Race and the Australian Constitution: From Federation to Reconciliation

George Williams

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol38/iss4/6

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
Race and the Australian Constitution: From Federation to Reconciliation

Abstract
The framing of the Australian Constitution initiated a pattern of discrimination against Australia’s Indigenous peoples. They were cast as outsiders to the nation brought about in 1901. This pattern was broken in 1967 by the deletion of the discriminatory provisions from the Constitution. Today, there is strong community support in Australia for the reconciliation process, which would involve recognition of Indigenous peoples as an integral and unique component of the Australian nation. However, this has yet to be translated into substantive legal outcomes. The author analyses the interaction of issues of race and the Australian Constitution as it has affected Australia’s Aboriginal peoples, and concludes with an examination of contemporary proposals for reform.

This article is available in Osgoode Hall Law Journal: http://digitalcommons.osgoode.yorku.ca/ohlj/vol38/iss4/6
The framing of the Australian Constitution initiated a pattern of discrimination against Australia's Indigenous peoples. They were cast as outsiders to the nation brought about in 1901. This pattern was broken in 1967 by the deletion of the discriminatory provisions from the Constitution. Today, there is strong community support in Australia for the reconciliation process, which would involve recognition of Indigenous peoples as an integral and unique component of the Australian nation. However, this has yet to be translated into substantive legal outcomes. The author analyses the interaction of issues of race and the Australian Constitution as it has affected Australia's Aboriginal peoples, and concludes with an examination of contemporary proposals for reform.

Une discrimination routinière s'est faite envers les peuples autochtones de l'Australie dans le cadre de la constitution australienne. Malgré que les peuples autochtones furent traités d'étrangers depuis la création de la nation en 1901, ceci a été rectifié en 1967 par l'élimination des dispositions discriminatoires de la constitution. En Australie aujourd'hui, un sentiment d'appui communautaire existe vis-à-vis un processus de réconciliation qui aurait comme objectif la reconnaissance des peuples autochtones comme étant une composante intégrale et unique de la nation australienne. Toutefois, ce processus doit encore se traduire en résultats juridiques substantifs. L'auteur analyse l'interaction entre les questions de race et la constitution australienne tel que cela a affecté les peuples autochtones. L'auteur conclut en examinant des propositions de réformes contemporaines.

I. INTRODUCTION ........................................................... 644

II. FEDERATION: INDIGENOUS PEOPLES AND THE AUSTRALIAN CONSTITUTION ................................ 647

III. A CENTURY OF NEGLECT .................................................. 650
    A. The 1967 Referendum .................................................. 652
    B. The Hindmarsh Island Bridge Case ................................... 653

© 2000, G. Williams.

* Anthony Mason Professor and Director, Gilbert & Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Barrister, New South Wales Bar; Laskin Professor of Public Law, Osgoode Hall Law School, York University (Winter 2001 semester). This is the revised text of the Laskin Lecture on Public Law, presented at Osgoode Hall Law School on 7 March 2001. The author thanks Emma Armson for her comments on an earlier draft and Pat Knowles for his research assistance.
I. INTRODUCTION

The year 2001 marks the centenary of the *Australian Constitution*.¹ It has been a focal point for celebration about how Australia, like Canada, has become one of the oldest continuous democracies in the world. Since 1901, the *Australian Constitution* has withstood political crises and the passage of time to produce a stable democracy responsive to and representative of the people. This has been a crucial factor in the economic and other successes of the Australian nation.

There has been much discussion over the course of those one hundred years about the achievements of the Australian legal system in protecting human rights, and about how this has been brought about without a bill of rights and the divisive and charged debates that have characterized the United States, and more recently the Canadian, constitutional systems. Over thirty years ago, Sir Robert Menzies, Australia's longest serving Prime Minister, proudly stated that “the rights of individuals in Australia are as adequately protected as they are in any other country in the world.”² He argued that Australia did not need a bill of rights because basic freedoms were adequately protected by the common law and by the good sense of elected representatives, who are constrained by the doctrine of responsible government (that is, the notion that the prime minister and ministers are answerable for their actions in the parliament). This reflected the views of the framers of the *Australian Constitution* expressed in the 1890s. Sir Owen Dixon, a former

¹ The Constitution, as enacted by the *Commonwealth of Australia Constitution Act 1900*, 63 & 64 Victoria, c. 12 (U.K.), came into force on 1 January 1901 [hereinafter *Australian Constitution*].

Chief Justice of the High Court, suggested in 1965 that the framers rhetorically asked: "[why] should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people ... all legislative power, substantially without fetter or restriction?" \(^3\) 

On 18 February 2000, Prime Minister John Howard, in discussing mandatory minimum sentencing on national radio, stated that "Australia's human rights reputation compared with the rest of the world is quite magnificent." \(^4\) Here, he expressed the commonly held view, and implied that the record underlying the reputation is just as good. Australians like to think that their basic rights are well protected. Of course, in the main this is correct. Australians are fortunate that the rule of law is firmly entrenched in their political culture, and that they have an independent High Court. However, there are many examples of where the legal system has failed sections of Australian society.

Visions of an excellent human rights record in Australia are not consistent with a careful and considered examination of the historical record. Even today, Australia suffers from significant and continuing problems, and issues of human rights are at the forefront of debate. For example, the regime of mandatory minimum sentencing for minor property offences operating since March 1997 in the Northern Territory\(^5\) has meant that the imprisonment rates of Indigenous women and children have risen alarmingly, including for offences such as the stealing of a packet of biscuits valued at three dollars. The legislation imposes a "three strikes and you're in" policy under which a third minor property offence will lead to automatic imprisonment of not less than twelve months.\(^6\)

Political agitators can also find themselves faced with jail. In 1996, Albert Langer was imprisoned for ten weeks for distributing leaflets encouraging voters to put the candidates of the major parties "equal last." \(^7\) He breached section 329(a) of the *Commonwealth Electoral Act 1918* (Cth), which provided that a person could not advocate a preferential vote numbered "1, 2, 3, 3." Langer challenged


\(^4\) Australian Broadcasting Corporation, Radio Broadcast, "AM Program" (18 February 2000).

\(^5\) *Sentencing Act 1995* (N.T.), as am. by the *Sentencing Act (No 2) 1996* (N.T.) and the *Sentencing Amendment Act 1998* (N.T.).

\(^6\) *Sentencing Act 1995* (N.T.), s. 78A. This regime was challenged in the courts on constitutional grounds, but was upheld by the Supreme Court of the Northern Territory in *Wynbyne v. Marshall* (1997), 117 N.T.R 11. Special leave to appeal to the High Court was refused.

\(^7\) On appeal, the length of the sentence was reduced.
this section in the High Court, but failed. In a strong dissent, Justice Sir Daryl Dawson described section 329(a) as "a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice." After the High Court finding, Amnesty International released a statement describing Langer as "the first prisoner of conscience in the country for over 20 years."

It might be argued that Australia is simply at par with other comparable nations, which continue to have their own human rights concerns. After all, Canada has its own debates on the appropriateness of mandatory minimum sentencing. However, Australia differs from these other nations in one crucial respect. It has not yet developed a statement setting out the basic rights and freedoms of the Australian people. Other common law nations have already done this: Canada in 1982, New Zealand in 1990, and even the United Kingdom (from which Australia’s legal system is derived) in 1998. Australia has been left behind, its legal system quarantined from human rights developments in other nations with which it has shared a common legal framework. While each of these nations, like Australia, had relied upon the common law tradition to protect rights, they have since recognised the need to supplement this with a bill of rights.

The critical weakness of the Australian constitutional and legal system lies in the area of human rights and race. The Australian Constitution was drafted explicitly to facilitate the enactment of racially discriminatory laws. This has affected one segment of the Australian population more than any other: Australia's Aboriginal or Indigenous

---

10 See, for example, the controversy surrounding the decision of the Supreme Court of Canada in R v. Latimer, [2001] 193 D.L.R. (4th) 577.
14 According to Chief Justice Spigelman of the Supreme Court of New South Wales, within a decade, British and Canadian court decisions in many areas of the law may become “incomprehensible to Australian lawyers.” He has warned that the “Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing.” Hon. J. Spigelman, “Access to Justice and Human Rights Treaties” (2000) 22 Sydney L. Rev. 141 at 150.
peoples,\textsuperscript{15} who inhabited Australia for uncounted thousands of years before white settlement in 1788. While the \textit{Australian Constitution} has produced stable democratic government, it has failed Indigenous peoples. This article focuses on this aspect of the \textit{Australian Constitution}, and the challenges it continues to present today. Part II examines the position of Indigenous peoples under the \textit{Australian Constitution} at the time of Federation. Part III analyses constitutional and other developments since Federation and examines the recent decision of the Australian High Court in \textit{Kartinyeri v. Commonwealth (Hindmarsh Island Bridge Case)}.\textsuperscript{16} Part IV looks at the current reconciliation process in Australia. Part V examines proposals for legal reform as part of this process.

\section*{II. FEDERATION: INDIGENOUS PEOPLES AND THE AUSTRALIAN CONSTITUTION}

The \textit{Australian Constitution} was not written as a people's constitution. Instead, it was a compact between the six Australian colonies designed to meet, amongst other things, the needs of trade and commerce.\textsuperscript{17} Consequently, the \textit{Australian Constitution} says more about the marriage of the colonies and the powers of their progeny, the Commonwealth, than it does about the relationship between Australians and their government. The document does not expressly embody the fundamental rights or aspirations of the Australian people. It contains few provisions that are explicitly rights-orientated.\textsuperscript{18} According to Lois O'Donoghue, a former chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC):

\begin{quote}
\end{quote}

\begin{quote}
(1998), 195 C.L.R. 337 [hereinafter \textit{Hindmarsh Island Bridge Case}].
\end{quote}

\begin{quote}
See, for example, \textit{Australian Constitution}, supra note 1, s. 92 which states: "trade, commerce, and intercourse among the States ... shall be absolutely free." As Manning Clark has argued, the Constitution was written by drafters who "wanted a Constitution that would make capitalism society hum": M. Clark, "The People and the Constitution" in S. Encel, D. Horne & R. Thompson, eds., \textit{Change the Rules! Towards a Democratic Constitution} (New York: Penguin, 1977) 9 at 18.
\end{quote}

\begin{quote}
G. Williams, \textit{Human Rights Under the Australian Constitution} (Melbourne: Oxford University Press, 1999) at 47-50 [hereinafter \textit{Human Rights}].
\end{quote}
It says very little about what it is to be Australian. It says practically nothing about how we find ourselves here—save being an amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.\textsuperscript{19}

The \textit{Australian Constitution} was drafted at two conventions held in the 1890s.\textsuperscript{20} Neither convention included any women,\textsuperscript{21} nor representatives of Australia's Indigenous peoples and ethnic communities. In most cases, Aboriginal people were not qualified to vote for the delegates to the Convention,\textsuperscript{22} and appear to have played no meaningful role in the drafting process itself.\textsuperscript{23} It is not surprising, then, that the \textit{Australian Constitution} as drafted did not reflect their interests or aspirations. The preamble makes no mention of the prior occupation of Australia by its Indigenous peoples.\textsuperscript{24} In fact, the operative provisions of the \textit{Australian Constitution} were premised upon their exclusion, and even discrimination against them. This, then, was the legal foundation upon which Aboriginal people were made part of the Commonwealth of Australia on 1 January 1901.

\textsuperscript{19} F. Brennan, \textit{Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia} (Carlton, Vic.: Constitutional Centenary Foundation, 1994) at 18.


\textsuperscript{21} Catherine Helen Spence stood for election as a South Australian delegate to the 1897-1898 convention; she was unsuccessful: see D. Headon, “No Weak-Kneed Sister: Catherine Helen Spence and ‘Pure Democracy’” in H. Irving, ed., \textit{A Woman’s Constitution?: Gender and History in the Australian Commonwealth} (Sydney: Hale & Iremonger, 1996) 42.


\textsuperscript{23} Brennan, \textit{supra} note 19 at 6.

\textsuperscript{24} The preamble of the \textit{Australian Constitution}, \textit{supra} note 1, states:

\begin{quote}
WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.
\end{quote}
The *Australian Constitution* of 1901 in many ways resembles the *British North America Act, 1867* that founded the Canadian nation. It differs, however, in its explicit negative treatment of Indigenous peoples. Section 51(xxvi) of the *Australian 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 went further in providing: “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 inserted into the *Australian 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 the 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, the leader of the 1897-1898 Convention and subsequently Australia’s first Prime Minister, 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.” In summarising the effect of section 51(xxvi), John Quick and Robert Garran, writing in 1901, stated that:

> It 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.

---

25 *British North America Act, 1867* (U.K.) 30-31 Vict., c. 3.


28 Compare the use of “people” in other provisions such as ss. 7, 24 of the *Australian Constitution*, *supra* note 1.


30 *Annotated Constitution, supra* note 20 at 622.
One framer, Andrew Inglis Clark, the Tasmanian Attorney General, supported a provision taken from the United States Constitution requiring the “equal protection of the laws.” This clause might have prevented the 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.” Clark’s provision was rejected by the framers who instead inserted section 117 of the Australian Constitution, which merely prevents discrimination on the basis of state residence.

Sir John Forrest, Premier of Western Australia, summed up the mood of the 1897-1898 convention when he stated that:

> 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.

In formulating the words of section 117, Henry Higgins, one of the early justices 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.”

III. A CENTURY OF NEGLECT

Given the drafting history of the Australian Constitution, it is not surprising that legislation enacted by the new Commonwealth Parliament was premised upon racially discriminatory policies. The Immigration Restriction Act 1901 (Cth), for example, prohibited the

---

32 *Melbourne Convention 1898*, supra note 29 at 665.
33 Section 117 of the *Australian Constitution*, supra note ?, 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 *Human Rights*, supra note 18 at 47-50.
34 *Melbourne Convention 1898*, supra note 29 at 666.
immigration into Australia of any person who, when asked by an officer, was unable to "write out at dictation and sign in the presence of the officer a passage of fifty words in length in a European language directed by the officer." This was the means by which the White Australia policy was implemented.

Of more significance to Aboriginal people was legislation that denied them the right to vote in federal elections. Prior to Federation, Aborigines other than freeholders were excluded from the Queensland franchise by section 6 of the Elections Act 1885 (Qld.). In Western Australia, a similar disqualification was imposed by section 12 of the Constitution Amendment Act 1893 (W.A.). New South Wales, South Australia, Tasmania, and Victoria imposed no such disqualification, and accordingly Aborigines in those states were entitled to vote for the first federal parliament in 1901. Section 41 of the Australian Constitution provided that "no adult person" entitled to vote at state elections should be prevented from voting at federal elections "by any law of the Commonwealth." Clearly, at the first federal election in 1901, this provision operated to ensure that Aborigines in all states except Queensland and Western Australia were entitled to vote.

The scope of the federal franchise was determined after Federation by the Commonwealth Franchise Act 1902 (Cth). That Act extended the federal franchise to women, and it had been proposed that the bill also extend the franchise to Aborigines. However, the latter proposal was strongly resisted and was finally defeated. Among its opponents were Isaac Isaacs, subsequently chief justice of the High Court and Australia's first Australian governor general, who thought Aborigines "have not the intelligence, interest or capacity" to vote; and Henry Higgins, who thought it "utterly inappropriate . . . [to] ask them to exercise an intelligent vote."

As finally enacted, section 4 of the Franchise Act specifically denied the voting rights of the "aboriginal native[s] of Australia . . .

---

36 Immigration Restriction Act 1901 (Cth), s. 3.
37 Section 6 stated: "No aboriginal native of Australia, India, China, or of the South Sea Islands . . ."
38 Section 12 stated: "No aboriginal native of Australia, India, China, or of the South Sea Islands . . ."
39 See Human Rights, supra note 18 at 96-103.
40 Hereinafter Franchise Act.
41 Australia, House of Representatives, Hansard (24 April 1902) at 11979.
42 Ibid. at 11977.
unless so entitled under Section 41 of the Constitution.” It was not until 1962 that the Commonwealth Electoral Act 1918 (Cth) was amended to extend universal adult suffrage to Aboriginal people. In the meantime, even when Aboriginal people were entitled to vote as a matter of law under section 41 of the Australian Constitution, as a matter of administrative practice they were denied that right.

A. The 1967 Referendum

The obvious discrimination against Aboriginal people on the face of the Australian Constitution was one factor in the emergence of moves to amend it. Another factor was a concern that Aboriginal issues were not being dealt with appropriately at the state level and that the 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”. The proposal was supported in every state and nationally by 89.34 per cent of Australians, with 9.08 per cent voting “No.” Of the forty-four 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 place of Aboriginal people within the Australian legal structure. However, it is important to note that, 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 Australian

43 Even then, unlike other Australians, it was not compulsory for Aborigines to enrol to vote: Commonwealth Electoral Act 1962 (Cth). Equality for Indigenous people at Commonwealth elections did not eventuate until 1983, when the Commonwealth Electoral Amendment Act 1983 (Cth) made enrolment for, and voting in, Commonwealth elections compulsory for Aboriginal Australians.


45 Amendment of the Australian Constitution is provided for by section 128. A successful change under section 128 must be: (1) passed by an absolute majority of both houses of the federal parliament, or by one house twice; and (2) at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states (that is, in at least four of the six states).

46 Australian Constitutional Law and Theory, supra note 44 at 1186.
Constitution, including the preamble, devoid of any reference to Indigenous peoples. While the objective of the 1967 referendum was to remove discriminatory references to Aboriginal people from the Australian Constitution and to allow the Commonwealth to take over responsibility for their welfare, it may be that, in failing to set this intention into the words of the Australian Constitution, the change actually laid the seeds for the Commonwealth to pass laws that impose a disadvantage upon them. 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 enabled the "races power" to be used to legislate for the detriment of Aboriginal people, it would be a sad irony. It would undermine the powerful symbolism attached to the 1967 referendum, which is viewed in Australia as Indigenous peoples' most significant political victory.

B. 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. Hindmarsh Island ("Kumarangk") is in the Murray River delta in South Australia. During the 1980s, there was commercial development 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) 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) was then enacted by the newly elected Howard (Liberal-National Party) Coalition

47 Hereinafter Heritage Protection Act.
48 Hereinafter Bridge Act.
Government to preclude any further possibility of a protection order under the 1984 Act. The Bridge Act amended the Heritage 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 validity of the Bridge Act. They argued, with myself as part of their legal team, 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. I will expand upon this point in part IV.

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." He acknowledged "the direct racist content of this provision" in the sense of "a capacity for adverse operation." 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.

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.

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

The case was decided by only six judges because Justice Callinan, after some initial reluctance, disqualified himself from deciding the

---


50 Ibid.

51 Ibid.
The challenge by the Ngarrindjeri women failed by five-to-one (with Justice Kirby dissenting), because, in the words of Chief Justice Brennan and Justice McHugh: "Once the true scope of the legislative powers conferred by section 51 [is] perceived, it is clear that the power which supports a valid Act supports an Act repealing it." It was common ground that the Heritage 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 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 the Native Title Act Case that the court might retain "some supervisory jurisdiction to examine ... the possibility of a manifest abuse of the races power." Moreover, they hinted at the possible relevance in such a case of the ultimate power of judicial review under Marbury v. Madison, and of Justice Dixon's suggestion in the Communist Party Case that in the Australian Constitution "the rule of law forms an assumption."

Justice Kirby's dissenting judgment held that the races power "does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race)." 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

---

52 Justice Callinan had previously advised the Commonwealth that the Act was constitutionally valid: see S. Tilmouth & G. Williams, "The High Court and the Disqualification of One of its Own" (1999) 73 Australian L.J. 72.

53 Hindmarsh Island Bridge Case, supra note 16 at 376.


55 Ibid. at 460.

56 5 U.S. (1 Cranch) 137 (1803).

57 Australian Communist Party v. Commonwealth (1951), 83 C.L.R. 1 at 193.

58 Hindmarsh Island Bridge Case, supra note 16 at 411.
be significantly altered" so as to permit only positive or benign discrimination.59

Justice Gaudron, who had previously suggested that a limitation of the races power to beneficial purposes had "much to commend it,"60 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."61 The deletion of eight words could not change the meaning of the words that remained. However, she 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 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."62 These tests, she suggested, might give operable meaning to the concept of "manifest abuse."63 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."64 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."65

The overall effect of the judgments was inconclusive. The Court split two-to-two on the scope of the races power, with a further two judges not deciding. It thus failed to resolve the issue of whether the Commonwealth possesses the power under the Australian Constitution to enact racially discriminatory laws. This possibility has reinforced calls for

59 Ibid. at 413.
60 Lim v. Minister for Immigration, Local Government, and Ethnic Affairs (1992), 76 C.L.R. 1 at 56.
61 Hindmarsh Island Bridge Case, supra note 16 at 366.
62 Ibid.
63 Ibid.
64 Ibid. at 367.
65 Ibid.
an Australian bill of rights. The result in the case could hardly be said to be a solid foundation from which to advance reconciliation. It is not surprising then that reconciliation requires a re-examination of the Australian Constitution.

IV. THE PRESENT: RECONCILIATION

The decision in the Hindmarsh Island Bridge Case coincided with the beginning of a dramatic rise in popular support for the reconciliation movement. The reconciliation movement comprises many grassroots organisations, such as Australians for Native Title and Reconciliation, and is supported by ATSIC. Politically, the process is overseen by a federal Minister for Reconciliation.

The government centrepiece of the movement is the Council for Aboriginal Reconciliation, which was established by statute in 1991 and was wound up at the end of 2000. The council undertook a decade of promoting and laying down strategies for the reconciliation process. The council’s vision of reconciliation was as follows: “A united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.” The final report of the council was publicly delivered in December 2000 to political leaders including the prime minister and the leader of the opposition. After a slow start and years of being dogged by controversy and resignations, the council was able to achieve greater public success in the final year of its term. The rise in popular support for reconciliation generally was brought about by events such as those described below.

66 See G. Williams, A Bill of Rights for Australia (Sydney: University of New South Wales Press, 2000).

67 The Council was established as a statutory authority on 2 September 1991 when the Council for Aboriginal Reconciliation Act 1991 (Cth) received the Royal Assent.

68 Its successor is Reconciliation Australia Limited, a private charitable foundation.

A. Native Title

Indigenous Australians achieved their most significant legal victory in 1992, when the High Court in *Mabo v. Queensland (No 2)*[^70] held that Aboriginal Australians possess a right to “native title” over their traditional lands and that this was not overridden upon British acquisition of sovereignty. It was held that such title is a continuing right except where it has been expressly extinguished. Subsequently, in 1996 in *Wik Peoples v. Queensland*,[^71] the Court found that “there was no necessary extinguishment of those rights by reason of the grant of pastoral leases.”[^72]

The response of the federal Parliament to *Mabo (No 2)* under the Keating labor government was to enact the *Native Title Act 1993* (Cth). This gave a statutory basis to the common law native title recognised by the High Court. It also had the effect of overriding Western Australian legislation, as a result of section 109 of the *Australian Constitution*.[^73] The Western Australian legislation had sought to extinguish all native title subsisting in Western Australia and thus to wholly negate the effect of the common law as declared in *Mabo (No 2)*[^74].

The approach of the subsequent Howard government to the decision in the *Wik Case* was less benign. In response to fears from farmers and miners that the decision would affect their economic well-being, prompted in part by suggestions from the government itself that the decision would lead to such a result and that large sections of Australia would now be subject to native title claims, including perhaps people’s own “backyards,”[^75] the government announced a “ten point plan” for native title. In the words of Deputy Prime Minister Tim

---

[^70]: (1992), 175 C.L.R. 1 [hereinafter *Mabo (No. 2)*].

[^71]: (1996), 187 C.L.R. 1 at 133 [hereinafter *Wik Case*].

[^72]: Ibid. at 133.

[^73]: Section 109 states: “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

[^74]: In *Western Australia v. Commonwealth (Native Title Act Case)* (1995), 183 C.L.R. 373 the High Court unanimously held that the *Land (Titles and Traditional Usage) Act 1993* (W.A.) was completely inoperative as it was inconsistent with both the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act*.

[^75]: This notion was rejected in *Fejo v. Northern Territory* (1998), 195 C.L.R. 96, in which the High Court held that native title is extinguished by a grant of freehold title.
Fischer, this plan would produce “bucket-loads of extinguishment.” 76 The package was enacted as the Native Title Amendment Act 1998 (Cth), 77 and in reducing the native title rights of Indigenous Australians had also to override the protection provided by the Racial Discrimination Act 1975 (Cth) from discrimination on the basis of race. 78 Hence, while section 7(1) of the Native Title Amendment Act states that “this Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act,” section 7(2) provides that the Racial Discrimination Act has no operation where the intention to override native title in the Native Title Amendment Act is unambiguous.

The lessening of Aboriginal rights to native title brought about by the Native Title Amendment Act created great division in Australian society, and contributed to the rise of new extreme right wing parties such as Pauline Hanson’s One Nation Party. This party saw even the “ten point plan” as caving into Aboriginal interests, and has as its policy: “To repeal the native title legislation, abolish ATSIC and reverse the effect of the Wik Legislation.” 79 The rise of Pauline Hanson’s One Nation Party and perceptions that the Native Title Amendment Act had caused injustice to Indigenous peoples also produced a countervailing reaction amongst other Australians, who in response rallied behind the reconciliation process.

B. The Stolen Generations

There has been in recent years further exposure of the many human rights abuses that have afflicted Indigenous peoples over the last century. The most important revelations concerned the so-called “Stolen Generations.” Over most of the twentieth century, Aboriginal children were forcibly taken from their family for adoption or to be placed into

77 Hereinafter Native Title Amendment Act.
78 Racial Discrimination Act 1975 (Cth), s. 10(1) [hereinafter Racial Discrimination Act] states that: “If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.”
institutions. This was the subject of an inquiry by the Human Rights and Equal Opportunity Commission (HREOC) headed by its president, Sir Ronald Wilson, a former justice of the High Court. Its 1997 report, *Bringing Them Home*, found:

Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten, in that time not one Indigenous family has escaped the effects of forcible removal (confirmed by representatives of the Queensland and WA [Western Australian] Governments in evidence to the Inquiry). Most families have been affected, in one or more generations, by the forcible removal of one or more children.\(^80\)

HREOC concluded:

Indigenous families and communities have endured gross violations of their human rights. These violations continue to affect Indigenous people’s daily lives. They were an act of genocide, aimed at wiping out Indigenous families, communities and cultures, vital to the precious and inalienable heritage of Australia.\(^82\)

The Inquiry recommended that reparations be made to the Stolen Generations, including an apology and monetary compensation.\(^83\)

Members of the Stolen Generations also issued a legal challenge in the High Court, in which they argued that the *Aboriginals Ordinance 1918 (N.T.)* was invalid insofar as it authorized the forced removal of Aboriginal children from their families and communities. The Ordinance was challenged by six plaintiffs, five of whom were Aboriginal Australians who, as children, had been forcibly removed from their families under the Ordinance. The sixth plaintiff was an Aboriginal mother whose child had been taken from her. The High Court held in *Kruger v. Commonwealth*\(^84\) that the enactment was valid. In the absence of a bill of rights, there was no legal recourse for the children or their parents. A further test case was brought in tort seeking damages, but this


\(^81\) Ibid. at 37.


\(^83\) *Bringing Them Home*, supra note 80 at 282.

\(^84\) (1997), 190 C.L.R. 1.
was also lost.\textsuperscript{85} The manifest injustice of such outcomes, in regard to an issue that produced strong emotional reactions in many Australians, was very important in creating a tide of community support for Indigenous people and their claims.

Reparations in the form of an apology or monetary compensation have yet to be made to the Stolen Generations. Concern at the continuing lack of redress has focused upon Prime Minister Howard’s refusal to apologize for past injustices.\textsuperscript{86} This has contributed to popular support for legal change and for recognition of the special position of Indigenous peoples in Australian society. The refusal to apologize has lead to an unofficial annual “National Sorry Day” being supported throughout Australia and the launch of a “Journey of Healing.”

C. 2000: The Year of Reconciliation

The Council for Aboriginal Reconciliation has described 2000 as “the year for reconciliation.”\textsuperscript{87} Reconciliation was made a central theme of the Sydney Olympics from the moment Aboriginal athlete Nova Peris-Kneebone became the first person to run in Australia with the Olympic torch, which she received at Uluru (formerly known as Ayres Rock). Reconciliation was a theme in both the opening and closing ceremonies, with the lighting of the flame by an Aboriginal woman, Cathy Freeman. This was followed by general public elation, and not a little relief, at Freeman’s winning of a gold medal in the four hundred metres track event. The effect of a sporting event such as the Sydney Olympics upon Australian political attitudes and culture should not be underestimated. Perceptions of the great success of the event are inextricably linked with positive attitudes towards the reconciliation process.

The year 2000 also saw the phenomenon of the Bridge Walks for Reconciliation in capital cities and towns across Australia. Around a quarter of a million people took part in the People’s Walk for Reconciliation across the Sydney Harbour Bridge on the twenty-eighth of May in what was one of largest public demonstrations for a cause ever seen in Australia. Hundreds of thousands more people joined bridge


\textsuperscript{86} Howard has, however, indicated his “deep and sincere regret” for past injustices against Aboriginal peoples: Australia, House of Representatives, \textit{Hansard} (26 August 1999) at 9165.

\textsuperscript{87}Final Report, supra note 69 at xii [emphasis in original]. Although it was also careful to note that this was “not yet the year of reconciliation.”
walks and related events on the same day and in the following weeks in cities and towns around Australia.

V. THE FUTURE: RECONCILIATION AND THE CONSTITUTION

The Final Report of the Council for Aboriginal Reconciliation made it clear that reconciliation will require several changes to Australia’s legal structure. Two directly affect the Australian Constitution.

A. A New Preamble

The council recommended that the *Australian Constitution* be altered to “recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution.”\(^*8^8\) A new preamble would not grant any new rights to Indigenous people, but would be an important symbolic statement. At best, such a statement might be used by the High Court to resolve the open question of whether the races power can be applied to discriminate against Aboriginal people.\(^*8^9\)

An attempt has already been made to draft a new preamble to the Constitution. In the midst of the debate over an Australian republic in 1999, Prime Minister Howard announced that a second referendum question would also be put before the Australian people concerning a new preamble.\(^*9^0\) He then, without public or Indigenous involvement, drafted a new preamble. His proposed version contained a clause that read: “Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures.”\(^*9^1\) Howard’s preamble attracted little support as a result of its awkward and confused wording, refusal to

---

\(^*8^8\) *Ibid.* at 105.

\(^*8^9\) Compare, however, section 125A of the *Constitution Alteration* (Preamble) 1999 (Cth), which would have been inserted into the Constitution along with the preamble put to the people in the unsuccessful 1999 referendum on an Australian republic. Section 125A read: “The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.”


\(^*9^1\) M. McKenna, “The Tyranny of Fashion: John Howard’s Preamble to the Australian Constitution” (1999) 10 Public L. Rev. 163 at 163.
acknowledge the original occupancy and custodianship of Australia by Indigenous peoples, a bizarre reference to “mateship,” and the fact that it had been drafted without public consultation. He subsequently produced a new preamble that was revised according to a deal between the government and the Democrats, who held the balance of power in the senate, before being rushed through parliament. The revised preamble put to the Australian people on 6 November 1999 contained a clause that read:

We the Australian people commit ourselves to this Constitution ... honouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.  

Like the vote on the republic itself, the referendum on the preamble was defeated nationally and in all six states. Nationally, the preamble received a “Yes” vote of 39.34 per cent and a “No” vote of 60.66 per cent. It was not widely embraced by the Indigenous community. Although it made reference to them, the reference was still ungenerous. “Kinship,” rather than “custodianship,” was used to describe the relationship of Indigenous peoples to the land. Unfortunately, “kinship” does not easily apply to the connection between a person and a place or thing. The next time a preamble is drafted, the process ought to involve consultation with Aboriginal people and the community more broadly.

B. A Treaty

The Council for Aboriginal Reconciliation recommended that “the Commonwealth Parliament enact legislation ... to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.” The idea of a treaty has long been supported by the Indigenous community, and the current elected chair of ATSIC, Geoff Clark, restated the call for a treaty between Indigenous peoples and the Australian Government at the Corroboree 2000 convention. It is difficult

92 Constitution Alteration (Preamble) 1999 (Cth).
94 See Final Report, supra note 69 at 106, the Reconciliation Bill 2000 in Appendix III, which was drafted to set out such a process. The author was a consultant to the council on the drafting of this legislation.
to see how the reconciliation process can move forward without such an agreement.

A treaty might be the lynchpin of the next stage in the reconciliation process. It could open up the Australian political and legal system, which, since federation, has largely excluded Indigenous peoples. In this context, a treaty signifies nothing more than an agreement between two or more parties. While it has connotations that suggest an agreement between sovereign nation states, this need not be the case. In many other countries, a treaty has been signed between the settler and Indigenous inhabitants as a way of striking an agreement on governance and other issues. New Zealand provides a good example, with the Treaty of Waitangi, signed in 1840. In fact, a treaty is the normal and accepted way in other nations of achieving an appropriate settlement. Australia is the only Commonwealth nation that does not have a treaty with its Indigenous peoples.  

Understood in this way, a treaty should not be of any greater concern than, say, something that might be called a framework agreement. Of course, the enormous difficulties cannot be hidden by whatever name is adopted for the instrument. Many questions would arise, such as who would negotiate on behalf of Indigenous peoples, and whether the treaty would grant Indigenous peoples a measure of self-government.

There is no constitutional reason why a treaty could not recognise a measure of sovereignty or self-government for Indigenous peoples. This could be developed within the existing legal system. The Australian Federation already encompasses different laws co-existing at the federal, state, and local levels. The High Court in Mabo (No 2) has also given legal effect to the native title of Indigenous peoples and has found that the content of this title is defined by Indigenous legal and cultural traditions. This did not fracture Australia’s existing system of law, but was accommodated within it.  

For Indigenous peoples, problems such as poverty are inextricably linked with the lack of control over their own lives. A treaty could grant them a greater say over their affairs and give them the place

---

95 Ibid. at 6.
96 Mabo (No 2), supra note 70 at 58 per Justice Brennan: “Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”
they have yet to gain within the Australian legal system. This would not give them special rights or privileges, but, like other Australians, provide a greater say over their own destiny. In moving forward in this direction, Australia has much to learn from both the successes and mistakes of Canada, and will undoubtedly look to nations such as Canada for guidance in the future.

VI. CONCLUSION

The framing of the *Australian Constitution* through to the early decades of the Australian nation 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 broken in 1967 by the referendum that deleted discriminatory provisions from the *Australian 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.

Today, there is strong community support in Australia finally to embrace Indigenous peoples as an integral and unique component of the Australian nation. This support has yet to be translated into meaningful results. As Australians celebrate the centenary of federation, no progress has yet been made on the recognition of Australia's Aboriginal peoples in the *Australian Constitution*. There has been a false start on the question of a new preamble, but the reconciliation process may yet produce in the longer term a preamble that involves Aboriginal people in its drafting. It should also produce a treaty that will set out the legal status of Indigenous peoples within the Australian Federation.