



ARTICLES

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THE PERILS OF INCLUSION: THE CONSTITUTION AND THE RACE POWER

INTRODUCTION

Constitutionally speaking, Australia has been described as "the frozen continent".¹ Yet on 27 May 1967 the people of Australia demonstrated an historic consensus in their desire to remove a blight on the Constitution.² Their decision to amend s51(xxvi) and strike out s127 of the Constitution was of profound importance to both Aboriginal and non-Aboriginal Australians. The constitutional ramifications of this are still to be worked out. In the current climate, where the issue of the extinguishment of native title has generated considerable political heat, the question of the scope of the Commonwealth Parliament's power to make "special laws" for "people of any race"

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1 Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, Melbourne 1967) p208.

2 See below p126.

remains open. In particular, the question of whether or not s51(xxvi) is now limited to making laws that only operate for the benefit of Aboriginal people requires an answer. This article will assess that question and offer a view as to the constitutional limits of the power.

CONTESTED TERRAIN: JUDICIAL METHOD AND CONSTITUTIONAL INTERPRETATION

The Australian Constitution represents more than the 128 sections that describe, divide and allocate governmental power. Its textual immediacy often masks deep historical, social and theoretical explanations as to its operation. The question of how the Constitution should be interpreted has provided an arena for both judicial³ and academic⁴ consideration. Sir Anthony Mason recently captured the current state of Australian interpretative debate when he noted that "[i]n this day and age, there are few certitudes in constitutional interpretation."⁵ Gone, it would appear (if it ever really existed), is the authority of what Sir Owen Dixon called "strict and complete legalism".⁶ Its demise can, to some degree, be accounted for by the success of the legal realist movement in Australian legal circles.⁷ The description of Australia's judicial method as a "species of legal realism"⁸ has brought with it a greater acknowledgment of the place that a sensitivity to policy considerations now plays in the interpretation of the constitutional text. One of the upshots of the critique of the legal realists is that constitutional interpretation is now contested terrain, with a number of perspectives on what *is* the most appropriate method of giving meaning to the document.

A constitution is by its very nature an "incompletely theorized convergence on an abstraction".⁹ It represents an agreement as to words, though the exact meaning of those words or the theoretical understanding which those words represent remains uncertain. For example we know that the Australian Constitution contains within it the textual requirements of a federal system and a separation of powers. Yet, the actual type of federation (centralised or decentralised) or the degree of separation (strict or functional)

3 For example see "Swearing in of Chief Justice Dixon" (1952) 85 CLR xi at xiv where he made his now famous "strict and complete legalism" statement. See also *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 17 per Barwick CJ.

4 Sampford & Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, Leichardt 1996).

5 Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Sampford & Preston (eds), *Interpreting Constitutions* p13.

6 As above, fn3.

7 The issue of the influence of Julius Stone on Sir Owen Dixon is taken up by Blackshield, "The Legacy of Julius Stone" (1997) 20 UNSW LJ 215 at 225-237.

8 Mason, "The Role of the Courts at the Turn of the Century" (1993) 3 JJA 156 at 164.

9 Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, New York 1996) p171.

was at 1901 "incompletely theorized". As J La Nauze stated when discussing the framers and their constitution:

They knew that they could not provide such detailed instructions that the verdict in a thousand particular disputes in an indefinite future would rarely be in doubt; this, in Barton's words, was "a Constitution, not a Dog Act".¹⁰

The task of interpretation is in large measure "to construe the unexpressed".¹¹ This article proposes that, in broad terms, the current debate as to how the Constitution should be interpreted can be divided into three models. They are: first, some form of original intent, secondly textualism and thirdly a "living force" or contemporary values approach. In recent cases members of the High Court have invoked all three approaches. Thus it can be concluded that no approach has proved itself to be exclusive of another.¹² Before turning to their role in the interpretations of s51(xxvi) of the Constitution we would like to lay out the various approaches or models and to highlight their reputed strengths and weaknesses.

Original Meaning and Original Intent

The interpretation of a constitution based on its original meaning or the original intent of the framers of the document has caused much academic debate in the United States and to a lesser degree in Australia. What is meant by "originalism" and how that differs from "intentionalism" is a problematic issue. There is a distinction between an originalism that concentrates on the text, and an original intent that focuses on the intention of the authors of those words. Whilst it is possible to draw a distinction,¹³ there is often slippage in the use of these terms. Moreover, the meaning of a term or a phrase may be the subject of various intentions. For example, as Quick and Garran note in their discussion of s90, the "primary meaning" of "excise" in England was different from the "secondary" meaning in colonial Australia, the meaning "in which the expression was intended to be used in the Constitution of the Commonwealth."¹⁴ Notwithstanding the problems associated with the terminology of "originalism" or "original meaning", it is an approach that has been accepted in some academic and judicial circles as one mode of constructing meaning.

What do we mean by "originalism"? According to Robert Bork, one of its chief protagonists, the approach may be reduced to a single guiding principle.

10 La Nauze, *Making of the Australian Constitution* (Melbourne University Press, Melbourne 1972) p270.

11 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

12 Though Dawson J has rejected what might be called a "living force" approach taken by other members of the Court: *McGinty v Western Australia* (1996) 186 CLR 140 at 182-3.

13 Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Sampford & Preston (eds), *Interpreting Constitutions* pp14-15.

14 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901) p837.

All that counts is how the words in the Constitution would have been understood at the time [of its drafting]. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.¹⁵

Robert Bork is adamant that the meaning of the words is not a search for the subjective intention of the authors.¹⁶ Much of the slippage in the use of originalism or intentionalism, as was noted above, occurs at this point. For instance, Frederick Schauer's definition of "originalism" suggests a degree of subjectivity. He says that: "Prescriptive language is to be understood by reference to evidence of the actual, contemporaneous mental states of the inscribers of the language at issue."¹⁷ Such a definition appears to encompass the very subjective meaning which Bork rejects. Many of the problems of definition capture the fact that "originalism" and what might be called "intentionalism" represent points on the same interpretative spectrum. Leaving to one side definitional problems, the key focus of "originalism" is upon the words of the text at the point of drafting. It is this fact that remains one of the greatest strengths of originalism and, as we will see, one of its greatest weaknesses. The concentration on the words of the text offers a powerful legitimacy to the process of interpretation. For originalists the authority of the original meaning of the words wards off accusations of "top-down" reasoning and provides a limiting focus for judicial inquiry.¹⁸ Thus supreme constitutional authority is to be found in the fixed meaning of the words of the Constitution at the time of its construction.

Originalism is analogous to orthodox methods of statutory interpretation and construes the words with regard to their original meaning supplemented by arguments developed from the context and the structure of the Constitution.¹⁹ Within the originalist position changes in social reality can be accommodated by the adoption of a number of interpretative methods. In the Australian context these include the construction of the words of the Constitution with a broad generality²⁰ and the development of the connotation/denotation

15 Bork, *The Tempting of America* (The Free Press, New York 1990) p144.

16 As above.

17 Schauer, "Defining Originalism" (1995) 19 *Harv JL & Publ Pol* 343.

18 In *McGinty v Western Australia* (1996) 186 CLR 140 at 232 McHugh J stated that "[t]op-down reasoning is not a legitimate method of interpreting the Constitution". He cited as authority for this view an article by Justice Posner, "Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) 59 *U Chi L Rev* 433.

19 Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Sampford & Preston (eds), *Interpreting Constitutions* p14. See also *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 112 where the Court notes that the scope of "representative government" is to be determined with regard to the constitutional "text and structure".

20 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 356-358 per O'Connor J.

distinction.²¹ Both of these methods hold true to the essential original meaning of the words whilst expanding their scope to deal with circumstances that did not exist at the time of their adoption.²² Critics of originalism have pointed to the obvious fact that often the words are not as clear as the theory would suggest. As Mason states "originalism is deceptive in that it claims very much more than it can deliver".²³

The other form of originalism, and one more adapted to the relative "silences" in the Constitution, is "original intent". As the name suggests, where the actual meaning of the words remains unclear the Court may have recourse to the intentions of the framers. The advantages of such an approach is that it provides a powerful legitimacy to the curial process. What greater authority could there be for the meaning of particular words than their authors? The process, it is argued, offers an objective and legitimate standard that non-originalism does not.²⁴

In the Australian context recourse to the intentions of the framers, as captured in the Convention Debates, was until recently denied.²⁵ However, since *Cole v Whitfield*²⁶ the use of historical material such as the debates has been used in a number of High Court decisions. Historical material may be consulted by the Court

for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.²⁷

The weakness in the original intent approach is that often there are silences as to the intention.²⁸ A related problem is the use of history in the hands of the legally trained.²⁹

21 *R v Brislan; ex parte Williams* (1935) 54 CLR 262 and *R v Commonwealth Conciliation and Arbitration Commission; ex parte Association of Professional Engineers* (1959) 107 CLR 208 at 267 per Windeyer J.

22 For a discussion of the cases and issues in this area see Zines, *The High Court and the Constitution* (Butterworths, Sydney, 4th ed 1997) pp17-22. With regard to originalism and this method see Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Sampford & Preston (eds), *Interpreting Constitutions* p14 and Goldsworthy, "Originalism in Constitutional Interpretation" (1997) *Fed L Rev* 1 at 31-32.

23 Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Sampford & Preston (eds), *Interpreting Constitutions* p15.

24 Scalia, "Originalism: The Lesser Evil" (1989) 57 *U Cin L Rev* 849 at 862.

25 *Sydney Municipal Council v Commonwealth* (1904) 1 CLR 208 at 213-214.

26 (1988) 165 CLR 360.

27 At 385.

28 As Sir Daryl Dawson has stated, "often the convention debates or history in general throw no light upon the problem": Dawson, "Intention and the Constitution - Whose Intent?" (1990) 6 *Aust Bar Rev* 93 at 101.

29 Schoff, "The High Court and History: It Still Hasn't Found(ed) What It's Looking For" (1994) 5 *PLR* 253.

As Scalia said of an argument based on original intent "[i]t is, in short, a task sometimes better suited to the historian than the lawyer."³⁰

Further, the original intent approach begs the question "whose intent?"³¹ It assumes that it is possible to distil a single or overriding intent when there may be a multitude of them on offer. For instance there were nearly 90 delegates to the Constitutional Conventions over the decade leading up to federation. Which of them do we suggest may be said to represent the relevant intent? In solving the problem of multiple intents should we look at what the group collectively decided? As we will see below with regard to certain provisions in the Constitution, their approval or rejection was sometimes based on slender majorities. Should we require something approaching greater consensus than mere majorities in determining intent? Moreover, what do we do when we establish the intention and it is repugnant to our modern sensibilities? These are but a few of the problems associated with the original intent approach to constitutional interpretation.³²

There remains one other major aspect that may be associated with the revival of "originalism" in America, and to a degree in Australia. It is that underlying some of the endeavours is an attempt to call to task so-called judicial activism. Thus in light of the originalist position Bork can describe the jurisprudence of the Warren Court as "constitutional revisionism"³³ and Craven the recent High Court as an "unfaithful servant".³⁴

Textualism

The notion that the Constitution should be interpreted according to the normal rules of statutory interpretation was adopted in the High Court's very first year. In *Tasmania v Commonwealth* the Court said that "[t]he same rules of interpretation apply that apply to any other written document."³⁵ However, it was also acknowledged that the Constitution was not like any other statute; it was "a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be".³⁶ The difficulty with applying the ordinary rules of statutory interpretation was highlighted during the first two decades of the Commonwealth when, presumably while keeping faithful to this method, the original

30 Scalia, "Originalism: The Lesser Evil" (1989) 57 *U Cin L Rev* 849 at 857.

31 Many of these issues are fully developed in Dworkin, *A Matter of Principle* (Clarendon Press, Oxford 1986) pp38-57.

32 Some of these arguments are discussed by both Bork, *The Tempting of America* ch8 and Goldsworthy, "Originalism in Constitutional Interpretation" (1997) *Fed L Rev* 1 at 25-27.

33 Bork, *The Tempting of America* p130.

34 Craven, "The High Court and the Founders: An Unfaithful Servant" (1997) 30 *Papers on Parliament* 63.

35 *Tasmania v Commonwealth* (1904) 1 CLR 329 at 338.

36 *Attorney-General (NSW) v Brewery Employees of New South Wales (Union Label Case)* (1908) 6 CLR 469 at 612 per Higgins J.

justices of the High Court were able to develop the implied immunities and reserved powers doctrines.³⁷

After 1920 the textual approach to the interpretation of the Constitution became closely associated with the *Engineers Case*.³⁸ The case itself has been criticised for its logical inconsistencies and unexpressed assumptions. Nevertheless, the *Engineers Case* has come to symbolise an approach to the Constitution that has been characterised as "legalistic". That is, an approach that strongly rejects social or political outcomes, or theories of federalism as being relevant to the process of constitutional interpretation. The *Engineers Case* endorses a statutory method of interpretation that concentrates on the express terms of the Constitution. It is this last emphasis on the text that gave rise to a belief that the case ultimately prohibited all implications in favour of some form of barren literalism.³⁹

As the above discussion has highlighted, the text plays a critical role in the interpretative exercise. A good statement of the textualist methodology can be found in McHugh J's judgment in *McGinty*. There he said that:

The Constitution contains no injunction as to how it is to be interpreted. Any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself. But since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means. It must therefore be interpreted by late twentieth century Australians according to the ordinary and natural meaning of its text, read in the light of its history, with such necessary implications as derive from its structure.⁴⁰

The strength in such an approach is that it has the authority of the document itself. Words have meaning, so the argument goes, and that meaning can be found within the document. The irony of this approach is that its perceived strength is also its greatest weakness. Words are often open to numerous interpretations, for instance the phrase "absolutely free" was inserted into s92 of the Constitution with the defence by Reid that "[i]t is a little bit of laymen's language which comes in here very well."⁴¹ History demonstrates that this "little

37 For a discussion of the development of the doctrines see Zines, *The High Court and the Constitution* ch1.

38 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

39 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 133 per Mason CJ.

40 *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

41 *Official Record of the Debates of the Australasian Federal Convention* (hereafter "Debates") Melbourne 1898 (Government Printer, Melbourne 1898) p2367.

bit of laymen's language" took on a life of its own and provided, until *Cole v Whitfield*,⁴² anything but clarity.

The "living force" or contemporary values

In 1901 Andrew Inglis Clark published his *Studies in Australian Constitutional Law*.⁴³ In the second chapter of the work he outlined his belief as to how a written constitution should be interpreted. He said:

This method of interpreting a written constitution cannot be properly said to be characteristic of either a liberal or a strict construction of the instrument. The basis of it is the recognition of the fact that the Constitution was not made to serve a temporary and restricted purpose, but was framed and adopted as a permanent and comprehensive code of law, by which the exercise of the governmental powers conferred by it should be regulated as long as the instruments which it created to exercise the power should exist. But the social conditions and the political exigencies of the succeeding generations of every civilized and progressive community will inevitably produce new governmental problems to which the language of the Constitution must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by the future generation, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.⁴⁴

Inglis Clark presents us with a wonderful irony. He has been described as the "primary architect of the Constitution"⁴⁵ and thus would be an individual whose views would surely be important for those who wish to make an original intent argument. Yet, when we look to Inglis Clark he instructs us to look not to the past but to the present. Inglis Clark's views were given prominence by Justice Deane in his judgment in *Theophanous*.⁴⁶ Commenting on the "living force" argument Deane J said that the Constitution must be construed so as to represent the will and intentions of all contemporary Australians.⁴⁷ In

42 (1988) 165 CLR 360.

43 Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, Sydney 1997).

44 At pp20-21.

45 *Theophanous v Herald & Weekly Times Ltd* (1993) 182 CLR 104 at 172 per Deane J.

46 As above.

47 At 173.

the context of the case, Justice Deane said that in determining the content of "representative government" the Court must "take full account of contemporary social and political circumstances and perceptions".⁴⁸

One of the striking features of the "living force" approach to constitutional interpretation is that it incorporates evolutionary standards. In *Cheatle v R* the question before the Court was whether or not the requirements of a jury trial contained in s80 of the Constitution were infringed by South Australian legislation that allowed for majority verdicts.⁴⁹ In their discussion of the characteristics of trial by jury in 1900 the Court acknowledged that some of those aspects are now inconsistent with the "generally accepted standards of a modern democratic society".⁵⁰ In particular, the judges noted the property qualification and the exclusion of women from service on juries. In rejecting the 1900 understanding of trial by jury the Court stated that

[i]t would, however, be absurd to suggest that a requirement that the jury be truly representative requires a continuation of any such exclusion in the more enlightened climate of 1993. To the contrary, in contemporary Australia, the exclusion of females and unpropertied persons would be in itself inconsistent with such a requirement.⁵¹

Similar arguments were put in *McGinty*⁵² where the meaning of the concept "chosen by the people" in ss7 and 24 of the Constitution was considered. In their judgments Chief Justice Brennan and Justices Toohey, Gaudron and Gummow noted the dynamic and evolving nature of Australia's representative democracy.⁵³ It was this evolution that would, in the judgment of Toohey, Gaudron and Gummow JJ, and arguably also in the view of Brennan CJ, prevent the return of a form of representative government that did not include a modern notion of democracy. Justice Toohey explicitly linked this conclusion with the "living force" doctrine. He said that

the Constitution cannot be frozen by reference to the year 1900 or thereabouts. The Constitution must be construed as a living force and the Court must take account of political, social and economic developments since that time.... [A]ccording to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy.⁵⁴

48 At 174.

49 *Cheatle v R* (1993) 177 CLR 541.

50 At 560.

51 At 560-561.

52 *McGinty v Western Australia* (1996) 186 CLR 140.

53 On representative democracy as a dynamic concept, see Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Fed L Rev* 35 at 50.

54 *McGinty v Western Australia* (1996) 186 CLR 140 at 200-201.

Likewise Gaudron J stated that:

Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as "chosen by the people" within the meaning of those words in ss7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.⁵⁵

Justice Gummow noted that the "evolution of representative government" meant that universal adult suffrage was now a characteristic of popular election "which could not be abrogated by reversion to the system which operated in one or more colonies at the time of federation."⁵⁶ Chief Justice Brennan said that "[i]n view of the fact that the franchise has historically expanded in scope, it is at least arguable that the qualification of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote".⁵⁷

The above expressions of the Constitution as a "living force" raise the complex problem of the way in which the "contemporary" standards are to be determined. The debate as to what "community standards" are and what values are enduring or temporal and how they should be used to shape Australian law is an ongoing one.⁵⁸ In 1957 Sir Owen Dixon noted that the common law was the "ultimate constitutional foundation" and that "constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, form not the least essential part".⁵⁹ This statement was later clarified by three Justices in *Theophanous* when they noted that the "antecedent common law can at most be a guide" in determining what is necessary for the working of the Constitution and its principles.⁶⁰

In *Mabo (No 2)* Justice Brennan made a definitive statement with regard to the common law and contemporary values. He said that "the common law should neither be nor seen to

55 At 221-222.

56 At 287. A similar statement is made by McHugh J in *Langer v Commonwealth* (1996) 186 CLR 302 at 342.

57 At 166-167.

58 See Braithwaite, "Community Values and Australian Jurisprudence" (1995) 17 *Syd LR* 35; Ziegert, "Judicial Decision-Making, Community and Consented Values: Some Remarks on Braithwaite's Republican Model" (1995) 17 *Syd LR* 372 and Braithwaite, "A Reply: Broadening Disciplines that Dull as Well as Sharpen" (1995) 17 *Syd LR* 397. See also Brennan, "Courts for People - Not People's Courts" (1995) 2 *Deakin LR* 1 at 7.

59 Dixon, *Jesting Pilate* (Law Book Co, Sydney 1965) pp212-213.

60 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126 per Mason CJ, Toohey and Gaudron JJ. See *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 108-112 where the Court discusses the relationship between the "one common law in Australia" and the Constitution.

be frozen in an age of racial discrimination" and that the rejection by the international community of the doctrine of terra nullius was in "accord in this respect with the contemporary values of the Australian people."⁶¹ This later point will be taken up in the last section of the article concerning s51(xxvi) where a link will be made between changes in the common law which reflect community standards and the interpretation of the Constitution.

Summary

These then are the three models that have been the mainstay of constitutional interpretation in Australia since federation. As has been suggested, none of these models has proved to be exclusive of another. Indeed Goldsworthy has argued that the High Court has been deft in "side-stepp[ing] or den[y]ing" the intention of the framers in favour of other means of interpretation when they felt it appropriate to do so.⁶²

This article does not claim that these are the only, or indeed the preferred, methods of interpreting our Constitution. Rather, we have chosen to focus our inquiries on those methods that have been endorsed by members of the Court since 1903. The purpose of laying out the models is to provide a framework for the interpretation of s51(xxvi). The next section will investigate the historical material related to the section as a way of appreciating its place in the Constitution. In terms of the above models such an inquiry will be critical for any interpretation based on originalism and of some importance for the "living force" approach. The second approach, textualism, of course would not necessarily rely on this historical material.

THE HISTORICAL BACKGROUND TO SECTIONS 51(xxvi) AND 127

This next section will be divided into four parts dealing with the historical background of ss51(xxvi) and 127. It begins with the formation of the Constitution and ends with the referendum in 1967. The purpose of this historical sweep is to build an account of the intentions of the framers, and those who proposed amendments to the Constitution.

Federation and Australian Aborigines

As the centenary of Federation draws near, it is important not only to reflect on the road to Federation, but also the distance that we as a nation, have travelled. In 1901 the Australian Constitution enshrined the state of race relations in this country. Two sections expressly made mention of Aboriginal Australians and their place in the life of the nation.

61 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 41-42.

62 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) *Fed L Rev* 1 at 2.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- ...

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

and

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

How did these sections get into the Constitution? And what was their effect? In an article published on the eve of the 1967 referendum Geoffrey Sawer noted that the framers of the Constitution "paid ... little attention to [the Aborigines'] position".⁶³ While this next section will traverse much of the same ground that Sawer has covered, it will do so as a means of establishing the intentions of the framers with regard to ss51(xxvi) and 127. As Sawer himself made clear the Convention Debates provide us with "contemporary evidence" of the thoughts of the framers. However, when he was writing in 1966 the High Court limited recourse to such material.⁶⁴ The denial of the Convention Debates was, as Sawer indicated, "absurd".⁶⁵

Section 51(xxvi)

The debate as to the meaning of what became s51(xxvi) commenced in Sydney in 1891. When clause 53 (as it was) was discussed in Committee the key point of dispute amongst delegates was whether or not the clause as it stood would limit the capacity of the States.⁶⁶ Thynne, for instance, argued that the States must retain the power of "excluding from the franchise any particular race or class of people whom they think it is undesirable...[to have]...entrusted with the franchise."⁶⁷ There was initially some confusion as to whether or not the clause affected that right of the States. Sir Samuel Griffith reassured delegates that

[t]he intention of the clause is that if any state by any means gets a number of an alien race into its population, the matter shall not be dealt with by the state, but the commonwealth will take the matter into its own hands.

63 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Fed L Rev* 17 at 17.

64 *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 at 213-214.

65 Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Fed L Rev* 17 at 22 fn27.

66 See Appendix A as to the original words of what became s51(xxvi).

67 *Debates Sydney 1891* p702.

...
What I have had more particularly in my own mind was the immigration of coolies from British India, or any eastern people subject to civilised powers. The Dutch and English governments in the east do not allow their people to emigrate to serve in any foreign country unless there is a special law made by the people of that country protecting them, and affording special facilities for their going and coming.⁶⁸

During a short debate the question of the effect of the clause on Aborigines was not discussed. Indeed, when reciting the clause during debate Gillies omitted the passage dealing with "aboriginal native race in Australia and the Maori race in New Zealand."⁶⁹ In the end the clause was adopted with the addition (without debate) of the phrase "to whom the parliament of the commonwealth deem necessary" moved by Deakin.⁷⁰

When the clause was next considered in Adelaide in 1897 again no express reference was made to its impact on Aborigines, though the Drafting Committee had removed the phrase "in Australia and the Maori race in New Zealand", acknowledging the fact that New Zealand would not be joining a wider Australasian federation. What discussion there was of the clause came from H B Higgins who stated that he assumed that the power was to "deal with the important question of the exclusion of the kanakas".⁷¹ In resisting Higgins' minor verbal amendments to the clause O'Connor invoked a greater authority. "This is Sir Samuel Griffith's clause. He had a special knowledge of the matter."⁷² Thus it is fair to assume that the intention which Griffith had provided six years before was endorsed in Adelaide.

The clause was not considered in Sydney in 1897. It was not until Melbourne in 1898 that the final major debate as to the meaning of the clause took place. In reconstructing the debate a number of themes are present in the minds of those framers who discussed the clause.

The first, and most obvious issue, was that of race. As Barton stated "[t]here are few questions of more importance" than the capacity of the Federal Parliament to deal with this subject.⁷³ The colonial representatives were all keen to have recorded for posterity the

68 At p702-703.

69 At p703.

70 At p704. Clearly, this is an important amendment. We would argue that it is for the Commonwealth to determine whether or not a particular circumstance requires a legislative response. However, as with all heads of power, that response must be within the scope of the power otherwise the Parliament could effectively recite itself into power: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 258 per Fullagar J.

71 *Debates Adelaide 1897* p831.

72 At p832.

73 *Debates Melbourne 1898* p238.

types of legislation that they had passed to deal with their various racial groups. Mr Isaacs told delegates that in Victoria they should be free to pass legislation to regulate Afghans and their access to hawkers' licences. He also raised the example of the use of Chinese labour in factories.⁷⁴ Braddon from Tasmania likewise noted the "grave question" of "Hindustanese" and hawkers' licences.⁷⁵ Sir John Forrest boasted that his colony had prevented "Asiatic or African alien[s]" from acquiring miners' licences and that they had also prevented these races from going into townships in the goldfields.⁷⁶ According to Barton the original intent of the section "was to deal with the affairs of such persons of other races - what are generally called inferior races, though I do not know with how much warrant sometimes - who may be in the Commonwealth at the time it is brought into existence."⁷⁷

The second theme, and one not unrelated to the first, was the question of protectionism. The type of economic union for the new Federation and the effect it might have on the various colonial economies had been a highly problematic issue for the framers of the Constitution. The influx of cheap labour was clearly of concern for those delegates from colonies with established manufacturing sectors. As Trenwith, the only representative of the labour movement, pointed out to his fellow delegates, the need for legislation dealing with aliens differed in the various colonies.⁷⁸ He went on to note that Victoria alone had factory legislation that "affects the Chinese in a manner such as no other colony has yet thought it necessary to affect them."⁷⁹ The "Chinese question", as Walker described it, was an issue that underlined the discussion on the control of cheap labour during the Convention.⁸⁰ Similarly the economic position of Queensland with its "black labour" gave some delegates cause to pause and consider the likelihood of uniform legislation for the regulation of aliens.⁸¹

A third theme that is apparent in the discussion of the clause is the greater issue of citizenship. At the time of the debate over clause 53 the Melbourne Convention had before it clause 110 which Inglis Clark, the then Attorney-General of Tasmania, had proposed at

74 *Debates Melbourne 1898* pp227-228.

75 At p233.

76 At pp240-241. Presumably Forrest was discussing s92 of the *Goldfields Act 1895 (WA)* which stated:

Any Asiatic or African alien found mining on any Crown land shall be liable for every such offence to a penalty not exceeding Ten pounds and the warden shall in his discretion cause such person to be removed from any goldfield and whether such person has or has not been prosecuted for an offence against the provisions of this section.

77 *Debates Melbourne 1898* p228.

78 At p235.

79 At p236.

80 At p254.

81 See Wise at p230 and Deakin at p231.

the 1891 Convention and which was modelled on the Fourteenth Amendment to the Constitution of the United States. The clause stated that:

A state shall not make or enforce any law abridging any privilege or immunity of citizens of other states of the Commonwealth, nor shall a state deny to any person within its jurisdiction the equal protection of the laws.

Inglis Clark was later to move, through the Tasmanian Parliament, an amendment to this clause so as to extend its operation to include the protection of "life, liberty, or property with due process of law".⁸² When dealing with the "race power" John Quick for one noted that clause 110 would stand in the way of a citizenship that was based on exclusion.⁸³ Higgins went further, giving a practical example of the effect of clause 110. He said, "[i]t has been held under a provision such as this that you cannot cut a Chinaman's pigtail off".⁸⁴

The issue of citizenship became closely linked with the question of discrimination. In a somewhat enlightened comment for the time Kingston made it clear that the race power should not be used to draw distinctions between various races with one exception.

Mr Kingston.- I think it is a mistake to emphasize these distinctions. Keep these coloured people out if you do not want them here, but if you admit them and do not want them to be a standing source of embarrassment in connexion with your general government, treat them fairly, and let them have all the rights and privileges of Australian citizenship.

Sir John Forrest. - Would you give them the right to vote?

Mr Kingston.- I do not think we ought to give them the right to vote.⁸⁵

Ultimately, the issue of race and citizenship would prove to be the critical factor in the decision of the framers not to adopt the "bill of rights" proposed by Inglis Clark.⁸⁶

A final theme that emerged during discussion of the "race power" had ramifications for colonial interests. This issue was essentially one of federalism. What sphere of government was to have ultimate authority to pass legislation dealing with particular

82 For an account of the attempt to include this section in the Constitution see Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment'" (1996) 42 *Aust J Pol & Hist* 10.

83 *Debates Melbourne* 1898 p246.

84 At p246.

85 At p247.

86 Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment'" (1996) 42 *Aust J Pol & Hist* 10.

racess? A close reading of the debates highlights the shifting views of the delegates as each supported either exclusivity to the new Commonwealth, the States or concurrence between the two.

In the discussion of the clause there is no recorded view as to its effect on Aborigines. From today's standpoint it would appear astonishing that our original constitutional "race debate" did not include any mention of Aborigines. Turning to the other section in the Constitution that expressly mentions Aborigines we find a similar lack of engagement on the part of the framers.

Section 127

The genesis of s127, as with s51(xxvi), can be found in a proposal by Sir Samuel Griffith on the second last day of the 1891 Sydney Convention. In introducing the new clause Griffith made no mention as to why Aborigines were specifically excluded from the determination of the population.⁸⁷ Chapter VII clause 3 stated that:

In reckoning the number of people of a state, or other part of the commonwealth, the aboriginal natives of Australia shall not be counted.

The clause was agreed to without discussion.⁸⁸ The next discussion of the clause took place at the Adelaide Convention in 1897 where there was a hint as to the reason behind the exclusion of Aborigines from the census. Commenting on the clause, Dr Cockburn agreed with the general sentiments of others as to the need for the section and added that with regard to those "natives who are on the rolls... they ought not to be debarred from voting".⁸⁹ Deakin, who next spoke, made the link between the census data and the quota for representation in the Commonwealth Parliament. He said, however, that the "aboriginal population is too small to affect that in the least degree".⁹⁰ The other link that was made between Aborigines and the census was expenditure. As Walker said:

[W]hen we come to divide the expenses of the Federal Government *per capita*, if he [Dr Cockburn] leaves out these aboriginals South Australia will have so much the less to pay, whilst if they are counted South Australia will have so much the more to pay.⁹¹

Having made these points the Committee agreed to the clause without division. It would thus appear there was a link made between the Aboriginal population and representation and expenditure. However, if this explanation was to provide some clarity on the issue it

87 *Debates Sydney 1891* pp898-899.

88 See Appendix B.

89 *Debates Adelaide 1897* p1020.

90 As above.

91 As above.

was soon disavowed the following year in Melbourne. By 1898 the various colonial parliaments had considered the draft Bill and made suggested amendments. With regard to s127 the Committee had before it two amendments from the Legislative Council of New South Wales and the Legislative Council of Tasmania which sought to insert "and aliens not naturalized" after the word "natives".⁹² When discussing these amendments Barton made it clear that the section was not connected with the determination of electors or finances. Those issues, he indicated, were covered in other clauses of the draft Constitution, which ultimately became s25 of the Constitution. He assured the delegates that the purpose of the clause was "solely to the reckoning of the number of people of a state when the whole population has to be counted, and where it would not be considered fair to include the aborigines."⁹³ There was no further debate and the amendments proposed by New South Wales and Tasmania were rejected.

The last amendment to the section occurred after the fourth report when the words "of the Commonwealth or" were inserted after "people".⁹⁴ The section as it appears in the Constitution was finally adopted by the Melbourne Convention.

Federation and Race

From the above account it would appear that Aboriginal people were in the background when the framers turned their minds to s51(xxvi). With respect to s127 there appears to be a confusion between the delegates as to what was being achieved. If we look to contemporary constitutional authors to clarify the issue there are similar silences. John Quick and Robert Garran in their *Annotated Constitution of the Commonwealth of Australia*⁹⁵ when discussing the two sections briefly summarise the Convention Debates. In terms of s51(xxvi) they note that the Commonwealth Parliament is empowered

to deal with the people of any alien races 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.⁹⁶

This last point picks up on comments made by Griffith at the 1891 Convention regarding the protection of British and Dutch subjects working overseas. What is clear in their summary of the section is that the main objective of the power was to authorise discrimination on the basis of race. Indeed, they give the example of the Fourteenth

92 *Debates Melbourne 1898* p713.

93 As above.

94 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* p984.

95 As above.

96 At p622.

Amendment of the United States Constitution that would have prevented such discrimination and conclude that:

There is no section in the Constitution of the Commonwealth containing similar inhibitions. On the contrary it would seem that by sub-sec. xxvi. the Federal Parliament will have power to pass special and discriminating laws relating to "the people of any race," and that such laws could not be challenged on the ground of unconstitutionality, as was done in *Yick Wo v Hopkins*.⁹⁷

The case mentioned, *Yick Wo v Hopkins*,⁹⁸ had been first produced by Isaac Isaacs in his argument against the adoption of the Tasmanian Amendment based on the Fourteenth Amendment. The case itself involved an ordinance of the City and County of San Francisco which denied laundry licences to Chinese. The ordinance was held to be unconstitutional by the Supreme Court in that it violated the "equal protection" clause of the Fourteenth Amendment. In addressing delegates in Melbourne in 1898 Isaacs cited the case and warned that if the amendment was adopted "[y]ou could not make any distinction between these people [Chinese] and ordinary Europeans".⁹⁹

Apart from these conclusions as to the capacity of the Commonwealth to use the power to discriminate on the basis of race, Quick and Garran make no comment on the relation between the section and Aborigines. Turning to their discussion of s127 there is a similar lack of information to be gleaned from their account. They briefly give an historical note which does not offer any reason for the exclusion of Aborigines from the operation of the section. What mention of "aboriginal natives" there is involves the reproduction of a table that purports to "show the number of aborigines enumerated or believed to exist in each Australasian Colony in 1891".¹⁰⁰

If we turn to the other constitutional authors of federation there is similarly little to be gained. Andrew Inglis Clark in his *Studies in Australian Constitutional Law* published in 1901 and 1905 made no direct reference to Aborigines apart from noting that s51(xxvi) was a concurrent power.¹⁰¹ William Harrison Moore in his work *The Constitution of the Commonwealth of Australia* published in 1902 and 1910 noted that s51(xxvi) enabled the Commonwealth to deal with

the various race problems which arise in different parts of Australia, and enables the Parliament to establish laws concerning the Indian, Afghan,

97 At p623.

98 (1886) 188 US 356.

99 *Debates Melbourne 1898* p669.

100 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* p984. The total Aboriginal population was estimated at 59 603.

101 Inglis Clark, *Studies in Australian Constitutional Law* p88.

and Syrian hawkers; the Chinese miners, laundrymen, market-gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia.¹⁰²

In terms of s127 he noted that it was "suggested by the Fourteenth Amendment (sec. 2) to the United States Constitution."¹⁰³ The section in the American Constitution states that:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

The only other reference to Aborigines noted their exclusion from voting under the *Commonwealth Franchise Act* 1902.¹⁰⁴

How do we assess this general oversight on the part of the framers with respect to Aborigines? We would argue that while there is a general disinterest in the plight of Aborigines there is keen concern by the framers on the issue of race. The framers were united in their wish to empower the Commonwealth to deal with people of any race. If we look at the debates it becomes clear that there is a bifurcation of the intended use of the power. Most discussion focused on the capacity of the Commonwealth to discriminate in a negative way with respect to the "undesirable" races.¹⁰⁵ Thus the Commonwealth could take up the role, if it so desired, to pass legislation with respect people of any race. What is also clear following Griffith's introduction of the power is that it was intended to have a beneficial element to it as well. This would, as Griffith said, allow for "special" laws for the subjects of nations that would not allow them to travel to Australia without some protection. As Griffith's examples indicate these were the people of the "Dutch and English governments in the east".¹⁰⁶ As to Aborigines there is very little comment.

The next section of this article will attempt to reconstruct the intention of the framers by reviewing post-Federation material that touches on the issue.

Federation to 1967

Royal Commission on the Constitution 1929

The first major review of the Constitution after Federation was initiated by the Bruce government in 1927. The Royal Commission consisted of seven members chaired by JB

102 Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, Sydney 1997) p464.

103 At p118.

104 At p126.

105 *Debates* Melbourne 1898 p665-666.

106 As above, fn68.

Peden and reported in December 1929.¹⁰⁷ The terms of reference of the Commission involved an inquiry into "the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation".¹⁰⁸ In particular the Commission inquired into ten areas,¹⁰⁹ though it also addressed other issues relating to the operation of the Constitution. One question that counsel assisting the Commission, Mr HS Nicholas, put to the Commission involved the issue of the status of Aborigines under the Constitution. As he said:

The only question I submit to the commission is whether that exception of aboriginal races should not now be deleted [from s51(xxvi)].... I know it has been suggested from time to time that dealing with the aboriginal races is properly a Commonwealth function. It is a function upon which the good name and reputation of Australia very greatly depend, and I suggest that it is worthy of the commission's consideration.¹¹⁰

The Commission sat in Canberra and every State capital (as well as some regional centres). It examined 339 witnesses and collected two volumes of evidence. Those who gave evidence to the Commission on the issue of Aborigines may be divided into three groups. The first represented those witnesses who offered general opinions on the Constitution. The second group offered an opinion on social matters including Aborigines. The last group limited their comments solely to the issue of the Aborigines.

The first group included Richard Windeyer, Philip David Phillips, HB Higgins, Edward Angelo, and Josiah Henry Symon. Higgins and Symon had both been delegates to the Constitutional Convention and presumably would have had intimate knowledge as to the intention of s51(xxvi). Higgins offered little insight, saying that:

With regard to the aborigines, I regard it as our duty as a nation to look after those whom we have dispossessed, but, at the same time, it by no means follows that, because a Protector of Aborigines is employed by the Commonwealth, he would necessarily do his work better than if he were employed by the State....I pass those things [the question of responsibility] by saying I do not commit myself to any opinion about them.¹¹¹

107 The membership was The Hon JB Peden KC, MLC, Senator PP Abbott, TR Ashworth, The Hon EK Bowen, MP, The Hon Sir HP Colebatch KB, MB Duffy, and The Hon DL McNamara MLC.

108 Aust, *Royal Commission on the Constitution (Peden, Chair) Report* (1929) p1.

109 Aviation, company law, health, industrial relations, interstate commission, judicial power, navigation law, new states, taxation and trade and commerce.

110 Aust, *Royal Commission on the Constitution of the Commonwealth (Peden, Chair) Report of Proceedings and Minutes of Evidence* (1927) p31.

111 At p435.

Symon went further, noting that he gave his "strong support" to the proposal to allocate power to the Commonwealth saying that:

there should be adequate humane provision for the aboriginal inhabitants of this country. They are the original owners of the soil, and the cruelties and ill-treatment and the want of care and so on to which they have been exposed have awakened a strong feeling of sympathy.¹¹²

He continued by proposing the creation of an Aboriginal "State" along the lines of the Indian reserves in the United States.

The other two witnesses who addressed the question of constitutional responsibility gave somewhat conflicting opinions. Windeyer supported the transfer mainly on the basis that it was a subject that required a national policy.¹¹³ Phillips in his evidence felt that the section should be struck out altogether stating: "You may ask whether the advantages of special legislation for special races are not so dangerous as to make it advisable to exclude that power altogether."¹¹⁴

The second group that gave evidence to the Commission consisted of three women's groups representing the Victorian Women Citizen Movement, the National Council of Women and the Women's Non-Party League of Tasmania. Mrs Edith Emily Jones from the Victorian Women Citizen Movement gave a passionate account of the need for social reform on many fronts including marriage, divorce, education and affirmative action. In respect of Aborigines she believed that the Commonwealth was best able to protect their interests.¹¹⁵ Mrs Clara Rutherford representing the National Council of Women stated that there should be a transfer as "[t]here is always a lot of local prejudice and local influence. In the Federal atmosphere they would disappear."¹¹⁶ Mrs Edith Waterworth from the Women's Non-Party League echoed the thoughts of the other women's groups acknowledging the need for a Commonwealth response to the question.¹¹⁷

The last group of witnesses represented the bulk of evidence on the question. These witnesses came from three major groups. The first were from the various State Aboriginal protectorates. The second were from a number of church missionary societies or protection societies. The last group represented the pastoralists. Evidence was again mixed on the best way to proceed. Generally the pastoralists did not see the need for a transfer of power. The church groups took the contrary view, with the State protectorates

112 At p1084.

113 At p223.

114 At p771.

115 At p334.

116 At p626.

117 At p918.

supporting the approach of their various governments. Of those who favoured the transfer of responsibility a number of reasons emerge.

The first of these, and perhaps the most critical in understanding the framers' intention as to the section, was explained by Mr Auber Octavious Neville, the Chief Protector of Aborigines for Western Australia. In reviewing the Convention Debates and s51(xxvi) he noted:

From this it will be seen that the aboriginal race was deliberately excluded. The Constitution finally adopted contained only a slight reference to the indigenous race, in section 51 (xxvi.). One can only conclude that in the earlier stages of the discussions it was assumed that the natives were so few in number and so rapidly dying out that it was not worth while creating provision for their control by the National Government.¹¹⁸

According to his biographer, Samuel Griffith was "sympathetic to the Aborigines" though he "probably shared the view of many of his contemporaries that the problems would soon vanish. Meanwhile, he wished to take humanitarian measures, albeit tempered by legalism, for them."¹¹⁹ This may explain the intention behind the absence of Aborigines in Griffith's original draft sections. This point becomes evident in the line of questioning of witnesses before the Commission. Indeed, one of the recurring questions is whether or not the Aboriginal race was dying out.¹²⁰ The overwhelming view of witnesses before the Commission was that they were not.¹²¹ For many witnesses it is this fact that suggested that there was now a need to have a national approach. The Reverend Ernest Richard Bulmer Gribble added an element of moral responsibility on the part of government when he suggested that "[t]he position at the present time is that the States are not bearing an equal burden, they are not bearing the white man's burden so far as the aborigines are concerned."¹²²

The reason for the transfer of responsibility also had an international dimension to it. As Nicholas had noted, the world was watching. Auber Neville made a similar point when he said:

If we are going to save this race we must not lose time in improving our methods, and adopting new ones, giving more time and thought to the matter as a nation deemed capable in the eyes of the world of caring for its

118 At p488.

119 Joyce, *Samuel Walker Griffith* (University of Queensland Press, St Lucia 1984) p115.

120 See for example Aust, Royal Commission on the Constitution of the Commonwealth (Peden, Chair) *Report of Proceedings and Minutes of Evidence* (1927) pp478, 493.

121 One cryptic comment came from Edward Angelo who stated at p658: "Our people are looking after the aborigines very well. The aborigines are fast disappearing."

122 At p1270.

section of the indigenous races within its bounds, and so remove the reproach of the past.¹²³

In general the tone with regard to Aborigines was well-intentioned, but, from a modern viewpoint, highly paternalistic. In the end the majority report of the Commission made no recommendation as to the amendment of s51(xxvi). It did however state that:

We recognise that the effect of the treatment of aborigines on the reputation of Australia furnishes a powerful argument for a transference of control to the Commonwealth. But we think that on the whole the States are better equipped for controlling aborigines than the Commonwealth. The States 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 better qualified to do so.¹²⁴

The minority report of Duffy and McNamara (with which Ashworth concurred) under the sub-heading of "Aborigines, Fauna and Flora, Fisheries and Forestry" made the following statement with regard to Aborigines:

The recommendation regarding aborigines is based upon the responsibility of the nation as a whole to care for the aboriginal native races of this country. It is hardly fair that the burden of caring for the natives should rest upon the States which have small populations but in which the bulk of the natives are, while the more settled States have little or no financial responsibility in the matter. The national Parliament should see that all carried their fair share of burden in respect to the displaced native races, and should accept the responsibility for their well-being.¹²⁵

The Commission made no recommendation as to s127.

Constitutional Review 1959

In May 1956 the House of Representatives and the Senate appointed a Joint Committee to "make recommendations for such amendment of the Constitution as the Committee thought necessary in the light of experience."¹²⁶ The Committee presented its first report in October 1958 and was reconstituted to continue its work in April 1959 presenting its final report to the Parliament later in that year. The membership of the Committee from the House of Representatives included the Prime Minister and Leader of the Opposition, as

123 At p490.

124 Aust, *Royal Commission on the Constitution* (Peden, Chair) *Report* (1929) p270.

125 At p303.

126 Aust, *Joint Committee on Constitutional Review* (O'Sullivan, Chair) *Report* (1959) p1.

ex officio members, Mr Calwell, Mr Downer, Mr Drummond, Mr Hamilton, Mr Joske, Mr Pollard, Mr Ward and Mr Whitlam. The Senate was represented by Senators O'Sullivan (Chair), Kennelly, McKenna and Wright.

The Committee investigated many aspects of the Constitution including the number and terms of Senators, s57, legislative powers with regard to navigation and shipping, aviation, scientific research, nuclear power, communications, industrial relations, corporations, trade practices, economic regulation and transport, new States and procedures related to constitutional alteration.

In its deliberation on the question of Aborigines the Committee limited itself to the operation of s127. In reviewing the section, the Committee suggested a reason as to how it found its way into the Constitution. They concluded that

[a]t Federation, the available means of communication made it almost impossible to obtain an accurate count of the aboriginal population of a State. Some difficulty will continue to be experienced in counting the number of aborigines who do not live in proximity to settlements but the means of communication and available sources of contact with aborigines of nomadic habit have improved so much since Federation that the Committee believes that there are no longer insuperable barriers to the carrying out of a satisfactory census of the aboriginal population of the States.¹²⁷

The Committee heard from a number of groups who supported the removal of the section from the Constitution. In making their submission, representatives of the Australian Federation of Women Voters referred to the Universal Declaration of Human Rights, arguing that the repeal of s127 would be consistent with the principles of the Declaration. While the Committee did not consider the existence of s127 a breach of the Declaration it did concede that the repeal of the section would be consistent with the objectives of the Declaration.¹²⁸ Ultimately the Committee recommended the repeal of s127.¹²⁹

Summary

This then concludes the historical search as to the framers' intention with respect to ss51(xxvi) and 127. What becomes clear from the above accounts is that Aborigines were very much overlooked by the framers when they discussed s51(xxvi). Clearly there is an argument that the reason that Aborigines were excluded from the legislative reach of the Commonwealth in s51(xxvi) was due to a belief, as with other welfare issues, that this was an issue best left to the States. However, the underlying explanation for Aborigines'

127 At p55.
128 At p56.
129 As above.

deliberate exclusion from the Commonwealth's reach can be better understood by reference to the general belief that they were, as Neville testified in 1927, a dying race. Their place was

in the language of social Darwinism, as a natural process of "survival of the fittest". According to this analysis, the future of Aboriginal people was inevitably doomed; what was needed from governments and missionaries was to "smooth the dying pillow".¹³⁰

As such their constitutional imprint was only marginal and indicated that they were to be subjects of the States until such time as they were to be the subjects of history.

As was noted before, the overwhelming (though not exclusive) intention of s51(xxvi) was to discriminate with respect to race. On the whole this was negative discrimination with the small exception of certain groups such as British or Dutch subjects who entered Australia.

Constitution Reform: The Road to Referendum

The first steps towards the constitutional amendment of 1967 commenced on 11 November 1965. On that day the then Prime Minister Sir Robert Menzies introduced the Constitutional Alteration (Repeal of Section 127) Bill 1965 into the Commonwealth Parliament. As the name suggests the government limited its reform agenda to s127 and did not propose to change s51(xxvi). In the second reading speech Menzies noted the report of the 1959 Committee and suggested that the "practical difficulties" of counting the Aboriginal population of 1900 had now been removed and that "section 127 is completely out of harmony with our national attitudes and with the elevation of the Aborigines into the ranks of citizenship which we all wish to see."¹³¹

With regard to the question of why the government had chosen not to amend s51(xxvi) Menzies explained that the words "other than the Aboriginal race in any state" contained in the section were

a protection against discrimination by the Commonwealth Parliament in respect of Aborigines. The power granted is one which enables the Parliament to make special laws, that is, discriminatory laws in relation to other races - special laws that would relate to them and not to other people. The people of the Aboriginal race are specifically excluded from this power. There can be in relation to them no valid laws which would treat

130 Aust, Human Rights and Equal Opportunity Commission, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) p28.

131 Aust, Parl, *Debates* (1965) Vol 48 at 2639.

them as people outside the normal scope of the law, as people who do not enjoy benefits and sustain burdens in common with other citizens of Australia.¹³²

Menzies also elaborated on the original purpose of the section. He said that it should be "remembered that section 51 (xxvi) was drafted to meet the conditions that existed at the end of the last century - for example, the possibility of having to make a special law dealing with kanaka labourers."¹³³ Thus, for Menzies, the section as it stood in 1965 represented a *benefit* for Aborigines as they were presumably beyond the discriminating hand of the Commonwealth. This is an interesting intention to ascribe to the text. Whilst it is clear under the Menzies' view that the Commonwealth could not directly pass legislation with respect to Aborigines, it could not discriminate against them either. Taking such a view, the power to enact legislation under s51(xxvi) could not be seen as discriminatory with regard to Aborigines. At worst it was neutral.

In the debate that followed over the Bill the Labor Opposition supported the removal of the "blot" from the Constitution, however they also wished to see reform to s51(xxvi).¹³⁴ Kim Beazley Snr said that the sections damaged Australia's international reputation and argued for the improvement of the Constitution so that there was "conferred upon the Commonwealth a positive power to make laws for the benefit of Aborigines".¹³⁵ Dr J Cairns likewise was unwilling to accept the Prime Minister's arguments regarding s51(xxvi). He said that:

I do not think we need worry about creating for the Commonwealth power to do something for the Aboriginal people. Surely this is not a legitimate concern or something that we should be unwilling to do. Certainly our overall objective is to treat the Aborigines as on the same footing as the rest of us, with similar duties and similar rights. But surely this is not an argument against providing for the Commonwealth a simple power to be able to do something for the Aborigines.¹³⁶

Perhaps the most interesting contribution to the debate over the Bill came from the member for Mackellar, Mr Wentworth, who described as an "anachronism" those sections dealing with Aborigines in the Constitution.¹³⁷ In his speech he proposed an amendment to the Constitution introducing a new section¹³⁸ that would "establish Australia as a non-

132 At 2638-2639.

133 At 2639.

134 Aust, Parl, *Debates* (1965) Vol 49 p3067 per Calwell.

135 At 3077.

136 At 3079.

137 At 3068.

138 The Wentworth proposal stated that:

Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth of

racial society” but also that would give the Commonwealth a power “to help the Aborigines and would prevent any discriminatory laws against them.”¹³⁹ In the end the Wentworth amendment was not put and the Bill was passed through the House of Representatives without dissent.¹⁴⁰

In March 1966 Mr Wentworth formally introduced his constitutional amendment in the guise of the Constitution Alteration (Aborigines) Bill 1966. The Bill amended s51(xxvi) by omitting the original words of paragraph (xxvi) and adding these words: “The advancement of the aboriginal natives of the Commonwealth of Australia”. Further the Bill created a new section 127A which adopted the language of his previous motion.¹⁴¹ The reasons for the Bill, according to Wentworth, were based on moral and resource realities. Moreover, he said that:

The mere omission of the words [from s51(xxvi)] seems to me to be unsatisfactory for several reasons. First, the sub-section does not say whether the discrimination should be adverse or favourable. If one looks at it one sees some implication, at any rate, that the discrimination would be unfavourable. We do need the power for favourable discrimination; we should not have the power for unfavourable discrimination.¹⁴²

This Bill was supported by all speakers who participated in the debate and many pointed to the need for positive action by the Commonwealth Government. Mr Bryant, for instance, noted:

The position is this: The Aboriginal people are still denied some of the advantages and benefits of being Australians and they will be denied those advantages while this section of the Constitution remains. While anything inhibits Commonwealth action in the field of Aboriginal advancement, the Aborigines cannot receive the full benefits of Commonwealth resources.¹⁴³

In the end the Bill lapsed with the prorogation of Parliament.

Australia to any discrimination or disability with the Commonwealth by reason of his racial origin:

Provided that this section shall not operate so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia.

At 3070.

139 As above.

140 At 3079-3080. When the Bill was put to the Senate it passed without dissent: Aust, Parl, Senate, *Debates* (1966) Vol S30 at 2025.

141 As above fn137.

142 Aust, Parl, *Debates* (1966) Vol 50 at 123.

143 At 132. A similar statement was made by Mr Robinson at 134.

In February 1967 the then Prime Minister Mr Holt made a ministerial statement committing the government to the constitutional procedures required to remove from the Constitution s127 and the words "other than the Aboriginal race in any State" in s51(xxvi).¹⁴⁴ The government declined the proposal of Wentworth on the grounds that it might "complicate the issues".¹⁴⁵ When the Constitutional Alteration (Aboriginals) Bill 1967 was introduced into Parliament the Prime Minister suggested that in regard to s51(xxvi) there had been established an "erroneous" but nevertheless a "deep rooted" view that the words in the section were discriminatory.¹⁴⁶ Notwithstanding this view the Government accepted that if the proposed referendum was approved by the people "the Government would regard it as desirable to hold discussions with the States to secure the widest measure of agreement with respect to Aboriginal *advancement*."¹⁴⁷

In the debate that followed, the Leader of the Opposition, Mr Whitlam, pledged the support of the Australian Labor Party. Whitlam made clear what would be the ramification of the alteration of s51(xxvi). He said that the Parliament

will be able for the first time to do something for Aboriginals - Aboriginals representing the greatest pockets of poverty and disease in this country. The incidence of leprosy, tuberculosis and infant mortality is higher among Aboriginals than among any other discernible section of the world's population and, as we know, the opportunities for Aboriginals even to have education - and certainly to pursue a calling after they have left school - to enjoy good housing conditions and to enjoy good public hygiene are less than those of other Australians. Hitherto it has been impossible for the Commonwealth to do these things directly itself. Hereafter it will be possible for the Commonwealth to provide the Aboriginals with some of that social capital with which most other Australians are already endowed.¹⁴⁸

Mr Wentworth, speaking during the debate, stated that with the amendment the Commonwealth would have the power to discriminate for the benefit of Aborigines. He said: "I think that some discrimination is necessary. But I think it should be favourable, not unfavourable."¹⁴⁹ Mr Bryant continued, stating that he believed that the amendment would give the Commonwealth the chance to address the plight of Aboriginals. He stated his belief "that it is only from the Commonwealth - even with a government such as this - that benefits are likely to flow from the wealth and prosperity of this country."¹⁵⁰ Mr

144 Aust, Parl, *Debates* (1967) Vol 54 at 113.

145 At 114.

146 At 263.

147 As above. Emphasis added.

148 At 279.

149 At 281.

150 At 282.

Beazley Snr stated that "[t]he Commonwealth should have this power because it is the Government which is confronted with the conscience of the world on this issue".¹⁵¹ When the Bill was put it received unanimous support in both the House of Representatives¹⁵² and the Senate.¹⁵³

In summarising the thoughts of those parliamentarians who spoke to the Bill it is possible to say that at the very least they wanted to remove from the Constitution the "erroneous" perception of discrimination. However, the overwhelming view is that they wished to remove the constitutional obstacle so that the Commonwealth could legislate beneficially, especially in the areas of housing, health and education. This was evident when members discussed the aborted attempt by Wentworth to explicitly provide a power dealing with the "the advancement of the aboriginal natives of the Commonwealth of Australia". Notwithstanding that this amendment was not put (primarily to counter the vagaries of constitutional amendment in Australia), the sentiments that it contained were transferred to the decision to omit the words "other than the Aboriginal race in any State" from s51(xxvi).

When the people of Australia voted on the constitutional amendment they were presented with only a "yes" case that had bipartisan support. The case stated:

CONSTITUTION ALTERATION (ABORIGINALS) 1967

Argument in favour of the proposed law

THE CASE FOR YES

The purposes of these proposed amendments to the Commonwealth Constitution are to remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Commonwealth Parliament considers this desirable or necessary.

To achieve this purpose, we propose that two provisions of the Constitution be altered which make explicit references to people of the Aboriginal race.

151 At 285.

152 At 287.

153 Aust, Parl, Senate, *Debates* (1967) Vol S33 at 372.

The first proposed alteration is to remove the words "other than the Aboriginal race in any State" from paragraph (xxvi.) of Section 51. Section 51 (xxvi.) reads:

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

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

The proposed alteration of this section will do two things. First, it will remove words from our Constitution that many people think are discriminatory against the Aboriginal people.

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

This cannot be done at present because, as the Constitution stands, the Commonwealth Parliament has no power, except in the Territories, to make laws with respect to people of the Aboriginal race as such.

This would not mean that the States would automatically lose their existing powers. What is intended is that the National Parliament could make laws, if it thought fit, relating to Aborigines - as it can about many other matters on which the States also have power to legislate. The Commonwealth's object will be to co-operate with the States to ensure that together we act in the best interests of the Aboriginal people of Australia.

The second proposed alteration is the repeal of Section 127 of the Constitution. That section reads:

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

Why was this provision included in the Constitution in 1900? Well, there were serious practical difficulties in counting the Aborigines in those days. They were dispersed, and nomadic. Communications in inland Australia were poor, and frequently non-existent. Today the situation is very different and counting is practicable.

Our personal sense of justice, our commonsense, and our international reputation in a world in which racial issues are being highlighted every day, require that we get rid of this out-moded provision.

Its modern absurdity is made clear when we point out that for some years now Aboriginals have been entitled to enrol for, and vote at, Federal Elections. Yet Section 127 prevents them from being reckoned as "people" for the purpose of calculating our population, even for electoral purposes!

The simple truth is that Section 127 is completely out of harmony with our national attitudes and modern thinking. It has no place in our Constitution in this age.

All political parties represented in the Commonwealth Parliament support these proposals. The legislation proposing these Constitutional amendments was, in fact, adopted unanimously in both the House of Representatives and the Senate. We have yet to learn of any opposition being voiced to them from any quarter.

Just as every available Member of the Commonwealth Parliament voted for the proposals outlined above, we believe that the Australian electorate as a whole will give strong support and endorsement to them.

We urge you to vote YES to both our proposals as to Aboriginals by writing the word YES in the square on the ballot-paper, thus:

YES

This case has been authorised by the majority of those Members of both Houses of the Parliament who voted for the proposed law and was prepared by the Prime Minister, the Rt. Hon. Harold Holt, Leader of the Federal Parliamentary Liberal Party; by the Deputy Prime Minister, the Rt. Hon. John McEwen, Leader of the Australian Country Party; and by the Leader of the Opposition, Mr. Gough Whitlam, Leader of the Australian Labor Party.

As with the debate in Parliament a number of express intentions can be found in the "yes" case. First, the amendments were to remove any ground for belief that the Constitution "discriminates in some ways *against* people of the Aboriginal race" and "[t]hat the Commonwealth's object will be to co-operate with the States to ensure that together we act in the *best interests* of the Aboriginal people of Australia". Second, the amendment would allow the Parliament to make special laws for Aborigines. Last, the amendments were made because of "[o]ur personal sense of justice, our commonsense, and our international

reputation". It is a fair representation of the "yes" case to suggest that everything pointed towards the fact that the amendments would bring about a benefit to the Aboriginal people. But more importantly there is nothing to suggest that the opposite would be the case.

When the people of Australia voted on 27 May 1967 the result was an overwhelming endorsement of the amendment.¹⁵⁴

	Number on roll	Votes for (%)	Votes against (%)	Total Valid Votes	Informal
New South Wales	2 315 828	1 949 036 (91.46%)	182 010 (8.54%)	2 131 046	35 461
Victoria	1 734 476	1 525 026 (94.68%)	85 611 (5.32%)	1 610 637	19 957
Queensland	904 808	748 612 (89.21%)	90 587 (10.79%)	839 199	9 529
South Australia	590 275	473 440 (86.26%)	75 383 (13.74%)	548 823	12 021
Western Australia	437 609	319 823 (80.95%)	75 282 (19.05%)	395 105	10 561
Tasmania	199 589	167 176 (90.21%)	18 134 (9.79%)	185 310	3 935
Commonwealth	6 182 585	5 183 113 (90.77%)	527 007 (9.23%)	5 710 120	91 464

This represents by far the most comprehensive support for any constitutional amendment that has been put to the people. As Mr Bryant, the member for Wills, reflected: "That overwhelming vote, had it occurred in some other part of the world, would have been said by many of us to have been rigged."¹⁵⁵

¹⁵⁴ The following table is taken from Macintyre, *Political Australia: A Handbook of Facts* (Oxford University Press, Melbourne 1991) p35.

¹⁵⁵ Aust, Parl, *Debates* (1967) Vol 56 at 186.

What was the effect of the referendum?¹⁵⁶ The obvious outcome was the removal of s127 and the striking out of the words "other than the aboriginal race in any State" for s51(xxvi). In terms of the power the result of the 1967 referendum could give rise to one of three views. The first is that the removal of the words "other than the aboriginal race in any State" meant that the power reverted to its original intention as a power to make special laws for both the benefit and detriment of any particular race. That is, it simply made Aborigines subject to the legislation of the Commonwealth Parliament. Such a view, we would argue, diminishes the intentions of those who campaigned and voted for the amendment of the section.

The second possible view is that the power remains a power to pass both beneficial and detrimental laws with respect to *all* races *other than* the "aboriginal race". That is, the effect of the 1967 referendum with its specific reference to Aborigines (based on a positive desire or intention with respect to Aborigines) is such that the section now incorporates an implied prohibition against detrimental legislation in the case of Aborigines. Notwithstanding that such a reading of the events of 1967 might create an anomalous situation as between the Aboriginal people and other races we would argue that it is perhaps the most historically accurate conclusion to be drawn from the 1967 referendum.

The final outcome is that the power is now wholly a beneficial one as to its operation. In other words, the 1967 amendment imposed a prohibition on detrimental legislation with respect to *all* races including Aborigines. The weakness in such a reading is the absence of any discussion or advocacy (apart from Wentworth's proposed section 127A) of this position.

In summary, we argue that the original intention of the framers of the Constitution was to provide a power for the Commonwealth to legislate with respect to the people of any race. The conclusion to be drawn from the debates is that this legislation was to discriminate in a negative sense against "undesirable" races and in a minority of cases to provide "special laws" for privileged races. Aborigines were assumed to be the "doomed" race and were thus left to the States to administer. The events surrounding the 1967 referendum clarify the meaning of the section. We have argued that the clear theme that emerges from the parliamentary debates and the "yes" case is that the passage of the amendment would allow the Commonwealth to legislate for the benefit of Aborigines. Nothing to the contrary is evident.

156 For a general discussion of the role of referendums and constitutional adjudication see Coper, "The People and the Judges: Constitutional Referendums and Judicial Interpretation" in Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, Sydney 1994) pp73-89. Coper does conclude that "transgression of the limits [of the notion of an implied benefit] would require a relatively extreme and unambiguous example of detriment to the interests of the Aboriginal people." (At 84.)

THE HIGH COURT AND THE RACE POWER

In the first part of this paper we highlighted the three analytical models that represent the modes of interpretation that have been developed by the High Court. In this section we will use these models as a way of assessing the case law in the area and offer a view, based on the statements of the various justices, as to whether or not s51(xxvi) is now solely for the "benefit" of Aboriginal people.

As was noted in the first section of this article, the three models are by no means exclusive of each other. Indeed one of the difficulties that occurs in their application is the way in which individual justices move between the models. For instance, Gibbs CJ in *Koowarta v Bjelke-Petersen*,¹⁵⁷ relied on an original intent argument to suggest that the power is open to both benevolent and detrimental usage, then proceeded to give a textual interpretation of the word "any".¹⁵⁸

Further, conclusions reached by one justice based on a particular approach are often adopted in another judgment which is applying a different methodology. For instance, Deane J's view that the power is "a general power to pass laws discriminating against or benefiting the people of any race", in *Commonwealth v Tasmania (Tasmanian Dam Case)*,¹⁵⁹ was developed (and qualified) after a discussion of the historical events relating to the section. This passage was repeated in *Western Australia v Commonwealth (Native Title Act Case)*¹⁶⁰ which essentially took a textualist approach.¹⁶¹

The scope and meaning of the race power with respect to Aborigines has been considered in three major cases: *Koowarta*,¹⁶² *Tasmanian Dam Case*,¹⁶³ and *Native Title Act Case*.¹⁶⁴

Original Intent and Section 51(xxvi)

From the above historical overview it is possible to isolate three groups from whom the meaning and intent of the power can be found. The first is that of the framers who considered the detailed provisions of the Constitution in the 1890s. The second is that of the parliamentarians who debated and passed the 1966 Bill that set in train the amendment of the Constitution. Last, there are the people of Australia and their endorsement of the

157 (1982) 153 CLR 168.

158 See below p130.

159 (1983) 158 CLR 1.

160 (1995) 183 CLR 373.

161 At 461. The qualification that Deane J added to this conclusion (and one that highlights his historical approach) was: "Since 1967, that power has included a power to make laws benefiting the people of the Aboriginal race." This sentence was not included in the *Native Title Act Case*. See below, fn178.

162 (1982) 153 CLR 168.

163 (1983) 158 CLR 1.

164 (1995) 183 CLR 373.

spirit and terms of the "yes" case put to them at the 1967 referendum. It is critical to determine the overriding intention.

If 1900 is the key moment then it is clear that the framers intended that the section was to allow discrimination on the basis of race with the occasional benefit for particular races. In other words, the section contains within it both beneficial and detrimental elements. If, however, we take the 1966 amending legislation as the key intentional moment, then it is clear that the intention behind the removal of the words was to ensure that benefits should flow to Aboriginal Australians. At no point in the debates was the use of detrimental legislation given serious consideration. The final moment is that of 1967 when over 90 percent of the electorate, arguably informed by the "yes" case, endorsed these proposed changes to the Constitution. From the 1967 perspective it must surely be argued that the section would be limited solely to the benefit of Aborigines.

A weakness in the original intent argument in regard to s51(xxvi) is that the number of intents increase over time. If we leave aside the possibility of collective intents then in 1898 there were at most 50 possible views on the section. In 1967, 165 parliamentarians passed the legislation. In 1967 the amendment was supported by 5 183 113 voters who presumably had a view on what the section was intended to achieve. Clearly there are some problems in ascribing what is the guiding intent if that intention is not described as a collective one over time. It should be noted, though, that the two most recent of the three collective intents favour a beneficial approach.

In a series of cases in 1992 some members of the High Court declared that the Australian people were the ultimate holders of sovereignty in the constitutional sense.¹⁶⁵ Such a view has major ramifications for notions of parliamentary sovereignty but also for the way in which the Constitution is to be interpreted. More particularly, when we speak of sovereignty with respect to s51(xxvi) do we mean the people of the 1890s who endorsed the Constitution, the people of 1967 who amended it or the people of today who live with the Constitution? Or do we mean that each of these moments represent an ongoing endorsement of the Constitution since 1901? If the latter is the case then the events of today have no greater importance than the referendum of 1967. Surely this cannot be the case. If, however, we mean that the people are sovereign in the sense that they have *ownership* of their Constitution then it is possible to say that the people are sovereign and they share that sovereignty equally over time.

Be this as it may, it is suggested that the most recently expressed intention of the people must be taken to be the defining one. Thus in 1967 the people clarified the meaning of s51(xxvi) of the Constitution. The reason for, and the intention behind, that clarification can be found in the words of their political representatives and the "yes" case.

165 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137 per Mason CJ.

The cases which have considered the scope of s51(xxvi) have included some references to the intentions that lay behind the text. In the judgments that have considered the question two views on the importance of 1967 have emerged.

The first of these is found in *Koowarta* where Gibbs CJ, having referred to the "original form"¹⁶⁶ of the section, merely mentioned the 1967 amendment to suggest that it achieved nothing more than an extension in the scope of the power. He then concluded that

[i]t would be a mistake to suppose that s. 51(xxvi) was included in the Constitution only for the purpose of enabling Parliament to make laws for the special *protection* of people of particular races.¹⁶⁷

Gibbs CJ cited as authority for this proposition Quick and Garran and the 1966 Sawyer article, both of which only refer to the framers' intentions for s51(xxvi).¹⁶⁸ It is thus curious that, for Gibbs CJ, intention is relevant, but only that of the framers in the 1890s. This approach, we would argue, is unsatisfactory, particularly when, as Deane J acknowledged (citing the same authority), "the architects of the Constitution paid no attention at all to the position of the Aboriginal people".¹⁶⁹ The judgment of Gibbs CJ in *Koowarta* relegated the intentions of the people in 1967 to that of merely conferring legislative power. One would naturally presume that the people who inserted the power had some intention relevant to the way in which the power should be exercised and that that intention should prevail over the intention of people who, at an earlier time, expressed virtually none. Thus, we would argue, it is difficult to conclude, as Gibbs CJ does, that on the question of intention the section is open to both a positive and negative interpretation.

The other judgments in *Koowarta* did not consider the question of intent but focused primarily upon the text or contemporary values in determining the scope of the power. Both of these issues are dealt with below.

The question of the intention behind the section was dealt with in greater detail in the *Tasmanian Dam Case*.¹⁷⁰ The most striking comments on the issue are found in the judgment of Murphy J. His Honour held that the section authorises "any law for the benefit, physical and mental"¹⁷¹ of the Aboriginal people. Further he said:

To hold otherwise would be to make a mockery of the decision by the people [to amend s51(xxvi) in 1967] which was manifestly done so that

166 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186.

167 As above. Emphasis added.

168 As above. (For these references, see above, fn13 & 62.)

169 *Tasmanian Dam Case* (1983) 158 CLR 1 at 272.

170 (1983) 158 CLR 1.

171 At 180.

Parliament could legislate for the maintenance, protection and advancement of the Aboriginal people.¹⁷²

In the same case Brennan J said "[n]o doubt par. (xxvi) in its original form was thought to authorise the making of laws discriminating adversely against particular racial groups".¹⁷³ The judgment, however, then affirmed that

the approval of the proposed law for the amendment of the proposed par. (xxvi) by deleting the words "other than the Aboriginal race" was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal people were to be at an end, and that the primary object of the power is beneficial.¹⁷⁴

His Honour subsequently referred to the operation of s51(xxvi) in protecting sites of particular significance to the Aboriginal people, as consistent with "the high purpose which the Australian people intended when the people of the Aboriginal race were brought within the scope of its beneficial exercise".¹⁷⁵ Consistent with this "high purpose", Brennan J noted that Parliament's

passing of the *Racial Discrimination Act* manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws.¹⁷⁶

Justice Deane made it clear in his judgment that since the founders "paid no attention at all to the position of the Aboriginal people",¹⁷⁷ their intention is hardly compelling. In contrast:

As it became increasingly clear that Australia, as a nation, must be diminished until acceptable laws be enacted to mitigate the effects of past barbarism, the exclusion of the people of the Aboriginal race from the provisions of s. 51(xxvi) came to be seen as a fetter upon the legislative competence of the Commonwealth Parliament to pass necessary special laws for their benefit. The referendum [in 1967] was carried by an overwhelming majority of the voters in every State of the Commonwealth. The power conferred by s. 51(xxvi) remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967,

172 As above.

173 At 242. Brennan J cites the account of Quick and Garran to support this conclusion.

174 As above.

175 At 245-246.

176 At 242.

177 At 272.

that power has included a power to make laws benefiting the people of the Aboriginal race.¹⁷⁸

The clear indication in Justice Deane's view is that the intention of the Australian people in 1967 is highly significant. The only ambiguity in Deane J's judgment is whether or not the outcome of the 1967 referendum was merely an addition to the scope of power (so that it could be used for the benefit or detriment of Aboriginal people) or an addition of an implied prohibition against its deleterious use. If the former is the case then it involves a reading of the intention of the people of 1967 which, we argue, is contrary to the relevant statements of the time. Moreover, it would appear to be inconsistent with the "past barbarism" which the 1967 amendment sought to "mitigate". The language strongly suggests that the general underlying power which continued to operate after 1967 was modified in that year to include Aboriginal people, but only for their benefit.

Given the absence of attention paid to Aboriginal people at Federation and the obvious significance of the 1967 referendum it seems absurd for Gibbs CJ to assert that "[h]istory [apparently pre-1967 history] strongly supports the view that 'for' in par. (xxvi) means 'with reference to' rather than 'for the benefit of'".¹⁷⁹

The question of a guiding intention for s51(xxvi) received only passing reference in the *Native Title Act Case* with the judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ approaching the issue from a textualist standpoint.¹⁸⁰ In determining what is meant by the word "necessary" the judges concluded that it is for Parliament to decide. This is supported by reference to passages from the Constitutional Conventions of Sydney in 1891 and Melbourne in 1898.¹⁸¹

The only other reference to the framers' intention is by way of a quotation from the judgment of Deane J in the *Tasmanian Dam Case* where he said that the race power is "a general power to pass laws discriminating against or benefiting the people of any race."¹⁸² Consideration of the full quotation reveals that this conclusion does not do his Honour's opinion justice. As we saw above, the context of this statement by Deane J includes an account of the significance of the 1967 referendum. Moreover, the Court in the *Native Title Act Case* specifically left open the question of whether or not it retained some "supervisory jurisdiction" over parliament in the face of "a manifest abuse of the races power".¹⁸³

178 At 272-273. It should be noted at this point that the omission of the last sentence from that passage in the *Native Title Act Case* (1995) 183 CLR 373 at 461 does an injustice to its meaning when the sentence is seen in its fuller context.

179 *Tasmanian Dam Case* (1983) 158 CLR 1 at 110.

180 *Native Title Act Case* (1995) 183 CLR 373 at 460-462.

181 At 460 fn321.

182 At 461 (quoting *Tasmanian Dam Case* (1983) 158 CLR 1 at 273).

183 At 460.

In conclusion it is clear from the cases that the issue of intent is a relevant consideration for some justices in determining the scope of s51(xxvi) of the Constitution. Though some refer to the framers we argue that their views are not convincing and that the thrust of the judgments that give pre-eminence to the spirit and terms of 1967 are to be preferred. It is the events of 1967 that clarify, or indeed introduce, a new overriding intention and one which some justices have endorsed in concluding that the power is now to be used solely beneficially.

Textualism and Section 51(xxvi)

As was noted above, a textual approach to s51(xxvi) would not, in the strict sense, require any knowledge of the historical background of the section. The meaning of the words of the Constitution, as Barwick CJ stated, are to be found within the four corners of the Constitution.¹⁸⁴ In evaluating the section within the textualist framework it is clear that conclusions are often reached without detailed argument. For instance, Stephen J suggested that the terms of the section are "unusual" in that

[t]he content of the laws which may be made under it are left very much at large; they may be benevolent or repressive; they may be directed to any aspect of human activity; so long as they are with respect to the people of a race such as is described in par. (xxvi) they will be within power.¹⁸⁵

Stephen J based this conclusion on a general reading of the power. So too Wilson J in *Koowarta* noted, with a "touch of irony", the fact that the Commonwealth had argued that the *Racial Discrimination Act* 1975 (Cth) could be based on a power that allowed discriminatory laws "for good or ill, for the people of any race."¹⁸⁶ The section, however, does contain a number of key words and phrases that determine the scope or limit of the power. In assessing the case law we have limited ourselves to discussion of whether or not any of the words of the section import a limitation as to benefit or not.

Any textual analysis embodies a certain inherent dissatisfaction, which is magnified in the case of this section due to the fact that the judgments have often examined and grouped the terms used in different ways. Nevertheless some themes do emerge.

"for"

The word "for" is considered directly in just three judgments. The first of these is found in *Koowarta* where Murphy J adopted an uncharacteristically textual approach. His Honour said:

184 *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 17.

185 *Koowarta* (1982) 153 CLR 168 at 209.

186 At 244.

In par. (xxvi) "for" means "for the benefit of". It does not mean "with respect to", so as to enable laws intended to affect adversely the people of any race. If with respect to or some similar expression were intended, it would have been used, as it is in other parts of s. 51 (see the opening words and pars. (xxxi) and (xxxvi)).¹⁸⁷

In striking contrast Gibbs CJ in the *Tasmanian Dam Case*, whose use of history suggests, in truth, a textual approach, said that: "History strongly supports the view that 'for' in par. (xxvi) means 'with reference to' rather than 'for the benefit of'."¹⁸⁸

The other judgment in which the word was expressly considered is that of Gaudron J in *Chu Kheng Lim*.¹⁸⁹ Quoting the above statement of Stephen J in *Koowarta* as to the "benevolent or repressive" nature of the section, Gaudron J responded by saying that:

There is, however, no decision of this court that compels the conclusion that a law which operates on or by reference to ... people of a race for whom it is deemed necessary to make special laws is, on that account, a valid law with respect to ... the people of that race.¹⁹⁰

Her Honour then added:

In *Koowarta v Bjelke-Petersen*, Murphy J expressed the view - which in my opinion has much to commend it - that s. 51(xxvi) only authorises law for the benefit of the race concerned, because, in context, "for" means "for the benefit of" and not "with respect to".¹⁹¹

Gaudron J also cited Brennan J's judgment in the *Tasmanian Dam Case* as supporting this position.¹⁹² The term "for" was not referred to in the *Native Title Act Case*. While there has been limited consideration of the word, the opinion tends towards the view that the meaning of the word "for" is to be construed as "for the benefit of".

"special"

The attitude of some members of the Court to the question of whether or not the section is limited to laws that bestow a "benefit" can also be discerned in their discussion of the word "special". In *Koowarta* Stephen J said that for a law to be one with respect to s51(xxvi) it "must be because of their special needs or because of the special threat or problem which

187 At 242.

188 *Tasmanian Dam Case* (1983) 158 CLR 1 at 110.

189 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 55.

190 At 55.

191 At 56.

192 As above, referring to *Tasmanian Dam Case* (1983) 158 CLR 1 at 242.

they [the race] present that the necessity for the law arises".¹⁹³ Later in *Tasmanian Dam* Mason J stated his view as to the scope of "special laws" within the section. They are:

to enable the Parliament (a) to regulate and control the people of any race in the event that they constitute a threat of or problem to the general community, and (b) to protect the people of any race in the event that there is a need to protect them.¹⁹⁴

Wilson J was of the view that "a law within s. 51 (xxvi) must of its very nature be discriminatory. It must be a special law for the reason that it addresses a problem that is peculiar to the people of a particular race."¹⁹⁵

In the *Native Title Act Case* the joint judgment cited the above passages and concluded that "special" qualifies "law" and that a "special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of particular race."¹⁹⁶

The conclusion to be drawn from the above discussion of "special laws" is that the power is open to deal with "threats", "problems" or "needs" and is at best neutral. The response to those situations may be beneficial or detrimental to the particular race for whom it is deemed necessary to make these laws. While it is possible to reach this conclusion, it is difficult to sustain it in the face of the fact that three members of the joint judgment (Brennan, Gaudron and Deane JJ) have indicated a preference for the view that the section is now limited to the benefit of Aboriginals.

What are we to make of the textualist analysis of the section? There are a number of unsatisfactory aspects to this approach to the section. To say that the word "for" means "with respect to" or "for the benefit of" highlights the problem of the textualist approach. Often, as in this case, words do not have any obvious meaning outside their context. In determining the context of this word there is an inevitable movement towards either an historical inquiry or a "living force" analysis. In other words, the textualist approach with regard to s51(xxvi) begs the question rather than answers it. Thus, we would argue that textualism is not a satisfactory vehicle by which the meaning of the section may be determined.

"Living Force" and Section 51(xxvi)

The last part of this section will deal with the so-called "living force" approach to the interpretation of s51(xxvi). As was noted above, this approach sees the Constitution as an

193 *Koowarta* (1982) 153 CLR 168 at 210.

194 *Tasmanian Dam Case* (1983) 158 CLR 1 at 158.

195 At 203.

196 *Native Title Act Case* (1995) 183 CLR 373 at 460-461.

evolving instrument that changes to meet the "social conditions and the political exigencies" of contemporary Australia.¹⁹⁷ It is not the "dead hand" of the past but the current holders of the Constitution that make it a "living force". Thus its meaning and operation should continue to be informed by contemporary values.

In *Cheatle* it was described as "absurd" to suggest that the requirements of "trial by jury" in s80 would now be met if women were excluded from them.¹⁹⁸ We would argue that it would be similarly "absurd" to interpret the Constitution so as to permit discrimination based on race. Contemporary values have moved since 1901, an evolution that was as much achieved as it was endorsed by the people of 1967.

Part of the "living force"/contemporary values approach requires an assessment of the distance that we as a nation have travelled since Federation. Thus, implicit in the view that women and the unpropertied could no longer be excluded from acting as jurors is a view on gender relations and citizenship in contemporary Australia. Likewise our understanding of "democracy" has come to encompass (at least) universal adult franchise.

On the question of race, as was mentioned above by Justice Brennan in *Mabo (No 2)*, "the common law should neither be nor be seen to be frozen in an age of racial discrimination".¹⁹⁹ Contemporary values on racial issues have moved on, not just since 1901 but also since 1967. It needs to be remembered that in 1971 *Milirrpum's Case*²⁰⁰ held Australia to be terra nullius notwithstanding the finding by Blackburn J that "if ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me".²⁰¹ In effect *Mabo* held that *Milirrpum* in 1971 was decided in what was still an age of racial discrimination.

A similar progression may be seen in many of the judgments relating to s51(xxvi). For instance in *Koowarta*, particularly in the context of Australia's international reputation,²⁰² Justice Wilson noted that

the existence of racial barriers is repugnant to the ideals of any human society. In substance the preamble testifies to the view that it is essential to the peace and well-being of the international community that the laws of a community apply to all members of that community regardless of race. It recognises that there is a generality that is basic to good laws. It is

197 Inglis Clark, *Studies in Australian Constitutional Law* p20.

198 See above p103.

199 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 41-42.

200 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

201 At 267.

202 In this case the implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

in order to give effect within Australia to the Convention that the Parliament has enacted the Act.²⁰³

A significant element in the determination of contemporary values is captured in an acknowledgment of the past injustices visited upon the Aboriginal community. For instance, Justice Murphy in an appendix to his judgment highlighted works that "starkly outline the discrimination suffered by Australian Aborigines".²⁰⁴

Other justices likewise implicitly acknowledge the discrimination that Aborigines have suffered, and the relevance of contemporary values, in their discussion of what constitutes "special laws". An example is Stephen J's reference to the "special needs" or "special threat or problem" which a particular race presents.²⁰⁵ The special needs of the Aboriginal people are to overcome the consequences of 200 years of sustained racial discrimination. The only threat or problem they pose, *as a race*, is to Australia's international reputation if these needs are not met.

Implicit in this statement is an acknowledgment that special laws for a race (be it because of the special needs of, or a special threat or problem presented by, Aboriginal people) cannot be understood as unchanging through time. Their needs may have some "fixed" or "objective" elements but in good measure they will inescapably be what people appreciate as being their needs as they develop over time.

The above analysis of the possible meanings of s51(xxvi) is by no means conclusive. As was indicated by the joint judgment in the *Native Title Act Case*, the question has not been considered by the Court. We have argued, however, that under each of the three interpretative models it appears that there is a strong indication that the power can be used solely for the "benefit" of Aboriginal people.

From an original intent perspective the only question appears to be which intent is conclusive of the issue. For those justices who highlight the 1967 referendum (such as Murphy, Deane and Brennan JJ) that intent modified not only the actual words of the section but provided a guiding prohibition against detrimental legislation. For Gibbs CJ the intention of the framers appears to be the principal intent. Yet, as we have demonstrated, the framers' views on the section's operation as to Aborigines were non-existent. In reconstructing their intention from other material the conclusion to be drawn is that, seeing the Aboriginal people as a "dying race", the framers did not see the need to enter them into the constitutional community.

Within the textualist model the question of historical intent is less relevant. Among the justices who have addressed the question of the meaning of the section opinion is divided.

203 *Koowarta* (1982) 153 CLR 168 at 244. See also at 260 per Brennan J.

204 At 242.

205 At 210.

Justices Murphy and Gaudron note that the word "for" is to be construed to mean "for the benefit of" Aboriginal people. Alternatively Gibbs CJ, Stephen J and possibly Wilson J appear to believe that the power is open to both benevolent and detrimental use. There is some indication also that the word "special" suggests that the power is available to deal with the "threat" or "problem" or "needs" of a particular race. This could suggest that the power is not limited solely to benefit. However, as we have noted, this conclusion does not take into account those views of three justices (Brennan, Gaudron and Deane JJ) who have indicated a preference for benefit. As was noted, however, the textualist model is unsatisfactory in that it highlights that the meaning of this section is not obvious or conclusive. Thus, it was argued, further inquiry beyond the text would be required to determine the meaning of the section.

The last model by which we assessed the power was the "living force" or contemporary perspective. There is little direct consideration of the power from within this model, though the analogous treatment of s80 and the concept of representative or democratic government suggest that just as it is now "absurd" to conceive of a system of jury trial that excludes women, so too it would be "absurd" to believe a power within the Constitution allows racial discrimination. This conclusion we believe is supported by the progressive or contemporary values that the "living force" approach incorporates.

There remains one last consideration in the argument that s51(xxvi) can now only be used solely for the "benefit" of (at least) Aboriginal people. That is the apprehension which the High Court has shown in considering the merits or otherwise of legislative decisions. The notion that the use of the power contained in s51(xxvi) is a matter of political rather than juridical consideration is clearly an important one. However, as Lindell rightly points out, "the mere fact that a matter may be characterised as political, using the term 'political' in its widest sense, is not sufficient to render the matter non-justiciable and beyond the scope of judicial review."²⁰⁶ As Dixon J noted in the *State Banking* case:

The Constitution is a political instrument. It deals with government and governmental power. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.²⁰⁷

Notwithstanding the fact that every consideration might be described as "political" there remains an over-arching concern regarding the proper exercise of the Commonwealth's legislative power. As Brennan J said in *Re Limbo*, "it would be a mistake for one branch

206 Lindell, "The Justiciability of Political Questions: Recent Developments" in Lee & Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, North Ryde 1992) p180.

207 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82.

of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected."²⁰⁸ The separation of powers is essential not only to the maintenance of government, but also for the protection of rights. Thus, while the judiciary cannot assume the function of another branch, it must determine the critical question of the existence and scope of the power upon which the legislature proceeds to exercise its political assessment.²⁰⁹ If, as we have argued, the power is limited solely to make laws for the benefit of Aboriginal people then the High Court will (as with any other power) be required to make a determination as to the characterisation of the proposed law.

The key issue in such a determination is that the concept of "benefit", which was introduced by the referendum of 1967, is by way of an implied prohibition on the otherwise unfettered operation of the section. While they represent prohibitions rather than a grant of power, it is possible to make an analogous argument with respect to ss92 and 117 and the implied prohibition in s51(xxvi) of the Constitution. The High Court has developed purposive tests against which the operation of the guarantee or limitation in ss92 and 117 may be assessed. Thus in *Castlemaine Tooheys Ltd v South Australia* the test was whether or not the law was "appropriate and adapted" to the Parliament's legitimate objective.²¹⁰ Such a balancing process is one means, we would argue, for determining whether or not the legislative objective is "disproportionate" to the guarantee of "benefit" implied within s51(xxvi).²¹¹ Clearly, this method incorporates a "margin of appreciation" for the objectives of the legislature at the same time as upholding the prohibition within the power.²¹²

208 *Re Limbo* (1989) 92 ALR 81 at 82.

209 *See Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

210 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ. Gaudron and McHugh JJ approached the issue by reference to the discrimination involved in the scheme (at 473-480). Similar statements were made in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 511 per Brennan J and at 573-4 per Gaudron J. It should be acknowledged that in *Leask v Commonwealth* (1996) 140 ALR 1 some members of the Court noted that, for the purposes of characterisation, proportionality is limited to purposive powers and when the law falls foul of a constitutional limitation: at 7 and 9 per Brennan CJ, at 15 and 18 per Dawson J and at 33 per Gummow J.

211 The issue of the legislative Acts (such as the *Native Title Act* 1993 (Cth)) having both beneficial and negative elements to them is taken up by Blackshield where he assesses the Act within the "equality doctrine" developed by members of the Court in *Leath v Commonwealth* (1992) 174 CLR 455: Blackshield, "The Implied Freedom of Communication" in Lindell (ed), *Future Directions in Australian Constitutional Law* pp245-251. The doctrine of "legal equality", as developed by Deane and Toohey JJ in *Leath*, was considered by members of the Court in *Kruger v Commonwealth* (1997) 146 ALR 126. In that case members of the Court were critical of the doctrine (at 155-159 per Dawson J, at 226-228 per Gummow J, and at 195 per Gaudron J). It must now be conceded that a "legal equality" argument with respect to s51(xxvi) is unlikely to succeed.

212 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 159 per Brennan J.

CONCLUSION

In 1978 HC ("Nugget") Coombs wrote that

[t]here is little in the history of the decade since the referendum about which white Australians can feel complacent, but the way ahead is clearer and the ferment of ideas necessary to open that way has begun.²¹³

Fourteen years later the High Court contributed to the task of finding the "way ahead" with its landmark decision in *Mabo (No 2)*²¹⁴ and still later in *Wik Peoples v Queensland*.²¹⁵ How we respond to the challenges that these decisions have presented will determine whether or not as a nation we move ahead or return to an age of division. The status of being an outsider, in the constitutional sense, for Aboriginal Australians was overcome in 1967. It would be a perversion of the hopes and aspirations of the people of Australia if thirty years later we celebrated their contribution to our constitutional history by suggesting that s51(xxvi) is a means by which yet another round of dispossession may be visited upon Australia's indigenous people.

213 Coombs, *Shame on US! Essays on a Future Australia* (Centre for Resource and Environmental Studies, ANU, Canberra 1996) piii.
214 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
215 (1996) 187 CLR 1.

APPENDIX A

Section 51(xxvi)

Sydney 1891

Chapter I clause 53.

The Parliament shall, also, subject to the provisions of this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to the following matters:-

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

Adelaide 1897

Chapter I clause 53.

The Parliament shall, subject to the provisions of this Constitution, have exclusive powers to make laws for the peace, order, and good government of the Commonwealth with respect to the following matters:-

1. The affairs of the people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the affairs of the aboriginal native race in any State.

Sydney 1897

Not considered

Melbourne 1899

As in Constitution

APPENDIX B**Section 127***Sydney 1891*

Chapter VII clause 3.

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

Adelaide 1897

Chapter VII clause 120.

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

Sydney 1897

Not considered

Melbourne 1899

As in Constitution