THE VOICE REFERENDUM AND THE FEDERAL DIVISION OF POWERS:

A NEW HEAD OF COMMONWEALTH LEGISLATIVE POWER TO IMPLEMENT THE VOICE’S REPRESENTATIONS?

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INTRODUCTION

In discussion about the upcoming Indigenous Voice referendum there has been little analysis or comment on the potential impact of the proposed constitutional amendment on the division of powers between the Commonwealth and the States. Neither of the official ‘Yes’ or ‘No’ cases make any reference to this issue.³ Instead, much of the focus has been on the extent to which the Commonwealth Parliament will be able to regulate the functioning of the Voice under the proposed s 129(iii) and the related question concerning the limits that the mandatory provisions of s 129(i) and (ii) might place upon the Commonwealth Parliament’s power to regulate the Voice. For example, the Explanatory Memorandum (EM) to the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 states that the Parliament would be able to determine ‘how the Voice will operate’ and the ‘standard procedures to be followed for interactions between the Voice and the Executive Government or the Parliament’.⁴ Similarly, the EM states that s 129 would not ‘oblige’ the Parliament ‘to follow a representation of the Voice’.⁵ However, the EM is silent, at least expressly, on the logically anterior question — does s 129(iii) confer any power on the Commonwealth Parliament to implement representations of the Voice, or would the Parliament always have to rely on its existing legislative powers to do so? Put differently, if the Voice were to make a representation to the Parliament that it should enact a law on a particular matter ‘relating to Aboriginal and Torres Strait Islander peoples’, but such a law cannot be supported by the Parliament’s existing legislative powers under ss 51 and 52 of the Constitution, would the

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³ See Australian Government, Your official referendum booklet - Your official Yes | No pamphlet.
⁴ EM, p 13 [27].
⁵ EM, p 11 [15].
Parliament be able to do so using the legislative power conferred by s 129(iii), or could any such law be enacted only by the States or through a specific reference of power by the States to the Commonwealth under s 51(xxxvii)? Beyond this, several related questions arise. Given that the power in s 129(iii) is ‘subject to this Constitution’, what limitations apply to the power? For example, noting that the legislative powers indicated in ss 51 and 52 are ‘for the peace, order and good government of the Commonwealth’, whereas these words are not included in the proposed s 129(iii), are there any implications for the application of the intergovernmental immunity doctrine when the Commonwealth exercises its legislative powers under s 129(iii)?

This paper focuses on these interrelated questions. Their significance is evident when it is appreciated that the Voice’s right to make representations on matters ‘relating to Aboriginal and Torres Strait Islander peoples’ under the proposed s 129(ii) is not, in its terms, limited to subject matter falling within ss 51 or 52 of the Constitution. The Commonwealth has power to make laws with respect to ‘[t]he people of any race for whom it is deemed necessary to make special laws’ under s 51(xxvi), but this is not the same as a power to make laws with respect to ‘matters relating to the Aboriginal and Torres Strait Islander Voice’ under the proposed s 129(iii). Would this latter provision, if inserted into the Constitution, confer power to make laws implementing a representation made by the Voice, particularly if the representation was that the Parliament enact a law of a particular description or to achieve a certain purpose in a specific way?

In approaching these questions, this paper adopts the same approach that the first author has taken in previous work on the Voice referendum.⁶ That is, we attempt to identify and address several of the constitutional issues we believe arise in relation to these questions and the possible lines of argument that may be available, but without expressing a concluded view on some of the issues where we do not see a clear or decisive answer.

Part I of this paper considers the scope of the Voice’s representation function under the proposed s 129(ii) as a necessary reference point for the consideration of the questions identified above. Part II then seeks to explore these questions by developing and analysing the potential arguments concerning the scope, nature and limits of the power under s 129(iii). We find that it is reasonably

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⁶ See Nicholas Aroney, ‘First Peoples and the People of the Australian Commonwealth’, Queensland Supreme Court and District Court Judges Conference, 14 August 2023; Nicholas Aroney and Peter Gerangelos, Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum (Submission 92).
arguable that s 129(iii) would confer a new power on the Commonwealth Parliament to enact legislation implementing representations of the Voice made in accordance with s 129(ii), irrespective of whether the legislation would otherwise fall within one of the Commonwealth’s existing heads of power under ss 51 and 52. This part also discusses the operation of the implied intergovernmental immunity doctrine in relation to laws enacted by the Commonwealth under the proposed s 129(iii). Whether, and if so to what extent, this new legislative power would involve an expansion of Commonwealth legislative power vis-a-vis the States must be assessed against the existing scope of the Commonwealth’s powers. Part III of this paper compares and contrasts the scope of a prospective legislative power to implement representations as against the most relevant existing head of power, the race power in s 51(xxvi) of the Constitution.

I. THE SCOPE OF THE VOICE’S REPRESENTATION FUNCTION

Subsections 129(i) and (ii) would enshrine, respectively, the existence of the Voice and its ‘core function’ of making ‘representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples’. Two aspects of s 129(ii) inform the breadth of the Voice’s representation-making function and any concomitant legislative power under s 129(iii) to implement such representations:

1. a ‘matter relating to Aboriginal and Torres Strait Islander peoples’; and
2. a ‘representation’ by the Voice ‘on’ that matter.

This part considers these aspects of s 129(ii), with a focus on the extent to which representations may be made on matters beyond the existing scope of Commonwealth legislative power.

A. ‘Matters relating to Aboriginal and Torres Strait Islander peoples’

The Voice’s power or right to make representations under s 129(ii) is tethered to the composite phrase ‘matters relating to Aboriginal and Torres Strait Islander peoples’. This phrase comprises

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7 When we refer to ‘existing’ legislative powers of the Commonwealth, we do not include new powers that may be conferred through a reference by the States or a particular State of additional legislative power to the Commonwealth under s 51(xxxvii).
8 EM, p 11 [10].
9 We use these terms generically and not in their Hohfeldian sense of a ‘power’ to make law or alter legal relations or a ‘claim-right’ which logically implies a correlative ‘duty’. In technical Hohfeldian terms, the Voice would have a ‘liberty’ to make representations.
two nouns, ‘matters’ and ‘peoples’, the latter being qualified by the adjective phrase ‘Aboriginal and Torres Strait Islander’, which are linked by the prepositional phrase ‘relating to’. Elsewhere in the Constitution the term ‘matters’ is used to designate a ‘class of subjects’ or ‘topics’ of legislative power (ss 51(xxxvi)-(xxxvii), 51(3xix), 52(ii)-(iii), 55 and 108) and topics of executive power (s 70), as well as in a more technical sense to define the jurisdiction of federal courts (ss 73-78). Noting that Voice representations will be made to either or both of the Parliament and the Executive Government, it appears that the term is being used in a broad sense corresponding to its natural and ordinary sense of ‘a thing, affair or business’. Consistent with Love v Commonwealth, the reference to ‘Aboriginal and Torres Strait Islander peoples’ would likely be interpreted on the basis of the tripartite test from Mabo v Queensland (No 2). The words ‘relating to’ require a connection or relationship between a matter and Aboriginal and Torres Strait Islander peoples. It has been observed that the words ‘relating to’ are ‘very wide’, even ‘extremely wide’; indeed, it has been said that ‘there is no expression more general or far-reaching’. However, as with similar phrases, ‘relating to’ is a ‘prepositional phrase of indefinite content’. Depending upon the context in which the phrase appears, it can encompass a considerable range in type and degree of connections or relationships. It is therefore appropriate to look to that context to give content to the phrase ‘relating to’ within s 129(ii).

Within its context in s 129, the phrase ‘relating to’ would be likely to encompass a diverse and wide range of connections or relationships between a matter and Aboriginal and Torres Strait Islander peoples. As a starting point, it is to be expected that the High Court will ‘lean to the broader interpretation’ of the phrase, absent any indication that a narrower interpretation would

11 See Macquarie Dictionary, definition of ‘matter’.
12 (2020) 270 CLR 152.
13 Aroney and Gerangelos, [18] citing Mabo v Queensland (No 2) (1992) 175 CLR 1, 70.
16 Such as ‘in respect of’ and ‘in relation to’.
17 See eg, MetLife Insurance Limited v Australian Financial Complaints Authority Limited [2022] FCAFC 173 [95].
18 MetLife Insurance Limited v Australian Financial Complaints Authority Limited [2022] FCAFC 173 [95].
‘best carry out its object and purpose’.\(^\text{19}\) For a similar phrase, ‘with respect to’, as used in s 51 of the \textit{Constitution}, a law answers the description of being ‘with respect to’ a subject matter if the connection between the law’s legal or practical operation and the subject matter is not ‘so insubstantial, tenuous or distant’ that it ought not to be regarded as such.\(^\text{20}\) A number of textual and structural aspects of the proposed constitutional amendment would arguably provide additional support for a similarly broad reading of s 129(ii). First, both the establishment of the Aboriginal and Torres Strait Islander Voice and the conferral of its representation-making function are, by the introductory words to s 129, expressed to be ‘[i]n recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia’. To similar effect, Chapter IX is titled ‘Recognition of Aboriginal and Torres Strait Islander Peoples’. While it is difficult accurately to predict the legal effects of constitutional recognition of Australia’s First Peoples, the chapeau to s 129 is likely to at least inform the interpretation of the section itself.\(^\text{21}\) Secondly, s 129 would be located within a standalone Chapter IX of the \textit{Constitution}. This would accord the Voice a structural prominence and constitutional status comparable to the Parliament, the Executive and the Judicature.\(^\text{22}\) Thirdly, the phrase appears specifically in subsection 129(ii), which identifies the Voice’s central, constitutionally enshrined function, that is, of making representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.\(^\text{23}\) The Voice would be the sole repository of that particular function under the \textit{Constitution}.\(^\text{24}\) Each of these textual and structural indications of the constitutional significance of the Voice and its core function would support a broad reading of the phrase ‘matters relating to Aboriginal and Torres Strait Islander peoples’ in s 129.

In interpreting s 129, the EM and other extrinsic materials may also be of some, albeit limited, assistance. Applying and adapting \textit{Cole v Whitfield}, extrinsic materials may be considered ‘for the purpose of identifying the contemporary meaning of the language used, the subject matter to which that language was directed and the nature and objectives of the movement ... from which [the

\(^{19}\) \textit{Jumbunna Coal Mine NL v Victorian Coal Miners’ Association} (1908) 6 CLR 309, 367-368 (O’Connor J).

\(^{20}\) \textit{Spence v Queensland} (2019) 268 CLR 355 [57].


\(^{22}\) See Aroney and Gerangelos, [5]-[8].

\(^{23}\) The Parliament may confer additional functions on the Voice under s 129(iii).

\(^{24}\) Noting, however, that the Parliament may be able to establish a similar body under s 51(xxvi).
decision to recognise Australia’s Indigenous peoples in the *Constitution* finally emerged*.25 These extrinsic materials may assist in resolving any lack of clear meaning or as support for an interpretation arrived at through consideration of the constitutional text.26 That said, these materials could not, and would not, be determinative of the meaning of the constitutional language.27 Nor is it permissible to refer to these materials to substitute any subjective intentions expressed as to the scope and effect of s 129 for the meaning of the words actually used.28 Ultimately, ‘it is the constitutional text which must always be controlling’.29 Accordingly, care must be taken with statements about the meaning and effect of s 129(ii) contained in the EM. For example, the EM contains the following statement:

The phrase ‘matters relating to Aboriginal and Torres Strait Islander peoples’ would include:

a. matters specific to Aboriginal and Torres Strait Islander peoples; and

b. matters relevant to the Australian community, including general laws or measures, but which affect Aboriginal and Torres Strait Islander peoples differently to other members of the Australian community (emphasis added).

Notably, this is not a statement as to the exhaustive meaning or application of s 129(ii). At the least, it may be said that the two types of matters here referred to would appear to fall squarely within the objective meaning of the phrase. Anticipating what we say later in this paper, the first type of matter bears a resemblance to the powers conferred on the Parliament under the existing s 51(xxvi), this being a power to make laws with respect to the people of any race for whom it is deemed necessary to make ‘special laws’. The second category, however, because it envisions ‘general laws or measures’, would not ordinarily fall within the scope of the race power.

For present purposes, what may be relevant to interpreting s 129(ii) that emerges from the EM and other extrinsic materials are the second and third matters referred to in *Cole v Whitfield*. The extrinsic materials shed light on the issues to which s 129(ii) is directed and the nature and


26 See Aroney and Gerangelos, [37].


28 *Cole v Whitfield* (1988) 165 CLR 360, 385; Aroney and Gerangelos, [37].

objectives of the movement from which the proposed constitutional amendment emerged. In addition to recognition, which is referred to in the title to Chapter IX and s 129 itself, these include the principle of self-determination (as referred to in the Uluru Statement) and the establishment of an institution to provide the views of Aboriginal and Torres Strait Islander peoples to the Parliament and to the Executive Government about ‘decisions, policies and laws that affect them’ and to ‘improve their lives’. These matters would likely provide further support for a broad and generous reading of the Voice’s power under s 129(ii), noting that the executive power of the Commonwealth does not simply ‘follow’ the contours of the Commonwealth’s legislative powers. When combined with the constitutional significance of the Voice and its representation-making function, s 129(ii) is likely to be interpreted as having a very broad scope. Seemingly, the requisite connection would be satisfied, and the Voice’s power would be enlivened, for most, if not almost all, areas or potential areas of governmental and legislative activity across all levels of government, at least if the matter, such as a particular law or measure, affects Aboriginal and Torres Strait Islander peoples differently to other members of the Australian community. As we explain in Part III (B), there is reason to think that it may even extend to matters that simply affect Indigenous peoples.

B. Representations on matters beyond the existing scope of Commonwealth power

For present purposes, it is not necessary to ascertain the precise outer limits of the matters on which the Voice may make representations. What is relevant to note is the breadth of the proposed section 129(ii) and that the section does not expressly limit the matters on which the Voice may make representations to matters or purposes within the Commonwealth’s existing powers. On the face of the subsection, the relevant question would simply be whether a representation is on a matter ‘relating to Aboriginal and Torres Strait Islander peoples’. This question draws no

30 EM, p 12 [25].
31 EM, General Outline, p 3. See also, Statement of Compatibility with Human Rights, p 8 [8], p 9 [12].
32 EM, General Outline, p 3.
34 We note here Stephen Mason’s observation that ‘matters relating to Aboriginal and Torres Strait Islander peoples’, although referring to such peoples in the plural, conceives of them as a collective whole, with the potential implication that such ‘matters’ must relate to Aboriginal and Torres Strait Islander peoples generally, and not only to any particular Aboriginal or Torres Strait Islander people individually. See Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum, Submission 239, 24 April 2023. That observation contrasts with the manner in which the High Court has interpreted and applied the race power: see, Kartinyeri v Commonwealth (1998) 195 CLR 337 [77] (Gummow and Hayne JJ).
distinction between whether the ‘matter’ is within Commonwealth legislative power or not. In principle, therefore, a ‘matter’ beyond the Commonwealth’s existing legislative powers may nevertheless still be characterised as ‘relating to Aboriginal and Torres Strait Islander peoples’. As will be argued in Part III, the laws that may be enacted pursuant to the ‘race’ power (s 51(xxvi) of the Constitution) are unlikely to extend as far as the representations that the Voice would be able to make pursuant to s 129(ii).

Does s 129(ii) *impliedly* limit the matters upon which the Voice may make representations to matters within Commonwealth legislative or executive power? That view was expressed by Stephen Mason in a submission to the Joint Select Committee for the Voice referendum.\(^{35}\) Mr Mason submitted that there was a ‘good argument’ to that effect ‘on the basis that there would be no point in having the Voice make representations on a matter outside Commonwealth power, in respect of which the Commonwealth could do nothing’.\(^{36}\) Bearing in mind the limits on the use of extrinsic materials noted above, the EM includes some equivocal passages that, on one reading, may suggest a *subjective* intention that the representations that the Voice may make are limited to ‘national’ or ‘Commonwealth’ matters.\(^{37}\) Given that the function of the Voice is to make representations to the Parliament and Executive Government of the Commonwealth, with no mention of the States,\(^{38}\) it is certainly arguable that the representations must be in respect of matters in relation to which the Commonwealth can meaningfully act. But the practical import of the argument turns on the definition of those matters about which the Commonwealth has a capacity to act in some effective way. Notably, the Commonwealth Parliament has power to make laws for the government of any territory of the Commonwealth (s 122), a power that is not otherwise limited as to subject matter but is plenary in scope.\(^{39}\) It would be a highly artificial and complex argument, lacking any clear textual basis in s 129(ii), to suggest that Voice representations to the Parliament

\(^{35}\) Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum, Submission 239, 24 April 2023, p 18.

\(^{36}\) Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum, Submission 239, 24 April 2023, p 18.

\(^{37}\) EM, Statement of Compatibility with Human Rights, p 9 [12] (‘This would allow Aboriginal and Torres Strait Islander peoples to contribute their views on the decisions, policies and laws that affect them *at a national level* through an enduring representative body’); EM, p 12 [19] (‘Subsection 129(ii) empowers the Voice to make representations, including to the Executive Government of the Commonwealth. This would include representations about any matter within the executive power of the Commonwealth’).

\(^{38}\) In relation to s 129(iii), the EM says that the Parliament’s power to make laws with respect to the Voice’s functions, would allow the Parliament to confer other functions on the Voice, such as to make representations to state or territory parliaments or governments (EM, p 13 [30]).

\(^{39}\) *Lamshed v Lake* (1958) 99 CLR 132, 153-154 (Kitto J); *Berwick Ltd v Gray* (1976) 133 CLR 603, 607 (Mason J).
might address a wider array of matters if directed to the enactment of laws within a Territory than if directed to the enactment of laws applying generally throughout the Commonwealth. Moreover, the Commonwealth has a capacity to legislate with respect to matters referred to it by a particular State or States (s 51(xxxvii)). There are no a priori limits as to the matters concerning which legislative power can be referred under this provision.\textsuperscript{40} A similar observation can be made about the power of the Commonwealth to make grants to the States ‘on such terms and conditions as the Parliament thinks fit’ (s 96).\textsuperscript{41} Furthermore, s 129(ii) uses the same words to define the subject matter of representations to both the Parliament and the Executive Government. It would be peculiar if Voice representations to the Executive Government might address a wider array of matters than representations directed to the Parliament. One of the functions of the Executive Government of the Commonwealth is to engage in inter-governmental discussions with the Executive Governments of the States and Territories, the subject matter of which discussions and negotiations often falls entirely or partially outside the legislative powers of the Commonwealth. Given the requirement that Ministers of State must hold seats in Parliament (s 64), it would be functionally debilitating to insist that the scope of Voice representations might be different depending on whether they are directed to the Parliament or Executive Government. Thus, while there might indeed be some implied requirement, or at least expectation, that representations by the Voice concern matters about which the Commonwealth can meaningfully act, the range of such matters seems effectively unlimited as to subject matter.

Quite apart from any such express or implied limits on the scope of representations under the proposed s 129(ii), the premise of Mr Mason’s argument may be open to question depending upon the proper construction of s 129(iii), which, as noted above, does not contain any reference to the legislative power being for the ‘peace, order and good government of the Commonwealth’. Much ultimately depends, therefore, on the proper construction of s 129(iii), which we discuss in Part II below.

Absent any implied limits, the apparent breadth of s 129(ii) raises the real prospect of the Voice making representations on matters in respect of which the Commonwealth Parliament does not have power based on its legislative powers prior to the referendum. Take the example of various

\textsuperscript{40} Thomas v Mowbray (2007) 233 CLR 307.

\textsuperscript{41} Victoria v Commonwealth (1926) 38 CLR 399.
aspects of the state criminal justice systems, including the age of criminal responsibility and criminal offences, procedures and sentencing laws. Those matters would appear to fall squarely within s 129(ii), noting, too, the following poignant statements in the Uluru Statement from the Heart, attached to the EM:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

On the other hand, the Commonwealth does not have any directly applicable head of legislative power with respect to the subject matter of state criminal justice systems. Of course, a head of power may support Commonwealth legislation that impacts or touches that subject matter.\(^42\) For example, if Australia was under an obligation to do so under a relevant international treaty, the external affairs power could support Commonwealth legislation decriminalising conduct that would otherwise be an offence under state law.\(^43\) However, depending upon the content or substance of a representation made by the Voice, there may not necessarily be an available head of power in ss 51, 52 or 122 to support legislation following or implementing the representation. If the constitutional amendment is passed, this gap between existing legislative power and the content of Voice representations would therefore provide a reason to interpret the legislative power conferred by s 129(iii) by reference to its remedial purpose, such that it would extend to the implementation of Voice representations on matters relating to Aboriginal and Torres Strait Islander peoples.

C. **Representations made by the Voice ‘on’ the matters referred to in s 129(ii)**

Underlying subsection 129(ii) is a conceptual distinction between: (a) the matters upon which the Voice may make representations, being ‘matters relating to Aboriginal and Torres Strait Islander peoples’; and (b) the policy content or substance of the Voice’s representations on those matters. The section does not define, and provides only very limited assistance in interpreting, the word


\(^{43}\) See eg, the *Human Rights (Sexual Conduct) Act 1994* (Cth); *Croome v Tasmania* (1997) 191 CLR 119.
‘representations’. The definitions of ‘representation’ and ‘representations’ in the Macquarie Dictionary may be of some assistance in this context. So, too, may the EM assist in identifying the contemporary meaning of ‘representations’. In this regard, the EM describes a ‘representation’ as being ‘a statement’ from the Voice to the Parliament and/or the Executive Government that would ‘communicate the Voice’s view on a matter relating to Aboriginal and Torres Strait Islander peoples’.

Save that a representation must be ‘on’ a relevant matter, subsection 129(ii) does not prescribe or place limits upon the policy content or substance of such representations. The requirement for representations to be ‘on’ a relevant matter would seemingly mean that a representation must be about or refer to such a matter. It would appear unlikely that a representation on a relevant ‘matter’ would need to be confined, in its terms, to only Aboriginal and Torres Strait Islander peoples. For example, the activities or conduct of other persons in the community may touch or concern a ‘matter relating to Aboriginal and Torres Strait Islander peoples’, such as in relation to cultural heritage matters. Seemingly, the Voice would also have the power to make a representation that a general law or measure ought to be enacted or amended in a particular way so as to seek to avoid, address or remove a differential effect on Aboriginal and Torres Strait Islander peoples. For example, noting the comment in the Uluru Statement that ‘our youth languish in detention in obscene numbers’, the Voice may make a representation, in general terms, that the age of criminal responsibility for minors ought to be increased to 14 years of age (or another age). In short, Voice representations could include recommendations that particular laws be enacted, repealed or amended in particular terms or to achieve certain goals or outcomes.

II. SCOPE & NATURE OF THE LEGISLATIVE POWER IN PROPOSED S 129(III)

If approved, s 129(iii) would confer a new head of power on the Commonwealth Parliament. Read with the chapeau, s 129(iii) provides that:

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia ...

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44 See Aroney and Gerangelos, [22]. Section 129 does not prescribe the form in which representations may be made by the Voice: [24].
45 EM, p 11 [12].
46 Aroney and Gerangelos, [24].
47 See Macquarie Dictionary, definition of ‘on’.

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the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

The language of this subsection is noticeably broader than the original draft wording proposed by Prime Minister Albanese at the Garma Festival in July 2022. That wording stopped at a legislative power with respect to the Voice’s composition, functions, powers and procedures. Those four specific matters remain in the inclusive list concluding the section, but now follow a conferral of a ‘broad power’ expressed without extrinsic limits.

Somewhat awkwardly, the power is defined as a power to make laws ‘with respect to matters relating to the ... Voice’. This sort of language extends the scope of the power beyond that which is merely ‘with respect to’ a subject matter. The Commonwealth Solicitor-General, Dr Stephen Donaghue KC, has opined that the ‘double use of wide connecting language’ would ‘textually produce a legislative power of great width’. This part of our paper considers the scope of the legislative power in s 129(iii) and whether, if approved, it would empower the Parliament to implement representations made under s 129(ii).

A. Principles applying to interpreting heads of Commonwealth legislative power

Even apart from the ‘double use’ of connecting language in the proposed s 129(iii), the High Court has affirmed that Commonwealth legislative heads of power are to be interpreted as widely as the words used can reasonably sustain, without taking into consideration the powers that are left to the States. Further, the Court has held that when characterising a Commonwealth law in order to determine whether it falls within power, the only question is whether the law can fairly be described as a law with respect to one or more of the Commonwealth’s heads of legislative power; it does not matter whether it can also be characterised as a law with respect to matters left to the States. The old ‘reserved powers’ doctrine offered a way in which the impact on the remaining powers of the States could be taken into consideration when interpreting Commonwealth powers

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48 EM, p 12 [26].
49 Aroney and Gerangelos, [41].
50 Opinion, [25].
and characterising Commonwealth laws.\(^{53}\) In the *Engineers Case*, however, the reserved powers doctrine was decisively rejected,\(^{54}\) and a new approach to the interpretation of the *Constitution* was inaugurated under which it became illegitimate to seek to maintain some kind of appropriate ‘balance’ between the powers of the Commonwealth and the States.\(^{55}\) It will be sufficient if there is a ‘connection’ between the law and the head of power, provided that the connection is not ‘so insubstantial, tenuous or distant’ that the law ‘cannot properly be described as a law with respect to [the] subject matter’.\(^{56}\) It has also been said that a law will only lack a sufficient connection if the connection is ‘tenuous, vague, fanciful or remote’.\(^{57}\)

Applying these principles to the legislative power in s 129(iii) — the subject matter of which is ‘matters relating to the Voice’, not merely the Voice itself — there will generally be a twofold process in determining whether a law falls within the head of power:

1. interpreting the phrase ‘matters relating to the Voice’ to determine the subject matter of the legislative power; and
2. characterising the law to see whether it has a sufficient connection with such a Voice-related matter such that it can properly be described as a law ‘with respect to’ that matter.

We say ‘generally’ because, as explained below, a power to enact legislation implementing representations may properly be viewed as a purposive aspect of s 129(iii) with some similarities to the purposive aspect of s 51(xxix).

**B. Solicitor-General’s opinion on laws about the legal effect of representations**

In an opinion dated 19 April 2023 (the Opinion), Dr Donaghue KC, examined the scope of the legislative power in s 129(iii). The Opinion was made public as an enclosure to a submission by


\(^{54}\) *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 485 (Barwick CJ): the *Engineers’ Case* ‘exploded and unambiguously rejected’ the State reserved powers doctrine.


the Commonwealth Attorney-General to the Joint Select Committee. The Opinion is relevant in considering the scope of proposed s 129(iii) for at least two reasons. First, it contains the views of the Commonwealth’s second law officer on this topic and provides an insight into the arguments that the Commonwealth may possibly raise before the High Court in any future litigation concerning s 129. Secondly, and most significantly, the Opinion likely forms part of the extrinsic materials that may be relevant to interpreting the section. For example, in *Wong v Commonwealth*, the High Court referred to an advice co-authored by the then Solicitor-General preceding the 1946 Social Services referendum as part of a suite of extrinsic materials relevant to interpreting s 51(xxiiiA). ⁵⁸

In the Opinion, the Solicitor-General addressed two questions regarding the proposed constitutional amendment, the second of which was:

> Would the power to legislate ‘with respect to matters relating to the Aboriginal and Torres Strait Islander Voice’ in proposed s 129(iii) of the Constitution empower the Parliament to specify whether, and if so, how, Executive Government decision-makers are legally required to consider relevant representations of the Voice?

The short answer to this question was an unequivocal ‘yes’. For ease of reference, we will refer to the type of legislation referred to in this question as a ‘Hypothetical Representations Act’. In answering this second question, the Opinion addressed two sub-questions: (a) would a Hypothetical Representations Act answer the description of a law ‘with respect to matters relating to the … Voice’? and (b) if so, would a Hypothetical Representations Act infringe an express or implied constitutional limitation, including any limitation arising from s 129(ii)? ⁵⁹

It is the Solicitor-General’s opinion on and analysis of the first sub-question, the characterisation of a Hypothetical Representations Act, that are most relevant for this paper. The Solicitor-General’s opinion on this sub-question was clear and unequivocal — a law ‘specifying whether Executive Government decision-makers are legally required to consider relevant representations of the Voice’ would answer the description of a law ‘with respect to matters relating to the …

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⁵⁹ Opinion, [22].
Voice'.60 This opinion was expressed in firm and unqualified terms, with the Solicitor-General saying that he had ‘no doubt’ that a law of this kind would properly be characterised as falling within s 129(iii) and that he could not identify any reasonable argument to the contrary.61 To similar effect, in addressing the second sub-question noted above, the Solicitor-General stated that the proposed s 129(iii) ‘necessarily includes (although it extends beyond) the power to legislate with respect to the legal effect of the Voice’s representations’.62 This was because such a law ‘must — by definition — “relate to” the Voice’.63 To adopt a metaphorical classification, this all suggests that for the Solicitor-General a Hypothetical Representations Act would be at the core, not in the penumbra, of the power conferred by the proposed s 129(iii).

More broadly, he commented that s 129(iii) would empower the Commonwealth Parliament to enact a law that has ‘more than an insubstantial, tenuous or distant connection either to the Voice itself or to any subject relating to the Voice’.64 With good reason the Solicitor-General distinguished here between laws with respect to the Voice itself (as an institution) and laws with respect to ‘matters relating to the Voice’. While the proposed s 129(iii) uses the latter phrasing, it plainly includes laws dealing with the Voice itself. A similar distinction is suggested by the explicit conferral of power with respect to the ‘composition’ of the Voice and its ‘functions, powers and procedures’. But the point is that the legislative power is not only to make laws with respect to the Voice, but also with respect to the wider conception of ‘matters relating to the Voice’. In the Solicitor-General’s view, this wider conception in s 129(iii) would encompass laws specifying ‘the rights and obligations of those who receive representations from the Voice’65 or ‘the legal effect of representations made by the Voice’.66 Similarly, and as noted in the Opinion as confirmatory support, the EM relevantly states that s 129(iii) would permit the Parliament to legislate ‘about the Voice’s representations’.67

60 Opinion, [27]
61 Opinion, [28].
63 Opinion, [35].
64 Opinion, [25] (emphasis in original).
65 Opinion, [27].
66 Opinion, [35]. See also [28], [36].
67 EM, p 13 [28]; Opinion, [36].
C. Proposed section 129(iii) and laws implementing representations by the Voice

The Solicitor-General’s Opinion brings into sharp focus the prospective breadth of the legislative power in s 129(iii) in its final form and raises the question of how far that power might extend. As Mr Donaghue (as the Solicitor-General then was) had noted years previously:

Open textured words have a core of determinate meaning, encompassing fact situations to which they clearly apply, and a penumbra of meaning, encompassing fact situations to which the terms neither clearly do or do not apply. The meaning of a word is indeterminate whenever there are reasons both for and against applying the word.68

In examining questions of characterisation, these types of metaphorical concepts are ‘not inappropriate, although not always helpful’.69 Accepting that s 129(iii) would likely apply to a Hypothetical Representations Act, what other legislation might then be supported by a head of power to make laws ‘with respect to matters relating to … the Voice’?

While the Solicitor-General was focussing on a hypothetical law of a more procedural or operational kind, there seems to be no reason in principle why a ‘matter’ or ‘subject’ ‘relating to the Voice’ might not include the policy content or recommendation contained in representations made by the Voice to the Parliament. It is to be expected that the High Court would give the same, broad meaning to the word ‘matters’ in both ss 129(ii) and (iii).70 The ‘double use of wide connecting language’ means that it is not fatal if the connection between the subject matter of the law and the subject matter of the law-making power involves an intermediate or inter-connecting link.71 It is sufficient if the law is ‘with respect to’ a matter ‘relating to’ the Voice. A representation made by the Voice is surely such a matter, not least because the core constitutional function of the Voice is to make representations. Indeed, it could be argued that the substantive or policy content of a Voice representation might itself be regarded as a matter relating to the Voice, particularly

70 Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450, 452.
71 In Re Dingjan; Ex Parte Wagner (1995) 183 CLR 323, Brennan J noted (at 339) the significant difference between a power to make laws ‘with respect to things relating to’ a subject matter, and laws ‘with respect to’ that subject matter. It was held by majority that legislation empowering the Australian Industrial Relations Commission to exercise certain of its regulatory powers ‘in relation to a contract relating to the business of a constitutional corporation’ could not be characterised as a law ‘with respect to … trading corporations’.
where the representation is made to the Parliament, and especially if that representation calls for enactment (as well as repeal or amendment) of a particular law. But even if this were not the case, all that is needed under the proposed s 129(iii) is that a law enacted by the Parliament is with respect to a matter relating to the Voice. As noted earlier, a law will answer to the description of being ‘with respect to’ a subject matter if the connection between the law’s legal or practical operation and the subject matter is not ‘so insubstantial, tenuous or distant’ that it ought not to be regarded as such. It seems clear that a law implementing the policy content or recommendation of a Voice representation would have a connection to that representation that is neither insubstantial, distant, tenuous, vague, fanciful nor remote. Indeed, it could be argued that such a law has a very close connection to that subject matter, for surely the central purpose of the right of the Voice to make representations to the Parliament is to enable the Voice to advocate for the enactment of certain laws.

Such an interpretation of s 129(iii) would draw support from the chapeau to s 129, which recognises Aboriginal and Torres Strait Islander peoples as ‘the First Peoples of Australia’. As noted above, that recognition is an indication of the constitutional significance of the Voice and its representation-making function. Importantly, the chapeau prefaces all three subsections of section 129. Accordingly, constitutional recognition is a common thread that is woven through and connects the establishment of the Voice, the conferral of its representation-making function and the power conferred upon the Parliament to make laws ‘with respect to matters relating to the … Voice’, which would arguably inform the interpretation of the section itself. Add to this the remedial purposes of the proposed constitutional amendment: it is arguable that the Voice’s function would be stultified if the Commonwealth Parliament lacked the legislative power to implement its representations. Put differently, if the Voice were to make a recommendation that a particular law should be enacted that falls outside the Parliament’s existing legislative competence, it would follow that s 129(iii) works to fill any lacunae in legislative power that would otherwise

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72 Repeal of a law or of a particular section or sections in a law raises a unique question. It is arguable that, in ordinary situations, if the Parliament has power to enact a law it also has power to repeal it. See Allpike v Commonwealth (1948) 77 CLR 62, 69 (Latham CJ); Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297, 325 (McHugh J); Health Insurance Commission v Peverill (1994) 179 CLR 226, 256 (Toohy J), 262 (McHugh J); Commonwealth v WMC Resources Ltd (1998) 194 CLR 1, 53-55 (McHugh J).

73 Spence v Queensland (2019) 268 CLR 355 [57].

Electronic copy available at: https://ssrn.com/abstract=4589764
exist.

In this way, a power to implement representations under s 129(iii) would bear some analogy to the purposive aspect of the external affairs power (s 51(xix)), particularly in relation to the implementation of international treaties. Like the power of the Voice to make representations, there is no a priori limit as to the subject matter or content of the international treaties to which Australia may become a party in the exercise of the power of the Executive Government to enter treaties.74 Contrary to the view that the Commonwealth’s power to make laws implementing international treaties is limited to matters or topics that are themselves of ‘international character’ or of ‘international concern’,75 the High Court has affirmed that the legislative power under the external affairs power extends to the implementation of treaty obligations on any topic.76 Moreover, the Court has affirmed that the power to legislate with respect to external affairs is not confined to the implementation of treaty obligations, but extends to the carrying out of recommendations, requests and draft international conventions resolved upon by international organisations.77 In coming to these conclusions, members of the High Court have drawn attention to the practical consequences of the policy fragmentation that would result if limits placed upon the Commonwealth’s legislative power meant that the States must cooperate in the implementation of international treaties.78 Australia would be ‘an international cripple’, Justice Murphy said, if the Parliament’s power to implement treaties was limited.79 The proposition that the external affairs power extends to the implementation of international recommendations and requests bears a strong analogy to the proposition that the power to make laws with respect to matters relating to the Voice would include legislative power to implement Voice representations.

74 R v Burgess; Ex parte Henry (1936) 55 CLR 608, 641 (Latham CJ: ‘the possible subjects of international agreement are infinitely various’), 681 (Evatt and McTiernan JJ); Victoria v Commonwealth (1996) 187 CLR 416, 477-480 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
75 R v Burgess; Ex parte Henry (1936) 55 CLR 608, 658 (Starke J), 669 (Dixon J); Airlines of New South Wales Pty Ltd v New South Wales (No 2) (1965) 113 CLR 54, 85 (Barwick CJ); New South Wales v Commonwealth (1975) 135 CLR 337, 390 (Gibbs J).
77 R v Burgess; Ex parte Henry (1936) 55 CLR 608, 687 (Evatt and McTiernan JJ); Victoria v Commonwealth (1996) 187 CLR 416, 483, 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
Just as the treaty aspect of the external affairs power does not include power to legislate simply with respect to the abstract subject matter with which an international treaty deals, it is not being argued that s 129(iii) could be interpreted to confer power to make laws simply with respect to ‘matters relating to Aboriginal and Torres Strait Islander peoples’ or with respect to the abstract subject matter that a Voice representation might happen to address. Rather, it is being proposed that the legislative power would extend to the implementation of the Voice representation, analogously to the power to make laws implementing the obligations contained in an international treaty to which Australia is a party or recommendations determined by an international organisation of which Australia is a member.

As in the external affairs cases, it might be countered that the proposed constitutional amendment should not be interpreted so as to readjust the constitutional distribution of powers between the Commonwealth and the States beyond that which is strictly required by the terms in which the new legislative power is conferred. Certainly, any alteration to the federal division of powers has not (so far) been a focus of the referendum debate or extrinsic materials, including the two official ‘yes’ and ‘no’ cases. Those materials and the legislative history suggest that the broadened language inserted following the Garma draft by inclusion of the phrase ‘matters relating to the … Voice’ was instead principally directed towards, although not necessarily limited to, conferring legislative power to enact the types of laws considered in the Opinion. The power to legislate conferred by s 129(iii) could be interpreted narrowly, having regard to the nature of the powers expressly included, namely power to make laws with respect to the ‘composition, functions, powers and procedures’ of the Voice. There is a sense, indeed, that these words, despite their varied scope, do not refer specifically to representations made by the Voice, and particularly not to the content of those representations. However, this is not a case of *ejusdem generis*, because the general terms of the grant of power appear *before* and not after the list of specific powers, and these are enumerated in expressly inclusive, not exclusive, terms.

Furthermore, as noted, the legislative power in the proposed s 129(iii) is *not* conferred ‘for the

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80 EM, p 13 [28] (‘The legislative power under s 129(iii) would also allow the Parliament to make laws about the Voice’s representations, including specifying whether or not, and if so in which circumstances, an Executive Government decision-maker has a legal obligation to consider the Voice’s representations’); Opinion, [35].

81 EM, p 13 [28]; Opinion, [35].

82 See *Dean v Attorney-General (Qld)* [1971] Qd R 391.
peace, order, and good government of the Commonwealth’, as is the case with ss 51 and 52. While these words are ordinarily apt to confer plenary powers of legislation,\(^8^3\) they are not essential to convey a power that, apart from their restriction as to subject matter or territorial limits, is plenary in nature.\(^8^4\) However, they _are_ apt to direct the orientation of the legislative power to laws that relate to the particular political community designated, whether this be the Commonwealth (or a particular State). The absence of such words in s 129, when they do appear in ss 51 and 52, militates against any argument that the constitutional amendment should not be interpreted to have readjusted the constitutional distribution of powers between the Commonwealth and the States. Moreover, in any case, ultimate power is vested in the Australian people, organised in their respective States and Territories and through the referendum procedure (in s 128), to approve amendments to the _Constitution_ as they consider appropriate, even if this entails an expansion of the powers of the Commonwealth and a diminution of the powers of the States, noting that a valid Commonwealth law will prevail over an inconsistent State law (s 109).

What other arguments or reasons may be advanced against interpreting s 129(iii) as conferring a power to implement representations made by the Voice? One potential argument would be that the phrase ‘with respect to matters relating to the … Voice’ ought to be interpreted narrowly, with the subsection being directed to regulating the Voice as a body, rather than the substance of matters dealt with by the Voice in representations. Such an argument could attempt to build on the High Court’s interpretation of s 52(ii), which uses the same ‘double-connecting’ words found in the proposed s 129(iii), but has been interpreted as having a ‘confined’\(^8^5\) ambit. Under s 52(ii), the Commonwealth Parliament has exclusive power to legislate ‘with respect to matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth’, being the departments referred to in s 69 of the _Constitution_.\(^8^6\) In the leading exposition of the section, Latham CJ in _Carter v Egg & Egg Pulp_

\(^8^3\) _R v Burah_ (1878) 3 App Cas 889, 904 (India); 22 _Hodge v The Queen_ (1883) 9 App Cas 117, 132 (Ontario); _Powell v Apollo Candle Co_ (1885) 10 App Cas 282, 290 (New South Wales); _R v Sharkey_ (1949) 79 CLR 121, 152; _Building Construction Employees and Builders Labourers’ Federation (NSW) v Minister for Industrial Relations_ (1986) 17 NSWR 372, 383-7, but see 404-6; _Union Steamship Co of Australia Pty Ltd v King_ (1988) 166 CLR 1, 9-10.

\(^8^4\) See _Constitution Act 1975_ (Vic); _Mobil Oil Australia Pty Ltd v Victoria_ (2002) 211 CLR 1.

\(^8^5\) See _Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority_ (1997) 190 CLR 410, 434-437 (Dawson, Toohey and Gaudron JJ), 488 (Kirby J).

\(^8^6\) See _Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority_ (1997) 190 CLR 410, 434-436 (Dawson, Toohey and Gaudron JJ).
Marketing Board held that s 52(ii) ‘relates to the control of matters relating to transferred departments’, not the substantive or subject matters with which such departments deal. His Honour regarded the section as ‘directed to establishing Commonwealth control of certain State servants and State property’. A majority of the High Court in Re Residential Tenancies Tribunal (NSW) v Henderson; ex parte Defence Housing Authority approved Latham CJ’s interpretation of s 52(ii). There his Honour said that s 52(ii) is ‘directed to establishing Commonwealth control of certain State servants and State property’. Might Carter and Henderson support an argument that the phrase ‘matters relating to’ in s 129(iii) is confined to ‘administrative’ or procedural ‘matters’ relating to the Voice?

Several important contextual differences indicate that the s 52(ii) case law would be of limited assistance in determining whether s 129(iii) would support legislation implementing the content or substance of the Voice’s representations. While containing the same phrasing, the two sections otherwise bear little resemblance. Section 129(iii) is centrally concerned with the establishment of the Voice and its right to make representations to the Parliament and Executive Government, whereas s 52(ii) was concerned with ‘ensur[ing] that State laws did not follow the persons or property of a department of the State public service into the Commonwealth public service’. Further, the Voice, unlike the specific departments that were the subject of s 52(ii), would be constitutionally enshrined in its own Chapter IX of the Constitution and thus accorded a constitutional status comparable to the three arms of government established in Chapters I, II and III of the Constitution. The interpretation of s 52(ii) in Carter was also shaped by textual and structural considerations that have no direct or analogous application to s 129(iii). Specifically, Latham CJ noted that if s 52(ii) conferred exclusive power ‘over the subject matters with which [the transferred] departments deal’, then several heads of power in s 51 would have been ‘quite

87 Carter v Egg & Egg Pulp Marketing Board (1942) 66 CLR 557, 571. See also, R v Brislan; ex parte Williams (1935) 54 CLR 262, 274-275.
89 Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority (1997) 190 CLR 410, 443 (Dawson, Toohey and Gaudron JJ) (with whom Brennan CJ agreed).
91 Similarly to Latham CJ, in Carter, Starke J said that section 52(ii) ‘relates to administrative control’ of the relevant departments and does not extend to any matter ‘which is dealt with’ by those departments (at 583).
92 Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority (1997) 190 CLR 410, 436-438 (Dawson, Toohey and Gaudron JJ).
unnecessary*. However, the textual and structural considerations that support this observation do not apply to s 129(iii) because the latter, if inserted into the Constitution, will be interpreted as an amendment intended to achieve the remedial purposes indicated by the chapeau and s 129 as a whole, including through the conferral upon the Parliament of wide powers to legislate with respect to matters relating to the Voice.94

The strongest argument against interpreting s 129(iii) as conferring a power to implement representations made by the Voice we can identify is based on the proposition that it should be interpreted by reference to the prevailing understanding of the nature and intent of the proposed amendment. It is arguable that there is at this present time a general understanding or assumption that the Parliament is to be given the power under s 129(iii) as a means of ensuring ultimate democratic control over the powers and functioning of the Voice, and not as a means of enlarging the legislative powers of the Commonwealth vis-a-vis the States. However, a not entirely dissimilar assumption or understanding concerning the conferral of strictly limited legislative powers on the Commonwealth Parliament was generally shared by the generation of Australians preceding federation in the 1890s and was put into operation in the High Court’s interpretation of the Constitution during the first two decades of the twentieth century.95 But when a new generation of judges were appointed, they formed a majority with the two surviving judges who had taken a wider view of the Commonwealth’s powers, overturning the early jurisprudence in favour of an interpretive method that has enabled the Commonwealth’s powers to wax ever larger over time.96

Notwithstanding this tendency, there would be a strong argument that s 129 should be interpreted in a limited manner having regard to prevailing understandings as to the intent of the amendment.97 However, the history of the High Court’s interpretation of the Constitution, and especially its resistance to incorporating the concept of ‘federal balance’ into its interpretive method,98 militates

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93 (1942) 66 CLR 557, 571. See also, R v Brislan; ex parte Williams (1935) 54 CLR 262, 275.
94 In this connection, we should also make clear that we are not arguing that the legislative power conferred by s 129(iii) are necessarily exclusive to the Commonwealth.
98 New South Wales v Commonwealth (Work Choices Case) (2006) 229 CLR 1, 73 [54], 103 [141], 104 [145], 116 [183], 118 [189], 120-121 [195]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
against this argument, especially over the long run.

D. **Limitations on the legislative power in proposed s 129(iii) of the Constitution**

The legislative power in s 129(iii) is expressed to be ‘subject to this Constitution’, so would not confer power to enact legislation inconsistent with any express or implied limitations on the Commonwealth’s legislative power. We again focus on Commonwealth laws implementing representations that cannot be supported by the Parliament’s existing legislative powers under sss 51 and 52 of the Constitution. If s 129(iii) extends that far, it is difficult to conceive of such a law infringing an express or implied limitation simply by reason of the Commonwealth implementing a representation made by the Voice. Plainly enough, no express or implied limitations arising from either s 129(i) or s 129(ii) would jeopardise legislation implementing representations made by the Voice under s 129(ii), assuming that the representation did not seek to fetter or limit the Voice’s representation-making function. In light of same ‘general express limitation’ appearing in s 51 and the High Court’s jurisprudence since the *Engineers* case, it also seems unlikely that there would be any limits on the new head of power in s 129(iii) based on a notion of ‘federal balance’. Depending upon the form, content and substance of a representation, legislation purporting to implement the representation could well be rendered invalid for infringing a recognised express or implied limitation, such as the implied freedom of political communication or the *Melbourne Corporation* principle. In this respect, though, it should not necessarily be assumed that the existing implied constitutional limitations would be applied without modification to legislation enacted under s 129(iii). As the High Court unanimously observed in *Gerner v Victoria*, ‘it is now well settled that what the Constitution implies depends on “what ... the terms and structure of the Constitution prohibit, authorise or require”’. If s 129 is inserted within a new Chapter IX, the Constitution’s terms and structure would obviously differ from the terms and structure the High Court was considering when it recognised the existing implied constitutional limitations. Accordingly, in considering whether legislation enacted under s 129(iii) may infringe an implied


100 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 73 [54], 103 [141], 104 [145], 116 [183], 118 [189], 120-121 [195]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

constitutional limitation, a preliminary question may arise as to whether the limitation itself ought to be considered afresh in light of the insertion of s 129, particularly subsections (i) and (ii).

Here it is worth considering whether the absence of the words ‘for the peace, order and good government of the Commonwealth’ might suggest that the power conferred by s 129(iii) could have a more far-reaching effect on the States than a law enacted under s 51. It is a settled principle that Commonwealth laws cannot ‘significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions’.102 The principle rests on the ‘constitutional conception of the Commonwealth and States as constituent entities of the federal structure’.103 In the earliest cases developing the principle it was often observed that one of the features of the Constitution that gives rise to this conception is the conferral of legislative powers on the Commonwealth Parliament specifically ‘for the peace, order and good government of the Commonwealth’, with the State Constitutions conferring legislative powers on the respective State Parliaments specifically ‘for the peace, order (or welfare) and good government of [each State]’.104 In the seminal Melbourne Corporation case, for example, Williams J, having observed that legislative powers of the Commonwealth Parliament are only ‘for the peace, order and good government of the Commonwealth’ and are also ‘subject to the Constitution’, reasoned that ‘there arises from the very nature of the federal compact ... a necessary implication that neither the Commonwealth nor the States may exercise their respective constitutional powers for the purpose of affecting the capacity of the other to perform its essential governmental functions’.105 This in turn led to the consequence that:

>a federal law which purports to bind the States must be examined to ascertain whether it is really a law for the peace, order and good government of the Commonwealth with respect to one of the enumerated subjects, or a law which, under colour of such a purpose, is really

104 Eg, West v Commissioner of Taxation (NSW) (1937) 56 CLR 657, 668-669 (Latham CJ); Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 47 (Latham CJ).
a law the purpose of which is to interfere with such functions.\textsuperscript{106}

Later in his judgment, Williams J went on to say that if a law:

seeks to give directions to the States as to the manner in which they shall exercise their executive, legislative or judicial governmental functions it is not a law for the peace, order and good government of the Commonwealth, but an unlawful intervention in the constitutional affairs of the States.\textsuperscript{107}

Aside from Latham CJ,\textsuperscript{108} the other justices in \textit{Melbourne Corporation} did not place explicit emphasis on this feature of the opening words of s 51. However, it seems clear that Dixon J had this in mind when he observed in \textit{Uther’s} case that in ‘federal or dual system government you do not expect to find either government legislating for the other’.\textsuperscript{109} Thus, his Honour went on to say:

Surely it is for the peace, order and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales, to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict. It is a question of the fiscal and governmental rights of the Commonwealth and, as such, is one over which the State has no power.\textsuperscript{110}

While in later cases little if any attention was given to these lines of reasoning,\textsuperscript{111} the description of the Commonwealth Parliament’s powers as being for the ‘peace, order and good government of the Commonwealth’ played a fundamental role in the seminal reasoning that gave rise to the implied immunities protecting both the Commonwealth and the States.

The absence of these words in the proposed s 129(iii) raises the question whether the High Court would interpret the legislative power conferred by that provision in a way that would enable the

\textsuperscript{106} \textit{Melbourne Corporation v Commonwealth} (1947) 74 CLR 31, 99.

\textsuperscript{107} \textit{Melbourne Corporation v Commonwealth} (1947) 74 CLR 31, 99-100.

\textsuperscript{108} \textit{Melbourne Corporation v Commonwealth} (1947) 74 CLR 31, 47 (Latham CJ).

\textsuperscript{109} \textit{In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation} (1947) 74 CLR 508, 529.

\textsuperscript{110} \textit{In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation} (1947) 74 CLR 508, 529-530.

\textsuperscript{111} But see, \textit{Victoria v Commonwealth} (1971) 122 CLR 353, 403 (Windeyer J) (‘But a law, although it be with respect to a designated subject matter, cannot be for the peace, order and good government of the Commonwealth if it be directed to the States to prevent their carrying out their functions as parts of the Commonwealth’).
Commonwealth to enact laws that affect the States to an extent greater than the Court has allowed when the Commonwealth legislates under s 51. Notably, it is proposed that s 129 will appear in its own chapter in the Constitution and would thus stand apart from the chapters that establish and empower the Commonwealth (Chs I, II and III) and the chapter that preserves the existence, powers and constitutions of the States (Ch V, especially ss 106 and 107). If the power of the Parliament to make laws with respect to matters relating to the Voice were to be inserted as a new placitum to the existing s 51, there would be good reason to expect that the existing intergovernmental immunity doctrine protecting the States would continue to operate as before. However, the establishment of an Indigenous Voice ‘in recognition of ... the First Peoples of Australia’ would introduce a further category of ‘people’ into the Constitution: the First Peoples alongside the people of the Commonwealth and the peoples of the States. This suggests a readjustment to the popular foundations of the Australian federal system at the most fundamental level.\(^\text{112}\) As the plurality in Re State Public Services Federation observed, the scope of any conferral of power by the Constitution is to be ‘ascertained by reference not only to its text but also to its subject matter and the entire context of the Constitution, including any implications to be derived from its general structure’.\(^\text{113}\)

III. COMPARISON OF PROPOSED S 129(III) AND THE RACE POWER

The proposition that the proposed s 129(iii) would result in a material expansion of the legislative competence of the Commonwealth Parliament depends on an assessment of its existing legislative powers, particularly those that authorise laws covering similar ground. The most obvious candidate is the power to make laws with respect to ‘people of any race for whom it is deemed necessary to make special laws’ in s 51(xxvi) of the Constitution. This part of the paper considers the High Court’s jurisprudence on the race power insofar as is relevant to considering whether a legislative power to implement the Voice’s representations would materially increase the Commonwealth’s existing legislative competence. We accordingly do not consider issues such as those addressed in Kartinyeri v Commonwealth\(^\text{114}\) as to whether the race power supports legislation that is not for the


\(^{113}\) Re State Public Services Federation; Ex parte Attorney-General (WA) (1993) 178 CLR 249, 271-272 (Mason CJ, Deane and Gaudron JJ).

benefit of the people of a particular race. Nor do we consider the application of the race power to other than Aboriginal and Torres Strait Islander peoples.

A. Overview of the race power

Prior to the 1967 referendum, the race power ‘was not a prominent feature of the constitutional landscape’.\textsuperscript{115} Since that time, however, the Commonwealth Parliament has relied on the power to support several laws relating to Indigenous Australians, most notably in relation to cultural heritage and native title.\textsuperscript{116} In a quartet of cases decided in the 1980s and 1990s,\textsuperscript{117} the High Court considered the interpretation of s 51(xxvi) and its application to some of those laws.

In the leading case, \textit{Western Australia v Commonwealth} (the \textit{Native Title Act} case),\textsuperscript{118} the joint judgment considered the race power in some detail.\textsuperscript{119} Relevantly for the purposes of comparison with s 129(iii), their Honours observed as follows:

1. The race power, unlike the aliens power or the corporations power, is not expressed to be a power to make laws simply with respect to persons of a ‘designated character’ — it must be ‘deemed necessary’ that ‘special laws’ be made for ‘the people of any race’.
2. The phrases ‘deemed necessary’, ‘special laws’ and ‘the people of any race’ prescribe the conditions of legislative power under s 51(xxvi).
3. It is a matter for the Parliament to deem whether it is necessary to enact such a special law, subject to the possibility of the Court retaining a supervisory jurisdiction for ‘a manifest abuse of the races power’.
4. ‘Special’ qualifies ‘law’. The ‘special quality’ of a law must be ascertained by reference to its differential operation upon the people of a particular race.


\textsuperscript{116} Eg, \textit{Aboriginal and Torres Strait Islander Heritage Protection Act 1984} (Cth); \textit{Native Title Act 1993} (Cth). See generally, Anne Twomey, ‘A Revised Proposal for Indigenous Constitutional Recognition’ (2014) 36(3) \textit{Sydney Law Review} 381, 397-398; Commonwealth Parliament, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, \textit{Final Report} (November 2018), p 124 [4.16].


\textsuperscript{118} \textit{Western Australia v Commonwealth} (1995) 183 CLR 373.

\textsuperscript{119} \textit{Western Australia v Commonwealth} (1995) 183 CLR 373, 460-461 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), citing \textit{Commonwealth v Tasmania} (1983) 158 CLR 1, 158 (Mason J), 244-245 (Brennan J), 273-274 (Deane J).
5. The ‘special’ requirement does not relate to the necessity identified or the circumstances which led the Parliament to deem it necessary to enact the law.

6. A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race.

7. A law may be special even when it confers a benefit generally, provided the benefit is of special significance or importance to the people of a particular race.

8. This special significance may be manifested either because the law on its face discriminates in favour of the people of a particular race or because it discriminates in favour of those people by its operation upon the subject matter to which it relates.

Applying these observations, the joint judgment held that the Native Title Act was ‘special’ in that it conferred ‘uniquely on the Aboriginal and Torres Strait Islander holders of native title … a benefit protective of their native title’.  

The decisions in Koowarta v Bjelke-Petersen and Commonwealth v Tasmania (the Tasmanian Dam case) illustrate the types of laws of ‘general application’ that s 51(xxvi) will and will not support. It is necessary to consider the judgments and the impugned legislation in each case in some detail.

In Koowarta, five members of the High Court held that the race power did not support the general prohibitions on racial discrimination in ss 9 and 12 of the Racial Discrimination Act 1975 (Cth). The impugned sections were not a ‘special law’ for the ‘people of any race’ because they were general laws that applied equally to ‘the people of all races’ and were ‘addressed to all persons regardless of their race’. Underpinning this conclusion was the construction of the phrase ‘the people of any race’ when read in the context of s 51(xxvi) and that section’s reference to ‘special laws’. In that context, the phrase was construed as referring to the people of a particular race (or perhaps several races), rather than the people of ‘all races’. While the race power did not support the impugned sections of the Racial Discrimination Act, several judges commented that the power

would support a law prohibiting racial discrimination against Indigenous peoples alone.\textsuperscript{123} In this respect, Stephen J also noted a further tentative possibility:

Were it possible to say that in this community only Aborigines faced the possibility of racial discrimination, an anti-discrimination law expressed in general terms might perhaps be seen to be no less a special law within par (xxvi) than would a law expressly confined to the prohibition of discrimination against Aborigines. The necessary special quality might perhaps be sufficiently attracted by facts dehors the legislation. Be that as it may, such an argument does not seem to me to be open in the present case.\textsuperscript{124}

In the \textit{Tasmanian Dam} case, the High Court had to consider the constitutionality of sections 8 and 11 of the \textit{World Heritage Properties Conservation Act 1983} (Cth), which the Parliament had expressly declared were ‘necessary to enact … as special laws for the people of the Aboriginal race’.\textsuperscript{125} Those sections concerned ‘Aboriginal sites’, which were defined (in part) as sites ‘the protection or conservation of which is … of particular significance to the people of the Aboriginal race’.\textsuperscript{126} Under s 8(3), the Governor-General could declare an Aboriginal site to be subject to the restrictions imposed by s 11 if satisfied that the site, or artefacts or relics situated thereon, were being or were likely to be damaged or destroyed. Section 11 imposed generally expressed restrictions in relation to declared Aboriginal sites, including making it unlawful for a person to do acts that damage or destroy a site or artefacts or relics situated thereon. Notably, section 11 applied only to sites falling within the World Heritage Convention as being of ‘outstanding universal value’.

By a 4-3 majority, the Court held that the race power supported sections 8 and 11. Justice Mason considered that s 51(xxvi) supports legislation that ‘protects the cultural heritage of the people of the Aboriginal race ... because the protection of that cultural heritage meets a special need of that people’.\textsuperscript{127} His Honour held that this characterisation of the sections was not negated by the sites being of universal significance, provided they were of ‘particular significance’ to Indigenous

\textsuperscript{123} \textit{Koowarta v Bjelke-Petersen} (1982) 153 CLR 168, 186, 202, 207 (Gibbs CJ), 245, 252 (Wilson J).
\textsuperscript{124} \textit{Koowarta v Bjelke-Petersen} (1982) 153 CLR 168, 211 (Stephen J).
\textsuperscript{125} \textit{World Heritage Properties Conservation Act 1983} (Cth), s 8(1).
\textsuperscript{126} \textit{World Heritage Properties Conservation Act 1983} (Cth).
\textsuperscript{127} \textit{Commonwealth v Tasmania} (1983) 158 CLR 1, 159 (Mason J); see, similarly, 276 (Deane J).
peoples. This ‘special and deeper significance’ could arise from the sites forming part of the cultural heritage of Indigenous peoples. Justice Brennan (with whom Murphy J agreed in part) considered that a law made under s 51(xxvi) may confer upon the members of a particular race ‘benefits which tend to protect or foster their common intangible heritage or their common sense of identity’. His Honour further pointed out that a law which does not discriminate in favour of the people of a race on its face may be valid if it does so by its operation upon the subject-matter to which it relates. This meant, in practice, that a law for the general protection of particular items of cultural heritage would be valid provided those items are of ‘particular significance’ to the people of a particular race.

B. **Comparison between the scope of the race power and s 129(iii)**

There are important points of difference between the race power and the new legislative power in the proposed s 129(iii), especially when read with the right to make representations in s 129(ii). These differences suggest that s 129(iii) would support certain categories of laws that would not be supported by the race power.

The first textual difference is that the race power is limited to the enactment of ‘special’ laws. Section 129(iii), by contrast, does not require laws to have any ‘special’ character, but refers simply to ‘laws’. Secondly, unlike most heads of power in s 51, the race power is a ‘persons power’. Specifically, it is a power to enact special laws ‘for’ a particular category of persons (‘the people of any race’), rather than a power to legislate in respect of an activity or subject matter. By contrast, the Voice’s right to make representations concerns ‘matters relating to’ Indigenous peoples, and the associated legislative power is to make laws with respect to ‘matters relating to’ the Voice. Although the word ‘for’ in s 51(xxvi) has been held to embrace laws conferring a right or benefit or imposing an obligation or disadvantage on the people of a particular race, the law must still be ‘for’ those people. It is not a power to make laws ‘with respect to’ the people of a particular

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128 Commonwealth v Tasmania (1983) 158 CLR 1, 244 (Brennan J); see, 180-181 (Murphy J).
129 Commonwealth v Tasmania (1983) 158 CLR 1, 244-245 (Brennan J).
130 Commonwealth v Tasmania (1983) 158 CLR 1, 245 (Brennan J).
race without any further qualification.

Under the proposed s 129(ii), the Voice may make representations not strictly ‘for’ a particular class of persons, but on matters ‘relating to Aboriginal and Torres Strait Islander peoples’. As explained in Part I, this phrase is likely to confer a power to make representations on a very broad range of matters. In his Honour’s dissenting judgment in Tooheys Ltd v Commissioner of Stamp Duties, Kitto J observed that the expression ‘relating to’ is not synonymous with ‘for’, and that the use of the former language ‘greatly widens’ the ambit of a legislative provision. Similarly, Taylor J, in his concurring judgment, observed that the phrase is ‘extremely wide’, and Windeyer J considered it to be an ‘elastic’ phrase capable of being ‘stretched to cover a great variety of instruments’.133 In her Honour’s dissenting judgment in Re Dingjan, Gaudron J noted that the words ‘relating to’ ‘do not ordinarily require a direct or immediate connection, although they will do so if that is indicated by their context’.134 In the context of statutory interpretation, the meaning of such language thus depends on judicial ascertainment of the intention of the legislature as can be discerned from the text and context.135 In the absence of any indication that a narrower meaning is intended, however, the natural and ordinary meaning of the phrase ‘requires no more than a relationship, whether direct or indirect’.136

It is important to underscore in this context that the EM does not propose that the power to make representations conferred by the proposed s 129(ii) would be limited to ‘matters specific to Aboriginal and Torres Strait Islander peoples’ or matters of general relevance to the Australian community but which affect Indigenous peoples ‘differently’.137 The right clearly ‘includes’ representations on these matters, as the EM notes, but it is not necessarily limited to them. And yet, attempting to define the abstract outer limits is fraught with danger: with good reason, the Courts are hesitant to construe ‘relational terms’ such as these beyond that which is necessary to resolve the particular case before them.138 What can be said is that the ‘matters’ may conceivably encompass any combination of ‘activities, events, persons or things’, and the nature of the

133 Tooheys Ltd v Commissioner of Stamp Duties (1961) 105 CLR 602, 616-617 (Kitto J), 620 (Taylor J), 624-625 (Windeyer J).
135 Tooheys Ltd v Commissioner of Stamp Duties (1961) 105 CLR 602, 617-618 (Kitto J).
137 EM, p 12 [24].

Nevertheless, even for the second category of matters referred to inclusively in the EM, a legislative power to implement representations on such matters would likely support laws that the race power does not. At first blush, this second category of matters may be thought closely to resemble the race power in that both involve similar concepts of laws either ‘affect[ing] Aboriginal and Torres Strait Islander peoples differently’ (s 129(ii)) or having a ‘differential operation’ on the people of a particular race (s 51(xxvi)). Importantly, however, these concepts would arise and be applied at different stages of the respective inquiries in assessing the constitutional validity of laws relying on s 51(xxvi) and s 129(iii). The EM refers to matters that may be the subject of representations as including general laws or measures (which includes existing laws) which affect Indigenous peoples ‘differently to other members of the Australian community’. For laws invoking s 129(iii) to implement representations on this second category of matters, the question would be whether the general measure the subject of a representation, not the law implementing that representation, affected Aboriginal and Torres Strait Islander peoples differently. The absence of a ‘special’ character or quality requirement in s 129(ii) suggests that, unlike the race power, a representation to the Parliament seeking enactment of a law would not need to call for a law that would have a differential operation upon Aboriginal and Torres Strait Islander peoples. Indeed, presumably many representations would call for the enactment of laws that would avoid, address or remove any such differential practical operations or effects. By contrast, for laws relying on s 51(xxvi), the concept of ‘differential operation’ is relevant when considering the law itself, not the circumstances leading to the enactment of the law. Under the race power, the question is whether the law relying upon s 51(xxvi) has a differential operation on a particular ‘race of people’. It is this differential operation that gives a law the character of a ‘special law’. As held in the *Native Title Act* case, the ‘special’ requirement ‘does not relate to the necessity identified or the circumstances which led the Parliament to deem it necessary to enact the law’. \(^\text{140}\)

To illustrate the distinction, consider the example of existing general measures that would be likely

regarded as affecting Indigenous Australians differently (or disproportionately) to other members of the Australian community, such as aspects of state criminal justice systems or the age of criminal responsibility.\textsuperscript{141} This differential effect would permit the Voice to make representations on those matters, such as calling for the enactment of particular laws, including raising the age of criminal responsibility. A law enacted under s 129(iii) implementing such a representation could be a law of general application that, on its face, has no differential operation in relation to Indigenous peoples. On the other hand, \textit{Koowarta} and the \textit{Tasmanian Dam} case suggest that the ‘special law’ requirement in s 51(xxvi) means that the power supports only a limited range of ‘laws of general application’. For example, the sections of the \textit{World Heritage Properties Conservation Act} upheld in the \textit{Tasmanian Dam} case applied generally but, in terms, protected Aboriginal cultural heritage and sites of ‘particular significance’ to Indigenous Australians. Continuing with the example above, it would appear unlikely that the race power would support laws of general application regarding the age of criminal responsibility or other aspects of state criminal justice systems. Absent the law having a differential operation on its terms, to be supported by the race power the law would need to have a ‘special significance’ for Indigenous peoples by ‘its operation upon the subject matter to which it relates’. While very different to the legislation upheld in the \textit{Tasmanian Dam} case, an argument might be made that such a law could be described as of ‘special significance’ to Indigenous peoples by addressing a matter that affects them differently to others. However, \textit{Koowarta} and the \textit{Tasmanian Dam} case suggest that the concept of ‘special significance’ does not extend this far. For example, in the \textit{Tasmanian Dam} case, Brennan J noted that it was section 8 of the \textit{World Heritage Properties Conservation Act} that ensured section 11 was ‘special in its operation’.\textsuperscript{142} His Honour also did not accept an argument regarding the import of \textit{Koowarta} that racial discrimination was a matter of ‘special significance’ to Indigenous Australians, noting that ‘victims of racial discrimination may sadly be found in many races’.\textsuperscript{143} Similarly, Stephen J in \textit{Koowarta}, in the passage quoted above, tentatively suggested that the race power may support a general anti-discrimination law if it could be said that only Indigenous


\textsuperscript{142} \textit{Commonwealth v Tasmania} (1983) 158 CLR 1, 245 (Brennan J).

\textsuperscript{143} \textit{Commonwealth v Tasmania} (1983) 158 CLR 1, 245 (Brennan J).
peoples ‘faced the possibility of racial discrimination’. Conversely, neither the text of s 129(ii) nor the second category of matters referred to in the EM require a matter to be of such particular or special significance or importance for Indigenous peoples before the Voice’s representation making function is enlivened. In contrast to Koowarta, there would appear to be no impediment to the Voice making representations on the general matter of racial discrimination (or any other general ‘matter relating to Aboriginal and Torres Strait Islander peoples’), which is another matter that could also be fairly described as differently (but not only) affecting Indigenous peoples.

Beyond this, there is also the prospect of representations that fall within s 129(ii) that are not described by the two categories set out in the EM. The proposed text does not require that the representations must be on matters specific to Aboriginal and Torres Strait Islander peoples or general laws or measures that affect Aboriginal and Torres Strait Islander peoples differently. It only requires that the representation must be ‘on matters relating to’ Aboriginal and Torres Strait Islander peoples. Grammatically, the proposed text is more like the power of the Parliament to make laws with respect to the ‘matters’ defined in s 51(xxxvi), (xxvii) and (xxxix). It is significantly different to the somewhat misleadingly labelled ‘race’ power, which is actually a power to make laws with respect to the ‘people’ of a particular race for whom it is deemed necessary to make special laws. Grammatically, a ‘matter’ can relate to a particular group of people simply because it affects them, not only when it affects them differently to others. In Re Pacific Coal, Gaudron J observed, in a dictum approved by the majority in the Work Choices case, that the power to make laws with respect to a corporation described in s 51(xx) includes the power to regulate ‘those whose conduct is or is capable of affecting its activities, functions, relationships or business’ of such corporations (emphasis added). In Work Choices, the Court rejected the argument that the scope of the power should be limited to laws in which the character of the corporation as a trading or financial corporation is significant in the way that the law relates to it. It may be expected that the Court would adopt a similar approach to the proposed s 129(ii).

And even if it were considered that the matter must nonetheless be significant for Indigenous

peoples, significance need not necessarily involve a differential effect, but only an effect that is significant in the sense of consequential or impacting. As McHugh J pointed out in Re Dingjan, a requisite degree of significance can be manifest in various ways, such as where some benefit is conferred or detriment imposed, or simply where a measure has an effect on relevant activities, functions or relationships.147

Just as the heads of power in s 51 are to be construed ‘with all the generality which the words used admit’,148 it is to be expected that the scope of the representation-making function of the Voice will not be ‘be given a meaning narrowed by an apprehension of extreme examples and distorting possibilities’.149 As French CJ indicated in R v Khazaal, it is always difficult to envision or predict the novel issues or possibilities that may be thrown up by future events.150 We therefore do not venture to predict the sorts of matters about which the Voice may offer representations, but we note that they are not limited to matters specific to Indigenous peoples or general laws or measures that affect those peoples differently. It may be sufficient that such laws or measures affect Indigenous peoples, or even a particular group of Indigenous peoples,151 in some way. The power of the Parliament to legislate with respect to matters relating to the Voice, if it includes power to make laws implementing the recommendations of the Voice, would be similarly wide-ranging.

IV. CONCLUSION

The proposed constitutional alteration has real potential to expand the Commonwealth’s legislative powers vis-a-vis the States. This potential arises from two key features of the proposed s 129: (a) the breadth of the matters upon which the Voice may make representations under s 129(ii); and (b) the significantly widened language of the power to legislate under the revised s 129(iii), especially when compared to the Garma draft. Under the proposed s 129(ii), the Voice may make representations on ‘matters relating to Aboriginal and Torres Strait Islander peoples’. This phrase is likely to encompass a very broad range of matters, including topics that are beyond the

148 R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207, 225-226.
Parliament’s existing legislative competence. By empowering the Commonwealth Parliament to make laws ‘with respect to matters relating to … the Voice’, the proposed constitutional alteration would also confer a legislative power of ‘great width’.\textsuperscript{152} It is arguable that this ‘double use of wide connecting language’ is apt to include the power to make laws implementing the content of Voice recommendations. Not only would this power extend to the types of representations and laws referred to in the EM and the Solicitor-General’s Opinion, but there is a reasonable prospect that it would include the enactment of laws implementing Voice representations on matters that affect Indigenous peoples. Furthermore, there is reason to think that such a power would expand the Commonwealth’s existing powers, particularly given the specific limits placed on the Parliament’s power to make laws under the race power (s 51(xxvi)). We do not express a concluded view on the outer limits of the legislative power that would be conferred by the proposed s 129(iii), but we contend that it represents a material increase in the Commonwealth’s existing powers.

We make these observations despite our reservations about the consistency of such an outcome with the prevailing understanding, at this time, of the nature and intent of the proposed amendment. We believe they are matters that should be considered as the Australian people exercise their responsibility to determine whether to approve the proposed amendment.

\textsuperscript{152} Opinion, [25].