Comments

Editor: Dan Meagher

DRAFTING A REPLACEMENT FOR THE RACES POWER IN THE AUSTRALIAN CONSTITUTION

A key question for any referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution is what to do about the races power in s 51(xxvi). It enables the federal Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". The Expert Panel report[1] delivered to Prime Minister Julia Gillard in January 2012 recommended that the power be removed from the Constitution.

The Expert Panel also recommended that a new replacement power to pass laws for Aboriginal and Torres Strait Islander peoples be inserted into the Constitution. It reached this conclusion because s 51(xxvi) is of continuing importance. It enables legislation such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Native Title Act 1993* (Cth) and, since the High Court's decision in *Williams v Commonwealth*,[2] a range of direct Commonwealth payments for matters such as Indigenous education, employment and housing.[3] Repealing the races power would presumably mean that such legislation and payments would become invalid. As a result, the races power needs to be replaced, rather than merely repealed.

CONSTRAINTS AND GUIDING FACTORS

Drafting a replacement for the races power is subject to a number of constraints and guiding factors. First, the object of replacing the races power is not to alter the scope of federal or State power, but merely to remove discriminatory references to the concept of race. As a result, a replacement power ought to, as closely as possible, provide *continuity* with the scope of the races power in so far as it relates to Aboriginal peoples. This goal is also important because of the political significance attached to the 1967 referendum, which enabled the making of national laws for Aboriginal peoples by the federal Parliament. It achieved this by removing the words "other than the aboriginal race in any State" from the races power.

Secondly, the replacement power must retain the *flexibility* of the races power as a means not only to support current actions, but also future laws and payments. For example, the races power proved sufficiently flexible to enable the regulation of native title,[4] a legal concept first recognised by the High Court in 1992 in *Mabo v Queensland (No 2)*.[5] The replacement power must extend to any other common law rights particular to Aboriginal people that might be recognised by the courts. Lest the referendum be opposed by significant sections of the Aboriginal community, it must also provide a source of power should the federal Parliament ever wish to provide for a treaty between Aboriginal peoples and the state.

Thirdly, a replacement power should *not enable the enactment of laws that discriminate on the basis of race*. By today's standards, the rationale for the races power was racist. Sir Edmund Barton, later Australia's first prime minister and one of the first members of the High Court, made the position clear when he told the 1897-1898 Constitutional Convention that the races power was necessary to enable the Commonwealth to "regulate the affairs of the people of coloured or inferior races who are

[1] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012).

[2] *Williams v Commonwealth* (2012) 248 CLR 156.

[3] *Financial Management and Accountability Regulations 1997* (Cth), Sch 1AA Pt 4, items 407.022, 407.052 and 410.017.

[4] *Western Australia v Commonwealth* (1995) 183 CLR 373 (*Native Title Act Case*).

[5] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

in the Commonwealth".[6] The High Court decision in the *Hindmarsh Island Bridge Case*[7] also left open the possibility that the power can be used to enact racially discriminate laws even after the 1967 referendum. As the Expert Panel found, a key component of the recognition agenda is to constrain the ability of the Commonwealth to discriminate on the basis of race.[8] Ideally, this would mean a constraint that engages with the potential impact, as well as purpose, of Commonwealth legislation, and one that adopts a substantive rather than purely formal view of equality.

EXPERT PANEL RECOMMENDATIONS

The Expert Panel grappled with these issues in recommending that a new s 51A be inserted into the Constitution. After setting out a preamble recognising matters including "that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples" and "acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples", the section conferred power on the federal Parliament to make laws with respect to "Aboriginal and Torres Strait Islander peoples".[9]

The Expert Panel further recommended a guarantee against racial discrimination that would limit this and other powers. The proposed s 116A would provide:

> (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.[10]

Neither Labor while in office, nor the new Coalition government led by Prime Minister Tony Abbott has responded to the recommendations of the Expert Panel. Abbott though has been critical of the notion that the Constitution include a clause like s 116A, rejecting the idea as a "one clause Bill of Rights".[11] Putting the merits of this claim to one side, it appears unlikely that the Abbott government will proceed with constitutional recognition in the form recommended by the Expert Panel. This has reopened debate about a replacement for the races power. The options fall into three broad categories reflective of the types of Commonwealth powers currently found in the Constitution.

A SUBJECT MATTER POWER

One option advocated by former New South Wales Chief Justice Jim Spigelman[12] would replace the races power with a power defined by reference to a list of subject matters of special significance to Aboriginal people. The power might thus refer to matters such as Aboriginal health, education, employment and representation, and the traditions, customs and customary entitlements of Aboriginal peoples, including native title. Such a list could satisfy the requirement of continuity with the races power, though the list of matters covered might need to be extensive given the diverse range of laws and payments currently supported by the races power.

---

[6] "Debates of the Australasian Federal Convention", Third Session, Melbourne (27 January 1898) (Sir Edmund Barton) in *Official Record of the Debates of the Australasian Federal Convention, 1891-1898* (Legal Books, 1986) Vol 4, pp 228-229.

[7] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (*Hindmarsh Island Bridge Case*).

[8] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, pp 149-150.

[9] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, p 133.

[10] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, p 173.

[11] Karvelas P, "Historic Constitution Vote over Indigenous Recognition Facing Hurdles", *The Australian* (online) (20 January 2012), http://www.theaustralian.com.au/national-affairs/policy/historic-constitution-vote-over-indigenous-recognition-facing-hurdles/story-fn9hm1pm-1226248879375.

[12] Spigelman J, "A Tale of Two Panels" (Speech delivered at the Constitutional Law Dinner, Sydney, 17 February 2012), http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner_speech_j_spigelman.pdf.

A different concern is whether even a long list of subject matters can include all topics of potential future significance to Aboriginal people.[13] One way to overcome this problem of flexibility might be to make such a list illustrative, rather than exhaustive, and to give power to the Commonwealth to make laws with respect to these and other "like" subject matters. The Constitution already contains a power in this form – that in s 51(v) over "Postal, telegraphic, telephonic, and other like services". Overseas experience, however, suggests that courts can have difficulty developing clear and predictable criteria for identifying those topics or categories that count as analogous in this context. The more internally diverse the categories are, the more likely this also is to be the case. An illustration is the approach of the Supreme Court of Canada to identifying "analogous" grounds of discrimination under the *Canadian Charter of Rights and Freedoms 1982*.[14] That court has sometimes taken a generous approach to the task, but in other cases has adopted a more formalistic approach.[15]

A different approach again would be to define the relevant subject matter more broadly. In a submission to the Expert Panel, Allens (Arthur Robinson) proposed a power to make laws with respect to "the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples".[16] Words such as this would likely have a high degree of continuity with current law (though it is not certain that they would encompass the concept of native title), but it is not clear that they are sufficiently flexible to encompass subjects of future actions with respect to Aboriginal peoples that would currently fall under the races power, such as laws and payments dealing with the economic empowerment of Aboriginal communities.

In any event, none of these drafting options deals directly with use of the power to enact legislation that discriminates against Aboriginal people. The test of whether a law is valid under a subject matter power is whether it has a "sufficient connection" to the relevant subject matter.[17] And while it may be thought undesirable to pass a law under a power that was designed to further Aboriginal disadvantage, it is not clear that such a law would be beyond the scope of the power. This is because the question of characterising the law is merely whether the requisite connection exists, and not additional matters relating to the "justice, fairness, morality and propriety" of the law.[18]

A PURPOSIVE POWER

A second option is to define Commonwealth power by reference to certain ends, or purposes. The validity of a law purportedly enacted under such a power is determined not merely according to whether the law has a sufficient connection to the relevant subject matter, but whether the law is "proportionate" or "reasonably appropriate and adapted" to the achievement of the relevant purpose.[19] This may enable the High Court to examine the impact of the law upon human rights, including whether the law on its face or in its practical effect discriminates against Aboriginal peoples. Even if the court did take this approach, such protection would be limited to laws passed under this power. It would not apply to laws enacted pursuant to other heads of power.

A purposive replacement power might enable the making of laws with respect to the elimination of all forms of race-based discrimination, or the adoption of "special measures" for the elimination of racial discrimination. A federal power to eliminate race-based discrimination has clear parallels with the United States Constitution, which gives Congress a power to "enforce, by appropriate legislation"

[13] Brennan S, "Constitutional Reform and its Relationship to Land Justice" (2011) 5(2) *Land, Rights, Laws: Issues of Native Title* 1 at 7.

[14] *Canada Act 1982* (UK) c 11, Sch B, Pt 1 (*Canadian Charter of Rights and Freedoms*).

[15] Dixon R, "A New Theory of Charter Dialogue: The Supreme Court of Canada, Charter Dialogue and Deference" (2009) 47 *Osgoode Hall Law Journal* 235.

[16] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, p 151.

[17] *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 at 491 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[18] *Burton v Honan* (1952) 86 CLR 169 at 179 (Dixon CJ).

[19] See, for example, in the context of the defence power in s 51(vi) of the *Constitution*: *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 592-593 (Brennan J) (*War Crimes Act Case*).

the requirements of Equal Protection found in the Fourteenth Amendment.[20] A power to adopt "special measures" would reflect the recognition provided by international law that states may take such measures to achieve substantive equality.

A concern with such drafting would be its capacity to ensure continuity. The *Native Title Act*, for example, is not directed to eliminating discrimination, but regulating a common law property right held only by Aboriginal peoples. It is also not clear that such drafting would enable the general recognition of Aboriginal culture and languages. Most provisions that focus on discrimination, and its elimination, contemplate a point at which such a goal will be achieved. In the United States, O'Connor J famously suggested in 2003 that in 25 years, "the use of racial preferences [would] no longer be necessary" to achieve racial diversity in higher education.[21] Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* likewise states that special measures "shall not be continued after the objectives for which they were taken have been achieved".[22] For many Aboriginal people, however, the Constitution must enable *enduring* recognition of their distinctive traditions, culture and ties to land. While arguments could be made for this within a discrimination-based paradigm, this will necessarily involve great uncertainty.

One way to overcome this problem may be to draft a purposive power with a more forward-looking focus, such as by framing the power in terms of:

> the recognition and advancement of Aboriginal and Torres Strait Islander people.

The concept of "recognition" might be understood by the High Court to be purely formal and symbolic, or to have a more substantive dimension. But in any event, it would likely give the Commonwealth a power to adopt measures that acknowledge the status of Aboriginal and Torres Strait Islanders as Australia's first peoples. Beyond that, it is hard to say what the court might make of the concept of "recognition" as a source of power.

"Advancement" is a term that has a mixed history in Australia. It has been used to justify racially paternalistic, and racist, policies.[23] But it has also been used by Aboriginal people as a rallying cry for asserting their civil rights. Borrowing from the language used by civil rights leaders of the NAACP or National Association for the Advancement of Colored People in the United States, Aboriginal leaders in the 1950s formed the Federal Council for the Advancement of Aborigines and Torres Strait Islanders. It played a key role in convincing Australians to vote "Yes" at the 1967 referendum. Recognising this, the Expert Panel proposed that the term "advancement" be used in a preamble to a new race power.[24]

The term "advancement" has been adopted in the South African and Indian Constitutions, where it has been given a wide meaning.[25] While the context for its use would be different in Australia, it is likely that the High Court would interpret it similarly to authorise measures designed to redress inequality and achieve more forward-looking goals such as economic empowerment. This could enable the making of laws for native title as well as new forms of title designed to advance Aboriginal equality in different ways.[26] Lest there were any doubt about whether such a power could support the making of laws for the recognition of Aboriginal culture and traditions, it could be further elaborated

---

[20] United States Constitution, Amendment XIV, s 5.

[21] *Grutter v Bollinger* 539 US 306 at 343 (2003).

[22] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[23] See, for example, Frankland K, "A Brief History of Government Administration and Torres Strait Islander Peoples in Queensland" (1994) p 11 (discussing the Queensland "Department of Aboriginal and Islander Advancement") (unpublished paper, copy on file with authors).

[24] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, pp 150-151.

[25] See, for example, *Constitution of the Republic of South Africa 1996* (South Africa), s 9(2); *Constitution of India 1950* (India), Arts 15(4), 16(4). See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) (giving very broad scope to the concept of advancement in s 9(2)); *MR Balaji v Mysore* AIR 1963 SC 649 (giving broad scope to make reservations based on caste, providing the reservations targeted not just caste per se, and did not go above some (generously defined) ceiling).

[26] On the link between non-traditional or statutory forms of native title and empowerment, see *R v Kapp* [2008] 2 SCR 483.

so as to be expressed as being for "the recognition and advancement of Aboriginal and Torres Strait Islander people *and their distinctive culture, language and traditions*".

There is uncertainty about how the High Court would interpret such a power given the lack of domestic constitutional precedent for such language.[27] It is likely, however, to satisfy the requirements of continuity and flexibility, and may provide protection against discriminatory laws. If a legislative measure were patently not aimed at advancing the interests of Aboriginal people, or adopted means that were poorly tailored to achieving those aims, the High Court could find that it was not reasonably appropriate and adapted to meeting the purposes of the power. This, however, could cut both ways. Non-Indigenous Australians might also use this avenue to challenge legislative measures with beneficial aims on the basis that they also failed the proportionality test.[28]

A PERSONS POWER

A third drafting option would be to follow the approach adopted by the Expert Panel, while combining its proposals in respect of the races power and s 116A. It might be that, rather than inserting a new s 51A into the Constitution, the races power could be replaced with a power to make laws with respect to:

> Aboriginal and Torres Strait Islander people, but not so as to discriminate adversely against them.

One slight change from the recommendation of the Expert Panel is to use the word "people", rather than "peoples". This change, in shifting away from the notion that the power is focused upon Aboriginal people as a group, removes the possibility that it might not extend to laws for Aboriginal people as individuals or subgroups of Aboriginal people (such as Aboriginal women or youth).

The qualification "but not so as to discriminate adversely against them" adapts the wording "but not so as to authorize any form of civil conscription" in s 51(xxiiiA) of the Constitution. This wording was moved in Parliament as an amendment by Robert Menzies to the social services proposal put to the people in 1946 by the Chifley Labor government.

The word "discrimination" could incorporate the existing jurisprudence on this concept in regard to ss 92 and 117 of the Constitution.[29] As a constraint, the idea of discrimination includes a focus by the High Court on the practical impact, as well as formal terms or purpose, of legislation, and also a substantive inquiry as to whether any law with such an impact could be considered reasonably appropriate and adapted to advancing some non-discriminatory purpose.[30]

This power mirrors the scope of the races power in so far as it applies to Aboriginal people. It thus has the highest degree of continuity and flexibility. It would also provide a more effective anti-discrimination constraint than either a subject matter and purposive power because in this form it has been drafted as both a power and a guarantee.

The High Court has adopted a broad approach to interpreting the powers granted to the Commonwealth Parliament in s 51: this is one reason why members of the court in the *Hindmarsh Island Bridge Case* suggested that the races power may still extend to measures that negatively, as well as positively, discriminate with regard to racial minorities. However, the court has adopted a different approach to powers that contain express qualifications.[31] Hence, it has held that the words "other than State banking" in s 51(xiii) impose a restriction upon federal legislative power generally,

[27] Brennan, n 13 at 6.

[28] See Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, pp 150-151 (noting this, and suggesting that it favoured use of the word of advancement only in a preamble to, rather than in the body of, a new races power).

[29] See Simpson A, "The High Court's Conception of Discrimination: Origins, Applications, and Implications" (2007) 29 *Sydney Law Review* 263. "Discrimination" is used in a different context in s 51(ii) in respect of taxation and equality of treatment between the States.

[30] See *Maloney v The Queen* (2013) 87 ALR 755 at 808 (Bell J).

[31] There are, of course, debates as to what constitutes such a limitation: see, for example, *New South Wales v Commonwealth* (2006) 229 CLR 1 (*WorkChoices Case*) (on the effect of the words "conciliation and arbitration" in s 51(xxxv).

rather than a restriction only on the scope of s 51(xiii).[32] The court has also recognised a number of like prohibitions, including the words "but not so as to authorize any form of civil conscription" in s 51(xxiiiA),[33] and has suggested that such limits may apply to the Commonwealth's power to regulate the Territories under s 122.[34]

Yet, a power and guarantee in this form would offer significantly narrower protection than the proposed s 116A. It would apply only to Commonwealth, and not State and Territory, laws. It would also not protect all people from racial discrimination, only the Aboriginal people referred to in the power.

CONCLUSION

Determining a replacement for the races power as part of a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution raises a number of challenging drafting issues. The difficulty is magnified by the need to continue the scope of the races power with respect to Aboriginal peoples, while also providing for future flexibility and limits upon the capacity of the Commonwealth to discriminate against Aboriginal peoples.

Our analysis suggests that a subject matter power is not likely to satisfy these requirements. A more appropriate option would be in the form of a purposive power or a provision that incorporates both a power and the guarantee. Provisions in this form might, respectively, be drafted as powers that enable the federal Parliament to make laws with respect to either:

> the recognition and advancement of Aboriginal and Torres Strait Islander people and their distinctive culture, language and traditions
>
> or
>
> Aboriginal and Torres Strait Islander people, but not so as to discriminate adversely against them.

Either drafting option could meet the requirements of continuity and flexibility, while the latter provides a superior option in terms of the protection offered against racial discrimination.

Rosalind Dixon
Professor, Faculty of Law, University of New South Wales; Director, Comparative Constitutional Law Project, Gilbert + Tobin Centre of Public Law
and
George Williams
Anthony Mason Professor, Scientia Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar

[32] *Bourke v State Bank (NSW)* (1990) 170 CLR 276.

[33] *WorkChoices Case* (2006) 229 CLR 1 at 127 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[34] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Wurridjal v Commonwealth* (2009) 237 CLR 309.

NEW ZEALAND'S PARLIAMENTARY PRIVILEGE BILL: THE EMPIRE FINALLY STRIKES BACK

The privileges of New Zealand's Parliament – or, more accurately, those of its House of Representatives – primarily derive from two statutory sources.[1] The first is the *Bill of Rights 1688* (NZ), Art 9.[2] The second is the *Legislature Act 1908* (NZ), s 242.[3] While giving parliamentary privilege its legal basis, neither legislative instrument defines exactly what it consists of, meaning that the existence (and ambit) of any particular privilege is a matter of legal interpretation. And as legal interpretation is the responsibility of the judicial branch of government, the courts have on a number of occasions been called upon to decide whether or not a given matter is covered by privilege.

While such judicial intervention is unavoidable, it does create the potential for inter-branch conflict. Simply put, the courts may be of the opinion that parliamentary privilege applies (or does not apply) in a particular way, while the members of Parliament disagree with that conclusion. This potential for disagreement then sets up a clash of authority. The courts' role as interpreters and appliers of the law means that any judicial decision on whether and how parliamentary privilege applies in a given case effectively will define how it operates in future cases. However, because parliamentary privilege has its basis in statute, and because New Zealand's Parliament is a sovereign lawmaker, it always is open to it to legislate to overturn the judiciary's interpretation of the law and impose its own. What then makes this clash different to other areas where the judiciary and legislature disagree over the optimal form that law should take is the subject matter involved. In short, a court decision on parliamentary privilege involves the judicial branch deciding the extent of the legislature's freedom from external interference; whilst a legislative decision to overturn such a decision inevitably involves an element of self-dealing, as the individuals who are deciding what parliamentary privilege ought to mean are the same people who gain the most from it.

These sorts of concerns have come to the fore in the form of the *Parliamentary Privilege Bill 2013* (NZ), introduced into the House in December 2013. While the proposed legislation would accomplish a number of ends, the primary reason for its introduction is to give effect to a series of Privileges Committee reports that recommended overriding the effect of two particular decisions by the Privy Council and the New Zealand Supreme Court. As these bodies were and are the highest bodies in New Zealand's curial hierarchy, the Bill represents a significant assertion of parliamentary authority over the views of the judiciary.

ENDING "EFFECTIVE REPETITION"

The first judicial decision in Parliament's sights is the Privy Council's decision in *Jennings v Buchanan*.[4] The case involved a defamation claim, brought after a member of Parliament in a parliamentary debate accused a named public official of misusing public money to pursue an affair. While this parliamentary statement could not itself found a cause of action, as it fell under by the absolute protection afforded by Parliament's "free speech" privilege, the Privy Council accepted that a later "effective repetition" of the statement outside of the House could be relied on in court.[5] This approach was not thought to improperly intrude into the internal affairs of the House, or to interfere with Parliament's free speech privilege, as:

[1] McGee D, *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) pp 607-608.

[2] The provision reads: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." This enactment remains a part of the law of New Zealand by virtue of the *Imperial Laws Application Act 1988*(NZ), s 3.

[3] The provision reads: "The House of Representatives and the Committees and members thereof shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as on 1 January 1865 were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof."

[4] *Jennings v Buchanan* [2005] 2 NZLR 577 (PC).

[5] The exact words, used in an interview with a newspaper, were that the member of Parliament in question "did not resile from his claim about the official's relationship": *Jennings v Buchanan* [2005] 2 NZLR 577 at [2].

> reference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement. The propriety of the member's behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament.[6]

The response of members of Parliament to this decision was less sanguine.[7] A report from the Privilege's Committee,[8] later unanimously accepted by the House of Representatives, concluded that: "taking no action at all in response to the [Privy Council's] decision is [not] practicable. Members are being challenged in media interviews in terms directly derived from the 'effective repetition' principle. Unless public debate is to be stymied, this must be addressed."[9] It went on to recommend that "the Legislature Act be amended to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability."[10] This recommendation was repeated in two later Privileges Committee reports.[11]

The government has now taken it up by including in the *Parliamentary Privilege Bill* a provision that states:

> it is not lawful for evidence (including, without limitation, *Hansard*) to be offered or received, questions asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, ascertaining any content, effect, or meaning of a statement …
> (a) made outside proceedings in Parliament by any person; and
> (b) to the effect (regardless of its form or terms) that the person affirms, adopts, endorses, or refers to the content, effect, or meaning of a statement or an action that a participant in proceedings in Parliament (who may, but need not, be the person) made or took in those proceedings; but
> (c) that, if considered alone, does not in and of itself repeat that content, effect, or meaning.[12]

Furthermore, for the avoidance of any doubt, the Bill also states that any such statements "are protected by absolute privilege".[13] The net effect is thus to undo the Privy Council's ruling, meaning that legal liability will only attach to extra-parliamentary statements that when considered *by themselves* contain some defamatory meaning (or, indeed, attract any other legal consequences).

Broadening "proceedings in Parliament"

The second judicial ruling threatened with a parliamentary override is the Supreme Court's decision in *Attorney-General and Gow v Leigh*.[14] The case involved a defamation claim brought by a communication's advisor, Ms Leigh, after a Minister questioned her professional competence during his answer to a parliamentary question. Once again, this ministerial answer could not directly found a

---

6 *Jennings v Buchanan* [2005] 2 NZLR 577 at [18].

7 For (mostly critical) academic commentary on the decision, see Allan J, "Parliamentary Privilege: Will the Empire Strike Back" (2002) 20(2) *New Zealand Universities Law Review* 205; Joseph P, "Constitutional Law – Parliamentary Privilege and Effective Repetition: Constitutional Review" [2003] *New Zealand Law Review* 428; McGee D, "The Scope of Parliamentary Privilege" [2004] *New Zealand Law Journal* 84; Geddis A, "Privilege, Parliament, and the Courts" [2004] *New Zealand Law Journal* 302; Harker J, "The Impact of Buchanan v Jennings on Freedom of Speech and Defamation: The Erosion of Parliamentary Privilege?" (2005) 11 *Auckland University Law Review* 27; Geddis A, "Parliamentary Privilege: Quis Custodiet Ipos Custodes?" [2005] *Public Law* 696; Geddis A, "Defining the Ambit of the Free Speech Privilege in New Zealand's Parliament" (2005) 16(1) PLR 12.

8 Privileges Committee, *Question of Privilege Referred 21 July 1998 Concerning Buchanan v Jennings* [2005] AJHR I17G.

9 Privileges Committee, n 8, p 9.

10 Privileges Committee, n 8, p 9.

11 Privileges Committee, *Question of Privilege Referred Relating to the Exercise of the Privilege of Freedom of Speech by Members in the Context of Court Orders* [2009] AJHR I17A, p 22; Privileges Committee, *Question of Privilege Concerning the Defamation Action Attorney-General and Gow v Leigh* [2013] AJHR I17A, pp 31-32, 37 (Privileges Committee 2013 Report).

12 *Parliamentary Privilege Bill 2013* (NZ) (179-1), cl 8(4).

13 *Parliamentary Privilege Bill 2013* (NZ) (179-1), cl 10.

14 *Attorney-General and Gow v Leigh* [2012] 2 NZLR 713 (NZSC).

legal claim, due to the free speech privilege. However, Ms Leigh instead sought to sue the departmental advisor, Mr Gow, who provided the Minister with the information on which his answer was based. In turn, Mr Gow (joined by the Attorney-General, representing the Speaker of the House) sought to have the action thrown out, on the basis that his advising the Minister was a "proceeding in Parliament" to which absolute privilege attaches.

The Supreme Court ruled in Ms Leigh's favour, for two reasons. First, it found that the correct test for whether privilege applied was whether it was "necessary" for the proper and efficient functioning of the House of Representatives that the occasion on which Mr Gow communicated with the Minister be regarded as an occasion of absolute privilege.[15] In other words, had Mr Gow shown that without this kind of occasion being regarded as absolutely privileged, the House could not discharge its functions properly? And having isolated this question, the court then concluded that it was *not* necessary to give Mr Gow the protection of absolute privilege: "It cannot be conducive to the proper and efficient functioning of the House to give those communicating with a Minister in present circumstances a licence to speak with impunity when predominantly motivated by ill will, nor a licence to take improper advantage of the occasion by using it for an improper purpose."[16]

Once again, the members of Parliament disagreed with the court. In a Privileges Committee report, they rejected the court's approach to whether privilege applies[17] (the "necessity" test) and also concluded that without the clear guarantee of absolute privilege, not only public servants but also other participants in the business of Parliament faced the risk of subsequent legal action.[18] Quoting the Chair of the New Zealand Law Commission, Sir Grant Hammond, the Committee concluded that: "The *Leigh* decision does not appear to be grounded in the facts of parliamentary life, but rather it attempts to apply the law in the abstract. The reality of parliamentary life is that it is a set of complex interactions leading to expression in debates and select committees and it is not necessarily easy to draw sharp lines between these interactions and expressions."[19] Consequently, the Committee recommended legislating to overturn the court's "necessity" test for "proceedings in Parliament"; a step the *Parliamentary Privilege Bill* takes as follows:

> For the purposes of Article 9 of the *Bill of Rights 1688*, and for the purposes of this Act, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee, and therefore includes (without limiting that general definition) the following:
>
> (a) the giving of evidence (and the evidence so given) before the House or a committee:
>
> (b) the presentation or submission of a document to the House or a committee:
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee:
>
> (d) the formulation, making, or publication of a document, including a report, by or pursuant to an order of the House or a committee (and the document so formulated, made, or published).[20]

ADDITIONAL MATTERS

While the primary purpose of the Bill is to fix the problems that Parliament believes the courts have created,[21] it does also accomplish a couple of other interesting matters of note. It specifically provides legal authority for the House of Representatives to levy a fine of up to $1000 on persons it finds to be

[15] *Attorney-General and Gow v Leigh* [2012] 2 NZLR 713 at [11].

[16] *Attorney-General and Gow v Leigh* [2012] 2 NZLR 713 at [19].

[17] Privileges Committee 2013 Report, n 11, pp 19-20.

[18] Privileges Committee 2013 Report, n 11, pp 28-29.

[19] Privileges Committee 2013 Report, n 11, p 28.

[20] *Parliamentary Privileges Bill 2013* (NZ) (179-1), cl 8(2).

[21] The Bill itself purports to "declare and enact, for the avoidance of doubt, the effect that Article 9 of the *Bill of Rights 1688* had, on its true construction, before this Act's commencement"; see *Parliamentary Privileges Bill* (NZ), No 179-1, cll 8(7), 21(4).

in contempt.[22] Although the House has made use of this purported power in the recent past,[23] the legal basis for it doing so was a matter of some doubt.[24] By explicitly authorising such punishments through legislation, Parliament removes any questions as to the enforceability of such an order. In addition, the Bill clarifies that the New Zealand House of Representatives does not possess the power to expel from membership of the House, and that members' seats become vacant only in the specific circumstances provided in the *Electoral Act 1993* (NZ), s 55.[25] There again had been some doubt about this issue, with disagreement amongst academic commentators as to whether the House's "composition privilege" still permitted it to take such a step against one of its members.[26] Parliament is now moving to clarify the matter by disavowing any such legal power.

CONCLUSION

The *Parliamentary Privilege Bill* looks almost certain to pass into law, given its genesis in a cross-party committee report that was unanimously endorsed by the House. The impact of it doing so likely will not be that great; there are (at most) only a handful of situations in any given year where potential issues of parliamentary privilege arise. Furthermore, many of those issues presently fall within the statutory qualified privilege defence,[27] meaning that the absolute privilege afforded by the new law will not significantly increase the protection afforded to them. The main effect of the new law instead will be to tidy up the area of parliamentary privilege by clarifying the legal basis for some of the House's powers, as well as draw a brighter line around those issues that are and are not within its ambit.

What is of interest beyond the actual effect of the new law, however, is the clash in perspectives that this legislation represents. In both *Jennings v Buchanan* and *Attorney-General and Gow v Leigh*, the courts focused on the individual claims before them and held that where the plaintiff has suffered a harm, then the law ought to provide a remedy unless there is a *really, really* good reason for it not to. This concern with ensuring that the courts remain able to provide justice to a wronged individual caused them to pare back the reach of privilege. In response, members of Parliament have focused on the institutional workings of the House, concluding that if there is *any* danger that allowing a person a legal remedy may inhibit how it conducts its business, then they ought not to be able to get one. Both perspectives then have their inbuilt biases and the potential to undervalue some matters and overestimate others. So what really then matters is, whose perspective finally triumphs? And Parliament has now given its answer to that question.

Professor Andrew Geddis
Faculty of Law, University of Otago
Due recognition for the title of this comment is given to Allan J, "Parliamentary Privilege: Will the Empire Strike Back?" (2002) 20 New Zealand Universities Law Review 205.

[22] *Parliamentary Privileges Bill 2013* (NZ) (179-1), cl 21.

[23] Privileges Committee, *Question of Privilege on the Action Taken by TVNZ in relation to its Chief Executive, Following Evidence he Gave to the Finance and Expenditure Committee* (2006) AJHR I17A, p 9.

[24] Geddis A, "Fines for Contempt in New Zealand's House of Representatives" [2007] *Public Law* 425.

[25] *Parliamentary Privileges Bill 2013* (NZ) (179-1), cl 22.

[26] Compare Geddis A, "Gang aft a-gley: New Zealand's Attempt to Combat 'Party Hopping' by Elected Representatives" (2002) 1 *Election Law Journal* 557 and Joseph P, *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2001) p 422 with Morris C, "Misbehaving Members of Parliament and How to Deal with Them" in Morris C, Boston J and Butler P (eds), *Reconstituting the Constitution* (Springer, Heidelburg, 2011) pp 250-251.

[27] *Defamation Act 1992* (NZ), s 16.

FORTESCUE METALS GROUP LTD v COMMONWEALTH: DISCRIMINATION AND FISCAL FEDERALISM

FACTS

Fortescue Metals Group Ltd v Commonwealth[1] (*Mining Tax Case*) involved a challenge to the Commonwealth's Minerals Resource Rent Tax (Mining Tax), as set out in the *Minerals Resource Rent Tax Act 2012* (Cth) and several associated Imposition Acts.[2]

The scheme taxes "above normal profits"[3] flowing from certain mining activity in Australia – mostly iron ore and coal mining.[4] A miner (or corporate group) with an annual profit under $75 million is exempt altogether. For others, the first $75 million in profit is not taxable. For profits in excess of $75 million, certain "allowances" and offsets can be deducted before tax is assessed. For some miners, offsets will take them under the $75 million threshold and render them exempt; for others, offsets merely reduce tax liability. Categories of allowance described in the legislation, but not at issue in the *Mining Tax Case*, include capital expenditure and offsets carried forward from previous tax periods.[5]

The offset implicated in the *Mining Tax Case* was the allowance for State "royalties" (State taxes on taking minerals) already paid.[6] The Mining Tax was structured to ensure that any increase or decrease in State royalty rates would stimulate a compensatory increase or decrease in taxpayers' liability.[7] In other words, if a State put its royalty rates down, the Commonwealth would claw more Mining Tax from miners in that State. If it put royalties up, the Commonwealth would ease its tax burden on miners in that State. This could, loosely, be called an "equalising tax" – because of this push-and-pull relationship with State royalties.

The plaintiff contended in the High Court that the Mining Tax legislation was invalid on four grounds:

(1) that the tax "discriminates between States", contrary to the proviso to s 51(ii);
(2) that it "gives preference" to one or more States, contrary to s 99;
(3) that it interferes with the performance of States' governmental functions, contrary to the *Melbourne Corporation* doctrine;[8] and
(4) that it interferes with States' capacity to grant aid to mining operations, contrary to s 91 (this will not be explored in this comment).

Western Australia and Queensland intervened, broadly supporting the plaintiff's arguments.

DECISION AND CRITIQUE

A Bench of six heard this case in March 2013 and gave judgment on 7 August 2013. Justice Gageler did not participate, having advised on the law's validity as Commonwealth Solicitor-General. All six judges rejected all of the plaintiff's arguments, in four separate judgments. Hayne, Bell and Keane JJ delivered a joint judgment. French CJ, Crennan and Kiefel JJ each wrote separately.

[1] *Mining Tax Case* [2013] HCA 34.

[2] *Minerals Resource Rent Tax (Imposition – Customs) Act 2012* (Cth); *Minerals Resource Rent Tax (Imposition – Excise) Act 2012* (Cth); *Minerals Resource Rent Tax (Imposition – General) Act 2012* (Cth).

[3] *Minerals Resource Rent Tax Act 2012* (Cth), s 1.10.

[4] See *Minerals Resource Rent Tax Act 2012* (Cth), Div 10: this sets out the "core rules" that are then elaborated in detail in the rest of the Act.

[5] *Minerals Resource Rent Tax Act 2012* (Cth), Ch 3.

[6] *Minerals Resource Rent Tax Act 2012* (Cth), ss 60.1 to 60.30.

[7] See *Mining Tax Case* [2013] HCA 34 at [53] (Hayne, Bell and Keane JJ).

[8] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

Section 51(ii) proviso

As regards the s 51(ii) proviso, all judges agreed that the Mining Tax did not "discriminate between States".[9] However, there was disagreement concerning the appropriate test to apply.

The plurality understood the s 51(ii) proviso to pose a fairly simple question: does a Commonwealth law, as a matter of form, differentiate between States (or parts of States)? They did not think it necessary, or appropriate, to frame this discrimination inquiry in the more "modern" terms used in other constitutional contexts: with a focus on, for example, appropriate comparators, substantive disadvantage, and legitimate objectives.[10]

For the plurality, the fact that the Mining Tax scheme applied a "uniform rule" meant it could not offend the s 51(ii) proviso.[11] That conclusion was drawn from a long line of cases treating such "uniform" application as a decisive answer to claims of discrimination inherent in Commonwealth tax laws.[12] Kiefel J broadly agreed with this.[13] Both judgments hint at a concern about the increased demands the court may face if it undertook to go behind uniform Commonwealth tax laws to scrutinise their differential effects.[14] Indeed, it is true that most taxes will show geographic trends in how their burdens fall – and, historically, this has not been considered constitutionally suspect.

French CJ did not share these apprehensions about a change in approach. He clearly favoured an assimilation of the s 51(ii) proviso to the modern, substantive understanding of discrimination now governing, most notably, ss 92 and 117.[15] In French CJ's view, consideration of appropriate comparators, reasonableness, proportionality, and other key elements of a substance focus could all inform the process of characterisation – described elsewhere as an "holistic" model of discrimination analysis.[16] In particular, he was prepared to look behind the Mining Tax's uniform application and consider whether it worked any unfair disadvantage – which, he said, it did not. This part of his reasons highlights an important, though sometimes overlooked, fact about substantive tests for discrimination: substance-focused tests can, and often will, vindicate laws imposing uniform treatment, provided that any resulting differential outcomes seem justifiable.[17]

Crennan J specifically left for another day the question of a modernised approach to the s 51(ii) proviso.[18] Nevertheless, in the course of upholding the Mining Tax by reference to a "uniform rule" test, Crennan J appears more comfortable, than the plurality, with the concepts and categories of modern discrimination analysis.[19]

In evaluating these reasons it is important to recall what was decided almost 10 years earlier in *Permanent Trustee Australia Ltd v Commissioner of State Revenue*.[20] A 5:2 High Court majority there said that proportionality-type questions were relevant in the application of s 99 of the Constitution and chose to assimilate s 99 to the emerging standardised approach to all discrimination questions arising

[9] *Mining Tax Case* [2013] HCA 34 at [50] (French CJ), [121]-[122] (Hayne, Bell and Keane JJ), [175] (Crennan J), [227] (Kiefel J).

[10] *Mining Tax Case* [2013] HCA 34 at [104], [108]-[117].

[11] *Mining Tax Case* [2013] HCA 34 at [115]-[116] (Hayne, Bell and Keane JJ).

[12] *Mining Tax Case* [2013] HCA 34 at [83]-[98] (Hayne, Bell and Keane JJ), especially at [98], citing *Conroy v Carter* (1968) 118 CLR 90 at 101.

[13] *Mining Tax Case* [2013] HCA 34 at [202], [223]-[225].

[14] *Mining Tax Case* [2013] HCA 34 at [117] (Hayne, Bell and Keane JJ), [225] (Kiefel J).

[15] *Mining Tax Case* [2013] HCA 34 at [45]-[50].

[16] *Mining Tax Case* [2013] HCA 34 at [31] (French CJ); Simpson A, "The High Court's Conception of Discrimination: Origins, Applications and Implications" (2007) 29 *Sydney Law Review* 263 at 282.

[17] Simpson, n 16 at 278.

[18] *Mining Tax Case* [2013] HCA 34 at [175].

[19] *Mining Tax Case* [2013] HCA 34 at [155]-[156], [161]-[162].

[20] *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 (*Permanent Trustee*).

in constitutional law.[21] Vigorous dissents from McHugh and Kirby JJ insisted that the majority's approach made little sense, given that s 99 (like s 51(ii)) was not intended as a protection for individuals. It was, they said, a purely federal protection and could not realistically function as such if its prohibition ceded to "reasonableness".[22]

In the *Mining Tax Case*, the plurality, Kiefel J, and perhaps also Crennan J, were reluctant to transform the s 51(ii) proviso in the way that *Permanent Trustee* had transformed s 99 – that is, by modernising the non-discrimination rule. In places, the plurality and Kiefel J seem to regard their objections to a substance test as obiter dicta – saying, essentially, that because the Mining Tax imposed a uniform rule there was no need to "go further" and ask questions about substance. On this, their judgments claimed direct support from earlier authorities.[23]

While this position may owe something to the way the parties' arguments unfolded – especially the Commonwealth's apparent confinement of proportionality-style arguments to an "alternative argument" – it is puzzling nonetheless. To maintain that it was "unnecessary" to make any findings about the applicability of modern non-discrimination analysis seems to miss much of the point of that analysis. Substance-focused approaches to testing for discrimination evolved to overcome evident deficiencies in the traditional form-focused approach – a focus on form, it was realised, was able to mask instances of unfairness to which the law perhaps should be responsive. That is what s 117's refashioning in *Street v Queensland Bar Association*[24] was intended to achieve. To regard the organisation of the parties' arguments in the *Mining Tax Case* as somehow precluding consideration of this point – whether the s 51(ii) proviso should be modernised along similar lines to s 99 – raises more questions than it answers.

French CJ is, unfortunately, alone in his meaningful engagement with whether the s 51(ii) proviso – irrespective of its history – warrants "modernisation". He certainly saw no procedural reason to sidestep that fundamental question; nor did he share the other judgments' preoccupation with earlier authorities endorsing form-focused discrimination analysis. Only French CJ seemed mindful of the fact that those cases – the likes of *Colonial Sugar Refining Co Ltd v Irving*,[25] *R v Barger*[26] and *Cameron v Deputy Federal Commissioner of Taxation*[27] – were decided well before the wider corpus of law began to take substantive discrimination seriously and that this might limit their relevance today.

The *Mining Tax Case*, then, is anomalous among constitutional discrimination cases decided over the last quarter century. For a High Court majority to say, in effect, "this law applies a uniform rule to all States, therefore we do not need to scrutinise it with a substance-focused test" seems, without more, inadequate – given the trajectory of constitutional non-discrimination jurisprudence in recent decades. A reasoned objection to modernising the s 51(ii) proviso would have been easy enough to construct – the dissents in *Permanent Trustee* represent two persuasive variations on such a position. The extension of modern substance-focused non-discrimination jurisprudence to a new context could be resisted by reference to constitutional policy – including modern and historical perspectives on

[21] See generally Simpson, n 16.

[22] *Permanent Trustee* (2004) 220 CLR 388 at 447-448 (McHugh J), 462-465 (Kirby J).

[23] *Mining Tax Case* [2013] HCA 34 at [83]-[98] (Hayne, Bell and Keane JJ), [200]-[226] (Kiefel J), discussing, in particular: *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360; *R v Barger* (1908) 6 CLR 41; *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68; *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735; *WR Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* [1940] AC 838; *Conroy v Carter* (1968) 118 CLR 90.

[24] *Street v Queensland Bar Association* (1989) 168 CLR 461.

[25] *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360.

[26] *R v Barger* (1908) 6 CLR 41.

[27] *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68.

federalism – or considerations of judicial policy, such as the appropriate scope of discretion and deference.[28] Alas, with the exception of French CJ's judgment, none of that explication is present in the *Mining Tax Case*.

Section 99

The plaintiff's written submissions claimed that the Mining Tax "gave preference" to some States over others, contrary to s 99. None of the judgments accepted this argument. For French CJ this conclusion flowed seamlessly from his analysis applying the s 51(ii) proviso.[29]

The other judgments are less straightforward in their treatment of s 99, all ducking an important issue of principle that underlay their stated conclusions. Ostensibly, the reason for the scant separate treatment of the s 99 question was the plaintiff's "acceptance", during argument, that if there was no finding of s 51(ii) discrimination then nor could there be a finding of "preference" for the purposes of s 99.[30] Kiefel J went further and stated that the s 99 question was "essentially the same as that arising under s 51(ii)".[31]

Important to understanding the implications of this concession is the view taken, in the judgments, to the status of *Permanent Trustee*. In short, all judgments that considered the s 99 question gave that decision unquestioning acceptance. For French CJ, endorsing *Permanent Trustee* was entirely congruent with his approach to the s 51(ii) proviso. However, the plurality have a harder time reconciling their support for the *Permanent Trustee* test with their reluctance to extend that approach to the s 51(ii) proviso. They at least perceived the potential incongruity and set about explaining why, in their view, a modern, substance-based test of discrimination was acceptable for s 99 but unsuitable in the context of the s 51(ii) proviso.

The semantic distinction the plurality offers in explanation is unconvincing. Specifically, they observe that s 51(ii) is directed to laws that "discriminate between" States or parts of States. This fact, they claim, distinguishes the s 51(ii) proviso from most other modern non-discrimination rules, which are typically directed to the vice of "discrimination against".[32] This idea of discrimination "between" States allows, they insist, no flexibility as to choice of comparator. Rather, the comparator is pre-set: States (or parts of States) are compared with other States (or parts).[33] Locking that comparator in place, the plurality suggests, makes it futile to ask all the other questions that modern non-discrimination tests ask, about reasonableness, proportionality and so on. In short, they insist that the proviso's own terms fuse it at the level of a form-based test, effectively blocking the introduction of further elements typically associated with modern, substance-focused tests of discrimination.

The idea that "discrimination between" must mean something different from "discrimination against" is far from self-evident; it is certainly not, alone, a solid basis for departing from a consistent line of reasoning in related contexts over 25 years.

And the implications for the plaintiff's case? Its apparent concession regarding the s 99 argument was either a significant strategic error or, perhaps, a tragedy of miscommunication. Either way, the preference for different understandings of discrimination in the contexts of ss 51(ii) and 99 must have come out of left field for the plaintiff. It would make little sense to concede the s 99 point if the plaintiff saw any chance that the test of discrimination to be applied there was significantly different from the test that would be applied in relation to the s 51(ii) proviso.

[28] See, for example, Zines L and Lindell G, "Form and Substance: 'Discrimination' in Modern Constitutional Law" (1992) 21 *Federal Law Review* 136; Simpson, n 16 at 280-281, 294.

[29] *Mining Tax Case* [2013] HCA 34 at [46], [50].

[30] *Mining Tax Case* [2013] HCA 34 at [123] (Hayne, Bell and Keane JJ), [176] (Crennan J).

[31] *Mining Tax Case* [2013] HCA 34 at [183].

[32] *Mining Tax Case* [2013] HCA 34 at [104], [110]-[111].

[33] *Mining Tax Case* [2013] HCA 34 at [113].

State immunity

The plaintiff and Western Australia both sought to invoke the *Melbourne Corporation* principle.[34] They argued that the Mining Tax's "equalising" effect interfered with States' ability to use mining royalties as an economic lever – to attract investment or incentivise particular activity.[35]

The plurality, with others agreeing, gave this argument short shrift.[36] In applying the *Melbourne Corporation* test, they considered that the "impaired economic lever" claim, even if it was an accurate assessment of the impact of the Mining Tax on State economic management, still did not qualify as a "limit or burden on any State in the exercise of its constitutional functions".[37] While the Mining Tax formula clearly had the potential to cause frustration for some States, it clearly did not threaten States' separate constitutional functioning.

FUTURE DIRECTIONS

When the court next considers the s 51(ii) proviso and s 99, it will have (at least) three options, in choosing a way forward:

(1) give both provisions a "broad" interpretation (consistently with French CJ's view in the *Mining Tax Case*);
(2) give both a narrow interpretation (as proposed in the dissents in *Permanent Trustee*); or
(3) give the sections different interpretations (as preferred by the plurality in the *Mining Tax Case*).

Option 1

Using a modernised, substance-focused discrimination test for both ss 51(ii) and 99 might have these advantages:

(a) consistency with discrimination principles and tests used elsewhere in the Constitution, as well as in statutory and international law; and

(b) facilitating judicial oversight of Commonwealth fiscal policy (as deeper judicial engagement with legislative policy is invited, if not demanded, by substance-focused non-discrimination tests).

That policy review role – if embraced as a necessary concomitant of a broad test – could be extensive:

- A Commonwealth law which on its face gave uniform treatment to the States (for example, the Mining Tax), could nevertheless be found to infringe the s 51(ii) proviso or s 99 if a court considered that it was *in substance* unfair to one or more States (for instance, because it failed to respond appropriately to some relevant difference among the States as regards the subject matter of a tax – climate, resources, demographics etc).
- Equally, a Commonwealth law treating States *differently*, on its face, could nonetheless be upheld as valid if a court thought that different treatment was appropriate and adapted to a legitimate policy objective (for example, tax breaks for remote areas to stimulate economic development).

Option 2

Reverting to the position before *Permanent Trustee*, with ss 51(ii) and 99 both receiving a narrow, form-focused interpretation, could have these advantages:

(a) constraining judicial discretion to second-guess policy (which may appeal if, for instance, there was concern about endless challenges to the "reasonableness" of taxes);

---

[34] Originating in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 and refined more recently in *Austin v Commonwealth* (2003) 215 CLR 185, *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 and *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

[35] *Mining Tax Case* [2013] HCA 34 at [126], [132].

[36] *Mining Tax Case* [2013] HCA 34 at [6] (French CJ), [145] (Crennan J), [229] (Kiefel J).

[37] *Mining Tax Case* [2013] HCA 34 at [137].

(b) remaining faithful to the original constitutional values that inspired these provisions (that is, absolute uniformity of treatment as between States);[38] and
(c) effectively neutering these limitations on Commonwealth power and allowing the Commonwealth to get on with managing the economy with minimal constitutional impediment.[39]

The most significant obstacle to this second approach is the need to overrule, or otherwise undermine, *Permanent Trustee*.

Option 3

Retaining a narrow, form-based test for the s 51(ii) proviso, while at the same time retaining *Permanent Trustee's* modernised test for s 99, has only one possible advantage. That approach could be seen as "better than nothing" by judges who are uncomfortable with modern, substance-focused discrimination tests in federal fiscal contexts but, at the same time, reluctant to reject past High Court rulings.

Conclusion

One can readily imagine why judges might baulk at expanding further the reach of the modern conception of discrimination in constitutional settings. The attendant tests take judges out of their comfort zone and propel them into close engagement with economic and social policy.

However, even while some judges may lack an appetite for that kind of engagement, it should never be assumed that they lack capability. Rather, the High Court has shown that it can do this well: *Castlemaine Tooheys Ltd v South Australia* affords a good example in a comparable context.[40]

The dissents in *Permanent Trustee* remain important, for laying out with clarity and honesty the judicial policy choices that these federal fiscal discrimination rules present. The next case needs to engage with that material directly – no matter which path is followed – if we are to avoid ongoing uncertainty.

Dr Amelia Simpson
ANU College of Law
This comment is an edited version of a paper presented at the Gilbert + Tobin Centre for Public Law Constitutional Law Conference 2014, 14 February 2014, Sydney.

[38] See, for example, Quick J and Garran R, *The Annotated Constitution of the Australian Commonwealth* (1901) p 550; Moore H, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) p 516.

[39] This idea is explored fully in Zines and Lindell, n 28.

[40] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.