WHY WERE ABORIGINES ORIGINALLY EXCLUDED FROM THE RACES POWER?

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I INTRODUCTION

In a recent paper, the Chief Justice of Western Australia has considered why Aborigines were originally expressly excluded from the federal races power in s 51 (xxvi) of the Constitution until it was amended to include them in 1967.[1] The paragraph, with the deletion made in 1967 shown, grants to the federal Parliament concurrent legislative power over:

> (xxvi) the people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws.

Unfortunately the Chief Justice's views about the reasons for the initial exclusion of Aborigines (reversed by the deletion in 1967 of the eight words shown) suffer somewhat from what historians sometimes call presentism (the anachronistic judging of past events by present-day standards), simple logical errors, and what appears to be a presumption that nothing done or said about Aborigines in past ages can have been the result of anything besides outright racism and malice — not even of something as anodyne as mere irrelevance to any subject at hand at any particular time. It will be shown here that Aborigines were originally excluded from s 51 (xxvi) because of their special status: they were the native people of the land and not imported. Perhaps, conversely, taking too optimistic rather than too pessimistic a view of the reasoning behind the exclusion of Aborigines from s 51 (xxvi), it could even be said to be a form of constitutional recognition of their special status.

But according to the Chief Justice,

> the framers of the Constitution had in mind that the races power would be used by the Commonwealth Parliament to discriminate adversely against people of a particular race. Members of the Aboriginal race were not excluded from that power for the purpose of protecting them from adverse Commonwealth discrimination, but to ensure that the States were empowered to continue to legislate adversely against Aboriginal people without interference by the Commonwealth.[2]

This would at least be an oddly convoluted approach for the framers of the Constitution to take. Why would those determined to perpetuate ill-treatment choose the less efficient means of having six State governments in charge of this nefarious undertaking? For what reason would they choose Aborigines for this dubious honour rather than any other group of non-white people?[3] Why did they not choose Aborigines

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1 Martin CJ, 'Passing the Buck — Has the Diffusion of Responsibility for Aboriginal People in our Federation Impeded Closing the Gap?' (2017) 44:9 *Brief* 28.

2 Ibid, 29.

3 There is a similar point to be made about Malbon, 'The Race Power under the Australian Constitution: Altered Meanings' (1999) 21 *Sydney Law Review* 80, 92, who first suggests that

for the more effective, or at least centralised form of maltreatment instead of subjecting every race but them to such a possibility? On what basis and for what end was this distinction between Aborigines and other races relating to the source of their maltreatment made?

Where, for that matter, is the actual evidence that the Founders thought these things, such as quotations demonstrating the existence of such a plan? Vast amounts of recorded speechifying accompanied the decade-long process of Federation, and such intentions can be expressed in decorous but clear language — yet there seems to be not a single word that suggests such a plan was postulated. It behoves those who suggest that a particular intention existed to provide the evidence for it when there is such a vast store to find it in.

Can we even be sure that all State legislation was adverse, or thought at the time to be adverse to Aborigines, thus achieving the reprehensible goal allegedly in mind? At Federation, indeed, there were a variety of approaches in the various States on the topic of Aboriginal affairs, some of them, at least by the standards of the time, not wholly adverse and even benevolent: in short, Victoria and South Australia pursued policies of well-meant paternalism and gradual integration, while Queensland and Western Australia had rather more of the rough frontier approach and New South Wales was moving gradually towards the Victorian/South Australian approach.[4] (Many may of course deride such paternalism today, but that was not how the measures concerned were generally thought of then, and it is the intentions of the people at the time that Martin CJ was talking about.)

Shortly afterwards in his ruminations, Martin CJ correctly records that Aborigines were barely mentioned in the Conventions, and then goes on to say that

> it is clear that the exemption of Aboriginal people from the non-exclusive legislative power to be conferred upon the Commonwealth under the Constitution was not for the purpose of protecting Aboriginal people from discriminatory laws to be passed by the Commonwealth, but rather for the purpose of ensuring that laws passed by the States discriminating against Aboriginal people were not jeopardised by inconsistent Commonwealth legislation and s 109 of the Constitution.[5]

Given that, as his Honour has just rightly stated, the topic in question was barely mentioned at all, how can such an intention possibly be 'clear'? Such a fact could be 'clear' only to those whose powerful intellects grant them direct access to historical facts without the tiresome need for looking at anything as trifling and troublesome as sources. And if the idea were to ensure the validity of all State laws discriminating against Aborigines, why is there not a separate section of the Constitution doing so completely — excluding them, for example, from the possibility of marriage under the federal power in s 51 (xxi), or indeed from all federal powers on the analogy of s 127? The marriage power does not say: marriage, other than the marriages of Aborigines.[6]

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the exclusion of Aborigines was intended to continue their oppression, and then states that nothing better could have been expected from the federal Parliament anyway!

4 There is a summary with further references in my 'History of Section 127 of the Commonwealth Constitution' (2016) 42 *Monash University Law Review* 206, 213–215.

5 Martin, above n 1, 31.

6 This is not by any means an out-of-the-way or merely theoretical example, as is shown by Ellinghaus, 'Regulating Koori Marriages: the 1886 Victorian *Aborigines Protection Act*' (2001) 67 *Journal of Australian Studies* 22. Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge UP, 1999), 112, seems to proceed from the American model of dual citizenship in concluding that as a result of their exclusion from the races power

And finally, to cap it all off, we find his Honour recording accurately that Sir Samuel Griffith was the moving force behind the clause that excluded Aborigines; then, barely missing a beat, he says that Griffith, the author of these enormities,

> was seen as a supporter of the advancement of Aboriginal people. As a politician in Queensland, he had actively promoted moves to ensure that the evidence of Aboriginal witnesses was admitted in legal proceedings and later, as Chief Justice of Queensland, directed a jury to treat the evidence of an Aboriginal witness with equal weight and respect as the evidence of any other. A biographer notes that a press report of the day included him with 'the black sympathisers'.[7]

This is all deeply confusing and confused, and suggests that a desired conclusion and a particular perspective on Australia's past rather than actual historical data have driven the argument and led the Chief Justice into such obvious illogicalities, evidence-free assertions, and contradictions. This trap, that of reasoning about what must have been intended with today's spectacles firmly in place but without looking to the sources to see what actually was intended, is one that far too many fall into.[8] Let us then make the effort to avoid it, and have a careful look at what lay behind the races power and Aborigines' exclusion from it. In so doing, we shall confirm the correctness of Kirby J's suggestion in *Kartinyeri v Commonwealth*[9] that the races power may really have been based on 'the unhappy experiences of Queensland with 'blackbirding'', the practice of taking labourers from the Pacific Islands to Queensland to work on the sugar crops and in other agricultural pursuits. Aborigines therefore quite naturally fell outside its remit.

II THE BLACKBIRDING CONTROVERSIES

Unfortunately it has, with some honourable exceptions, long been a besetting sin of legally trained writers about Federation history — and not merely Chief Justices[10] — to ignore the surrounding historical circumstances of the period during which Federation was proposed, debated, and triumphed — almost as if Federation had come to pass in isolation, or in a special chamber hermetically sealed from the politics of the day. This is perhaps understandable, given that Federation produced an entirely new polity and, to some extent, a new start: it was a forward-looking movement. But such a procedure is not historical. It was only natural for people in the 1890s to ask themselves how the creation of a federal polity would affect their daily lives and the current issues which they were concerned about or wished to see action on — issues

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the Aborigines had only State and not national citizenship; at any rate, Aborigines came under all other federal powers, such as marriage, just not under the races power. If the argument that Aborigines were not treated as citizens in the early decades of Federation is to be made (see e.g., below n 10), it cannot be based on their exclusion from the races power.

7 Martin, above n 1, 31.

8 I draw attention to another similar case in above n 4, 207f.

9 (1998) 195 CLR 337, 403.

10 And indeed, another Chief Justice is an honourable exception: French CJ, 'The Race Power: A Constitutional Chimera' in Lee and Winterton (eds.), *Australian Constitutional Landmarks* (Cambridge UP, 2003), ch. 8. A further honourable exception is Galligan and Chesterman, 'Aborigines, Citizenship and the Australian Constitution: Did the Constitution Exclude Aboriginal People from Citizenship?' (1997) 8 *Public Law Review* 45.

that had been handled up to that time mostly by the politicians and officials of the colonies. Federation was also meant to enable common action on topics of general concern, topics which were, of course, already under discussion. When we discuss the origins of the races power and Aborigines' exclusion from it, we must therefore look to see what contemporary concerns motivated these phenomena.

As part of the general historical background, it must first be recalled that one of the proudest achievements of the British people in the nineteenth century was the abolition of slavery throughout the Empire in 1833[11] and the all-out war against slavery conducted at vast expense and trouble off the coast of Africa both by diplomatic means and by brute military force. This last was provided by the once-famous West Africa Squadron, whose work finished only in 1870 and was thus within the living memory of all but the very young in the 1880s and 1890s,[12] a class to which the new Premier of Queensland, born in 1845, had ceased to belong several decades earlier. The Underground Railroad enabling American slaves to escape to British North America (today's Canada), where British public policy prohibited slavery and thus blocked their return to the Americans and made them free people, was another widely known and celebrated recent historical fact, and another nineteenth-century hero closely associated with the fight against slavery was David Livingstone, of the 'I presume' fame that has lasted to our own day, who died only in 1873. Even the slightest suspicion that slavery might be re-introduced in all but name — and it can be claimed, although controversially, that Pacific Island labour was at times simply slavery stripped of the label[13] — was therefore bound to appal beyond measure liberally inclined people such as (Sir) Samuel Griffith QC.

Against this general background, the *Hopeful* case emerged shortly after Griffith QC first became Premier of Queensland in November 1883 — beginning the first period in Queensland's history, says one commentator, that legislation on Pacific labour could be passed without the blessing of the squatting and planting interests whose interests lay in ensuring a constant supply of cheap labour.[14] Griffith QC had long been 'a bitter opponent of Kanaka labour'[15] — and that, as we shall see, for reasons that reflected the sophistication of his mind and were far from simply racist.

Needless to say, stories of more or less proved veracity relating to the treatment of recruits from the Pacific Islands were already well known before the *Hopeful* case, but it was a particularly egregious and grossly shocking case in which there was also incontrovertible proof of misfeasance. In short, in late 1884 two members of the crew of that ship were tried for and convicted by a jury of the murder in cold blood of two of their Pacific Islander 'recruits' while on a 'recruiting' — really a press-ganging — voyage in the period from May to July 1884. They were sentenced to death, while others of the crew, including the government agent who appears to have passed most of the voyage in a state of inebriation, were convicted of kidnapping certain other

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11 *Slavery Abolition Act* 1833 (Imp).

12 See, for example, Tombs, *The English and their History* (Alfred Knopf, 2015), 550–553. On the Pacific equivalent, see Parnaby, *Britain and the Labour Trade in the South-West Pacific* (Duke UP, 1964), 166 *et seqq*.

13 Evans, Saunders, and Cronin, *Race Relations in Colonial Queensland: A History of Exclusion, Exploitation and Extermination* (University of Queensland Press, 1975), 150; Shann, *An Economic History of Australia* (Cambridge UP, 1948), 243f.

14 Parnaby, above n 12, 84f. Bolton, *A Thousand Miles Away: A History of North Queensland to 1920* (ANU Press, 1972), 144 also points to economic factors that coincided with Griffith QC's assumption of power and may have promoted rougher than usual methods of recruiting by planters from 1883.

15 Ross Fitzgerald, *From the Dreaming to 1915 — A History of Queensland* (University of Queensland Press, 1982), 247.

Pacific Islanders. A Royal Commission set up by Griffith QC as Premier within weeks of the murder trials,[16] after taking immense pains to receive evidence from five hundred Islander witnesses who often spoke little English,[17] found that the *Hopeful*'s so-called recruiting voyage had been

> one long record of deceit, cruel treachery, deliberate kidnapping and cold-blooded murder. The number of human beings whose lives were sacrificed during the 'recruiting' can never be accurately known. [… T]here is in our estimation abundant evidence of the commission of many other murders. The inhuman slaughter of the natives of Hiliwow was amply corroborated by six or seven witnesses. Anything more heartrending we have never heard or seen than the tale by the father, Togaiwina, of the drowning of his little boy, or the horror depicted in Waneipa's eyes, and on his face, as he described the doing to an atrocious death of the boy on the reef.[18]

In those days there was little point in trying someone in the criminal Courts for more murders than one given that the death sentence cannot be carried out more than once on the same person, but the Royal Commission found that many more murders than just two had been committed. The Royal Commission also uncovered and publicised numerous other illegal acts, frauds, and abuses that took place on several other recent 'recruiting' voyages. Griffith QC began to think of entirely banning recruitment — not to protect white people, or White Australia, but in the interests of the Islanders and for the good name of Queensland.[19]

Griffith QC was however first faced with considerable public pressure to commute the sentences of death of the two *Hopeful* crew members. He resisted with all his might on the grounds — as he told a deputation seeking mercy in December 1884 in words that convey a sense of still, and quite rightly, being personally outraged and emotionally affected by the condemned criminals' conduct that he had learnt of months beforehand — that 'the murders were as brutal as any ever committed', 'he had never heard of such a voyage of murderous atrocity', and 'when he first read the papers he had exclaimed that it would have been the proper thing if every man had been hung from the yardarm'.[20] These are not mild expressions, and they were published widely

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16 The instrument establishing the Royal Commission was, of course, signed by the Governor, Sir Anthony Musgrave, previously Governor of South Australia and possessor of an intellect that was neither mean nor unenlightened. It should not go unmentioned that his entry in the *Australian Dictionary of Biography* includes the following sentence: 'With (Sir) Samuel Griffith, who became premier in November [1883], he shared a deep enthusiasm for Australian Federation and a concern for the protection of primitive peoples'. The remarkable fact should also be mentioned that the Colonial Office was headed at this time by Sir Robert Herbert — the first Premier of Queensland.

17 Bolton, above n 14, 152.

18 *Report with Minutes of Evidence taken before the Royal Commission appointed to Inquire into the Circumstances under which Labourers have been Introduced into Queensland from New Guinea and Other Islands Etc*., Queensland Parliamentary Papers 1885 II 797, 828. The report was also published in the *Brisbane Courier*, 4 May 1885, 2f. The Commissioners were an MP, a barrister, and a police magistrate. No doubt they were carefully chosen for the task, and the proceedings of the Royal Commission reveal that at least one of them had been personally involved in investigating the type of matters they inquired into, but a review of their obituaries in newspapers does not reveal anything in their biographies that would contribute to the analysis here. Something of the case against their finding may be discovered in McNaughtan, 'The Case of Benjamin Kitt' (1951) 4 *Journal of the Royal Historical Society of Queensland* 535, 541f.

19 Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984), 96–98.

20 *Brisbane Courier*, 13 December 1884, 5.

in the newspapers at the time. Eventually compelled to commute the sentences to imprisonment after being outvoted by his ministerial colleagues on the question,[21] Griffith QC, swallowing a pill that evidently retained its bitter taste in his mouth for many months, stated his view publicly in Parliament that 'no two murderers ever more richly deserved death'[22] than those two *Hopeful* crew members whom the jury had convicted.

No doubt Griffith QC could be charged with attitudes that would not be acceptable today. Being a politician, he was also aware that a rejection of coloured labour for any reason would win votes among those whom the Pacific Islanders might displace from employment, namely the working class;[23] it would be ludicrously utopian to expect him to have ignored this angle.[24] However, it is very abundantly clear — it is quite beyond argument — that Griffith QC was also not of the view that anything at all could be done to Pacific Islanders, but that they were bound by common humanity to be treated with respect, even in an age which was rougher than our own and in which less well-off people lived far harder lives than they do today. There were no votes, for example, in sacking negligent government agents who had failed to look out for the interests of Islanders on the ships or in prescribing in detail in private memoranda the number of passengers permitted on a recruiting ship by reference to the height between the decks.[25] But his is not a surprising attitude in the century which saw not merely the rise of social and racial Darwinism, but also the much-trumpeted abolition of slavery.[26] Griffith QC's robust and clearly heartfelt stance during the

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21 Joyce, above n 19, 99; Wiener, *An Empire on Trial: Race, Murder and Justice under British Rule, 1870–1935* (Cambridge UP, 2009), 58f. Official documents on the case may be found in Queensland Parliamentary Papers 1890 I 551.

22 Queensland Parliamentary Debates, Legislative Assembly, 14 July 1885, 80.

23 Bolton, above n 14, 146f; Johnston, *The Call of the Land: A History of Queensland to the Present Day* (Jacaranda, 1982), 63; Joyce, above n 19, 97; Wiener, above n 21, 56. An interesting workers' perspective from an earlier era is Harris, 'The Struggle against Pacific Island Labour, 1868–1902' (1968) 15 *Labour History* 48.

24 It is curious to find Affeldt, *Consuming Whiteness: Australian Racism and the 'White Sugar' Campaign* (Lit Verlag, Vienna, 2014), 163, referring to earlier 'legislation on this matter [that arguably] occurred less out of sheer humanitarian concern for the Islanders but rather as a move forced by the public outrage about the allegations of deceit and brutal treatment during the recruiting process' — for these things were not opposites but based upon each other: outrage begets concern. It is not a requirement in writing history, even post-colonial history, that all politicians' motives should be assessed solely in terms of votes and all credit denied to men of the nineteenth century, who were just as capable of empathy as people today. At the very least, if unworthy motives are to be attributed to actors the case must be made for doing so; it cannot simply be assumed to be the case, especially given that Griffith QC's sincerity is convincingly defended by Parnaby, above n 12, 186f. Equally, if Martin CJ's statement that s 51 (xxvi) was intended 'to discriminate adversely against people of a particular race' (see above n 1) means that there was no benevolent intent at all towards those other races but solely a discriminatory intent, his Honour is clearly wrong: while some discrimination was undoubtedly in the offing, it was equally thought desirable to protect the Pacific Islanders against slavery-in-all-but-name.

25 Joyce, above n 19, 101.

26 Needless to say, there is much further information about this period of Queensland's history which is fascinating but not germane to the present topic. It includes surprising episodes such as successful legal actions by Islanders against overseers for assault and, more generally, their ability to take their fate into their own hands despite their often exposed and vulnerable position. See, for example, Corris, *Passage, Port and Plantation: A History of Solomon Islands Labour Migration 1870–1914* (Melbourne UP, 1973) — a most valuable work based in part upon conversations with surviving Pacific Islanders who had worked in Queensland; Finnane and Moore, 'Kanaka Slaves or Willing Workers? Melanesian Workers and the Queensland Criminal Justice System in the 1890s' (1992) 13 *Criminal Justice History* 141; Saunders, *Workers in*

Hopeful controversy also gives the lie to any accusation that he, at least, was acting under a mere 'pretext of humanitarian concern'[27] — however unfashionable it may be to see good in any colonial politician concerned with relations among the races in the nineteenth century. As in our day, people in the nineteenth century, both in the elite political class and outside it, had a variety of views about all manner of things and not all of them were using humanitarian concerns as a mere 'pretext'.

While defeated on the fate of the *Hopeful* murderers, Griffith QC, as Premier, began a vigorous and effective reform campaign on the issue of Pacific Island labour. New recruiting regulations and instructions to government agents were issued in an extraordinary Gazette[28] and printed by the Government Printer in a handy booklet alongside the applicable legislation.[29] As an interim measure, in June, July, and December 1884 recruiting was banned by Griffith QC's ministerial directive in a large number of recruiting grounds.[30] The mortality rate of workers was successfully attacked and brought under control; it had coincidentally, and very often due to circumstances outside recruiters' and employers' control, reached alarming heights in 1884, the same year as the *Hopeful*'s infamous voyage.[31] Negligent government agents were dismissed and new ones engaged;[32] the standard of administration improved markedly.[33] Islanders who had been unlawfully recruited were returned home at government expense and a *Pacific Islanders' Employers' Compensation Act 1885* was passed for the benefit of their employers. Finally, s 11 of the *Pacific Island Labourers Act of 1880 Amendment Act 1885* decreed that no Islanders should be brought to Queensland after the end of 1890.

To finish this story will take the reader slightly beyond the period when Federation begins to be discussed and drafts of what were to become the races power would emerge, but it is convenient to do so now.[34] In 1892 Griffith A-G QC, again Premier, found himself obliged to reverse his previous decision, backed by parliamentary enactment in 1885, that no further Islanders would be allowed into Queensland; he issued a lengthy 'Manifesto to the People of Queensland'[35] on 12 February 1892 to explain this *volte face*, and the *Pacific Island Labourers (Extension) Act 1892* gave effect to the decision that Pacific labourers could again come to Queensland. By that year, his last full year as Premier before his translation to the

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Bondage: The Origins and Bases of Unfree Labour in Queensland 1824–1916 (University of Queensland Press, 1982), ch. 2, 4; Wiener, above n 21, ch 1, 2.

27 Affeldt, above n 24 at 165.

28 Queensland Government Gazette, 18 April 1884, 1151–1153; 24 April 1884, 1231; *Regulations under the* Pacific Islanders Labourers Act 1880 *and Instructions to Government Agents*, Queensland Parliamentary Papers, 1884 II 729.

29 *Imperial and Colonial Acts Relating to the Pacific Island Labour Trade; and Regulations and Instructions for the Guidance of Government Agents appointed under the* Pacific Island Labourers Act 1880 (Acting Government Printer, Brisbane, 1884).

30 Queensland Government Gazette, 21 June 1884, 1855; 28 June 1884, 1924; 5 July 1884, 3; 24 December 1884, 2040; 3 January 1885, 38f; 4 July 1885, 37f. See also Corris, above n 26, 37f.

31 Evans, *A History of Queensland* (Cambridge UP, 2007), 132f; Evans, Saunders, and Cronin, above n 13, 188f.

32 Wiener, above n 21, 59f.

33 Parnaby, above n 12, 152.

34 I will not, however, deal with occurrences after the adoption of the Constitution. They are handily summarised in, for example, Megarrity, '"White Queensland": the Queensland Government's Ideological Position on the Use of Pacific Island Labourers in the Sugar Sector 1880–1901' (2006) 52 *Australian Journal of Politics and History* 1, 9–12. See also McConnel, '"Separation is from the Devil while Federation is from Heaven": the Separation Question and Federation in Queensland' (1999) 4 *New Federalist* 14.

35 Published in, e.g., *Telegraph* (Brisbane), 13 February 1892, 5.

Bench, he was in coalition with his former arch-enemy (and supporter of Pacific Island labour) Sir Thomas McIlwraith, but a more important factor behind this decision was the depression which had overtaken the sugar industry due to a dreadful combination of the general depression then afflicting Australia, low world sugar prices, and drought.[36] Needless to say, all possible safeguards against abuses were taken;[37] in his 'Manifesto'[38] Griffith A-G QC promised to take steps 'preventing abuses in the introduction of the labourers, and for preventing them from entering into competition with white labourers in other occupations', as a result of which even some urban radicals and churches were willing to countenance the resumption of the system under the watchful eye of its former arch-foe[39] — but by no means all, as the parliamentary debate on the Act of 1892 showed.[40]

It also goes without saying that, after so many years of being the doughty opponent of black labour in Queensland, Griffith A-G QC's reversal of his stance in 1892 caused much comment throughout Australia.[41] For example, the Legislative Assembly of Victoria, acting on the initiative of a humanitarian missionary with contacts in the less altruistically motivated labour movement,[42] took the unusual step of passing a motion without a division (although not wholly without opposition) condemning its sister colony's decision and urging the government to do something to thwart it (although it was obviously impossible to say what exactly it could do with any hope of success).[43] Thomas Playford, the Premier of South Australia, tried to organise an inter-colonial conference on the subject, but the Premier of Queensland refused to participate; his reasons for declining were widely published in the press.[44] In Sydney the St Leonard's branch of the Labour Electoral League passed a motion condemning the change, sent it to Griffith A-G QC, received a courteous and detailed reply from him (although their votes were worthless to him) and, having read it, resolved to hold another meeting as soon as possible to condemn him even more.[45] When recruiting resumed the Melbourne *Argus* sent along an undercover reporter on a recruiting ship to assess whether its work was conducted decently; the resulting reports, generally very positive, were published in fourteen long instalments in the newspaper over the month of December 1892.[46]

While those immediately affected by the *volte face*, the sugar growers, changed their previous 'Damn Sam Griffith'[47] slogan into something more complimentary, not everyone in Queensland was pleased: the nascent labour movement, for example, was

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36 Fitzgerald, Megarrity, and Symons, *Made in Queensland: A New History* (University of Queensland Press, 2009), 44f. The general background is most skilfully recounted and analysed in Bolton, above n 14, 198–205.

37 Evans, above n 31, 134f; Parnaby, above n 12, 188, 192f.

38 See above, n 35.

39 Bolton, above n 14, 238; Parnaby, above n 12, 188; see also Joyce, above n 19, 171.

40 See, for example, Griffith A-G QC's protest at the tactics of his opponents in Queensland Parliamentary Debates, Legislative Assembly, 6 April 1892, 160.

41 And also beyond it. See, for example, UK Parliamentary Debates, House of Commons, 23 May 1892, 1515f; 26 May 1892, 1887–1890. In this section I largely omit, given my overall topic, the numerous references that could be given to concern in the UK, both official and non-official, about Queensland's record.

42 Parnaby, above n 12, 189.

43 Victorian Parliamentary Debates, Legislative Assembly, 25 May 1892, 156–164; and see UK Parliamentary Debates, House of Commons, 26 May 1892, 1888f.

44 E.g. *Argus*, 2 June 1892, 5; 9 June 1892, 5.

45 *Sydney Morning Herald*, 2 April 1892, 9; *Telegraph* (Brisbane), 5 April 1892, 5.

46 Affeldt, above n 24, 175.

47 Bolton, above n 14, 145; Joyce, above n 19, 170 (noting also the role of the Queensland government yacht *Lucinda* in this episode of the story); Shann, above n 13, 251 fn 2.

not, given that local workers would find themselves undercut as labourers in the sugar fields and a bad precedent was possibly set for other industries — to say nothing of out-and-out racial prejudice. It is noteworthy, however, that local workers also objected to imported Italian labour with such vociferousness that the Italian government became reluctant to send further immigrants.[48] The Premier's middle-class urban and his opponents' working-class and rural radicalism differed so much that '[t]he tragedy was that there was no point of contact between the two radicalisms'.[49] For present purposes, however, it is quite sufficient to note that the great reversal of 1892 still further identified Griffith A-G QC in the public mind with the topic of Pacific Island labour and the need for its proper regulation.

What drove Griffith's overall stance on Pacific Island labour? It was stated above that it was a complex matter, and his views are of the sophisticated nature that one would expect from a man of his attainments — although they are also views characteristic of his own time: even the best and brightest cannot be expected to be a hundred years ahead in thought on every topic under the sun. There is no need to provide any explanation of his outrage at the doings of the *Hopeful*, but his stance on the broader question was informed by a particular vision of Queensland's future. Of course, it is certainly true to say that Griffith's aim was not to build a multicultural society or to ensure unlimited upward social mobility for the Pacific Islanders, as distinct from decent treatment for them while in Queensland and travelling to and from Queensland.[50] Anyone who expected Griffith to have such a lofty goal would obviously be guilty of crass presentism. Putting ourselves, rather, in his shoes, we may first recall that he was born in 1845 and was therefore in his most intellectually impressionable years while news of the American Civil War reached Australia. It was a war fought among fellow countrymen of largely the same stock as that from which Australia's settlers were drawn; a war that threw doubt upon the stability of one of the world's great experiments in modern democracy such as his own colony was embarking upon; and a war of a shockingly new type that made use of industry, railways, and mass armies with the consequently inevitable mass deaths and maimings. It is thus anything but surprising that Griffith was not in the front rank of enthusiasts for either a multi-racial society or an economy based upon slavery or quasi-slavery. As well as being immoral, it was downright dangerous.

Indeed, in reading his thoughts on the topic under discussion it is impossible even today not to be reminded of the south of the United States, which is no doubt why he very rarely found it necessary to draw any such link expressly. It was too obvious to his contemporaries to need explanation.[51] Thus, in his 'Manifesto'[52] Griffith A-G QC wrote:

> My objection has not been on account of the colour of men's skins, but I have maintained that the employment of such labour under the conditions to which we had become accustomed was injurious to the best interests of the colony regarded as a home for the British race, and principally for the following reasons: —

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48 Bolton, above n 14, 203. A sample of the tone may be found in the *Bulletin*, 12 December 1891, 2f. In the *Ballarat Star*, 31 August 1899, 2, Finnish immigrants who may prove 'undesirable in part' were mentioned.

49 Bolton, above n 14, 204.

50 Cf. Evans, Saunders, and Cronin, above n 13, 153–155, who point both to the limited work opportunities offered to Melanesians in Queensland and their status as temporary labourers, not permanent residents.

51 For some exceptional explanations, see Megarrity, above n 34, 5 n 19.

52 Above n 35.

1. It tended to encourage the creation of large landed estates, owned for the most part by absentees, and worked by gang labour, and so discouraged actual settlement by small farmers working for themselves.
2. It led to field labour in tropical agriculture being looked down upon as degrading and unworthy of the white races.
3. The permanent existence of a large servile population amongst us, not admitted to the franchise, is not compatible with the continuance of our free political institutions.

Griffith A-G QC was able to explain his change of heart again, and that last point in particular, in a short article he published in that year in a literary journal entitled *The Antipodean*.[53] After an opening shot at the 'great number of persons who, never having seen the tropical parts of [Australia], are prepared to express a confident and exhaustive opinion on' the topic of coloured labour, Griffith A-G QC turns first to the 'socio-political aspect of the question' and highlights the danger of one race governing another — '[t]his aspect of the question is already presenting itself in South Africa', he rather strikingly says. The danger is, of course, that the governing race will think of itself only and disregard the interests of the governed race. This in turn will mean that democracy will fail to secure the welfare of all the people, and will need to be replaced by some other system. While Griffith A-G QC had shown himself in other contexts capable of contemplating the franchise for non-whites,[54] here he leaves the idea out of the discussion. It would be the obvious solution for us, but not for all of his own time — not for many of his constituents at least. What system could replace democracy is not revealed, but Griffith A-G QC is probably thinking of some type of oligarchy such as in the southern United States, or perhaps the system of absentee landlordism that prevailed in much of Ireland or an 'aristocracy of white planters deriving wealth and ascendancy from the exploitation of semi-servile labour'[55] as in the West Indies. None, he thought, makes for healthy bodies politic. We can immediately see that a sizeable minority of disenfranchised helots will contaminate the atmosphere of any state.

As far as the physical possibilities are concerned, Griffith A-G QC took the view that experience was not yet sufficient to say whether it was possible for Caucasians to dwell permanently in the coastal tropics. This was a subject of much scientific controversy at about this time.[56] Perhaps he was somewhat more dismissive of the view that white people could not perform labour in the tropics than he was willing to say in public; Sir Henry Parkes in his memoirs recalls a conversation in which Griffith 'sharply interposed' during a conversation on the topic, saying, 'Who says they can't do it? I say they can!'[57] What he did say in *The Antipodean* was that he was 'confident that through a large extent of northern Australia the physical conditions will allow of the system of small farms owned and cultivated by Europeans in place of the

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53 (1892) 1 *Antipodean* 13. Its editors were G E Evans and J T Ryan, both of whom may be found in the *Australian Dictionary of Biography*. Unless otherwise stated the following quotations are from this essay; its brevity makes pinpoint citations unnecessary.

54 Taylor, above n 4, 225.

55 Shann, above n 13, 255.

56 See, e.g., Blainey, *A Shorter History of Australia* (Random House, 2014), 100, who provides an explanation for this controversy that is sympathetic to the people of the time; McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (Melbourne UP, 1998), 66f.

57 Parkes, *Fifty Years in the Making of Australian History* (Longmans, Green, and Co., London 1892), 571.

system of large estates worked by gangs of coloured labourers'. This would lead to a fairer and more democratic society in which large concentrations of economic and political power were avoided as far as practicable.[58]

While, therefore, 'the permanent settlement of northern Australia with coloured races in considerable numbers must disturb the homogeneity of the civilisation of the continent and affect its form of government, […] the continuance of Polynesian immigration, which can be neither permanent nor assume large proportions, is desirable in the present stage of tropical industry' — while white labour was still too scarce and it was uncertain whether the climate was hospitable to it. His concern was not merely, therefore, a reluctance to see a racially mixed society such as had led to war across the Pacific — although that certainly was part of it; Griffith A-G QC also wished to create a society free of gross inequality, if also free of racial mixtures. In the conditions of the time, it is easy to see why some people thought that a fairly equal society could not easily be achieved with a large minority of non-white people among a mostly European population; such a happy state of affairs has, after all, been only arguably achieved even in our own time in the southern United States, and in the late nineteenth century the appalling slaughter of the American Civil War was at the forefront of everyone's mind.

III 'THIS IS SIR SAMUEL GRIFFITH'S CLAUSE'[59]

A *Nothing to do with the case*

Clearly, when statements such as the one quoted in the heading to this section were made in the Constitutional Conventions relating to s 51 (xxvi), no-one would have had the slightest doubt about what was principally in mind, for Sir Samuel Griffith remained, even after accepting judicial appointment, strongly identified in the public mind in general and among the political class in particular with the topic of Pacific Islander labour in Australia. The *Hopeful* case was one of the first major challenges faced by the new Premier of Queensland and his strong response to it and widely noticed and remarkable *volte face* on the topic of Pacific Island labour a few years later — 'a surprise', Sir Henry Parkes states in his memoirs written in the very year of the *volte face*, 'to most people at a distance'[60] — helped to define his public image throughout Australia for many years. As soon as the name 'Griffith' was mentioned in this connexion, everyone would naturally think of the topic of Pacific Islander labour — although, needless to say, all involved were also aware that the power would extend to other imported races such as the Chinese and were, by and large, quite content with that result also.

The sort of legislation he might have envisaged under the power would be the protective if paternalistic legislation and regulations he was in charge of in Queensland:[61] they provided not merely for the voyage and the process of recruitment, but also for things such as the contents of contracts of service entered into, hospitals for sick Islanders, the payment of return passage by employers and for wages and their

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58 Megarrity, above n 34, 5. After our hero's departure from politics, but surely with his support, the *Sugar Works Guarantee Act 1893* (Qld) was passed to allow small-holders to club together and raise funds for a common sugar mill by issuing government-backed debentures.

59 Constitutional Convention, 19 April 1897, 832 (Richard O'Connor).

60 Parkes, above n 57, 571.

61 Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 23.

payment in the presence of an inspector. That is not, of course, to deny that the races power would be open for any use, beneficial or otherwise, as well as for uses that might fall arguably into both categories: thus, for example, restricting the industries in which Islanders might labour certainly reduced their options, but at the same time made it easier to supervise their employers and to provide effective regulations for their employment. Clearly, too, it was contemplated that provision would be made for repatriation — voluntary or otherwise. In the words of Quick and Garran, s 51 (xxvi)

> enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.[62]

It is also by now apparent that it would have been very odd indeed had Aboriginal people been included within the races power.[63] 'Sir Samuel Griffith's clause' was conceived to deal with entirely different problems commencing with the importation of labourers from foreign shores which had given rise to a colossal scandal in the middle of the 1880s. Had Aborigines been brought under this clause, they would have been wildly out of place given their status as the native peoples who could neither be imported from outside nor repatriated outside Australia. Had their inclusion been a realistic possibility, which for the reason just given it never was, it would furthermore have been necessary to debate which of the colonies' various approaches to Aboriginal affairs[64] might be adopted by the Commonwealth; while this, like the tariff for example, would be a decision that could be finally taken only by the federal Parliament once assembled, it is hard to imagine that the Conventions would never have wished to consider the issue even in outline, especially given the wide divergences in the colonies' approaches to the issue and the possibility that some of the differences might be harder to eliminate because explicable by ineradicable differences of size or climate among the colonies rather than ideology.

It is also not the case, as sometimes alleged,[65] that the races power was essentially superfluous as all of Griffith A-G QC's concerns could have been subsumed under the immigration, aliens, and external affairs powers. Clearly the actual entry of labourers would come within the clause, but not necessarily their fate once landed. At the very least, this is far from obvious, and the legislation protecting and governing them on shore was not necessarily justifiable under the immigration power; something would depend upon the future course of judicial interpretation of that power, which did indeed reveal various views about the reach of the immigration power. Nor would the immigration power necessarily cover children of immigrants born here or those who had arrived before the establishment of the Commonwealth;[66] only the races power would do that. The aliens power, for its part, would not cover British subjects (i.e. any person of any race in any British colony or much of India),[67] while the external affairs

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62 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901), 622.

63 French CJ, above n 10, 185.

64 See above, n 4.

65 Sawer, above n 61, 22f; cf. French CJ, above n 10, 181.

66 This point is noted by Barton QC in Convention Debates, 27 January 1898, 228.

67 Griffith A-G QC expressly referred to this category in Convention (8 April 1891, 703), rendering the failure to realise this point all the more curious. The need to exclude non-white British subjects was also stated forcefully and at length by the widely-read *Bulletin* writer James Edmond in his *A Policy for the Commonwealth* (Bulletin, 1900), 42 (reprinted from the

power would not cover the labourers within Australia. It should also be remembered that s 92 would prevent the States from prohibiting entry to persons of certain races once in Australia, but using s 51 (xxvi) the Commonwealth, if desired, could confine them to certain areas within States from which they would be unable to reach a State border.

B *A dying race?*

It would also be wrong to explain Aborigines' exclusion by the fact that they were sometimes thought to be a dying race and therefore would soon disappear. While the belief that the Aborigines were a dying race was widespread by the 1890s, the view that this belief might be behind their exclusion from the races power does not appear earlier than a speculative remark in 1927 by the Chief Protector of Aborigines in Western Australia.[68] The origins of the idea that the Aborigines might be a dying race can admittedly be traced back well before Federation — to the 1830s, in fact, as a study by Russell McGregor has shown.[69] But there is simply no evidence at all in any materials from the 1890s for that view as a justification for Aborigines' exclusion from the races power and no debate whatsoever in any source, official or non-official, on what would have been, on this perspective, some fundamental and unavoidable questions: primarily, it might be asked whether Aborigines really were a dying race or not; how much of any diminution, past or future, was due to intermarriage and/or assimilation and how much to literal extinction without posterity; what forces were bringing about any such result; and how quickly those forces would bring it about. It might well also be asked whether federal administration would make any difference to those forces, whatever they were, which in turn would require a debate about what they were. Debate in the Conventions, often quite discursive, might easily then have branched out into other important and related topics such as whether an unlawful 'helping hand' was being given by settlers to the supposedly inevitable natural process of extinction, and whether extinction would be desirable (as evidencing progress of the human race on social Darwinist lines — such views were indeed expressed by some, although not all) or, assuming that extinction was undesirable, whether it could be reversed in whole or in part and the Aborigines added to the general evolutionary progress of the human race. Even at what is admittedly perhaps the highest point of scientific racism — around the time of Federation, the time of the 'high racism of the late nineteenth century'[70] — not everyone, neither scholars nor the political elite, shared identical views on such questions and there was much diverse scientific theorising, from today's perspective more than faintly ridiculous and embarrassing, on the place of the Aborigines in the past and future of the evolutionary story, why an unhappy fate was supposedly allotted to them, and what its causes were.[71]

Could it be that the Founders simply assumed that the Aborigines were a dying race and took their extinction as much for granted as they took their incapacity to be an imported race, explaining the complete silence on the former topic also? This seems highly unlikely. First, as the federal Constitution was under discussion, assorted

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Bulletin), using language that would not be heard in polite company today. I do not know whether subjects of the Indian princely states not directly administered by the Crown would be considered aliens for the purposes of the aliens power; I suspect they would have been, and hence my qualification: much of India.

68 Sawer, above n 61, 18; Williams and Bradsen, 'The Perils of Inclusion: the Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95, 118f.

69 McGregor, above n 56, 14.

70 Hirst, *Looking for Australia: Historical Essays* (Black Inc., Melbourne 2010), 56.

71 See McGregor, above n 56, 34–48.

politicians of various hues objected, sometimes in quite vehement terms, to the exclusion of the Aborigines from the constitutional count of the population under s 127,[72] claiming that, for example, it implied that they were less than human or were not citizens. But the same voices, with exactly the same opportunity to comment, were entirely and uniformly silent on s 51 (xxvi). In each colonial Parliament except that of Queensland as well as in the Conventions themselves the draft Constitution was examined line by line, and not one of those politicians who objected to s 127 raised any difficulty with Aborigines' exclusion from the race power, let alone any supposed assumption that they were a dying race,[73] nor is there any mention of the 'dying race' theory in connexion with s 51 (xxvi) in any semi- or non-official source. These people were silent about s 51 (xxvi) when they might have spoken as boldly and clearly as they did about s 127 because there was nothing for them to object to; s 51 (xxvi) did not assume anything about the future of Aborigines beyond that they would not become entrants to Australia from foreign parts, something on which no sensible debate could occur.

Secondly, there were a number of notable contemporary dissenters from the view that the Aborigines were doomed to die out who could have objected, or been cited by objectors, had anyone perceived that view behind any part of the draft Constitution; it is not as if the 'dying race' view held the field unchallenged and could not be the subject of debate. Archibald Meston, protector of Aborigines in southern Queensland from 1898 to 1903, was one such dissenter; he published a report on the question and played a role in the enactment of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld),[74] which, whatever its other defects, was not based on the 'dying race' theory. Work on this legislation started in 1894 at the instance of (Sir) Hugh Tozer, one of the ministers of the Griffith/McIlwraith coalition who, according to his biography in the *Australian Dictionary of Biography*, 'was noted for his efforts to ameliorate the condition of Queensland Aborigines: he wanted them to regain "freedom of life and action" and he viewed reservations as places of protection which Aborigines should enter by choice rather than coercion'. Finally, the short title of the legislation just cited reminds us that, in northern Australia, opium introduced from Asia (along with alcohol and sex offered by non-white crews of ships visiting the northern coast) was frequently thought a major contributor to or hastener of the Aboriginal race's extinction;[75] thus, there would also have been easy opportunities in debate and discussion on s 51 (xxvi) to segue between a supposedly distinctive vice of the Chinese, one of the races most certainly a candidate for 'special laws' under s 51 (xxvi), and the imminent demise of the Aboriginal race as a justification for

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72 Taylor, above n 4, 228–233.

73 The sole query was in the Legislative Council of New South Wales (Parliamentary Debates, 24 August 1897, 3304):

> The Hon. JAGO SMITH said it seemed to him that [s 51 (xxvi), then in the exclusive powers list] had been so drawn as to make it absolutely certain that Queensland would not federate. He did not think the Queensland people would ever join the dominion if it were intended to give the dominion [i.e. federal] legislature the exclusive right to legislate in regard to aliens or kanakas. He moved:
>
> That [s 51 (xxvi)] be omitted.
>
> Amendment negatived.

74 McGregor, above n 56, 60f, and his biography in the *Australian Dictionary of Biography*. Thorpe, 'Archibald Meston and Aboriginal Legislation in Colonial Queensland' (1984) 82 *Historical Studies* 52, 66 identifies contradictory views expressed by Meston on the question and provides much useful background on his largely pre-Darwinian and partially Romantic intellectual premises.

75 McGregor, above n 56, 54f, 65.

excluding the latter from the races power; but this thought too occurred to no-one at any time.

Surely, had Aborigines' alleged imminent extinction been all that stood between them and federal responsibility for them, at least one or two of all these theories and connexions would have been mentioned, and above all there would have been some debate about whether extinction was even occurring and the desirability and prospects of reversing it if it was, against the background of the variety of approaches to Aboriginal policy in the various colonies. In the 1890s, when the idea of a doomed race had long since been introduced into the public discourse, no squeamishness on this subject stood in the way of frankly raising such topics. But they were not raised by any of the hundreds of people who had the opportunity to do so on the public record, for everything suggests that, on the contrary, the problem that the races power was directed at simply had nothing to do with Aborigines and so such questions never made it anywhere near the agenda and occurred to no-one.

Even assuming that the Aborigines were a dying race, that fact itself would not disqualify them from federal control and could not explain why they were exempted from it. Indeed, for many, including Griffith QC both before and after 1892, Islander labour was an even more temporary phenomenon than the existence of Aborigines, on even the most pessimistic assumptions, might be. In his 'Manifesto' of 1892[76] Griffith A-G QC had suggested a limit of a further ten years on Pacific Islander labour,[77] and so Pacific Islanders were likely to disappear from Australia faster than any extinction of the Aboriginal race could reasonably be expected even by those with such an expectation. The concerns that Pacific Island labourers caused were likely to die out, and indeed did die out more rapidly (by the return of most of the Islanders to their homes) than the Aborigines possibly could literally die out; but still the Pacific Islanders, the problem that would likely disappear faster, and not the Aborigines, became the object of federal power. It is therefore evidently not the expected duration of the problem that determined what the races power would cover, but its nature: Islanders could be localised within areas requiring their labour and sent back upon its conclusion, and their recruitment, importation, and conditions of employment necessarily had to be organised, given that none would come without a job. None of this applied to Aborigines.

C *The federation of Queensland scheme*

One of the lesser-known curiosities of Australian constitutional history is Griffith A-G QC's scheme, in his final term as Premier, to divide Queensland itself into a federation. The original version of this plan provided for three provinces, later reduced to two. It contained the first known version of a races power.

The initial draft of the scheme in 1890 contained a power for the central legislature to make laws about the 'affairs of people of any race who are not included under the laws applicable to the general community, or with respect to whom it is necessary to make special laws'.[78] This was poorly phrased, suggesting as it does an exemption from local laws in the nature of a capitulation or system of personal law, which is assuredly not what was meant. However, the point of interest for present purposes is that the author of this scheme, Griffith A-G QC, explained it in Parliament as follows:

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76 Above n 35.

77 As it turned out, this was not a bad guess having regard to the time limit imposed by the *Pacific Island Labourers Act 1901* (Cth), but that obviously takes us beyond Federation.

78 Queensland Parliamentary Debates, Legislative Assembly, 20 November 1890, 1518.

> The reason why that should be under the central control is clearly because it affects the relations of the people, whether of Queensland or Australia, with the outside world.
>
> Honourable members: Hear, hear![79]

It is true that there is no exclusion of Aborigines in this proposal, but the reason given for the proposed power is so exactly in accordance with what is proposed here that further commentary is hardly necessary: it is plain that Aborigines were a domestic people and relations with them did not involve the outside world.

When the 'three Queenslands' federal scheme next came before Parliament, in September 1891, the omission of an exclusion of Aborigines had become apparent in circumstances shortly to be described, and the missing exclusion is to be found: the proposed power now read 'affairs of people of any race with respect to whom it is necessary to make special laws not applicable to the general community, but not including the aboriginal native race'.[80] The wording has also been tidied up, as can be seen, to remove the incongruity previously present. No explanation of the exclusion of Aborigines was provided, because the reason for it was obvious. They would now have fallen under item 18 on the provincial list — the Canadian scheme of two lists, one for the centre and one for the provinces, was to be adopted — which read: 'all matters affecting the internal affairs of the province which are not assigned to the Parliament of the united provinces'.[81]

Parliamentary commentary on this proposal by members was sparse and not very illuminating, but — both before and after the *volte-face* 'Manifesto' was published in February 1892[82] and both in the earlier three-provinces and later two-provinces versions of the scheme — members commented upon the need for imported labour to be monitored and controlled and made no objection to the exclusion of the Aborigines, which was accepted as a natural one.[83] Nor does the reasoning behind the exclusion of Aborigines from central power suggested by Martin CJ work here either: could it seriously be proposed, for example, that the intention behind this version of the races power was that the provinces of Queensland should have a free hand to disadvantage Aborigines without central control from Brisbane? That would be a long bow indeed given that all would start off with the Queensland law on the subject and there was no sign of any desire on the part of any region to consider the question and take action in any direction at all. That suite of problems was not what drove the separationists. Rather, the Aborigines were simply a local affair not needing centralised control.

The only peculiarity worth special mention is that the races power was intended not as concurrent, but as exclusive to the centre because, as Griffith A-G QC said, it 'should be in the hands of the general government and not in the hands of the legislatures of particular provinces'.[84] This will be taken up in the next section. Of course, this did not directly affect Aborigines once they had been excluded from the races power.

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79 Queensland Parliamentary Debates, Legislative Assembly, 20 November 1890, 1514.

80 Queensland Parliamentary Debates, Legislative Assembly, 15 September 1891, 1045; 16 September 1891, 1057.

81 Queensland Parliamentary Debates, Legislative Assembly, 15 September 1891, 1046; 16 September 1891, 1058.

82 See above, n 35.

83 Queensland Parliamentary Debates, Legislative Assembly, 16 September 1891, 1078; 29 September 1892, 1410; 6 October 1892, 1469.

84 Queensland Parliamentary Debates, Legislative Assembly, 26 July 1892, 794.

D *History of the federal Bill*

In December 1890, a month after first presenting to Parliament the first draft of his scheme for Queensland federation, Griffith A-G QC had made use of the *Lucinda* for a trip north to investigate the state of the sugar industry — a prelude to the 'Manifesto' and subsequent legislation re-admitting Pacific Islander labour fourteen months later.[85] Three months later, over the Easter weekend of 1891, the *Lucinda* was, more famously, the venue for the first serious hammering out of the terms of the federal Constitution for Australia. It was evidently on board that it first occurred to one of those present that native races should be exempted from the races power, for we find a handwritten addition to it of the new phrase '; but so that this power shall not extend to authorise legislation with respect to the Maori race of New Zealand'.[86] Aborigines were added in to this exclusion on Easter Monday.[87] Clearly this exclusion was then imported into the Queensland federation scheme presented to Parliament again in September 1891.

Yet again we find that the reasoning of Martin CJ does not fit the facts: Maoris were thought of first, not Aborigines. Had the intention all along been to disadvantage Aborigines, they would have been thought of and excluded from the beginning. And why start with Maoris and only then move on to Aborigines if the intention were to disadvantage Aborigines? For the Maoris, all of whom had the vote,[88] would not have tolerated for a moment, let alone voted for a provision designed to disadvantage them — had it ever come to that in New Zealand. In fact (Sir) William Russell of New Zealand had pointed out in the Australasian Federation Conference of 1890 in Melbourne[89] that the Maoris — many of whom had, well within living memory, waged war against the Crown in New Zealand — would not for a moment stand for their affairs being assigned to a largely Australian federal legislature that knew nothing of New Zealand's special history and needs. Perhaps it was the memory of Russell's contribution that set off the train of thought on the *Lucinda* that had the Maoris excluded. Their exclusion, far from being a means of discriminating against them, was in their interests and in those of New Zealand as a whole. Were, then, the Maoris and the Aborigines excluded from the races power within a few days of each other with exactly opposite objectives, beneficial in the first case and malevolent in the second, although no-one troubled to explain or even to mention this oddity? Surely not. At any rate, nothing much was made in any forum, official or unofficial, of the removal of Maoris and Aborigines from the proposed races power, because it simply corrected an oversight and was not of its essence. The Maoris, of course, were deleted in 1897,[90] but only because it had become clear that New Zealand would not be joining the federation.

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85 Joyce, above n 19, 170.

86 Williams, *The Australian Constitution: A Documentary History* (Melbourne UP, 2005), 196; and see 224. For the deletion of Maoris in 1897, see 511.

87 Ibid 260, 274.

88 Adult Maori women were enfranchised along with other women in New Zealand shortly after, in 1893, unlike all Aborigines, although some Aborigines also had the vote: Stretton and Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise' (1993) 25 *Australian Historical Studies* 521, 522f. Although the numbers were fairly small, we might equally ask why enfranchised Aborigines would be expected to vote for a Constitution containing a provision designed to do them harm.

89 11 February 1890, 42.

90 See above, n 86.

One peculiarity that did cause a lot of comment is that until the end of January 1898 the draft Bill provided for the races power to be not concurrent, but exclusive — in other words, it was to appear in what is now s 52, which would have had four paragraphs instead of three. Griffith CJ himself went on the public record in 1897 with a statement that it would be legitimate to make the races power concurrent rather than exclusive,[91] and so it must not be thought that his Honour was implacably opposed to the change. Yet it is not the change, but the initial proposal that excites surprise — and excited long debates in the Conventions, with some discussion about which State laws would be invalidated by this exclusive provision and how exactly this system would work. It was again stated over and over again by numerous speakers that the point of the power was to deal with people introduced into Australia.[92] In the 1898 Convention it is also noticeable that it was largely labour's sole representative, Billy Trenwith, a bootmaker by trade, who talked some sense into the high-powered lawyers on the Convention on the exclusive/concurrent point and had the change made.

In the Convention of 1891 Griffith A-G QC justified his proposal for an exclusive power by stating that 'the introduction of an alien race in considerable numbers into any part of the Commonwealth is a danger to the whole of the Commonwealth, and upon that matter the Commonwealth should speak, and the Commonwealth alone'.[93] For Barton QC, another reason for inserting this power was that

> the Commonwealth will have control of the external relations of the whole of the continent and of Tasmania. These external relations may be very pertinent to any legislation that will have to be adopted, so that you may have the complication, if you do not insert a provision of this kind, of having the States continuing to legislate in respect to a matter in which they have no responsibility, while the external relations, the explanation of all these matters and the responsibility for them to the Imperial Government, will rest with the Commonwealth. That would be an undesirable condition of things.[94]

He might have been thinking, for example, of the recent trade treaty between Japan and Britain that all the Australian colonies — except, be it noted, Queensland — had refused to adhere to and which permitted Japanese people freely to enter British territory.[95] Even more pertinent was the failure of the Imperial authorities to agree to colonial proposals for explicitly race-based restrictions on immigration in 1895, partly because it would exclude some British subjects and partly because of sensitivities relating to the Japanese, who objected to being lumped in with the Chinese as Asians. The Imperial rejection of explicitly race-based immigration laws forced the adoption of the apparently non-discriminatory dictation test by some of the Australian colonies and New Zealand.[96]

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91 Griffith CJ, *Notes on Australian Federation: Its Nature and Probable Effects* (Government Printer, Brisbane 1896), 16.

92 Convention Debates, 8 April 1891, 702–704; 27 January 1898, 228–243. The debate continued on 28 January 1898, pp. 245–256, but with little germane to the present topic.

93 Convention Debates, 31 March 1891, 525.

94 Convention Debates, 27 January 1898, 232.

95 See Article I of the treaty reprinted in (1911) 5 *American Journal International Law* (Supp) 187, 188, with Article XIX, 195f, giving the Australian and other self-governing colonies the option to refuse to adhere to it. See Sissons, *Bridging Australia and Japan Volume 1* (ANU Press, 2016), 95 and Queensland Parliamentary Debates, Legislative Assembly, 20 July 1897, 343–360; 28 July 1898, 45.

96 O'Connor, 'Keeping New Zealand White, 1908–1920' (1968) 2 *New Zealand Journal of History* 41, 43; Quick and Garran, above n 62, 626f.

The exclusivity of the power as originally proposed certainly illustrates the importance Griffith A-G QC attached to the topic.[97] In the realm of practical politics, an exclusive power over imported peoples would have ensured that the federal Parliament took over the question at once, and it would not have more than a small representation from northern Queensland where the sugar interests predominated. It would therefore have been less sympathetic to any need for further labour while also ensuring that proper conditions were maintained for any Islanders still in Queensland.[98] That, as we have seen, was a matter dear to Griffith A-G QC's heart. But had Commonwealth power — especially an exclusive power — over Aborigines been thought by anyone to be a realistic prospect, the divergences among the colonies in Aboriginal policy would have made it imperative, at some point, to discuss in Convention which line of policy the future Commonwealth would be likely to take and how such a system of administration would work; such questions could not possibly have been avoided if the power were exclusive, but no such debate occurred. Nor, it can hardly be said, was there any debate even under the most gentle of euphemisms about who — the States, as they would become, or the new federal government — could oppress Aborigines most effectively. Rather, the idea behind making the power exclusive was that it dealt with people and affairs outside Australia.

IV NON-OFFICIAL VIEWS OF THE EXCLUSION OF ABORIGINES FROM S 51 (XXVI)

On a couple of occasions public commentary on the draft Constitution showed that those few who directed their minds to this question also realised that the exclusion of the Aborigines from the races power was quite natural or not in need of explanation. The great anti-federal organ the *Daily Telegraph*[99] of Sydney conjured up the spectre of a State — the Northern Territory; it included a handy map showing it shaded black — peopled by imported black labourers.

> Now, as no Parliament makes laws respecting the people of any race who do not inhabit the territory over which the Parliament has control, except, of course, to exclude them as undesirable aliens (and that the sub-section includes a reference to aboriginals is proof that it is not exclusion that is contemplated), then it naturally follows that the framers of the Convention Bill distinctly contemplated the possibility of the federal Parliament making special laws for the control of a race or races distinct from the white population or the aboriginals who should inhabit federated Australia.

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97 Although all of his speechifying and writing on this point appears at first sight to be thrown into doubt by Griffith CJ's statement, in a long pro-Federation speech reported in *Brisbane Courier*, 27 May 1899, 4 under the heading 'COLOURED LABOUR', that there was little probability of interference by the federal Parliament with Queensland's laws — if so, why have an exclusive power? I think however that his Honour may have had primarily in mind at this point the laws on the treatment of the labourers once they had arrived, rather than their recruitment and right to stay; if so, he was correct and the apparent contradiction is resolved, for the *Pacific Island Labourers Act 1901* (Cth) dealt only with the latter set of topics.

98 This is how 'Merely Colonial', writing to the editor of the *Telegraph* (Brisbane), 7 June 1899, 7 feared things would turn out, and the outcome more sanguinely predicted by the *Evening News* (Sydney), 28 May 1898, 6 — with copious references to the American Civil War.

99 8 June 1899, 6. The line of argument taken here appears to have found an echo in the *Inquirer and Commercial News* (Perth), 6 July 1900, 7, although with no reference to the Aborigines.

Seguing neatly from this ingenious but over-subtle argument to its next point, the unnamed writer claimed that 'the existence of a servile alien race in any country is always associated with oppressive systems of monopoly', and went on to warn of the construction of a railway line north to Darwin to support a big-business mining monopoly — at the expense of the taxpayers of New South Wales, naturally. The logical error in this *tour de force* is that the exclusion of the Aborigines could not demonstrate anything about the intended use of the power against included races, but it is clear enough from the final words quoted that, as far as this clause was concerned, in the writer's view 'the white population' and the Aborigines already inhabiting federated Australia were on one side, outside the clause's reach, and everyone else was on the other side as applicants for admission.

Unsurprisingly, the *Bulletin* also was in favour of using the races power to exclude non-whites, despite what it saw as the hypocrisy of the wealthy who wanted to let them in to increase profits, and accordingly wasted no words on the completely different problem of the Aborigines.[100] The vehemence of its views on this topic at the time is tolerably well known. None of these commentators remarked upon the natural exclusion of the Aborigines or suggested that any evil intent towards them lay behind their exclusion.

A less prominent newspaper, the *Clarence and Richmond Examiner*,[101] quoted s 51 (xxvi) and commented:

> The true inwardness of the funniosity of the sentence just quoted does not consist in its tangled English, though that is comical enough, but in the rare justice and modesty of the Convention in determining not to regard the aboriginal as an alien. Surely they were generous in not placing a poll tax upon King Billy and his Mary. King Billy's views on this act of condescension would no doubt be expressed in lurid phraseology.

The leader writer evidently also grasped the point at once. Other newspapers' contributions did not speak of Aborigines directly, but in discussing s 51 (xxvi) spoke exclusively of the need for the regulation of imported races such as the Chinese or, of course, the Pacific Island labourers — even in distant Western Australia.[102] For the *Newcastle Morning Herald and Miners' Advocate*,[103] s 51 (xxvi) confirmed 'the right to exclude aliens [that] is acknowledged throughout the British Empire' and had been confirmed by the Privy Council in *Musgrove v Toy*.[104] It is, I hope, not labouring the point unduly to indicate that such reasoning was also obviously and naturally inapplicable to Aborigines. They could not be found on a boat seeking entry to Australia as aliens (even if they exceptionally did go overseas, as the Aboriginal cricketers had done as early as 1868).

On the other hand, the wealthy politician-businessman (Sir) William McMillan, speaking at the Congress of the Australian and New Zealand Association for the Advancement of Science in January 1895, thought that 'every sane person' realised that it was 'quite impossible' for Europeans to settle and work in the tropics (thereby implying the insanity and consequent unfitness for office of the Chief Justice of Queensland). For McMillan, s 51 (xxvi) was a way of ensuring that tropical Australia

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100 Edmond, above n 67.
101 1 February 1898, 4.
102 *Inquirer and Commercial News* (Perth), 6 July 1900, 7; *Kalgoorlie Miner*, 11 September 1900, 4.
103 3 April 1891, 4.
104 [1891] AC 272.

could be worked by the races that were capable of doing so as 'properly regulated labour'. He even made bold to suggest that 'there must be large concessions made by the democratic spirit of the south to the very different social and political ideas which must of necessity dominate the north'; without such concessions 'no central government will be able to maintain the Union'[105] — again a clear reference to the American Civil War. McMillan's method of avoiding the tensions which had led to civil war in America was thus not to exclude coloured people entirely, but for the southern democracies to pull their democratic heads in in the interests of northern progress — exactly what Griffith A-G QC had feared in his article in the *Antipodean*.[106]

Although he was not a labour man, the radical barrister James Drake — later a Senator and federal minister and firmly opposed to non-white labour — wrote a paper entitled 'The Coloured Labour Problem in Relation to Federation' which was printed as part of the *Proceedings of the People's Federal Convention* in Bathurst in November 1896.[107] With constant allusions to the need to avoid racial divisions such as plagued the Americans — Drake's year of birth was 1850 — he quoted s 51 (xxvi), referred to the need to keep 'alien races' under federal control, especially given the changes of the last few years (a reference to the 'Manifesto') and trusted that the Convention would 'set the feet of Australia surely upon the path that will lead her to a place of honour and dignity amongst the nations of our race, establish peace within her borders and lay deep and well the foundations of our industrial prosperity that knows no tint of shame'.[108] For him, too, s 51 (xxvi) was obviously about foreign interlopers and not Aborigines.

V CONCLUSION

It might be thought curious that this article needs to be written at all. Many exceedingly important things were excluded from the federal list of powers: education, hospitals, and roads are the most obvious examples. From the perspective of the late nineteenth century, railways were an equally if not more important topic but were also excluded, with the exception of a few sundry heads of power merely scratching the surface and mostly requiring the consent of the States anyway. Today there continue to be express exclusions from otherwise unlimited powers, like that found in s 51 (xxvi) until 1967, for State banking and insurance. No-one suggests that all these topics were excluded from federal powers because they were unimportant or so that they could be downgraded or discriminated against somehow. They were just not thought suitable for federal control for a variety of mostly obvious reasons, so that, again, there was no serious debate about the possibility of including hospitals, for example, within federal powers.

As Griffith QC said at the very start of the Federation decade, at the Conference of 1890:

> There are some things which, it is quite clear, the separate provincial governments cannot do properly or efficiently, although they may do them in

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105 McMillan, 'Some Factors of Federation' in Shirley (ed.), *Report of the Sixth Meeting of the Australasian Association for the Advancement of Science held at Brisbane, Queensland, January 1895* (The Association, Sydney 1895), 701f.

106 See above n 53.

107 William Andrews and Co., Sydney, 1897, 160-166.

108 At 166.

> some sort of way, [but] it is not intended to transfer to the [federal] executive government anything which could be as well done by the separate governments of the colonies.[109]

Such matters as hospitals, schools, roads, and railways were internal affairs which did not, it was generally thought, require a co-ordinated national response, involve Australia's external relations or borders or connect with any other field in which the Commonwealth was likely to be active[110] — that the Commonwealth has since found ways to poke its nose into these topics is not to the present point.

The exclusion of hospitals and schools, for example, from federal powers does not raise a moral question; it does not suggest that the Founders thought health or education unimportant or, indeed, that the whole human race would shortly die out and there would be no need for hospitals or schools any more; the question was solely an organisational one, and because the answer was obvious under contemporary conditions hardly anything was said about it.

The exclusion of something from the federal list of powers was not, we can now perceive, intended as a downgrading of it. It implied nothing beyond the idea that local rather than federal control was preferable. The federal list of powers was not a list of the most important challenges facing Australian governments in 1900, with everything else of secondary importance and to be discriminated against. It is simply a list of what was thought necessarily or desirably controlled by a central government as things stood at the end of the nineteenth century. The States were not intended as second-rate operations for issues of merely subsidiary importance or short-term challenges that would likely disappear soon. Nor was there any *a priori* basis for suggesting that either they or the Commonwealth would more enthusiastically pursue discriminatory policies of any sort towards anyone.

Faced, then, with the fact that Aborigines were excluded from federal power, we might ask simply: so what? Federal power did not embrace a lot of extremely important topics. All this information tells us is that Aborigines were not thought to be in need of central control. It says nothing at all about their general importance to the people of the day or what policies should be pursued in respect of them. We do not have to look high and low for reasons why Aborigines were excluded, such as their alleged status as a dying race or a desire to ensure that they were more effectively oppressed. We must discard our modern-day assumption that the federal government is predominant and preeminent and perceive that the amendment of 1967 obscured the position at Federation by using the otherwise moribund[111] races power — since the expulsion of most of the Pacific Island labourers in the first decade of Federation, it had been all but redundant — as a peg on which to hang federal responsibility for Aboriginal affairs.

The exclusion from federal power is thus barely in need of explanation at all. But this article has shown clearly that we do have an explanation for it. That explanation is

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[109] Debates of the Federal Conference, 10 February 1890, 10f.

[110] As late as 1927 the Royal Commission on the Constitution, in its *Report* (Government Printer, Canberra 1929), 270, advocated leaving responsibility for Aborigines with the States because they 'control the police and the lands, and they to a large extent control the conditions of industry. We think that a Commonwealth authority would be at a disadvantage in dealing with the aborigines, and that the States are qualified to do so'. On this episode see Paisley, 'Federalising the Aborigines? Constitutional Reform in the Late 1920s' (1998) 111 *Australian Historical Studies* 248. Cf. also Irving, above n 6, 127, who points out that leaving Aboriginal affairs with the States meant that they were left to the 'discretion and judgment of individual officials' — but would not that also have been the case under federal administration?

[111] French CJ, above n 10, 185f.

easily found if one looks for it instead of inventing reasons *ex cathedra* without looking at the data. The races power emerged from the need to regulate and regularise the importation and use of Pacific Island labour, to which were then added more general concerns about the possible influx of other non-white races and the perceived need to maintain White Australia. There may not be a great deal to be proud of in this fact — although we have seen that humanitarian concerns did motivate many of those seeking regulation of Pacific Island labourers — but it is self-evident, and it was self-evident to people at the time that Aborigines were not part of the problem which was to be resolved by the races power, as they were not an imported race on the Commonwealth's borders. There was no discussion in connexion with the drafting of the federal Constitution about what policies could possibly be pursued federally in respect of Aborigines or whether they were a dying race or not because their exclusion from the power did not depend upon such questions. They were the native race of the country and could not be excluded from Australia. They therefore did not belong in a power which assumed the availability of the capacity to regulate entry and to expel. In a backhanded way, Aborigines' exclusion from the races power was an acknowledgement of their special status as Australia's native non-Europeans. It could even be said to be a sort of constitutional recognition for Aborigines.