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CONSTITUTIONAL LAW  
AND INDIGENOUS  
AUSTRALIANS:  
CHALLENGE FOR A  
PARCHED CONTINENT

Law Council of Australia  
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Constitutional Change: Recognition or Substantive  
Rights?

The Hon. Michael Kirby AC CMG

**LAW COUNCIL OF AUSTRALIA**  
**OLD PARLIAMENT HOUSE, CANBERRA**

**FRIDAY 22 JULY 2011**  
**DISCUSSION FORUM**

**CONSTITUTIONAL CHANGE: RECOGNITION OR SUBSTANTIVE  
RIGHTS?**

**CONSTITUTIONAL LAW AND INDIGENOUS  
AUSTRALIANS: CHALLENGE FOR A PARCHED  
CONTINENT**

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**GETTING TO YES IN AUSTRALIA**

It is a privilege for any Australian, especially of my generation, to gather in Old Parliament House. To speak in the building in which the parliamentary business of our nation was discharged for more than half a century. Here are found the portraits and the spirits of the famous Australians who led this country in peace and war. The Law Council of Australia deserves praise for summoning us to consider an issue of existential importance for our continental land: the provisions of the national Constitution as they concern the indigenous people: the Australian Aboriginals and Torres Strait Islanders.

Let us, at the outset, pause to reflect on the respect we owe to them, both to their forebears and to their Posterity<sup>1</sup>. Let us do so sincerely as the New Zealanders do; not mechanically or perfunctorily. Wrongs have

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\* Justice of the High Court of Australia 1996-2009. Chairman of the Australian Law Reform Commission 1975-1984. Honorary Life Member of the Law Council of Australia.

<sup>1</sup> The words used in the preamble to the Constitution of the United States of America: "To secure the blessings of Liberty to ourselves and our Posterity ...".

been done to the indigenous people. Including in this place. And including in the Constitution that binds us all<sup>2</sup>.

In 1951, speaking in this building, Prime Minister Robert Menzies lamented the failure of his misbegotten referendum to dissolve the Australian Communist Party and to impose civil burdens on communists. He said<sup>3</sup>:

“The truth of the matter is that to get an affirmative vote from the Australian people on a referendum proposal is one of the labours of Hercules. [T]his last referendum showed us ... the amount of sheer hard lying that goes on in the course of a referendum campaign designed to alter the Constitution and the amount of muddled thinking and speaking that can proceed from minds that are supposed to be improved by university degrees is quite baffling to me.”

Lying and muddled thinking there may have been. But on that occasion, and many others besides, the Australian people showed wisdom and good judgment in rejecting the proposal to change their national Constitution.

Geoffrey Sawer once said that, constitutionally speaking, Australia was a “frozen continent”<sup>4</sup>. It did not necessarily have to be so. The mechanism adopted to provide for formal amendment of the constitutional text was copied from Switzerland. It was innovative, in that it placed ultimate power in the hands of the Australian people. There were many ways in which in which this faith in the electors was signalled during the creation of the federal Constitution:

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<sup>2</sup> Cf. *Coe v The Commonwealth of Australia and the Government of the United Kingdom* (1978) 52 ALJR 344; (1979) 53 ALJR 403.

<sup>3</sup> Quoted in L.F. Crisp, *Australian National Government* (1983) 5<sup>th</sup> Ed, 40.

<sup>4</sup> G. Sawer, *Australian Federalism in the Courts* (1967) 208.

- \* The decision (unlike that in the United States of America and Canada) to hold the constitutional conventions in public, with a verbatim transcript for all to see and read<sup>5</sup>;
- \* The election of delegates and the provision (reflected in the Preamble<sup>6</sup> to the *Constitution Act*) that the Constitution was adopted at the people's request by the United Kingdom Parliament<sup>7</sup>; and
- \* The detailed provisions for electoral democracy that permeate the constitutional text<sup>8</sup>.

In fact, our Constitution is suffused with the sovereignty of the people. Not the sovereignty of the Crown. Nor the sovereignty of parliament (as in the United Kingdom). The sovereignty of the Constitution traceable to the will of the sovereign people. All the people. Including the Aboriginal people, although they had no real part in its design or adoption and received only minor, and then substantially negative, mention in its text<sup>9</sup>.

Most educated Australians, and all lawyers I hope, know the daunting record of referendums to alter the text of the Australian Constitution. In 110 years of the operation of our Constitution, there have been 44 referendum proposals. Eight only have been carried with the requisite double majority required by s128 of the Constitution.

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<sup>5</sup> G. Williams and D. Hume, *People Power: The History of the Future of the Referendum in Australia* (UNSW Press, Sydney, 2010).

<sup>6</sup> "Whereas the people of New South Wales, Victoria, South Australia, Queensland; and Tasmania ... have agreed to unite in one indivisible Federal Commonwealth under the Crown ... and under the Commonwealth hereby established."

<sup>7</sup> *Commonwealth of Australia Constitution Act* 1900 (UK); 63 & 64 Victoria, Chapter 12.

<sup>8</sup> See e.g. Australian Constitution, ss25, 51(xxvi) as first enacted and s127 (repealed).

<sup>9</sup> John Williams, "The Emergence of the Commonwealth" in H.P. Lee and George Winterton, *Australian Constitutional Landmarks* (Cambridge UP, Melbourne, 2003).

The process began well enough on 12 December 1906 when a proposal to make amendments to the system of rotation of senators was carried nationally and in all States. Then the second referendum, on 13 April 1910, was carried nationally and in five States, empowering the Commonwealth to take over public debts owed by the States. Yet on that same day, another proposal, to amend s87 of the Constitution relating to the distribution of customs and excise revenue to the States failed nationally, although carried in three States<sup>10</sup>. That is when the great freeze began. Thirteen referendums were held between 1910 and 1926 and none of them was carried. Occasionally, the defeated referendum went straight to the heart of the political agenda of the government of the day. This was so in the repeated efforts of governments formed by the Australian Labor Party to secure greater federal power over industrial employment<sup>11</sup>. And then there was the Communism referendum of 22 September 1951 which failed to gain a national majority although succeeding in three States<sup>12</sup>.

The biggest majority ever secured in an Australian constitutional referendum was that won on 27 May 1967 concerning Aboriginals<sup>13</sup>. It amended s51(xxvi) ('the races power') to delete the exclusion of Aboriginals from the grant of federal legislative power. And it removed s127 dealing with the exclusion of some Aboriginals from the national census. The national vote in favour of this change, which was carried in all six States, was 89.34%, with only 9.08% against. It was an astonishing affirmation of a broad national recognition that Australia had

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<sup>10</sup> The record is set out in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (5<sup>th</sup> Ed), Federation Press, Sydney, pp1303ff.

<sup>11</sup> Most lately on 28 September 1946 which gained a national majority (46.26% 'Yes', as against 45.71% 'No') but majorities only in three States.

<sup>12</sup> In the Communist Party Referendum held on 22 September 1951, the total 'Yes' vote was 48.75%. The 'No' vote was 48.85%.

<sup>13</sup> *Constitutional Alteration (Aboriginals) 1967* (No.55 of 1967). See Williams and Hume, above n5, 232.

a big problem to address with its indigenous peoples. And that the only way that this could be done was by empowering the Federal Parliament to make laws specifically for the people of the Aboriginal race.

The dregs of the cup of that victory were not then anticipated. But it did not take long for it to be revealed in decisions of the High Court of Australia in *Kartinyeri v The Commonwealth*<sup>14</sup> and in *Wurridjal v The Commonwealth*<sup>15</sup>. In the former, it was made plain that the words “laws for” did not imply only laws favourable to the Aboriginal Australians. In each of those cases, laws restricting and curtailing the rights of Aboriginals under the Constitution were upheld.

In *Kartinyeri*, the high hopes and idealistic aspirations of the electors of 1967 were turned on their head. The races power was revealed, in all of its ignominy, to be (as the framers of the Constitution contemplated in the 1890s) a provision capable of regulating and restricting minority races in a way that would never be done for the majority, comprising the Anglo-Celtic settlers<sup>16</sup>. Australia must be one of the few nations on earth that has a constitutional provision designed for the apartheid era of White Australia, given such an interpretation by its constitutional court. It lies in wait for the exercise of federal legislative power not only ‘for’ Aboriginals, but ‘against’ their equal rights with Australians of other races. Today, in this chamber, it behoves us as Australians to reflect upon such a shocking outcome of the idealistic aspirations of 1967.

The 1967 referendum on Aboriginals was not the first time that a proposal had been made to enhance federal power to recognise the

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<sup>14</sup> *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 414-419 [159]-[167].

<sup>15</sup> *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 394-5 [214].

<sup>16</sup> *Loc cit.* Contrast at 337 [14] per French CJ.

special position of indigenous Australians. The first such proposal was considered on 19 August 1944 when Dr. H.V. Evatt (later the victor over Menzies in the Communism referendum) led the campaign to secure federal power over 14 new matters. He sought these powers for a mere period of five years and for the purpose of post-war reconstruction. But even this was too much to ask. Australians have generally been unwilling to agree to any referendum that involves affording more power to the Federal Parliament. The mood was not right for a vote to enlarge the entitlements of Aboriginal Australians. Yet Dr. Evatt, as Minister for Foreign Affairs, was learning in the councils of the world that Australia's racist policies were offensive and intolerable to most nations because they were not white and a new spirit of liberty and multi-racialism was about to explode in the aftermath of the horrifying discoveries of the racial genocide perpetuated by the pure white Nazis and their allies.

### **THE LAST ATTEMPT: THE 1999 PREAMBLE PROPOSAL**

Nor were the 1944 and 1967 referendums to be the last concerning Aboriginals. On 6 November 1999, in curious conjunction with a referendum to create a republic in Australia in place of constitutional monarchy, a proposal was made to insert a new preamble that would address historical elements and suggest common commitments. Whilst the then newly elected Prime Minister, John Howard, was generally hostile to the republic proposal, he was constant in his support for the new Preamble. In the drafting, he invited the assistance of one of Australia's finest poets, Les Murray. But when their proposal was released, it was criticised as sexist in expression and inadequate in its recognition of indigenous Australians. The word 'mateship', beloved of Mr. Howard, had to go.

Professor George Williams and Mr. David Hume in their book *People Power: The History and Future of the Referendum in Australia*<sup>17</sup> give their version of what then happened:

“[Mr] Howard was torn between acknowledging the truth (the long, undisputed history of Indigenous occupation of Australia) and maintaining the support of the National Party (who were concerned about the risk for rural landholders should a strongly worded preamble give legal or symbolic force to native title claims). The criticism hit home and [Mr] Howard enlisted the services of Indigenous Democrat Senator Aden Ridgeway to assist with re-drafting the preamble to better describe the relationship between indigenous Australians and land. After rejecting words implying a legal relationship (such as ‘custodianship’), Howard and Ridgeway settled on a phraseology that was emotive, but insubstantial: that indigenous Australians had a deep ‘kinship’ with the land. The final text of the new [proposed] preamble on which Australians voted was as follows:

‘With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.

We the Australian people commit ourselves to this Constitution. Proud that our national unity has been forged by Australians from many ancestries;

never forgetting the sacrifices of all who defended our country and liberty in time of war;

upholding freedom, tolerance, individual dignity and the rule of law;

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;

recognising the nation-building contribution of generations of immigrants;

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<sup>17</sup> *Ibid*, above n5, 185.



mindful of our responsibilities to protect our unique natural environment;

supportive of achievements as well as equality of opportunity for all;

and valuing independence as dearly as the national spirit which binds us together in both adversity and success.”

A great deal of money was spent on the referendum campaign. Both the republic and preamble referendums were defeated, neither gaining a majority in a single State. The republic question was the fifteenth least successful referendum passed upon by the Australian electors. And the preamble “never had a chance”<sup>18</sup>, gaining less than 40% of the national vote (39.3%), dipping to a mere 32% in Queensland and 34% in Western Australia. The most supportive federal electoral districts tended to be wealthy urban seats<sup>19</sup>. Nationwide, Labor electorates were more likely to vote yes; but the issue was not one where the vote was divided on party lines. When the result was announced, Prime Minister Howard urged his fellow citizens to “get on with the job of responding to things that are of direct and immediate interest to the Australian people”<sup>20</sup>. He did not have much time for ‘big picture’ thinking.

Now, it cannot be said that the Australian people have always been simply stubborn and stupid in their votes on constitutional referendums. Apart from the fundamental theory of a democratic constitution, that the people (not the press, the politicians or the experts) are always right, the fact is that there are good explanations for most, if not all, of the

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<sup>18</sup> *Ibid*, 195.

<sup>19</sup> *Ibid*, 196.

<sup>20</sup> *Ibid*, 198. See *Sydney Morning Herald*, 8 November 1999, 7.

referendum defeats that predominate during 110 years of Australia's nationhood.

The Communism referendum, for example, affected a member of my family, who was the National Treasurer of the Australian Communist Party. He was a fine and idealistic man, however misguided his political views may have been. The people showed great wisdom in rejecting that referendum. Just as the majority of the High Court of Australia had earlier shown great prudence in invalidating the *Communist Party Dissolution Act* 1950.

Similarly, in the circles in which I mix, I hear endless criticisms of the affirmative vote in the referendum to require federal judges to retire no later than 70 years<sup>21</sup>. Next to the Aboriginal referendum, this is the one that gained the biggest affirmative vote: 78.63% nationally, with 83.51% in New South Wales. 'But they are so brilliant, so just and wise. Such a loss of talent. Such a shocking sacrifice'. Well, I supported the referendum in 1977 and I support it still. It helps clear the decks. It promotes generational change. It prevents governments, by life appointments, putting their stamp on the highest federal courts for too long. The people were not wrong.

Even many Australians who favour a republic, do not favour one in which the politicians elect the President. Nor one in which the President's power to dismiss a government are intolerably vague. And as for the referendum on the Preamble, it gave no substance to the Aboriginal people. Simply another instance of words, which come cheap. In case there was any doubt about this the proposed change

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<sup>21</sup> *Constitutional Alteration (Retirement of Judges) 1977* (No.83 of 1977).

was accompanied by a disclaimer providing that the preamble, if added, was non-justiciable. It was never to be used as a source of interpreting the Constitution or other laws as providing new legal rights where none had been specifically enacted.

If the addition of the proposed Preamble was purely honeyed words, with no economic or other substance to them, not a few electors would have asked themselves: why bother to add those words at all? Similar questions have been asked since 1999 in respect of other constitutional preambles in the States respecting indigenous peoples<sup>22</sup>. These have likewise been accompanied by non-justiciable disclaimers. So even the National Apology, with its Cranmerian cadences reportedly written by Kevin Rudd, has been taken to task because unaccompanied by appropriate recompense to those to whom the apology was extended<sup>23</sup>.

So where do we go after this discouraging national record? Are we simply wasting our time because the political realities suggest that no referendum will secure the requisite double majorities unless it is painless; is supported by all strands of politics; is clear and simple in its operation; and avoids any hint of granting new powers to the Federal Parliament to do works of substance? If these are the realities of formal constitutional change in Australia, are Australian citizens forever bound to leave the effective processes of constitutional change to the ingenuity

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<sup>22</sup> Anne Twomey, "The Preamble and Indigenous Recognition", unpublished paper. Referring to successive amendments to the New South Wales, Victorian and Queensland State Constitutions. Such Constitutions do not require referendums for such amendment. Cf. *Constitution Act 1902* (NSW), S2(3) inserted by the *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW); *Constitution Act 1975* (Vic), s1A(3) and *Constitution of Queensland 2001* (Qld), s3A.

<sup>23</sup> M.D. Kirby, "Of Words and Realities" in *Indigenous Law Bulletin* (30 Anniversary Edition) (March/April 2011), 11 at 13. See also Sarah Maddison, *Beyond White Guilt* (Allen & Unwin, Sydney, 2011) citing Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press, 1998, 114.

of the lawyers and judges gathered across the rose garden in the High Court of Australia<sup>24</sup>?

## **A NEW OPPORTUNITY: THE 2010 PROMISE**

*A political commitment?* Now we have a new opportunity. Like most things that have ever come to this place, it derives from politics. One of the conditions for the support of the Greens and of the Independent, Mr. Andrew Wilkie MP, following the 2010 election, was that the government, led by Julia Gillard, would work collaboratively to hold a referendum during the 43<sup>rd</sup> Parliament on “indigenous constitutional recognition”<sup>25</sup>.

Any referendum for such a purpose would need to be held at or before the next federal election. This must be conducted, at the latest, on or before 30 November 2013. In the current political circumstances, the chances of an earlier federal election cannot be overlooked<sup>26</sup>. In pursuit of the foregoing political agreement, the federal government established an “expert panel” to consult and report by the end of 2011 upon options to fulfil the given promise. Members of the panel are participating at this forum.

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<sup>24</sup> A reference to *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 185 [432] ff. The referendum history was referred to by Callinan J at 284-301 [707]-[735] and by myself at 187 [437].

<sup>25</sup> Twomey, above n22. Agreement Between the Australian Greens and the Australian Labor Party, 1 September 2010, para.3(f) and Agreement Between the Hon. Julia Gillard MP and Mr. Wilkie, 2 September 2010, para.3.2(f). The Coalition Parties had also earlier promised a referendum on indigenous recognition at the 2013 election. See P. Karvelas and L. Hall, “Coalition to put Aboriginal Recognition to a Referendum”, *The Australian*, 10 August 2010, 1.

<sup>26</sup> Twomey, *ibid*, 1.

*The panel criteria and pillars:* In May 2011, the panel issued a discussion paper. In it they suggested four principles to guide their proposals<sup>27</sup>. They must be:

- \* A contribution to a more unified and reconciled nation;
- \* Of benefit to, and accord with the wishes of, indigenous people;
- \* Capable of securing support of an overwhelming majority across political and social spectrums; and
- \* Technically and legally sound.

The panel also listed seven possibilities for constitutional recognition that it is considering. In these remarks, I will concentrate on the four most likely to fulfil the stated criteria. And in my view, one must add to the announced criteria two more. Any referendum proposal must:

- \* Keep closely in mind the history of, and the lessons from, past referendums in Australia; and
- \* Conform harmoniously to the basic language and structure of the Constitution, for it is the sixth oldest continuously operating such instrument in the entire world.

Learning from the history of referendums is vital. Those who fail to do so are condemned to yet another humiliating defeat. Amongst the lessons of the history are those proposed by Williams and Hume. After recounting the long and sorry record of defeated proposals, the authors suggest five pre-conditions for success, which they call 'pillars'<sup>28</sup>:

- \* The pillar of bipartisanship;

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<sup>27</sup> Australia, Expert Panel, *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, 16.

<sup>28</sup> Williams and Hume, above n5, 244.

- \* The pillar of popular ownership of the proposal; not control by politicians or an elite;
- \* The pillar of effective popular education;
- \* The pillar of sound and sensible proposals, in keeping with what Mr. Peter Reith has called “the constitutional temper of the Australian people”<sup>29</sup>; and
- \* The adoption of modernised procedures for the conduct of the referendum, including the removal of expenditure restrictions presently imposed on federal governmental spending designed to explain the proposal<sup>30</sup>.

*Additional complications:* In the particular case of a proposed referendum concerning Australia’s indigenous peoples, I would add to this list another strict requirement. It is suggested by history, including recent history. Whatever the general political dynamics, fundamental principle demands that nothing should be done concerning constitutional recognition of our indigenous people without a proper, thorough and transparent process of consultation with them, in all of their varieties. There must be no more rushed political moves to meet other peoples’ agendas<sup>31</sup>. There must be no more paternalistic impositions of solutions upon Indigenes, supposedly for their benefit and whatever they might think<sup>32</sup>. We are talking of serious and substantially eternal things. These are not the play things of politicians, temporarily in office. Our indigenous people walk to a different drum. And if that requires a longer

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<sup>29</sup> Peter Reith cited Williams and Hume, above n5, *ibid*, 254.

<sup>30</sup> *Referendum (Machinery Provisions) Act 1984* (Cth). See Williams and Hume, above n5, 260. These follow the report of the Australian House of Representatives, Standing Committee on Legal and Constitutional Affairs, *A Time for Change, Yes/No? Enquiry into the Machinery of Referendums* (December 2009), 60.

<sup>31</sup> *Wurridjal*, (2009) 237 CLR 409 at 400 [233]-[234].

<sup>32</sup> *Ibid*, at 400 [233].

process for accomplishment than two years, then so it must be. The national humiliation of a second rejection would be best avoided.

There is another consideration. Whilst Australian electors have proved themselves capable of differentiating between different referendum proposals submitted at the same time<sup>33</sup>, experience tends to show that the simpler and clearer the proposal, the more likely the success. As Mr. Reith put it, “a genuine problem and a reasonable solution” makes victory more likely<sup>34</sup>.

A proposal to recognise local government in the Constitution has now been added to the questions under national consideration. This, like the Preamble for Indigenes, was also put before the people in an earlier form. It happened on 18 May 1974<sup>35</sup>. Now, the former Chief Justice of New South Wales (James Spigelman) has been appointed to head an expert panel dealing with this further topic<sup>36</sup>. It would seem desirable that such disparate subject matters should be kept separate. Not least because a further “pillar” that needs to be considered, based on the history of referendums in Australia, is that, once rejected, a proposal does not tend to become more palatable by being re-presented in new terms. On the whole, repeatedly re-submitted questions tend to suffer increasingly powerful rejection: as if the electors become irritated by the

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<sup>33</sup> As they did on 13 April 1910 when a proposal in respect of State debts was carried; but a proposal on financial and legislative powers was not. And on 28 September 1946, when a proposal on social services was carried; but proposals on organised marketing and industrial employment were not. And on 27 May 1967 when the proposal on Aborigines was carried; but the proposal for a severance of the nexus between the Houses of Federal Parliament was not. And on 21 May 1977, when proposals for casual Senate vacancies and retirements of federal judges and voting on referendums in the Australian Capital Territory and the Northern Territory were carried. But proposals on elections, local government bodies and simultaneous House of Representatives and Senate elections were not.

<sup>34</sup> Peter Reith cited Williams and Hume, *ibid*, above n5, 254.

<sup>35</sup> A proposal to grant power to the Commonwealth to borrow money to make financial grants to any local government body. This was carried in only one State and rejected nationally. See Williams and Hume, above n5, 274.

<sup>36</sup> Reported *Lawyers Weekly*, 1 July 2006, 6.

politicians' persistence. This was the fate of the repeated efforts to secure federal powers to regulate directly industrial relations and to avoid conciliation and arbitration. Such a proposal was rejected at referendums in 1911, 1913, 1919, 1926 and 1946. But then, it was remarkably obviated by the High Court's majority decision in the *Work Choices Case* in 2006, by using a re-conceived notion of the corporations power<sup>37</sup>.

Keeping the criteria and pillars of action steadily in mind, what are the 'ways forward' (if I may coin a phrase) to secure appropriate constitutional provisions with respect to the Aboriginal and Torres Strait Islander people of Australia? And what should these be?

#### **FOUR PROPOSALS FOR CONSITUTIONAL RECOGNITION**

*Deletion of section 25:* One possibility for affirmative constitutional recognition of Australia's indigenous peoples, would be the deletion of s25 of the Constitution. This is a little known provision that says:

"25. For the purposes of the last section [governing the number of members of the House of Representatives] 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 people of the State or of the Commonwealth, persons of that race resident in that State, shall not be counted."

This is a frankly racist provision. It is elliptically worded, but it carries nineteenth century notions that Chinamen in the gold fields and Aboriginals in the remote outback might, by reference to their race, be disqualified from voting in a State, and therefore in federal Commonwealth, elections. The possibility that this might be so was

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<sup>37</sup> *Work Choices Case* (2006) 229 CLR 1 at 135-155 [239]-[327]. This was over the dissents of Callinan J *ibid* at 331 [793] ff and myself at 205 [481] ff.



quite congenial to their then attitudes to racial discrimination. However, the Northern Territory Intervention laws were enacted in a rush, just before the 2007 federal election, singling out Aboriginals in that Territory for treatment different from, and less than, that accorded to the people of every other race. The Intervention law lifted the application to them of the *Racial Discrimination Act 1975* (Cth). It removed the protections of the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>38</sup>. In the *Wurridjal Case*, which I suggest is not one of the finest hours in Australian legal history, when ‘on a demurrer’ the Aboriginal plaintiffs were denied their day in court, I said<sup>39</sup>:

“If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable. ... We should not slam the doors of the courts in their face. This is a case in which a transparent public trial of the proceedings has its own justification.”

Yet the door was slammed, albeit politely, observing all due legal forms. The purposes of the legislation were said to be beneficial and protective. But there was no consultation with the Aboriginal people. And the outcomes are strongly contested to this day.

The lesson is that, so long as racist provisions exist in the Australian Constitution, they stand at risk of being used. This would be a powerful reason for removing them. A referendum simply to delete s25 from the Constitution would, I believe, stand a strong chance of qualifying on all

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<sup>38</sup> . *Wurridjal* (2009) 237 CLR 309 at 394 [213].

<sup>39</sup> *Wurridjal* (2009) 237 CLR 309 at 394-5 [214]. Although the Intervention legislation relied additionally on the Federal Parliament’s power to make laws for a Territory (NT), the law also purported to rely on the races power. In that decision, the majority held that restrictions on the Federal Parliament’s powers in section 51 also applied to laws enacted for territories. Thereby imparting in the case any limits applicable to laws with respect to acquisition of property or special race laws.

of the criteria and satisfying all of the pillars of past experience. However, it would be an empty gesture, devoid of any present practical utility. Constitutional change in Australia is hard enough to secure without expending the necessary effort for little or no practical use.

*A non-discrimination provision:* A second proposal is for the insertion in the Constitution of a modern provision forbidding discrimination against any person (or perhaps any citizen) on the grounds of their race. Historically, such a provision would incorporate novel concepts into the Australian constitution, given that the adoption of the ‘races power’ was specifically intended to permit unequal treatment, under the Australian Constitution of Chinese and other non-Caucasian people, then seen as a potential threat to the Anglo-Celtic settlers.

When Andrew Inglis Clark secured the inclusion in the 1891 draft of the Constitution of a clause forbidding a State to make or enforce any law abridging any privilege or immunity of citizens of other States and denying persons “the equal protection of the laws”<sup>40</sup>, the provision (and an expanded version proposed for it) was rejected in 1897. The rejection occurred on the basis of the arguments of Isaac Isaacs, that United States models for such a law were “intended to protect the blacks. Nobody denied these rights to the whites”<sup>41</sup>. Isaacs warned<sup>42</sup>:

“You could not make any distinction between these people [Chinese] and ordinary Europeans. You could lay down all the conditions you like to apply all round, but you could not impose conditions that would in effect, no matter how the language was guarded, draw a distinction between them and ordinary citizens.”

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<sup>40</sup> See J. Williams, “Race, Citizenship and the Formation of the Australian Constitution” (1996) 42 *Australian Journal of Politics and History*, 10.

<sup>41</sup> Australian Constitutional Debates, Melbourne, 1898, 669.

<sup>42</sup> *Ibid.* See J. Williams, “The Emergence of the Commonwealth” in H.P. Lee and G. Winterton, *Australian Constitutional Landmarks* 1, above n9, at 26-27.

So Clark's idea was dropped. Attempts to read into the language and structure of the Constitution a fundamental notion of the equality of all peoples in the Commonwealth has so far only mustered the support of three Justices of the High Court of Australia<sup>43</sup>. So have we overcome our racial demons sufficiently to progress from the asserted use of the races power to do *unfavourable* things on the grounds of race to our Indigenes. So that now we are ready suddenly to proclaim a complete reversal of direction, turning constitutional *power* into a constitutional *restriction* in the name of equality? Given that the power of restriction was asserted in the Northern Territory Intervention as recently as 2007, and was continued despite a change of government and is forever lauded by the News Limited press throughout Australia, the prospects of gathering the essential preconditions to meet the stated criteria and the accepted pillars for an equality provision seems rather unlikely.

There would be a further complication. Any such non-discriminatory provision in our Constitution would have to extend to the people of every race (indigenous and non-indigenous). A non-discriminatory principle would itself have to be non-discriminatory. But then, the question would be posed, why forbid discrimination on the grounds only of race? Why not also sex or gender? Why not culture or religion? Why not physical or mental disability? And if you want to be really modern and in tune with the *Zeitgeist*, why not, like the South Africans, forbid discrimination on the grounds of sexual orientation? Racial inferiority is not the only demon that some Australians and their politicians have rattling around in their heads.

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<sup>43</sup> *Leeth v The Commonwealth* (1992) 124 CLR 455 at 486 ff (relying on the Preamble to the Act) per Deane and Toohey JJ; at 501-503 per Gaudron J. Contrast per Mason CJ, Dawson and McHugh JJ at 466-471 and per Brennan J at 475-476.

The ideas of a great new principle of non-discrimination worked in South Africa because of the overthrow of brutal apartheid. We have had no such catharsis in Australia. The undercurrents of racial prejudice remain all too evident. Witness the wholly disproportionate political and media responses to the tiny trickle of so-called “boat people” leading to departures from this nation’s obligations under the *Refugees Convention and Protocol*<sup>44</sup>. So the prospects for a non-discrimination clause look bleak indeed.

*Amendment or deletion of the races power.* A third more important (and in every way more urgent) subject for constitutional reform could be the deletion or modification of the power in s51(xxvi) of the Constitution that permits the Federal Parliament to make laws with respect to the “people of any race for whom it is deemed necessary to make special laws”.

Originally, this power did not extend to the Aboriginal people of Australia. That was so because their regulation was to be left to State parliaments. The aim of deleting the exclusion was to afford the power to the Federal Parliament to enact laws beneficial to the indigenous people of the nation. However, the power to make laws that were beneficial has been held to include the making and amendment of laws that discriminate against people on the grounds of their race. This, in part, is what was done in the Northern Territory Intervention legislation.

It is a shocking thing, in this day and age, to empower our national parliament to enact laws depriving one segment of our population and

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<sup>44</sup> See e.g. Michael White, “The Tampa Incident” (2006) 78 ALJ 101 at 249.

citizenry of basic rights enjoyed by others, specifically by reference to their race. Particularly because there is no counter-balancing provision for non-discrimination or equality. Such a notion reflects nineteenth century concepts of racial superiority and paternalistic interventions for 'the natives'. As the 2007 legislation shows, ideas of these kinds can sometimes get caught up in the heat of election campaigns, when emotive, complex and sometimes selfish issues are thrown into the debates. A better defined power specifically permitting the Federal Parliament to make laws with respect to the advancement of the health, welfare and housing of Aboriginal and Torres Strait Islander peoples would make more clear what was obviously intended in the 1967 referendum.

If anyone in 1967 had suggested that such laws would be used to take away rights; to take over property; to intrude into homes and communities; to do so with federal police and soldiers; and to take control of income and dignity, it would have come as a rude shock to the electors<sup>45</sup>. The present races power is a relic of colonial thinking. It would be better not to have it at all (and to rely on other powers, or new confined powers, for assisting indigenous people) than to have it stand with the current interpretation as evidence that, constitutionally speaking, we are still basically White Australia, however much we boast that we have changed.

Still, in the present fragile political circumstances in Australia, and with the unyielding daily propaganda of powerful media interests, would repeal of the races power secure bipartisan support and popular

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<sup>45</sup> *Kartinyeri v The Commonwealth* (1998) 195 CLR at 397 [126] referring to the views of Murphy J; and at 397 [127] referring to the views of Brennan J; and at 398 [128]-[129] referring to the views of Gaudron J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56.

endorsement? At the very least, against the background of the experience in the past decade, this must be doubtful. The world would look with astonishment at a decision of the Australian electors to retain its legislative power over prejudicial racial enactments when elsewhere in the world this is seen as an anathema and contrary to universal fundamental rights.

*And so a preamble?* These conclusions bring me to the idea of a new constitutional preamble. Something simpler, and noble, brief and true, that (with the repeal of s25) might conform to the requisite criteria and pass through the pillars that must be faced by constitutional referendums in Australia.

There are real questions of a technical kind concerning any such Preamble. The only preamble that presently exists is not contained in the Australian Constitution itself. It appears in the Imperial statute that formally, at the request of the Australian electors, brought our Constitution into operation. Does our Federal Parliament have the power to amend the “covering clauses” of the Imperial statute? Or is that something that we must seek, cap in hand, in the plenitude of our independence, from the Palace of Westminster<sup>46</sup>? If this were done, does the constitutional amending provision of s128 of the Australian Constitution apply at all? Or is it concerned only with amendment of the text of *our* part of the document? Have the *Australia Acts* of 1986<sup>47</sup> provided to independent Australia a late Imperial legislative gift to allow us to change the Imperial statute and to insert a new preamble respecting the Aboriginal people? Would we do so anyway, as a matter

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<sup>46</sup> Cf. *Attorney-General for Western Australia v Marquet* (2003) 217 CLR 545 at 571 [68]-[69] per Gleeson CJ, Gummow, Hayne and Heydon JJ; contrast at 612-617 [202]-[215] of my reasons.

<sup>47</sup> See *Australia Acts* 1986 (UK and Commonwealth), s15(1).

of politics, without a referendum? And on such a matter, would an affirmative vote be required in *every* State, and not just in a *majority* of States as s128 provides<sup>48</sup>?

If there are any doubts about these technical questions, must we insert any new preamble, awkwardly, at the beginning of our own constitutional text, leaving the “covering clauses” of the Imperial preamble to record the historical events as they stood in 1900? And when we start inserting a simple preambular statement invoking, and respecting the indigenous people of this ancient land, will the majority of our fellow citizens be content with such exceptionalism? Or will they demand references to the other values evident in our history? Perhaps ‘mateship’ would get another run. Perhaps the baggy green or the ANZAC spirit. Once you start altering a constitution, the plethora of interest groups come out of the woodwork demanding that their interests be acknowledged. And in the background, the hard-nosed practical people of local government will be pressing their claims and demanding their special recognition.

## **CONCLUSIONS: SECURING A NEW PEACE**

These remarks show the complexity of the issues raised by the political promise to consider collaboratively “indigenous constitutional recognition”. Whilst great constitutional themes remain to be resolved, so do many urgent tasks of day to day importance to daily indigenous disadvantage:

- \* The shockingly high rates of incarceration of indigenous people in Australia’s prisons<sup>49</sup>, where Aboriginal and Torres Strait Islanders constitute 26% of the full-time prisoner population whilst being only

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<sup>48</sup> Discussed Twomey, above n22 at 26-27.

<sup>49</sup> Indigenous prison rates are set out *Sydney Morning Herald*, News Review, 18 June 2011, 3.

2.5% of the total population. They suffer a fourteen times higher imprisonment rate than non-indigenous people. They represent 2,208 members of their ethnicity per 100,000 of the adult population, surely one of the highest such proportions in the world;

- \* The lack of after-care and support for indigenous prisoners produces serious risks of breakdown, return to prison and post-release suicide. This is a reason why we should be addressing substance and not just words. Judges and lawyers know this. They are duty-bound to inform their fellow citizens<sup>50</sup>;
- \* Housing levels for indigenous people are seriously below the national standards. So are health levels and educational attainments. The British with their huge Empire had a much better record in securing graduate and post-graduate recognition and advancement of colonial people than we have yet attained. Neglect and indifference were the companions of White Australia. Despite many fine efforts, and high hopes, the situation remains one of shocking disadvantage;
- \* The high hopes that the *Mabo* case<sup>51</sup> provoked<sup>52</sup>, that land rights would alter the economic dynamics of indigenous Australians, have only partly been fulfilled. Other cases and laws have taken away what was given, including by insisting on a burden of proving links to the land that is sometimes hard to discharge in the absence of records and documents<sup>53</sup>. Contrast the way, in a stroke, the New Zealand Parliament has changed this in that country, under a conservative government, by reversing the

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<sup>50</sup> Stuart Kinnear (Burnet Institute, Melbourne, July 2011, reported in *Medical Journal of Australia*): Death rates amongst newly released prisoners in Australia are ten times higher than amongst inmates sentenced to non-custodial punishments with one-third of deaths occurring in the first four weeks after discharge. *The Australian* 18 July 2011, 3.

<sup>51</sup> *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

<sup>52</sup> Reinforced by *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>53</sup> *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.



necessary burden of proof. See *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ), s106(3). A similar proposal was lately made in Australia by former Prime Minister Keating<sup>54</sup>. It is past time for such a law. Without economic change and responsibility, social progress will remain pitifully slow.

- \* Even in a simple matter like the preservation of a unique artistic collection of a fine Aboriginal artist, Gordon Syron, disrespect is all too evident. Where is the indigenous museum at Circular Quay or Federation Square in Melbourne? A nation that truly respected its indigenous people would not leave the preservation and advancement of their culture solely to the vicissitudes of the private sector.

So can we find a formula of words for a constitutional preamble? And would it be accompanied as late time with a swift re-assurance, to gain the votes of the sceptical, that it would have no legal effect anyway? If so, what is the point? These are the complex questions that the Australian people must consider. They do not become less complex by glossing over the difficulties or by ignoring the history precedes the current debates.

At the beginning of the AIDS epidemic, a remarkable international civil servant, Jonathan Mann, taught the world and me a vital lesson. It was that necessary actions of high moment and moral purpose will only succeed if we engage, consult and respect those in the front line. The countries that followed Mann's advice in this respect, including, with bipartisan support, Australia, made progress in tackling the challenge of

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<sup>54</sup> P.J. Keating, Lowitja O'Donohue Lecture 2011, reported *The Australian*, 1 June 2011, 3; *Sydney Morning Herald*, 1 June 2011, 15.

HIV. Those that did not have suffered grim consequences which are continuing.

We can derive a lesson in the present context from this experience. The beginning of wisdom in a constitutional recognition of Australia's indigenous peoples must be to ask them what they want. What is important to them? What will help them to heal the wrongs of the past with which we began the modern story of Australia? What will herald a new beginning? Whilst the constitutional text belongs to all Australians, the beginning of the journey that we must make belongs with the indigenous people, who were in this land first.

If our constitutional alteration is informed by this approach, we may make progress. Otherwise, we stand in peril of yet another failure, compounding the wrongs of the past with new wrongs inflicted in the present. In the end, constitutional words are important; but they are not enough. A new attitude of mind and heart is necessary. In the logjam of Australian politics and its often 'toxic' media, change will be difficult to attain. But this difficulty is our challenge. And the spirit of our country will not be at peace until this challenge is met and answered.

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