

## RECONCILIATION AND THE CONSTITUTION

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### I. INTRODUCTION

When a State's very existence is predicated on the accumulation of lands from prior Indigenous inhabitants, one might logically expect to see such foundational matters addressed in the Constitution of the new State. This has not yet occurred in Australia for the following reasons. First, the State has itself evolved from Great Britain to a scatter of self-governing colonies, subject to ultimate control from the Imperial Government, to the federal Commonwealth of Australia. Secondly, British settlement proceeded on the convenient assumption that there was simply no need to consider the Aboriginal peoples. Initially, this view was based on the mistaken belief of those involved in Cook's first voyage that the land was literally uninhabited (*terra nullius*) apart from a few scattered groups along the coast. Subsequently, it was based on the premise that the inhabitants had no property in the land and, indeed, no law.

As to the first matter, there is no longer any basis for confusion as to ultimate constitutional responsibility. By 1986 at the latest, Australia had shed the remaining vestiges of UK control.

As to the second matter, this convenient theory was finally exploded in *Mabo [No 2]*. This decision brought the common law of Australia in line with the common law as it was received in other former British colonies by a belated recognition of native title, based on Indigenous law.

Is it feasible at this stage in our history to achieve a similarly belated Constitutional recognition of the position and the rights of Indigenous Australians?

This issue has been discussed for some time, but has only recently been given some degree of urgency by the approach of the Centenary of Federation and by the related timetable accepted by the Commonwealth Parliament when it enacted

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the *Council for Aboriginal Reconciliation Act 1991* (Cth). A final responsibility for the third three-year Council term is to report whether reconciliation would be advanced by a “formal document or documents of reconciliation” and, if so, to make recommendations to the Minister “on the nature and content of, and manner of giving effect to, such a document or documents”.<sup>1</sup>

## II. RECONCILIATION

The Macquarie Dictionary<sup>2</sup> offers the following meanings of the term “reconciliation”:

to render no longer opposed; bring to acquiescence (fol. by to): *to reconcile someone to his fate.*

to win over to friendliness: *to reconcile a hostile person.*

to compose or settle (a quarrel, difference, etc).

to bring into agreement or harmony; make compatible or consistent: *to reconcile differing statements.*

Opinions may differ among Australians as to which of these distinct meanings should be the appropriate outcome of the reconciliation process initiated by the 1991 legislation. A number of Indigenous Australians have suspected that governments have in mind the first of the above meanings.

Interestingly, a Bicentennial proposal by Brennan and Crawford proposed a different term: Aboriginal *recognition*.<sup>3</sup> Such a term would suggest that the necessary adjustments need to be made by non-Indigenous Australians rather than by Aborigines and Torres Strait Islanders.

## III. CONSTITUTIONAL REFORM

Reform of the Commonwealth Constitution has been off the national agenda since the negative result of the 1988 referendum on four of the proposals deriving from the *Final Report* of the Constitutional Commission.<sup>4</sup>

Constitutional reform has recently returned to the agenda in the specific context of the proposal to move to a republic, in the “minimalist” sense of replacing the Queen by an Australian head of state. In February 1998, the Constitutional Convention considered not only this proposal, but also supported adding a new preamble to the Constitution which would, among other things, acknowledge “the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders”. There was some hope that the

1 Second Reading Speech, Minister for Aboriginal and Torres Strait Islander Affairs, 1991.

2 Macquarie Library (2nd revision) 1987.

3 F Brennan and J Crawford, “Aboriginality, Recognition and Australian Law: Where to from Here?” (1990) 1(1) *Public Law Review* 53.

4 Constitutional Commission, *Final Report*, AGPS (1988).

two issues – the ‘minimalist’ republic and the preamble – might be put to the electorate in a joint referendum.

This no longer seems likely. The Prime Minister, John Howard, with some input from poet Les Murray, drafted a preamble which has attracted little support and, indeed, considerable criticism. It appears unlikely that there will be agreement on a preamble in time for it to be included in the scheduled referendum on the republic.

#### IV. PREAMBLE

How important is preambular recognition of Indigenous Australians?

The idea has been around for some time. Indeed, the Constitutional Commission had a proposal for a new preamble from its Committee on Individual and Democratic Rights. In May 1997, the Australian Reconciliation Convention supported a preamble which would recognise “the Aboriginal peoples and Torres Strait Islanders as its Indigenous peoples with continuing rights by virtue of that status”. The proposal from the 1998 Constitutional Convention has already been noted.

In 1995, three major reports were presented to the Keating Government after consultation with Indigenous Australians for the proposed “social justice package”. Support for an appropriately worded preamble was reported by ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner, but with an important reservation, as reported by the Council for Aboriginal Reconciliation:

[I]t was quite clear during the consultation process that there was wide-ranging support to have such an acknowledgment inserted in the Constitution, provided it was regarded as a first step of a broader process. Concern was expressed that such a change would be seen as an easy symbolic step which would be all that was needed to address constitutional issues for Indigenous peoples.<sup>5</sup>

What then are the non-symbolic constitutional issues for Indigenous Australians? How might the goal of reconciliation be advanced by changes to the Commonwealth Constitution?

#### V. RACIAL DISCRIMINATION

One nearly symbolic proposal is for the repeal of s 25 of the Constitution which allows for the possibility of a State law disqualifying people of a particular race from voting at elections for that State’s lower house. If this occurred, the people of that race would not be counted in reckoning the numbers of people in the State, for the purposes of allocating House of Representatives

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5 Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians*, 1995 at 36.

seats. In effect, it penalises a State for any such discrimination. But the general view is that the provision has passed its “use-by” date.

A more substantive issue is whether the Constitution should contain a prohibition against racial discrimination. The *Racial Discrimination Act* 1975 (Cth) has been invaluable in the protection of Indigenous peoples’ rights against discriminatory state action, as reflected in such landmark High Court decisions as *Koowarta v Bjelke-Petersen*,<sup>6</sup> *Mabo v Queensland (No 1)*,<sup>7</sup> and *Western Australia v Commonwealth*.<sup>8</sup> However, the Act cannot prevail against discriminatory Commonwealth legislation.

The Constitutional Commission in 1988 recommended a general guarantee against discrimination on race and other grounds. In its 1995 report *Going Forward*, the Council for Aboriginal Reconciliation proposed a Constitutional prohibition of racial discrimination. Such a prohibition would be important to Australians generally, but in particular to Indigenous Australians.

## VI. THE RACE POWER

Section 51(xxvi) of the Constitution originally gave the Commonwealth Parliament legislative power 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”. The emphasised words were deleted as a result of the 1967 referendum, which has been regarded as a milestone for the rights of Indigenous Australians. In fact, the effect was simply to give the Commonwealth Parliament a concurrent legislative power with the States, and one which it has generally been reluctant to exercise against concerted State opposition.

The race power, when exercised, has been given a broad interpretation, as in the High Court’s decision in *Western Australia v Commonwealth*.<sup>9</sup>

The Constitutional Commission in 1988 recommended that the power be replaced by a specific power to pass laws *with respect to* “Aborigines and Torres Strait Islanders”.

There has been an argument that s 51(xxvi) should be interpreted as a power to pass laws only *for the benefit of* Indigenous Australians. This argument was advanced in the Constitutional challenge to the validity of the *Hindmarsh Island Bridge Act* 1997 (Cth).

In *Kartinyeri v Commonwealth*,<sup>10</sup> five of the six Justices (Kirby J dissenting) held that any such limitation could have no applicability to the power of the Commonwealth to repeal or amend its prior legislation. Brennan CJ and McHugh J made no decision as to whether there was any such limitation, whereas only Kirby J held that there was a limit on Parliament to pass laws

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6 (1982) 153 CLR 168.

7 (1988) 166 CLR 186.

8 (1995) 183 CLR 373.

9 *Ibid.*

10 (1998) 152 ALR 540.

within the scope of the race power that were only for the 'benefit of' a particular race.

The only other Constitutional protection for the rights of Indigenous Australians lies in the generally applicable guarantee of 'just terms'. This applies when the Commonwealth passes a law with respect to "the acquisition of property ... from any State or person for any purpose in respect of which the Parliament has power to make laws".<sup>11</sup> This requirement had to be taken into account in the drafting of the NTA and, particularly, in the drafting of the 1998 amendments, in relation to provisions concerning the extinguishment or impairment of native title rights and interests. It should be noted that one of the great unknowns about the native title legislation is the ultimate national 'price tag' that will be incurred in the interests of achieving 'certainty' for governments and industry.

## VII. INDIGENOUS RIGHTS

Any prohibition of discrimination on the grounds of race might serve to protect the "citizenship rights" of Indigenous Australians as individuals, but would not necessarily recognise their collective "indigenous rights" in matters like rights to land and waters, culture, and self-government. The distinction between the two sets of rights was emphasised in the "social justice package" reports by ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner.

These reports have proposed such initiatives as:

- an Indigenous Bill of Rights;
- Indigenous participation in the process of government;
- reform of inter-governmental financial arrangements as they relate to Indigenous communities;
- provision for elements of self-government/self-determination; and
- protections for land and culture.

Such outstanding issues may be incorporated in the proposed document or documents of reconciliation and, at the sub-national level, in regional agreements of one kind or another. Not all of them need to be settled at the level of the Commonwealth Constitution. Indeed, some of them can also be addressed at the level of State Constitutions.

Interestingly, in 1996, the Sessional Committee on Constitutional Development of the Northern Territory Legislative Assembly proposed a draft Constitution in which the territory might aim to achieve admission to Statehood. The draft contained innovative provisions for protection of Aboriginal land rights and sites, for Aboriginal self-government and for recognition of Aboriginal law. Unfortunately, most of these provisions were eliminated or

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11 Australian Constitution, s 51 (xxxi).

weakened in the draft Constitution put to the electorate in October 1998. The move to Statehood was rejected for the time being.<sup>12</sup>

If a national level document of reconciliation is achieved that has some broad support, it would be possible to give it constitutional status. In the period between 1979 and 1983, the Fraser Government engaged in discussions with the National Aboriginal Conference on proposals for a “Makarrata”. Makarrata is a Yolgnu term coined by the National Aboriginal Conference when the Prime Minister objected to their earlier references to a “treaty”. The “T” word has, likewise, been avoided in the context of the current Reconciliation process. The Senate Standing Committee on Constitutional and Legal Affairs inquired into the constitutional and legal feasibility of such a compact, and accepted the possibility of a constitutional amendment, modelled on existing s 105A, to provide constitutional backing for any such agreement.

### VIII. CONCLUSION

There is little dispute that Aboriginal people and Torres Strait Islanders experience the highest levels of socio-economic disadvantage in Australian society and suffer the greatest impact of racial discrimination. In addition, their position as the first peoples of Australia has received little acknowledgment, although there has been some shift over the past three decades with the gradual acceptance of recognised land rights, native title and the increasing knowledge of their history and culture.

But it is still a novel idea that Indigenous Australians are, as such, bearers of rights, as distinct from claimants of charity.

The close of the twentieth century and the centenary of the Commonwealth seem to be appropriate times at which to seriously address the process of Reconciliation. There are strong arguments that constitutional change should be a vital part of this process.

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12 G Nettheim, “Aboriginal Constitutional Conventions in the Northern Territory”, (1999) 10(1) *Public Law Review* 8.