THE RACES POWER AND THE 1967 REFERENDUM

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I Introduction

The *Australian Constitution* ('*Constitution*') was drafted at two Conventions held in the 1890s.[1] Neither Convention included representatives of Australia's Indigenous peoples. In most cases Aboriginal people were not qualified to vote for the delegates to the Convention and appear to have played no meaningful role in the drafting process. It is not surprising then that the *Constitution* did not reflect their interests or aspirations. While its preamble set out the history of the enactment and the notion that the *Constitution* was based upon the support of the people of the colonies, it made no mention of the prior occupation of Australia by its Indigenous peoples. In fact, the operative provisions of the *Constitution* were premised upon exclusion and discrimination. This was the legal foundation upon which Aboriginal people became part of the Commonwealth of Australia.

II The *Constitution* as drafted

Section 51(xxvi) of the *Constitution* provided that the Commonwealth Parliament could legislate with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. This was the so-called 'races power'. Section 127 also provided: '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'. Significantly, neither provision spoke of Indigenous peoples as people, but in the latter case as 'aboriginal natives'.

Section 51(xxvi) was deliberately inserted into the *Constitution* to allow the Commonwealth to discriminate against sections of the community on account of their race. Of course, Aboriginal people were not subject to this section. However, this was not because they were to be protected, but because it was thought that Aboriginal issues were a matter for the States and not the federal government. By today's standards, the reasoning behind section 51(xxvi) was clearly racist. Edmund Barton, leader of the 1897-1898 Convention and later Australia's first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[2] In summarising the effect of section 51(xxvi) John Quick and Robert Garran, writing in 1901, stated that

> [i]t enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise 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.[3]

One framer, Tasmanian Attorney-General Andrew Inglis Clark, supported a provision taken from the *United States Constitution* requiring the 'equal protection of the laws'.[4] This clause might have prevented federal and State Parliaments from discriminating on the basis of race. However, the framers were concerned that Clark's clause would override Western Australian laws under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field'.[5] Clark's provision was rejected by the framers who instead inserted section 117 of the *Constitution*, which merely prevents discrimination on the basis of state residence.[6] Sir John Forrest, Premier of Western Australia, summed up the mood of the 1897-1898 Convention when he stated:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to

> talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.[7]

In formulating the words of section 117, Henry Higgins, one of the early members of the High Court, argued that it 'would allow Sir John Forrest … to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race'.[8]

III The 1967 Referendum

The obvious discrimination against Aboriginal people in the *Constitution* was one factor generating moves to amend it. Another factor was a concern that Aboriginal issues were not being dealt with appropriately by the States and that federal Parliament ought to be given primary responsibility for their welfare. In 1967 a proposal was put before the Australian people under which the words 'other than the aboriginal race in any State' in section 51(xxvi) would be struck out and section 127 deleted entirely. The people overwhelming voted 'Yes', with the proposal supported by around 90 percent of Australians. Out of the 44 referendum proposals put to Australian people since 1901 this is the highest 'Yes' vote so far achieved.

The 1967 referendum was an important turning point in the position occupied by Aboriginal people in the Australian legal system. However, while the referendum deleted an obviously discriminatory provision in the form of section 127, it did not insert anything in its place. Indigenous peoples were not granted any particular rights to land or otherwise. The change left the *Constitution*, including the preamble, devoid of any reference to Indigenous peoples. Discrimination was replaced with silence.

The objective of the 1967 referendum was to remove discriminatory references to Aboriginal people from the *Constitution* and to allow the Commonwealth to take over responsibility for their welfare. However, in failing to include this intention in the words of the *Constitution*, and in failing to include a freedom from racial discrimination, the change actually laid the seeds for the Commonwealth to pass laws imposing a disadvantage on Indigenous people. The racially discriminatory underpinnings of section 51(xxvi) were extended to Aboriginal people, but without any textual indication that the power could be applied only for their benefit. If the referendum did enable the races power to be used to legislate to the detriment of Aboriginal people, it would be a sad irony. It would undermine the powerful symbolism attached to the 1967 referendum.

IV The Hindmarsh Island Bridge Case

The possibility that the races power, as extended to Indigenous peoples, might be applied to their detriment was raised in a case before the High Court of Australia in 1998.[9] Hindmarsh Island ('Kumarangk') is in the Murray River delta in South Australia. During the 1980s commercial development took place on the island and in 1989, as a condition of planning approval for a marina development, it was proposed that a bridge be constructed from the island to the mainland. This proposal met strong opposition on Aboriginal heritage grounds since the island and the Goolwa Channel area in which it was located were part of the traditional home of the Ngarrindjeri people. The Minister for Aboriginal and Torres Strait Islander Affairs was urged to exercise his powers under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*Protection Act*') for the protection and preservation of the area. Ngarrindjeri women claimed to be the custodians of secret 'women's business' for which the island had traditionally been used, and which could not be disclosed to Ngarrindjeri men, nor to other men.

In 1994 and 1996 the claim was the subject of two reports to the Minister. Each report ended in a controversy that failed to resolve the underlying issue. The *Hindmarsh Island Bridge Act 1997* (Cth) ('*Bridge Act*') was then enacted by the newly elected Howard (Liberal-National Party) Coalition Government to preclude any further possibility of a protection order under the *Protection Act*. The *Bridge Act* amended the *Protection Act* so that it no longer applied to 'the Hindmarsh Island bridge area' and thus prevented any further possible claim by the Ngarrindjeri women.

The Ngarrindjeri women responded by bringing an action in the High Court challenging the constitutional validity of the *Bridge Act*.[10] They argued that the *Bridge Act* could not be passed under the races power because that power extends only to laws for the benefit of a particular race and cannot be used to impose a detriment on the people of a race. This argument was of momentous political significance because, if accepted, it might have provided a legal platform from

which to challenge the Howard Government's 'ten point plan' for native title.

In the High Court the Commonwealth argued that there are no limits to the races power, that is, provided that the law affixes a consequence based upon race, it is not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing the Commonwealth Solicitor-General, Gavan Griffith, suggested that the races power 'is infused with a power of adverse operation'.[11] He acknowledged 'the direct racist content of this provision' in the sense of 'a capacity for adverse operation'.[12] The following exchange then occurred:

> Kirby J: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary … or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.
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> Griffith QC: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.[13]

Of course, without a bill of rights or express protection from racial discrimination, there was no such over-arching reason.

The case was decided by only six judges because Callinan J, after some initial reluctance, disqualified himself from deciding the matter.[14] The challenge failed by 5:1 (with Kirby J dissenting) because, in the words of Brennan CJ and McHugh J: 'Once the true scope of the legislative powers conferred by s 51 [is] perceived, it is clear that the power which supports a valid Act supports an Act repealing it'.[15] It was common ground that the *Protection Act* was valid. Hence, it necessarily followed that a later modification of its operation must also be valid. This conclusion meant that Brennan and McHugh JJ did not need to address the scope of the races power.

The other four judges did address that issue. Justices Gummow and Hayne held that the power could be used, as in this case, to withdraw a benefit previously granted to Aboriginal people (and thus to impose a disadvantage). More generally, they pointed out that the use of 'race' as a criterion, which section 51(xxvi) not only permits but requires, is inherently discriminatory, and that any discriminatory measure which benefits some may disadvantage others. They did, however, leave open the suggestion raised in *Western Australia v Commonwealth*[16] that the Court might retain 'some supervisory jurisdiction to examine … the possibility of a manifest abuse of the races power'.[17] Moreover, their Honours hinted at the possible relevance in such a case of the ultimate power of judicial review under *Marbury v Madison*,[18] and of Dixon J's suggestion in *Australian Communist Party v Commonwealth*[19] that in the *Constitution* 'the rule of law forms an assumption'.[20]

Justice Kirby's dissenting judgment held that the power 'does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race)'.[21] He argued that the 1967 amendment 'did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws', but reflected the Parliament's 'clear and unanimous object', with 'unprecedented support' from the people, that the operation of section 51(xxvi) 'should be significantly altered' so as to permit only positive or benign discrimination.[22]

Justice Gaudron, who had previously suggested that a limitation of the races power to beneficial purposes might have 'much to commend it',[23] concluded that, on closer examination, such a limitation could not be sustained – in part because the suggestion that the original effect of the power had been changed by the 1967 amendment was too weighty a consequence to ascribe to a 'minimalist amendment'. The deletion of eight words could not change the meaning of the words that remained. However, her Honour went on to examine more closely the requirement in section 51(xxvi) that the Parliament must deem it 'necessary' to make special laws for the people of a race. Applying an analysis of the concept of discrimination, Gaudron J argued that any such judgment of necessity must be based on some 'relevant difference between the people of the race to whom the law is directed and the people of other races', and hence that the resulting legislation 'must be reasonably capable of being viewed as appropriate and adapted to the difference asserted'.[24] These tests, she suggested, might give operable meaning to the concept of 'manifest abuse'. Further, she found it 'difficult to conceive' that any adverse discrimination by reference to racial criteria might nowadays satisfy these tests, and 'even

more difficult' in the case of a law relating to Aboriginal Australians, since any obvious 'relevant difference' in their situation is one of 'serious disadvantage', including 'their material circumstances and the vulnerability of their culture'.[25] On the face of it, therefore, 'only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances'.[26]

The overall effect of the judgments was inconclusive. The Court split 2:2 on the scope of the races power, with a further two other judges not deciding. It thus failed to resolve the issue of whether the Commonwealth possesses the power under the *Constitution* to enact racially discriminatory laws. This possibility has reinforced calls for an Australian charter of rights.[27] The result could hardly be said to be a solid foundation from which to advance reconciliation or the idea of equal rights.

V Conclusion

The framing of the *Constitution* saw a pattern of discrimination emerge against Australia's Indigenous peoples. This was based upon their exclusion from Australian political and cultural life, and was a consequence of the legal system and the attitudes of the day. This pattern took hold and was only (partially) broken in 1967 by the referendum that deleted discriminatory provisions from the *Constitution*. Unfortunately, that referendum failed to establish a new pattern or vision of the place of Indigenous peoples within Australia's political and legal structure. Until this occurs, the possibility of exclusion and discrimination remains.

Endnotes

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1 *Official Record of the Debates of the Australasian Federal Convention* (1891-1898) (1986 ed) ('*Convention Debates*').

2 *Convention Debates*, vol 4, Melbourne 1898, 228-29.

3 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1995 ed), 622.

4 *Convention Debates*, vol 1, Sydney 1891, 962.

5 *Convention Debates*, vol 4, Melbourne 1898, 665.

6 Section 117 provides: 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'. See George Williams, *Human Rights under the Australian Constitution* (1999) 119-27.

7 *Convention Debates*, vol 4, Melbourne 1898, 666.

8 *Convention Debates* , vol 5, Melbourne 1898, 1801.

9 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge case*').

10 The author appeared as counsel in this case for the Ngarrindjeri women.

11 Transcript of proceedings, *Kartinyeri v Commonwealth* (High Court of Australia, Kirby J and Griffith QC, 5 February 1998).

12 Ibid.

13 Ibid.

14 Justice Callinan had previously advised the Commonwealth that the *Hindmarsh Island Bridge Act 1997* (Cth) was constitutionally valid. See Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of its Own' (1999) 73 *Australian Law Journal* 72.

15 *Hindmarsh Island Bridge case* (1998) 195 CLR 337, 376.

16 *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act case*').

17 Ibid 460.

18 5 US (1 Cranch) 137 (1803).

19 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Part case*').

20 Ibid 193.

21 *Hindmarsh Island Bridge case* (1998) 195 CLR 337, 411.

22 Ibid 413.

23 *Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 56.

24 *Hindmarsh Island Bridge case* (1998) 195 CLR 337, 366.

25 Ibid 367.

26 Ibid 367.

27 See George. Williams, *A Charter of Rights for Australia* (2007).