

THE RECOGNITION OF INDIGENOUS AUSTRALIANS IN THE TEACHING OF FEDERAL CONSTITUTIONAL LAW¹

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I INTRODUCTION

It seems axiomatic that all law students would study constitutional law; not only because it is a requirement of the 'Priestly 11', but because the Commonwealth Constitution and its interpretation by the High Court of Australia represent the primary law of the nation, providing the formal structure to our system of government and laws.² Yet Australia's federal constitutional framework has remained conspicuously silent on the proper recognition and rights of its first peoples, and sometimes the teaching of constitutional law compounds this omission. The absence of Indigenous participation in the formation of the federal constitutional system tells us much about the framers' vision of what the distinctive new nation was to be, and who was expected to participate in the political, legal and constitutional structures and institutions of Australia. Indeed, W E H Stanner's characterisation of the 'Great Australian Silence' of Australia's history in his 1968 Boyer Lectures is an apt description of the constitutional and political landscape of the twentieth (and indeed some of the twenty-first) century. But the 'Great Australian Silence' should not be perpetuated by those of us teaching law students.

This article argues that any teaching and examination of Australian constitutional law should take account of all of those who constitute the nation, including of course, the recognition of Indigenous people within our federal and State Constitutions.³ While the 'Priestly 11' do not themselves explicitly require the teaching of broader social, contextual or critical approaches towards teaching constitutional law, the Threshold Learning Outcomes ('TLOs') do anticipate that legal education should move beyond 'the rules' and examine relevant legal contexts.⁴ In terms of faculty learning objectives of constitutional law, addressing Indigenous constitutional issues naturally meets the aims of teaching students how to 'analyse and critically evaluate the current state of federal and Victorian constitutional law and practice', 'discuss the desirability of reform' and 'analyse and critically evaluate judgments of the High Court and other Australian courts in constitutional cases', among other objectives.⁵ It also assists in development a range

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2 Commonwealth of Australia Constitution Act 1900.

3 See for example Asmi Wood. 'Incorporating Indigenous Cultural Competency Through The Broader Law Curriculum' (2013) *Legal Education Review* 57. There is not scope in this piece to discuss the impacts of native title law, statutory land rights or the role of the *Racial Discrimination Act 1975* (Cth).

4 The Priestly 11 are formally known as the Law Admissions Consultative Committee's *Prescribed Academic Areas of Knowledge* (2009 Law Council of Australia) <<http://www.lawcouncil.asn.au/LACC/index.php/ct-menu-item-3/documents-about-present-admission-policies>>. The Constitutional Law area makes no mention of Indigenous (or other) perspectives or issues. On the TLOs and Indigenous curriculum issues, see the discussion by Thalia Anthony and Melanie Schwartz 'Invoking Cultural Awareness through Teaching Indigenous Issues in Criminal Law and Procedure' 2013 (23) *Legal Education Review* 31–56 at 31–2. See more generally Sally Kift, Mark Israel and Rachael Field *Bachelor of Laws Learning and Teaching Academic Standards Statement* (2010 ALTC) <<http://www.lawteachnetwork.org/tlo.html>>.

5 See eg Monash University, Faculty of Law, Constitutional Law LAW 3201 Handbook Entry 2014 at <<http://www.monash.edu.au/pubs/2014handbooks/units/LAW3201.html>>. Other law faculties will have similar objectives, and these will often refer to the applicable TLOs, such as TLO 1, knowledge, and TLO 3 thinking skills.

of desirable graduate attributes such as skills of critical analysis, analysis and evaluation, cultural awareness and global awareness.⁶ A number of landmark High Court cases concern the rights of Indigenous Australians; this paper examines some of the cases, topics and issues concerning Indigenous Australians which might readily fit into the curriculum in undergraduate or postgraduate studies of Federal Constitutional Law.⁷ Topics which can be used both to address a range of TLOs and to engage student awareness and understanding of Indigenous issues are considered in turn; the acquisition of sovereignty and reception of British law in Part II, then the issues arising out of Federation, and the development of an Australian Constitution, including the race power, and the ‘just terms’ provision as they stand today in parts III and IV. Matters of constitutional reform and the recognition of Indigenous rights are then considered in Part V. Part VI concludes that the teaching of Australian constitutional law should no longer reflect the denial of Indigenous history and law that typifies the Constitution itself.

II SOVEREIGNTY MATTERS

Studies of constitutional law often begin with an evaluation of the reception of British law, the *Australian Courts Act 1828* (Cth), and the basis of British acquisition of sovereignty. Absent any treaties, or participation in the formation of the Commonwealth Constitution, the Indigenous people of Australia have never ceded sovereignty to the United Kingdom.⁸ Although Captain Cook was instructed to take possession of the territory ‘with the consent of the natives’, such consent was neither asked for, nor given, and he claimed possession of the east coast for King George III in 1770. Governor Phillip’s instructions to establish a settlement at Botany Bay in 1788 provided no obligation that the rights of the Indigenous people be upheld (only that he ‘conciliate their affections’) and proceeded on the assumption that the territory was theirs to claim; thus it became the sovereign domain of the British Crown.⁹ On the basis of the assumption of *terra nullius* and the purported discovery of ‘uninhabited’ lands, English law blanketed the continent; no Indigenous laws were recognised, no pre-settlement sovereign rights were accepted.¹⁰

While the landmark case of *Mabo v Queensland (No 2)*¹¹ is often taught to law students regarding native title and the development of the common law,¹² it is also a case that deals with the acquisition of sovereignty. Brennan J explained the acquisition of the Australian Colony:¹³

In a settled colony in inhabited territory, the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally. Thus the theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (so far as it was locally applicable) as though New South Wales were ‘an uninhabited country ... discovered and planted by English subjects’. The common law thus became the common law of all subjects within the Colony who were equally entitled to

6 For examples of graduate attributes see UTS law site <<http://www.law.uts.edu.au/graduate-attributes/attributes.html>>, or University of New South Wales *Program Objectives and Graduate Attributes* <<http://www.handbook.unsw.edu.au/undergraduate/programs/20134701.html#programobjective>>.

7 This chapter draws upon some earlier materials published by the author, particularly see Sarah Joseph and Melissa Castan *Federal Constitutional Law: A Contemporary View* (4th ed 2014) Chapter 14; Melissa Castan *Constitutional Law: Briefs* (2008).

8 John Batman signed two documents with Victorian Koories in 1835, although Governor Burke did not accept them as binding on the colonial authorities. See generally Alistair Campbell, *John Batman and the Aborigines* (Melbourne, 1987); Bain Attwood with Helen Doyle, *Possession: Batman’s treaty and the matter of history* (2009).

9 Governor Phillip’s Instructions 25 April 1787 (UK) — National Archives of Australia *Documenting a Democracy* at <<http://www.foundingdocs.gov.au/item.asp?dID=35>> 24 April 2010.

10 See Bain Attwood *Telling the Truth about Aboriginal History* (2005); Peter Russel, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (2005).

11 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo No 2*).

12 Melissa Castan & Jenny Schultz ‘Teaching Native Title’ (1997) *Legal Education Review* 75.

13 *Mabo No 2*, 36.

the law's protection as subjects of the Crown. As the subjects of a conquered territory and of a ceded territory became British subjects, a fortiori the subjects of a settled territory must have acquired that status. Its introduction to New South Wales was confirmed by s 24 of the *Australian Courts Act 1828* (Imp) (56) 9 Geo IV c 83.

The perception that there was no applicable legal system or sovereign ruler over the territory of Australia prior to European settlement was purportedly validated by Anglo-Australian common law a century prior to *Mabo (No 2)*, in *Cooper v Stuart* (1889),¹⁴ where the Privy Council found (obiter) that New South Wales was, at settlement, a territory 'practically unoccupied, without settled inhabitants or settled law'. An inflated concept of *terra nullius*, grounded on a weak precedent, became the framework on which Australia's constitutional law was constructed.¹⁵

Justice Brennan considered the International Court of Justice's rejection of the legitimacy of the expanded theory of *terra nullius* in the *Advisory Opinion on Western Sahara*,¹⁶ and concluded:¹⁷

If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law' in *re Southern Rhodesia* (1919) AC, at 233-234 can hardly be retained. ... If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country ... Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

Thus the High Court majority in *Mabo (No 2)* rejected the fiction that the territory was unoccupied, and acknowledged that the Indigenous people of Australia had a pre-existing legal system; accordingly they had certain rights under that system which remained in force until modified by the new sovereign. This analysis underpins our common law's recognition of a limited form of Indigenous property law known as 'native title'.¹⁸

For students of constitutional law, the ambiguity over whether the Colony was settled or conquered remains. In *Mabo (No 2)* the plaintiffs had accepted that the Murray Islands 'were settled by the British rather than conquered or ceded';¹⁹ this was a compromise position adopted by the parties, who were seeking to argue the issue of property title, rather than the larger issue of where sovereignty rested. But the outcome of the case seems to contain an internal contradiction; the Court rejected the British version of *terra nullius* and found that Indigenous property laws survived the acquisition of the territory, yet it also affirmed that sovereignty was acquired by 'settlement', a consequence of which is that no Indigenous laws would survive.²⁰

The sovereignty issue is a fundamental issue underlying any discussion of the acquisition of political and legal power over the Australian territory, thus it underpins Australian constitutional law. While students might have fairly assumed the partial recognition of Indigenous law in

14 *Cooper v Stuart* (1889) 14 App Cas 286, 291.

15 This was consistent with the views expressed by the leading commentator on the English Common Law, William Blackstone. *Commentaries on the Laws of England*, (1807) section 4. Justice Blackburn relied upon *Cooper v Stuart* in his rejection of the communal title claim in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ('Gove Land Rights Case'). See further David Ritter, "The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis" (1996) 18(1) *Sydney Law Review* 5.

16 *Advisory Opinion on Western Sahara* (1975) ICJ Rep 39, 41-2.

17 Brennan J in *Mabo No 2*, 41-2.

18 See Robert French, 'Native Title A Constitutional Shift', *University of Melbourne Law School JD Lecture Series*, 24 March 2009 <http://www.hcourt.gov.au/publications_05.html>.

19 *Mabo (No 2)* (1992) 175 CLR 1, 182 (Toohey J).

20 See further Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: an unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195.

Mabo (No 2) paved the way for a reconsideration of the sovereignty issues, Mason CJ, sitting alone, twice has dismissed any possibility of such an argument.²¹ The then Chief Justice's strong statements in these post-*Mabo* cases suggested that any acknowledgment of independent (or coexisting) sovereignty of Indigenous Australians is not likely to be argued successfully before the Australian High Court.²² Rather, political processes might be the source of some level of recognition for the self-determination and sovereign rights which are applicable to Indigenous people. The discussion of this issue of the difference between the role of the court and the role of the political and parliamentary processes addresses an important learning objective in the study of constitutional law.

III FEDERATION, THE CONSTITUTION AND INDIGENOUS EXCLUSION

Our constitutional law classes might point to Federation in 1901 as having been established by democratic processes, and might expressly note that the Preamble refers to the people of the various States having 'agreed to unite in one indissoluble Federal Commonwealth ... under the Constitution', yet it is also important to acknowledge that not all of 'the people' were entitled to vote on the formation of the Federation, nor were they considered to be a part of it.

Class discussion of the assumptions and concerns of the constitutional founders illustrates the issues that arise when the Constitution is interpreted in light of the 'founders' intentions' or 'originalist' analysis.²³ In the late 1800s Indigenous people were perceived to be a 'dying race', and no reliable count of their population was kept,²⁴ so the drafters did not turn much attention to them; they were considered insignificant, particularly for purposes of calculating public expenditures.²⁴ The discussion of these attitudes and assumptions makes for a clear link to analysis of the 'race' power, discussed below.

At Federation, there were only two references to the Indigenous people in the Constitution (a third reference, to 'race' is found in s 25, discussed below). First, section 51(xxvi) provided that the Commonwealth had power to make laws 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. [emphasis added]

This 'race' power was intended to empower the Commonwealth Parliament to make laws about racial minorities, such as the Melanesian field labourers (known as 'kanakas') and the Chinese working largely on the goldfields. The States were cautious with the powers they were granting to the Commonwealth, and only handed over those subject matters that were seemingly of federal interest; Indigenous people were not considered to be of probable federal concern.²⁶ Thus, the States reserved legislative power over the Indigenous people within their territories.²⁷

The second provision, s 127, stated:

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

This clause related to two aspects of population recording; first, the funding arrangements whereby the Commonwealth guaranteed certain government funds on the basis of State

21 *Coe v Commonwealth (No 2)* (1993) 118 ALR 193; *Walker v New South Wales* (1994) 182 CLR 45. See also Brennan J's discussion of the acquisition of the territory as an 'act of state' which is beyond challenge by that courts of that state at (1992) 175 CLR 1, 31.

22 See also Andrew Lokan's conclusion in 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1999) 23 *Melbourne University Law Review* 65, 120. Generally, see Stephen Gray, 'Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo v Queensland*' (1993) 2 *Griffith Law Review* 39; Stephen Curry, *Indigenous Sovereignty and the Democratic Project* (Ashgate, 2004).

23 See further Joseph and Castan, above n 7, Chapter 1.

24 Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 18.

25 John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (1997) 71.

26 In *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 404-9, Kirby J traces the history of the formulation of the section.

27 The Commonwealth could exercise power over Aboriginal people in the Territories under s 122 of the Constitution.

populations, and second, the distribution of federal parliamentary constituencies between States, which is proportionate to each State's population under s 24. Section 127 thus seemed based on the assumption that some Indigenous people were so inferior that they were not to expect the same level of government expenditure or political participatory rights as non-Indigenous Australians.²⁸

In addition, s 25 reads:

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Section 25, paradoxically, was designed to discourage States from discriminating against people on the grounds of race with regard to the right to vote; any such discrimination would result in a reduction in that State's parliamentary representation in the federal Parliament under s 24. Even so, students will readily observe that the section seems to anticipate the exclusion of an ethnic group from the franchise, which suggests that s 25 is now out of place.²⁹

Although, contrary to some assumptions, the Constitution did not explicitly exclude Indigenous people from being citizens or voting, nor specify lower levels of government expenditure or social services, it did not safeguard Indigenous people from such discrimination by unreliable State legislatures. Those constitutional provisions that did focus upon Indigenous Australians suggested that they were not to be counted as Australians.

Can legal educators assume that their students know that for most of the twentieth century many Indigenous people could not vote,³⁰ receive social welfare entitlements, move freely from place to place, choose their place of residence, own property, receive wages earned, or even bring up their own children — that they were explicitly denied fundamental human rights most other Australians took for granted? Would our law students understand these not only as events of the past, but also as laws and rules having contemporary ramifications? We might assume they acquired such knowledge from studies at school, or from exposure to the issues in the media,³¹ or possibly some personal recollection of the debate over the Apology in 2008.³² However, students may not always understand that these deprivations of civil and political rights were not always due to racially specific legislation; sometimes it was a matter of the way legislation was administered by State governments as well as the failure by all governments to significantly redress the historical and continuing harms perpetuated by ingrained prejudice against Indigenous Australians.

Professor Davis explains that

[t]he reality for Indigenous Australians is that Australia's public institutions have failed to accommodate difference and in some cases, as seen in native title law, have distorted and limited the practice of Indigenous culture and religion. This has been referred to in some literature as the psychological *terra nullius*, or the racism of Australia's public institutions.³³

28 Sawyer, above n 24, 25ff. Note he suggests that although there was no set definition of 'aboriginal natives' it was probably confined to those described as 'full bloods' and did not include Torres Strait Islanders, at 26.

29 See the *Final Report of the Constitutional Commission*, 1988, 156–7, which recommended the repeal of s 25 (as did the *Final Report of the Council for Aboriginal Reconciliation* 2000, 21 <<http://www.austlii.edu.au/orgs/car/finalreport/contents.htm>> at 1 March 2010).

30 See generally Chesterman and Galligan, above n 25, Chapter 6, on the history of the Indigenous franchise.

31 See generally *ibid*; Human Rights and Equal Opportunity Commission (HREOC), *Bringing them Home*, National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997); Quentin Beresford and Paul Omaji, *Our State of Mind: Racial Planning and the Stolen Generation* (1998) and *Rabbit Proof Fence* (Directed by Philip Noyce, 2002) or Doris Pilkington-Nugli Garimara, *Follow the Rabbit-Proof Fence* (University of Queensland Press, 1996). Students might benefit from considering the arguments and outcome in *Kruger v Commonwealth* (1997) 190 CLR 1 (discussed below), which well illustrates how susceptible Indigenous people were to the purported benevolence of State governments, and the lack of protection against such practices at the federal political and constitutional level.

32 See 'The Apology' <http://www.abc.net.au/news/events/apology/> or see Australia, House of Representatives, Parliamentary Debates (Hansard), 13 February 2008, 167–73 (the Hon K M Rudd MP, Prime Minister).

33 Megan Davis, 'A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions' (2006) 8 *UTS Law Review* 135, 135–6.

While racism is generally understood by students in a social context, in the constitutional context we might further discuss the meanings of ‘institutional racism’ or the ‘terra nullius’ of our public institutions.³⁴

In light of current debates on the constitutional recognition of Indigenous Australians by way of a referendum, students could be provided with an opportunity discuss the myths, meanings and intentions of the referendum of 1967; at that time it was hoped that the federal government would undertake the necessary consistent responsibility for resolving the dismal disadvantage still endured by Indigenous Australians.³⁵ That referendum came to assume a potent symbolic mythology; that it would have the potential to effect deep-seated change for Indigenous Australians,³⁶ displacing discriminatory State laws, and allowing access to the necessary financial resources. Kirby J depicted the state of affairs at the 1967 referendum in his (dissenting) judgment in *Kartinyeri v Commonwealth* (1998):³⁷

the leaders of all of the major Australian political parties issued statements supporting the amendment to par (xxvi) and the repeal of s 127. The Prime Minister (Mr Holt), in his statement said that it was not acceptable to the Australian people that the national Parliament ‘should not have power to make special laws for the people of the Aboriginal race, where that is in their best interests’. For the Federal Opposition, Mr Whitlam stated that the then provisions of the Constitution were ‘discriminatory’. He pointed out the need to assist Aboriginal communities in the realms of housing, education and health, and stated that the Commonwealth must ‘accept that responsibility on behalf of Aborigines’. It was also vital, he argued, to remove the excuse ‘for Australia’s failure to adopt many international conventions affecting the welfare of Aborigines’. ... There was not the slightest hint whatsoever in any of the substantial referendum materials placed before this Court that what was proposed to the Australian electors was an amendment to the Constitution to empower the Parliament to enact laws detrimental to, or discriminatory against, the people of any race, still less the people of the Aboriginal race.

The referendum was put on 27 May 1967. It was overwhelmingly approved. In the history of Australian constitutional referenda, no other such vote has come close to the unique political and popular consensus demonstrated in the 1967 referendum on Aborigines.

The constraints in formal amendment (through s 128) to the Commonwealth Constitution are often discussed in the study of constitutional law, so it is worth noting that the 1967 referendum result was the strongest endorsement of a constitutional amendment in Australia’s history.³⁸ Despite the clear intent of voters to secure wide-ranging, constructive effects, such as ‘equal rights’ for Indigenous people, the constitutional impact of the 1967 referendum was more mundane, authorising the Commonwealth to pass ‘special laws’ for Indigenous people, but not *requiring* the Commonwealth to pass such laws. The States still retained concurrent power over Indigenous people. The deletion of s 127 provided that Indigenous people could be ‘reckoned’ in the national census, but no explicit reference to what we might consider ‘citizenship’ or civil and political rights was included. This referendum is significant for those studying constitutional law as it demonstrates that referenda can be successfully employed to alter the Constitution, and it epitomizes an important symbolic shift in the general electorate’s acknowledgment of the often-deprived circumstances of many Indigenous people. But it is equally important to observe that despite strong political mandate for reform, there was no prompt action by the Commonwealth government, and very little reform of Commonwealth or State laws or their administration as an immediate consequence.

34 Megan Davis ‘Chained to the Past: the Terra Nullius of Australian Political Institutions’ in Tom Campbell, Jeffrey Goldsworthy, Adrienne Stone (eds) *Protecting Rights without a Bill Of Rights: Institutional Performance and Reform in Australia* (2006).

35 See Bain Attwood, Andrew Markus, Dale Edwards and Kath Schilling, *The 1967 Referendum or When Aborigines Didn’t Get the Vote* (1997), 24.

36 Ibid 59. See also Paul Kelly, ‘Unfinished Business’, *The Australian*, 14 March 2001, 11.

37 *Kartinyeri v Commonwealth* (the *Hindmarsh Island* case) (1998) 195 CLR 337, 408–9.

38 See Enid Campbell, ‘Changing the Constitution: Past and Future’ (1989) 17 *Melbourne University Law Review* 1, 21.

IV LAWS FOR THE ‘ABORIGINAL RACE’

Interpretation of the scope and meaning of Commonwealth heads of power makes up a considerable part of any constitutional law curriculum. Typically, constitutional law units will focus on the external affairs power (s 51xxix), the corporations power (s 51xx), the taxation power (s 51ii) and the grants power (s 96). There are aspects of all the heads of power that may support legislation regarding Indigenous Australians, but the most relevant is of course the ‘race’ power, s 51 (xxvi), and particularly the post-1967 version.³⁹ There is enduring debate over the scope of the Commonwealth’s power under s 51(xxvi) today.⁴⁰ There are few cases on the scope of the race power, and none clearly resolve the issue over whether the amended s 51(xxvi) allows for Commonwealth laws which discriminate against Indigenous Australians.⁴¹ This makes it an interesting vehicle for an investigation of the different interpretive techniques or styles of constitutional reasoning in the High Court. The tension between ‘originalist’ and ‘literalist’ approaches is brought out clearly for students by the Justices in the race power cases.⁴²

An issue of enduring judicial divergence is whether the Commonwealth has plenary power over the people of any race, so as to make laws for those people, whether those laws are entirely, or partially beneficial, or detrimental? Or is the race power restricted, permitting only laws which *benefit* the people of the particular race, and excluding detrimental laws from the ambit of s 51(xxvi)? Limitations to Parliament’s race power may be construed from the requirement within the placitum that ‘special’ laws for ‘the people of any race’ be *necessary*, and from consideration of the underlying benevolent intentions of the electorate in 1967 (at least with regard to laws affecting Indigenous Australians).⁴³ The main case of interest is *Kartinyeri v Commonwealth* (1998).⁴⁴ The Commonwealth Parliament passed the *Hindmarsh Island Bridge Act 1997* (Cth) (the *Bridge Act*), exempting the Hindmarsh Bridge project from the usual ministerial approval processes, effectively allowing a disputed construction project to proceed. The consequence of the Act was to remove the construction site from the probable protection of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the *Heritage Protection Act*), thus ensuring the construction would take place despite any consequent harm to Indigenous cultural heritage within the area. The challenge was to the validity of the *Bridge*

39 Robert French ‘The Race Power: A Constitutional Chimera’ Chapter 8 in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, CUP)

40 An unusual feature of this discussion is the exploration of the concept of ‘race’ — it is difficult to find any objective benchmark (whether it be scientific or legal) of what constitutes a “race” today (although it might have seemed perfectly apparent to the drafters of the Constitution). See the discussion in Justin Malbon, ‘The Race Power Under the Australian Constitution: Altered Meanings’ (1999) *Sydney Law Review* 80, esp 81–5.

41 In *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘*Tasmanian Dam Case*’), a number of Justices addressed the issue regarding the scope of s 51(xxvi) in obiter dicta. Murphy, Brennan, and Deane JJ indicated that the power could only support the enactment of laws which benefited a particular race, while Gibbs CJ indicated that the race power was plenary, and could therefore support beneficial and detrimental laws. In *Western Australia v Commonwealth* ((1995) 183 CLR 373 (‘*Native Title Act Case*’)) all of the Justices agreed that the *Native Title Act 1993* (Cth) had been validly enacted under s 51(xxvi). They also found that the Act was for the benefit of Indigenous Australians. When compared to the pre-existing common law, the Act clarified the rights of native title holders, and provided protection against future inconsistent State laws. As the Court found that the law was in fact beneficial for Indigenous Australians, there was no need to consider whether s 51(xxvi) authorised the enactment of detrimental laws. The majority (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ) did indicate however (at 460) that, whilst it was for the Parliament to essentially decide whether a special law for a race was ‘necessary’, the Court may retain supervisory jurisdiction over the question of ‘necessity’ in order to guard against ‘manifest abuse’ of the power.

42 For discussion of those tensions see Joseph and Castan, above n 7, Chapter 14, 546 and French on *Kartinyeri* in Lee and Winterton, above n 39, 205–6.

43 In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 it was held that the *Racial Discrimination Act 1975* which applied to protect people of all races from discrimination, was not a “special law” for the people of any one race, and was therefore not enacted under s 51(xxvi); see Gibbs CJ at 187 and Stephen J at 207. The law was however validly enacted under the external affairs power, s 51(xxix).

44 *Kartinyeri* above n 37. The background to this case is intricate, but illustrative of the complex intersection of culture, politics, and use of the legal process to resolve disputes. See for example Joseph and Castan pp533-534, and for a different approach, see Diane Bell, *Ngarrindjeri Wurrurarrin: A world that is, was, and will be* (Spinifex 2014).

Act, and its substantive provision, s 4. The female plaintiffs were of the Ngarrindjeri people, and they claimed that their cultural heritage was threatened by the construction of the bridge. The question before the High Court was whether the *Bridge Act* was validly enacted pursuant to s 51(xxvi) of the Constitution.

In order to illustrate the manner in which arguments are put before the High Court, and the virtue of exploring numerous lines of argument, it is worth encouraging students to examine the different submissions made to the Court. Counsel for the plaintiffs argued first that s 51(xxvi) did not authorise laws that distinguished or discriminated between members of a racial group; the Act here did differentiate within a racial group (Indigenous Australians) as the Act's detriment affected only one Indigenous group, the Ngarrindjeri. Secondly, it was submitted that any law enacted under s 51(xxvi) had to be for the benefit or advancement of people of any race, and not to their detriment. The *Bridge Act* was detrimental because it removed rights the plaintiffs would usually enjoy under the (clearly beneficial) *Heritage Protection Act*. Alternatively, it was argued that s 51(xxvi) could not authorise laws that were disadvantageous to Indigenous Australians, in view of the benevolence associated with the 1967 constitutional alteration (ie the revised drafters' intentions). We can ask students at this point which submissions they think would be effective, and why they find those submissions were convincing; it is interesting that five of the six sitting Justices rejected the challenge, all diverging in their reasoning.⁴⁵

Students will have to apply high-level skills of critical analysis, and evaluation in order to distil the ratio on the race power, as there was no majority evident on that crucial issue. Three Justices (Brennan CJ and McHugh J, with Gaudron J agreeing on this point) found the *Bridge Act* was a partial repeal of the *Heritage Protection Act*, as its effect was to in part reduce the scope of the 1984 Act. As the *Heritage Protection Act* was indisputably a law validly enacted under s 51(xxvi), the same head of power could support its whole or partial repeal (thus illustrating the principle that what Parliament can enact, it can repeal, in whole or in part).⁴⁶ Brennan CJ and McHugh J stated (at 356):

Once the true scope of the legislative powers conferred by s 51 are perceived, it is clear that the power which supports a valid Act supports an Act repealing it.

This decision meant that these three Justices did not need to consider the scope of s 51(xxvi); Gaudron J still did deliver obiter views on that issue.⁴⁷

Gummow and Hayne JJ, also in the majority, did not accept the 'repeal' argument, but did find the law validly enacted under s 51(xxvi).⁴⁸ Kirby J did not agree that the *Bridge Act* was a simple repeal of the *Heritage Protection Act*, and found it invalid. Thus, Gaudron, Gummow, Kirby, and Hayne JJ all considered the scope of s 51(xxvi). These Justices all discarded the first argument put by the plaintiff, that s 51(xxvi) cannot authorise laws which distinguish or discriminate between members of a racial group, holding that s 51(xxvi) supports laws with respect to a sub-group of a particular race.

The four Justices however divided on whether s 51(xxvi) only authorises laws for the benefit of the people of a race or, in the alternative, for the benefit of the people of the Aboriginal race. Gummow and Hayne JJ suggested that the power could be used to impose a disadvantage on Aboriginal people, while Gaudron and Kirby JJ disagreed with them. It is worth delving into some of the detail of their reasoning in order to illustrate the different approaches to constitutional interpretation.⁴⁹

45 Only six Justices sat, as Callinan J excused himself, having given advice as a QC to the government on the validity of the Hindmarsh Island Bridge Bill 1997. Kirby J wrote a dissenting judgment.

46 See Peter Johnston and James Edelman, 'Beyond Kartinyeri: drawing the flame close to Wik' (1998) 1 *Constitutional Law and Policy Review* 41, 42. See also the judgment of McHugh J in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 51–2, on the scope of Commonwealth power under s 51(xxxi).

47 (1998) 195 CLR 337, 365–7.

48 Students might note that Gummow and Hayne JJ found that only laws that expressly repeal certain provisions of a prior Act can be presumed valid on the basis of the "repeal" argument. The *Bridge Act* did not show a textual repeal, and therefore needed to be independently characterised under s 51(xxvi).

49 The different perspectives of the Justices are examined in detailed in Joseph and Castan above n 7, 546 and French above n 39, 199–204.

The details of the differences between these Justices would be suitable for an exercise to demonstrate how constitutional interpretation can lead to a diminution of rights, and the tendency of the High Court to adopt quite divergent interpretive approaches to constitutional issues. For example a class could be divided into groups representing the plaintiffs, the respondent and the different Justices, and present to the class or each other on each perspective. Notably Kirby J in dissent found the law to be beyond the scope of the race power because it was detrimental to Indigenous people by reference to their race. He said (at 417):

The purpose of the race power in the Australian Constitution, as I read it, is therefore quite different from that urged for the Commonwealth. It permits special laws for people on the grounds of their race. But not so as adversely and detrimentally to discriminate against such people on that ground.

Kirby J also referred to the proper place of human rights standards drawn from comparative or international law in assisting the resolution of constitutional ambiguities.⁵⁰ Students of constitutional law might be invited to consider whether the ambiguity within s 51(xxvi) should be resolved in favour of protecting rather than diminishing rights, as Kirby J advocated. It also raises interesting questions on the role of international law in constitutional interpretation. However, this case offered no clear majority on those issues.⁵¹

In earlier cases, such as *Mabo (No 2)*, and *Kruger v Commonwealth* (1997),⁵² the High Court had considered the possibility of contemporary racially discriminatory laws being acceptable, and decided they were not. But those were not cases that invoked the scope the race power. Students might consider their own assessment of the role of the High Court regarding protection of Indigenous legal rights when they reflect on *Kartinyeri*; when the validity of a modern law having detrimental impact and clearly based on distinctions of race was raised, the High Court failed to interpret the races power in the Constitution so as to protect Indigenous people from overt racial discrimination.⁵³

Notably, in his final judgment prior to his retirement (in *Wurridjal v Commonwealth* (2009) 237 CLR 309, discussed below), Kirby J expressed his palpable frustration at the position adopted by the High Court in *Kartinyeri*, and the treatment of Indigenous people by the Court in general:

History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that criterion [citing *Kartinyeri*]. The history of Australian law, including earlier decisions of this Court, stands as a warning about how such matters should be decided. Even great judges of the past were not immune from error in such cases. Wrongs to people of a particular race have also occurred in other courts and legal systems. In his dissenting opinion in *Falbo v United States*, Murphy J observed, in famous words, that the ‘law knows no finer hour’ than when it protects individuals from selective discrimination and persecution. This Court should be especially hesitant before declining effective access to the courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny.⁵⁴

50 Kirby J promoted this approach to constitutional interpretation throughout his tenure on the bench, see *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513, 657 ff, and for the contrary view, see McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562, 578.

51 Here it would be useful to draw upon the conclusions offered by French, above n 39, 204–5.

52 *Kruger v Commonwealth* (the *Stolen Generation* case) (1997) 190 CLR 1.

53 See also the discussion in Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Australian Constitutional Law: Materials and Commentary* (8th ed, 2009), 271–9.

54 Justice Kirby’s frustration appears to be as a result of the decision of the majority to reject ‘the claimants’ challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race and does so in a ruling on a demurrer’ *Wurridjal* (2009) 237 CLR 309, 394–5. Kirby’s criticism was met with a terse rebuke by Chief Justice French at 337. The High Court also overturned the old case of *Teori Tau v Commonwealth* (1969) 119 CLR 564 and found that the just terms requirement of s 51 (xxxi) applies to s 122 of the Constitution.

Students of constitutional law might wonder why there has not been a case unambiguously addressing the scope of the races power since *Kartinyeri*. The *Native Title Amendment Act 1998* (Cth) diminished native title property rights when compared to other people's property rights (thus acting to the detriment of Indigenous people), and that Act is unlikely to be characterised as a partial repeal (as opposed to an amendment) of the *Native Title Act 1993* (Cth).⁵⁵ The *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth) abolished the Aboriginal and Torres Strait Islander Commission, to the detriment of Indigenous peoples' political participation rights.⁵⁶ A challenge to either of these Acts would oblige the courts to finally resolve the scope of s 51(xxvi), but no decision regarding the constitutional validity of either Act has emerged.⁵⁷

Another head of power that is particularly relevant to the consideration of Indigenous people in the Australian Constitution is the 'just terms' requirement for Commonwealth acquisitions of property, found in s 51 (xxx). This section has two aspects, it confers power on the Commonwealth to acquire property for certain purposes, and it limits the Commonwealth's acquisition power by requiring that such property can only be acquired on 'just terms'.⁵⁸ The jurisprudence on this area of constitutional law is complex, and somewhat unstable, in that predicting the outcome of disputes that come before the High Court is not a certainty.⁵⁹ Indigenous claimants have invoked this section to resist Commonwealth dealings with traditional country, asserting that there has been an 'acquisition' and thus a requirement for 'just terms'.⁶⁰ Students could be encouraged to consider the application of this requirement in the context of the *Northern Territory National Emergency Response Act 2007*. This aspect of the so-called 'Intervention' came under constitutional challenge in the *Wurridjal* case, in particular whether the legislation satisfied the 'just terms' part of s 51 (xxx) of the Constitution.⁶¹ The case deals with complex provisions of the *Emergency Response Act* and its relationship with Northern Territory Land Rights laws. The *Emergency Response Act* granted a five-year statutory lease to the Commonwealth over property previously granted in fee simple to Aboriginal Land Trusts under the *Land Rights Act*, and also abolished a system of access by permit operating on Aboriginal Land Trust land. The majority found these measures amounted to 'acquisitions of property' under s 51 (xxx), and also found that 'just terms' were provided for those acquisitions. The Court also overturned the old case of *Teori Tau v Commonwealth*⁶² and found that the just terms requirement of s51 (xxx) applies to s 122 of the Constitution.⁶³ Students might be invited to discuss the outcome of this case, and their understandings of what the 'just' aspect of just terms requires, both in their own minds, and within the jurisprudence of the High Court.⁶⁴

55 See, for speculation regarding the constitutional validity of the *Native Title Amendment Act 1998* (Cth), Johnston and Edelman, above n 46, 47–8.

56 For further details see Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009), Chapter 13.

57 The scope of s 51 (xxvi) did not arise in *Wurridjal v Commonwealth* (2009) 237 CLR 309, which was concerned with the scope of s 51(xxx) and s 122. The High Court will not deliver 'Advisory Opinions'; its role (as per s 76 of the Constitution) as a court of dispute resolution was confirmed in *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

58 See Joseph and Castan above n 7, 426 ff.

59 Ibid 450.

60 See for instance *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495.

61 The details of this case are explored by Joseph and Castan, above n 7, 445–50, and in greater detail by Sean Brennan 'Wurridjal v Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2010) 33 *Melbourne University Law Review* 957, or Matthew Stubbs, 'The Acquisition of Indigenous Property on Just terms: *Wurridjal v Commonwealth*' (2011) *Sydney Law Review* 119.

62 (1969) 119 CLR 564.

63 As noted above (n 54), *Wurridjal* was unusual as it was decided in a 'demurrer', an old legal pleading where the defendant (here the Commonwealth) challenges the 'legal sufficiency' of the claim or cause of action. A demurrer is not a challenge to the ultimate merits of a case or claims, as the facts expressly or impliedly asserted in the statement of claim might be taken as admitted for purposes of demurrer. It presents an interesting opportunity to discuss this aspect of High Court procedure (see High Court Rules 2004 No. 304, r 27.07). Interestingly, *Mabo v Queensland* (No 1) (1988) 166 CLR 186 was fought on a demurrer. See Bryan Keon-Cohen 'The Mabo Litigation: A Personal and Procedural Account' [2000] 24 *Melbourne University Law Review* 893.

64 For instance see Dixon J in *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290, and Deane J in *Commonwealth v Tasmania* (1983) 158 CLR 1, 291.

V CONSTITUTIONAL REFORM, RIGHTS AND RECONCILIATION

On opening the 42nd federal Parliament on 13 February 2008, Prime Minister Rudd made a formal apology to the stolen generations — an acknowledgment that was long past due and widely acclaimed.⁶⁵ As with the 1967 referendum, those studying constitutional law might consider whether or not aspirations arising from the Apology far outweigh the reality of what the federal government could or would do in the short term or medium term. The Apology did not seek to directly address any of the constitutional or legislative deficiencies identified in this chapter.⁶⁶

Our Constitution currently fails to safeguard the basic human rights standards that our law students might (wrongly) assume are recognised and enforced. The federal Constitution expresses protection for few fundamental rights and freedoms, and even those that are expressed offer fairly weak protection because of the limited scope given to those sections by the High Court.⁶⁷ The consequences of the absence of a constitutional bill of rights manifested in the capacity of the Parliament to enact the *Northern Territory National Emergency Response Act 2007* (Cth), which was explicitly contrary to the *Racial Discrimination Act 1975* (Cth).⁶⁸ *Wurradjal*, discussed earlier, gives a clear example of the limitations of the express ‘just terms’ requirement in the Constitution. An earlier example of the lack of rights protection arose in *Kruger’s* case.⁶⁹ The plaintiffs contested the constitutional validity of a Northern Territory Ordinance (enacted under s 122 of the Commonwealth Constitution) that had empowered authorities to remove Indigenous children from their parents, as well as the compulsory detention of Indigenous people on reserves on alleged ‘welfare’ grounds. The plaintiffs submitted that the Ordinance violated a number of express and implied constitutional rights: namely freedom from arbitrary detention,⁷⁰ rights of equality, freedom of religion (s 116), freedom of movement and association and freedom from genocide, however all of these claims failed.⁷¹

Constitutional law students, and others, might find it interesting to consider the High Court’s finding regarding genocide in *Kruger’s* case. The plaintiffs alleged that the law amounted to genocide by authorising the compulsory transfer of the children of one racial group to the people of another racial group. Such transfer of children is identified as genocide under Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide 1948* when it is carried out with the intention of destroying, in whole or in part, the targeted racial group. The Human Rights and Equal Opportunity Commission had previously asserted that the ‘removals policy’ was genocidal, in the *Bringing Them Home* report.⁷² In spite of this, the High Court found that the Northern Territory Ordinance had not allowed removals for genocidal purposes, merely for ‘welfare’ purposes. The Justices’ interpretation of the Ordinance meant that they did not have to decide whether the Constitution in fact prohibits genocide, because they decided the removals were for the ‘welfare’ of the children. Nevertheless three Justices considered the matter; one justice, found that the Constitution impliedly prohibits genocide (Gaudron J), while two Justices found that the Constitution did not prohibit genocide (Dawson and Gummow JJ).

65 See ‘Australia, House of Representatives, Parliamentary Debates (Hansard), 13 February 2008, 167–73 (the Hon K M Rudd MP, Prime Minister). Notably the apology and acknowledgement made by the Hon B Nelson, Leader of the Opposition, was not met with the same acclaim, and is rarely referenced.

66 Students might note that Kirby J considered the Apology not ‘legally irrelevant’; see *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 70.

67 Joseph and Castan, above n 7, Chapter 12.

68 See s 132 of the *Emergency Response Act*. See also Marcia Langton ‘Trapped in the Aboriginal Reality Show (2008) 19 *Griffith Review* 143; cf Jon Altman and Melinda Hinkson *Coercive Reconciliation: stabilise, normalise, exit Aboriginal Australia* (Arena 2007).

69 *Kruger v Commonwealth* (the *Stolen Generation* case) (1997) 190 CLR 1.

70 This submission was also an argument regarding separation of Commonwealth judicial power.

71 See Joseph and Castan, above n 7, chapters 12–14. Also see Sarah Joseph, ‘*Kruger v Commonwealth: Constitutional Rights and the Stolen Generations*’ (1998) 24 *Monash Law Review* 486, 495. See also *Cubillo and Gunner v Commonwealth* (2000) 103 FCR 1, and *Trevorrow v South Australia (No 5)* [2007] SASC 285. More recently see *Collard v Western Australia* [2013] WASC 455.

72 HREOC, above n 31.

If this latter view is correct, then our federal Constitution fails to protect one of the most basic human rights, and a long recognised international law standard.⁷³

In teaching about constitutional reform, Indigenous issues may provide a useful case study for prospective developments, particularly given the current debates surrounding recognition of Indigenous Australians.⁷⁴ The very real prospects of constitutional recognition of Indigenous Australians, and the best form of words to address such reform is one of the few opportunities teachers have to discuss a contemporaneous referendum. Formal constitutional reform through the use of s 128 has proven to be an arduous, and often unsuccessful endeavour, but we should resist the temptation to teach our law students that a difficult argument is not worth attempting. Common suggestions from students (and many others) for the modernisation and reform of our Constitution revolve around alterations to reflect the reality of prior Indigenous ownership and first discovery of Australia, as well as recognition of rights of equality, non-discrimination and difference.⁷⁵ The recommendations of the Prime Ministers Expert Panel,⁷⁶ and discussion of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) are excellent starting points. Students might consider the ramifications of altering section 51(xxvi) to authorise the Commonwealth to make special laws only for the benefit of any race, and the impact or utility of a section making it unlawful to adversely discriminate on the basis of race with regard to the right to vote (to replace s 25).⁷⁷ Specific constitutional protection of Indigenous rights, like that adopted by Canada, is often raised as a possibility.⁷⁸ Students might have the opportunity to explore whether the inclusion of specific Indigenous rights would be appropriate, or even possible, and whether they would strengthen the validity and integrity of our constitutional system.⁷⁹

There remain strong arguments for the Preamble to include acknowledgment of the first occupancy and ‘ownership’ (and yes, sovereignty) of Australia by Indigenous peoples; even the recognition of ongoing rights arising out of that status as Australia’s first peoples might have a place in the Preamble.⁸⁰ The issue of how to amend the Preamble, (as part of the covering clauses) should be explored, and this raises discussion of the *Australia Act 1989* (UK and Cth). Many students would not recall the failed referendum on alteration of the Preamble to the Constitution, in 1999, and they could consider how the political and social context impacts on any referendum’s success. Students might explore the idea of whether the referendum process itself may have wider impacts in Australia, much as the 1967 referendum result and the national Apology each generated broad shift in national attitudes.⁸¹ There may also be other paths to alter

73 See the views of the different justices in *Nulyarrima v Thompson* (1999) 96 FCR 1192; (1998) 148 FLR 285.

74 Discussion papers and other materials on this debate can be found at <http://recognise.org>. Students could adopt various roles and present submissions on desired reform proposals, for example ranging from the minimalist change to the Preamble, to extensive recognition of Indigenous rights through new constitutional clauses. Such a learning activity would engage students in higher order analysis, critical thinking and communication of the constitutional impact of the different positions. It also would assist in development of greater understanding of social justice and cultural awareness, these are key graduate attributes.

75 Further matters of substantive economic and social inequality, such as standards of health, education, housing and employment still must be addressed, and programs to meet these needs are still of course critical. Melissa Castan, ‘Reconciliation, Law, and the Constitution’, in Michelle Grattan (ed), *Reconciliation* (Bookman Press, Melbourne, 2000), 202, 206; Mick Gooda, *Social Justice and Native Title Report 2014* (2014).

76 Prime Minister’s Expert Panel *The report of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (2012).

77 This was one of the proposals of the Council for Aboriginal Reconciliation, *Final Report* (2000), 21 <<http://www.austlii.edu.au/orgs/car/finalreport/contents.htm>> 1 March 2010.

78 Section 35(1) of the *Constitution Act 1982* (Canada) recognises and affirms ‘the existing aboriginal and treaty rights of the aboriginal peoples of Canada’.

79 This would also raise the opportunity to discuss the role and impact of the United Nations General Assembly Declaration on the Rights of Indigenous Peoples, adopted in 2007, which Australia endorsed in 2009. (A/RES/61/295).

80 The Victorian Constitution was altered in 2004 to acknowledge the absence of Aboriginal participation in the creation of that instrument, and to recognise Victoria’s Aboriginal people as the original custodians of territory. See *Constitution Act 1975* (Vic), s 1A. The Queensland Constitution was similarly altered in 2010 to include a Preamble which honours ‘the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community’. See *Constitution Act 2001* (Qld).

81 See Melissa Castan, above n 75, 206.

the Constitution, including amendment of the *Referendum (Machinery Provisions) Act* 1984 (Cth), and development of consensus building mechanisms such as plebiscites, conventions and concomitant law reform.⁸² The discussion of the recognition of Indigenous people in States' Constitutions and their Preambles, and analysis of the impact and efficacy of such recognition can be explored.⁸³

In addition to constitutional amendments, students often ask about a 'treaty', or negotiated settlement agreement, which could recognise the distinct rights of Australian Indigenous people, and set in place national standards.⁸⁴ Like amendment to the Constitution, such an agreement is only realistic if there is widespread community momentum in favour of embarking on the process; if that is evident, then, such an agreement should be enshrined in the Constitution (in a section akin to s 105A on state agreements), or at the minimum in federal and State statutes.⁸⁵

VI CONCLUSION

The Constitution and laws of Australia still reflect the denial of Indigenous identity, presence, laws, and rights. Past examples include so-called protection laws associated with policies of dispossession, assimilation and child removals, and laws that denied basic civil and political rights, such as voting, political participation, citizenship and freedom of movement and association. Current examples include laws regarding the administration of criminal justice or welfare that ostensibly appear neutral yet are applied in a manner that disclose ingrained racism.⁸⁶ There is no reason for the teaching of Australian constitutional law to reflect the same denial. The recognition of the role that the Anglo-Australian constitutional, legal and political system have played in the discrimination and dispossession of Indigenous Australians is as essential now as it was in 1901, 1967 or 2000. Explicit incorporation of these issues into the constitutional law curriculum for law students is an essential aspect of redressing the omissions inherent in our Constitution.

82 As suggested by George Williams in 'Thawing the Frozen Continent' 2008 (19) *Griffith Review* 35.

83 See above n 80.

84 Some treaty proposals can be found in documents such as G Clarke, 'From Here to a Treaty', *Hyllus Maris Lecture*, Latrobe University, September 2000; Marcia Langton 'A Treaty between our Nations', *Inaugural Professorial Lecture*, University of Melbourne, November 2000; Patrick Dodson, *Wentworth Lecture*, 12 May 2000, Canberra.

85 Legal issues regarding a treaty are explored at length in the book by Sean Brennan, Larissa Behrendt, Lisa Strelein, and George Williams, *Treaty* (Federation Press, 2005).

86 Castan, above n 75, 209; Davis above n 33.

