Australian Racism:

The Story of Australia's First and Only Black Premier and Chief Justice – Sir Francis Villeneuve Smith[1]

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ABSTRACT OF THE LAUNCH OF THE BOOK *SIR FRANCIS VILLENEUVE SMITH* BY J BENNETT AND R SOLOMON

Sir Francis Villeneuve Smith was the third Premier and fourth Chief Justice of the British colony of Tasmania. He was born in Haiti and his mother, Josephine Villeneuve, was of African descent. His skin colour was dark. He migrated to Australia from England, where he had been educated and admitted to the Bar. His brilliance soon won him high public offices. However, his skin colour led to social isolation for his mother and denigration and insults intended to wound him. He was called 'Blackie Smith', 'Nigger' etc. But his talents overcame the racial taunts and the outrage that 'a coloured person is sitting in judgment upon the Anglican (sic) race'. His experience was accompanied by racist laws and policies in Australia against which we must be ever vigilant.

From the establishment of British colonies in Australia and arrival of people of British ethnicity, the country had to face three significant features of the place:

- The arrivals included comparatively few people in total number and almost all of them were 'white' in skin colour. Most of the population encountered relatively few Indigenous people or others whose skin colour was other than white. Theirs was a homogenous mainly Anglo Celtic community. People of colour were an immediately noticeable and tiny minority;
- Because the Indigenes of Australia were few and were not organised in cities and towns but mostly in coastal areas, virtually all of the interactions that the new arrivals and later settlers had were with each other and with new arrivals from overseas who were also of white skin colour and of British ethnicity; and
- Legally, the new arrivals and other people born in the Australian colonies were, like the Indigenous people, British subjects by nationality. They shared this status with the peoples of a huge global Empire that was multi-racial and dependent for their ultimate safety and defence on the loyalty (or at least the tolerance) of millions of other British subjects who were not white and many of whom were very sensitive to racial differentiation and disadvantage. The peace and safety of the British Empire depended, in part, upon the force of military and naval power; but also on the tranquility and submission to British rule of millions of subjects who were not white in skin colour.

In the Australian colonies, attitudes of imperial superiority and racial leadership led to intense scrutiny of 'coloured aliens' who were entering the country, especially in the north. Marriage and other unions between Aboriginal women and men of colour or other immigrants and the white majority in Australia were the subject of widespread disapproval throughout the 19th century. Thus, there was great civic anxiety over miscegenation.[3] Nevertheless, pastoralists experimented with importing free or indentured labour from India, Afghanistan, China and the Pacific Islander peoples and Maori from New Zealand. The farmers argued the need for such people to perform work in conditions inimical to most of the whites. On the whole, the British Colonial Office, local governors and a growing number of settlers opposed the 'admixture of races'. In consequence, from at least the 1850s the colonies in Australia began to adopt restrictive immigration policies. The tropical north of Australia was treated as an exception.

Nationalism in Australia was not revolutionary or inherently anti-British. It regarded eventual independence of the Australian colonies as a likely attribute of Britishness. National identity in the new land would be developed within the membership of the wider imperial family. There was a self-conscious sense of destiny among many of those who demanded self-government and eventually federation for Australia. They saw their destiny as being to develop societies and governance which copied those of England. A growing commitment to a 'White Australia' – meaning an Australia in which the Asian population, Chinese in particular, would be excluded and dramatically reduced, even to the point of non-existence, had been taking shape in the Australian colonies before the Federation movement got underway.

After the 1850s, all of the newly established colonial parliaments in Australia enacted laws to expressly limit Chinese immigration. These included the *Chinese Immigration Act 1855* (Vic) and the *Chinese Immigration Restriction and Regulation Act 1861* (NSW). Restrictions were also imposed on the employment of Chinese immigrants in identified industries. An Australasian Inter-Colonial Conference on the 'Chinese Question' in 1888 concluded with an agreed commitment to a common

restrictive immigration policy. By that time, the goal of a guaranteed Australian 'whiteness' was a powerful unifying factor in the Great South Land.[4] Virtually everybody supported it.

Sir Henry Parkes, five times Premier of New South Wales, declared that 'the crimson thread of kinship' ran through all colonial Australians.[5] This shared kinship was the reason for the insertion in the draft Australian Constitution of a power, granted to the Federal Parliament, to enact 'special laws' with respect to the people of any race.[6] Dealing with the Indigenous people who were black was identified as a particular local problem. It was thus a matter for the colonies, later the states, alone. But the power to control immigration from overseas, including potentially people of different dark skinned races, was viewed as a national problem. Hence the adoption of the constitutional power over immigration in s 51(xxvii) which promptly led to the enactment of the federal *Immigration Restriction Act 1901* (Cth).

The Imperial authorities at Westminster did not readily approve of the Australian colonial legislation insofar as it specifically restricted the entry of other British subjects by reference to their racial identity or appearance. Thus, the 1855 *Chinese Immigration Act* in Victoria was repealed under British pressure in 1863. However, by the 1870s colonial anxieties were freshly fuelled by the arrival of thirteen thousand Chinese gold diggers, first on the Queensland goldfields, later in Victoria and New South Wales. Reports from California told of an increasing Chinese presence there. This had resulted in the creation of a US congressional joint committee of 1876. It found:[7]

> 'There was danger of the white population in California becoming outnumbered by the Chinese; they came here under contract, in other words as coolies of a servile class; that they are subject to the jurisdiction of organised companies … The Chinese cheap labour deprived white labour of employment, lowered wages and kept white immigrants from coming to the State.'

The Australian colonists were fearful of the same developments happening here.

In the early 1880s in Australia, there was therefore mounting agitation in the colonies over the 'Chinese question'. The issue was posed whether the continent's future lay 'with Greater Britain or greater China?'[8] This concern was voiced throughout Australasia. Having recently established their own legal jurisdictions, the colonists were resistant to losing this to demographic expansionism from Asia. A great increase in the Chinese population in their own country in the 18th and 19th centuries had already led to large movements of 'overseas Chinese' into South East Asia where their progeny has remained behind to this day, often as vulnerable minorities. Recent research has shown that the Chinese in colonial Australia increasingly demanded recognition for what we would now view as their human rights. They did so in campaigns linked to international demands for an end to racial discrimination.

The British authorities in London were torn between loyalty to the settlers in Australasia and imperial pressure towards limiting the most objectionable features of laws involving racial discrimination. In Asia, the newly emerging Japanese Empire demanded the removal of immigration restrictions as applied in British colonies affecting them. Australian officials for their part repeatedly resisted imperial pressure to avoid or repeal discriminatory laws against migrants who were Indians and Japanese.[9] In 1897, a colonial conference was held in London to coincide with Queen Victoria's Diamond Jubilee. White colonial leaders agreed to adopt a so called 'Natal formula'. This provided for the use of a literacy test to achieve racial discrimination, but without the offensiveness of specifically naming unwanted races. A similar test had earlier been introduced in Mississippi in 1890 to disenfranchise African Americans and to discourage the arrival of more them.

So it was that the *Immigration Restriction Act* of 1901 was one of the first statues enacted by the new Australian Federal Parliament. It incorporated a dictation test in a 'European' language. That law was enacted despite strenuous objections by Chinese and Indian spokesmen and by Japanese diplomats in London and in Sydney.

Ironically, the Japanese protested at what they saw as the undeserved 'insult' of classifying them with other Asians and Pacific Islanders. They pointed not only to their history but also to their 'national [skin] complexion'. Like the Chinese earlier, they had come to the conclusion that the real issue for the British colonists was not civilisation or economic prowess but race and skin colour. This they regarded as deeply insulting, possibly because they themselves sometimes shared a disdain for people of darker skin colour and regarded themselves as effectively 'white'. In the end, the British Imperial authorities gave way to the demands of the white leaders of the settler colonies. But the anger on the part of the Japanese continued to fester.

The *Immigration Restriction Act* was not the only new law of the Commonwealth addressed to strengthening the goal of White Australia. Even the *Post and Telegraph Act* sought to prevent employment of non-white labour, including on ships carrying mail to Australia. The *Pacific Island Labourers' Act* also provided for the deportation of Pacific Islanders who had earlier been imported to work in Northern Australia. Henry H B Higgins, one of the Founders of the Commonwealth and later a Justice of the High Court of Australia supported this legislation. He said that it was necessary to protect people who were used to a high standard of life and to good wages and conditions. They would not consent, he declared, to 'labour alongside men who receive a miserable pittance and who are dealt with very much in the same way as slaves'.[10]

Meantime, several developments began to get in the way of continuing the restrictions based on skin colour. One of these was the very effectiveness of Australian missionaries in converting thousands of Pacific Islanders to Christianity. They then drew the brutal treatment of the Christian Pacific Islanders in Australia to the attention of the authorities and the general population. Some even preached Christian messages of racial equality. Nevertheless, Australian governments began to assert what they called 'Australia's Monroe Doctrine'. This envisaged that the islands of the Pacific, and not just continental Australia, were to be held by the Anglo-Saxon race so as to belong to the 'people of Australasia'. Such intentions exasperated the Imperial authorities. They were also difficult to reconcile with an effective White Australia policy, except on the basis of the taking of profits from the work of 'coloured' people while excluding them as permanent immigrants. The same consequence was also to flow from the assumption by the Australian federal government of control over Papua in 1906 and over German New Guinea (later a mandated territory of the League of Nations) in the early days of the Great War.

Once the national project of the Commonwealth got started after 1901, the assertion by home politicians of adherence to a permanent white racial composition was virtually unanimous. It was to last for nearly three quarters of the ensuing century.[11] Japan had fought alongside Britain, Australia, New Zealand and their Allies in the First World War. Japan therefore earned a place at the table for the drafting of the *Treaty of Versailles* in 1919. Japan's diplomats again criticised the Australian *Immigration Restriction Act* and similar laws adopted in the United States and elsewhere. However, the chief Australian delegate at Versailles,

William Morris Hughes, stood out for his total opposition to any concession on such laws. He was unapologetically racist in outlook. His views were popular with the Australian electors.[12]

The *Immigration Restriction Act* was not a flash in the pan. Alfred Deakin offered an exalted explanation for such measures. They represented, he said, 'the desire to be one people and remain one people without the admixture of other races.' This had been 'the most powerful force in the making of Federation.'[13] This assertion by Deakin was historically dubious, there having been scant attention to the issue in the referendum campaigns over federation. However, from the 1890s on, the newly emerging Labor Party made White Australia central to their increasingly successful campaigns in Australia's federal elections.

British pressure for amelioration for the language of Australia's immigration legislation was eventually accepted by the Commonwealth. Edmund Barton pointed out that the exclusion of non-white immigrants was only really effective because Australia was protected by the Royal Navy.

It was therefore best, he suggested, to conform to British suggestions that a test for exclusion expressed in terms of facility in a European language should be used rather than by reference to race or skin colour as such. However, the ALP advertised itself as national and racial before anything else. Its first objective was 'the cultivation of an Australia sentiment based upon the maintenance of racial purity, and the development in Australia of an enlightened and self-reliant community'.[14] For most of the 20th century the maintenance of White Australia alongside loyalty to, and dependence on, the British Empire, the adoption of industrial arbitration, protectionism, tariffs and general isolationism were the common features of the core policies of all of Australia's major political groupings.

True to his ALP origins, Dr Herbert Vere Evatt, otherwise an important and liberal founder of the United Nations, defended Australia's racially restricted immigration policies in the conferences and negotiations that followed the end of the Second World War.[15] When Mr R G Menzies was returned to lead the federal government in 1949, he promised to soften the 'harshness' of ALP government's enforcement of racial immigration by avoiding family break-up in individual cases. With this compact White Australia then began to gradually recede from front page news.[16]

The core policy of White Australia endured throughout the long years of the Menzies Government. However, Australia's diplomats by the 1960s began to meet counterparts from newly independent countries of the Commonwealth of Nations who explained the serious insult that the White Australia policy involved for non-Caucasian neighbours and friends. Ironically, it was then that the ALP began to lead the internal Australian debates in favour of reform of the policy, a step that succeeded in the change of the official platform of the ALP at its 1965 Federal Conference. Substantial alterations of the still applicable federal laws had to await the departure of R G Menzies and the appointment of Harold Holt as Australia's Prime Minister. The growing international diplomatic campaign against South Africa's Apartheid regime spilt over to demands for changes from Australia. Prime Minister Holt led the successful campaign for the 1967 referendum to amend the language of the 'races power'. He did not seek to abolish it but to expand the power so as to include the enactment of racially-based federal laws with respect to Australia's Aboriginal people.[17]

In the end, it was the Whitlam Government after 1972 that terminated the remaining elements in the legal and regulatory infrastructure that had sustained White Australia. Thereafter, Malcolm Fraser's administration established the Institute of Multi-Cultural Affairs, promising a completely new unifying theme for the Australian nation. While, after 1996, John Howard was later much less comfortable with the idea of multi-culturalism, the notion survived all of the Governments that followed Malcolm Fraser's. The Aboriginal population was increasing in numbers and the earlier expectation that Indigenous Australians would die out became less acceptable or necessary in the post 'White Australia' era.[18]

Universal human rights as declared by the United Nations now most definitely include the entitlement of all persons to be free and equal in dignity and rights with no reference to such criteria as race, skin colour and Indigenous status as a cause for discrimination.

From the 1980s significant numbers of immigrants from Asia and other 'non-white' countries began to arrive in Australia to settle and make it their home. Across the continent, their children began to attend schools, especially public schools. Their families began to settle in suburban neighbourhoods. Acquaintance and familiarity played a big part in the acceptance of this very significant cultural change. This was reinforced by the enactment of the *Racial Discrimination Act 1975* (Cth), the creation of the Australian Human Rights Commission; of the Australian Law Reform Commission; and the appointment of the Racial Discrimination Commissioner.

Despite these advances, legal reflections of the long-held attitudes of racial superiority and hostility continued to persist until changed in Australia. A few obvious instances may be mentioned:

- The abolition of the legal rule denying Indigenous Australians access to the wealth and benefits of their traditional lands was not reversed, as it might have been, by parliamentary legislation. It was only eventually reversed by judicial decisions of the High Court of Australia in *Mabo v Queensland [No.2]*[19] and *Wik Peoples v Queensland*[20].
- The attempts to confine the actual operation of the amended 'races power' in the Australian Constitution to purposes beneficial to Indigenous peoples, and not adverse to their interests, failed in argument before the High Court in *Kartinyeri v The Commonwealth*[21];
- The national apology to the Indigenous people of Australia was given in the Federal Parliament in 2008 with bipartisan support.[22] However there has been no apology for those others who suffered from and under White Australia. While making an acknowledgement of country has now become a standard convention in Australia, converting such gestures to economic and other recompense has not yet occurred. On the contrary, in the Northern Territory of Australia a National Intervention took place in 2009, which (however well intentioned) was clearly discriminatory in its operation and involved differential application of laws based upon the characteristic of the Aboriginal race among those affected and without consultation with those so disadvantaged: These laws were upheld as valid by the High Court of Australia in *Wurridjal v The Commonwealth*[23] but not without a dissent from me;
- The number of Australians identifying in the national census as deriving from Asian origins is now approximately 9%. However, the numbers of judicial officers, senior counsel, partners in legal firms and legal academics who are Asian remains very small: unreflective of the shift in the composition of the general population. This fact led to the creation in 2014 of the Asian Australian Lawyers' Association, since which greater minority participation in all branches of the legal profession has begun to occur. Similar improvements are needed in respect of Indigenous Australians. The lead time for achieving such reforms is not short;
- A request by assembled representatives of Australia's First Peoples at Uluru in 2018 for a voice in the *Statement from the Heart*[24] into the Federal Parliament was immediately and peremptorily dismissed by the then Prime Minister Turnbull.[25] The request was even misrepresented as involving a demand (never made) namely for a third chamber in the Federal Parliament. The aspiration of constitutional recognition of, and respect for, the First Peoples remains to be achieved in Australia. Its fate now appears to be somewhat uncertain;[26] and

- So far as those who endeavour to come to Australia to claim protection as refugees, which Australia has promised to accord them in accordance with the *Refugees Convention 1951* and the *New York Protocol*, such people face highly discriminatory laws; banishment to off-shore detention centres in Nauru and Manus Island PNG; together with prolonged detention and other serious burdens that appear left-overs from the earlier way that Australia addressed unwanted and unwelcome people (mostly of colour) through dictation tests in unknowable languages; and prolonged incarceration to discourage the foolhardy who attempt to arrive as the first white people and early settlers had done, by small boats.

Of course, racial discrimination has never been confined to Australia. It is an infantile phenomenon common to the people of all races. It traces its origins to fear, distaste and rejection of the 'other'. It appears to be specially common among island people, like Australians, the British, the Japanese and others – although it is certainly not confined to them. It led to a life-long burden of social isolation borne in the British colonies in Australia by Josephine Villeneuve, a "very dark-skinned young woman" that drove her back to Britain which she found to be more welcoming. It was she who gave birth in Haiti in 1819 to Francis Smith. He was destined to become a remarkable leader of the executive and judicial branches of government in Tasmania.[27] Like his mother, he was also obliged to suffer calumny, racial slurs and discrimination in his chosen land of adoption. However, he won through to success and accomplishment by his sheer ability and personal industry. His very large talents were acknowledged by his appointments to high offices of state and to civil honours, including the imperial honour of knighthood.[28]

Alas, overcoming attitudes and laws that discriminated on racial grounds was to prove a very common source of injustice in colonial and post-colonial Australia. Such prejudices did not die out in Australia when the accomplishments of Sir Francis Villeneuve Smith were recognised for all to see. But in the end, parliaments and Courts addressed many of the injustices. Other institutions of government in the Courts and specialised commissions in Australia addressed the deep human feelings that lay behind the injustices. In *Mabo v Queensland [No.2]*[29], it fell to Justice F.G. Brennan in the High Court of Australia to explain, in the context of the denial of native title to the dark skinned Indigenous people of Australia, the offence that was involved in rejecting legal equality on the basis of race and racial characteristics:

> '… 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 … Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust discriminatory doctrine of that kind can no longer be accepted. The expectations in the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights … brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'

Universal human rights as declared by the United Nations now most definitely include the entitlement of all persons to be free and equal in dignity and rights with no reference to such criteria as race, skin colour and Indigenous status as a cause for discrimination. Moreover, it also now includes the right to equality by reference to sex, age, disability, sexual orientation and gender identity. Australia has experienced a long journey struggling with many of these forms of discrimination. The life stories of immigrant, lawyer, politician, Premier and Chief Justice Sir Francis Villeneuve Smith, and of his mother Josephine Villeneuve and of his wider family, are simply particular cases that illustrate this aspect of Australia's national story. They demonstrate that people should not suffer disadvantage and hostility because of some feature of their human nature that is part of them: that they did not choose and cannot change.

The triumphant and successful life of Sir Francis Villeneuve Smith indicates why Australian's must ensure that all forms of irrational prejudice must be banished. In Australia we constantly need to tackle such aspects of discrimination because, among the nations of the earth, we were early leaders in discriminatory laws and practices. For nearly 200 years we became experts in devising and enforcing laws and policies that enforced the discrimination and reinforced the attitudes of fear, loathing and hostility that lay behind such laws. The life of Sir Francis Villeneuve Smith demonstrates how wrong-headed such attitudes are. Fortunately most Australians have come to realise this. But Australia's lawyers were often foremost in enforcing, justifying and upholding the discrimination while it lasted. That is why this latest book by John Bennett and R C Solomon in the series on *Lives of the Australian Chief Justices* deserves special attention, even today. **BN**

ENDNOTES

1 Remarks made on the occasion of the launch in Hobart on 30 July 2019 and at the Bar Association of New South Wales in Sydney on 15 August 2019 of the book by J Bennett and R Solomon, *Sir Francis Villeneuve Smith,* Federation Press, Sydney, 2019.
2 Former Justice of the High Court of Australia (1996-2009); Co-Chair of the Human Rights Institute of the International Bar Association (2018-).
3 T Banivanua Mar and P Edmunds, 'Indigenous and Settler Relations' *The Cambridge History of Australia*, Vol. 1, Cambridge, Melbourne, 2013, 362-3 (hereafter *Cambridge History*).
4 H Irving, 'Making the federal Commonwealth 1890-1901' in *Cambridge History*, 242 at 248-9. See also Joseph Lee, 'Anti-Chinese Legislation in Australasia' (1889) 3 *Quarterly Journal of Economics* (OUP) 218 at 221-224.
5 H Irving (ed), *The Cambridge Companion to Australian Federation* (Cambridge, 1999), 355 citing Parkes.
6 *Australian Constitution*, s 51(xxvi).
7 M Lake, 'Colonial Australia and the Asian Pacific Region' in *Cambridge History, 535 at 542-3.*
8 B Moloughney and J Stenhouse, 'Drug-Besotten, Sin Begotten Fiends of Filth: New Zealanders and the Oriental Other' (1850-1920) (1999), 33, *New Zealand Journal of History*, 1 at 43.
9 M Lake, above, *Cambridge History,* 535 at 548-549.
10 H B Higgins in *Commonwealth Parliamentary Debates*, Vol. 5, 6815 (3 November 1901) cited Lake, *Cambridge History*, 549.
11 S Gageler, "A Tale of Two Ships: The *Tamper* and the *Afghan*" (2019) 40 (3) *Adelaide Law Review*, 360.
12 C McCreery and K McKenzie, 'The Australian Colonies in a Maritime World' in *Cambridge History, 560 at 567.*
13 H Irving, above, *Cambridge History, 242 at 246. See also M Lake, Cambridge History,* 535 at 559.
14 M Bellanta, 'Rethinking the 1890s' in *Cambridge History*, 218 at 231.
15 E Ede, 'Internationalist Vision for a Post-War World: H V Evatt, Politics and the Law', unpublished, University of Sydney, 2008, 73ff.
16 C Bridge, 'Australia, Britain and the British Commonwealth', *Cambridge History,* Vol. 2, 518 at 532-533.
17 J Brett, "The Menzies Era, 1950-66" *Cambridge History, Vol. 2, 112 at 129. See also P Strangio, "Instability, 1966-82" Cambridge History,* Vol.2, 135 at 136.
18 Strangio above, *Cambridge History,* Vol. 2 135 at 146 – 147.
19 (1992) 175 CLR 1.
20 (1996) 187 CLR 1.
21 (1998) 195 CLR 337.
22 Hon Kevin Rudd MP, Prime Minister, House of Representatives, 13 February 2008. The speech was supported by the Leader of the Opposition, Hon B Nelson MP.
23 (2009) 237 CLR 309.
24 *Uluru Statement from the Heart,* released on 26 May 2017 by delegates to the Aboriginal and Torres Strait Islander Referendum Convention at Uluru, Central Australia.
25 "Turnbull Government says no to Indigenous "Voice to Parliament"', *The Conversation,* 26 October 2017, online.
26 See Hon Ken Wyatt MP, 'An Indigenous Voice: Let's make it easier for the next Neville Bonner to be heard', https://www.smh.com.au/national/an-indigenous-voice-let-s-make-it-easier-for-the-next-Neville-Bonner-to-be-heard-20091029-p535br.html.
27 J M Bennett and R C Solomon, *Sir Francis Villeneuve Smith (Lives of the Australian Chief Justices),* Federation, Sydney, 2019 at 24-27.
28 Ibid, at 150 (1862). But in 1880, a proposal for promotion to a higher class was not successful. See ibid, 193.
29 (1992) 175 CLR 1 at 42.