the matter of jurisdiction. As Macklem explains, for self-government rights to operate in the contemporary Canadian legal system, the following questions need to be resolved:

1. How would an Aboriginal order of government relate to the distribution of power between Parliament and provincial legislatures?
2. Will federal or provincial laws continue to apply to Aboriginal people? To what extent?
3. To what extent should Aboriginal jurisdiction be exclusive to the Aboriginal nation?
4. To what extent should Aboriginal jurisdiction be shared with Parliament or a provincial legislature?
5. Which level of government – federal, provincial, or Aboriginal – should prevail in the event of a conflict between or among laws regulating subjects that fall within shared jurisdiction?\(^{307}\)

In Macklem’s view, there are three main possibilities:

1. concurrent regulation by three tiers of government (federal, provincial and aboriginal);\(^{308}\)

2. carving out a sphere of exclusive Aboriginal jurisdiction;\(^{309}\) and

\(^{306}\) Ibid vol 1, 812–13 (citations omitted).


\(^{308}\) Ibid 176.
3. distinguishing between ‘core’\textsuperscript{310} and ‘peripheral’ jurisdiction.\textsuperscript{311}

The proposal set out in the \textit{Charlottetown Accord of 1992} falls within Macklem’s third possibility:

Matters essential or ‘integral’ to an Aboriginal community’s ability to ‘safeguard and develop’ its language, culture, economy, identity, institutions, and traditions and ‘to develop maintain and strengthen’ its relationship to its land, water, and environment were to fall within the exclusive jurisdiction of Aboriginal governments.\textsuperscript{312}

However, in the event of overlap among federal, provincial and aboriginal laws, aboriginal jurisdiction was intended to be limited. Section 29 of the \textit{Charlottetown Accord} (proposed s 35.4(2) of the \textit{Constitution Act 1982}) stipulated:

No Aboriginal law or any exercise of the inherent right of self-government … may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.\textsuperscript{313}

The key word appears to be ‘essential’, which could be interpreted in numerous ways. The scope for differing interpretations of the intention behind the provision is also rife:

One interpretation is that it said nothing concerning paramountcy; the provision was directed to the scope of Aboriginal jurisdiction and not to which law was paramount, assuming each was a valid exercise of legislative authority. On this view, an Aboriginal government would not have possessed the authority to pass laws that address matters essential to peace, order, and good government in Canada. Instead of providing guidance on the nature of the hierarchy that ought to structure the three orders of government, the Accord would have declared Aboriginal laws that regulated matters essential to peace, order, and good government in Canada unconstitutional regardless of whether they actually conflicted with federal or provincial legislation.\textsuperscript{314}

\textsuperscript{309} Ibid.
\textsuperscript{310} The core of jurisdiction would be an exclusive area into which neither the federal nor provincial governments could enter: ibid 177.
\textsuperscript{311} ‘Matters on the periphery of Aboriginal jurisdiction could allow for concurrent regulation, overlap, and duplicative laws’: ibid.
\textsuperscript{312} Ibid 178 (citations omitted).
\textsuperscript{313} \textit{Charlottetown Accord},Draft Legal Text, s 29 (proposed s 35.4(2)) Cited in ibid 179.
\textsuperscript{314} Macklem, \textit{Indigenous Difference}, above n 66, 179 (citations omitted).
On the other hand:

Another interpretation … is that a federal or provincial law essential to the peace, order, and good government of Canada is paramount if it conflicts with an otherwise valid exercise of Aboriginal jurisdiction. This interpretation would have opened the door for partial Aboriginal paramountcy. Aboriginal laws that did not conflict with federal or provincial laws essential to peace, order, and good government but which did conflict with other federal or provincial laws would have been paramount over those other laws.\(^{315}\)

Despite these difficulties that largely remain unresolved, Hogg has predicted that ‘the Accord will have some lasting effects on the status of aboriginal peoples’.\(^{316}\) This is particularly the case given the eleven first ministers, two territorial leaders, and leaders of the four national aboriginal organisations (the Assembly of First Nations, the Native Council of Canada, the Métis National Council and the Inuit Tapirisat of Canada) all had a seat at the table: ‘In this way, the aboriginal organizations were treated as if they were already a third order of government, as was contemplated by the Accord’.\(^{317}\) In addition, ‘the agreement by all first ministers and territorial ministers that the aboriginal peoples have an “inherent” right of self-government should probably be regarded as an informal recognition that the right exists now, albeit in inchoate form, despite the failure to ratify the express declaration to that effect in the Accord’ (the Accord was defeated in the referendum of 1992).\(^{318}\) Indeed, the Government of Canada continues to officially recognise ‘the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act 1982’.\(^{319}\)

Hogg, therefore, ends on an optimistic note:

This recognition by all governments should facilitate the negotiation of self-government agreements between governments and first nations, which can of course take place

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\(^{315}\) Ibid (citations omitted).

\(^{316}\) Hogg, above n 303, vol 1, 813.

\(^{317}\) Ibid.

\(^{318}\) Ibid.

under the existing constitutional provisions, and which is already in progress in some parts of the country. Nor is there any reason why the provisions of self-government agreements, which are modern treaties, should not have constitutional status as treaty rights protected under s 35. The movement to self-government can and will proceed despite the failure of the Charlottetown Accord.320

Whether similar optimism is possible in Australia is another matter. On the one hand, the practice of negotiating native title agreements may be drawn upon if and when there is enough support for more far-reaching agreements. On the other hand, however, without constitutional backing these agreements are likely to be a much blunter instrument than in Canada where treaty rights are protected under s 35. With this in mind, I explore the difficulties of achieving constitutional backing in Australia in the final chapter of this part.

VI CONSTITUTIONAL REFORM OPTIONS IN AUSTRALIA RELATING TO SELF-GOVERNMENT RIGHTS

In the final chapter of Topic 1, I identify the constitutional reform proposals relating to self-government rights (constitutional reform deliberations being the fourth mode of migration) that have been advanced in Australia and I contemplate how these proposals could affect whether and how common law self-government rights are recognised by Australian courts. I also reflect on the fact that the Australian reform proposals are quite distinct from those advanced in Canada (explored immediately above) and the implications this might have for the migration of foundational ideas.

A Recommendations of the Expert Panel

The Expert Panel established by the Australian Government in December 2010 to carry out consultations and make recommendations on options to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution did not specifically address the issue of self-government. While the Report of the Expert Panel comments at length on agreement-making and sovereignty related issues, the Expert Panel did not make any recommendations in relation to these issues.321 One of the recommendations, however, which is to include a preambular statement to a new head of power (this will be

320 Hogg, above n 303, vol 1, 813 (citations omitted).
discussed in greater detail in Topic 2), bears some similarity to s 35 of the Constitution Act 1982 and as such merits consideration in the context of self-government rights. After discussing this recommendation, I turn to consider the Expert Panel’s views on sovereignty and agreement-making.

1 Inclusion of a Preambular Statement in a New s 51A

As outlined above, ‘existing aboriginal and treaty rights’ are recognised by s 35(1) and many (including the Canadian Government) are of the view that self-government rights are included within the ambit of this section. In contrast the Australian Constitution is currently silent on the issue. Indeed, since the 1967 referendum removed the discriminatory references to the ‘Aboriginal race’ and ‘Aboriginal natives’, there are no references to Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

One of the recommendations of the Expert Panel was to repeal s 51(xxvi) of the Australian Constitution and adopt a proposed new s 51A which would include a preambular statement.\(^{322}\) Section 51(xxvi) originally empowered the Parliament to make laws with respect to: ‘The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’. The words ‘other than the aboriginal race in any State’ were removed by referendum in 1967 with the approval of more than 90% of the electors. As a result, it is now ‘competent for the Parliament to make special laws with respect to the people of the Aboriginal race’.\(^{323}\)

Like other heads of power conferred on the Commonwealth, s 51(xxvi) is a broad power. It has been relied on to make laws to benefit Aboriginal and Torres Strait Islander peoples. However, the fear is that it can also be relied on to make laws to their detriment (see Topic 2). The Report of the Expert Panel recommends that s 51(xxvi) be repealed and two new provisions be adopted: a new head of power (s 51A) and a prohibition of racial discrimination (s 116A), which will be discussed in depth in Topic 2.

\(^{322}\) Ibid xviii.

\(^{323}\) Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 186 (Gibbs CJ).
Proposed new s 51A would be entitled ‘Recognition of Aboriginal and Torres Strait Islander peoples’ and would enable the Parliament to make laws ‘with respect to Aboriginal and Torres Strait Islander peoples’. It would include ‘its own introductory and explanatory preamble’. This recommendation, in full, is as follows:

That a new ‘section 51A’ be inserted, along the following lines:

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.\(^{324}\)

The Expert Panel states that it favoured a preamble to the section rather than a preamble to the Australian Constitution on the basis that ‘there is too much uncertainty in having two preambles [to the Constitution]’ and ‘there are too many unintended consequences from the potential use of a new preamble in interpreting other provisions of the Constitution’.\(^{325}\)

The Panel states that ‘there was next to no community support for a “no legal effect” clause to accompany a preamble’.\(^{326}\) (The 1999 proposal to insert a new preamble into the Australian Constitution included a provision (s 125A) which expressly stated that


\(^{325}\) Ibid xiii.

\(^{326}\) Ibid.
the preamble had no legal effect and the State Constitutions which recognise Aboriginal and Torres Strait Islander peoples include similar provisions.\textsuperscript{327}

It would, of course, be for the High Court to interpret a provision recognising first occupation and acknowledging ‘the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters’. However, one possibility might be that this would give some momentum to self-government claims, which, like those made in relation to s 35(1) of the Constitution Act 1982, find their roots in the common law.

2 Sovereignty

Although the Report of the Expert Panel discusses ‘the aspiration of some Aboriginal and Torres Strait Islander peoples for recognition of their sovereign status’, the Panel concluded that ‘any proposal relating to constitutional recognition of the sovereign status of Aboriginal and Torres Strait Islander peoples would be highly contested by many Australians, and likely to jeopardise broad public support for the Panel’s recommendations’.\textsuperscript{328}

3 An Agreement-Making Power

Similarly, in relation to an agreement-making power, the Panel concluded that ‘[a]t the present time, any proposal for a form of constitutional backing for a treaty or other negotiated agreements with Aboriginal and Torres Strait Islander peoples would be likely to confuse many Australians, and hence could jeopardise broad public support for the Panel’s other recommendations’.\textsuperscript{329} While not making any recommendations in relation to an agreement-making power, the Report of the Expert Panel ‘record[s] the voices of those who have called for some form of constitutional backing for a treaty or other agreements with Aboriginal and Torres Strait Islander peoples’.\textsuperscript{330} Allens Arthur Robinson, for example, argued that the insertion of an agreement-making power into the Constitution ‘would offer strong protection of Indigenous rights provided by

\begin{flushright}
327 Constitution Act 1902 (NSW) s 2(3), Constitution Act 1975 (Vic) s 1A(3), Constitution of Queensland 2001 (Qld) s 3A.
329 Ibid 201.
330 Ibid 199.
\end{flushright}
agreements made under this power, while simultaneously allowing significant flexibility regarding the details of such agreements’.\textsuperscript{331} In addition, the agreements made could pursue certain objectives, most notably ‘recognising and affirming “an inherent right of ‘self-government”’.\textsuperscript{332}

B The Role of Agreements in Achieving Recognition of Self-Government Rights

As discussed above, unlike the case of various parts of Canada, in Australia there is no treaty, of any description, between Aboriginal and Torres Strait Islander peoples and the Crown.\textsuperscript{333}

While it is clear that treaties can play a role with respect to the recognition of Indigenous peoples, the nature of this role is highly contested. On the one hand, historically the treaties made with Indigenous peoples were the product of a considerable imbalance of power and led to the renunciation of rights.\textsuperscript{334} This point was powerfully made by the Senate Standing Committee on Constitutional and Legal Affairs in its 1983 report \textit{Two Hundred Years Later : Report on the Feasibility of a Compact or ‘Makarrata’ between the Commonwealth and Aboriginal People}:

It is significant for the contemporary debate that they were, for the most part, treaties imposed by a powerful colonising nation on an indigenous population with no choice other than to agree to the terms. While the language of the treaties may indicate an intent and concern to safeguard indigenous rights, their principal purpose was to sanction the colonising powers’ alienation of land from the indigenes.\textsuperscript{335}

However, on the other hand, treaties have also played an important role in the protection of rights. As Patrick Macklem explains, treaty rights ‘typically protected interests

\textsuperscript{331} Allens Arthur Robinson, Submission No 3447 to the Expert Panel on Constitutional Recognition of Indigenous Australians, 3 October 2011, 15 quoted in ibid 200.

\textsuperscript{332} Ibid.

\textsuperscript{333} See page 24.

\textsuperscript{334} Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, \textit{Two Hundred Years Later : Report on the Feasibility of a Compact or ‘Makarrata’ between the Commonwealth and Aboriginal People} (1983) (‘Two Hundred Years Later’) 58.

\textsuperscript{335} Ibid.
associated with cultural, territorial, and self-government rights, but … are predicated on successful negotiations with the Crown’.\(^\text{336}\)

The power-imbalance is highlighted by Tully. He explains that ideally three conventions of mutual recognition, continuity and consent should be adhered to.\(^\text{337}\) However, historically ‘the Crown has imperiously proclaimed, in the language of Hobbes, the treaties to be a “burden” tolerated solely at its “pleasure”.’\(^\text{338}\) Despite this contested historical record, it does not preclude the possibility that various agreements could be negotiated in Australia on the basis of the three conventions in the spirit of ‘treaty constitutionalism’.\(^\text{339}\) As Tully explains:

> These partnerships will take many forms, depending on the arrangements the partners reach in discussions guided by the three conventions. By calling these agreements ‘treaty constitutionalism’ … I do not mean to imply that only one form is possible. This would be another kind of imperialism. The appropriate degree of interdependency and the best sort of agreement vary with the very different circumstances of Aboriginal and non-Aboriginal partners on this earth.\(^\text{340}\)

Such agreements clearly have the potential to contribute to the recognition of Indigenous self-government rights. Similar arguments have been made by Langton et al:

> The power of this process of voluntary negotiations and agreements is that, while it goes some way towards making amends for past injustices, it also redefines future interactions between victims and perpetrators and attempts to negotiate improvements on existing social injustices.\(^\text{341}\)

It would also be possible to build on the ground laid by native title agreements. Although the native title system has been described as ‘a hope disillusioned, an opportunity lost’, there is also considered to be another story ‘of negotiation, of


\(^{337}\) Tully, above n 59, 137.

\(^{338}\) Ibid 138.

\(^{339}\) Ibid 117.

\(^{340}\) Ibid 137.

agreement-making, of changed approaches, of activity beyond the strict requirements of
native title law’. 342

However, as with native title agreements, there could be shortcomings:

Agreements may not be negotiated in environments of equal bargaining power and
resources. Agreements may fail to deliver promised benefits because of a lack of
resources or a failure to address implementation issues, or because the terms have been
poorly negotiated. 343

It would therefore be necessary to ensure ‘adequate, and equitable, resourcing’ of
representatives and ‘processes which facilitate indigenous governance rather than
imposed management structures’ 344 to bring about meaningful recognition.

Once self-government rights are recognised in agreements, it would then fall to the
courts to interpret these rights (which may be seen as deriving from the common law).
Hence, there might still be scope to consider Canadian developments.

C The Forms an Agreement Might Take

1 Terminology

Although the possibility of an agreement or agreements between Aboriginal and Torres
Strait Islander peoples and the Australian Government has been championed by many,
the exact form and process is heavily debated. Even nomenclature has led to
controversy, particularly surrounding the word ‘treaty’ which was rejected by the
Australian Government in the past because it implies an internationally recognised
agreement between two (sovereign) nations. 345 Advice was even obtained by the
Government citing Coe [No 1] 346 in support of the finding that the word ‘treaty’ is

title and Ten Years of the Native Title Act’ (2003) 27 Melbourne University Law Review 523, 564.
343 Ibid 564–5 (citations omitted).
344 William Jonas, ‘Reflections on the History of Indigenous People’s Struggle for Human Rights in
Australia — What Role Could a Treaty Play’ (Paper presented at the Treaty: Advancing Reconciliation
345 Two Hundred Years Later, above n 334, 17. See also Sean Brennan, Brenda Gunn and George
Williams, “‘Sovereignty’ and Its Relevance to Treaty-Making between Indigenous Peoples and
346 (1979) 53 ALJR 403.
‘clearly inapplicable to any form of agreement between the Commonwealth and Aborigines since the latter are not a “nation”’. 347

At various times concern has also been expressed by the members of the Australian Government that a ‘treaty’ would divide the nation. 348 As Patton explains ‘governments have been reluctant to endorse proposals which divide the nation. The argument that a treaty is an agreement between sovereign political bodies and as such threatens to divide the nation has been a standard response to treaty proposals since the 1970s’. 349 However, for the very reason that ‘[i]mplicit in discussion of this option is the question of the existence of Aboriginal sovereignty in a sense akin to nationhood’, 350 it may be preferred by some Aboriginal and Torres Strait Islander peoples.

Due to the controversy surrounding the word ‘treaty’, recourse has been made on occasion to other words including ‘compact’, ‘makarrata’ or ‘domestic treaty’. 351 However, no one word is unproblematic. 352 As the Senate Standing Committee explained in its report in 1983, ‘makarrata’ is a Yolnu word from North-East Arnhem Land to which many meanings have been attached but which is commonly regarded as meaning ‘a coming together after a struggle’. 353 However, during the course of the inquiry the Committee visited Yirrkala in North-East Arnhem Land where elders explained that ‘garma’ would be more appropriate as it can mean ‘the bringing of everybody together as one’. 354 Another issue with the word ‘makarrata’ is that it has been regarded as a foreign word in Aboriginal communities in other parts of Australia. This is emphasised by Patrick Dodson who has predicted that ‘it is a futile exercise to get one word from one linguistic group, culture group or law group that is acceptable to other linguistic and cultural law groups’. 355 However, if several agreements are made

347 Cited in ibid 21.
348 Ibid.
350 Two Hundred Years Later, above n 334, 29.
351 Ibid 15.
352 Ibid.
353 Ibid.
355 Ibid 22.
with individual Indigenous communities as outlined below, each community could adopt their own word for the agreement. As the Senate Standing Committee explained ‘the label which ultimately attaches to any agreement is a matter for decision between the parties’.

Despite this, the Senate Standing Committee report opted for the word ‘compact’ as a ‘neutral descriptive word’. There is a risk, however, that the word ‘compact’ may be too neutral for people to rally behind it or to feel a sense of attachment to it, which might be a crucial element in the success of a proposal and the prospects for recognition.

2 Form

The words ‘treaty’, ‘domestic treaty’, ‘makarrata’ and ‘compact’ have been variously used to describe:

an umbrella document providing direction and perspective to all areas of policy, including land rights, self-management, customary laws and recognition of Aboriginal culture and religion … a national declaration of shared principles and common commitments.

However, as will be discussed below, once one drills down into the areas that could be covered, even what may first appear to be innocuous such as ‘self-management’ can be heavily contested.

The forms a treaty or agreement may take include:

- one national treaty;
- a national agreement of principles that allows for treaties to be signed at the regional level; or

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356 Ibid.

357 Ibid.


The Senate Standing Committee concluded that a ‘compact’ was feasible. However, the report notes that ‘[a] further issue is whether there should be one or several separate agreements’, and whether an agreement or agreements might be given constitutional status (see below).

The 1988 Constitutional Commission also considered whether constitutional backing be given to an agreement, or agreements, between the Commonwealth and representatives of Aborigines and Torres Strait Islanders. However, the Commission did not make any recommendations pending the outcome of negotiations:

> We are well aware that the issues raised by this matter are complex and that any proposal for a formal agreement may be surrounded by controversy, particularly if the agreement would impose substantial obligations on the Commonwealth and confer substantial benefits on Aborigines and Torres Strait Islanders. ...

> There is no doubt that the Commonwealth has sufficient constitutional powers to take appropriate action to assist in the promotion of reconciliation with Aboriginal and Torres Strait Islander citizens and to recognise their special place in the Commonwealth of Australia. Whether an agreement, or a number of agreements, is an appropriate way of working to that objective has yet to be determined. ...

> [W]e agree with the Powers Committee that a constitutional alteration to provide the framework for an agreement provides ‘an imaginative and attractive approach to the immensely difficult situation that exists’. But any alteration should not be made until an agreement has been negotiated and constitutional alteration is though necessary or desirable.

Similarly, the Report of the Expert Panel states:

> Like the Constitutional Commission in 1988, the Panel was not persuaded that any alteration to the Constitution should be attempted until such agreement or agreements

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361 Two Hundred Years Later, above n 334, 3.


had been negotiated in a process involving Aboriginal and Torres Strait Islander peoples, the Commonwealth and the States and Territories. The Panel considered that no proposal for an agreement should be taken to the Australian people at referendum until they were in a position to know what they were being asked to approve. This is a challenge for the future.\(^{364}\)

My view is that agreements with individual Indigenous groups are more feasible than one national treaty, especially given there is not one supposedly homogenous group, ‘the Aboriginal people of Australia’, with whom an agreement could be made.\(^{365}\) It could also help alleviate the difficulties present in negotiating agreements, such as the difficulty of selecting negotiators to represent Indigenous interests, as identified by the Senate Standing Committee.\(^{366}\) However, it could escalate other issues, particularly those surrounding resources, unless the Commonwealth provides substantial financial support for all parties in order to help reduce the inequalities in bargaining positions.

Greg McIntyre has taken a similar position:

> In my view the most appropriate group for indigenous and non-indigenous stakeholders to commence negotiation of a treaty with is each indigenous or Aboriginal or Torres Strait Islander group, whether styling itself a ‘community’, ‘people’, ‘society’ or ‘nation’, which adheres to a common set of laws and customs which control its behaviour. That group will ordinarily be co-extensive with the group who, at least at the time of colonisation, held the communal native title for an area. That form of group will ordinarily be found to be in the nature of a polity which governs itself in accordance with its laws and customs.\(^{367}\)

McIntyre explains that agreements with individual Indigenous groups may in turn lead to a more far-reaching treaty:

> Provided the negotiations commence at the local level, it may be possible that all of the above alternatives can be achieved, and that, indeed, that may be the most appropriate result.

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\(^{365}\) Cf Coe [No 1] (1979) 53 ALJR 403, 408 (Gibbs J).

\(^{366}\) Two Hundred Years Later, above n 334, 134–47.

\(^{367}\) McIntyre, above n 360.
It is more likely if agreement is reached at a local level in relation to locally significant issues that the necessary goodwill will be engendered to reach agreement at regional levels. It may then be possible to identify from local and regional agreements universal principles which can be nationally agreed, resulting in the possibility of a national treaty of international significance.  

Agreements with individual Indigenous groups may also be more manageable. Australia already has experience in negotiating Indigenous Land Use Agreements (‘ILUAs’) that could be drawn upon. However, this experience only takes us so far. As Strelein points out:

> The process of determination and negotiation of ILUAs sets Indigenous peoples as one of hundreds of interest holders and, in its current form, does not adequately recognise the status of native title holding groups as political, legal and social entities.

Much could be learned from Canadian experiences, including the ratification of the Nisga’a agreement considered in Campbell. As discussed above, the political and legal issues that might arise are numerous and include technical matters such as the extent of aboriginal jurisdiction and the interplay with other laws, which can make a unified position difficult to obtain.

### D Existing Power to Enter into an Agreement

An agreement or agreements could potentially be entered into by the Australian Government as an exercise of the Commonwealth’s executive power under s 61 of the Constitution. Such an agreement could be intended to be symbolic only. While it may contain declarations of intent to legislate in a particular area, it would not be legally enforceable. There may also be scope for the Australian Government to enter into agreements without legislative authority: Williams v Commonwealth (2012) 86 ALJR 713.

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368 Ibid.  
369 The Native Title Act provides for the negotiation of voluntary ILUAs about the management of land and waters: Division 3, Subdivisions B, C, D, E.  
372 See pages 51–53 above.  
373 However, note that there are limits on the ability of the Commonwealth executive government to enter into agreements and make payments without legislative authority: Williams v Commonwealth (2012) 86 ALJR 713.
contracts with representative bodies. However, similar issues would arise as to the ability of the contract to be abrogated as with ordinary legislation.

The Australian Government could make laws to implement an agreement relying on a number of heads of power including s 51(xxvi) (the race power), s 51(xxix) (the external affairs power) and s 122 (the territories power). Existing Commonwealth power could also be supplemented by referrals from the States under s 51(XXXVII) as discussed in the next section. However, the Commonwealth’s legislative powers are ‘subject to the Constitution’ so, for example, the Commonwealth could not legislate to provide for the acquisition of property otherwise than on just terms (s 51(XXI)).

Moreover, without constitutional backing it is unlikely that any agreement could be entrenched at the Commonwealth level. According to the doctrine of parliamentary sovereignty, future parliaments are able to make or unmake any laws of the Parliament’s choosing.

1 Supplementing Existing Power: Section 51(XXXVII)

The possibility of relying on state referrals made under s 51(XXXVII) was raised by the Senate Standing Committee. Under s 51(XXXVII) of the Constitution the Commonwealth Parliament has power to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

It is worth noting that some of the points made by the Senate Standing Committee do not accord with present thinking on referrals. For example, the report states that ‘[t]his power would operate to enable the states to refer to the Commonwealth their concurrent power with reference to the people of the Aboriginal race thus leaving the field exclusively to the Commonwealth to achieve an agreement affecting all Aboriginal people and Torres Strait Islanders’. However, it is generally regarded that the States can only refer power to the Commonwealth that the Commonwealth does not presently have. In addition, if a state refers power in a particular area, it does not mean that the

374 Two Hundred Years Later, above n 334, 104–5.
375 Ibid 104.
state gives up the ability to legislate in that area unless prevented from doing so because its laws would be rendered inconsistent due to the operation of s 109 of the Constitution. Indeed the ability for the states to continue to legislate concurrently with the Commonwealth has given rise to complex concurrent operation provisions in the Commonwealth laws made in reliance on state referrals. The Senate Standing Committee also notes that state referrals would expose the compact to ‘serious vulnerability as a State could withdraw the reference at any time’. While it is true that the States would be able to terminate their references, no state has yet had recourse to this option, perhaps because of political and other reasons that would dissuade them from doing so.

Despite the issues identified above, referrals are an effective tool for ensuring national uniform regulation if all States are prepared to refer power. The Senate Standing Committee report explains that ‘[i]f it were desired to achieve uniformity, throughout Australia, this technique would require all States to refer power authorising the Commonwealth to legislate for a compact’. This may appear to be an impossible task. Indeed the report mentions that ‘following the inability of all States to agree in recent years to refer family law matters to the Commonwealth, doubts have been expressed about the likelihood of getting all States to agree to such a reference’. However, since the Senate Standing Committee reported in 1983, all states have referred power in a diverse range of areas including corporations (2001), terrorism (2003), personal property securities (2009–2010) and consumer credit (2009–2010).

Even though there are a broad range of powers available and there is the possibility of supplementing these powers with referrals from the states, many regard constitutional backing to be preferable given legislation made in aid of a compact will always be subject to change by a future Parliament. It would also avoid tricky questions about

376 Ibid.
378 Two Hundred Years Later, above n 334, 104.
379 Ibid.
380 Parrott, above n 377, 11.
what impact agreements without constitutional backing could have on the states\textsuperscript{381} and, legal issues aside, whether the Australian Government should be prepared to act unilaterally in areas where the states have an interest.\textsuperscript{382} That said, if the states oppose the incorporation of an agreement-making power it might not succeed at referendum given the double majority requirements of s 128 of the \textit{Australian Constitution}. However, if this support is secured, constitutional backing could bring about greater recognition of the distinct place of Aboriginal and Torres Strait Islander peoples in Australian society.

\textbf{E \hspace{1em} Constitutional Backing}

Given the inherent susceptibility of ordinary legislation to change, constitutional entrenchment of an agreement or treaty has been considered to be ‘the best way to guarantee recognition of the place of Indigenous peoples in Australian society’.\textsuperscript{383} However, opinion differs on whether an agreement should be incorporated in the \textit{Constitution} or whether an agreement-making power should be added.

\textbf{1 \hspace{1em} Incorporation of an Entire Agreement into the Constitution}

Of the two options for constitutional backing, incorporation of an entire agreement into the \textit{Constitution} is often considered to be less desirable or workable than the incorporation of an agreement-making power. As Barker explains, ‘[c]onstitutional experience suggest[s] ... that securing an amendment to the \textit{Constitution} to incorporate a treaty would be an extremely difficult, if not impossible task’.\textsuperscript{384} However, the advantage would be that an agreement would be secured (in contrast, an agreement-making power, as discussed below, would not be a guarantee that agreements would be entered into). Also, as the Senate Standing Committee report explains, once enshrined in the \textit{Constitution}, ‘a degree of immutability would attach to the compact thereby

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\begin{itemize}
\item \textsuperscript{381} The issue is identified by Keon-Cohen: see Bryan Keon-Cohen, ‘The Makarrata — A Treaty within Australia between Australians: Some Legal Issues’ (1981) 57(9) \textit{Current Affairs Bulletin} 4, 16.
\item \textsuperscript{382} The Australian Government has stated in the past that it would not be prepared to do so: see \textit{Two Hundred Years Later}, above n 334, 17.
\item \textsuperscript{384} Ibid (citations omitted).
\end{itemize}
\end{footnotesize}
protecting it from any damage due to short-term political or social expediency’. 385 It would also ‘put beyond doubt the Commonwealth’s power to negotiate a compact and, once agreement was reached, to fulfil its obligations under it’. 386

However, the Senate Standing Committee report identifies ‘serious drawbacks’ with this approach: ‘While inclusion of the full text within the Constitution would confer certainty, making removal or change very difficult, the resulting lack of flexibility could be a major disadvantage’. 387 Moreover, ‘opposition to even one term, or apprehension about the overall length and complexity of the proposed amendment, could spell failure’. 388

Whether incorporation of the text of an agreement into the Constitution would be more difficult for the public to agree to than a relatively unknown agreement-making power is a point of conjecture. Some have offered a guess that ‘an amendment which does not specify the content of the agreement might excite less opposition’. 389 However, the Senate Standing Committee was of the view that while detail might prevent understanding, it would not necessarily encourage opposition. 390 As the report states, ‘from all points of view it is concluded that an attempt to include the full text of a compact in the Constitution would almost certainly result in the failure of a referendum’. 391 Whether this prediction is accurate and still holds in the early 2010s is difficult to tell. Suffice it to say that the inclusion of the full text in the Constitution would not be workable if agreements are to be pursued with individual Indigenous groups, which, as pointed out above, is often overlooked.

385 Two Hundred Years Later, above n 334, 67.
386 Ibid.
388 Two Hundred Years Later, above n 334, 68–9.
389 Ibid 69.
390 Ibid.
391 Ibid.
2 An Agreement-Making Power

The option of including an agreement-making power in the Constitution that could enable the Commonwealth to enter into an agreement or agreements with Aboriginal and Torres Strait Islander peoples is usefully summarised as follows in the Senate Standing Committee report:

[This] possibility would be a section in more general terms, giving the Commonwealth power to enter a compact with representatives of the Aboriginal people and to carry out its terms. It would further provide that the compact would be binding on the Commonwealth and States, notwithstanding any other provision of the Constitution and would set out in broad terms the sorts of areas to be covered by the compact. Acceptance of such a constitutional amendment would be followed by legislative measures putting into effect the terms agreed upon between both sides to the negotiations.\(^\text{392}\)

According to Dodson, the benefit of an agreement-making power is that it ‘removes the complexity of trying to incorporate the text of a treaty into the Constitution’.\(^\text{393}\) However, the exact wording of an agreement-making power and the areas that could potentially be covered by such agreements could give rise to difficult questions.

There is at least a precedent on which such a power could be modelled. Section 105A of the Constitution enables the Commonwealth to enter into financial agreements with the States and is often considered to be relevant in this regard. As explained by the Senate Standing Committee:

Section 105A had its origins in the 1920s. The Commonwealth, anxious to reorganise the financial arrangements of the nation, obtained the concurrence of the States to the Financial Agreement of 1927, which was enacted by the Commonwealth Parliament and approved at a referendum in 1928, and inserted in the Constitution as s 105A in 1929.\(^\text{394}\)

\(^{392}\) Ibid 29–30.

\(^{393}\) Dodson, above n 387, 38.

\(^{394}\) Two Hundred Years Later, above n 334, 70.
Section 105A provides as follows:

**Agreements with respect to State debts**

(1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including:

(a) the taking over of such debts by the Commonwealth;

(b) the management of such debts;

(c) the payment of interest and the provision and management of sinking funds in respect of such debts;

(d) the consolidation, renewal, conversion, and redemption of such debts;

(e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and

(f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4) Any such agreement may be varied or rescinded by the parties thereto.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.

Modelled on s 105A, a proposed s 105B was first suggested by Gil Shaw in 1982, and was considered by the Senate Standing Committee:
(1) The Commonwealth may make a treaty or treaties with persons or bodies recognised as representatives of Aboriginal and Torres Strait Islander peoples of Australia with respect to the status and rights of those people within Australia including but not limited by the following:

(a) restoration to Aboriginal and Torres Strait Islander peoples or to some of them of their lands which were owned and occupied by them prior to 1770;

(b) compensation for the loss of any land incapable of being restored to the Aboriginal and Torres Strait Islander peoples or some of them;

(c) matters of health, education, employment and welfare;

(d) matters of political status, representation and organization, including self-government;

(e) matters of inherent sovereignty and the sharing of sovereignty;

(f) matters of language, culture, heritage and intellectual and cultural property;

(g) the law, including Aboriginal and Torres Strait Islander law and custom, relating to the exercise of judicial power by the Commonwealth of Australia or any State or any Territory within Australia;

(h) Any other matter identified by Aboriginal and Torres Strait Islander peoples in relation to their status as first peoples and nations.

(2) The Parliament shall have the power to make laws for the validating of any such treaty or treaties made before the commencement of this section. Such laws shall not be altered, amended, rescinded or repealed by the Parliament without the free and informed consent of the Aboriginal and Torres Strait Islanders party to the treaty or treaties as well as a two-thirds majority vote of the members of both houses of the Parliament entitled to vote.

(3) Any treaty or treaties made may be varied or rescinded by the parties thereto and as such shall supersede any prior treaty or treaties for the purposes of this section.

(4) Subject to sub-section (2), the Parliament shall have the power to make laws for the implementation by the parties of such treaty or treaties.
(5) Any laws passed under clauses 2 and 4 shall be binding upon the Commonwealth, the States and Territories within Australia, notwithstanding anything contained in this Constitution or the Constitutions of the several states or the self governing laws of any territory or any law of the Commonwealth, or of any State or territory.

(6) Any variation or alteration or rescinding of this section shall occur in the following manner

(a) notwithstanding section 128 a bill for a law for a referendum shall not be introduced into the Parliament without the Parliament having obtained two thirds majority support of the Aboriginal and Torres Strait Islander peoples;

(b) the terms of the treaty or treaties permits such alteration, amendment or rescinding, and if so, are complied with.\(^{395}\)

This draft provision could provide a useful starting point when considering the form an agreement-making power should take. However, each word would need to be closely scrutinised. For example, the word ‘treaty’ appears throughout proposed s 105B. As discussed above, my preference would be for the word ‘agreement’ to be used instead, with an understanding that agreements could be given appropriate names, perhaps from the language of the Indigenous community in question. Proposed s 105B(1) also lists the ‘status and rights’ that could be covered by the agreements. As discussed in the next section below, the areas that could be covered might be heavily contested. In the interests of securing support perhaps it would be more expedient to list only three or four examples, especially given the list is not intended to be exhaustive.

The other proposed sections can be summed up as follows: s 105B(2) (the equivalent of s 105A(2)) is a power of validation in respect of any agreement entered into before the new section took effect;\(^{396}\) s 105B(3) (the equivalent of s 105A(4)) is a power for the parties to vary or rescind the agreement;\(^{397}\) s 105B(4) (the equivalent of s 105A(3)) vests power in the Parliament to make laws for the carrying into effect of the terms of the agreement;\(^{398}\) s 105B(5) (the equivalent of s 105A(5)) provides that laws made

\(^{395}\) Ibid 73–4.

\(^{396}\) Ibid 72.

\(^{397}\) Ibid.

\(^{398}\) Ibid.
under the provision prevail over anything contained in Commonwealth or State Constitutions;\textsuperscript{399} and s 105B(6) (which has no equivalent in s 105A) is intended to entrench the provision by requiring a special procedure for its alteration.\textsuperscript{400}

Section 105B(5) merits further consideration. When the Commonwealth’s power to legislate under s 105A was challenged by the New South Wales Government in 1932, Rich and Dixon JJ expressed the opinion that the effect of s 105A(5):

\begin{quote}
    is to make any agreement of the required description obligatory upon the Commonwealth and the States, to place its operation and efficacy beyond the control of any law of any of the seven Parliaments, and to prevent any constitutional principle or provision operating to defeat or diminish or condition the obligatory force of the Agreement.\textsuperscript{401}
\end{quote}

The Senate Standing Committee considers that this effect of the provision indicates its ‘overriding strength’.\textsuperscript{402} Or, as Shaw explains, it gives the constitutional amendment ‘full force and allow[s] the greatest latitude in legislative creativity’.\textsuperscript{403} In other words, as a ‘notwithstanding’ clause, s 105B(5) overcomes the fact that the Commonwealth’s legislative powers are generally ‘subject to the Constitution’. However, for this very reason it might be cause for concern in the general community, particularly given s 105B(5) may enable the Commonwealth to legislate to provide for the acquisition of property otherwise than on just terms.\textsuperscript{404} This may be particularly concerning to the general public if s 105B(1)(a) is retained, which specifies that agreements may cover the ‘restoration to Aboriginal and Torres Strait Islander peoples or to some of them of their lands which were owned and occupied by them prior to 1770’. However, these provisions were drafted pre-\textit{Mabo [No 2]} and the advent of native-title so would need to be redrafted to take this into consideration. The fact that such far-reaching changes have occurred in the Australian legal landscape since 1982 also evidence the desirability of keeping s 105B(1) at the broadest level of generality.

\textsuperscript{399} Ibid 73.

\textsuperscript{400} Ibid 73.

\textsuperscript{401} \textit{New South Wales v Commonwealth [No 1]} (1931) 46 CLR 155, 177.

\textsuperscript{402} \textit{Two Hundred Years Later}, above n 334, 72.

\textsuperscript{403} Quoted in ibid 74.

\textsuperscript{404} Ibid.
An additional reason for including s 105B(5) in the draft was to enable laws passed under it to contain special majority provisions to pass, repeal or amend legislation putting the compact into effect: ‘as the section would operate “notwithstanding” anything contained in the Constitution, it would not be necessary to abide by sections 23 and 40 of the Constitution, which require simple majority votes in both the Senate and the House of Representatives’.405 It may also enable extra-Parliamentary requirements such as ‘concurrence by recognised Aboriginal representative groups to any change to, or even initial passage of, legislation based on a compact’.406

Although it is possible that s 105B(5) would overcome any doubts that may exist about the Commonwealth’s power to pass ‘manner and from’ provisions,407 the desirability of such a measure would need to be closely scrutinised. This is particularly the case given ‘manner and form’ provisions go against the grain of parliamentary sovereignty, a principle that is so revered in our constitutional system.408 In my view, if an agreement-making power can be effective without such measures being taken, such unnecessary complication should be avoided. Anything that could jeopardise the success of a proposal would need to be crucial to its workability. For similar reasons, I do not think that s 105B(6) is desirable. Section 128 already provides over and above enough protection (indeed it is thought to lead to a ‘frozen continent’).409

Although proposed s 105B would not require prior settlement of the terms of an agreement, when considering a national ‘compact’, the Senate Standing Committee considered that it was nevertheless desirable for the terms of the agreement to be settled first. The Senate Standing Committee pointed to the fact that the successful 1928 referendum to insert s 105A into the Constitution occurred after the Financial

405 Ibid 75.
406 Ibid.
408 As Hanks et al explain, ‘the proposition that Parliament may be obliged by earlier legislation to follow a complex and restrictive procedure to legislate on certain topics, effectively writes those topics out of the current policy agenda and denies to the majority of elected representatives the capacity to develop and implement policies on those topics’: Peter Hanks, Frances Gordon and Graeme Hill, Constitutional Law in Australia (LexisNexis Butterworths, 3rd ed, 2012) 164.
Agreement had been entered into between the Commonwealth and the States in 1927.\textsuperscript{410} Given the likely difficulty of ensuring success at the referendum ballot box, taking this approach may be particularly desirable as a reassurance to voters about the nature of the agreements possible. Even if several agreements with individual Indigenous groups are contemplated, it would be possible to adhere to this approach to the greatest extent possible by providing examples of the agreements that had already been negotiated.

One problem with the agreement-making power approach would be that even if the Constitution is amended to include such a power, it would not guarantee that agreements will be entered into. One can only guess what sort of detrimental effect would be caused by an agreement-making power that is not used. It may depend on the amount of time that has elapsed. At least in the short term, even if agreements are never reached, perhaps the process of sitting at the table as equals (or as close as possible to) will itself be important for recognition.

F The Issues that Could be Covered by Agreements

It would be important not to raise hopes as to what could be potentially agreed to by the Australian Government and the relevant Indigenous community. Rather, in addition to the broad areas that could be listed in a provision such as s 105B(1), further provisions could be negotiated on a case-by-case basis.

Examples of areas that could be covered, and the corresponding issues that may arise, can be gleaned by considering the issues identified by the Australian Treaty Committee:

- the protection of Aboriginal identity, languages, law and culture;
- national land rights legislation;
- conditions governing mining and exploration of natural resources on Aboriginal land;
- compensation for loss of traditional lands and for damage to those lands and traditional way of life; and

\textsuperscript{410} Two Hundred Years Later, above n 334, 70.
• the right of Aboriginal Australians to control their own affairs and establish their own associations for this purpose.411

The fifth dot point identified by the Australian Treaty Committee, ‘the right of Aboriginal Australians to control their own affairs and establish their own associations for this purpose’, demonstrates a desire for self-government measures to be covered by agreements. If the attributes of self-government are clearly set out, this could be preferable to the piecemeal changes that could be brought about by judicial recognition of self-government as discussed above. Further, unlike sovereignty demands, it might be able to gather support from both sides of politics. As Malcolm Fraser, former Liberal Prime Minister, advocated in the August 2000 Vincent Lingiari Memorial Lecture:

Let us move to self-government. This does not relate to setting up a separate state. It doesn't relate to establishing a separate sovereignty, to the division of this country. Aboriginal leaders have spoken overwhelmingly of their wish to contribute to Australia. They have not spoken of separation.

Self-government can apply to running your school, running local community health centres and services, or perhaps a cultural association, matters which might in some cases be undertaken by local government. The Canadian experience is a positive one, it is not a frightening one. We should learn from other people, especially where their experience is so relevant to ours.412

The other dot points, particularly the second and third, would need to be reconsidered in the light of more recent developments. Like draft s 105B, these demands were put together pre-Mabo and the advent of native title so may need to be adjusted. Consideration would also need to be given to how the agreements negotiated between the Commonwealth and Indigenous groups sit with other agreements such as ILUAs and also the extent to which the agreements would and could affect third parties. Even what appears to be straightforward such as the ‘conditions governing mining and exploration of natural resources on Aboriginal land’ could raise various complexities.

411 Cited in Two Hundred Years Later, above n 334, 13.

However, native title processes, such as those arising from the right to negotiate with respect to certain proposed future developments within claim boundaries, could also provide a useful point of comparison. They have also demonstrated some promise, which Maureen Tehan refers to as the other story of native title: the story ‘of negotiation, of agreement-making, of changed approaches’. Therefore, while agreements of this sort are not unprecedented in Australia, their scope could be extended through a process of constitutional change.

G The Unique Trajectory of Constitutional Reform Deliberations in Australia in relation to Self-Government Rights

As stated at the start of this chapter, in Australia constitutional reform proposals in relation to self-government rights have proved to be quite distinct from those advanced in Canada. Although the focus of this exploration was to contemplate how these proposals could affect whether and how common law self-government rights are recognised by Australian courts, it also highlights the extent of difference between the Canadian and Australian constitutional machinery (either proposed or actual) that is capable of expressly supporting self-government rights. Mindful of these differences, I have tried to demonstrate throughout that even though the migration of foundational ideas from Canada to Australia through the fourth mode of migration (constitutional reform deliberations) is less pronounced than through the other modes of migration of foundational ideas (arguments of counsel, judicial determinations and academic critique), this does not mean that the potential of the first three modes of migration is necessarily reduced. As explained above, for example, the presence of s 35 of the Canadian Constitution Act 1982 should not automatically exclude Canadian jurisprudence from consideration in Australia because s 35 only recognises and affirms, but does not create, Aboriginal rights. In addition, the fact that Australia has not executed treaties (or if it were to pursue agreements, the fact that these could be in a very different form) should not preclude comparison between Canada and Australia. Although Canadian treaty cases are of limited relevance in Australia, the cases dealing

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413 See Native Title Act 1993 (Cth) s 26(1). Note that there are some future acts to which the right to negotiate does not apply, for example for mining infrastructure: s 24MD(6B).

414 Tehan, above n 341, 564.

415 See pages 24–27 above.
with common law Aboriginal title and Aboriginal rights, particularly those originating in British Columbia, are still relevant.\textsuperscript{416} The way in which the migration of strictly constitutional ideas can be outpaced by the migration of common law ideas also further reinforces my preference for using the umbrella term ‘foundational ideas’.

\textbf{VII CONCLUSION}

It may be that like native title, common law self-government rights are limited to rights and interests created prior to the acquisition of sovereignty which would be subject to strict continuity tests and would be susceptible to extinguishment.\textsuperscript{417} Given the limited nature of such rights, first achieving constitutional recognition of self-government rights would be desirable. Various constitutional reform proposals, particularly to introduce an agreement-making power (as was advocated in the 1980s), could have a positive effect on whether and to what extent common law self-government rights are recognised by Australian courts.

However, at this stage it looks more likely that the recognition of Indigenous self-government rights will occur in the courts than in the ballot box. Such recognition is likely to be limited. Even if a group’s right to regulate a cultural practice is recognised by the courts, Australian Commonwealth and State laws would be likely to prevail in the event of a direct conflict, which could result in the Aboriginal regulative capacity being rendered inoperative if not extinguished.\textsuperscript{418} Alternatively, this might mean that the right to regulate cultural practices only extends to those practices that are compatible with the historical and modern exercise of Crown sovereignty, in a similar vein to McLachlin CJ’s finding in \textit{Mitchell},\textsuperscript{419} and compatible with general principles such as the rule of law.\textsuperscript{420}

\textsuperscript{416} See page 27 above.


\textsuperscript{418} See generally Macklem, \textit{Indigenous Difference}, above n 66, 176 for a discussion about which level of government should prevail in the event of a conflict.

\textsuperscript{419} [2001] 1 SCR 911, 952–3.

\textsuperscript{420} For a discussion about the limitations imposed by liberal principles see Will Kymlicka, \textit{Multicultural Citizenship} (Oxford University Press, 1995) 152.
While Macklem predicts that ‘recognition of Aboriginal governmental authority will throw current law governing the distribution of legislative authority into a state of confusion’ and raises numerous complex questions, my view is that the incremental recognition of a particular group’s right to regulate and control the manner in which cultural practices are carried out is unlikely to result in as much confusion. This type of recognition, which stems from ideas that also originate in Canada, is a ‘crisper’ more confined formulation than those previously attempted in Australia. It is therefore more likely to be recognised than more far-reaching claims such as the ones attempted in Coe [No 1], Coe [No 2] and Walker. The potential for such claims to be reformulated in this way also demonstrates the extent to which foundational ideas from Canada about self-government rights (particularly when conceptualised as the right to regulate and control cultural practices) can offer a valuable new perspective to a shared issue.

Although not constituting ‘a state of confusion’, as Macklem has suggested, there are various complex issues that arise, which depend in part on whether self-government rights are argued to be an incident of native title and whether this is done under the Native Title Act or under the common law of native title. As discussed above, if native title is the starting point, these rights are likely to be confined to those rights connected to land and waters. However, there is also the potential for recognition of rights of

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421 Macklem, Indigenous Difference, above n 66, 175.

422 The questions Macklem poses in relation to Canada can be paraphrased as follows: 1. How would an Aboriginal order of government relate to the distribution of power between Parliament and provincial legislatures? 2. Will federal or provincial laws continue to apply to Aboriginal people? To what extent?; 3. To what extent should Aboriginal jurisdiction be exclusive to the Aboriginal nation? 4. To what extent should Aboriginal jurisdiction be shared with Parliament or a provincial legislature?; 5. Which level of government – federal, provincial, or Aboriginal – should prevail in the event of a conflict between or among laws regulating subjects that fall within shared jurisdiction?: ibid 172–80. For a discussion of the territorial limits of Aboriginal rights see Douglas Harris, ‘Indigenous Territoriality in Canadian Courts’ in Ardith Walkem and Halie Bruce (eds) Box of Treasures or Empty Box?: Twenty Years of Section 35 (Thetys Books, 2003) 176.

423 See especially Monahan, Constitutional Law, above n 131, 470–1.

424 For a discussion of the ‘crisper formulations’ that may be offered by comparative law see Mason, above n 2 and page 20 above.

425 (1979) 53 ALJR 403.

426 (1993) 68 ALJR 110.


428 Macklem, Indigenous Difference, above n 66, 175
regulation or control to extend to other cultural rights and interests on the basis of the common law justifications identified, which are equally applicable in Canada and Australia — allowing for the migration of ideas from one country to the other (and back again).

Picking the right case to advance self-government rights will be no easy feat. In Canada, more than 10 years have passed since *Delgamuukw*[^429] was handed down and yet, ‘[a]pparently, the “right case for the Court to lay down the legal principles” of self-government still has not materialized’.[^430] Without a crystal ball one cannot paint a picture of what the ideal case would be. If previous cases are any guide, there could be a diverse range of circumstances which might provide an appropriate vehicle, such as fishing regulation and cultural heritage.

While it is clear that there are numerous scenarios that could provide a more suitable vehicle than the far-reaching claims already attempted in Australia, perhaps an important starting point is to remember that claimants will have to satisfy the courts that their claims are based on ‘some immediate right, duty or liability’.[^431]

Although the current state of Australian law does not immediately appear to be promising, it is at least arguable that previous decisions leave open the possibility of judicial recognition of rights akin to self-government rights as part of the common law of Australia. This could be done by building on the small incremental steps already taken in Canada on the basis of the shared common law justifications for self-government rights. While progress has been slow in Canada, the courts have shown a reluctance to get involved which is not characteristic of Australian courts in the field of Indigenous rights. If the right case were to come along, much ground could be covered on the basis of ideas that have migrated from Canada. However, whether the incremental recognition of rights to regulate and control the manner in which cultural practices are carried out (especially those in relation to land) is seen to be worth fighting for is another matter. Given the limitations inherent in the piecemeal nature of judicial

recognition, the first step will be to decide whether the potential benefits outweigh the time and cost commitment of going before the courts.

It is possible that counsel may be reluctant to contribute to the transplantation of this common law idea on behalf of their clients without a full appreciation of all the implications, which may in turn mean that judges are less likely to do so. As explained in the thesis introduction, the modes of migration can be interdependent. The fact that the second mode (judicial determinations) can be dependent on the first (arguments of counsel) is quite stark in this case. Unless the right case comes along in which counsel assess that the benefits outweigh the risks of arguing for the incremental recognition of rights to regulate and control the manner in which cultural practices are carried out by drawing on various foundational common law ideas, including those explored by academics in Canada (academic critique being the third mode of migration), the courts will never be in a position to decide such a case.

In order to make an informed assessment, counsel would need to weigh up the potential implications and advise their clients accordingly. If assessments of the implications have also migrated from another jurisdiction such as Canada, this will be a much easier feat. Making such an assessment without considering potential limitations, including those that can be gleaned thanks to insights gained from Canada, as outlined throughout Topic 1, could mean that the assessment is inaccurately made. Indeed, as argued throughout this thesis, the dangers of transplantation of foundational ideas without consideration of broader ideas, particularly concerning the implications of transplantation, can produce unintended consequences. However, the more such ideas migrate the greater the likelihood that an informed and appropriate decision can be made.

Weighing up all the risks is especially important given the limitations inherit in the piecemeal nature of judicial recognition of self-government rights and the difficulty of achieving such recognition, as illustrated by the Canadian case law. The risks involved might be so great that advocates decide to devote their time elsewhere, for example, towards the cause of achieving constitutional recognition (perhaps through an agreement-making power through which self-government rights could be furthered),

432 See also page 22 above.
and thus privilege this mode of migration. It therefore appears that irrespective of the type or mode of recognition, the migration of foundational ideas can be an invaluable decision-making tool for advocates.
In the context of proposals to amend the *Australian Constitution* to recognise Aboriginal and Torres Strait Islander peoples, the Expert Panel established by the Australian Government identified ‘insert[ing] a new guarantee of non-discrimination and racial equality for all Australians’ as one of the ‘recognised approaches for addressing the problem of the “race power”’. Like in Topic 1, this part draws on a modified version of the framework set out by Choudhry in *The Migration of Constitutional Ideas*: while I agree with Choudhry that ‘migration’ encompasses transplants, I also refer to ‘transplantation’ when I want to specifically refer to the deliberate adoption of a provision of another Constitution. I have also developed four ‘modes’ of migration to assist our understanding of the interrelated processes at play. The focus of Topic 2 is the extent to which constitutional ideas regarding equality and non-discrimination could potentially migrate from Canada to Australia and serve as proposals for constitutional reform (constitutional reform deliberations being the fourth mode of migration identified in the thesis introduction). In particular, I consider whether the equality provision of the *Canadian Charter of Rights and Freedoms*, s 15, could be transplanted (with or without substantial modification) for inclusion in the *Australian Constitution*.

I start with an appraisal of the history and perceived problems surrounding s 51(xxvi) (the ‘race power’) of the *Australian Constitution* and in so doing consider what, if anything, Canadian approaches could offer Australia. My view is that the utility of the transplantation of constitutional provisions depends on the starting point. Its usefulness may be less when the focus is on a parochial issue. However, informed by ideas that could migrate from Canada to Australia, it is possible to craft a new provision that

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434 Choudhry, above n 4.

435 See page 22 above.
overcomes some of the difficulties that have arisen in Canada, which I call the ‘express freedom from racial discrimination’ (s 117A). This provision differs in certain respects from the Expert Panel’s proposal for a prohibition of racial discrimination (s 116A).

After considering the nature of s 51(xxvi) and the impetus for a non-discrimination guarantee, I then consider how a non-discrimination guarantee could be crafted and issues of scope — examining, in particular, its desired scope and whether it should be expressly confined in some way (for example, as a guarantee ‘for all Australians’). I again draw on Canadian developments given the right to equality in the Canadian Charter of Rights and Freedoms applies to ‘every individual’ while other rights are confined to citizens.

Were s 15 of the Canadian Charter of Rights and Freedoms to be transplanted, with or without substantial modification for inclusion in the Australian Constitution, or were Australia to include a non-discrimination guarantee of limited resemblance to s 15 but guided by similar aspirations, it is possible that Australian High Court justices, following the lead of counsel, will draw on Canadian developments, even for the purposes of comparison, which highlights that transplantation or initial migration can lead to the further migration of ideas (and again sheds light on the interrelatedness of the four modes of migration set out in the thesis introduction). 436

Although there are ways in which the drafting of a non-discrimination guarantee could be modified to try to overcome the difficulties that have arisen in Canada, it needs to be stated from the outset that this could give rise to other (as yet) unforeseen difficulties. When ‘addressing the problem of the “race power”’ 437 is considered as a starting point, it appears that the outright transplantation of overseas approaches may be of limited utility. However, the more ideas migrate from other jurisdictions, the greater the availability of ideas that could provide the basis for a unique solution to a uniquely Australian issue. At the very least, the case law that has developed around s 15 of the Canadian Charter of Rights and Freedoms can help Australians to appreciate the risks of approaching Aboriginal rights issues solely through the prism of equality and non-discrimination. As has been argued throughout this thesis, it is dangerous to transplant

436 See pages 18–23 above.
foundational ideas without other ideas (particularly in relation to implications) also migrating. If the potential implications are also assessed by learning from experiences in other countries such as Canada, the migration of foundation ideas can be an invaluable decision-making tool for advocates. While it is a tool that does not provide automatic answers, it provides advocates with a more informed starting point from which to depart when making decisions about whether to pursue non-discrimination as the preferred mode of constitutional recognition of Aboriginal and Torres Strait Islander peoples.

A Advocating the Use of Comparative Law

Like in Topic 1, I feel compelled to defend my preference for advocating the utility of considering comparative constitutional law developments when it comes to constitutional reform. The sorts of concerns that are often raised were cited in the Report of the Expert Panel:

These international examples should provide guidance; however, it is particularly important for Australia to find its own solutions.

When looking at constitutional change, care should be taken not to transpose approaches in Canada and the USA as the circumstances of those communities are different — one size does not fit all.438

While I consider that looking abroad is useful when identifying options for constitutional reform and when exploring the potential legal implications of (modified) transplants where they are deemed appropriate, I appreciate that in public discourse overemphasising foreign similarities could be counterproductive. Painting a picture of migrating constitutional ideas is certainly unlikely to be how a politician would sell a proposal for reform, particularly in Australia where undue attention on the Canadian Charter of Rights and Freedoms might mean that the focus shifts further into rights debates. In existing scholarship on the necessary ingredients of a successful referendum campaign simplicity is often emphasised.439 Certainly, in such a campaign comparative law references may overcomplicate debates. However, they may enrich the legal analysis that must precede any such campaign.


439 Ibid 218. See also George Williams and David Hume, People Power: The History and Future of the Referendum in Australia (UNSW Press, 2010) ch 7 for recommended approaches for ‘Getting to Yes’.
In order to understand comparative constitutional law developments in their proper context, an important factor to consider is the mechanism for constitutional alteration.

1 Constitutional Change in Canada

The *British North American Act 1867* (now called the *Constitution Act 1867*) contained no general amendment provision. As Hogg explains ‘[t]he reason for this omission was that the framers were content for amendments to be made in the same way as the *BNA Act* itself — by the imperial Parliament’.

After the *Statute of Westminster 1931* conferred upon the Dominions the power to repeal or amend imperial statutes, the *British North American Act 1867* could still only be amended by the UK Parliament. However, at the 1930 imperial conference it was agreed that the UK Parliament would no longer make any enactments without the request and consent of a dominion. In any event, as Hogg describes, ‘long before 1930, the practice had developed of requesting amendments by a “joint address” of the Canadian House of Commons and the Canadian Senate’. However, the role of the provinces was unclear: ‘There had been no consistent practice by the federal government of obtaining the consent of the provinces before requesting an amendment, although unanimous provincial consent had been obtained for all amendments directly affecting provincial powers’.

When Prime Minister Trudeau proposed the amendments which ultimately became the *Canada Act 1982* and the *Constitution Act 1982* he proclaimed that he would proceed unilaterally if provincial support could not be obtained. In a decision following references directed by three provinces to their Courts of Appeal that were subsequently appealed to the Supreme Court of Canada and heard together, *Re Resolution to Amend the Constitution*, the Supreme Court held that the consent of the provinces to the proposed amendments was not required ‘as a matter of law’. However, the Court also held that ‘as a matter of convention’ a ‘substantial degree’ of provincial consent was

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440 Hogg, above n 303, vol 1, 66 (citations omitted).
441 *Statute of Westminster 1931* (UK) 22 Geo 5, c 4 (‘Statute of Westminster’).
442 See Hogg, above n 303, vol 1, 66.
443 Ibid 67.
required’. Subsequently, agreement was reached on an altered version of the amendments with nine of the ten provincial Premiers (with the Premier of Quebec dissenting). As Hogg explains, ‘[t]his agreed-upon version was passed as a joint address by both Houses of the federal Parliament, was sent to London, was enacted by the United Kingdom Parliament as the *Canada Act 1982*, which included, as Schedule B, the *Constitution Act 1982*. Part V of the *Constitution Act 1982* includes amending procedures which enable the *Constitution Act 1867* and the *Constitution Act 1982* to be amended without the involvement of the UK Parliament. Hogg summarises the five amending procedures in Part V as follows:

1. A general amending procedure (s 38) for amendments not otherwise provided for (as well as for amendments listed in s 42), requiring the assents of the federal Parliament and two-thirds of the provinces representing 50 per cent of the population;

2. An unanimity procedure (s 41), for five defined kinds of amendments, requiring the assents of the federal Parliament and all of the provinces;

3. A some-but-not-all-provinces procedure (s 43), for amendment of provisions not applying to all provinces, requiring the assents of the federal Parliament and only those provinces affected;

4. The federal Parliament alone (s 44) has power to amend provisions relating to the federal executive and Houses of Parliament; and

5. Each provincial Legislature alone (s 45) has power to amend ‘the constitution of the province’. One of the perceived failures of the *Constitution Act 1982* was the failure to accommodate Quebec. According to Hogg:

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445 See Hogg, above n 303, vol 1, 67.
446 Ibid vol 1, 68 (citations omitted).
447 Ibid vol 1, 76.
448 Ibid vol 1, 71.
Quebec was of course legally bound by the *Constitution Act 1982* because the Act had been adopted into law by correct constitutional procedures. However, the government of Quebec thereafter refused to participate in constitutional changes that involved the new amending procedures.\(^{449}\)

Following negotiations on Quebec’s conditions, the *Meech Lake Constitutional Accord of 1987* was entered into by all eleven first ministers. However, it lapsed after only being ratified by eight of the ten provinces.\(^{450}\) As Hogg poignantly describes, the process was resumed in 1991 ‘but with an even more ambitious goal — to cure everybody’s constitutional discontents as well as Quebec’s’. This process culminated in the *Charlottetown Accord of 1992*.\(^{451}\) The *Charlottetown Accord* included all elements of the *Meech Lake Constitutional Accord*, as well as other changes such as provision for an elected Senate and, provision for Aboriginal self-government.\(^{452}\) The *Charlottetown Accord* would also have required Aboriginal consent to future amendments of constitutional provisions referring to Aboriginal peoples.\(^{453}\) This time the first ministers agreed to submit the Accord to referendum before proceeding to the constitutionally required legislative ratifications. However, the referendum failed. (Hogg explains that the unanimity procedure of s 41 of the *Constitution Act 1982* was applicable to both Accords because they included provisions relating to the composition of the Supreme Court of Canada as well as a change in the amendment procedures.)\(^{454}\) This result has been thought to have ‘brought to an end the search for a constitutional accommodation with Quebec’.\(^{455}\) However, given other issues were also at stake, such as Aboriginal self-government, it has also put more pressure on the courts to bring about accommodation and recognition as explored in Topic 1.

In contrast to the difficulties experienced in attempting such broad-reaching constitutional change, it is important to note that the new amendment procedures in the *Constitution Act 1982* are much more flexible than s 128 of the *Australian Constitution*,

\(^{449}\) Ibid vol 1, 72.

\(^{450}\) Ibid vol 1, 73.

\(^{451}\) Ibid.

\(^{452}\) Ibid. See also page 42 above.

\(^{453}\) Ibid vol 1, 101.

\(^{454}\) Ibid vol 1, 73 n 40, 74 n 46.

\(^{455}\) Ibid vol 1, 74.
which will be discussed below. And, perhaps more importantly, many of the constitutional provisions that may be of interest in Australia have been amended. In particular, s 25 (the non-abrogation clause),\textsuperscript{456} s 35 (the provision recognising Aboriginal and treaty rights),\textsuperscript{457} and s 37 (the commitment to further constitutional discussions)\textsuperscript{458} of the Constitution Act 1982 have already been amended.

2 Constitutional Change in Australia

Section 128 of the Australian Constitution sets out the process for constitutional alteration. A proposed law must be enacted by the Parliament and the proposed alteration must be supported in a referendum by double majorities — by a majority of voters overall as well as a majority of voters in four or more States. The Australian Constitution has been changed only eight times in 44 attempts.\textsuperscript{459} The difficulties experienced in changing the Constitution famously led Geoffrey Sawer to exclaim that Australia is the ‘frozen continent’.\textsuperscript{460}

There have only ever been four proposals that would have changed the relationship between Aboriginal and Torres Strait Islander peoples and the Australian Constitution; only one of which was successful. Along with the successful 1967 referendum, power to legislate over Aborigines was one of fourteen proposed extensions of Commonwealth power put to the people in 1944\textsuperscript{461} and the deletion of s 25 of the Constitution\textsuperscript{462} was proposed as part of the nexus referendum in 1967\textsuperscript{463} and the democratic elections referendum in 1974.\textsuperscript{464}

Section 128 may be regarded as a democratic guarantee given it requires proposals for constitutional reform to be approved by double majorities. However, arguably this assumes that the public will be capable of making an informed choice. The difficulty, as

\textsuperscript{456} See page 158 below.
\textsuperscript{457} See page 24 above.
\textsuperscript{458} See page 69 above.
\textsuperscript{459} For discussion of the record of constitutional change see Williams and Hume, above n 439.
\textsuperscript{460} Sawer, above n 409, 208.
\textsuperscript{461} Constitution Alteration (Post-war Reconstruction and Democratic Rights) 1944 (Cth).
\textsuperscript{462} See pages 140–147 below.
\textsuperscript{463} Constitution Alteration (Parliament) 1967 (Cth).
\textsuperscript{464} Constitution Alteration (Democratic Elections) 1974 (Cth).
Justice Ronald Sackville has explained, is that the ‘prosaic form of the *Australian Constitution* ... create[s] serious barriers to community understanding’.465

Perhaps these issues aren’t peculiar to constitutional reform but pertain to political discussion more generally. Nevertheless, it is important to keep this dynamic in mind, especially when considering developments in other jurisdictions, such as Canada, where constitutions change in very different ways. As disappointing as it may be, given difficulties in explaining technical amendments to the Constitution to the general public, in the current political climate they may never see the light of day even where it is generally accepted amongst academics or practitioners that a proposed change would result in improvements to our constitutional system. Public opinion is also susceptible to manipulation and whether or not this is condoned may depend on which side of the debate one is on.

Despite the inherent tension in s 128 and the impossibility of a general public constituted by constitutional experts, I think the aim of political discourse and constitutional dialogue nevertheless should be to provide as accurate a picture as possible. Moreover, I am of the view that drawing on and contrasting comparative developments can, if done in a thoughtful and well-informed way, be a useful way to paint such a picture.

II  HISTORY AND CURRENT OPERATION OF S 51(XXVI)

Before considering what Canadian approaches can offer, my preference is to consider the background to the issue of the ‘race power’ that is currently confronting Australians. Section 51(xxvi) originally empowered the Commonwealth Parliament to make laws with respect to: ‘The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’.

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A History of s 51(xxvi)

The first draft of the Constitution considered at the 1891 Constitutional Convention included a provision which would have given the Commonwealth Parliament power to make laws with respect to the ‘affairs of people of any race who are not included under the laws applicable to the general community, or with respect to whom it is deemed necessary to make special laws’. 466

In the course of revisions of the draft which took place during the 1891 Convention, the provision was altered to exclude Aboriginal and Torres Strait Islander peoples from the proposed Commonwealth power to make special laws. The final draft from the 1891 Convention provided as follows:

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

This draft power was included alongside three other powers that were proposed to be exclusive to the federal Parliament. 467

At the Melbourne session of the 1898 Convention, it was decided that the power should be placed among the proposed powers that the Commonwealth Parliament should share concurrently with the States, and the clause was revised to take the form in which it was originally enacted. 468

According to Quick and Garran, the purpose of s 51(xxvi) was to enable the Commonwealth Parliament:

to deal with the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain

468 Quick and Garran, above n 467, 622. See ‘Melbourne Session of the Convention, 1989’ in Williams, above n 466, 1128.
occupations, or to give them special protection and secure their return after a certain period to the country whence they came.\footnote{469}{Quick and Garran, above n 467, 622.}

Given the current focus on s 51(xxvi) and non-discrimination, it is interesting to note that in their commentary on the power, Quick and Garran make reference to the Fourteenth Amendment of the \textit{United States Constitution} and the case of \textit{Yick Wo v Hopkins}\footnote{470}{118 US 356, (1886).} where a power to grant laundry licences (which was exercised in favour of Europeans and not ‘Chinamen’) was held to be unconstitutional:

The decision in Yick Wo’s case turned, of course, on the special inhibitions of the fourteenth amendment. There is no section in the Constitution of the Commonwealth containing similar inhibitions. On the contrary it would seem that by sub-sec xxvi the Federal Parliament will have power to pass special and discriminatory laws relation to ‘the people of any race’, and that such laws could not be challenged on the ground of unconstitutionality, as was done in \textit{Yick Wo v Hopkins}.\footnote{471}{Quick and Garran, above n 467, 623.}

Such references, of course, also demonstrate that the migration of ideas from other jurisdictions to Australia is not a new phenomenon.\footnote{472}{The influence of the \textit{United States Constitution} on the drafting of the \textit{Australian Constitution} has been the subject of some commentary: see, eg, George Winterton, ‘Another Bicentenary: The Influence of the \textit{United States Constitution} in Australia’ (1998) 32(3) \textit{Quadrant} 5; William Buss, ‘Andrew Inglis Clark’s Draft Constitution, Chapter III of the \textit{Australian Constitution}, and the Assist from Article III of the \textit{Constitution of the United States}’ (2009) 33 \textit{Melbourne University Law Review} 718.}

\section{1967 Referendum}

The words ‘other than the aboriginal race in any State’ in s 51(xxvi) were removed by referendum in 1967. This referendum, which also removed s 127 of the \textit{Constitution} (which provided that ‘aboriginal natives’ were not to be counted in determining the population of the Commonwealth) was the most decisive since Federation (with 90.77 per cent of the overall vote in favour).\footnote{473}{Australian Electoral Commission, \textit{Australian Referendums 1906–1999} (2000) (CD-Rom).}

The High Court has said that, as a result of the 1967 alteration to s 51(xxvi), it is now ‘competent for the Parliament to make special laws with respect to the people of the
Aboriginal race’. While the vote was an overwhelming success and was cast as a ‘vote for Aborigines’, as John Scott has pointed out, ‘it is ironic that the inclusion of Aboriginal people ... was achieved by removing our name from two places in the Constitution’. 475

Much has been written on the ‘myths’ of the 1967 referendum, particularly with respect to citizenship, discrimination and rights. 476 As discussed in the next section below, it has often been incorrectly asserted that the Commonwealth could not make laws with respect to Aboriginal people prior to 1967. The removal of s 127 has also been incorrectly assumed to be all about the ‘census’. 477

Constitutional complexities aside, it is possible that both before and after 1967 the referendum was lumped together with other changes that were occurring at the time. For example, the federal franchise was extended to Aboriginal citizens in 1962 478 and the remaining restrictions on the right of Aboriginal people to vote in State elections were removed by 1965 (Aboriginal people were given the vote in 1962 in Western Australia and in 1965 in Queensland).

Likewise, the remaining outwardly discriminatory laws were slowly being removed, as explained by Attwood and Markus:

In 1959 the Commonwealth had extended entitlement to pensions and unemployment and maternity allowances to all Aboriginal people except those classed as ‘nomadic or primitive’, and in 1966 this final discrimination was removed. In 1957 Victoria became the first mainland state to remove all forms of racial discrimination from its statutes when it repealed sections of the Licensing Act, which prohibited supply of alcohol to Aborigines, and sections of the Police Offences Act, under which it was an offence for a

474 Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 186 (Gibbs CJ).


478 Commonwealth Electoral Act 1962 (Cth). However, voting was not made compulsory for Aboriginal citizens until 1983.
white person to ‘wander or lodge in company with any of the Aboriginal natives of Victoria’. In 1963 New South Wales removed its last discriminatory laws, and in 1966 South Australia followed suit. This meant that only Queensland and Western Australia retained discriminatory laws at the time of the 1967 referendum.479

It is believed that many of these changes owed much to the pressure exerted on governments by the Federal Council for the Advancement of Aborigines and Torres Strait Islanders which had also been advocating for constitutional change.480

When it came closer to the 1967 referendum, Attwood and Markus claim that despite these breakthroughs and despite understanding of the nature of the proposed changes to the Constitution, it was still represented ‘as a matter of federal control, the repeal of racist laws, and citizenship for Aborigines’.481 The citizenship dimension may be particularly surprising given the Constitution makes no reference to citizenship and given Aboriginal people were already citizens by virtue of the Nationality and Citizenship Act 1948 (Cth). However, this may be explained by the fact that ‘citizenship was not only a matter of civil rights determined by legal arrangement but of social and economic rights that were usually determined by political arrangements’. 482

The story that was painted can perhaps be explained thus:

Arguably, this occurred because they believed that the Commonwealth government was the primary means of providing a form of citizenship for Aboriginal people which entailed social and economic rights and so was more meaningful or real than citizenship in terms of political or civil rights, and because they were convinced that they had to secure a massive ‘yes’ vote in the referendum in order to create a mandate for a federal government willing to play a greater role in Aboriginal affairs. At the same time, though, it can be suggested that the way they represented the referendum was determined by the fact that they had inherited a political narrative or tradition which had

479 Attwood and Markus, above n 476, 38.
480 Ibid.
481 Ibid 45.
482 Ibid 19.
long tied the calls for a greater Commonwealth role in Aboriginal affairs, the overthrow of racially discriminatory laws and rights for Aborigines to constitutional change.\textsuperscript{483}

A somewhat more constrained (and arguably more accurate) picture was painted by the Government at the time. In the second reading speech for the \textit{Constitution Alteration (Aboriginals) 1967}, the then Prime Minister, Harold Holt, noted that the effect of the proposed changes would be:

the removal of the existing restriction on the power of the Commonwealth to make special laws for the people of the Aboriginal race in any State if the Parliament considers it necessary. As the \textit{Constitution} stands at present, the Commonwealth has no power, except in the Territories, to legislate with respect of people of the Aboriginal race \textit{as such}. If the words ‘other than the Aboriginal race in any State’ were deleted from section 51(xxvi), the result would be that the Commonwealth Parliament would have vested in it a concurrent legislative power with respect to Aboriginals \textit{as such}, they being the people of a race, provided that Parliament deemed it necessary to make special laws for them. It is the view of the Government that the National Parliament should have this power.\textsuperscript{484}

The referendum did not involve a ‘no’ campaign but rather involved a simple positive case promoted over many years. The ‘yes’ case explained the nature of the proposals as follows:

First, it will remove words from our \textit{Constitution} that many people think are discriminatory against the Aboriginal people.

Second, it will make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary.\textsuperscript{485}

As simple as the ‘yes’ case may appear, the controversy surrounding what 1967 stood for has continued to this day. It is also likely to create confusion when new proposals for constitutional recognition are discussed.

\textsuperscript{483} Ibid 45–6.

\textsuperscript{484} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 1 March 1967, 263 (Harold Holt).

\textsuperscript{485} Reproduced in Australian Electoral Commission, above n 473. See also Attwood and Markus, above n 476, 126–7.
On the basis of various oral testimonies that have been collected, Attwood and Markus point out that many do not regard the 1967 referendum very highly: ‘Some are of the opinion that it made little difference to their lives, that there is still a long way to go before equality is achieved, and that they still have to struggle for their basic rights’. 486 In contrast, for some Aboriginal people the 1967 referendum is highly significant: ‘many assert that they “got the rights in 1967” or were allowed “to go to places that we never went before, such as pictures [and] swimming pools”’. 487 Attwood and Markus suggest that statements such as these can be explained by the fact that often ‘a long and complex train of occurrences’ (such as the changes that occurred throughout the 60s) ‘can be compressed into a single one’ (in this case the 1967 referendum). 488 There are at least two further explanations:

First, since the referendum highlighted and challenged racial discrimination, local governmental authorities might have been persuaded to abandon long-standing rules (such as barring Aboriginal children from municipal swimming pools); second, the referendum might have provided Aboriginal people with the necessary impetus to assert the legal rights that they already had on paper by enabling them to overcome their own fears and be bold enough to do things like taking up seats in the same section of the cinemas as everyone else ... In other words, the referendum helped Aboriginal people become real Australian citizens because it alerted them to their rights and gave them the confidence to exercise these. 489

In addition to the social and political effects, the legal implications of the 1967 referendum are highly contentious.

C  Laws in Relation to Aboriginal and Torres Strait Islander Peoples before 1967

Until 1967, s 51(xxvi) excluded ‘people of the Aboriginal race’ from its scope. However, this did not mean that the Commonwealth Parliament could not make laws that operated in relation to Aboriginal and Torres Strait Islander peoples, which is often incorrectly thought to be the case.

486 Attwood and Markus, above n 476, 69.
487 Ibid.
488 Ibid 70.
489 Ibid 69.
As Attwood and Markus explain, the claim that the Commonwealth could not intervene in Aboriginal affairs because of s 51(xxvi) was erroneous ‘but it had acquired the power of a convention and so was simply accepted’. However, even after the 1967 referendum this erroneous interpretation has remained. A glaring example is provided in the report of the Senate Standing Committee on Legal and Constitutional Affairs, *Two Hundred Years Later*, which incorrectly asserts that ‘[t]he purpose of this amendment was to give the Commonwealth Parliament the power to legislate with respect to the Aboriginal people, a power which had previously been enjoyed exclusively by State legislatures’.

The fact of the matter is that the Commonwealth Parliament could make laws that operated in relation to Aboriginal people and indeed, the Commonwealth Parliament did do so. All that it was prevented from doing was relying on s 51(xxvi) to make ‘special laws’ in relation to Aboriginal people. The reason for this is that so long as a law made by the Commonwealth Parliament is capable of being described as a law with respect to one of the enumerated subject matters with respect to which the Commonwealth Parliament may make laws, it is irrelevant that the law may also be regarded as a law with respect to some other subject matter with respect to which the Commonwealth Parliament does not have express power to make laws.

So, even before 1967, the Commonwealth Parliament was able to enact laws specifically in relation to Aboriginal people, such as s 39 of the *Commonwealth Electoral Act 1918* (Cth), and laws which affected Aboriginal people among others.

D **Reliance on s 51(xxvi) since 1967**

Following the 1967 amendment, the High Court has held that it is ‘competent for the Parliament to make special laws with respect to the people of the Aboriginal race’. Examples of laws made since 1967 in reliance on s 51(xxvi) that have been considered

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490 Attwood and Markus, above n 476, 19.
491 *Two Hundred Years Later*, above n 334, 80–1.
493 Section 39 as originally enacted provided that ‘[n]o aboriginal native of Australia, Asia, Africa, or the islands of the Pacific (except New Zealand) was entitled to vote at federal elections unless so entitled by s 41 of the Constitution’.
by the High Court include laws protecting sites of cultural significance and securing native title.

Some Acts, particularly the *Aboriginal and Torres Strait Islander Act 2005* (Cth), the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and the *Native Title Act*, also make reference to the fact that the Act is a ‘special law’ for Aboriginal and Torres Strait Islander peoples in the preamble. For example, the preamble to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) provides as follows:

Preamble

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

E  Limitations on s 51(xxvi)?

Although, as discussed above, it is clear that it is ‘competent for the Parliament to make special laws with respect to the people of the Aboriginal race’, as then Justice Robert French of the Federal Court (now Chief Justice of the High Court) has commented extra-curially, ‘[t]he historical contexts of the original provision and its amendment have generated a tension which has no resolution’. Various attempts have been made to resolve this tension, most notably by limiting the power to ‘beneficial’ laws or laws that meet a test of ‘necessity’.

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495 Sections 8 and 11 of the what was the *World Heritage Properties Conservation Act 1983* (Cth) were upheld by the High Court in *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘Tasmanian Dam Case’).

496 The validity of most of the *Native Title Act* (apart from s 12) was upheld by the High Court in *Native Title Act Case* (1995) 183 CLR 373.


Beneficial Laws

Whether a law enacted under s 51(xxvi) must be a beneficial law has been the subject of intense scrutiny. Some High Court justices have suggested that s 51(xxvi) would support only beneficial and not adversely discriminatory laws. However, other judges are of the view that discriminatory laws can be made under s 51(xxvi). In *Kruger v Commonwealth*, for example, Gaudron J remarked that it is ‘arguable that that power only authorises laws for the benefit of “the people of [a] race for whom it is deemed necessary to make special laws”’. Gaudron J later developed a more sophisticated approach. In *Kartinyeri v Commonwealth* she opted for a test of necessity, finding that s 51(xxvi) is not confined to ‘beneficial laws’. However, on the basis of the necessity test (discussed below) she found that s 51(xxvi) ‘presently only authorises laws which operate to the benefit of Aboriginal Australians’. Ultimately, in *Kartinyeri* only Kirby J held that the power is confined to beneficial laws. Gummow and Hayne JJ were of a different opinion and Brennan CJ and McHugh J did not decide the question.

Although s 51(xxvi) has not been considered by the current High Court, French draws the following conclusions about the power in the extra-curial piece mentioned above:

As construed by a now substantial body of High Court jurisprudence, there is nothing in the power, other than the possibility of a limiting principle of uncertain scope, to prevent

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500 (1997) 190 CLR 1, 111.

501 (1998) 195 CLR 337, 368 (‘Kartinyeri’).

502 Ibid.

503 Ibid 411.

504 Ibid 378.


506 Indeed only Gummow and Hayne JJ decided *Kartinyeri v Commonwealth* (1998) 195 CLR 337, which was the last case to consider the power in a comprehensive manner. In a recent speech the Hon Michael Kirby referred broadly to *Wurridjal v Commonwealth* (2009) 237 CLR 309 in the context of constitutional change and s 51(xxvi). However, the focus of *Wurridjal* was the s 122 of the *Australian Constitution* (the territories power). See Michael Kirby, ‘Constitutional Law and Aboriginal and Torres Strait Islander Peoples: Challenge for a Parched Continent’ (Speech delivered at the Law Council of Australia Discussion Forum, Old Parliament House, 22 July 2011).
its adverse application to Australian citizens simply on the basis of their race. There is little likelihood of any reversal of the now reasonably established proposition that the power may be used to discriminate against or for the benefit of the people of any race. The history of the 1967 amendment and its beneficial purpose with respect to Aboriginal people cannot be treated as informing the language of the power with a benign limiting spirit. There are, in any event, serious textual and practical obstacles to such a construction.\textsuperscript{507}

Drawing again on the irresolvable tensions created by the ‘historical contexts of the original provision and its amendment’\textsuperscript{508} French also quotes from an article by Geoffrey Lindell to point out that ‘there is a difference between showing an intention to use the power for beneficial purposes [as was the intention in 1967] and an intention to only use it for such purposes’.\textsuperscript{509} However, this difference has been blurred, particularly by the statements by politicians at the time. For example, Prime Minister Harold Holt assured voters: ‘I am confident that acceptance of this referendum proposal by the people will work only for the good of our Aborigines’.\textsuperscript{510} Similarly, a cabinet submission from Attorney-General Billy Snedden stated that ‘it seems implicit in the arguments put forward that it is accepted generally that, if the Commonwealth were given the power to legislate by the deletion of the words [other than the Aboriginal race] it would not itself discriminate against Aborigines, though it might give them special help’.\textsuperscript{511} The Second Reading Speech and the ‘yes case’\textsuperscript{512} arguably also demonstrate such an intention. However, the intention of individual parliamentarians at the time is one thing, ‘parliamentary intent’ is another, and, in any event, the use that can be made of the Convention debates, or equivalent extrinsic materials when it comes to a constitutional amendment, has not been clearly established.\textsuperscript{513}

\textsuperscript{508} Ibid.
\textsuperscript{510} Quoted in Attwood and Markus, above n 476, 82.
\textsuperscript{511} Quoted in ibid.
\textsuperscript{512} See page 117 above.
\textsuperscript{513} See, eg, the overview of High Court decisions referring to the issue in Wong v Commonwealth (2009) 236 CLR 573, 604 (Heydon J).
French further identifies the ‘major practical difficulty’ of the ‘institutional competence of courts to judge whether a law is beneficial’, which will be considered below when outlining options for reform.

2  Necessity

On current authority, although the words ‘for whom it is deemed necessary to make special laws’ qualify the content of s 51(xxvi), the judgment as to whether a law is ‘deemed necessary’ is for the Commonwealth Parliament, subject to a possible supervisory role for the High Court in cases of ‘manifest abuse’ (see below).

However, in *Kartinyeri*, Gaudron J was of the view that the High Court could consider whether there was material upon which the Parliament might ‘reasonably’ form its judgment. Accordingly, her Honour said that the test of the validity of a law based on s 51(xxvi) is whether it is reasonably appropriate and adapted to a real and relevant difference. Gaudron J also expressed the opinion that the circumstances justifying such a conclusion in relation to racial minorities would be likely only to be circumstances of disadvantage. In other words, as mentioned above, in her Honour’s view s 51(xxvi) ‘presently only authorises laws which operate to the benefit of Aboriginal Australians’.

Justice Gaudron’s approach was not accepted by the rest of the Court. And according to French, ‘it requires much development before it can be deployed in the face of a legislative determination to deal with a perceived “threat” or “problem” connected with the people of a particular race’. However, French appears to concede that there could be a limited role for necessity as suggested by Gageler: namely, a ‘reviewable abuse of power would arise where Parliament could be shown to have failed to form the requisite

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517 Ibid 368.

judgment of “necessity” or to have failed to form its judgment on rational grounds’. 519
But, of course, this does not allow for merits review of legislation. 520

3 Manifest Abuse

The Native Title Act Case raised the possibility of the High Court retaining supervisory jurisdiction to examine manifest abuse of power. 521 However, the question was left undecided. In Kartinyeri Gummow and Hayne JJ again reiterated that the High Court retains supervisory jurisdiction against abuse of power. 522 In contrast, Kirby J rejected the criterion of ‘manifest abuse’ as inherently unstable. 523

4 The Only Remaining Limitation: Rule of Law?

Further possible limitations include limitations reflecting international law norms, as suggested by Kirby J in Kartinyeri, 524 and the rule of law, as identified by Lindell in the article mentioned above. 525 Although quickly dismissing the former, French concedes that the rule of law may have a part to play:

It seems unlikely, notwithstanding the observations of Kirby J in Kartinyeri, that any limiting construction of the power which reflects international law norms will be accepted. There is, however, a reference in the joint judgment of Gummow and Hayne JJ to the rule of law as a traditional conception within which the Constitution was framed. ... In this connection it may be recalled that the rule of law was described by Dixon J as a foundation assumption of the Commonwealth Constitution. Gleeson CJ, in the context of a reference to s 75(v) of the Constitution, described it as providing “a basic guarantee of the rule of law”. It is, however, a broad concept and difficult to define. While its application to principles of statutory construction and the preservation

523 Ibid 414.
524 Ibid 418–19.
525 Lindell, above n 509, 274.
of fundamental rights is well established, its potentiality in constitutional construction and in particular in the construction of the race power is less clear.\footnote{French, ‘The Race Power: A Constitutional Chimera’, above n 498, 207 (citations omitted).}

Since the time of publication of French’s chapter, the ‘rule of law’ and the ‘principle of legality’ have featured in a number of High Court judgments.\footnote{See, eg, \textit{K-Generation Pty Ltd v Liquor Licensing Court} (2009) 237 CLR 501, 520; \textit{South Australia v Totani} (2010) 242 CLR 1, 28–9; \textit{Cadia Holdings Pty Ltd v New South Wales} (2010) 84 ALJR 588, 603; \textit{Hogan v Hinch} (2011) 85 ALJR 398, 403–4; \textit{Saeed v Minister for Immigration and Citizenship} (2011) 241 CLR 252, 259; \textit{Lacey v A-G (Qld)} (2011) 85 ALJR 508, 521; \textit{Australian Crime Commission v Stoddart} (2011) 86 ALJR 66, 105, 107.} Although these references occurred in the context of statutory construction, it may be a testament to how receptive the Court would be to rule of law considerations when s 51(xxvi) next comes before it. It could at least be hoped that a Nazi style dictatorship law (as is often referred to in discussions of the race power)\footnote{During the \textit{Kartinyeri} hearing, when Kirby J stated that ‘it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it’, the then Commonwealth Solicitor-General, Gavan Griffith QC, responded ‘Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason’: Transcript of Proceedings, \textit{Kartinyeri v Commonwealth} (High Court of Australia, 5 February 1998).} would be found invalid on this, or other similar bases.

\section*{F Reform Options}

Given the undesirability of a power that ‘continues to imbue the Australian polity with race’\footnote{Megan Davis, ‘A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions’ (2006) 8 \textit{University of Technology Sydney Law Review} 135, 139.} and due to its highly contested operation, many people have advocated that s 51(xxvi) be amended; either by adding a beneficial requirement, repealing the power entirely or by repealing it and substituting it with a power with respect to ‘Aboriginal and Torres Strait Islander peoples’ or ‘Aborigines and Torres Strait Islanders’.

\subsection*{1 Repeal}

The simplest option for reform is arguably to repeal s 51(xxvi). If this option were to be seriously considered it would make the warning provided by Geoffrey Sawer prior to the 1967 amendments appear ‘prophetic’, to coin the term used by French.\footnote{French, ‘The Race Power: A Constitutional Chimera’, above n 498, 208.} Sawer had the following to say in 1966:
Having regard to the dubious origins of the section, and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would seem preferable to any amendment intended to extend its possible benefits to Aborigines.531

The principal difficulty with simply removing s 51(xxvi) is that it is possible that some current laws could no longer be supported (where there is not otherwise sufficient heads of power) and consequently s 109 could no longer be relied upon in such cases to override discriminatory state laws. It would also mean that Indigenous affairs would largely become a state and not a Commonwealth issue, which would be contrary to views expressed in the past, for example in the Eva Valley Statement.532 Similarly, it would be necessary to reconcile a proposal to repeal s 51(xxvi) with the 1967 referendum and to determine what this would mean for recognition, particularly given this option could be seen to amount to ‘finishing the 1967’ job.533

(a) Relying on Other Heads of Power

In the absence of s 51(xxvi), the Commonwealth might be able to rely on other heads of power to legislate in an area (particularly s 51(xxix), the external affairs power, s 122, the territories power, and the implied nationhood power). However, this would depend on all the circumstances.

Although the present concern is laws with respect to Aboriginal and Torres Strait Islander peoples, other heads of power could also be relied upon to legislate with respect to other racial groups. As the Law Council has pointed out, the removal of s 51(xxvi) ‘would leave available to the Federal Parliament the external affairs power — and through it the International Convention on the Elimination of all Forms of Racial Discrimination (‘CERD’)534 — as a source of power for the enactment of non-

532 The Eva Valley Statement, for example, provided: ‘We want the Commonwealth Government to take full control of Native Titles issues to the exclusion of the States and Territories’. The whole statement is extracted in the Appendix to Christine Fletcher (ed), Aboriginal Self-Determination in Australia (Aboriginal Studies Press, 1994).
533 A J Brown, ‘What’s It Going to Take? Convincing Australians to Vote “Yes: to Constitutional Reform During the 43rd Parliament” (speech delivered at the Constitutional Law Conference and Dinner, Sydney, 18 February 2011).
discriminatory laws in respect of other racial groups’. However, as explained below, the implementation aspect of the external affairs power would not extend as far as the races power currently does. While my understanding is that there are not currently any laws with respect to groups others than Aboriginal and Torres Strait Islander peoples that rely on s 51(xxvi), this does not mean that such laws would not be contemplated in the future. If, for example, the Commonwealth wished to pass laws relating to multiculturalism which were designed to support particular racial groups, reliance would need to be placed on the external affairs power, and possibly also the aliens and immigration powers (but query how far these powers extend once people from such groups obtain Australian citizenship).

For example, for an Act such as the *Native Title Act* to be valid, it would need to be supported by s 51(xxix). In the *Native Title Act Case*, the High Court confirmed that s 51(xxvi) supported the *Native Title Act 1993* as originally enacted, with the exception of s 12. It is arguable that parts of the *Native Title Act* may also be supported by the treaty implementation aspect of s 51(xxix). For similar reasons as those explained above, it is not necessary to characterise a law upon one subject matter of constitutional power to the exclusion of others.

For the *Native Title Act* to be supported by s 51(xxix) there must be sufficient conformity between the *Native Title Act* and the obligations of a treaty, such as *CERD* or the *International Covenant on Civil and Political Rights* (‘ICCPR’). (Although 51(xxix) may extend to carrying out recommendations it is unlikely to extend to declarations such as the *United Nations Declaration on the Rights of

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538 See page 119.

539 While it is not necessary that a law implement a treaty in its entirety, ‘a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention’: *Industrial Relations Act Case* (1996) 187 CLR 416, 487.


The relevant test is whether ‘the law selects means which are reasonably capable of being considered appropriate and adapted to achieving the purpose or object of giving effect to the treaty, so that the law is one upon a subject which is an aspect of external affairs’.

Indeed, in the Native Title Act Case the Commonwealth argued that the challenged provisions of the Native Title Act were supported by s 51(xxix) as they were appropriate and adapted to the implementation of Australia’s obligations under Articles 2.1, 2.2 and 5 of CERD and Articles 2, 26 and 27 of the ICCPR. The High Court ultimately found that it was unnecessary to decide this point. A similar enquiry would be required of the Native Title Amendment Act 1998 and subsequent amendments. Much may depend on whether the native title Acts are considered as a whole or whether individual provisions are considered in isolation. However, there is at least a substantial risk that various

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544 Article 2.1 of CERD obliges State parties ‘... to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races’.
545 Article 2.2 of CERD provides that ‘State parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belong to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved’ (emphasis added).
546 Article 5 of CERD provides: ‘In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights ... (d) Other civil rights, in particular ... (v) the right to own property alone as well as in association with others’
547 Each State Party undertakes under art 2.2 of the ICCPR ‘to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised’ by the ICCPR, including equality before the law and protection against discrimination on the groups of race (art 26).
548 Article 26 of the ICCPR provides: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.
549 Article 27 of the ICCPR provides: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.
provisions of the *Native Title Act* would not be consistent with Australia’s treaty obligations and so would not be upheld by the High Court as provisions supported by the external affairs power.

Similar issues may arise with respect to an Act such as the former *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). Unlike the National Congress of Australia’s First Peoples which incorporated as a Company Limited by Guarantee in April 2010,\(^{552}\) for an Act such as the former *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) to be valid in the absence of s 51(xxvi), it would likely need to be supported by s 51(xxix) or the nationhood power. Although packaged as an Act to promote the development of ‘self-management’ and ‘self-sufficiency’,\(^{553}\) Acts such as the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) may play an important role in the development of self-government. In the absence of judicial recognition of self-government (as discussed in Topic 1), it could be a substantial setback for Commonwealth power in this area to be reduced, particularly given the uncertainty regarding how far s 51(xxix) and the nationhood power may extend in this area.

Where no other heads of power can be relied upon, it would also be open to one or more of the states to refer power to the Commonwealth under s 51(xxxvii). If recent circumstances are anything to go by, however, achieving uniform state referrals that give the Commonwealth enough capacity to legislate in this area could be, at least politically, next to impossible.\(^{554}\)

\(b\) *The Operation of s 109*

If, as a result of the repeal of s 51(xxvi), various Commonwealth Acts ceased to be operative, another consequence would be that any State laws that had been inoperative under s 109 (due to their inconsistency with one of the Commonwealth Acts) and had not been repealed would be revived.


\(^{553}\) *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 3(d).

Similarly, the Commonwealth would only be able to rely on s 109 to override inconsistent state laws to the extent that other heads of power are available. Currently, if, hypothetically, a state were to enact a law which operated in an adverse sense on the basis of race, s 51(xxvi) would enable the Commonwealth to override the discriminatory state law, or aspects of the operation of the state law. However, this would depend on all the circumstances of the operation of the discriminatory state law. Indeed, in many cases the Racial Discrimination Act 1975 (Cth), which is supported by s 51(xxix) (so would not be affected by the removal of s 51(xxvi)), 555 may well be sufficient.

(c) *Avoiding the Concept of ‘Race’?*

Underlying proposals to repeal or repeal and substitute s 51(xxvi) is the unacceptability by contemporary standards of ‘race’ as a concept. Indeed, although reconcilable with traditional constitutionalism, a power based on race falls foul of the conventions of contemporary constitutionalism outlined above.

As French has pointed out extra-curially, ‘[a]s a scientific, biological term it is a meaningless category’. 556 Judicial discussion of the concept varies. In the *Tasmanian Dam Case*, for example, Brennan J considered that while the word ‘race’ is not a ‘term of art’, a ‘biological element’ is essential. 557 Deane J considered that the words ‘people of any race’ have ‘a wide and non-technical meaning’: in relation to Aboriginal people, the word ‘race’ covers ‘a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal [sic]’. 558 Given since 1967 s 51(xxvi) has primarily (if not exclusively) been used to make laws with respect to Aboriginal and Torres Strait Islander peoples, the question that arises is whether the subsection should be reworded to reflect this. However, the tricky question of how to define ‘Aboriginal and Torres Strait Islander peoples’ or ‘Aborigines and Torres Strait Islanders’ will remain.

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2 Repeal and Substitute

It has often been suggested that it may be preferable for s 51(xxvi) to be repealed and a new provision substituted; for example, to allow parliament to make laws to address a constitutionally acknowledged disadvantaged position of Aboriginal and Torres Strait Islander peoples. 559

(a) Recommendations of the 1988 Constitutional Commission

The 1988 Constitutional Commission recommended that s 51(xxvi) be replaced by a new paragraph which would avoid reference to ‘race’ by giving the Commonwealth Parliament power to make laws with respect to ‘(xxvi) Aborigines and Torres Strait Islanders’. 560

The Constitutional Commission also recommended against s 51(xxvi) or an equivalent section being ‘qualified to sustain only laws “for the benefit” of Aborigines and Torres Strait Islanders’. 561 The reasons provided by the Constitutional Commission continue to carry considerable weight, including: the difficulty inherent in interpreting the concept of benefit (which is a political matter); the desirability of heads of power being broadly construed; and the inevitability that the concept of benefit would partially retain some of the difficulties of the notion of ‘special laws’. 562

Others have expressed support for the conclusions of the Constitutional Commission. For example, French has commented that ‘[t]he recommendation of the Constitutional Commission 1988 that the race power be replaced by a provision empowering the Commonwealth Parliament to make laws with respect to Aborigines and Torres Strait Islanders should be adopted’. 563


561 It did this by expressing agreement with the reasons of the Powers Advisory Committee to the Commission: ibid, vol 2, 720.

562 Ibid, vol 2, 715.

(b) The Operation of a Power to Make Laws with Respect to Aboriginal and Torres Strait Islander Peoples

However, difficult characterisation questions could arise in relation to a power to make laws with respect to ‘Aborigines and Torres Strait Islanders’. What sufficiency of connection would be required? Would it be necessary to prove that a person is an Aborigine or Torres Strait Islander in order for a law, beneficial or otherwise, to apply to the person?

In Garth Nettheim’s view, the advantage of the Constitutional Commission recommendation is that it avoids many of the difficulties inherent in the races power:

The effect would be that the Commonwealth Parliament would no longer have a race-based power for people of other races and the tricky reference to ‘race’ would be deleted. The requirement of the necessity for ‘special laws’ would also be deleted. The power would remain as it is for Aboriginal and Torres Strait Islander peoples, and, possibly, enlarged.\(^{564}\)

Assuming Nettheim is correct in postulating that an ‘Aborigine and Torres Strait Islander’ power would enlarge the current races power in relation to Aboriginal and Torres Strait Islander peoples, most of the laws presently enacted in reliance on the races power may continue to be valid.

However, complexity could nevertheless arise given future laws made in reliance on an ‘Aborigine and Torres Strait Islander’ power are likely to define Aboriginal and Torres Strait Islanders in order to make their intended operation clear. Courts would also need to construe statutes so that they are within constitutional power and in so doing would need to consider who are ‘Aborigines and Torres Strait Islanders’.

‘Aboriginal peoples’ and ‘Torres Strait Islanders’ are commonly defined by reference to race or descent. For example, s 253 of the Native Title Act 1993 (Cth) provides as follows:

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Aboriginal peoples means peoples of the Aboriginal race of Australia …

‘Torres Strait Islanders’ means a descendant of an indigenous inhabitant of the Torres Strait Islands.

The preamble to the Native Title Act 1993 (Cth) also explains that:

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

If definitions such as these remain prevalent, this would mean that the replacement of the races power with a ‘Aborigine and Torres Strait Islander’ power would not necessary avoid questions of race. Judicial determinations on ‘Aborigine’ as a racial category demonstrate that judges have struggled with such definitions and concepts.

A three-part test has emerged by which:

- the person must identify as Aboriginal,
- the Aboriginal community must recognise the person as Aboriginal,
- and the person is Aboriginal by way of descent.

Judges have grappled with the terminology of race in different ways. In Shaw v Wolf, for example, Merkel J highlighted that ‘race’ implies more than descent. It imports a meaning of communal recognition and self-identity. This can lead to difficult evidentiary issues. Furthermore, as De Plevitz and Croft highlight, the scope of genetic science needs to be taken into consideration:

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565 ‘[C]ommunities, clans, tribes and language groups of Aboriginal persons’ were intended to be covered by this definition: see Native Title Bill 1993, Explanatory Memorandum, 101.

566 See also Aboriginal and Torres Strait Islander Act 2005 (Cth) s 4; Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 3; Aboriginal Land Act 1991 (Qld) s 7; Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 3; Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) s 3; Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act 1978 (Cth) s 3.


570 De Plevitz and Croft, above n 568, 104

Though science can show a person is descended from particular ancestors it cannot prove that that descent is Aboriginal.\(^{572}\)

It is important to stress that repealing and substituting the race power in this way is not without complexity. In particular, it may not result in a complete avoidance of tricky questions to do with ‘race’.

\((c)\) A Subject Matter Power as Opposed to a ‘People Power’

Some of the submissions made to the Expert Panel, most notably the submission of Allens Arthur Robinson, supported wording a new s 51(xxvi) as a subject matter power, such as a power to make laws with respect to ‘the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples’.\(^{573}\) As Allens Arthur Robinson explained:

By referring to specific subject matters important to Indigenous people, this formulation avoids many of the issues of ambiguity and justiciability ... A head of power formulated in this way would clearly support Commonwealth laws creating special measures for Indigenous people, as well as important existing Commonwealth laws such as the *Native Title Act* and the *Aboriginal and Torres Strait Islander Heritage Protection Act*.\(^{574}\)

The firm also expressed the view that:

[A] head of power formulated in this way is likely to be treated as a subject matter power, and to be subject to a ‘sufficient connection’ test rather than a ‘reasonably appropriate and adapted test’ for the purposes of determining whether a law is supported by the power. However, the final interpretation given to any formulation of the head of power will ultimately be a matter for the High Court.\(^{575}\)

This idea was also recently supported by former Chief Justice of the New South Wales Supreme Court, James Spigelman, who recently explained that such a subject matter power is in contradistinction to a people power, which of its very nature draws a

\(^{572}\) De Plevitz and Croft, above n 568, 105.


\(^{574}\) Ibid.

\(^{575}\) Ibid.
distinction between persons and hence discriminates (another obvious example is s 51(xix), the ‘aliens power’).\textsuperscript{576}

Adopting a subject matter power like the Allens Arthur Robinson proposal may, as a matter of logic, alleviate somewhat the need for a racial discrimination prohibition to protect against negative discrimination towards Aboriginal and Torres Strait Islander peoples. However, it is conceivable that some Aboriginal and Torres Strait Islander peoples who, as reported by the Expert Panel, strongly support a prohibition, would still remain of the view that a prohibition on laws (whether they be made under s 51(xxvi) or other heads of power such as s 122) is required. While it would depend on the exact nature of the drafting of any subject-matter power, a power such as the one advocated by Allens Arthur Robinson (which for that matter also links back to ‘Aboriginal and Torres Strait Islander peoples’) would narrow the scope of Commonwealth power. At the very least, before dismissing a prohibition outright (like some media commentators), in the interests of more informed debate, there remains much to explore in relation to the formulation of a new power and any accompanying prohibition, for which Canadian experience may be instructive, especially when considering the recommendations of the Expert Panel.

\textit{(d) Recommendation of the Expert Panel — A New ‘s 51A’}

As mentioned above,\textsuperscript{577} the \textit{Report of the Expert Panel} recently recommended the repeal of s 51(xxvi) and the adoption of a new head of power (s 51A) which would include a preambular statement:

\begin{quote}
\textbf{Section 51A Recognition of Aboriginal and Torres Strait Islander peoples}

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

\textbf{Acknowledging} the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
\end{quote}

\textsuperscript{576} James Spigelman, ‘Dinner Speech’ (Speech delivered at the Gilbert + Tobin Centre of Public Law, Constitutional Law Conference and Dinner, Sydney, 17 February 2012). This speech was later published in James Spigelman, ‘A Tale of Two Panels’, \textit{Quadrant}, April 2012, 36.

\textsuperscript{577} See page 75 above.
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.578

Apart from the preamble to s 51 and the use of the word ‘peoples’ the proposal is
similar to that of the 1988 Constitutional Commission. Like the Constitutional
Commission, the Expert Panel also recommended that the clause be accompanied by a
non-discrimination provision, s 116A, as discussed below.

In interpreting the meaning of the word ‘peoples’ in proposed new s 51A the High
Court might consider international jurisprudence. However, the use of international law
in constitutional interpretation is contentious as epitomised in the debate between Kirby
and McHugh JJ in Al-Kateb v Godwin.579 That said, international law at the time the
Australian Constitution was enacted, and perhaps by extension — amended — might
still be relevant even following the more restrictive approach of McHugh J:

contrary to the view of Kirby J, courts cannot read the Constitution by reference to the
provisions of international law that have become accepted since the Constitution was
enacted in 1900. Rules of international law at that date might in some cases throw some
light on the meaning of a constitutional provision.580

Depending on the approach taken, there may be greater or lesser scope for international
law ideas to migrate.

In addition to the issues discussed in Topic 1, it is unclear whether the inclusion of the
word ‘advancement’ in the preamble to s 51A would ensure that proposed s 51A could
not be used to make laws to the disadvantage of Aboriginal and Torres Strait Islander
peoples. If the use of ‘advancement’ were intended to have this effect, a direct statement

in the power itself might be preferable. However, whether or not a particular law may be regarded as for the ‘advancement’ of Aboriginal and Torres Strait Islander peoples can be very contentious. If the validity of a law were challenged on such a ground, it is unclear to what extent the High Court would defer to Parliament. Moreover, it is possible, as the Report of the Expert Panel acknowledges, that adoption of proposed new s 116A might obviate the need for a reference to ‘advancement’ in s 51A. The relationship between ss 51A and s 116A is considered further below.\(^{582}\)

In addition to replacing s 51(xxvi) with proposed new ss 51A and 116A, the Report of the Expert Panel recommends that s 25 be repealed\(^{583}\) and that a new section be adopted, to be entitled ‘Recognition of languages’, which would be inserted in Chapter VII of the *Australian Constitution* (entitled ‘Miscellaneous’):

**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.\(^{584}\)

The Report of the Expert Panel refers to this as a ‘declaratory’ languages provision, without clarifying what this would entail other than to state:

To a considerable extent, constitutional recognition of Aboriginal and Torres Strait Islander languages overlaps with the question of the content of a statement of recognition ... and the conferral of a head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples ... However, a separate languages provision would provide an important declaratory statement in relation to the importance of Aboriginal and Torres Strait Islander languages. The Panel understands that a declaratory provision would be ‘technically and legally sound’, and would not give rise to implied rights or obligations that could lead to unintended consequences.\(^{585}\)

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\(^{581}\) Ibid xiv–xv.

\(^{582}\) See from page 165 onwards.

\(^{583}\) See the discussion from page 140 below.

\(^{584}\) Ibid xviii.

\(^{585}\) Ibid 132.
Despite the uncertainty surrounding proposed new s 127A, by far the most controversy has surrounded proposed new s 116A. To understand this proposal in context, the next chapter considers the various impetuses for a non-discrimination guarantee.

III IMPETUSES FOR A NON-DISCRIMINATION GUARANTEE

A As a Response to the ‘Race Power’ Problem

As set out above, the Expert Panel identified ‘insert[ing] a new guarantee of non-discrimination and racial equality for all Australians’ as one of the ‘recognised approaches for addressing the problem of the “race power”’. 587

The Expert Panel is not alone in reaching this conclusion. Indeed, many argue that reform of s 51(xxvi) should be accompanied by a new section making it unlawful to adversely discriminate against any people on the grounds of race. 588 Such anti-discrimination measures are often expressed in different ways: some concentrate on the addition of a beneficial requirement to s 51(xxvi), as canvassed above; while others focus on the principles of equality and non-discrimination and the need for a prohibition of racial discrimination. 589 For example, George Williams has recently advocated for the insertion of new sections that ‘prohibit the enactment of racially discriminatory laws by any Australian Parliament’. 590

Some recommendations for rights-based recognition have even been accompanied by draft provisions. The Constitutional Commission proposed the following provision:

586 An earlier version of this chapter was prepared for assessment in the ANU College of Law postgraduate course ‘Comparative Constitutional Law’ and was reproduced in Louise Parrott, ‘An Express Freedom from Unfair Discrimination: Adapting Canadian Approaches to Equality in the Context of Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’ (ANU College of Law Research Paper No 11-29, Australian National University, 2011). I would like to thank Dr Katharine Young, Brendan Lim, Jeff Murphy, Leonie Young and an anonymous referee for their helpful suggestions.


589 See, eg, Mick Dodson, ‘The Continuing Relevance of the Constitution for Indigenous Peoples’ (Speech delivered at the National Archives of Australia, Canberra, 13 July 2008).

(1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin;

(2) Subsection (1) is not infringed by measures taken to overcome disadvantages arising from race, colour or ethnic or national origin.\(^{591}\)

The proposal of the Constitutional Commission involves what I have called ‘transplantation’: the deliberate adoption of the approach of another jurisdiction as a means of reform. The Constitutional Commission was quite specific about its approach:

The task as we see it is to formulate a provision which is sufficiently broad to encompass the major grounds of discrimination, yet explicit and precise enough to avoid the problems which analogous provisions have generated elsewhere. For this purpose, we have preferred to use Article 12 of the draft New Zealand Bill of Rights as a model, rather than the recommendation of the Rights Committee or the relevant sections of the United States Constitution or the Canadian Charter of Rights and Freedoms.\(^{592}\)

The Expert Panel has recommended a new s 116A, 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.\(^{593}\)

Proposed new s 116A will be considered further below.\(^{594}\)

For present purposes, I concentrate on the lessons that can be learned from the Canadian experience, after first considering the role of s 25 of the Australian Constitution, which as explained below was modelled on a provision of the United States Constitution.

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\(^{592}\) Ibid, vol 1, 545.


\(^{594}\) See the discussion from page 165.
B  *As a Response to the ’s 25 Problem’*

As well as being considered a potential answer to the beneficial/positive discrimination issue surrounding the race power, a non-discrimination guarantee has also been seen as a desirable accompaniment to the deletion of s 25 of the *Australian Constitution*. Indeed, the Expert Panel recommended the repeal of s 25 together with the ‘related but separate amendment ... to proscribe laws and executive actions that discriminate on the basis of race’. 595

In order to understand the operation of s 25, which was described as ‘odious and outdated’ by the Constitutional Commission in 1988, 596 it must be read in the context of other constitutional provisions, particularly s 24. It is also necessary to consider its origins and history.

1  *The History and Contemplated Operation of s 25*

Section 25 provides as follows:

**Provisions as to races disqualified from voting**

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Section 24 requires the number of House of Representatives members for each State to be in proportion to their relative populations. Section 25 then provides that, for the purposes of s 24, if a State law were to disqualify all members of a race resident in the State from voting in State elections, those persons would not be counted for the purposes of the population counts required for House of Representatives elections. It is therefore said to operate as a disincentive on a state disqualifying members of a race, as acknowledged by the 1988 Constitutional Commission. 597

Despite this potential operation (although it is difficult to know what was intended by the inclusion of the section given it sits uneasily with many of the racist sentiments expressed during the

595 Ibid 14.

596 *Constitutional Commission Report*, above n 362, vol 1, 156.

597 Ibid.
Convention debates), many advocate for the deletion of s 25 given it contemplates racial discrimination. For similar reasons as those outlined in relation to s 51(xxvi), the continuing place of s 25 in the Constitution is thought to be unacceptable by contemporary standards given provisions such as these continue ‘to imbue the Australian polity with race’.

Section 25 has its origins in the Fourteenth Amendment of the United States Constitution. The relevant part of the Fourteenth Amendment (§ 2) is as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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598 For a discussion of the relevant Convention debates see Brian Costar, “‘Odious and Outmoded’?: Race and Section 25 of the Constitution’ in John Chesterman and David Philips (eds), Selective Democracy: Race, Gender, and the Australian Vote (Circa, 2003) 89, 90–2 and Anne Twomey, ‘An Obituary for s 25 of the Constitution’ (2012) 12 Public Law Review 125. Drawing conclusions about intent requires some guess work. It is at least possible that s 25 is not a product of ‘anti-racist intent’, as Twomey suggests at 125, but rather was included for nothing more than number matching purposes. Nonetheless, Twomey’s explanation of the genesis of s 25 is particularly informative in that she explains that at the time of the 1891 draft Constitution, ‘it was intended that, like the United States, there would not be a separate federal franchise in Australia. Instead, the right to vote in Commonwealth elections would be determined by the franchise in each State’: at 127. Hence, the draft provision may have been intended to ensure that ‘a State could not exclude people of a particular race from voting in State (and consequently federal) elections, while simultaneously relying on them to boost the population of the State to increase its representation in the Commonwealth Parliament’: at 127. Ultimately the Commonwealth Parliament was given the power to enact its own franchise (through ss 30 and 51(xxxxvi) of the Constitution), which occurred in 1902: at 130. When what is now s 30 was included in the draft Constitution in 1897 perhaps little thought was given to the fact that what may have been the logic underlying s 25 would not apply as clearly once there was a federal franchise. See below n 609 and the accompanying text for an explanation of a similar ‘number matching’ issue underlying part of s 128.


601 See Quick and Garran, above n 467, 456.
As explained by Quick and Garran:

The Fourteenth Amendment was passed after the Civil War, in order to induce the Governments of the States to confer the franchise on the emancipated negroes, who were declared citizens of the United States. It was designed to penalise, by a reduction of their federal representation, those States which refused to enfranchise the negroes.  

The operation of s 127, which was removed as a result of the 1967 referendum, is also relevant to the history of s 25. Section 127 provided as follows:

Aborigines not to be counted in reckoning population

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

Section 25 did not operate directly as a disincentive to the exclusion of ‘aboriginal natives’ from state electoral franchises before 1967. This is because, until removed in 1967, s 127 provided that ‘aboriginal natives’ were not to be included in population counts, which included population counts for s 24 purposes.

The actual effect of s 25 in the past is not entirely clear. Even if s 25 had been applied to reduce numbers included in the various counts, it does not appear that it would ever have made a difference to the calculation of s 24 quotas.

One thing that is clear is that but for s 127, s 25 would have had an operation prior to 1967. However, confusion abounds in descriptions of s 25, including the following summary in the Report of the Expert Panel:

602 Ibid.

603 There is a concise explanation in Clarke, Jennifer, Patrick Keyzer and James Stellios, Hanks’ Australian Constitutional Law: Materials and Commentary (LexisNexis Butterworths, 8th ed, 2009) 268. See also Williams and Hume, above n 439, 141. Note that Williams and Hume are incorrect in stating that ‘[n]o attempt has ever been made to delete section 25 of the Constitution’: at 141.

604 Costar and Twomey disagree on whether s 25 was ever invoked: Costar, above n 567, 92; contra Twomey, above n 598, 135. According to Twomey, arguments that s 25 has never had any operation ‘does not appear to be consistent with the numerous requests by the Electoral Commissioner for legal advice early in the 20th century’: at 135.

605 On this point, Costar and Twomey agree: Costar, above n 567, 92; Twomey, above n 567, 135. Costar is also of the view that ‘[e]ven if the Commonwealth had attempted to enforce the section, any state so inclined could easily have evaded its obligations. ... [A] state could achieve a generally discriminatory objective by drafting laws so as not to disenfranchise “all” the members of a targeted racial group’: at 92–3.
At the time of Federation, legislation in Queensland and Western Australia disqualified, among others, Aboriginal men from voting. Against this background, section 25 allowed for the continuation of such racially discriminatory laws.607

Such confusion may arise from the fact that in some respects s 25 bears similarities with the compromise in s 128 that accounts for the fact that some States did not allow the vote to part of the population — but in that case women rather than a particular ‘race’. As Quick and Garran explain, ‘[t]he difficulty … was that whilst a State had women’s suffrage, and others had not, the electors of that State would count for twice as many as the electors in the other States’.608 A compromise was found so as not to penalise States without women’s suffrage by including in s 128 the following statement: ‘But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails’.609

2 Previous Referenda on s 25

The removal of s 25 was proposed as part of the 1967 ‘nexus’ referendum and the 1974 ‘democratic elections’ referendum. Both referenda failed, although the ‘nexus’ referendum was held at the same time as the ‘Aboriginals’ referendum,610 which, as mentioned above,611 was the most successful referendum in Australia’s history.

(a) The 1967 ‘Nexus’ Referendum

The 1967 nexus referendum sought to amend s 24 and remove ss 25 and 26612 of the Constitution so as to enable the number of members of the House of Representatives to be increased without necessarily increasing the number of senators (ie to break the link

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606 This is an issue that is often overlooked: see, eg, The Report of the Expert Panel, above n 49, ch 5.
607 Ibid 14.
608 Quick and Garran, above n 435, 987.
609 I would like to thank Professor Kim Rubenstein for drawing my attention to this aspect of s 128. See also Twomey, above n 567, 129.
610 This grammatically incorrect term (to say the least) is reflected in the title: Constitutional Alteration (Aboriginals) 1967.
611 See page 102 above.
612 Section 26 specified the number of members to be chosen in each State for the House of Representatives in the first election after federation, and it had no continuing operation.
or ‘nexus’ between the number of members of the House of Representatives and the
number of senators).\textsuperscript{613}

Although the removal of s 25 was part of the ‘nexus’ proposal and the referendum was
held at the same time as the ‘Aboriginals’ referendum, voters did not have the
opportunity to vote on the removal of s 25 as a separate proposal. It therefore appears
that little can be deduced from the unsuccessful outcome in 1967.

\textit{(b) The 1974 ‘Democratic Elections’ Referendum}

The proposed removal of s 25 in 1974 was again part of a broader proposal which
involved amending ss 29 and 30 of the \textit{Constitution} to ensure all electorates had as
nearly as practicable the same number of people. This proposal was itself one of four
proposals put to a referendum, which was conducted under the ‘deadlock’ provision of
s 128,\textsuperscript{614} in 1974.\textsuperscript{615} However, it again appears that the referendum was defeated for
reasons unrelated to the removal of s 25.

3 \textit{Current Operation of s 25: Is the Protection Afforded by the Section Necessary?}

Section 25 has no current operation given it would apply only if a state law disqualified
all persons of a race from voting in State elections and there are no such state laws. This
leads to the question whether a disincentive on a state disqualifying members based on
race is needed. The \textit{Report of the Expert Panel} comes to the conclusion that the section
is a ‘dead letter’ that should be removed:

The Panel’s legal advice is that there are no legal risks in removing section 25. No
structural or other interpretative problems would follow. The review of the history of
section 25 in Chapter 1 demonstrates that the section no longer serves any useful
purpose. There are no State laws that disenfranchise people on the basis of race.
Because of the \textit{Racial Discrimination Act 1975 (Cth)}, and section 109 of the
\textit{Constitution}, section 25 is now a dead letter. Any attempt by a State to enact such laws

\textsuperscript{613} \textit{Constitution Alteration (Parliament) 1967 (Cth).}

\textsuperscript{614} The ‘deadlock’ provision in s 128 enables a referendum on a proposed constitutional change to be held
where a proposal has been twice passed by one House of Parliament although not supported by the other
House.

\textsuperscript{615} \textit{Constitution Alteration (Democratic Elections) 1974 (Cth).}
would be invalid, given the Racial Discrimination Act and section 109 of the Constitution.616

While it may be a technicality (and a hypothetical one at that given no such state laws are currently under contemplation) it is possible that a Commonwealth law such as the Racial Discrimination Act 1975 might have limited operation with respect to voting in state parliamentary elections due to intergovernmental immunities.617 While, on the other hand, protections could arise from an implied right to vote, it is far from certain that any such right will ever be found to exist with respect to the elections of a state.

4 Comparison of Voting Rights at Commonwealth and State Level
Unlike at the Commonwealth level, no right to vote has yet been held to exist on the basis of an implication drawn from one of the state constitutions.

Although in King v Jones618 and R v Pearson; Ex parte Sipka619 the High Court held that there is no current express right to vote in s 41 of the Constitution, an implied right to vote has since been accepted by a majority of the court in Rowe v Electoral Commissioner.620 As Gleeson CJ explained in a passage in Roach v Electoral Commissioner, which was approved by a number of judges in Rowe v Electoral Commissioner, the words of ss 7 and 24 (which require that senators and members of parliament ‘shall be directly chosen by the people’) ‘have come to be a constitutional protection of the right to vote’.621

However, as Twomey has pointed out, ‘little attention has been paid to the relationship between s 41 and s 25’ (and for that matter ss 24 and 25).622 At the Commonwealth


617 See also Twomey, above n 598, 141. As Twomey points out, ‘it is arguable that a State’s legislative control over its franchise falls within the “constitutional powers” of the State and that any Commonwealth legislation which “restricts or burdens one or more of the States in the exercise of their constitutional powers” is invalid: at 141, quoting Austin v Commonwealth (2003) 215 CLR 185, 258 (Gaudron, Gummow and Hayne JJ).

618 (1972) 128 CLR 221.


621 (2007) 233 CLR 162, 174. See also Rowe (2010) 243 CLR 1, 19 (French CJ), 49 (Gummow and Bell JJ), 107 (Crennan J) and 127 (Kiefel J).

level, it was once thought that the ‘people might constitutionally be denied the franchise on the grounds of race’ on the basis of numerous constitutional provisions including s 25.623 However, in *Roach v Electoral Commissioner*, Gleeson CJ found that diminishing universal adult suffrage in such a way would not be possible, as it ‘could not now be described as a choice by the people’ as required by ss 7 and 24 of the *Constitution*.624

At the state level, the Court is yet to have an opportunity to consider whether there is an implied right to vote in each of the state constitutions that is comparable to the implied Commonwealth right. This right would have to arise from the wording of the relevant state constitution as it is unlikely that an implication from the *Australian Constitution* would ‘trickle down’ to the states.625 However, unless entrenched as a ‘manner and form’ provision, the provisions from which such an implication could arise would be inherently susceptible to modification.626

I do not think that it would be appropriate to advocate that s 25 be retained given it contemplates racial discrimination. However, it is important to consider whether it is worthwhile repealing s 25 without substituting the section with some sort of protection. As former Commonwealth Attorney-General Bob Ellicott QC advocated in his submission to the Expert Panel, ‘there is much to be said for amending the *Constitution* beyond the mere removal of s 25’.627 As Hilary Charlesworth has recently commented:

[Section 25] is a startling provision in a modern *Constitution*, contemplating governmental discrimination on the basis of race. It reflects a perspective that is at odds with Australia’s national narrative and its international obligations. I suggest … that

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623 *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 44.
625 In *McGinty v Western Australia* (1996) 186 CLR 140 a similar argument was rejected by the High Court. In that case the applicants had argued that there is an implication drawn from the *Commonwealth Constitution* requiring all electorates to have as nearly as practicable the same number of people (known as ‘one vote, one value’) and that this implication should also apply to the Western Australian Constitution. This argument was rejected on both counts.
626 See Hanks et al, above n 408, 164.
repeal of the current section 25 and its replacement by an equality provision would be an important step.628

While a non-discrimination guarantee or equality prohibition that applies to both Commonwealth and State laws clearly can be regarded as a solution to s 25, the remaining discussion focuses on a non-discrimination guarantee as a solution to the race power issue given this has been the focus of debate in Australia. When considering lessons that can be learned from Canada, it is also important to note there is no equivalent of s 25 in the Canadian Constitution. Rather, the focus of the Canadian Charter of Rights and Freedoms is equality.

C Canadian Equality Experience in Relation to First Nations

1 Outline of Relevant Provisions

Section 15 of the Canadian Charter of Rights and Freedoms provides as follows:

15. Equality Rights

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Section 15, along with the rest of the Canadian Charter of Rights and Freedoms, applies to the Parliament and Canadian Government ‘in respect of all matters with the authority of Parliament’ and to the provincial legislatures and governments ‘in respect of all matters within the authority of the legislature of each province’.629

628 Quoted in ibid.

629 Canadian Charter of Rights and Freedoms s 32(1).
2 Response to the Canadian Bill of Rights Jurisprudence

It is often said that the drafters of the Canadian Charter of Rights and Freedoms sought to respond to the perceived shortcomings of jurisprudence on s 1(b) of the Canadian Bill of Rights\textsuperscript{630} which guarantees ‘equality before the law’.\textsuperscript{631} The Supreme Court of Canada has only once held that the equality clause in s 1(b) of the Canadian Bill of Rights has the effect of nullifying a statutory provision. In \textit{R v Drybones}\textsuperscript{632} the Court struck down a provision of the Indian Act\textsuperscript{633} that made it an offence for ‘an Indian’ to be intoxicated off a reserve.\textsuperscript{634} Although subsequent challenges to the Indian Act 1952 were unsuccessful,\textsuperscript{635} as Hogg explains, the Bill of Rights jurisprudence was left in a state of disarray: ‘\textit{Drybones}, although not overruled, was distinguished on implausible grounds, and equality in s 1(b) was defined in a variety of inconsistent ways’.\textsuperscript{636}

3 Elements of s 15

Unlike s 1(b) of the Canadian Bill of Rights, s 15 of the Canadian Charter of Rights and Freedoms is not limited to ‘equality before the law’. Instead, ‘four equalities’ are guaranteed — equality before and under the law and the equal protection and benefit of the law — and discrimination based on a number of grounds, including race, is expressly prohibited.\textsuperscript{637}

Hogg explains the nature of the interpretative dilemma posed by s 15 as follows:

\begin{quote}
With the adoption of the Charter of Rights, Canadian courts faced a dilemma. On the one hand, they could not apply s 15 so deferentially as to rob it of any serious force; that
\end{quote}

\textsuperscript{630} RSC 1985, app III.
\textsuperscript{632} [1970] SCR 282.
\textsuperscript{633} RSC 1952, c 149.
\textsuperscript{634} See Hogg, above n 303, vol 2, 606.
\textsuperscript{635} Ibid.
\textsuperscript{636} Ibid vol 2, 606–7.
\textsuperscript{637} See Anne F Bayefsky ‘Defining Equality Rights’ in Ann F Bayesky and Mary Eberts (eds), \textit{Equality Rights and the Canadian Charter of Rights and Freedoms} (Carswell, 1985) 1, 3; Macklem, \textit{Indigenous Difference}, above n 66, 201.
was the criticism of their decisions under the *Canadian Bill of Rights*. On the other hand, they could hardly review every distinction in the statute book ... 638

Despite initial uncertainty in Canada, ‘the winding course of judicial interpretation’, 639 which was marked in particular by the seminal case *Andrews v Law Society of British Columbia*, 640 the move to a focus on human dignity in *Laws v Canada*, 641 and the about turn of *R v Kapp*, 642 seems to have settled 643 on the following approach, as explained by McLachlin CJ and Abella J in *R v Kapp*:

The template in *Andrews*, as further developed in a series of cases culminating in *Law v Canada* ... established in essence a two-part test for showing discrimination under s 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same. 644

If these tests are met, the burden then shifts to the Canadian Government to justify the discriminatory law under ss 1 or 15(2) of the *Canadian Charter of Rights and Freedoms*. Section 15(2) provides that s 15(1) does not preclude ‘any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups’. Section 1 provides that all the *Charter* rights are subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

The relationship between these sections when aboriginal rights are at issue is slowly evolving, as I explore in the next section. There is broad consensus that s 15(2) is

639 Ibid vol 2, 621 (citations omitted).
642 [2008] 2 SCR 483.
643 See also *Ermineskin Indian Band v Canada* [2009] 1 SCR 222 and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* [2011] 2 SCR 670. *Ermineskin Indian Band v Canada* is discussed at page 162 below. In *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* the Supreme Court found that the exclusion of the claimants from membership in a Métis settlement did not constitute discrimination under s 15.
644 [2008] 2 SCR 483, 502 (citations omitted).
designed to permit the enactment of affirmative action programs in the name of substantive equality. However, it is unclear from the wording of s 15 ‘whether s 15(2) is an exception to s 15(1) or whether it is simply a clarification of s 15(1).’ Whether the introductory wording suggested by the Constitutional Commission, ‘is not infringed by’ (as opposed to the Canadian ‘does not preclude’, which has also been adopted by the Expert Panel), could avoid the exception/clarification debate would need to be considered in Australia if similar provisions are to be drafted on the basis of foreign transplants. Otherwise, ambiguity can lead to confusion and potentially conflicting results as illustrated by three decisions analysed by Macklem in 2001: Manitoba Rice Farmers Association v Manitoba Human Rights Commission, R v Willocks and Lovelace v Ontario. To this analysis I add a discussion of the 2008 case R v Kapp. I chose these decisions amongst the vast jurisprudence on s 15 because they concern the validity of programs that differentiate between non-aboriginal and aboriginal peoples. These cases also highlight the role of surrounding Charter provisions and the position of laws enacted under the federal Indians power, which I explore further below.

4 Case Studies

(a) Manitoba Rice Farmers

In Manitoba Rice Farmers Simonsen J held that a program developed by Manitoba that gave preference to Aboriginal peoples in the issuing of new wild rice licences violated s 15(1) and did not comply with s 15(2). By taking what Macklem considers to be a ‘formal perspective’ to equality and by regarding s 15(2) as an exception to the general prohibition against discrimination, Simonsen J held that ‘[i]n order to justify a

645 Hogg, above n 440, vol 2, 654 (emphasis in original).
646 Macklem, Indigenous Difference, above n 66, 201.
647 (1987) 50 Man R (2d) 92 (‘Manitoba Rice Farmers’).
648 (1995) 22 OR (3d) 552.
650 [2008] 2 SCR 483.
651 An examination of the extent to which Charter rights apply to First Nations or the issues that arise in disputes between Aboriginal peoples falls beyond the scope of this thesis.
652 (1987) 50 Man R (2d) 92.
program under s 15(2) ... there must be a real nexus between the object of the program declared by the government and the form and implementation’. 654 In this case, there was no ‘nexus’ because, in Simonsen J’s view, the disadvantage suffered by Aboriginal people was not caused by a prior inability to obtain licences but instead by an absence of capital and management assistance. 655 In addition, Simonsen J held that the remedy ‘unnecessarily denie[d] the existing rights of the non-target group’. 656

(b)  R v Willocks

At issue in R v Willocks 657 was a diversion program established by the Government of Ontario which enabled offenders who agree to the facts in charges brought against them to be diverted out of the ordinary justice system with the Crown’s consent and brought before a council of Aboriginal elders. 658 As Macklem explains, ‘Willocks, a black man charged with assaulting his spouse, argued that the diversion program was underinclusive because it was unavailable to non-Aboriginal offenders and therefore constituted discrimination based on race’. 659 Watt J held that the diversion program was authorised under s 15(2) because it was designed to ameliorate the adverse conditions of Aboriginal people. His Honour’s approach to s 15(2) was much broader than that of Simonsen J in Manitoba Rice Farmers. Watt J held that the purpose of s 15(2) ‘is to ensure ... that subsection 15(1) does not, in the name of equality, prohibit measures which are designed to achieve equality for a disadvantaged group’, 660 noting that ‘[i]n any program which is designed to ameliorate the conditions of a disadvantaged group, others will be “disadvantaged” as a result of their non-eligibility for participation’. 661 Following this approach, legislatures have more freedom to establish priorities among disadvantaged groups as long as such initiatives are not ‘grossly unfair’ and do not ‘unnecessarily deny any existing rights of persons outside the target group’. 662 Watt J

655 Ibid 102.
656 Ibid.
657 (1995) 22 OR (3d) 552.
659 Ibid.
660 (1995) 22 OR (3d) 552, 570.
661 Ibid 571.
662 Ibid 562. See also Macklem, Indigenous Difference, above n 66, 220.
accordingly demonstrated greater deference to the legislature than Simonsen J in *Manitoba Rice Farmers*.

(c) Lovelace v Ontario

In *Lovelace v Ontario*[^663] the Supreme Court of Canada took a somewhat different approach to those of the provincial courts in *Manitoba Rice Farmers* and *R v Willocks*. In this case Ontario Métis and non-status Indians sought a declaration that they were entitled to share the profits of Casino Rama, a commercial casino located on an Indian reserve.[^664] The Supreme Court of Canada held that the distribution scheme[^665] did not constitute discrimination within the meaning of s 15(1).[^666] By distinguishing between Indian bands and other Aboriginal communities, the Supreme Court reflected an understanding of the different needs, capacities and circumstances of the two types of communities.[^667] Although leaving open the possibility that s 15(2) might be ‘independently applicable to a case in the future’,[^668] the Supreme Court held that ‘the equality right is to be understood in substantive rather than formalistic terms’[^669] and suggested that ‘s 15(2) can be understood as confirming the substantive equality approach of s 15(1)’.[^670]

(d) R v Kapp

The Supreme Court subsequently gave an independent operation to s 15(2) in the 2008 decision *R v Kapp*.[^671] McLachlin CJ and Abella J summarised the issues that arose in the following way:

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[^664]: Ibid 963, 972 (Iacobucci J).
[^665]: The terms for distributing the casino’s proceeds were negotiated between the Province of Ontario and the Chiefs of Ontario. They were distributed only to Ontario First Nations communities registered as bands under the *Indian Act*, RSC 1985: ibid 959–60.
[^666]: Ibid 959.
[^668]: Ibid 1007.
[^669]: Ibid 1004.
The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under s 15 of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19–20, 1998.

The appellants base their claim on s 15(1). The essence of the claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, raise the issue of the interplay between s 15(1) and s 15(2) of the *Charter*.

Specifically, they require this Court to consider whether s 15(2) is capable of operating independently of s 15(1) to protect ameliorative programs from claims of discrimination — a possibility left open in this Court’s equality jurisprudence.

We have concluded that where a program makes a distinction on one of the grounds enumerated under s 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s 15’s guarantee of substantive equality is furthered, and the claim of discrimination must fail. As the communal fishing licence challenged in this appeal falls within s 15(2)’s ambit — one of its objects being to ameliorate the conditions of the participating aboriginal bands — the appellants’ claim of a violation of s 15 cannot succeed.672

The controversy had arisen when the commercial fishers had protested the ‘Pilot Sales Program’ advance fishery opening (for the Musqueam, Tsawwassen and Burrard Bands) by fishing without licences during the 24-hour opening. They were charged with illegal fishing and they sought to defend the charges by arguing that the Pilot Sales Program was unconstitutional because it violated their right to equality under s 15 of *Canadian Charter of Rights and Freedoms*.673 In the Provincial Court Kitchen J found that the communal fishing licence granted to the three bands was a breach of the equality rights

672 Ibid 495–6 (McLachlin CJ and Abella J).

of the appellants under s 15(1) that was not justified under s 1 of the Charter.\(^{674}\) Kitchen J’s decision was reversed by the British Columbia Supreme Court,\(^{675}\) with whom the British Columbia Court of Appeal\(^ {676}\) and the Supreme Court of Canada\(^ {677}\) ultimately agreed. However, as Dominique Nouvet explains the three appeal courts produced a total of eight sets of reasons ‘some of which diverge significantly’, resulting in a resolution of the discrimination claim that was ‘by no means ... straightforward’.\(^ {678}\)

After considering the debate of whether s 15(2) is a ‘shield’ or an ‘interpretive aid’, McLachlin CJ and Abella J found:

In our view, there is a third option: if the government can demonstrate that an impugned program meets the criteria of s 15(2), it may be unnecessary to conduct a s 15(1) analysis at all. As discussed at the outset of this analysis, s 15(1) and s 15(2) should be read as working together to promote substantive equality. The focus of s 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s 15(2) is on enabling governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other.\(^ {679}\)

In Nouvet’s view, this may not have much practical significance for the outcome of equality cases, but it might affect how arguments are framed:

[Whether the Crown seeks to defend a law that is genuinely aimed at ameliorating the situation of a disadvantaged group by relying on s 15(1) or s 15(2), the result is the same — that is, the law should be upheld. However, the fact that s 15(2) can now be dispositive of an equality challenge will presumably affect the structure of s 15 arguments where s 15(2) is at issue by encouraging litigants to focus their efforts on establishing or disputing its application.\(^ {680}\)

\(^{674}\) R v Kapp [2003] 4 CNLR 238. See the summary at [2008] 2 SCR 483, 499.
\(^{676}\) R v Kapp (2006) 56 BCLR (4th) 11.
\(^{677}\) R v Kapp [2008] 2 SCR 483
\(^{678}\) Nouvet, above n 673, 83.
\(^{679}\) R v Kapp [2008] 2 SCR 483, 511 (emphasis in original).
\(^{680}\) Nouvet, above n 673, 85.
McLachlin CJ and Abella J also provided guidance on how to determine whether a program is ameliorative within the meaning of s 15(2) and quoted extensively from *Manitoba Rice Farmers*. In their view, the inquiry must focus on the purpose of the program rather than its effects:

There is nothing to suggest that a test focussed on the goal of legislation must slavishly accept the government’s characterization of its purpose. Courts could well examine legislation to ensure that the declared purpose is genuine. Courts confronted with a s 15(2) claim have done just that. For example, in *Manitoba Rice Farmers Association v Human Rights Commission (Man)* (1987), 50 Man R (2d) 92 (QB) (rev’d in part (1988), 55 Man R (2d) 263 (CA)), Simonsen J explained, at para 51:

A bald declaration by government that it has adopted a program which ‘has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race ...’ does not ipso facto meet the requirements to sanctify the program under s 15(2) of the *Charter*. The government cannot employ such a naked declaration as a shield to protect an activity or program which is unnecessarily discriminatory.

... In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage.  

As well as being criticised for reflecting ‘the current uncertain and troubled state of equality jurisprudence in Canada’,  *R v Kapp* has been criticised from an aboriginal rights perspective. According to Nouvet, rather than viewing the program as involving measures that facilitate management of the fisheries in a manner consistent with *Sparrow* and subsequent court decisions, the Court characterised the program as a

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682 Diana Majury, ‘Equality Kapped: Media Unleashed’ (2009) 27 *Windsor Year Book of Access to Justice* 1, 5. In her article Majury also argues that in Canada ‘public understanding of equality, reinforced by mainstream media, remains firmly tied to the notion that equality is about sameness’: at 3. The same may be true of Australia.

discretionary program designed to provide economic assistance to disadvantaged Aboriginal groups,\textsuperscript{685} in a way that may have far-reaching effects:

The characterization of the PSP [Pilot Sales Program] adopted by the majority of the Supreme Court of Canada in \textit{Kapp} may well influence the public’s perception of Aboriginal peoples and their relationship to the salmon fisheries. By relying on s 15(2) and reducing the PSP to a program designed to provide economic assistance to disadvantaged groups, I fear that the Supreme Court of Canada’s decision will inadvertently help perpetuate the stereotype held by many Canadians that First Nations live off of social programs and ‘handouts’.\textsuperscript{686}

Diana Majury is equally critical:

Aboriginal fishing rights are just that — rights, not affirmative action measures — making this case an inappropriate context in which to engage with the issue of affirmative action. Diluting the long-standing rights of a people into affirmative action exposes the myopic dominance that inheres in the concept of affirmative action.\textsuperscript{687}

For Nouvet the case was not only a missed opportunity to clarify the role of s 25 (as will be explored below), but it was also a missed opportunity to encourage Crown actors to work towards reconciliation: ‘While the Court did not need to endorse the PSP specifically, it could have reiterated that negotiated settlements are the ideal outcome when differences arise between Aboriginal peoples and the Crown in relation to s 35 rights’.\textsuperscript{688}

5 \textit{Role of Surrounding Provisions}

As illustrated by these cases, the role of s 15 cannot be considered in isolation. In particular, ss 1, 25 and 33 of the \textit{Constitution Act 1982} need to be taken into consideration.

\textsuperscript{684} That said, the Court has not held that the right to fish for commercial purposes falls within Aboriginal rights.

\textsuperscript{685} Nouvet, above n 673, 86.

\textsuperscript{686} Ibid 90.

\textsuperscript{687} Majury, above n 682, 5 (citations omitted).

\textsuperscript{688} Nouvet, above n 673, 93–4.
Section 1 of the *Canadian Charter of Rights and Freedoms* provides as follows:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

As Hogg explains, if a challenged law has the effect of limiting one of the Charter’s guaranteed rights ‘the court must then decide whether the limit is a reasonable one that can be demonstrably justified in a free and democratic society’. 689

The test set out in the leading Supreme Court of Canada decision on s 1, *R v Oakes*, 690 was later summarised by the Court as follows:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
   
   (a) be ‘rationally connected’ to the objective and not be arbitrary, unfair or based on irrational considerations;

   (b) impair the right or freedom in question as ‘little as possible’; and

   (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective. 691

This summary was also drawn on by Crennan and Kiefel JJ in the High Court decision of *Momcilovic v The Queen* that considered a similar provision in the *Charter of Rights and Responsibilities Act 2006* (Vic), s 7(2). 692

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689 Hogg, above n 303, vol 2, 112.
692 (2011) 85 ALJR 957, 1087. As Crennan and Kiefel JJ explained at 1085 ‘the [Victorian] Charter was drafted with an eye to legislative and constitutional instruments in other countries which have the general object of protection and promotion of human rights’.
The role of s 1 of the Canadian Charter of Rights and Freedoms in equality cases is not clear-cut.\textsuperscript{693} It has also rarely arisen for consideration. For example, in \textit{R v Kapp} given no s 15 violation could be found, s 1 was not engaged. In contrast, in \textit{Manitoba Rice Farmers} s 15 was found to be violated. However, Simonsen J found that the failure to meet the requirements of s 15(2) was determinative of the s 1 outcome:

... s 15(2) creates its own ‘rational limit’ of s 15(1) which in my view precludes further inquiry [at the s 1 stage] when justification is sought under s 15(2) fails.\textsuperscript{694}

In remains to be seen what position the Supreme Court will take on these issues post \textit{R v Kapp} where s 15(2) is violated.

\textit{(b) Section 25}

Section 25 of the Charter of Rights and Freedoms provides as follows:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 25(b) was repealed and substituted by the Constitution Amendment Proclamation 1983. As originally enacted, it read: ‘(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement’.

The full potential of s 25 is yet to be fully explored. As Hogg explains, it is an interpretative provision that does not create any new rights.\textsuperscript{695} At the very least it is clear that it prevents s 15 from resulting in the unintended invalidation of laws made with respect to aboriginal peoples: ‘In the absence of s 25, it would perhaps have been


\textsuperscript{694} (1987) 50 Man R (2d) 92, 104.

\textsuperscript{695} Hogg, above n 303, vol 1, 810.
arguable that rights attaching to groups defined by race were invalidated by s 15 ... of the Charter’. 696

In Corbiere v Canada697 a provision of the Indian Act698 imposing a residence requirement was struck down by the Supreme Court on the basis of an analogous ground of discrimination (‘Aboriginality-residence’) to those enumerated in s 15. 699 In that case it had been argued that the provision was one of the ‘other rights’ referred to in s 25 and was therefore shielded from constitutional attack. 700 However, the Court held that ‘the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the “other rights and freedoms” included in s 25’. 701

In R v Kapp the majority opted not to address the issue of whether the fishing licence program could qualify as an ‘other right or freedom’ within the meaning of s 25:

These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case–by–case basis as they arise before the Court. 702

In contrast, Bastarache J found that ‘[s]ection 25 of the Charter applies in the present situation and provides a full answer to the claim’. 703

As Nouvet asserts, ‘[i]t is unfortunate that the majority did not take this rare opportunity to rule on the function of s 25’. 704 The last opportunity was Corbiere v Canada in 1999 and ‘it may be many years yet before another case squarely raises this issue’. 705

696 Ibid.
698 RSC 1985, c I-5.
700 Hogg, above n 303, vol 1, 810.
701 [1999] 2 SCR 203, 248 (L’Heureux-Dube J). See also at 224 (McLachlin and Bastarache JJ).
703 Ibid 548.
704 Nouvet, above n 673, 91.
705 Ibid.
(c) Section 33

Although Canadian courts have broad rights of judicial review under s 24 of the Canadian Charter of Rights and Freedoms, s 33 contains a legislative override mechanism. Section 33 enables the Parliament or a provincial legislature to override the guarantees in ss 2 and 7 to 15, for up to five years at a time. This is done by including in a statute an express declaration that the statute is to operate notwithstanding a provision of the Canadian Charter of Rights and Freedoms.

Section 33 provides as follows:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

As Hogg explains, ‘[t]he override power, if exercised, would remove the statute containing the express declaration from the reach of the Charter provisions referred to in the declaration without the necessity of any showing of reasonableness or demonstrable justification’.

706 See Hogg, above n 303, vol 2, 164.
While the override power has never been used by the Canadian Government, it has been used by the provinces, particularly Quebec.\(^{707}\)

Section 33 gives rise to theoretical and other dilemmas that are quite complex and go beyond the scope of this thesis. Suffice it to say that it has been described as ‘a uniquely Canadian compromise of two rival constitutional models — the American model of strong judicial review, and the British model of parliamentary sovereignty’.\(^{708}\) As Goldsworthy explains, in principle, at least, s 33 ‘should help legislators resist the democratic debilitation that might otherwise attend the legalization of rights’.\(^{709}\) However,

> [t]he failure of Canadian legislatures to make more frequent use of their override clause is something of a puzzle. It may be due to factors peculiar to Canada, especially the ways in which the clause was drafted, interpreted and allegedly abused by Quebec. ... In Australia, the Constitutional Commission observed in 1988 that: ‘Canadian experience in the use of such a power is no safe guide to how such a power might be used in Australia ... There is no knowing how Australian governments might seek to utilise a legislative override power’.\(^{710}\)

6 **Laws Enacted under the federal Indians power**

Unlike *Manitoba Rice Farmers*, *R v Willocks* and *Lovelace v Ontario*, which involved provincial schemes, *R v Kapp* involved licences made under federal regulations.\(^{711}\) It had previously been thought that laws made pursuant to s 91(24) of the *Constitution Act*

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\(^{707}\) See ibid, vol 2, 167. See also Edward Greenspan, ‘Split Verdict!’ *Globe and Mail* (online), 13 May 2011 <http://www.theglobeandmail.com/news/arts/books/mighty-judgment-how-the-supreme-court-of-canada-runs-your-life-by-philip-slayton/article2021470/print/>. See further Jeffrey Goldsworthy, ‘Judicial Review, Legislative Override and Democracy’ (2003) 38 *Wake Forest Law Review* 451. Goldsworthy explains that while the provision has been used more often than is often thought, ‘the fact remains that it has been used very rarely’: at 466.


\(^{709}\) Goldsworthy, above n 707, 470.


\(^{711}\) *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332: see *R v Kapp* [2008] 2 SCR 483, 498 [7].
with respect to Indians, such as the Indian Act, are generally not vulnerable to challenge on a number of grounds, as explained by Hogg:

The situation of the aboriginal peoples is a special one. The Constitution Act 1867, s 91(24), empowers the federal Parliament to make laws in relation to ‘Indians, and lands reserved for the Indians’. ... [A]ny law enacted under that head will either explicitly employ the racial classification ‘Indian’ or will have disparate impact on Indians who live on ‘lands reserved for the Indians’... The special status of aboriginal peoples has been reinforced by ... s 35 of the Constitution Act 1982 ... [and] s 25 of the Charter of Rights ... By reason of these provisions, s 15 has only a limited role to play with respect to aboriginal peoples. A law enacted by the federal Parliament under s 91(24) for the benefit of Indian people, and laws enacted to give effect to aboriginal or treaty rights, are not affected by s 15 of the Charter.

Even though it was thought that laws that are enacted under the federal Indians power are not affected by s 15 of the Canadian Charter of Rights and Freedoms, such laws could fall foul of one of the other grounds of discrimination in s 15 (such as religion, sex, age, or mental or physical disability) or an analogous ground. An example of this was the provision of the Indian Act that was struck down in Corbiere v Canada on the basis of discrimination on the grounds of ‘Aboriginality-residence’, as discussed above.

The approach of the majority in R v Kapp suggests that s 15 has a greater ‘role to play with respect to aboriginal peoples’ than previously thought. Ermineskin Indian Band v Canada is also in keeping with this new trend. When responding to a challenge to the constitutional validity of provisions of the Indian Act that prohibit investment of royalties by the Crown, the Court expressed the view that the impugned legislation met the first limb of the two-part Andrews test that was reaffirmed in R v Kapp.

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712 (Imp), 30 & 31 Vict, c 3 (‘Constitution Act 1867’).
713 Hogg, above n 303, vol 2, 661 (citations omitted).
714 See page 159 above.
715 Hogg, above n 303, vol 2, 661.
717 Sections 61 to 68 of the Indian Act, RSC 1985, c I-5.
718 See above n 644 and accompanying text.
However, the Court found that the provisions did not ‘draw a distinction that perpetuates disadvantage through prejudice or stereotyping’. 719

Given the difficulties in applying a non-discrimination provision to laws made in reliance on a power centred on race or a cultural group (such as s 51(xxvi) as it currently stands or as replaced as proposed by the Expert Panel or the Constitutional Commission), careful consideration would need to be given to this issue in Australia. If the focus of a constitutional amendment is Indigenous recognition, merely transplanting s 15 of the Canadian Charter of Rights and Freedoms (a provision designed largely in response to the Canadian Bill of Rights jurisprudence with a broader focus in mind) may not be desirable. This is a reminder of the dangers of a barebones approach to transplants, as outlined in the thesis introduction. 720 However, the more ideas migrate, the more feasible a (modified) transplant may become. There is also no denying that foundational ideas regarding equality and non-discrimination that have begun to migrate from Canada to Australia are already informing Australian consideration of the various issues.

D Lessons for Australia

As well as demonstrating the interpretative difficulties surrounding the relationship between ss 15(1) and 15(2) of the Canadian Charter of Rights and Freedoms, the Canadian cases discussed above highlight some of the issues that are likely to arise if Australia goes down a similar path. In particular, the degree of deference shown to Parliament is likely to be a point of contention.

The focus on persons outside the target group in Manitoba Rice Farmers could be explained by what Kingsbury calls the supposed ‘logic’ that ‘claims settlement with indigenous peoples for the restoration of land to traditional owners may involve racial

719 [2009] 1 SCR 222, 286 (Rothstein J for the Court). Jonnette Watson Hamilton and Jennifer Koshan are critical of the Court’s decision. They explain that although ‘[t]he Court tries to frame the money management rules and Crown practice as matters of “Aboriginal self-determination and autonomy”’, ‘[i]f the broader social, political and legal context had been considered, Crown control over Indian moneys could have been seen as part of the long history of paternalism and colonialism under the Indian Act, harms that are surely based, at least in part, on stereotyping and prejudice’: Jonnette Watson Hamilton and Jennifer Koshan, ‘Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp’ (2010) 47 Alberta Law Review 927, 937.

720 See above n 33 and the accompanying text.
discrimination against non-members of these groups’. Kingsbury therefore warns that ‘[t]he concept of non-discrimination is thus valuable in, but also a potential obstacle to, indigenous peoples’ claims’. Like Manitoba Rice Farmers, R v Kapp illustrates the risk that the equality rights aspects of a case could completely overshadow ‘its Aboriginal rights dimension’. Very little attention has been given to warnings such as these in Australia. While it might be due to the fact that there has been a much narrower focus in Australia on racial discrimination as opposed to equality, there is still the potential for competing interests to be at play. If the wording of the Canadian provisions is transplanted to Australia and the intention is to operate within a substantive equality framework, perhaps reference could be made to this intention in the explanatory material accompanying the constitutional amendment. However, the High Court is only likely to have regard to this material if in the opinion of the Court the clause is ambiguous.

In addition to the four Canadian cases considered above, the Australian case Gerhardt v Brown illustrates the potential for confusion regarding the nature of a non-discrimination guarantee and any special measures ‘exception’. In this case s 19 of the Pitjantjatjara Land Rights Act 1981 (SA), which provided unrestricted access to the relevant lands to the Pitjantjatjara, Yungkutatjara and Ngaanatjara peoples, while others were prohibited from entering without permission, was upheld by the High Court as being a ‘special measure’ under s 8 of the Racial Discrimination Act 1975 (Cth). However, as Nettheim explains, ‘[t]he High Court was criticised for reaching the right decision for the wrong reasons; namely, for finding that the provisions were

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722 Ibid.
723 Nouvet, above n 673, 94.
725 (1985) 159 CLR 70.
726 See ibid 76 (Gibbs CJ).
727 Ibid 87–8 (Gibbs CJ), 104 (Mason J), 108 (Murphy J), 113 (Wilson J), 143 (Brennan J), 154 (Deane J), 162 (Dawson J). Section 8 of the Racial Discrimination Act 1975 (Cth) cross-refers to art 1(4) of CERD.
discriminatory so as to need to be saved by the special measures exemption’. In Nettheim’s view, there are a number of potential issues that arise when trying to characterise Indigenous rights, particularly land rights, as being ‘special measures’, including the requirement that special measures be necessary and of limited duration. The Committee on the Elimination of Racial Discrimination has also more recently emphasised that ‘[s]pecial measures should not be confused with specific rights pertaining to certain categories of person, such as ... the rights of indigenous peoples’. With these issues in mind, in the next section I outline how a freedom from racial discrimination could be crafted, before going on to consider the potential scope of the guarantee and the (interpretative) risks involved in inserting such a provision without the surrounding machinery of a bill of rights like the Canadian Charter of Rights and Freedoms.

E Crafting an Express Freedom from Racial Discrimination

1 Recommendation of the Expert Panel: A New s 116A

As outlined above, the Expert Panel has recommended a new s 116A, 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.\(^{731}\)

The *Report of the Expert Panel* explains that the Expert Panel

came to the view that there is a case for moving on from the history of constitutional non-recognition of Aboriginal and Torres Strait Islander peoples and racial discrimination ... and affirming that racially discriminatory laws and executive action have no place in contemporary Australia.\(^{732}\)

The *Report of the Expert Panel* also states that it was ‘clear from the outset that any discussion of a bill or statement of rights was well outside its remit’.\(^{733}\) It appears that the Panel considers a prohibition of racially discriminatory laws and executive action to be of a different nature. However, this view has proven to be contentious. Indeed, it has been criticised as a ‘one-clause bill of rights’,\(^{734}\) to which proponents have responded with statements like ‘if anything it is a one-clause non-discrimination principle’.\(^{735}\)

A puzzling aspect of proposed new s 116A is its relationship with the proposed new power with respect to ‘Aboriginal and Torres Strait Islander peoples’, s 51A (with accompanying preamble).

The *Report of the Expert Panel* explains that:

In order to minimise the risk of invalidating current and future Commonwealth laws with respect to Aboriginal and Torres Strait Islander peoples, the proposed racial non-discrimination provision needs to be qualified so that the following laws and actions are secure:


\(^{732}\) Ibid 157.

\(^{733}\) Ibid.


• laws and measures adopted to overcome disadvantage and ameliorate the effects of past discrimination; and

• laws and measures adopted to protect the cultures, languages or heritage of any group.  

The Report of the Expert Panel appears to be alluding to the fact that it is possible that the High Court will consider that all laws made under s 51A will require consideration of whether the laws are in breach of s 116A. However, this could mean that the only laws that can be made under s 51A are those ‘adopted to overcome disadvantage and ameliorate the effects of past discrimination’ and ‘adopted to protect the cultures, languages or heritage’ of Aboriginal and Torres Strait Islander peoples.

Rather than adopting a provision like s 116A(2), which appears to have a direct effect on the scope of the power to make laws with respect to Aboriginal and Torres Strait Islander peoples, it may be preferable to adopt a prohibition with a general limitation.

2 Prohibition with a General Limitation: A New s 117A

In order to provide another option for consideration, I have drafted a new ‘s 117A’ (while this might appear to be reminiscent of a proposal by William Wentworth in 1966, I have merely renumbered the section so as to avoid confusion):

Section 117A Freedom from racial discrimination

(1) The Commonwealth or a State or Territory shall not make any law imposing on any person a disadvantage based on race, colour, ethnic or national origin.

(2) Subsection (1) does not preclude any law that is reasonably appropriate and adapted to serve a legitimate end in a manner consistent with substantive equality and cultural diversity.


737 The history of this proposal is set out in ibid 30 (citations omitted):

In March 1966, William (Billy) Wentworth, the Liberal Member for Mackellar and later Australia’s first Minister for Aboriginal Affairs, introduced a Private Member’s Bill to repeal section 51(xxvi), and instead to confer on the Commonwealth Parliament power to make laws ‘for the advancement of the Aboriginal natives of the Commonwealth of Australia’. Wentworth also proposed a new ‘section 117A’ prohibiting any law, State or Commonwealth, that subjected any person born or naturalised in Australia ‘to any discrimination or disability within the Commonwealth by reason of his racial origin’.

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I have italicised the words ‘any person’ as these will be the subject of consideration in the next chapter.

In calling s 117A an ‘express freedom from racial discrimination’, I have been influenced by the implied freedom of political communication. However, I am under no misapprehension that this proposal would avoid any of the controversy that surrounded the Expert Panel’s proposed s 116A. While the implied freedom of political communication has not been free from controversy either, some of the criticisms would not apply as they stemmed from the perception that the High Court was ‘activist’ in finding implications in the Australian Constitution.

Like the Expert Panel’s proposal, as a limitation on laws, as opposed to a free-standing right, tricky questions regarding remedies and whether rights provisions need to be accompanied by a suite of other provisions (as discussed above with respect to s 15 of the Canadian Charter of Rights and Freedoms) may not arise to the same extent. Indeed, personal rights of action are quite foreign to Australian constitutional law as the High Court recently pointed out in Aid/Watch Inc v Federal Commissioner of Taxation.

Like the Expert Panel, I have also included ‘Territory’ to avoid the uncertainty that once surrounded other constitutional limitations, such as s 51(xxxi), and the extent to which they apply to laws made under the territories power (s 122) and by extension under the self-government Acts. Similarly, the 1988 the Constitutional Commission recommended that all protections, including s 117, should be extended to persons in and from the territories.

I have also tried to match the style of drafting of the provisions that would surround s 117A. For example, s 116 provides ‘[t]he Commonwealth shall not make any law ...

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738 See, eg, above n 734.
739 See, eg, Jason L Pierce, Inside the Mason Court Revolution (Carolina Academic Press, 2006) 162–6.
740 See the discussion from page 156 above.
743 Australian Constitutional Commission, above n 362, vol 1, 68.
for imposing’. Unlike the Expert Panel, I have confined s 117A to any ‘law’. As explained above, a limitation on laws is not unfamiliar in Australian constitutional law. However, if broader protection is ultimately desired, this part of s 117A(1) and the start of s 117A(2) could be reworded in line with the Expert Panel proposal.

I have also opted for the word ‘disadvantage’ rather than ‘discriminate’. Although ‘discriminate’ probably has a well-understood legal meaning of discriminate negatively,744 as discussed above, all laws made under a head of power with respect to Aboriginal and Torres Strait Islander peoples arguably discriminate.745 However, such laws will not necessarily impose disadvantages on Aboriginal and Torres Strait Islander peoples (and in the event that this were to occur s 117A(1) would assist). If other people are disadvantaged by not having a law apply to them, this arguably would not have been based on ‘race, colour, ethnic or national origin’ but rather on the inherent nature of a power with respect to Aboriginal and Torres Strait Islander peoples. In such a circumstance s 117A(2) may also be able to assist.

In drafting s 117A(2) I drew on the implied freedom of political communication questions746 and a combination of ss 1 and 15(2) of the Canadian Charter of Rights and Freedoms. I was cognisant of the need to introduce the notion of substantive equality, while at the same time I felt the need to differ in important respects from other equality instruments in order to arrive at a new option for consideration.

If the provision is part of a package to constitutionally recognise Aboriginal and Torres Strait Islander peoples, cultural diversity is arguably crucial. While it is a concept that might be contentious, it is one that merits debate. It may be instructive for Australians to

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744 Indeed, according to the Committee on the Elimination of Racial Discrimination, ‘“positive discrimination” is, in the context of international human rights standards, a *contradictio in terminis* and should be avoided’: Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009).*

745 See page 135 above.

746 The two ‘Lange questions’ (named after *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520) were recently described by French CJ, Gummow, Hayne, Crennan and Bell JJ in *Wotton v Queensland* [2012] HCA 2, [25] as follows:

The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government...
have regard to the criticisms levelled at the *Canadian Charter of Rights and Freedoms* in this regard. Tully, for example, argues that:

> the solution cannot be to presume that a constitution can avoid recognising any culture. … A recent example of presumed, culture-blind liberal constitutionalism is the *Canadian Charter of Rights and Freedoms* of 1981. Rather than uniting the citizens on a constitution that transcends cultural diversity, it has fostered disunity. The province of Québec, the Aboriginal peoples, women and the provinces resisted it at various times as the imperial imposition of a pan-Canadian culture over their distinct cultural ways. Many other countries, such as the United Kingdom and New Zealand, have experienced similar public debates over charters of rights and cultural diversity.747

Whether s 117A would achieve the appropriate balance is a matter of conjecture. However, it may be an option that could help to progress debate on the issue. In order to further assess its potential, I next consider its scope and the interpretative issues that may arise.

**IV Scope of a Non-Discrimination Guarantee**748

This chapter considers the scope of a non-discrimination guarantee. In particular, I consider whether a guarantee of non-discrimination should also extend to non-citizens by assessing the various options in light of Canadian experience.

I first examine the various options, including whether a non-discrimination guarantee should be confined to citizens and/or residents or whether it should apply to everyone, and what the possible implications might be. I then compare Canadian developments given the right to equality in the *Canadian Charter of Rights and Freedoms* applies to ‘every individual’ while other rights are confined to citizens. I argue that the more inclusive the approach taken the better, particularly given one of the purposes underlying proposals for constitutional recognition appears to be creating a greater sense of membership and belonging for Aboriginal and Torres Strait Islander peoples. In my view, achieving this should not come at the cost of creating further divisions between citizens and non-citizens in Australia. There are many lessons that can be

747 Tully, above n 59, 7.

748 An earlier version of this chapter was prepared for assessment in the ANU College of Law postgraduate course ‘Citizenship Law in Context’.
learned from Canada in this regard, even if simply to remind Australians of where caution should be exercised. There is otherwise a real of ‘fostering disunity’ rather than ‘uniting … citizens’.  

A Overview of the Options

An issue left unresolved in the above section is the scope of my proposed s 117A:

Section 117A Freedom from racial discrimination

(1) The Commonwealth or a State or Territory shall not make any law imposing on any person, (resident* in any State or Territory/an Australia citizen) a disadvantage based on race, colour, ethnic or national origin.

(2) Subsection (1) does not preclude any law that is reasonably appropriate and adapted to serve a legitimate end in a manner consistent with substantive equality and cultural diversity.

This can be contrasted to the proposal of the 1988 Constitutional Commission:

(1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin …;

(2) Subsection (1) is not infringed by measures taken to overcome disadvantages arising from race, colour or ethnic or national origin ...

Similarly, the proposal of the Expert Panel is not confined to Australian citizens, despite the Expert Panel Discussion Paper referring to the protection as being a protection ‘for Australians’. However, this is not clear on the face of s 116A(1). Rather, proposed new s 116A(1) provides that ‘the Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin’.

In the above provisions I have italicised the terms ‘everyone’, ‘any person resident in any State or Territory’ and ‘an Australian citizen’ to highlight how a proposal to insert a non-discrimination or equality provision into the Australian Constitution may give rise

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749 Tully, above n 59, 7. See also above n 62.

750 Constitutional Commission Report, above n 362, vol 1, 536 (emphasis added).

to questions about whether protections should extend to non-citizens and citizens alike. With this in mind I have also placed brackets around the phrases after ‘person’ in proposed s 117A as the phrases ‘resident in any State or Territory’ or ‘Australian citizen’ may not be strictly necessary. In addition, I have put an asterisk after resident given ‘person resident’ could be extended to ‘person who is resident, temporarily resident or domiciled’ in line with the changes to s 117 recommended by the Constitutional Commission, as discussed below.752

B A Protection for Citizens, Residents or Everyone?

1 Confining the Guarantee to ‘Citizens’

As Quick and Garran concisely summarised, the Australian Constitution recognises different gradations of political status: ‘the people of the Commonwealth’ (ss 24, 25 and former s 127), subjects of the Queen (ss 34 and 117) and people of a State (ss 7 and 24).753 Another obvious ‘status-based category’, to adopt Rubenstein and Lenagh-Maguire’s terminology’,754 is ‘aliens’ (s 51(xix)). In contrast, the word ‘citizen’ does not appear in the Australian Constitution apart from in s 44(i) in relation to disqualification of a ‘citizen of a foreign power’. As Rubenstein explains, this was the result of a deliberate omission.755 The framers opted instead for the term ‘subject of the Queen’.756 They also rejected John Quick’s proposal to insert a power over ‘Commonwealth citizenship’.757 However, the Commonwealth Parliament has express power to make laws with respect to ‘naturalisation and aliens’ (s 51(xix)) and ‘immigration and emigration’ (s 51(xxvii)) and is considered to have sufficient power

752 See page 179 below.
753 Quick and Garran, above n 435, 957.
757 Ibid 303.
to create and define the concept of Australian citizenship'. Nevertheless, to this day many advocate for the inclusion of an express power over citizenship.

If, in 1901, the constitutional status of ‘citizen’ was not appropriate for the new Australian federation, the question that now arises is whether the term should also be avoided in crafting new constitutional provisions. However, the difficulty that could now be faced, that was not an issue in 1901, is that a ‘subject of the Queen’ is ‘no longer appropriate for constitutional purposes’ so is not an appropriate alternative. For this reason, the Constitutional Commission recommended that the expression be omitted in the sections in which it occurs, and more recently, Leslie Zines has stated that ‘it would be a good idea to change “subject of the Queen”, wherever it appears, to “Australian citizen”’. In contrast, Cheryl Saunders has suggested that the word ‘person’ may ‘now be better’.

If the proposal to adopt the term ‘Australian citizen’ in preference to ‘subject of the Queen’ is ever taken up, or if a new non-discrimination provision expressly applies to ‘Australian citizens’, then considerable debate might be generated about the implications of being a ‘constitutional citizen of Australia’ as opposed to a ‘statutory citizen’, to adopt the language of Genevieve Ebbeck. As Ebbeck explains, currently the existence of a statutory concept of Australian citizenship should not be seen to preclude, automatically, a constitutional concept of Australian citizenship. Kirby J may have hinted at this in Shaw, when he distinguished between being a ‘national of

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760 The reasons for the omission are summarised in Rubenstein, ‘Citizenship and the Constitutional Convention Debates’, above n 756.

761 Constitutional Commission Report, above n 362, vol 1, 162.

762 Ibid.


Australia’ and a ‘statutory citizen’. The reference to being a ‘national of Australia’ could also be understood as a reference to being a constitutional citizen of Australia.

It will be interesting to see if members of the High Court have recourse to a constitutional concept of Australian citizenship when interpreting the Constitution, and indeed find that there is a constitutional implication of Australian citizenship. If such an implication exists, considerable debate will then be generated about the consequences flowing from such an implication. 766

As identified by Ebbeck, these consequences might extend to the right to vote (which has since been regarded as an implied right deriving from the words ‘directly chosen by the people’ in ss 7 and 24 of the Australian Constitution) 767 and the right to enter Australia. 768 In other words, there is already scope to argue that there is an implied status of constitutional citizenship in Australia that gives rise to certain consequences. However, if the term ‘Australian citizen’ is inserted into the Australian Constitution, this status would be placed beyond doubt. Nonetheless, the potentially numerous implications of this status would only become clear as the High Court is called upon to determine the various issues that could arise. Given this uncertainty, a more conservative approach would be to avoid the term ‘Australian citizen’ altogether (unless this means that everyone enjoys the benefit of the section, which could ultimately be quite progressive) or to draw upon existing status-based categories.

2 Unspecified Operation

If the provision is silent on the issue, the High Court might need to decide who has the benefit of the non-discrimination guarantee or who has standing to challenge the relevant law when a case first comes before the High Court. While regard might be had to the extrinsic materials if the Court considers that the provision is ambiguous, given the importance and potential for controversy surrounding the scope of the protection, my view is that it should be dealt with expressly.

766 Ibid 164 (citations omitted). The passages of Kirby J’s judgment in Shaw v Minister for Immigration and Multicultural Affairs (2003) 218 CLR 28 (‘Shaw’) referred to are at 62.

767 See Rowe v Electoral Commissioner (2010) 243 CLR 1. See also page n 621 above and the accompanying text.

768 Ebbeck, above n 765, 155–60. See also Irving, above n 758.
For some, citizenship is an (appropriately) exclusionary status and it is important that certain entitlements be limited to citizens so that it remains a valuable status. As Bosniak points out, ‘[a]nalysts have spilled much ink ... over questions regarding the significance and legitimacy of the line dividing citizens from aliens, including the legitimacy of denying rights and benefits to aliens’. However, under the framework of the ICCPR as Rubenstein explains, ‘the only fundamental rights that should discriminate between citizens and non-citizens are the democratic rights such as the right to vote, the right to stand for election to Parliament and the right to be employed in certain government positions’.

The uncertainty that may surround the scope of the non-discrimination guarantee, if it is not made express, can be highlighted by comparing the differing views held by a few former High Court justices regarding whether the implied freedom of political communication extends to non-citizens. In Cunliffe v Commonwealth the issue was considered separately by Mason CJ, Deane and Brennan JJ. Mason CJ was of the view that non-citizens actually within this country are entitled to invoke the implied freedom of political communication, particularly when they are exercising that freedom for the purpose, or in the course, of establishing their status as entrants and refugees or asserting a claim against government or seeking the protection of the government.

Although Deane J considered that non-citizens could rely on some constitutional guarantees, this did not extend to the implied freedom of political communication given a non-citizen ‘stands outside the people of the Commonwealth whose freedom of

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769 See, eg, Peter H Schuck, Citizens, Strangers, and In-between: Essays on Immigration and Citizenship (Westview Press, 1998) and the commentary in Rubenstein, Australian Citizenship Law in Context, above n 755, 182. Schuck was called as an expert witness in the trial of a case that went on appeal to the Supreme Court of Canada, Lavoie v Canada [2002] 1 SCR 769, which is discussed below. For a discussion of the various reasons that might justify discriminating on the basis of citizenship see also Stephen Legomsky, ‘Why Citizenship’ (1994) 35 Virginia Journal of International Law 279.


771 Rubenstein, Australian Citizenship Law in Context, above n 755, 180 (citations omitted).


773 This issue is discussed in Rubenstein, Australian Citizenship Law in Context, above n 755, 264–5.

774 (1994) 182 CLR 272, 299.

775 Ibid 336.
political communication and discussion is a necessary incident of the Constitution’s doctrine of representative government’. Brennan J went further in finding that ‘[a]liens ... have no constitutional right to participate in or to be consulted on matters of government in this country’. Even if current High Court justices adopt a similar view to Deane or Brennan JJ in relation to the scope of the implied freedom of political communication, this does not mean, however, that they will necessarily regard a non-discrimination guarantee in the same way. As discussed above, under the framework of the ICCPR it is acceptable to link certain democratic rights, such as the right to vote, to citizenship. Given political communication is an ‘indispensable incident’ of a system of representative government, 778 it might be viewed as a democratic right that can be limited to citizens, like the right to vote. In contrast, a non-discrimination guarantee might be interpreted by the High Court as a fundamental human right which cannot be encroached upon without express words or a necessary implication to the contrary.

With this in mind, I consider the benefits of applying a non-discrimination guarantee to ‘everyone’ after first examining the remaining status-based categories to whom the guarantee could be expressly limited.

3 Confining the Guarantee to a ‘Subject of the Queen, Resident in any State’

Given the Australian Constitution already contains a provision, namely s 117, that only applies to a ‘subject of the Queen’ who is ‘resident in any State’, a question that arises in relation to a non-discrimination guarantee is whether any new provision should be similarly confined. If not, amending s 117 to align with the new provision might also arise for consideration.

Section 117 of the Australian Constitution provides as follows:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

776 Ibid.
777 Ibid 328.
As first drafted by Inglis Clark, this provision would have reflected Art IV § 2 of the *United States Constitution* by prohibiting any State from ‘abridging any privilege or immunity of the citizens of other states of the Commonwealth’. It would have also paralleled to some extent the Fourteenth Amendment to the *United States Constitution* by declaring that no State should ‘deny to any person, within its jurisdiction the equal protection of the laws’.  

However, as Hanks et al explain, ‘delegates at the 1898 convention in Melbourne saw such a guarantee as threatening overtly racist laws, directed at Australian Aborigines, Pacific Islanders and Chinese’. As explained above, a decision was also ultimately made to avoid use of the term ‘citizen’. Instead, the present form of s 117 was adopted, which would apply to a ‘subject of the Queen, resident in any State’.

The reference to a ‘subject of the Queen’ in s 117 was intended to exclude ‘aliens’ from the benefit of the section. As Gaudron J explained in *Kruger v Commonwealth*, ‘[t]here is a dual aspect to s 117: it operates to prevent discrimination; it also sanctions discrimination so far as concerns persons who are not subjects of the Queen’.

The discrimination prohibited by s 117 is discrimination on the basis of residence of a different State. However, to be entitled to the protection afforded by s 117 a person must be a ‘subject of the Queen’. Although a ‘subject of the Queen of Australia’ is now considered to mean an Australian citizen, as discussed above, the terminology ‘subject of the Queen’ is outmoded.

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779 See Hanks et al, above n 408, 601.
780 Ibid 602.
781 Ibid.
783 (1997) 190 CLR 1, 113.
785 Shaw (2003) 218 CLR 28, 43 (Gleeson CJ, Gummow and Hayne JJ). In contrast, in his dissenting judgment in *Singh v Commonwealth* McHugh J expressed the view that a ‘subject of the Queen of Australia’ includes persons born in Australia who are not otherwise Australian citizens (and who are therefore not ‘aliens’ within the meaning of s 51(xix)): (2004) 222 CLR 322, 342.
Prior to the 1989 case *Street v Queensland Bar Association*786 the protection afforded by s 117 was considered to be weak due to a ‘triumph of form over substance’.787 In *Street* the High Court reversed this trend, at least for the time being,788 by finding that s 117 was infringed by both the old and amended form of Queensland admission requirements for barristers that had required barristers to cease to practice in another State or, as amended, required barristers to intend to practice principally in Queensland.

As Zines explains, the object of s 117 was seen by all the judges as ‘one of fundamental importance to the nature of our federation’.789 The purpose was variously expressed as: enhancing ‘national unity and a real sense of national identity’,790 expressing ‘a fundamental feature of federation ... equality of treatment’;791 promoting ‘national economic and social cohesion and the establishment of a national citizenship’;792 ensuring that persons from one State ‘are treated in another as citizens of the one nation, not as foreigners’;793 and expressing the notion that Australia’s ‘laws are to apply equally to all its citizens’.794

While the purposes underlying s 117 sound exemplary, especially as articulated by the various judges in *Street*, in light of the object of excluding Aborigines from its remit, s 117 is hardly an appropriate guide for constitutional reform to recognise Aboriginal and Torres Strait Islander peoples. There have also been numerous recommendations to amend the section, as discussed immediately below.

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786 (1989) 168 CLR 461 (‘Street’).
787 Ibid 523 (Deane J).
788 Interestingly this trend may have been reversed yet again in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 (‘Sweedman’); see Amelia Simpson, *Sweedman v Transport Accident Commission: State Residence Discrimination and the High Court’s Retreat into Characterisation* (2006) 34 Federal Law Review 363. However, as Zines points out *Street* was not overruled in *Sweedman*: Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 578.
789 Zines, above n 788, 576. See also Hanks, above n 779, 542.
791 Ibid 512 (Brennan J).
792 Ibid 522 (Deane J).
793 Ibid 541 (Dawson J).
794 Ibid 600 (Toohey J).
4  **Confining the Guarantee to ‘Residents’**

Another option would be to confine a non-discrimination guarantee to residents, broadly construed, in line with the changes to s 117 favoured by the Constitutional Commission.795 The Commission explained:

> We see no reason to confine the protection to ‘subjects of the Queen’ or to Australian citizens. Also, having regard to our general approach throughout this Report in matters relating to the Territories, we believe that the protection should be extended to persons in and from the Territories.796

The Commission’s view was that the notion of ‘resident’ in s 117 should not be confined to permanent residence.797 Drawing on Denis Rose’s earlier proposals,798 the Commission recommended altering s 117 to include persons who are permanently or temporarily resident or domiciled in other States.799

The Commission therefore proposed that s 117 be omitted and the following provision be substituted:

(1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.

(2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.800

In extending s 117 to persons who are ‘resident, temporarily resident or domiciled’, at the very least, this recommendation might go some way to addressing perceived problems in the case law, particularly those cases decided prior to 1988 (*Street* was decided in 1989). However, it may not provide a useful template for a non-

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796 Ibid 68 (citations omitted).

797 Ibid 67.


800 Ibid 68.
discrimination guarantee. The status of a resident of a State or Territory when in another State is a distinct issue for a federation. In contrast, the right to freedom from discrimination can be regarded as a fundamental human right, as will be explored in the next section.

5 A Non-Discrimination Guarantee for ‘Everyone’

Arguably the very nature of non-discrimination and equality provisions require that they extend to everyone, as to do otherwise would exacerbate existing inequalities. A more inclusive approach would also be in line with one of the purposes that may underlie Indigenous recognition proposals: creating a greater sense of membership for Aboriginal and Torres Strait Islander peoples.\(^\text{801}\)

International law provides support for a more inclusive approach to equality and non-discrimination. Although CERD permits discrimination between nationals and non-nationals,\(^\text{802}\) such discrimination is not permitted in relation to fundamental human rights.\(^\text{803}\) Similarly the rights contained in the ICCPR, with limited exceptions,\(^\text{804}\) are intended to apply to citizens and non-citizens equally.\(^\text{805}\)

With the international law framework in mind, the Constitutional Commission’s proposed equality provision, extracted above, was drafted to extend to ‘everyone’. Similarly, s 15 of the Canadian Charter of Rights and Freedoms applies to ‘every individual’, as discussed below. In the next section, I examine the implications of this choice in Canada, where citizens also enjoy several specific rights, in order to determine the desirability of a similarly broad provision in Australia, whilst remaining cognisant of key differences between the Canadian Charter of Rights and Freedoms and the Australian Constitution, particularly the lack of a bill of rights in Australia. However, as explained below, these differences do not preclude the possibility of drafting a tighter

\[^{801}\text{Expert Panel Discussion Paper}, \text{above n 433, 12–13.}\]
\[^{802}\text{Ibid art 1(2).}\]
\[^{803}\text{See Rubenstein, \textit{Citizenship in Context}, \text{above n 755, 179.}\}
\[^{804}\text{Ibid art 25. Pursuant to art 25 ‘every citizen shall have the right and opportunity’ to take part in public affairs, to vote and to have access to public service.}\]
\[^{805}\text{See Rubenstein, \textit{Citizenship in Context}, \text{above n 755, 179.}\}
prohibition of racial discrimination that is informed by the ideas that have migrated from Canada to Australia.

C The Canadian Charter, Equality Rights and ‘Every Individual’

1 ‘Citizens’ and their Rights

Unlike the Australian Constitution, the word ‘citizen’ appears in several provisions in the Canadian Charter of Rights and Freedoms. Citizens enjoy specific rights pursuant to s 3 (right to vote and be qualified for membership in the relevant legislature), s 6 (right to enter, remain in and leave Canada) and s 23 (right to instruction in the language of the English or French linguistic minority population).

However, like in Australia, citizenship is largely a creature of statute and a relatively recent one at that.806 There are also similarities between the ‘aliens’ and ‘immigration’ heads of power in the Australian Constitution and ss 91(25) and 95 of the Constitution Act 1867, which respectively granted legislative competence over ‘Naturalization and Aliens’ and ‘Immigration’.

Citizenship is not defined in the Constitution Act 1982. As Rubenstein and Lenagh-Maguire explain, given the Constitution ‘does not create a constitutional form of citizenship’807 and yet citizens enjoy certain Charter rights, ‘[t]he adoption of the Canadian Charter of Rights and Freedoms has given additional meaning and depth to the statutory concept of citizenship in Canada’.808

Peter Hogg argues that it seems unlikely that the courts would develop their own definition of ‘citizen’.809 Although this issue has not yet been considered by the Supreme Court of Canada, in 2000 the Federal Court of Appeal ruled that although the Canadian Charter of Rights and Freedoms refers to ‘citizens’, the concept has no meaning apart from that created by statute.810

806 It was established for the first time by federal statute in 1947: see Hogg, above n 303, vol 2, 78.
807 Rubenstein and Lenagh-Maguire, above n 754, 145.
808 Ibid.
809 Hogg, above n 303, vol 2, 78.
Hogg also argues that the meaning of ‘citizen’ should not be frozen in time:

it would be unfortunate if the courts were to hold that the statutory rules defining citizenship in 1982 (when the Charter came into force) constituted the rigid, unchangeable definition for constitutional purposes. The best course is for the courts to accept that citizenship is a creature of federal statute law and that it can be changed from time to time by the federal Parliament, even though the consequence of any such change is also to change the scope of ss 3, 6 and 23 of the Charter.\textsuperscript{811}

Other commentators appear to be more concerned about the potential consequences if there are no limits on the legislature’s capacity to define citizenship. Galloway\textsuperscript{812} and Buhler,\textsuperscript{813} for example, argue that ‘citizen’ must have some constitutional meaning independent of the statutory framework established by the legislature.\textsuperscript{814} As Rubenstein and Lenagh-Maguire point out, ‘there may be similarities here with the High Court of Australia’s elucidation of a constitutional concept of “membership” of the Australian community that is distinct from, but may control, the statutory status of citizenship’.\textsuperscript{815} Indeed, despite the lack of definition of ‘alien’ in the Australian Constitution, which is now considered to be synonymous with ‘non-citizen’,\textsuperscript{816} Gleeson CJ in \textit{Singh v Commonwealth} stated that ‘[e]veryone agrees that the term “aliens” does not mean whatever Parliament wants it to mean’.\textsuperscript{817} There must be some limits. This is an issue that Hogg appears to appreciate when he states ‘[o]f course, the courts should review any amendment to the citizenship law to satisfy themselves that it is reasonably related to a legitimate national objective, and is not simply a device to limit Charter rights’.\textsuperscript{818}

\textsuperscript{811} Hogg, above n 303, vol 2, 78.
\textsuperscript{814} Rubenstein and Lenagh-Maguire, above n 754, 146.
\textsuperscript{815} Ibid.
\textsuperscript{817} Ibid.
\textsuperscript{818} Hogg, above n 303, vol 2, 78.
Equality Rights Applying to ‘Every Individual’

Although citizens enjoy specific rights in ss 3, 6 and 23, the equality rights in s 15 of the *Canadian Charter of Rights and Freedoms* apply to ‘every individual’. As Galloway explains, in Canada ‘[t]he mere fact that citizens are guaranteed constitutional rights appears to conflict with the guarantee of equality to every individual’. 819 In Australia, if one were to have a longer term focus and consider inserting specific rights for Australian citizens, such as the right to return, this tension may also become apparent. However, given the non-discrimination guarantee under consideration is confined to racial discrimination and is not a general right to equality like s 15 of the *Canadian Charter of Rights and Freedoms*, this tension is likely to be less pronounced in Australia as explained below.

If a law infringes s 15, a court must then consider whether it is justified under s 1 of the *Canadian Charter of Rights and Freedoms*, which, as discussed above, 820 provides that all *Charter* rights are subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

Although citizenship is not a ground of discrimination, in *Andrews v Law Society of British Columbia* the Supreme Court of Canada found that the citizenship prerequisite for admission to the legal profession amounted to discrimination. 821 Discriminating on the basis of citizenship status or nationality is generally considered to be distinct from discriminating on the basis of ‘national origin’. 822 However, in *Andrews* the Supreme Court found that s 15 discrimination extends beyond the grounds listed in s 15(1) to analogous grounds. The majority found that citizenship was an analogous ground based on the claim that non-citizens were a ‘discrete and insular minority’. 823

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819 Galloway, above n 812, 222.
820 See page 157.
821 [1989] 1 SCR 143 (‘Andrews’).
822 When considering these terms in the context of ss 9 and 10 of the *Racial Discrimination Act 1975* (Cth) in *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202 the Federal Court found at 210–11 that there ‘a distinction between national origin and nationality, the latter being a purely legal status (and a transient one at that)’.
823 [1989] 1 SCR 143, 152–3 (Wilson J); 183 (McIntyre J).
In *Andrews* the Supreme Court also found that the discrimination in question could not be justified under s 1 of the *Canadian Charter of Rights and Freedoms*.824 This is in contrast to *Lavoie v Canada* where a majority of the Supreme Court upheld citizenship preferences for hiring into the federal public service either on the basis that it could be justified under s 1825 or on the basis that the law did not fall foul of s 15 due to an absence of impairment of human dignity.826 (However, as discussed above,827 since *R v Kapp*,828 human dignity is no longer the touchstone of s 15 cases.)

In *Lavoie* one of the arguments put forward by the Canadian Government in favour of the law’s validity was on the basis that the federal Parliament’s power over citizenship, which, like in Australia, derives from the ‘Naturalization and Aliens’ power,829 would be unduly restrained if no distinction between citizens and non-citizens were permitted.830 However, this argument was not accepted by the majority. In the principal majority opinion, Bastarache J held that laws imposing disabilities on non-citizens are not exempt from *Charter* principles831 and that this ‘would not “abolish the concept of citizenship”’.832 In contrast, Arbour J, in dissent, held that there could be no breach of s 15 given ‘legislating over matters of citizenship itself entails differential treatment between citizens and non-citizens’.833 This is a position that has been taken in relation to immigration laws.834

824 Ibid 156 (Wilson J). McIntyre J dissented on the application of s 1: at 192.
825 [2002] 1 SCR 769, 788 (Bastarache J) (‘*Lavoie*’). Bastarache J also delivered judgment for Gonthier, Iacobucci and Major JJ.
826 Ibid 850 (Arbour J), 854 (LeBel J).
827 See above from page 148.
829 Section 91(25), *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3.
831 Ibid 803.
832 Ibid.
834 See *Chiarelli v Canada* [1992] 1 SCR 711, which involved a federal law authorising the deportation of permanent residents convicted of serious criminal offences. As Bastarache J explains in *Lavoie* at 800, given ‘s 6 of the *Charter* specifically authorized differential treatment of non-citizens for immigration purposes, the law was held not to be discriminatory’.

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After *Lavoie* the Supreme Court of Canada was criticised for being overly deferential to Parliament.\(^835\) While these issues are unlikely to arise for consideration before the High Court of Australia provided s 117A is drafted as set out above (in particular given the proposed drafting of s 117A is limited to ‘discrimination based on race, national or ethnic origin’ which is less likely to be interpreted as including analogous grounds), consideration would be required as to whether s 117A would limit the ‘aliens’ power. A similar argument might be attempted to the one argued by the Canadian Government in *Lavoie*. However, if a non-discrimination provision were to be limited to discrimination on the grounds of race (as opposed to extending to nationality or analogous grounds), distinguishing between citizens and non-citizens without more would be unlikely to infringe the guarantee. Moreover, any concern on the part of the Australian Government would be of a different nature given this limitation on Commonwealth power would essentially amount to losing the scope to use the ‘aliens’ power to discriminate on racial grounds, which is a course of action that is abhorrent by any standards.

The utility of the Canadian cases drawn on above is to highlight some of the future debates that could arise in Australia and to think through potential responses to these debates. This can in turn inform the ways in which a ‘transplant’ can be modified to suit what is in many ways a parochial issue, which will be explored in the next section. It is also possible that the more ideas migrate, the more feasible a (modified) transplant may become in this area. However, while it may be possible to draft a tighter prohibition, there remains a risk that focusing on non-discrimination could overshadow the Aboriginal rights dimensions underlying many calls for recognition. This is a difficult issue for advocates that I will return to in the conclusion.

**D Preferred Drafting in Relation to Scope**

My preferred option is for a non-discrimination guarantee to apply to non-citizens and citizens alike:

(1) The Commonwealth or a State or Territory shall not make any law imposing on any person a disadvantage based on race, colour, ethnic or national origin.

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(2) Subsection (1) is subject only to such limits prescribed by law that are reasonably appropriate and adapted to serve a legitimate end in a manner consistent with substantive equality and cultural diversity.

This approach would be similar to the Canadian approach to equality, in recognising that all persons have a fundamental right to freedom from racial discrimination. While the Canadian approach goes further to recognise other grounds of discrimination, a non-discrimination guarantee is a first step. If a new provision were to apply to ‘any person’, Australia would be at one with Canada in recognising that there are fundamental rights for which citizenship should not be an exclusionary category.

On the other hand, were a new non-discrimination provision to apply to ‘Australian citizens’ thus introducing (at least expressly) a concept of constitutional citizenship, this would bring the Australian constitutional approach to citizenship closer to that of Canada given the term would be constitutionalised but not defined. However, the Canadian approach would still be distinct given citizens have numerous express rights. That said, these rights are limited to special categories (such as the right to return) and do not impinge on fundamental human rights.

In my view, Australia should take a similar approach to Canada in upholding the fundamental human rights of all persons. Although extending a non-discrimination guarantee to all persons would potentially reduce legislative power, the Government should not contemplate passing racially discriminatory laws, whether they apply to non-citizens (‘aliens’) or not. To do otherwise would amount to introducing an unnecessarily discriminatory element into the very provision designed to stamp out racial discrimination in Australia. This is a clear demonstration of the risks of not taking a holistic approach to the transplantation and migration of foundational ideas — it is imperative for ideas relating to the implications of certain transplants to also migrate. The more ideas migrate, the greater the possibility for informed decisions to be made by advocates of change.

E Concluding Comments Regarding Scope

Along with the issue as to who should enjoy the protection of the freedom (and whether this should be made express in the section), other issues of scope may arise. However, not all such legal implications can be dealt with in advance. It is inevitable that many
will fall for determination by the High Court on a case by case basis. This has the potential to make many people nervous, and perhaps unnecessarily so. As the Report of the Expert Panel explains, reasons for not supporting change include concerns about long-term and possibly unforeseeable legal consequences, and possible future judicial interpretation of any new constitutional text.836

Sean Brennan has recently tried to quell these concerns by explaining that at some point:

we must accept that judges will interpret any new words put into the constitution. That is their job. We should focus on giving them well-considered words, not pretend we can change the constitution but somehow keep the judges out of it.837

There is no denying that the interpretation of a non-discrimination guarantee would be largely left to the courts if included in the Australian Constitution. However, this is not unlike the situation with respect to other constitutional provisions. No matter how cautious drafters are, constitutional provisions are subject to interpretation. Even provisions that might be regarded as more straightforward inclusions in the Australian Constitution, such as s 92 (freedom of interstate trade), have had a tumultuous history.838

Were s 15 of the Canadian Charter of Rights and Freedoms to be transplanted (with or without substantial modification for inclusion in the Australian Constitution) or were Australia to include a non-discrimination guarantee of limited resemblance to s 15 but guided by similar aspirations, it is possible that Australian High Court justices, following the lead of counsel, will draw on Canadian developments. Even if this only occurs for the purposes of comparison, this in itself highlights that transplantation or initial migration can lead to the further migration of ideas, which is by no means new, as cases such as Street,839 A-G (Vic) ex rel Black v Commonwealth840 and Momcilovic v

838 Compare, for example, High Court jurisprudence on s 92 before and after Cole v Whitfield (1988) 165 CLR 360.
**The Queen** demonstrate.\(^{841}\) It also highlights the interrelationship between constitutional and judicial recognition (the two modes of recognition that have been the focus of this thesis).

V  **CONCLUSION**

Ideas that are migrating from Canada are already guiding advocates who seek constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Expert Panel’s proposed new s 116A is in many respects similar to s 15 of the *Canadian Charter of Rights and Freedoms*, but the surrounding machinery is different. There are ways in which the drafting of the provision could be further modified to try to overcome the difficulties that have arisen in Canada. However, this could give rise to other (as yet) unforeseen difficulties. When ‘addressing the problem of the “race power”’\(^{842}\) is considered as a starting point, it appears that the outright transplantation of overseas approaches may be of limited utility. However, the more ideas migrate from other jurisdictions, the greater the availability of ideas that could provide the basis for a unique solution. At the very least, the case law that has developed around s 15 of the *Canadian Charter of Rights and Freedoms* can help Australians to appreciate the risks of approaching Aboriginal rights issues solely through the prism of equality and non-discrimination.

I commenced Topic 2 by analysing the history and current operation of s 51(xxvi) so as to first put into context the issues faced in Australia. If the specific situation of Australia — s 51(xxvi) and the history of 1967 — is considered as a starting point, the utility of outright transplantation of overseas approaches appears to be less. However, the more ideas migrate from other jurisdictions, the greater the availability of ideas that could provide the basis for a unique solution to a uniquely Australian issue. Much can be learned from Canadian experiences, as the steps I took in developing an express freedom from racial discrimination demonstrate. However, my conclusions remain tentative in relation to the utility of an express freedom of racial discrimination. While it is possible to draft a tighter prohibition, there is a risk that focusing on non-discrimination could overshadow the Aboriginal rights dimensions underlying many

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\(^{841}\) (2011) 85 ALJR 957.

calls for recognition. This may well be where ideas migrating from Canada can provide the greatest assistance: by demonstrating the implications of such a modified transplant.

As stated above, in many respects the approach underlying the express freedom is similar to s 15 of the Canadian Charter of Rights and Freedoms, but the surrounding machinery is different. If a similar provision is ever adopted it will therefore be interesting to see how closely Australia follows in Canadian footsteps. However, getting to that point is likely to be the most significant hurdle. Just as Topic 1 considered how the lack of treaties in Australia might act as a barrier to the migration of foundational ideas from Canada to Australia, current hostility towards bills of rights in Australia, or anything resembling a ‘one-clause bill of rights’ (whether justified or not) could be an insurmountable hurdle to taking the fourth mode of migration (constitutional reform) to its logical conclusion. In the meantime, through the third mode (academic critique) Australian legal analysis has the potential to be enriched by looking abroad to countries like Canada, particularly when identifying options (even to discount them) and exploring potential legal implications.
THESIS CONCLUSION

Given the need for a conceptual framework through which to approach the lessons that can be learned from Canada in relation to judicial and constitutional recognition of Aboriginal and Torres Strait Islander peoples, my starting point was to adapt the conceptual frameworks identified by Choudhry in *The Migration of Constitutional Ideas*.843 Unlike Choudhry, who includes the concepts of transplantation and borrowing in the concept of migration,844 I chose to keep the concept of transplantation somewhat distinct from the broader concept of migration. For the purposes of my analysis, I also began by identifying the various modes by which foundational ideas migrate from one jurisdiction to another — notably, in the arguments of counsel, judicial determinations, academic critique and constitutional reform deliberations.

I developed my thesis that it is dangerous to transplant foundational ideas, whether derived from the common law or constitutional law, without other ideas (particularly in relation to implications) also migrating in response to two distinct but related topics: ‘Topic 1 — The Potential for Judicial Recognition of Indigenous Self-Government Rights: The Migration of Foundational Ideas from Canada to Australia’ and ‘Topic 2 — Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, the Race Power and an Anti-Discrimination Guarantee: Contemplating Canadian Approaches to Equality’.

As far as the migration of foundational ideas from Canada is concerned, in Topic 1 my starting point was to consider the lessons that could be learned from the Canadian jurisprudence in order to understand the ideas that have migrated or could potentially migrate to Australia. In Topic 2, I started with an appraisal of the lack of recognition of Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* and the perceived problems with s 51(xxvi), and, in so doing, considered the benefits that (modified) Canadian transplants might offer.

Through these two topics I examined two of the recognised modes of recognition — judicial and constitutional — and focused on two discrete types of recognition — self-government and non-discrimination — and the lessons that can be learned from Canada.

843 Choudhry, above n 4.
844 Ibid 21.
In addition, these two topics involved examination of two distinct types of foundational ideas — common law and constitutional.

With respect to these two modes and two types of Indigenous recognition my conclusions were similar; so too were my conclusions in relation to common law and constitutional ideas. These conclusions were in support of my thesis that it is dangerous to transplant foundational ideas without other ideas (particularly in relation to implications) also migrating. However, this risk should not downplay the fact that the migration of foundational ideas — whether through the deliberations and arguments of counsel, judicial decisions, academic critique or constitutional reform — can be an invaluable decision-making tool for advocates, who might in turn contribute to one or more of these modes of migration.

The migration of foundational ideas from Canada regarding Indigenous self-government rights and non-discrimination is a particularly useful tool when deciding whether to seek certain types of judicial or constitutional recognition. What decision advocates will arrive at remains to be seen.

In the meantime, in response to Topic 1, I explored the potential benefits of adopting a ‘crisper’ more confined formulation of the right to self-government than those previously attempted in Australia by focusing on the right to regulate and control cultural practices. This formulation stems from ideas that originate in Canada and may be more likely to be recognised than more far-reaching claims such as the ones attempted in Coe [No 1], Coe [No 2] and Walker. The potential for such claims to be reformulated in this way also demonstrates the extent to which foundational ideas from Canada about self-government rights can offer a valuable new perspective to a shared issue.

However, before following in Canadian footsteps and seeking the incremental (and hence limited) recognition of rights to regulate and control the manner in which cultural

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845 For a discussion of the ‘crisper formulations’ that may be offered by comparative law see Mason, above n 2 and page 20 above.
846 (1979) 53 ALJR 403.
848 (1992) 175 CLR 1.
practices are carried out (for example, on the basis of shared common law justifications for self-government rights), advocates will need to weigh up the potential benefits against the time and cost commitment of going before the courts. I cannot overstate the importance of weighing up the risks given the limitations inherent in the piecemeal nature of judicial recognition of self-government rights and the difficulty of achieving such recognition, as illustrated by the Canadian case law. The risks involved might also mean that advocates devote their time elsewhere, including towards the cause of achieving constitutional recognition (which may involve an agreement-making power through which self-government rights could be furthered).

In response to Topic 2, I demonstrated that when considering whether the Australian Constitution should be amended to insert a prohibition on racial-discrimination, Australian legal analysis has the potential to be enriched by looking abroad to countries like Canada, particularly when identifying or discounting options and exploring potential legal implications. In relation to Topic 2, my conclusions were tentative. While it may be possible to draft a tighter prohibition, there remains a risk that focusing on non-discrimination could overshadow the Aboriginal rights dimensions underlying many calls for recognition. At the very least, the case law that has developed around s 15 of the Canadian Charter of Rights and Freedoms can help Australians to appreciate the risks of approaching Aboriginal rights issues solely through the prism of equality and non-discrimination.
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