

Aboriginal Rights in Australia

On Recognising Aboriginal and Torres Strait Islander Peoples in the Australian Constitution

By [Dr. George Venturini](#)

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On Recognising Aboriginal and Torres Strait Islander Peoples in the [Australian] Constitution – a belated homage or yet another swindle ?

“There are two issues that will manifest our maturity: first, proper constitutional recognition of the first people; second, independence from the regal pantomime in England.”

Peter Gebhardt, 1936, Poet and former County Court Judge
in Melbourne

The learned Judge got it right, but not in the correct sequence. To do anything seriously about respecting the Indigenous Peoples of what is now Australia, the country must become a republic. And there is the rub.

The Judge was writing on the occasion of Australia Day [2011], “that artificial and trumped-up celebration, the excuse for manufactured emotion, [which] should force us to look closely at our history and the truths of that history *vis-à-vis* the Aboriginal population and the brutal facts of that history.” And, for good measure, he went on: “... a history we have refused to acknowledge, to understand and to negotiate, all to our historical detriment. Succeeding hordes of imprinters do not know and do not want to know. The triumphalism of Australia Day is tainted by the tragedy of ignorance and imposed ignominy.”

On 8 November 2010 Prime Minister Julia Gillard announced the establishment of an Expert Panel to consult on the best possible options for a constitutional amendment on recognition of Aboriginal and Torres Strait Islander Peoples to be put to a referendum. The Prime Minister stated: “The first peoples of our nation have a unique and special place in our nation. We have a once-in-50-year opportunity for our country.”

The Panel’s terms of reference provided for it to report to the Government on possible options for constitutional change, including advice as to the level of support from Indigenous Peoples and the broader community for each option, by December 2011.

In November 2007 Prime Minister John Howard, in one last opportunistic electoral manoeuvre, had announced his support for recognition of Aboriginal and Torres Strait Islander Peoples in a new preamble to the Constitution. On 24 November 2007 Howard’s

Liberal [conservative] Party lost the election which brought to office the Kevin Rudd/Julia Gillard Labor government, formed on 3 December.

On 23 July 2008 the Commonwealth Government conducted a community Cabinet meeting in eastern Arnhem Land. Prime Minister Rudd was presented with a Statement of Intent on behalf of *Yolngu* and *Bininj* clans living in *Yirrkala*, *Gunyangara*, *Gapuwiyak*, *Maningrida*, *Galiwin'ku*, *Milingimbi*, *Ramingining* and *Laynhapuy* homelands – approximately 8,000 Aboriginal people in Arnhem Land. The ensuing *communiqué* argued that the right to maintain culture and identity and to protect land and sea estates were preconditions for economic and community development in remote communities. The *communiqué* called on the Government “to work towards constitutional recognition of our prior ownership and rights.” Receiving the *communiqué*, the Prime Minister pledged his support for recognition of Indigenous Peoples in the Constitution.

On 24 June 2010 Ms. Gillard toppled Rudd from the prime ministership. On 21 August 2010 new elections followed, for which the Australian Labor Party formulated a policy proposing that “constitutional recognition of Aboriginal and Torres Strait Islander peoples would be an important step in strengthening the relationship between indigenous and non-indigenous Australians, and building trust.” A Gillard Labor Government would establish an Expert Panel on Indigenous Constitutional Recognition comprising Indigenous leaders, representatives from across the federal Parliament, constitutional law experts and members of the broader Australian community.

The Opposition, too, had a ‘Plan for real action for Indigenous Australians’. The plan was very similar to that of the Government and provided that the Coalition [of the Liberal and National parties] would encourage public discussion and debate about the proposed change, and seek bipartisan support for a referendum to be put to the Australian people at the 2013 election.

The Australian Labor Party was re-elected, albeit without a majority. Ms. Gillard was confirmed as Prime Minister of a minority government.

In September 2010 agreements were reached by the Gillard minority government with the Australian Greens and three Independent members to hold a referendum “during the [life of the current] Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution.”

On 23 December 2010 the Prime Minister announced the membership of the Expert Panel on Constitutional Recognition of Indigenous Australians. The Panel comprised persons from Indigenous and non-Indigenous communities and organisations, small and large business, community leaders, academics, and members of Parliament from across the political *spectrum*. Membership was drawn from all States and Territories, cities and country areas. The members of the Panel would serve in an independent capacity.

Throughout 2011 the Panel was supported by an executive officer, a media adviser and the Indigenous Constitutional Recognition Secretariat in the Department of Families, Housing, Community Services and Indigenous Affairs.

The Panel met throughout 2011: in Canberra in February, October and November, Melbourne in March, July and December, and in Sydney in May and September; it also conducted much of its work out of session.

The process required:

- the building of a general community consensus;
- the central involvement of Indigenous and non-Indigenous people; and
- the collaboration with Parliamentarians from across the political *spectrum*.

The Expert Panel was to report by December 2011.

In performing its role, the Panel was to:

- lead a broad national consultation and community engagement programme to seek the views of a wide *spectrum* of the community, including from those who live in rural and regional areas;
- work closely with organisations, such as the Australian Human Rights Commission, the National Congress of Australia's First Peoples and Reconciliation Australia who have existing expertise and engagement in relation to the issue; and
- raise awareness about the importance of Indigenous constitutional recognition including by identifying and supporting ambassadors who will generate broad public awareness and discussion.

The Panel was to have regard to:

- key issues raised by the community in relation to Indigenous constitutional recognition;
- the form of constitutional change and approach to a referendum likely to obtain widespread support;
- the implications of any proposed changes to the Constitution; and
- advice from constitutional law experts.

At its second meeting in Melbourne in March 2011 the Panel agreed on four principles to guide its assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander Peoples, namely that each proposal was to:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social *spectra*; and
- be technically and legally sound.

In its consideration of options for constitutional recognition, the Panel was strictly guided by these four principles.

The Panel worked closely with organisations such as the National Congress of Australia's First Peoples, Reconciliation Australia and the Australian Human Rights Commission. Congress undertook a number of surveys of its members in relation to recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution. Reconciliation Australia undertook activities to complement the work of the Panel. These included contributing content to the Panel's website, appointing ambassadors and facilitating public meetings.

In May 2011 the Panel published and had distributed a discussion paper, *A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition*. The discussion paper identified seven ideas intended to provide a starting point for conversation with the public envisaged by the Panel, but in no way to limit the scope of proposals which might have been raised through the consultation and submissions process.

The Panel set up an interactive website providing an online presence, involved social media including *Twitter, Facebook, YouTube, Flickr, Tumblr* and a blog feed, and published all submissions on the website unless confidentiality had been requested. The Panel engaged a media adviser to develop a media strategy to inform the public as widely as possible. The strategy included arranging features and opinion pieces, television and radio talkback programmes, and speeches at various events.

Between May and October 2011 the Panel conducted a broad national consultation programme, which included public meetings, individual discussions, presentations at festivals and other events, the website, and a formal public submissions process.

State and local office contacts of the Department of Families, Housing, Community Services and Indigenous Affairs, and other contacts developed lists for each consultation. In developing such lists the Panel concentrated on Aboriginal and Torres Strait Islander leaders, business leaders, community leaders, leaders of organisations with Reconciliation Action Plans, and faith-based leaders.

The consultation schedule included meetings with key interested parties, and public consultations in 84 urban, regional and remote locations and in each capital city. It involved as many Aboriginal and Torres Strait Islander communities as possible. Wherever possible, at least two Panel members attended each consultation. At most places, the Panel held an initial meeting with local elders before holding a public community consultation and, where achievable, meetings with other community and business leaders. At each consultation, copies of the discussion paper, the Australian Constitution, information kits, and a questionnaire were distributed.

Between May and October 2011 the Panel held more than 250 consultations, in 84 locations, with more than 4,600 attendees.

A short film summarising the discussion paper was translated into 15 Aboriginal and Torres Strait Islander languages, namely *Guringdji, Murrinh-Patha, Anindiyakwa, Arrernte, Kimberley Kriol, Pitjantjatjara, Wik Mungan, TSI Kriol, Warramangu, Walpirri, Yolngu, Kriol, Tiwi, Alywarra* and *Kunwinjku*.

Between May and September 2011 the Panel received 3,464 submissions from members of the public, members of Parliament, community organisations, legal professionals and academics, and Aboriginal and Torres Strait Islander leaders and individuals.

To assist its analysis of the records of consultations and public submissions, as well as to work together closely on the preparation of its report, the Panel established a research and report subgroup. An external consultant, *Urbis*, was engaged to provide a [qualitative analysis](#) of the key issues and themes raised in submissions.

The Panel was aware that, in holding public meetings and inviting written submissions, it would only be able to obtain the views of a small number of Australians. To gather the views

of a wider spectrum of the community, and to help build an understanding of the likely levels of support within the community for different options for constitutional recognition, the Panel commissioned *Newspoll* – by the way, an asset of the ‘Murdoch stable’ – to undertake research. In February 2011 *Newspoll* tested initial community support by placing a question on its National Telephone Omnibus Survey which asked: “If there was to be a referendum to recognise indigenous Australians in the Australian Constitution, based on what you know now would you vote in favour of it or against it?” In March 2011 *Newspoll* again tested levels of community support. In August 2011 *Newspoll* undertook exploratory qualitative research designed to assist the Panel better to understand the views of Australian voters on constitutional recognition of Aboriginal and Torres Strait Islander Peoples.

In September and October 2011 *Newspoll* conducted two nationally representative telephone surveys. The first survey was designed to help the Panel understand the level of support for a broad range of ideas for constitutional change as the Panel’s consultation activities were nearing their conclusion. The second survey aimed to test the Panel’s early thinking on possible recommendations, and was timed to ensure that information on levels of public support was available during November and December while the Panel was deliberating on its final recommendations.

In November 2011 *Newspoll* conducted a second round of qualitative research designed to assist the Panel in finalising the language of its recommendations, and in future communications about advancing constitutional recognition of Aboriginal and Torres Strait Islander Peoples.

The Panel also developed a web survey to test support for ideas raised with it during the consultation period. A link to the survey was provided to people who had given contact details at consultations, and to people on the email databases of the National Congress of Australia’s First Peoples, Reconciliation Australia and the Australian Human Rights Commission.

Between 22 and 30 November 2011 *Newspoll* conducted four online focus group sessions in relation to possible wording for recommendations. Online focus groups (‘live chats’) included people of different ages, both supportive of and opposed to constitutional recognition of Aboriginal and Torres Strait Islander Peoples.

To some extent, submissions to the Panel were constrained by the way ideas were framed in its discussion paper. Discussions at consultations, on the other hand, were less constrained, and options were suggested which had not been canvassed in the discussion paper. As the Panel’s work progressed throughout the year, its thinking about options for recognition developed. In this sense the process was iterative. The quantitative research undertaken by *Newspoll* also elicited responses to specific questions, which reflected the Panel’s thinking at different stages of the process. To this extent, the Panel recognised that the analysis of consultations, the analysis of submissions and the results of the quantitative research are not directly comparable.

The Panel’s terms of reference included the requirement to advise the Government on the “level of support from Indigenous people” for each option for changing the Constitution. One of the principles adopted by the Panel to guide its assessment of proposals was the need for any proposal “to be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples.”

Testing the level of support for any proposal across the entire Aboriginal and Torres Strait Islander population would be immensely difficult. No established survey instrument could provide an accurate and representative measure of the opinion of Aboriginal and Torres Strait Islander Peoples. At the request of the Panel, the possibility of constructing a statistically representative panel of Aboriginal and Torres Strait Islander respondents to a large national survey was investigated, but found not to be feasible.

The Panel placed a strong emphasis upon ensuring that its consultation schedule enabled it to capture the views of as many Aboriginal and Torres Strait Islander Peoples and communities as possible within the available timeframes. In addition to the meetings held in the course of the broader consultation programme, the Panel also held high-level focus groups with Aboriginal and Torres Strait Islander leaders.

The Panel was also informed by responses to its web survey from people who identified themselves as Aboriginal or Torres Strait Islander. The Panel also sought to make use of other sources of information on the views of Aboriginal and Torres Strait Islander Peoples, including surveys of its members conducted by the National Congress of Australia's First Peoples.

Finally, the Panel received submissions from many Aboriginal and Torres Strait Islander people and organisations. The views expressed in these submissions assisted the Panel in its discussions and in arriving at its recommendations.

The last of the four principles agreed by the Panel required that any proposal be "technically and legally sound." This reflected the requirement in the Panel's terms of reference that suggested changes have regard to "the implications of any proposed changes to the Constitution and advice from constitutional law experts."

The Panel sought legal advice on options for, and issues arising in relation to, constitutional recognition. Advice was provided by constitutional law experts among the Panel's members, as well as by leading practitioners of constitutional law. In addition to this advice, legal roundtable meetings were held further to test that the Panel's proposed recommendations were legally and technically sound.

Submissions were also made to the Panel by many legal practitioners, academics and professional associations. These submissions assisted the Panel in its discussions and in forming its recommendations.

To test community responses to its proposed recommendations, the Panel adopted a number of strategies, including engaging *Newspoll*.

The Panel also held a series of high-level focus groups in October and November 2011 with Aboriginal and Torres Strait Islander leaders in order further to test proposed recommendations. The lists of interested persons which had been developed for the purpose of consultations were drawn on to invite participants to the Aboriginal and Torres Strait Islander focus groups. Focus groups were held in Adelaide, Brisbane, Broome, Cairns, Canberra, Darwin, Hobart, Melbourne, Perth, Sydney and Thursday Island.

These discussions were an important step in obtaining the views of Aboriginal and Torres Strait Islander Peoples in relation to the Panel's proposed recommendations.

Legal roundtables were also held further to test proposed language for unintended consequences. Six such roundtables were held: one in Brisbane, one in Perth, two in Melbourne and two in Sydney. These were attended by some 40 barristers and academics with expertise in constitutional law.

Roundtables with officials from multiple government agencies were held in Brisbane and Melbourne. A roundtable discussion was also held in Sydney, attended by 20 representatives from non-governmental organisations.

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The Expert Panel Report is divided into eleven chapters, with four appendices, an abundant bibliography and a good index. After an introduction, the chapters present a historical background, a comparative and international recognition, the national conversation dealing with themes from the consultation programme, forms of recognition, the 'race' provision contained in the Australian Constitution, considerations on racial non-discrimination, on governance and political participation, on agreement-making, approaches to the referendum and finally a draft Bill.

The Report barely touched upon the claim for 'sovereignty' by Indigenous Peoples. It observed, correctly, that sovereignty is explained in ways and with concepts quite varied even amongst Indigenous Peoples. In addition, qualitative research undertaken by the Panel in August 2011 found that the concepts of 'sovereignty' and 'self-determination' were poorly understood by non-Indigenous Australians and, anyway, any proposal on the subjects would have been unlikely to satisfy the fourth of the Panel's principles, namely the requirement that such proposal be "technically and legally sound."

On this matter of 'sovereignty' the Report reveals the clash between some of the beliefs of Indigenous Peoples and the language used, not only in the Report but in the everyday conversation of ordinary non-Indigenous Australians.

The difficulty, almost impossibility, of reconciling current non-Indigenous values with the strongly held beliefs by Indigenous people is glaringly demonstrated by the contents of a statement of *Yolngu* law which was submitted to the Panel by one of its members: Timmy Djawa Burarrwanga of the *Gumatj* clan.

The statement, which appears even before the introduction to the Report, reads:

"It is really sad that non-Aboriginal people do not understand about our law.

We cannot have traditions unless we know and respect *ngarra rom* and *mawul rom*. *Ngarra rom* is our law. *Mawul rom* is the law of peace-making. We hold *ngarra rom* in our identity. We have never changed our laws for thousands of years. It is like layers and layers of information about our country.

Ngarra rom works to enable government within the various Aboriginal nations, led by the *dilak*, or clan leaders. *Ngarra rom* also governs relations among nations. *Ngarra* is also a knowledge system. Under *ngarra*, there are *djunggaya* or public officers who make business go properly. There are *djunggaya* all over this country - for Yolngu, Arrernte, Walpirri, Murri, Koori and Noongar and all the Aboriginal nations.

We Yolngu have *ngarra* or hidden knowledge. *Ngarra* holds the Yolngu mathematical system about relationships among all people, beings and things in the world – land, sea, water, animals, plants, the wind and the rain, and the heavens.

We Yolngu have never been anarchists or lawless.

The Constitution in 1901 did not change *ngarra*.

In 1901, the Constitution ignored *ngarra rom*. Without acknowledgment in the Constitution, there is lawlessness and anarchy. Without acknowledgment in the Constitution, we are separate.

The preamble to the Constitution is a short job. The Constitution is a barrier to understanding the indigenous cultures of this country. No more British preamble. Let us be together in the Constitution to make unity in this country. This means 'We are one. We are many of this country'.

Timmy Djawa Burarrwanga, *Gumatj* Clan."

There could be no better way to express the firm view that for the last 224 years the Indigenous Peoples and the new Australians who began to arrive with Captain Phillip in 1788 have been speaking different languages, irreconcilable to either group.

New Australians have been using words such as *Constitution, modern liberal democracy, equality, fairness, justice, law, elections, government* and indeed *sovereign* and *sovereignty* which hardly live together.

Furthermore, there is a religious tone to the statement which is not understandable to and shared by new Australians. The 'whites' have been in turn acting as 'abandoned Britons' and 'multicultural' acquisitions and accretions – and all aspirants or practitioners of the fine arts which demand Anglo supercilious politeness and/or the 'playing of the game' which goes with it.

In this race to assertion the Indigenous and Torres Straits Islanders Peoples have always come second – when they have survived.

Much use was made during Prime Minister Howard's eleven-year period of the expression "black armband view of history." That was the appeal of John Winston Howard, whose main achievement was a grand waste of time: he wanted to appear ordinary to an extraordinarily ordinary populace, when all he had to do was to be himself – by definition, ordinary. Almost at the end of a long period of Philistinism he spoke of 'practical reconciliation', while preparing to send in the Army to re-occupy Indigenous Lands. He was a grand consumer of words such as 'freedom', and 'democracy'. Those virtues were alright for the new Australians, so long as they continued to vote for his Coalition. And with those words went other mantra-like mystical words: 'the Westminster System', 'parliamentary democracy', and of course 'the Mother Country' – from time to time subject to re-definition – and the Monarchy. It was a sclerotic world in which history would not really matter much, confined in the popular view to recall name and particulars of such and such match, player, race, horse, march – and The Queen, with Her dysfunctional but Royal Family and Her Royal Firm.

What follows will be a "redeeming view of history."

It is believed that the ancestors of [Indigenous Australians](#) arrived in what is now called Australia some 40,000 to 60,000 years ago – probably as early as 70,000 years ago. They developed a [hunter-gatherer](#) lifestyle, established enduring [spiritual](#) and [artistic](#) traditions and utilised [stone technologies](#). For tens of thousands of years they performed religious practices associated with the *Dreamtime*. The *Dreamtime*, or the [Dreaming](#) is a [sacred](#) era in which ancestral [Totemic](#) Spirit Beings formed [The Creation](#). The *Dreaming* established the laws and structures of society and the ceremonies performed to ensure continuity of life and land. Recent archaeological finds suggest that a population of 750,000 could have been sustained. People appear to have arrived by sea during a period of glaciation, when Papua [New Guinea](#) and [Tasmania](#) were joined to the continent. The journey still required sea travel however, placing the Indigenous Peoples among the world's earlier mariners.

The greatest population density developed in the southern and eastern regions, the [River Murray](#) valley in particular. Indigenous Peoples lived and utilised resources on the continent sustainably, agreeing to cease hunting and gathering at particular times to give populations and resources the chance to replenish. 'Firestick farming' amongst people of the northern regions was used to encourage plant growth which attracted animals. Indigenous Peoples belong to the oldest, most sustainable and most isolated cultures on Earth.

The *Dreaming* was and remains prominent in Indigenous Peoples' artistic expressions. Such art is believed to be the oldest continuing tradition of art in the world. Evidence of Indigenous art can be traced back at least 30,000 years and is found throughout Australia.

Despite considerable cultural continuity, life for Indigenous Peoples was not without significant changes. About 10-12,000 years ago modern Tasmania separated from the mainland, and some stone technologies failed to reach the Tasmanian people – such as the hafting of stone tools and the use of the [boomerang](#).

There is evidence that when necessary, the Indigenous Peoples could keep control of their population growth and in times of drought or arid areas were able to maintain reliable water supplies. In south eastern Australia, near present day [Lake Condah](#), semi-permanent villages of beehive shaped shelters of stone developed, near bountiful food supplies. For centuries [Macassan](#) trade flourished with the Indigenous Peoples of the present day Australian north coast, particularly with the [Yolngu](#) people of northeast [Arnhem Land](#).

When Indigenous Peoples first set eyes on Captain James Cook in 1770, the population consisted of some 250 distinct nations, within each of which there were numerous tribes or clans who spoke one or more of hundreds of languages and dialects. Complex social systems and 'elaborate and obligatory' laws and customs differed from nation to nation. Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. When Cook arrived at soon-to-be-called Botany Bay on the east coast of Australia on 29 April 1770, he was carrying instructions from the Admiralty issued in 1768. Those instructions provided, among other things: "You are also with the consent of the natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain."

Of his first encounter with local people Cook wrote in his journal that "all they seem'd to want was for us to be gone." Cook continued to chart the eastern coast to the northern tip of modern Queensland, and raised the British flag at *sans dire* Possession Island, off present day Cape York Peninsula. He 'took possession' of the whole eastern coast of Australia, and

named it New South Wales.

In October 1786 the British Government appointed Captain Arthur Phillip as first governor of New South Wales, which was designated to be a convict place. By the time Phillip was commissioned to lead the First Fleet, his instructions from King George III had nothing to say about the “consent of the natives.” Phillip’s instructions counselled him to “live in amity and kindness” with the natives, but anticipated the need for measures to limit native “interference.” On 18 January 1788 Phillip arrived at Botany Bay with a fleet of nine ships. Between 26 January and 6 February 1788, 827 convicts – 580 males and 247 females – as well as 211 marines landed at what was to be called Port Jackson.

Phillip – clearly the first thief – was authorised to grant land to those who would ‘improve it’ – that is to say, to ‘receivers of stolen goods’.

The operation was eased by the convenient fiction that the land was *terra nullius* – which belongs to no-one. It was so to be for 204 years and only through the exertion of force by and on behalf of the British Crown and the views of sycophantic historians. No-one had sought permission to land, no-one had consented, no-one had ceded. Sovereignty was not passed from the Indigenous Peoples by any actions of legal significance voluntarily taken by or on behalf of them.

‘The natives’ were found to be quite ‘different’: scantily covered, un-receptive of the Christian religion’s blessings, unable to speak English, unwilling to acknowledge the majesty of a foreign boss called the King – why, ‘barbarians’.

They turned out to be quite resistant to the dispossession, and the promise of real estate agency, the lure of banking business and commercial enterprise which in time would develop under the protection for several decades of a military dictatorship.

The earliest record of an armed encounter between Indigenous Peoples and the occupiers is dated May 1788. Violence developed and systematised, never turning into a programmatic effort of extermination – except for [Van Diemen’s Land](#), modern day Tasmania, where a ‘Black Line’ of death was drawn and, incidentally, failed.

One [George Augustus Robinson](#) then proposed to set out unarmed ‘to mediate’ with the remaining tribes-people. With the assistance of a woman named [Truganini](#) as guide and translator, Robinson convinced remaining tribesmen to surrender to an isolated new settlement at [Flinders Island](#), where most later died of disease, but above all of loneliness.

People who ‘belong to the land’ – as any Indigenous person would say – would suffer exceptionally from being separated from the native place. As a sublimation of sheer brutality, forced ‘relocation’ would knowingly be the tool for the ‘dispersion’ of Indigenous Peoples. A new form of the English language was about to take foot.

Raids, murders, massacres of Indigenous Peoples continued in different parts of the continent to the 1930s as the land was being taken over by new arrivals and expansion. Prejudice, the natural child of ignorance, survives to the present. The period of armed conflict is rarely mentioned; it is portrayed as a sequel of *scaramouches* necessary to assert and defend the ‘right of property’. Serious historians, unpaid for their opinion, often refer to this as the time of ‘the frontier wars’.

One of the last known and documented massacres of Indigenous Peoples took place from 14

August to 18 October 1928 near the [Coniston cattle station](#), in what is today the [Northern Territory](#).

The massacre occurred in revenge for the death of a [dingo](#)-hunter named Frederick Brooks, killed by 'natives' in August 1928 at a place now known as [Yukurru](#). Official records at the time stated that 31 people were killed. The then-owner of Coniston station was a member of the punitive party for the first few days and estimated that at least twice that number were killed between 14 August and 1 September. Serious historians estimate that as many as 110 'native' men, women and children were killed. Some clans: the *Anmatyerre*, the *Kaytetye* and the *Warlpiri* believe that up to 170 died between 14 August and 18 October.

Even before the arrival of the occupiers in local districts, imported diseases often preceded them. A smallpox epidemic was recorded in Sydney in 1789, which wiped out about half 'the natives' around Sydney. It then spread well beyond the then limits of the occupied area, including much of south-eastern Australia; it reappeared in 1829-30, killing 40 to 60 per cent of the 'native' population.

The impact of the occupation was profoundly disruptive to 'native' life and, though the extent of violence is still debated, there was considerable conflict on the frontier. At the same time, some of the occupiers were quite aware they were standing on Indigenous land. Rarely British justice would take its blind off to see. Thus, when in 1838 at least twenty-eight 'natives' were massacred at the [Myall Creek](#) in New South Wales, not even the occupying authorities could fail to have seven 'whites' tried, convicted and hanged by the colonial courts.

'The natives' also attacked white intruders; in 1838 fourteen of them were killed at Broken River in Port Phillip District, which was to become Victoria in 1851, by Aborigines of the Ovens River, almost certainly in revenge for the illicit use of Aboriginal women.

In 1845 one of the 'receivers' attempted to justify his position by writing: "The question comes to this; which has the better right - the savage, born in a country, which he runs over but can scarcely be said to occupy ... or the civilised man, who comes to introduce into this ... unproductive country, the industry which supports life." This is the substance of life in a mercantile society.

Early commentaries often, and conveniently, tended to describe 'the natives' as doomed to extinction following the arrival of the English. An 'inferior black race' was bound to disappear.

From the 1830s colonial governments established what were going to become the controversial offices of the [Protector of Aborigines](#) in an effort to avoid mistreatment of Indigenous Peoples and conduct government policy towards them.

Captain Hutton of Port Phillip District once told Chief Protector of Aborigines [George Augustus Robinson](#) that "if a member of a tribe offends, destroy the whole." That was the practice of the time: there is record that it translated, in places such as Afghanistan for instance, into an English unwritten order 'to butcher and bolt'.

Queensland's Colonial Secretary Arthur H. Palmer wrote in 1884: "the nature of the blacks was so treacherous that they were only guided by fear - in fact it was only possible to rule...the Australian Aboriginal...by brute force."

Robinson had come upon a word which would work absolute magic to successive generations of occupiers: protection. The use of the word would become a great contributor to the development of 'Antipodean' English.

'Protection' was really of, by and for the occupiers and would be applied for a long time, up to the present indeed, against 'the other', 'the outsider', 'the enemy' from time to time as conveniently defined.

In the context of the time, 'protection' was the *omnibus* formula against 'the intruders' and all those who could be seen as a threat to 'the settlement' of the colony. That view of life in the colony would crystallise into the 'White Australia' policy.

The 1838 massacre at Myall Creek was followed by the adoption of a 'policy' to describe Australia's approach to immigration, long before federation and until the latter part of the twentieth century. 'Protection' favoured applicants from certain countries - soon to be specified as Anglo-Celtic countries. Now, there is another example of *double entendre*. There are no Anglo-Celtic countries. There is England, and there are Ireland and Scotland; maybe in the process the Welsh were either left out of the glorious classification or assumed to be some sort of enlarged village, there, just outside England proper - hard to be specific in such lunacy.

'Protection' of the ill-gotten 'settlement' was meant to be from Asiatic 'races' - mainly the Chinese who had arrived in search of gold.

* * *

The origins of the 'White Australia' policy can be traced to the 1850s. White miners' resentment towards industrious Chinese diggers culminated in violence on the Buckland River in Victoria, and at Lambing Flat (now Young) in New South Wales. The governments of these two colonies introduced restrictions on Chinese immigration.

Events on the [Australian goldfields](#) in the 1850s led to hostility towards Chinese miners on the part of many 'whites'. The hostility was to affect many aspects of relations between the two groups for the following century.

The [Chinese](#) generally worked in large organised groups, covering the entire ground surface, so that if there was any gold there, the Chinese miners usually found it. They lived communally and frugally, and could subsist on a much lower return than 'white' people. The rural background of most of the Chinese diggers suited them very well to life as alluvial gold-miners: they were used to long hours of hard outdoor work as members of a disciplined team, accustomed to simple sleeping quarters and basic food, and were satisfied with a much smaller return of gold than the majority of the 'whites'.

'White' resentment of the apparent success of the Chinese first surfaced as petty complaints: the 'whites' made stereotypical claims that the Chinese muddied the water holes, they worked on the Sabbath, they were thieves, they had insanitary habits, they accepted low wages and would drive down the value of labour. No evidence was ever proffered that any of these things were true. One could paraphrase: "Labour in a white skin cannot be free so long as labour in a [yellow] skin is branded." Ignorant people were bound to be prejudiced. So, because the Chinese were distinctive in appearance, language and dress, they became classic targets for [xenophobia](#), and surly resentment became

systematic hatred.

Modern day haters of 'the other' are bound not to know what xenophobia means; they do however practice it with a certain formal politeness, restraint. "I am not a racist, but ..."

Once again a question of money – a supreme governor in a society which has remained to this day wedded to mercantilism – gave rise to several violent protests against government policies across Victoria and New South Wales in the late 1850s and early 1860s.

The first anti-Chinese demonstration occurred in [Bendigo](#), Victoria in July 1854. Some of these incidents took the form of outright attempts at excluding the Chinese from a goldfield, or a portion of it. Disputes between 'white' and Chinese miners flared into brawls at [Daylesford](#) and [Castlemaine](#). A party of Chinese *en route* to the [Victorian diggings](#) from [Robe](#) discovered a new goldfield at [Ararat](#), and were driven off their find by 'white' competitors.

In July 1857 repeated incidents at the [Buckland River](#) goldfield in Victoria culminated in a [major riot](#).

Similar events occurred in New South Wales, which was just feeling the impact of significant Chinese immigration. In 1856 'white' miners drove Chinese off the diggings at [Rocky River](#) in [New England, the northern part of New South Wales](#). Serious clashes followed at [Adelong](#) in 1857 and [Tambaroora](#) in 1858.

The most notorious of these incidents was the so-called Lambing Flat Riot, actually a drawn-out series of incidents between November 1860 and September 1861 on the [Burrangong goldfield](#) in New South Wales. Several place names are sometimes used interchangeably when describing these events. Lambing Flat, the name which has attached itself most persistently to the events, was a sheep paddock where one of the more violent incidents took place.

The Burrangong riot was played out against the background of a contentious debate in the [New South Wales Parliament](#) over legislation to restrict Chinese immigration. Chinese numbers on the New South Wales goldfields had been relatively small, but were rising in the wake of restrictions imposed in Victoria. Restrictive legislation had also been proposed in New South Wales as early as 1858 in the wake of Victorian and [South Australian](#) laws.

Trouble had begun late in 1860 with the formation of a [Miners Protective League](#) [emphasis added], followed by mass meetings of 'white' miners evicting Chinese miners from sections of the Burrangong field.

In ten months of unrest at Burrangong, the most infamous riot occurred on the night of 30 June 1861 when a mass of perhaps 3,000 'white' miners drove the Chinese off the Lambing Flat, and then moved on to the Back Creek diggings, destroying tents and looting possessions. About 1,000 Chinese abandoned the field and set up camp at a sheep station, twenty kilometres away. There were two triggers for the violence: in Sydney the Legislative Council had rejected the anti-Chinese bill, and a false rumour swept the goldfield that a new group of 1,500 Chinese were marching towards Burrangong. During the following days the [police](#) arrived, identified the promoters of the riot, and three were arrested two weeks later. What followed was an armed attack on the police camp by about 1,000 'white' miners on the night of 14 July 1861. The police used fire power and mounted [sabre](#) charges, leaving

one rioter dead and many wounded.

The police briefly abandoned the field, but then a detachment of 280 [soldiers](#), [sailors](#) and police reinforcements arrived from Sydney and occupied the area for a year. The Chinese were reinstated on segregated diggings, the ringleaders of the riots were tried and two were gaoled. But the lesson was not lost on the Chinese.

The 'occupiers' attitude - both governments' and 'whites' - resulted in a long list of 'encounters' with Indigenous Peoples that one should call 'massacres in a process of extermination'.

Brutality was particularly savage in what became the colony of Queensland, with the consequence that the cost of such encounters there exceeded that of all other colonies. No complete list is possible because such events were generally veiled in secrecy and often called for the use of deceptive practices such the poisoning of wells, the 'generous' distribution of flour laced with arsenic - and at 'Christmas' the offering of puddings laced with strychnine, the distribution of infected blankets, and the spreading of hitherto unfamiliar diseases. Those practices were, in the language of the time, considered more 'safe', that is to say less noticeable than armed raids.

Many massacres were to go unknown and unpunished due to these practices, through what are variously called a 'conspiracy' or 'pact' or 'code' of silence which fell over the killings of 'natives'.

Still, at mid-1838, when parties of mounted and armed stockmen pursued 'natives' in the Gwydir River, a local magistrate branded the event as "a war of extirpation." Such words enter the everyday use - as if 'the natives' were unwanted flora or execrable fauna, "vermin" was the frequently heard word.

There were more clashes in New South Wales and particularly in that part of the colony which became Victoria, against the *Daung Wurrung* and [Dja Dja Wurrung](#), the *Tarnbeere Gundidj* and the [Djargurd Wurrung](#) tribes.

The 'encounters' with *Wiradjuri* along the Murrumbidgee River were a genuine war which lasted throughout the 1830s, 1840s and up to the 1850s.

Gippsland massacres, which resulted in the killing of up to 1,000 'natives' have been recorded as occurring during 1840 to 1850, while hundreds died in raids along the Brisbane River, the Balonne and Condamine Rivers, the Dawson River, the Warrigal Creek, the Barwon and Narran Rivers and in the Mount Gambier region of South Australia. Some well known perpetrators of these massacres became 'folk heroes' in the eyes of the 'occupiers': William Fraser of Queensland was one of them. He was reputed to have extinguished the *Yeeman* tribe.

The 1860s opened and continued with new massacres of men, women and children in Queensland and went on to conclude with 'search and destroy' expeditions in the Swan River colony which later became Western Australia, near La Grange Bay and at the Dampier Archipelago. Hundreds of the *Yaburara* tribe were killed. The 'event' was celebrated with a monument still visible at Fremantle - the 'Explorers' Monument' !

There is more than one source to suggest the existence of a 'conspiracy of silence' about the massacres of *Djara*, *Konejandi* and *Walmadjari* peoples in Western Australia in 1887.

In the 1870s there were further massacres of “blacks of the [northern Queensland] interior who would first receive their ‘baptism of fire’ ... [becoming] acquainted with the death-dealing properties of the mysterious weapon of the white man”, as a newspaper of the time chronicled.

In the same area, in 1874-75, according to a ‘white’ miner’s letter dated 16 April 1876, “the niggers got a dressing there”, leaving no doubt as to what the writer meant, which was complete with the invitation to “a visit from any number of phrenological students in search of a skull, or of anatomical professors in want of a ‘subject.’ ”

Among the many unrecorded episodes of police brutality one well known concerned the murder of 28 men and 13 girls of the *Guugu-Yimidhirr* tribe of far north Queensland in 1879; this was followed by the killing of 200 *Kalkadoon* people near Mount Isa in 1884, and of an unknown but large number of the *Djabugay* tribe in 1890. These were plain ‘state murders’.

This savagery was followed by the Barrow Creek massacre, in that part of South Australia which became the Northern Territory in 1911. *Kaytetye* people had suffered the abuse of their women and the closing of the only water source by ‘white’ men. A large police hunt killed some 90 Indigenous persons.

During 1880s-90s the ‘wars on blacks’ would continue in Arnhem Land, still in the Northern Territory, taking place at different locations. Men, women and children of the *Yolngu* clans of *Gumatj*, of *Ganalpuynghu*, of *Djinba* and *Mandelpi* were chased and shot dead by [mounted police](#) and men from the Eastern and African Cold Storage Supply Company, a company incorporated in South Australia, controlled by ‘honourable’ Melbourne businessmen as ‘proxies’ of English interests.

There were other forms of ‘protection’ – none of them disinterested.

[Christian churches in Australia](#) sought to convert ‘the natives’, and were often used by governments to carry out ‘welfare and assimilation policies’. Despite the many attempts at ‘detrabalising’ them, the treatment by governments and landowners was so brutal as strongly to justify the position of people such as Professor Patrick Dodson, who became a minister of the Catholic religion, and is one of the co-Chairpersons of the Expert Report and prominent advocate of Indigenous Peoples’ right to land [Noel Pearson](#), who was reared at a [Lutheran](#) mission in [Cape York](#), and has written how Christian missions throughout Australia’s colonial history “provided a haven from the hell of life on the Australian frontier while at the same time facilitating colonisation.”

It would take more than a century before, from the 1960s, Australian writers would begin to re-assess the invaders’ assumptions.

In 1968 anthropologist Professor William [E.H. Stanner](#) described the lack of historical accounts of relations between the occupiers and the Indigenous Peoples as “the great Australian silence.” Historian Professor [Henry Reynolds](#) argued that there was a “historical neglect” of the Aborigines by historians until the late 1960s.

By the late nineteenth century, ‘dispersion’ – that is killing, and disease had devastated the Indigenous population. Social Darwinist ideas, loosely derived from Charles Darwin’s 1859 *Origin of species*, promoted the belief that Indigenous Peoples were headed towards extinction. Discourse around the ‘White Australia’ policy seldom mentioned them, and then

only to dismiss them as an 'evanescent race' who would eventually disappear in contrast to the dynamic, virile, enduring, and therefore threatening Asiatic races. The Japanese would occupy a peculiar position *vis-à-vis* the 'White Australia' policy.

A long period of control of Aboriginal and Torres Strait Islander Peoples would begin. Already in 1860 the State of South Australia had appointed a Chief Protector of the interests of Indigenous People. In the late nineteenth and early twentieth centuries, 'protective' legislation, known as the 'Aborigines Acts', would be enacted in all mainland States - in Victoria in 1869, in Queensland in 1897, in Western Australia in 1905, in New South Wales in 1909, and in South Australia in 1911 - and in the Northern Territory in 1912. The 'Aborigines Acts' could require people to live on reserves run by governments or in missions, where their lives were closely regulated. By 1911 there were 115 reserves in New South Wales alone. Indigenous Peoples living outside reserves, in urban areas, on pastoral properties and in more remote areas, were spared the 'reserve' regime, but their lives were subject to 'protectionist' legislation. Otherwise they could apply to the Aborigines Protection Boards for an exemption from the legislation, known as a 'dog tag' - a touch of English cynophilia !

The 'Aborigines Acts' imposed restrictions on personal interactions between Indigenous and non-Indigenous Peoples, and on Indigenous Peoples residing on and off reserves. The 'Acts' provided for controlling marriage, prohibiting alcohol consumption, empowering Protectors to place Aboriginal people on reserves, and imposing curfews in town. Through by-laws and regulations, as well as social convention, Indigenous Peoples were denied entry to swimming pools, picture theatres, hospitals, clubs and so on.

In some States and in the Northern Territory, the Chief Protector had legal guardianship over all Indigenous children, including those who had parents. The removal of Indigenous children from their families under the auspices of Protection Boards was common during this period. Employment of Indigenous Peoples was subject to a government permit or licence. Wages were routinely withheld from Indigenous workers; they were either paid directly to the Protector or food and clothing were provided *in lieu* of wages. The practice continues, particularly in the Northern Territory.

In the 1930s, legislators widened the definition of 'Aborigines' in order to formalise control over an increasing population of mixed descent. A bewildering array of legal definitions led to inconsistent legal treatment and arbitrary, unpredictable and capricious administrative treatment. An analysis of 700 separate pieces of legislation suggests the use of no less than sixty seven identifiable classifications, descriptions or definitions.

For example, in 1934 Queensland redefined 'Aborigines' as persons of full descent and 'half-castes', including 'any person being the grandchild of grandparents one of whom is aboriginal' and any person of Aboriginal extraction who, in the opinion of the Chief Protector, was 'in need of ... control'. In 1936 Western Australia came up with the notions of 'quarter-caste' or 'quadroon'. And in 1963 a new 'protective' act excluded 'quarter-castes' from the definition of 'natives'. Queensland introduced the concept of 'quarter-caste' and a new approach to classification which distinguished between 'Aborigine' - being a 'full-blood', 'Part-Aborigine', 'Assisted Aborigine', 'Islander' and 'Assisted Islander'. Such distinctions were retained to 1971, when a new act redefined 'Aborigine' by descent. Victoria had adopted such classification in 1957 and continued to 1972, when an 'Aborigine' came to be defined as an 'inhabitant of Australia in pre-historic ages or a descendant from any such person'.

In 1937 the first Commonwealth-State Native Welfare Conference was held, attended by representatives of all States, except Tasmania, and the Northern Territory. The conference officially sanctioned the policy of 'assimilation': "[T]his conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end."

In 1961 the Native Welfare Conference again endorsed the policy of 'assimilation' as follows: "[A]ll Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians."

Until about 1972 virtually all aspects of the lives of Indigenous Peoples were subject to control. Viewed by present day standards, fundamental human rights – such as freedom of movement, freedom of association, freedom of employment, control over property, and custody of children – were denied, and the law characterised by systematic racial discrimination.

* * *

As early as the 1840s there had been some attempts to promote the formation of an inter-colonial General Assembly to deal with matters of common inter-colonial interest, but the proposals did not meet with support from the colonists, whose interests were competing. The movement towards the formation of a single unity ultimately came from some of the more enlightened colonists. It was driven by concern about foreign affairs, immigration, defence, trade and commerce and industrial relations, and an obsession about the maintenance of the 'white race' against 'coloured races' within and the threat of immigration or invasion. Australia would be born with this feeling – as a frightened country.

There also developed in the 1890s a perception of 'people' or 'race' embedded in the idea of nationality. Australians of the nineteenth century, and beyond, would use the terms 'people' and 'race' interchangeably.

It was for Henry Parkes, recognised later as one of the 'founding fathers of the Constitution', to speak rather rhetorically of "The crimson thread of kinship [which] runs through us all." That Constitution would grow out of moves towards a federation of the six self-governing colonies. Before 1901 ultimate power over these colonies – New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia – rested with the United Kingdom Parliament at Westminster.

During the 1890s a series of conferences were held to discuss federation.

A Constitutional Conference in 1890 led to a Constitutional Convention in 1891. A [Constitution](#) Bill was adopted by that Convention but did not gain much acceptance. For a short time the move towards federation lost its *momentum*.

The move was started again with a conference held in Corowa in 1893, organised by the Australian Federation League. That conference proposed that the legislature of each Australian colony pass an Act providing for the election of representatives to attend a

statutory convention or congress to consider and adopt a Bill to establish a Federal [Constitution](#) for Australia. That plan was considered by a Conference of the colonial Premiers held in Hobart in 1895. The six premiers of the Australian colonies agreed to establish a new Constitutional Convention by popular vote. The Premiers decided that each colony would pass enabling Acts to choose ten delegates each to meet at a Convention to draft a Federal [Constitution](#) for consideration by each colonial parliament.

The new Convention met in Adelaide in March 1897 and then in Sydney in September 1897 and finally in Melbourne in January 1898. A proposed [Constitution](#) Bill was reconsidered and revised by a drafting committee. It was adopted by the Convention in March 1898. Referendums were subsequently held in each of the colonies and ultimately a majority of people in a majority of the colonies approved the proposed [Constitution](#). Western Australia's referendum was not held until July 1900, but it ended up supporting the [Constitution](#).

A [Constitution](#) Bill incorporating the proposed [Constitution](#) was submitted to the United Kingdom Parliament. Subject to some changes, relating to appeals to the Privy Council from the High Court, the Bill was passed by both the House of Commons and the House of Lords and on 9 July 1900 received the Royal Assent. The proclamation establishing the Commonwealth was signed by Queen Victoria on 17 September 1900 to take effect from 1 January 1901.

The Australian [Constitution](#) came into existence as a section of an Act of the United Kingdom Imperial Parliament. One of Australia's famous jurists of the twentieth century, Sir Owen Dixon, Chief Justice of the High Court of Australia, would describe the [Constitution](#) as not being "a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government." but as "a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's dominions."

On that 1 January 1901 federation of the colonies was proclaimed at Centennial Park in Sydney by Australia's first Governor-General, John Adrian Louis Hope, 1st Marquess of Linlithgow. Australia's first Prime Minister was Edmund Barton, who held the position from January 1901 to September 1903.

The Constitution of the Commonwealth of Australia came into effect at federation, but this did not mean that Australia was now independent of Britain. When the United Kingdom approved colonial federation, it simply meant that the six self-governing states of Australia allocated some functions to a federal authority. Australia gained the status of a Dominion, which meant it remained a self-governing colony within the British Empire, with the Head of State being the British monarch. Until very recently the British Government appointed Australia's Governors-General and State Governors, who answered to the British Government.

All Dominions within the British Empire were declared "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations" at the Imperial Conference of 1926. The *Statute of Westminster* 1931 ratified the discussions of the Imperial Conference. This meant that Australia and other Dominions such as Canada, New Zealand and South Africa could now conduct treaties and agreements with foreign powers, and manage their own military strategies. No longer – it seems – were the Australian Governors-General, Parliament and individual governors

answerable to the United Kingdom. The British monarch could only act on the advice of the Australian Government.

On 9 October 1942 the Australian Parliament formally adopted the Statute of Westminster 1931 under the *Statute of Westminster Adoption Act 1942*.

Only on 3 March 1986 Australia reached the next stage towards independence: on that day the *Australia Acts* came into effect. The *Australia Acts* declared that Australia had the status of a sovereign, independent and federal nation. Yet, the nation still retains Elizabeth II as head of state, but her position as Australia's head of state is completely separate from her position as the head of state of any other country, including the United Kingdom. What the *Australia Acts* effectively did was remove the ability of the British Government to make laws for Australia, and removed the last legal link with the United Kingdom by abolishing the right of appeal to the judicial committee of the Privy Council. It was not until 1988 that the last state, Queensland, removed this from its statutes.

Some might very well say, as at least a powerful Indigenous movement proclaims, advocating for a republic, that Australia is still on a path to independence, because the country is still *technically* ruled by the British monarchy, even though that monarchy does not have any right to interfere with Australian laws.

As far as the Indigenous Peoples were concerned, the view shared by the overwhelming majority of the Convention delegates was that the 'Aboriginal race' was on the way to extinction. Their calculations were comforted by the reduction of the 'native' population from some 750,000 to less than 100,000.

Two sections of the Constitution dealt with 'the aboriginal race' or 'the aboriginal natives.' Another, Section 25, dealt with them only by way of inference.

Section 25, on 'Provisions as to races disqualified from voting', in Chapter 1, Part 3 of the Constitution, which deals with The House of Representatives, read and presently reads: "For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted."

A specific provision was contained in Section 51, on the 'Legislative powers of the Parliament', and provides that: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxvi) The people of any race, [other than the aboriginal race in any State,] for whom it is deemed necessary to make special laws:" The words in square brackets were removed by the *Constitution Alteration (Aboriginals) Act [No. 55 of] 1967, n. 2*.

And Section 127 - Aboriginal natives not to be counted, provided that: "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." This section was repealed by the *Constitution Alteration (Aboriginals) Act [No. 55 of] 1967, n. 2*.

The Convention debates of the 1890s make clear that section 51(xxvi) was intended to authorise the enactment by the Commonwealth of racially discriminatory laws. In the original draft Constitution Bill of 1891, the proposal was for a grant of exclusive legislative power to the Commonwealth Parliament with

respect to: “[t]he affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the aboriginal native race in Australia and the Maori race in New Zealand.” At that time, New Zealand was a potential member of an Australasian nation-state which might also have included Fiji and other Pacific islands.

The course of the debates suggests that the former Premier of Queensland and Australia’s first Chief Justice, Sir Samuel Griffith, a so-called ‘liberal’, proposed the clause and explained: “What I have had more particularly in my own mind was the *immigration of coolies* from British India, or *any eastern people subject to civilised powers*. ... I maintain that no state should be allowed, because the federal parliament did not choose to make a law on the subject, to allow the state to be *flooded by such people* as I have referred to.” [Emphasis added]

As Professor Geoffrey Sawer commented, everything Griffith was concerned about could have been achieved under the immigration, aliens and external affairs powers. However, the Convention debates make clear that the power was regarded as important by the drafters of the Constitution. In 1898, the head of the (economic) Protectionist Party, Edmund Barton, from New South Wales, who would become Australia’s first prime minister and a founding justice of the High Court of Australia, commented that the ‘race power’ was necessary, so that “the moment the Commonwealth obtains any legislative power at all it should have the power to regulate the affairs of the *people of coloured or inferior races* who are in the Commonwealth.” [Emphasis added]

Arguing against a Commonwealth head of power, the future premier of Western Australia, Sir John Forrest, a ‘moderate’ (economic) Protectionist, contended: “*We have made a law that no Asiatic or African alien can get a miner’s right or do any gold mining*. Does the Convention wish to take away from us, or, at any rate, not to give us, the power to continue to legislate in that direction? ... *We also provide that no Asiatic or African alien shall go on our goldfields*. These are local matters which I think should not be taken from the control of the state Parliament.” [Emphasis added]

Forrest also observed that “[i]t 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.” [Emphasis added] Forrest was absolutely correct.

A South Australian delegate, James Howe, who was conservative on most matters, but had ‘a genuine concern for the plight of the poor’, commented: “I think the cry throughout Australia will be that our first duty is to ourselves, and that *we should as far as possible make Australia home for Australians and the British race alone*.” [Emphasis added]

George Reid, leader of the Free Trade and Liberal Association, a future premier of New South Wales and fourth prime minister of Australia, agreed with Forrest that it was “certainly a very serious question whether the internal *management of these coloured persons*, once they have arrived in a state, should be taken away from the state.” He was prepared, however, to give that power to the Commonwealth because “it might be desirable that there should be uniform laws in regard to *those persons, who are more or less unfortunate persons when they arrive here*.” [Emphasis added]

As Professor Sawer commented, the Convention debates in relation to section 51(xxvi) “reveal only too clearly a widespread attitude of white superiority to all coloured peoples,

and ready acceptance of the view that the welfare of such people in Australia was of little importance.”

It was clear from the very beginning that the obsessive preoccupation of the delegates was what to do with samples of the ‘coloured races’ already in Australia – mainly but not exclusively the Chinese and the *Kanakas* who had been kidnapped and brought to Queensland to provide the fortune of some of the delegates – but above all of keeping out ‘coloured races’.

Those of ‘coloured race’ residing in Australia would be disposed of with whatever means, mainly deportation. ‘The others’ would be kept out by the early passing of a restrictive immigration act. Introduced by Prime Minister Edmund Barton on 7 August 1901, the *Immigration Restriction Act* 1901 received the Royal Assent on 23 December 1901. By strictly limiting entry into [Australia](#) it came to form the basis of the ‘[White Australia](#)’ policy. It also provided for [illegal immigrants](#) – the residing ‘coloured races’ – to be [deported](#). The Act granted immigration officers – to be sure prejudiced and grossly mis-educated – a wide degree of discretion to prevent individuals from entering Australia. The Act prohibited various classes of people from immigrating, but most importantly it introduced the [dictation](#) test, which required a person seeking entry to Australia to write out a passage of fifty words dictated to them in any European language, not necessarily English, at the discretion of an immigration officer. The test allowed that kind of immigration officers to evaluate applicants on the basis of language skills.

The tenor of the Convention debates, with the exception of the contributions from Dr. John Quick from Victoria – who was considered a member of the [Protectionist Party](#), Charles Kingston – who was a ‘high [protectionist](#)’, and Josiah Symon – who was a member of the Free Trade Party, the latter two both from South Australia, spoke openly about their desire for laws applying discriminatory controls to ‘coloured races’. Particularly Quick and Kingston wanted to keep the ‘coloured races’ out. However, both urged that, once admitted, they should be treated fairly and given all the privileges of Australian citizenship. Kingston, in particular, expressed the view that if ‘coloured people’ were to be admitted to Australia, they should be admitted as citizens and enjoy all the rights and privileges of Australian citizenship: “[I]f you do not like these people you should keep them out, but if you do admit them you should treat them fairly – admit them as citizens entitled to all the rights and privileges of Australian citizenship. ... We have got those coloured people who are here now; we have admitted them, and I do trust that we shall treat them fairly. And I have always set my face against special legislation subjecting them [to] particular disabilities ... I think it is a mistake to emphasize these distinctions ...” The view of Josiah Symon was just as ‘radical’ for its time: “It is monstrous to put a brand on these people once you admit them. It is degrading to us and to our citizenship to do such a thing. If we say they are fit to be admitted amongst us, we ought not to degrade them by putting on them the brand of inferiority.”

The incomparable American satirist Ambrose Bierce (1842-1913 ?) has a poignant definition for this kind of speaker: “One who, professing virtues that he does not respect, secures the advantage of seeming to be what he despises.”

No serious need to deal with ‘the natives’ – by all then reasonable expectation they were supposed to disappear towards extinction, naturally.

In relation to other ‘races’, the records of the Conventions shows that some provisions

suggested for inclusion in the Constitution were rejected so that the States could continue to enact legislation that discriminated on racial grounds. For example, the original Commonwealth Bill of 1891 provided that: "A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws."

This notion of 'equal protection of the laws' was intended to be imported from the Fourteenth Amendment to the Constitution of the United States. Such influence, of an inspirational and legal kind, was fashionable at the time, but not sufficiently so that the suggestion would gain favour with the delegates. The clause was voted down: 24 to 17.

Henry Higgins, a so-called 'liberal' delegate from Victoria and later a justice of the High Court, confirmed at the Melbourne Convention in 1898 that "we want a discrimination based on colour."

In their 1901 *Annotated Constitution*, Quick and Garran said of the 'race power': "[I]t enables the Parliament to deal with 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." [Emphasis added]

Professor Sawyer, referring to the words 'alien race' in Quick and Garran's work, suggested that they probably did not mean 'alien' in any precise sense of nationality law, "but merely people of a 'race' considered *different from* the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc. etc.) mixture, derived from the United Kingdom, which formed the main Australian stock."

In 1910 Professor Harrison Moore wrote that section 51(xxvi) was intended to enable the Commonwealth to pass the sort of laws which before 1900 had been passed by many States concerning "the Indian, Afghan, and Syrian hawkers; the Chinese miners, laundrymen, market gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various 'coloured races' employed in the pearl fisheries of Queensland and Western Australia."

Such laws were designed "to localize 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."

Only a country which plays loose with the meaning of words could have both a Constitution like the Australian and, simultaneously, take pride in its 'liberal' and 'democratic' traditions.

It goes without question that the intended reach of section 51(xxvi) was not the regulation of the affairs of the 'aboriginal natives'.

Professor Sawyer correctly remarked that, notwithstanding that the constitutional conventions "contained many men who were in general sensitive, humane, and conscious of those less fortunate sections of the community", no delegate appears to have suggested "even in passing that there might be some national obligation to Australia's earliest inhabitants."

There is no indication, from the records of the period, that those who were to form

Australia's first national government would give any chance to the possible significance of section 51(xxvi) for Aboriginal and Torres Strait Islander Peoples.

There was no discussion of their exclusion from the scope of the 'race power', and no acknowledgment of any place for them in the nation set up with the Constitution.

Only South Australia, in the 1890s, had made provisions for the placing of Indigenous People on the electoral rolls, so that they could be able to vote for delegates to the Constitutional Conventions. In the other colonies, Indigenous and Torres Strait Islander Peoples were not able to vote for delegates to the Conventions.

This exclusion from the framers of the nation's Constitution continued a pattern of marginalisation and systematic discrimination, the consequences of which endure today. As Professor Megan Davis has correctly commented: "There is a sense that, beginning with their exclusion from the constitutional drafting process in the late 19th century, Aboriginal and Torres Strait Islander people have on the whole been marginalised by both the terms and effect of the Constitution."

* * *

A quick look of the Australian Constitution reveals that it is technically an act of the British Parliament passed in 1900, the last vestiges of British legislative influence in Australia having been eliminated with the passage of the *Australia Act* in 1986.

The Constitution is in fact contained in Section 9 of "An Act to Constitute the Commonwealth of Australia." The first 8 sections of the Act record that the people of the Australian colonies have agreed to unite in a federal commonwealth and that the new system of government was not imposed on the Australian people by the British Parliament.

Something else should be further said about this document, which is regarded - mostly by people who have not read it, or perhaps not understood it - as the foundation of a *modern, liberal democracy*.

One is reminded of Humpty Dumpty appearing in [Lewis Carroll's *Through the looking-glass*](#) (1872), discussing [semantics](#) and [pragmatics](#) with [Alice](#), and saying in a rather scornful tone: "When I use a word, it means just what I choose it to mean - neither more nor less."

First, a brief overview of the document in question.

The document is structured on eight chapters.

Chapter 1 - on *The Parliament*, establishes the Commonwealth Parliament as the Legislative Branch of government. In that Chapter, [Part 1](#) establishes its legislative power in Australia and provides for a Governor-General, representing the Queen, with power to summon Parliament; [Part 2](#) provides for the composition and election of the Senate, and the filling of Senate vacancies. It details quorums, voting arrangements and the procedure for election of a President of the Senate; [Part 3](#) provides for the composition and election of the House of Representatives and the filling of House vacancies. It details quorums, voting arrangements and the procedure for election of a Speaker of the House of Representatives; [Part 4](#) deals with matters applicable to both houses of Parliament, particularly the qualification of members and the privileges of the Parliament; and [Part 5](#) deals with the

powers of the Parliament and provides a list of 40 paragraphs of specific powers. This part also deals with the joint powers of the houses and the means of resolving disagreements between the houses.

[Chapter 2 - on *The Executive Government*](#), deals with that branch of government which carries out and enforces the laws. It provides for the exercise of executive power by the Governor-General advised by an Executive Council. Section 64 stipulates that Ministers are to be Members of Parliament, the only section of the Constitution which refers to the system of 'responsible' Government.

[Chapter 3 - on *The Judicature*](#), provides for the establishment of the branch of government dealing with the courts of law. Section 71 provides that the judicial power of the Commonwealth is vested in the High Court of Australia and other federal courts established by the Parliament. Other sections deal with the appointment, tenure and removal from office of judges of the High Court and other courts. Section 76 confers power on the Parliament to determine the jurisdiction of the High Court.

[Chapter 4 - on *Finance and Trade*](#), deals with these matters. One of the most important sections is Section 83 which provides that no money is to be drawn from the Treasury except under an appropriation by law. Other sections deal with customs duties, requiring that they be uniform throughout the Commonwealth.

Perhaps the most important section in the whole chapter, maybe in the Constitution, is Section 92 which requires that trade and commerce amongst the states shall be absolutely free.

Section 96 empowers the Commonwealth Parliament to grant financial assistance to the States.

Section 105A, inserted by referendum in 1929, deals with the taking over by the Commonwealth of States' debts.

[Chapter 5 - on *The States*](#), provides for the continuance of their constitutions, parliamentary powers and laws.

Section 109 provides for Commonwealth law to prevail over State law, but only in those cases where State law is inconsistent with Commonwealth law.

Other sections prohibit the States from coining money, raising armed forces or discriminating against the residents of other States.

Section 119 also requires that the Commonwealth is to protect the states against invasion or domestic violence.

[Chapter 6 - on *New States*](#), deals with the procedures for the establishment of new States and provides for the surrender of territories to the Commonwealth by States.

[Chapter 7 - on *Miscellaneous*](#), is made up of two sections, one dealing with the establishment of the seat of government, the other providing for the appointment of deputies of the Governor-General.

[Chapter 8 - on *Alteration of the Constitution*](#), provides that proposals for constitutional

alteration be initiated by the Parliament and approved in a referendum by a majority of voters Australia-wide and a majority of voters in a majority of States.

A [Schedule](#) attached to the Constitution contains the oath or affirmation to be taken by Members of Parliament before they take their seats. Presently, Members of Parliament who select to take an oath will say: " I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Her heirs and successors according to law. So help me God !" Members who instead choose to make an affirmation will say: " I, A.B., do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty et cetera ... "

A Governor-General swears allegiance to the English monarch of the time, *not* to the Australian Constitution, as one would expect in a *modern, liberal, democratic* country.

The Constitution is interpreted and operates in two ways: literally - some sections of the Constitution are taken literally and followed to the letter; conventionally - other sections operate through a series of 'constitutional conventions' which vest real power in the hands of elected politicians.

Alongside the text of the Constitution, and [Letters Patent](#) issued by the Crown, such [Conventions](#) are an important aspect of the Constitution; they have evolved over the decades and define how various constitutional mechanisms operate in practice. Conventions are unwritten rules, not laws. They express an accepted way of doing something. The 'Westminster parliamentary system' is built around these kinds of unwritten rules. They presume that people of good reputation and character behave in an honourable way. By and large Australian 'conservatives' do not respect 'Labour people' as persons of honour. This is one of the reasons why 'conservatives' have been preferred to 'Labour people' = rabble on a three-fourth basis since federation.

Conventions play a powerful role in the operation of the Australian Constitution because of its set-up and operation as a '[Westminster System](#)' of '[responsible government](#)'. Some notable Conventions include the following: 1) while the Constitution does not expressly set up the office of [Prime Minister of Australia](#), such an office developed a *de facto* existence as head of the cabinet. The Prime Minister is seen as the head of government. And that seems a small matter. 2) while there are few constitutional restrictions on the power of the [Governor-General](#), by convention the Governor-General acts on the advice of the Prime Minister.

However, because Conventions are not textually based, their existence and practice are open to debate. Real or alleged violation of a convention has often led to political controversy.

The most serious and damaging case, so far, was the [Australian so-called constitutional crisis of 1975](#), in which the operation of Conventions was seriously tested and Conventions were violated. The ensuing constitutional crisis was resolved dramatically when the Governor-General Sir [John Kerr](#) dismissed the Labor Prime Minister [Gough Whitlam](#), appointing [Malcolm Fraser](#) as caretaker Prime Minister with a tacit understanding that there would be a 1975 general election. A number of Conventions were broken during this malpractice episode. These include:

1) The Convention that, when a senator from a particular State vacates her/his position

during the term of office, the State government concerned would nominate a replacement from the same political party as the departing senator. This Convention was broken first by the [Lewis](#) 'conservative' government of [New South Wales](#) and then by the [Bjelke-Petersen](#) 'agrarian socialist' government of [Queensland](#) which both, 'properly', filled Labor vacancies: the first, with an independent and the second, with a Labor member notoriously opposed to the Whitlam Government, respectively.

The Convention was codified into the Constitution through a [national referendum in 1977](#). The amendment requires the new senator to be from the same party as the old one and would have prevented the appointment by Mr. Lewis, but not that by Mr. Bjelke-Petersen. However, the amendment states of the appointee that if "before taking his seat he ceases to be a member of that party... he shall be deemed not to have been so chosen or appointed." Mr. Bjelke-Petersen's appointee had been expelled from the Labor Party before taking his seat and would therefore have been ineligible under the new constitutional amendment.

2) The Convention that, when the Senate is controlled by a party which does not simultaneously control the House of Representatives, the Senate would not vote against money [supply](#) to the government. This Convention was broken by the Senate controlled by the [Liberal-Country Party coalition](#) in 1975.

3) The Convention that a Prime Minister who cannot obtain supply must either request that the Governor-General call a general election, or resign. This Convention was allegedly broken by Prime Minister Whitlam in response to the Senate's unprecedented refusal.

In moment of need, the 'constitutional monarchy' of Australia could not lead to a 'responsible government' in November 1975. The unmentioned consequence of that Royal Ambush is that the Labor Party has lost the courage even of a possible antagonistic manoeuvre coming from 'Yarralumla', which is the official seat of the Governor-General.

There, an unelected Governor-General, appointed by the Queen in London, surreptitiously dismissed an elected prime minister. If there was a resulting fault in the 'System' it was due to the firm adherence by Mr. Whitlam to the constitutional practice followed in the United Kingdom.

Perhaps Mr. Whitlam was unaware, when he proposed to the Queen the appointment of John Kerr, that Kerr had supported anti-Communist, anti-Labor organisations and parties; had dabbled in 'intelligence' long before becoming an 'asset' of the Central Intelligence Agency; and that, in addition to such a politically compromising situation, he had serious problems of drunkenness, and a proven reputation for sexual preference for 'young flesh', propensities which in themselves could open him to blackmail. Many Labour members who could read, write and correlate information were appalled at the appointment. The best which may be said about this monumental mistake by Mr. Whitlam is that the Prime Minister - as a man of honour - firmly believed that "The Governor-General would do his duty." And so he was telling his supporters.

In that Mr. Whitlam was perversely correct: Kerr remained ultimately loyal to the Seat of Privilege, in London.

In those circumstances, a populace accustomed to conceive of equality as at the lowest possible common denominator, where unpardonable ignorance is cheerily shared and

enjoyed by all, where freedom consists of defaming politicians, belittling intellectuals - a word which then becomes a term of abuse, spelled purposely between inverted commas, and where a Prime Minister too educated, too erudite, standing even physically above the execrable crowd, devoted to carrying out a programme of modernisation, reform and melioration of the country, too conscious of his abilities - hence defined as 'arrogant', was constantly challenged by people surviving in a society swarming with predacious banksters, real estate artists, shysterish solicitors, nostrum peddlers, and priestly paedophiles and who transfer their revenge on persons who genuinely, honourably and competently seek public office with an aggressiveness which testifies to their inverted servility.

So, long as the s/governants let those people free to make fun of Mrs. Elizabeth (*soi disante* Windsor, but in fact) Herzogtum Sachsen-Coburg und Gotha, married to Philip (*soi disant* Battenberg-Mountbatten, but in fact) [Schleswig-Holstein-Sonderburg-Glücksburg](#), Australians - males in particular - are satisfied with their subsistence in bigotry - and ultimately racism - at home, nominal manliness of course in the house, and a confluence of those 'qualities' in vicarious imperialism abroad. Result? An official loss of 102,734 lives in various wars.

Curiously, there is never a reference to losses in the 'wars on the Blacks' - or their victims, for that matter: 20,000 of them before federation, and another 10,000 after.

Only theoretically, therefore, and when applied in good faith by honest men/women, that barbaric piece of paper which is the 'Australian' Constitution can be sustained by Conventions which underpin its operation and that of the Executive Government.

Some reference to the out-datedness of that piece of paper should persuade the sceptics. Alas, it can do nothing for the illiterate, the imbecile and the 'conservative'.

The Australian Constitution makes no mention of the position of Prime Minister, the Cabinet, or political parties. With the Governor-General as a viceroy, the Prime Minister and the Cabinet are just glorified real estate agents.

There is no rule which stipulates that the Prime Minister must be a member of the House of Representatives.

A literal reading of the Constitution suggests that the Governor-General runs the government.

As Section 2 of the Constitution recites: "A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth..."

Here is where a Convention comes in.

In practice, the Governor-General is chosen by the Prime Minister of the day, possibly - but not necessarily - in conjunction with Cabinet.

In the early years of the Federation, the Governor-General was appointed from Britain. In the early 1930s Labor Prime Minister James Scullin visited London in order to apply pressure on the British Government to allow the appointment of Sir Isaac Isaacs as Governor-General, and thus overcoming the anti-Semitism ingrained in the English Court. Isaacs eventually became the first Australian to hold the position. Since the 1960s all Governors-General have been Australian-born. This is a requisite which may amount to nothing in the frequent

cases of sycophancy.

Section 5 of the Constitution reads: “The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.”

Not so – in practice the government of the day decides when Parliament will sit. These are intensely political decisions made by the Prime Minister and the most senior members of the government and its advisers.

Section 24, on the constitution of the House of Representatives, provides that: “The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.

The number of members chosen in the several States shall be in proportion to the respective members of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of senators:

(ii.) The number of members to be chosen in each State shall be determined by dividing the number of people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

...” [Emphasis added]

The provision, and particularly the real meaning of the words “chosen by the people” was tested in *Attorney-General for Australia (at the relation of McKinlay) and others v. Commonwealth of Australia and others* (1975) 15 C.L.R. 63. The central issue was whether the electoral boundaries set under the Commonwealth *Electoral Act* contravened the requirement of Section 24. The plaintiffs claimed that the section required that as nearly as practicable, the number of electors in each electoral division in a State be equal. The full court ruled that the section did not require equal number of people or electors in electoral divisions.

Mr. Justice Murphy powerfully dissented. He began by saying that the main question before the Court was whether the Australian Constitution guarantees electoral democracy. The response was a sounding ‘no’. He shared the plaintiffs’ contention that the words emphasised guarantee equal representation – one head, one vote, with consequent honestly administered results.

The position has not moved one single centimetre forwards in the last 37 years.

The House of Representatives is composed of 150 members, elected in designated electoral divisions for 3 years with the preferential voting system and full allocation of preferences.

Only a person paid for her/his biased opinion could state that such a system does not leave Australians unequal by result, and weight of their representation.

The results of the 21 August 2010 federal election for the House of Representatives led to a staggering comparison: the Australia Labor Party, with 4,711,363 votes and 37.99 per cent, obtained 72 seats. The 'Coalition' (Liberal Party of Australia, 3,777,383 votes, Liberal National Party of Queensland, 1,130,525 votes, National Party of Australia, 419,286 votes, Country Liberal Party of the Northern Territory, 38,335 votes and National Party for Western Australia, 43,101 votes) - and thus for a grand total of 5,406,630 votes and 43.66 per cent, obtained 72 seats. The Australian Greens, with 1,458,998 votes and 11.76 per cent, obtained 1 seat. There were 312,496 votes for Independents and 510,876 votes for other groups. Four Independents were elected. A minority government was possible with the vote of some Independents and of the Greens representative.

How that result could be satisfactory, and above all democratic, is beyond belief. But self-willed ignorant, illiterate, innumerate, indifferent people, could be made to believe anything, if sufficiently and frequently lied to.

After distribution of the forced 'preferences' the results for the two parties of the system were: the Australian Labor Party, with 6,216,445 of the votes and 50.12 per cent, obtained 72 seats. The 'Coalition', with 6,185,918 votes and 49.88 per cent, obtained 72 seats. It deserves repeating: *the Greens, with 1,458,998 votes and 11.76 per cent, obtained one seat.*

The consequence of this monstrously undemocratic and un-representative system is the axiomatic proposition that the 'Labor' Party cannot win anything close to a majority without the Greens 'preferences' and the Greens cannot win any seats without the 'Liberals' 'preferring' them *in odium* of 'Labor' !

Of course, the system is favoured by both Her Majesty's governments and oppositions. The liturgy of the 'Westminster System' provides for an Opposition opposing everything - in Australia even on the light of the day, and a government caught by the preoccupation of being re-elected, surviving the most destructive attacks of the Opposition, and when ordinary, or ordinarily led as the present, running for cover under the constantly unfavourable pollster opinions.

But in that way 'The Westminster System' is safe, and Parliament may carry on daily with its ritualistic, procedural farce.

Did anyone say: *modern, liberal democracy* ?

Section 28 of the Constitution says: "Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be soon dissolved by the Governor-General."

Well, not really - this section is interpreted literally in the sense that no House of Representatives may continue for longer than three years, but an earlier dissolution of the House is not exclusively decided by the Governor-General.

Officially, the Prime Minister calls upon the Governor-General 'to request' a dissolution. In most cases, the request is granted, but a Governor-General is not duty bound - not to the Australian people, anyway.

There have been historical incidents of Governors-General rejecting or querying the Prime Minister's advice. There were three occasions between 1901-10 when such requests were

rejected by the Governor-General, and in 1983 when the Governor-General, Sir Ninian Stephen, sent Prime Minister Malcolm Fraser away with instructions to provide detailed argument in support of his request for a double dissolution of the Parliament.

Chapter 2 of the Constitution on the Executive Government sets out in Sections 61-70 how the Government of Australia shall operate. Significantly, it makes no mention of the Cabinet, political parties or the Prime Minister.

Government by *cabal* would be 'constitutionally' possible in Australia. It often is.

An Australian federal ministry must meet a number of constitutional requirements and conventions. Section 64 requires that **all ministers must be Members of Parliament**.

Furthermore, **the 'Westminster System' requires that the ministry must command the support - that is to say, have the 'confidence' - of the House of Representatives.**

This Convention is reinforced by the requirement of Section 53, whereby all appropriation bills must originate in the House of Representatives. Without the ability 'to secure supply' from the House of Representatives, a ministry is obliged to resign or call an election.

Then there is high-sounding Section 61: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

Practically, it is the Cabinet, led by the Prime Minister, which performs this task.

Section 62 provides that: "There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure."

In fact, the Governor-General, acting on the advice of the leader of the majority party in the House of Representatives, summons members of the majority party and swears them/or takes their affirmation in as ministers. The Executive Council operates in accordance with the Constitution, but the Governor-General always acts on the advice of her/his ministers.

The section locates the effective executive power in the Ministers of the Crown. It was that section upon which the 'conservative' Australian Government relied in a well-known incident in 2001 when it prevented a Norwegian vessel, the *Tampa*, from bringing more than 400 asylum seekers on to the Australian mainland.

Government and Opposition were then half-way that period of competition in meanness which animates the two opposing factions of the 'Westminster System' in Australia.

Since 1992 intending refugees - some of 'the other others' - have been mandatorily imprisoned if arriving in Australia by sea, undocumented. Such criminal treatment of *poorcrists* marks the systematic barbarism and violations of no fewer than seven basic international human rights treaties and conventions and no fewer than six optional protocols to those treaties that Australia has signed and ratified.

Only Australian governments enjoy the privilege of being 'liberal' and xenophobic at the same time !

Pursuant to Section 64, "The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth."

In reality the Prime Minister is the person who leads the party with a majority in the House of Representatives. The ministers are chosen by the Prime Minister who advises the Governor-General of the names and portfolios to be allocated to them.

It was this section of the Constitution that the Governor-General mis-used in the Royal Ambush to dismiss the [Whitlam Government](#) in 1975. This is not the only instance in federal political history of the Governor-General exercising the so-called 'reserve powers' in this way.

Section 68 states: "The command-in-chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative."

In truth, the Prime Minister and the Defence Minister are in charge of the armed services. It is they, who take charge of, although no responsibility for, sending troops around the world, often and increasingly on lies: Vietnam, Iraq, Afghanistan - and given the lack of information available, where else ?

It is unlikely that the armed services would accept orders from the Governor-General if they were not also Government orders.

Section 72 states: "The [Justices of the High Court](#) and of the other courts created by the Parliament shall be appointed by the Governor-General in Council."

In fact, judges are appointed by the Cabinet. The Governor-General simply rubberstamps the decision at a meeting of the Federal Executive Council.

There is a basic Convention of the 'Westminster System' which provides for cases of collective ministerial responsibility, and another by which individual ministerial responsibility is enforced - theoretically, that is to say.

Cabinet meets in secret and speaks with one voice. Ministers who are not prepared to accept the collective decisions of Cabinet are expected to resign. Ministers who speak out in public against Cabinet decisions can expect to be dismissed by the Prime Minister.

Cabinet solidarity is not always upheld.

Ministers are expected to take responsibility for the administration of their departments, the actions of their staff and themselves. This principle has become increasingly difficult to interpret and enforce, given the size and complexity of modern government. Often the political support of the Prime Minister is the most crucial factor determining whether ministers survive scrutiny and criticism of their conduct. With the support of the Prime Minister there is no problem. Otherwise, personal responsibility is brought to work and the culprit must resign.

As for amending the Constitution, a referendum process is the only process available – although extraordinarily difficult. This is one of the reasons why constitutional referendums are relatively infrequent. There have been only 44 attempts on 19 separate occasions to change the Constitution. Only 8 of these have been successful, the most recent in 1977. Only 4 referendums have succeeded in the past 50 years.

Recognition of the Aboriginal and Torres Strait Islander Peoples in the Preamble to the Constitution could become quite difficult, if in any way associated with the unfavourable opinion about the Gillard Government.

* * *

An Act to place certain restrictions on Immigration and to provide for the removal from the Commonwealth of prohibited Immigrants, briefly the *Immigration Restriction Act* of 1901, carried number 17 of the Commonwealth Acts for that year. That goes a long way in explaining the obsession of the early legislators.

Having introduced the Bill, and speaking in support of it, Prime Minister Edmund Barton declared: “I do not think either that the doctrine of the equality of man was really ever intended to include racial equality. There is no racial equality. There is basic inequality. *These races are, in comparison with white races – I think no one wants convincing of this fact – unequal and inferior. The doctrine of the equality of man was never intended to apply to the equality of the Englishman and the Chinaman.* There is deep-set difference, and we see no prospect and no promise of its ever being effaced. Nothing in this world can put these two races upon an equality. Nothing we can do by cultivation, by refinement, or by anything else will make some races equal to others.” [Emphasis added]

On 12 September 1901, Alfred Deakin, the first federal attorney-general and three times prime minister between 1903 and 1910, raised the question of how the Commonwealth would define non-‘white’ aliens once the program of a ‘white Australia’ had been implemented: “The programme of a ‘white Australia’ means not merely its preservation for the future – it means the consideration of those who cannot be classed within the category of whites, but who have found their way into our midst ... That end, ... means the *prohibition of all alien coloured immigration*, and more, it means at the earliest time, by reasonable and just means, the *deportation or reduction of the number of aliens now in our midst*. The two things go hand in hand, and are the necessary complement of a single policy – the policy of securing a ‘white Australia’.” [Emphasis added]

Deakin devoted considerable time to explain the exclusion of Japanese. Here is what he said: “I contend that the Japanese require to be excluded because of their high abilities. ... *the Japanese are the most dangerous because they most nearly approach us, and would therefore be our most formidable competitors.* It is not the bad qualities, but the good qualities of these alien races that make them dangerous to us. It is their inexhaustible energy, their power of applying themselves to new tasks, their endurance, and low standard of living that make them such competitors.” [Emphasis added]

There was much condescension in Deakin’s view of the Indigenous Peoples: “Little more than a hundred years ago Australia was a Dark Continent in every sense of the term. There was not a white man within its borders. In another century the probability is that Australia will be a White Continent with not a black or even dark skin amongst its inhabitants. *The aboriginal race has died out in the South and is dying fast in the North and West even where*

most gently treated. Other races are to be excluded by legislation if they are tainted to any degree." [Emphasis added]

In 1919 Prime Minister William Morris Hughes hailed the 'White Australia' policy as "the greatest thing we have achieved." Hughes was summing up all the asides of an Australian politician: he had travelled from the Australian Labor Party (1901-16) to [National Labor](#) (1916-17) to [Nationalist](#) (1917-30) to [Australian](#) (1930-31) to [United Australia](#) (1931-44) to [Liberal](#) (1944-52). None of these movements and parties really meant what they appear to be. Hughes was expelled from three parties, and represented four different [electorates](#) in two states. Hughes was a man of revolving, recyclable principles, and quite successful at that.

'Protection' of Indigenous Peoples would continue in a different form in the early 1930s, of course for the convenience of the 'white' society. Legislators found it necessary to widen the definition of 'Aborigines' in order to formalise control over an increasing population of mixed descent. A bewildering array of legal definitions led to inconsistent legal treatment and arbitrary, unpredictable and capricious administrative treatment.

The 'policy' pursued by each of the different states in the 1930s was plain 'racial policy'.

Even from the Labor side, and from one of the most respectable prime ministers, would come a confirmation that Australia was racist. During the second world war, Prime Minister John Curtin would reinforce the policy, saying: "This country shall remain forever the home of the descendants of those people who came here in peace in order *to establish in the South Seas an outpost of the British race.*" [Emphasis added]

The aspiring prime minister Menzies had gone even further, as everyone knows. Menzies was greatly impressed with much of what he saw when he and his wife toured Nazi Germany in 1938.

After the Munich Agreement of 29 September 1938, which began the dismembering of Czechoslovakia, Menzies returned to Australia. On 6 November 1938 he told a Presbyterian church audience that a government "founded on licence would destroy itself", and went on to call for more "national powers" to help the development of a "national spirit." A fortnight earlier he had told a Melbourne audience that "There is a good deal of really spiritual quality in the willingness of young Germans to devote themselves to the service and well-being of the State.", and that the enthusiasm for service to the State evident in Fascist Italy and Nazi Germany "could be well emulated in Australia." Writing home he would notice that "..., it must be said that this modern abandonment by the Germans of individual liberty and of the easy and pleasant things of life has something rather magnificent about it." Even coming from a man owned and operated by the Bank of New South Wales this was breathtaking ! But, inspired by racism ? Noooh ! But, if the doubt persists, ask the Irish. They will remember what he said of them.

Ten years later, Menzies would begin the longest prime ministership in the history of Australia, infused with hatred for the 'yellow race' - which was supposed to come down and invade the continent. He poisoned an ignorant and indifferent populace with the disease of the most yobbish anti-Communism - which translated into anti-unionism. Because of his own insufficiency he regaled the country with a slavish monarchism - which was expressed in the most servile and demeaning forms. A lawyer of some fame and a pretentious cultivator of civility - of the 'British' style, of course - he told the

Australians and the world that *apartheid* in South Africa was an 'internal matter'; therefore should be of no interest to Australia. Menzies attempted effectively to interfere with the invasion of Egypt to retain the Suez canal in 'the proper hands' - which obviously meant the hands of the Franco-English company. Before retiring he involved Australian boys in a war in Indochina predicated on a lie - which could never be disproved because the alleged 'invitation' was never found.

For mental laziness, emotional dependence and sheer reaction Menzies - the Lord Warden of the Cinque Ports, five port towns on the southeast coast of England which had strategic importance in Roman times ! - offered Australians the comfort of living in some kind of kingdom of nothingness. In December 1949 - as Professor Manning Clark wrote - when one was witnessing "one third of the population of the world ... marching forwards, [Australians] choose to stand still." Clark found it even more depressing that "in December 1975 [at the shafting of the Whitlam redemption, Australians] showed the world that [they] did not mind if someone turned the clock back. We were still a nation of petty-bourgeois property owners, who thought it was prudent to prefer men with the values and skills of receivers to visionaries and reformers to govern our country. We had the values of the counting house; we were interest rate men; we thought quality of life men should pull their head in."

In that renewed state of 'white' imbecile beatitude, the Indigenous and Torres Strait Islander Peoples were more than 'evanescent' - they did not exist.

The 'White Australia' policy was gradually, ever so slowly, pavidly, dismantled after Immigration Minister Harold Holt's decision in 1949 to allow 800 non-European refugees to stay and Japanese war-brides to be admitted to Australia. There followed a modest easing of restrictions on the migration of non-Europeans - read: 'non-whites'. In March 1966 came the announcement by Immigration Minister Opperman, after a review of the 'white' policy, that "applications for migration would be accepted from well-qualified people on the basis of their suitability as settlers, their ability to integrate readily and their possession of qualifications positively useful to Australia." Over subsequent years Australian governments gradually enfeebled the policy.

The final obstacles were to be removed by the Whitlam Government in 1973.

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In a life devoted to the 'rediscovery' of real Australian history, and in more than ten learned studies Professor Henry Reynolds has dispelled the myth of the Indigenous Peoples' "pathetically helpless" reaction to English invasion.

This is not the place to review such monumental and scholarly effort. Suffice to say that Reynolds has turned Australian history not upside down but inside out. Of course, those who do not wish to hear, or read, or understand still believe that Reynolds' approach represents a '[black armband view](#)' of Australian history. Others, who are profusely paid for their opinion, have provided a sanitised view of the frontier battles which went on for some 200 years, and continue as an academic disagreement with more peaceful but still offensive terms.

Indigenous Peoples have seen too much of the dark underside of 'white Australia' to believe nothing but that Australians are hypocrites, or wilfully ignorant who simply brush aside over 200 years of infamy by calling it 'all that' and wanting it to be forgotten.

This is the painful reality which attaches to the 'Aboriginal Embassy' standing in front of the Old Parliament House in Canberra since January 1972, exactly for the purpose of demanding that memory be kept alive and that 'sovereignty' - however that may be defined - remain as an unbridgeable abyss between two ways of life.

Professor William E.H. Stanner collected the quip from an old tribesman: "You are very clever people, very hard people, plenty *humbug*." *Humbug* can be both a verb and a noun. As a noun it describes a person who seeks to impose deceitfully upon others, to cheat, to trick, to swindle.

The old man was right.

This year, on the occasion of 'Australia Day', which has been conveniently arranged for 26 January as the presumed day of the arrival of Captain Phillip, Indigenous Peoples took offence at the rumour surrounding comments about the Embassy by the Leader of the Opposition, Tony Abbott. Some of them decided to vent their anger outside a gathering in a restaurant about 200 metres from the Embassy encampment of a celebratory occasion arranged by the Government and attended by Prime Minister Gillard and Mr. Abbott. The demonstration was 'robust'; 'theatrics' were arranged by the bodyguards to the Prime Minister which culminated in the usual scandalising and scurrilous reporting by the mainstream press - which is private, and by most of the other media - which also are private. Mr. Bob Carr, the former Labor Premier of New South Wales and now Minister for Foreign Affairs, although then not yet called to that position, took the occasion to comment: "*I agree with [the Leader of the Opposition] and think his remarks entirely sensible. The tent embassy in Canberra says nothing to anyone and should have been quietly packed up years ago. Suddenly we are presented with a demand for 'Aboriginal sovereignty' - which can only mean separatism - which nobody has defined and which, on principle, 99 percent of Australians would oppose and a majority of Aborigines oppose.*"

On 1 March 2012 Prime Minister Gillard appointed Mr. Carr Minister for Foreign Affairs. In one of his first public utterances the new Minister spoke of Australia becoming a human right leader in the Asia-Pacific region. As the old tribesman said ...

The following month, on 25 April 2012, which is 'Anzac Day', the Governor-General was overseas extolling the sacrifice of the youth of Australia in foreign wars, beginning with the

invasion of Turkey ninety seven years ago; the Prime Minister was doing her customary rhetorical exercise at the known point of that invasion – Gelibolu, Gallipoli – and none at home was giving any sense to the often repeated “Lest we forget”, which is emblazoned on monuments throughout the land to remember the fallen in those foreign wars.

Not a word has ever been said about the Indigenous Peoples who died really defending their own home.

Of course there was resistance to the invasion ! But, one should add, there was deception every time the invading society has attempted some form of ‘reconciliation’ with the Indigenous Peoples. This topic deserves separate serious treatment.

Nevertheless, mention should be made of the encounters between the two societies which were intended to be peaceful, after some 20,000 had been killed up to federation, and some more – perhaps 10,000 – after that and to the 1930s.

But the ‘white man’ proceeded on his own terms. He may now be up to yet another swindle.

Attempts to amend the Constitution go back at least one hundred years.

In 1910 the Australian Board of Missions called on “Federal and State Governments to agree on a scheme by which all responsibility for safeguarding the human and civil rights of the aborigines should be undertaken by the Federal Government.”

In 1913 the Australian Association for the Advancement of Science made a similar proposal.

In 1928 the Association for the Protection of Native Races submitted to the Royal Commission on the Constitution that “the Constitution be amended so as to give the Federal Government the supreme control of all Aborigines.”

In 1929 a majority of the Royal Commission on the Constitution referred to the testimony of ‘a great number of witnesses’ about the need to give increased attention to Aboriginal people – the language of the time. The majority recognised that the effect of the treatment of Aboriginal people on the reputation of Australia furnished a powerful argument for the transfer of power to the Commonwealth, but recommended against amending section 51(xxvi) “mainly on the ground that the States were still better equipped than the Commonwealth to attend to the special needs of the aborigines within their territories.”

The minority did not dissent from that view, but observed that the financial burden of making special provision for Aboriginal people should not fall wholly on the States in which they were most numerous. This could be accommodated by the making of conditional federal grants to Queensland and Western Australia, where the largest number of so-called ‘full-bloods’ outside the Northern Territory were to be found. The Royal Commission made no recommendation in relation to Section 127.

It is fair to say that none thought of asking the Indigenous Peoples what they wanted. ‘White man’ knew better.

During the years between 1933 and 1936 the Melbourne Indigenous community began gathering support for a petition to King George VI, seeking direct representation in Parliament, enfranchisement and land rights.

On 12 November 1937 Mr. William Cooper, who was a leading figure in the movement, called for a 'Day of mourning' to be held simultaneously with the celebrations on 26 January 1938, the agreed day of the 150th anniversary of the arrival of the First Fleet.

On that 'Day of mourning', the recently established Australian Aborigines League met and passed a resolution "to raise our people to full citizen status and equality within the community" and published a pamphlet calling for land rights.

Twenty some years after, in 1959 a Joint Parliamentary Committee on Constitutional Review unanimously recommended the repeal of Section 127, but did not reach agreement on the grant of legislative power with respect to Aboriginal people.

The Committee also recommended the repeal of Section 25.

In 1961 the Federal Conference of the Australian Labor Party resolved that Section 127 be repealed and the exclusion of Aboriginal people under Section 51(xxvi) be removed.

In 1963 the *Yirrkala* Elders of the *Yolngu* people presented a bark petition to the Commonwealth Parliament in the English and *Gumatji* languages. The petition protested the Commonwealth Government's decision to grant mining rights in the Arnhem Land reserve, and called for recognition of *Yolngu* land rights and a parliamentary inquiry. In response to that petition, a seven-member select committee from the House of Representatives was set up to investigate the grievances of the *Yolngu* people. The committee recommended payment of compensation to the *Yolngu* people, protection of sacred sites, and acknowledgment of the moral right of the *Yolngu* people to the land. The meaning of the words 'moral right' might have easily been lost in translation.

In 1964 the Leader of the Labor Opposition, Arthur Calwell, introduced the Constitution Alteration (Aborigines) Bill to remove the exclusionary words 'other than the aboriginal race in any State' from Section 51(xxvi) and to delete Section 127. Calwell called attention to possible United Nations criticism that the Constitution was 'discriminating against' the Aboriginal people.

Then the Labor Party was sensitive to possible criticism from the United Nations. Now it is totally unconcerned that many international treaties and conventions and their protocols

- duly ratified by Australia
- are routinely violated.

Robert Menzies' Attorney-General, Billy Snedden, affirmed that all parliamentarians felt that "there should be no discrimination against aboriginal natives of Australia." He warned that the proposed change to Section 51(xxvi) created the potential for "discrimination ... whether for or against the aborigines." The Bill lapsed when Parliament was dissolved.

In 1965 Prime Minister Menzies introduced the Constitution Alteration (Repeal of Section 127) Bill for a referendum for the removal of Section 127. Menzies opposed the amendments to Section 51(xxvi) on the ground that to include Aborigines in the race power "would ... not be in the best interests of the Aboriginal people", although he was sympathetic to the notion of repealing that section altogether. The Bill passed both Houses, but it was not put to referendum.

This confirmed a 'protective', merely wishful, nature of such fanciful manoeuvres.

In March 1966 William Wentworth, the Liberal Member for Mackellar and later Australia's

first Minister for Aboriginal Affairs, introduced a Private Member's Bill to repeal Section 51(xxvi), and instead to confer on the Commonwealth Parliament power to make laws 'for the advancement of the Aboriginal natives of the Commonwealth of Australia'. Wentworth also proposed a new 'section 117A' prohibiting any law, State or Commonwealth, which subjected any person born or naturalised in Australia 'to any discrimination or disability within the Commonwealth by reason of his racial origin.'

Interesting – the present Leader of the Opposition seems to have a problem with the proposal by the Expert Panel of a similar Section 116A !

Clause 3 of the Wentworth proposal contained a proviso that the section should not operate 'so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia'. Wentworth cited a concern that the deletion of the exclusion of people of the Aboriginal race from Section 51(xxvi) could leave them open to "discrimination ... adverse or favourable." He suggested that the "power for favourable discrimination" was needed, but that there should not be a "power for unfavourable discrimination." While the Bill passed both Houses of Parliament, it ultimately lapsed and did not go to referendum.

In August 1966 Vincent Lingiari led a walk-off of 200 *Gurindji*, *Ngarinman*, *Bilinara*, *Warlpiri* and *Mudbara* stockmen from a cattle station at Wave Hill in the Northern Territory in protest at their pay and living conditions.

The walk-off generated support within many sectors of the Australian population. The *Gurindji* walk-off was about equal pay, but also became a symbol of the struggle for equal citizenship rights and recognition of distinct rights relating to culture, land and self-determination.

On 1 March 1967 Prime Minister Harold Holt introduced the Constitution Alteration (Aboriginals) Bill, which proposed the deletion of words 'other than the Aboriginal race in any State' from Section 51(xxvi), as well as the deletion of Section 127. The amendment would give Parliament power to make special laws for Aboriginal people which, with cooperation with the States, would 'secure the widest measure of agreement with respect to Aboriginal advancement'. The Leader of the Opposition, Gough Whitlam, supported the Bill, and it passed both Houses of Parliament without a single dissenting voice. The Leader of the Opposition in the Senate, Senator Murphy, said: "The simple fact is that they are different from other persons and that they do need special laws. They themselves believe that they need special laws. In this proposed law there is no suggestion of any intended discrimination in respect of Aboriginals except a discrimination in their favour." The referendum was put on 27 May 1967. In addition to gaining majority support in every State, the proposal received 90.8 per cent of valid votes nationally. This remains the largest majority for any referendum ever held in Australia, more than 10 per cent higher than for any other referendum before or since.

The referendum brought minimal improvements. On one hand, the repeal of the overtly discriminatory provision in Section 127 meant the removal of the prohibition on counting Aboriginal people in the population statistics.

On the other, the specific exclusion in Section 51(xxvi) of power to make laws with respect to the 'people of the aboriginal race in any State' was removed. Aboriginal and Torres Strait Islander peoples ceased to be mentioned at all in the Constitution. Of particular significance among the post-1967 legislation enacted by the Commonwealth Parliament is the *Aboriginal*

Land Rights (Northern Territory) Act 1976.

During 1973-74 the Woodward Royal Commission into Aboriginal land rights in the Northern Territory, instituted by the Whitlam Government, led to the introduction into Parliament in 1975 by Prime Minister Whitlam of a Bill. After the Royal Ambush of November 1975 Prime Minister Malcolm Fraser reintroduced a Bill and steered it through Parliament in 1976. The Act provides for the strongest form of land rights in the country. As a result almost half of the Northern Territory has been returned to the Indigenous People.

In 1966 Professor Sawyer warned presciently that, having regard to “the dubious origins of [Section 51(xxvi)] and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would be preferable to any amendments intended to extend its possible benefits to the Aborigines.” In relation to Section 127, Sawyer noted that by 1966 all Aboriginal people had the federal vote, and were likely soon to have the vote in all States. While it was difficult to see any case against the repeal of Section 127, Sawyer cautioned that its repeal would make “little difference to anything that matters, and least difference of all to the Aborigines.”

Several important acts have been enacted by the Commonwealth Parliament after the 1967 referendum, in reliance upon several federal powers, including those of Section 51 (xxvi).

Some of them are:

- the *World Heritage Properties Conservation Act 1983*, Sections 8 and 10 of which confer protection on sites of cultural significance to Indigenous People;
- the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;
- the *Native Title Act 1993*; and
- the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

In 1985 a commission was established yet again to review the Australian Constitution. In its final report in 1988 the Constitutional Commission made a number of recommendations in relation to the provisions of the Constitution bearing upon the question of race and the position of Aboriginal and Torres Strait Islander Peoples.

The Constitutional Commission recommended the repeal of Section 25 of the Constitution “because it is no longer appropriate to include in the Constitution a provision which contemplates the disqualification of members of a race from voting.”

In relation to Section 51(xxvi), the Commission noted that until 1967, Parliament could “pass special and discriminating laws” relating to the people of any race. The Commission referred to a number of decisions in recent years in which judges had observed that laws made under Section 51(xxvi) ‘may validly discriminate against, as well as in favour of, the people of a particular race’. The Constitutional Commission concluded: “It is inappropriate to retain section 51(xxvi) because the purposes for which, historically, it was inserted no longer apply in this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based. The attitudes now officially adopted to discrimination on the basis of race are in striking contrast to those which motivated the Framers of the Constitution. It is appropriate that the change in attitude be reflected in the

omission of section 51(xxvi).”

The Commission considered it unnecessary to retain Section 51(xxvi) “for the purposes of regulating such things as the entry and activities of aliens in Australia or the confinement of people who might reasonably be suspected of acting contrary to Australia’s interests.” Other legislative powers provided ample support for any laws directed at protecting Australians from any activities or groups which were not in the national interest.

Together with the recommendation for the omission of Section 51(xxvi), the Commission recommended the insertion of a new paragraph (xxvi) which would give the Commonwealth Parliament express power to make laws with respect to ‘Aborigines and Torres Strait Islanders’. The recommendation was made for two reasons: 1) because the nation as a whole has a responsibility for Aborigines and Torres Strait Islanders; and 2) because the new power would avoid some of the uncertainty arising from, and concern about, the wording of the existing power.

Consistent with such an approach, the Commission recommended the insertion of a new ‘section 124G’, which would give everyone the right to freedom from discrimination on the ground of race. In relation to rights to equality, the Commission recommended that the Constitution be altered to provide: “124G (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief. (2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.”

The Commission also considered a proposal for constitutional support for an agreement between the Commonwealth of Australia and representatives of Aborigines and Torres Strait Islanders. The Commission noted that the history of the gradual occupation of Australia was filled with examples of disregard for the interests of Aboriginal people dispossessed from their land, and that in recent years attempts had been made formally to recognise the fact that Australia was occupied before the arrival of the First Fleet and that invasion had had adverse effects on the Indigenous Peoples. The Commission also referred to the recommendation in 1983 of the Senate Standing Committee on Constitutional and Legal Affairs for the insertion in the Constitution of a provision, along the lines of section 105A, conferring a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people.

The Commission agreed that a constitutional alteration to provide the framework for an agreement provided “an imaginative and attractive approach” but concluded that any alteration should not be made until an agreement had been negotiated.

Section 105A, on which a possible referendum might be modelled, was approved at a referendum in 1928 after the Financial Agreement of 1927 had been entered into between the Commonwealth and the States. The electors were therefore in a position to know precisely what was being approved. The 1988 referendum was held on 3 September. It contained four questions. None took up the recommendations of the Commission in relation to provisions relating to Aboriginal and Torres Strait Islander people and the Constitution’s race provisions. None of the four questions passed.

The experience for Aboriginal and Torres Strait Islander Peoples in the 1970s and 1980s was mixed.

In January 1972 Prime Minister William McMahon publicly acknowledged some of the concern in the community about the policy of 'assimilation'. But he did nothing about it. Following the election of the Whitlam Labor Government in December 1972, the policy of 'assimilation' was abandoned and a new policy of 'self-determination' was introduced. Much of a new policy of humane consideration of the 'white' problem *vis-à-vis* the Indigenous People was abandoned with the Royal Ambush of November 1975.

The beneficiary of that authentic *coup d'état* was Malcolm Fraser, whose election in 1975 brought some initiatives, including the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976*, the establishment of the Aboriginal Development Commission, and consideration of the feasibility of a compact or *Makarrata* between the Commonwealth and Indigenous People. The mention of such pact by the federal Government was one more hoodwinking manoeuvre.

Since 1883 Bob Hawke had been the Labor Prime Minister. The rhetoric would become more sophisticated – the failure really to face the 'white' problem more obvious.

This was the time when the Aboriginal and Torres Strait Islander Commission (1990-2005) was established, ostensibly as the body through which Indigenous and Torres Strait Islander Peoples were more or less formally involved in the processes of government affecting their lives. A number of Indigenous programmes and organisations fell under the overall umbrella of the Commission.

In April 1991 the Constitutional Centenary Conference held in Sydney presented to the prime minister, State and Territory premiers and chief ministers, and opposition leaders a statement which recommended among other items for action that the reconciliation process should "seek to identify what rights the Aboriginal and Torres Strait Islander peoples have, and should have, as the indigenous peoples of Australia, and how best to secure those rights including through constitutional changes."

In 1991 the Council for Aboriginal Reconciliation was organised, in 1992 the Office of Aboriginal and Torres Strait Islander Social Justice Commissioner was opened within the Human Rights and Equal Opportunity Commission, and in 1994 the Torres Strait Regional Authority was set up.

Twenty years ago, in the case of *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1, the High Court of Australia held that the common law of Australia recognised native title. The term 'native title' was used by the High Court to recognise that Aboriginal peoples and Torres Strait Islanders may have existing rights and interests in land and waters according to traditional laws and customs and that these rights are capable of recognition by the common law.

Specifically, the Court recognised a claim by Eddie Mabo and others on behalf of the Meriam people of the Island of Mer in the Murray Islands in the Torres Strait, that the Meriam people owned the land at common law because they were the traditional owners of their country under Islander law and custom.

The Queensland Government had earlier tried to extinguish the Meriam people's property rights under the *Queensland Coast Islands Declaratory Act 1985*. However, the High Court ruled in 1988, in *Mabo v. the State of Queensland (No. 1)*, that the Queensland law breached the Commonwealth's *Racial Discrimination Act 1975* (Cth).

The Mabo judgment dealt with some of the basic premises of the Australian legal system and society. In particular, the decision repudiated the notion of *terra nullius* – a land belonging to no one – on which the invaders' whole land tenure system had been conveniently based. The High Court recognised that the rights of Aboriginal people and Torres Strait Islanders to native title may survive in certain areas and that their native title must be treated fairly before the law with other titles.

On 10 December 1992, the anniversary of the *Universal Declaration of Human Rights*, during the Year of the World's Indigenous People, Prime Minister Paul Keating travelled to one of the poorest 'ghettos' of Indigenous People in Sydney to deliver one of his most moving speeches. At one point he said:

“And, as I say, the starting point might be to recognise that the problem starts with us non-Aboriginal Australians.

It begins, I think, with that act of recognition.

Recognition that it was we who did the dispossessing.

We took the traditional lands and smashed the traditional way of life.

We brought the diseases. The alcohol.

We committed the murders.

We took the children from their mothers.

We practised discrimination and exclusion.

It was our ignorance and our prejudice.

And our failure to imagine these things being done to us.

With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds.

We failed to ask – how would I feel if this were done to me?”

And coming to the end Mr. Keating also said:

“We cannot imagine that the descendants of people whose genius and resilience maintained a culture here through fifty thousand years or more, through cataclysmic changes to the climate and environment, and who then survived two centuries of dispossession and abuse, will be denied their place in the modern Australian nation.”

There was in that speech the spark for an entire programme; the only word missing was 'reparation' in the sole terms that a mercantile society would understand.

Alas, the Keating Government was the same which had introduced mandatory detention legislation in May 1992. Under the legislation, still enforced, asylum seekers arriving in

Australia without prior authorisation are to be detained for unspecified and prolonged periods of time, causing untold psychological damage to children, women and men. As at 30 April 2012, 463 children were in detention. Of the 5,967 persons in immigration detention as at 30 April 2012, about 34 per cent had been detained for three months or less and 75 per cent had been detained for 12 months or less. Such figures are not so rosy: Australia's longest-serving detainee [Peter Qasim](#) was detained for more than 7 years before being released in 2005.

In response to the *Mabo* judgment, the Federal Parliament, by the initiative of the Keating Government, enacted the [Native Title Act 1993](#). In addition, the Government established an Indigenous Land Fund and promoted the delivery of a 'social justice package'. The Act established the [National Native Title Tribunal](#) to make native title determinations in the first instance, appealable to the [Federal Court of Australia](#), and thereafter to the High Court.

In March 1995, following community consultation – which always represented a form of 'co-optation' of 'moderate' Indigenous persons, mostly 'respectable' blacks who have been singled out for white favour and interest – each of the Aboriginal and Torres Strait Islander Commission, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner provided a report on the social justice package to the prime minister. Each of these reports raised the need for constitutional reform.

Recommendations coming from these three organs were quite similar and amounted to a demand for constitutional recognition of special status and cultural identity of Indigenous Peoples, through a redefinition of Indigenous Peoples "as a nation in a way that would promote meaningful reconciliation", "effective educational and public awareness for both the Indigenous and non-Indigenous communities and to ensure ongoing indigenous involvement in broader processes which could lead to constitutional reform", – that an "appropriate new preamble to the Constitution be prepared for submission to referendum with such preamble to acknowledge the prior occupation and ownership, and continuing dispossession of Aboriginal and Torres Strait Islander peoples", – that a referendum question be put 'to repeal the race-related provisions of Section 25 of the Constitution, an opportunity would arise to pose a positive question to entrench in the Constitution a new clause which would explicitly prohibit the making of laws which discriminate on the grounds of race (save where such a provision was for the specific benefit of the race involved) and providing that the Commonwealth has the power to legislate to outlaw all forms of discrimination on the grounds of race."

The social justice package proposals were not advanced by the incoming conservative government following the 1996 federal election.

In its final report to the prime minister and the Commonwealth Parliament in December 2000 the Council for Aboriginal Reconciliation made, among others, the following recommendation in relation to the manner of giving effect to its reconciliation documents: "3. The Commonwealth Parliament prepare legislation for a referendum which seeks to 1) recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and 2) remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race."

Following the case of [Wik Peoples v. Queensland](#) (1996), (1996) 187 C.L.R. 1 Parliament amended the *Native Title Act* in 1988. The *Wik* decision revolved on the point whether

statutory leases extinguish [native title](#) rights. The Court found that the statutory pastoral leases under consideration did not bestow rights of exclusive possession on the leaseholder. As a result, native title rights could co-exist depending on the terms and nature of the particular pastoral lease. Where there was a conflict of rights, the rights under the pastoral lease would extinguish the remaining native title rights.

The decision provoked a lengthy debate in Australian politics. It led to intense discussions on the validity of land holdings in Australia. Some political leaders criticised the Court for being out of touch and for introducing uncertainty into Australian life. The [Howard Government](#), which had succeeded the Keating Government in 1996, formulated a “10 point plan” to bring certainty to land ownership in Australia.

The new ‘conservative’ government succeeded in having the original act amended to the disadvantage of Indigenous Peoples.

The Royal Commission into Aboriginal Deaths in Custody operated between 1987 and 1991. It studied and reported on the high level of deaths of Indigenous Peoples whilst in custody after being arrested or convicted of committing crimes. The Commission Report emphasised medical conditions and injuries caused by police, the death from natural causes and the high rate of suicides.

The Report showed that Indigenous Peoples were keen to grasp the opportunity for self-determination, but were not equipped for the tasks suddenly presented. The inadequacies of the education system and the domination, lack of self-esteem and debilitation produced under the period of ‘assimilation’ meant that there would be many failures. According to the Report, Indigenous People were not really being offered self-determination – “just the tantalising hint of it.” They were bequeathed “the administrative mess which non-Aboriginal people left” and told to fix it: “It was their mess now.”

In 1995 an Inquiry was established by the Keating Labor Government in response to efforts made by key Indigenous agencies and communities concerned that the general public’s ignorance of the history of kidnapping and State-organised, forcible removal was hindering the recognition of the needs of its victims and their families and the provision of services. The Inquiry concluded with a large and well documented report which was tabled in Federal Parliament in May 1997. It carried the high-sounding title of: *Bringing them home*. The Report marked a pivotal moment in the controversy which has come to be known as the ‘[Stolen generations](#)’.

In a serious country, a civilised country, the victims could have expected to receive reparations, which are an important and internationally accepted way of acknowledging wrongs and guaranteeing that such wrongs will not happen again.

How naïve, wrong were those victims ! As the old man had said ... There were not even the customary ‘statements of intention’.

The 1996 federal election would put an end to 13 years of Labor Government under Bob Hawke and Paul Keating. The Liberal Party leader, John Howard, had resumed the leadership of his party in January 1995.

The election in 1996 of the Howard Government, a reactionary more than conservative government, saw an emphasis on ‘practical reconciliation’, the concept of ‘shared

responsibility', and a verbal commitment to address the profound economic and social disadvantage of many Indigenous Peoples. Howard's view found considerable approval amongst 'escapist' Australians. They joined in the 'Howard defence': "I did not have anything to do with the past and, therefore, there is no need for me to come to terms with it." No one asked Howard to accept guilt, of course. No one would be so stupid, blind, deaf. But he was deaf - profoundly morally deaf, and could not even express embarrassment, or a sense of collective shame. Cowardly, he was unable to embrace what was belatedly good for, and long overdue by, the country.

'Practical reconciliation' was a way of ignoring, even denying, that there existed a 'white' problem in Australia. The 'Liberals' are against 'symbolism'. They apply that word to everything which cannot be translated into money, and that includes that "mushy, misguided multiculturalism" that Howard's pusillanimous deputy so loudly abhorred. While on one hand there was some song-and-dance and passing appreciation of 'diversity' - purely for electoral purposes and to gain the 'ethnic' vote - on the other there was the demonising of the cultural identity and ridiculing of the traumatic history by 'Liberal' leaders who in the privacy of their clubs still label what they call 'the indigenous rights agenda' as a meaningless symbolism which has no 'positive, practical outcomes'. This hypocrisy went a long way in quietly encouraging and later tolerating the entry into the Parliament of an ignorant, racist member from Queensland, Pauline Hanson. She had been the endorsed Liberal Party candidate until she made 'controversial statements about Aborigines'. On that ground she had been dis-endorsed. So she stood as an Independent and gained a seat.

Her 'platform' was basically a running complaint on behalf of 'mainstream Australians' against "those who promote political correctness and those who control the various taxpayer funded 'industries' that flourish in our society servicing Aborigines, multiculturalists and a host of other minority groups." This theme continued with the assertion that "present governments are encouraging separatism in Australia by providing opportunities, land, moneys and facilities available only to Aborigines."

She believed, as she said in her first speech in Parliament, that "[Australians] are in danger of being swamped by Asians. Between 1984 and 1995, 40% of all migrants coming into this country were of Asian origin. They have their own culture and religion, form ghettos and do not assimilate."

In the Howard Government's silence, she 'was on a roll.' Parliament passed a resolution condemning her views on immigration and multiculturalism. Prime Minister [John Howard](#) refused to [censure](#) such a far-right [nativist](#), misinformed, uneducated and racist. He never spoke critically about her, acknowledging - rather, on the pretext - that her views were shared by many Australians. True - almost one million Queenslanders would vote for her. Howard confined himself to comment that he saw the expression of such views as evidence that - as he said - the "pall of [political correctness](#)" had been lifted in Australia.

In 1998 the party of that 'Independent-from-thought' gained 9 per cent of the nationwide vote. For many in Australia and or all Indigenous Peoples, that prime-ministerial silence was to be the sign of the time - and of things to come.

At the 1999 referendum, electors were asked to vote on a proposal for alteration to the Constitution to insert a preamble designed, among other things, to "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.”

The proposal was rejected by a majority of Australian voters and by a majority of voters in a majority of States. In 2005 The Aboriginal and Torres Strait Islander Commission would be disbanded with the collusion of the parties of ‘The System’, and Commonwealth bureaucrats resumed the responsibilities previously undertaken by that Commission.

Meanwhile, the Howard Government was preoccupied with ‘other others’.

In August 2001 the [Howard Government](#) refused permission for the [Norwegian](#) freighter [Tampa](#), carrying 438 rescued [Afghans](#) from a distressed fishing vessel in international waters, to enter Australian waters. Everywhere else in the world, the view is held, and very strongly, that survivors of a shipwreck are to be taken to the closest suitable port for medical treatment. The nearest Indonesian port was twelve hours away; Christmas Island – which is Australian – was six or seven hours closer. But that is the view of civilised countries. And in Australia ?

When the ship’s captain requested the Australian Government’s permission to land the asylum seekers at Christmas Island, arguing that the ship was not designed for 438 people, only its 27 crew; and there were no lifeboats or other safety equipment available for the asylum seekers in the case of an emergency, the Howard Government refused permission for the ship to enter Australia’s territorial waters, and threatened to prosecute Captain [Rinnan](#) as a ‘[people smuggler](#)’ if it did so.

Howard’s refusal triggered an Australian political controversy in the lead up to a federal election, and a diplomatic dispute [between](#) Australia and [Norway](#).

When the *Tampa*, bound by the ‘law of the sea’, entered Australian waters, the Prime Minister ordered the ship be boarded by [Australian special forces](#). This brought censure from the Norwegian [Government](#) which complained at the United Nations that the Australian Government failed to meet obligations to distressed mariners under international law. Within a few days the Howard Government introduced the *Border Protection Bill* into the House of Representatives saying it would confirm Australian sovereignty. Close to a federal election, Howard was showing how tough he was on so-called ‘illegal migrants’. The Liberal Party campaigned vigorously on the issue, with Howard’s statement “we decide who comes into this country and the circumstances in which they come.”

Immediately thereafter, the Howard Government introduced the so-called ‘[Pacific solution](#)’, whereby the asylum seekers were taken to [Nauru](#) where their refugee status was considered, rather than in Australia.

The *Tampa* crisis had an enormous effect. Domestically, the Howard Government’s line attracted strong support, especially in the aftermath of the [11 September 2001 attacks](#). The Australian Government’s popularity rating rose throughout the crisis. In the federal election following the arrival of the *Tampa*, many viewed the asylum seekers as ‘queue-jumpers’, falsely claiming to be refugees in order to gain [illegal entry](#) into the country. There were concerns of a security risk, involving a ‘floodgates’ situation where ‘[people smugglers](#)’ would deliberately aim at Australia as a perceived ‘soft target’. Australia appeared, once again, as the frightened country. The issue also divided the Labor Party internally, with the minority [Left faction](#) of the party arguing strongly in favour of a ‘softer’ approach, including the abolition of mandatory detention.

The Howard Government was once again showing the world how virile Australians are. Internationally, things were rather different: Australia was criticised by many countries, particularly Norway, which accused it of evading its human rights responsibilities. What is that ?

It was a kind of welcome back, you ignorant, militantly anti-intellectual, misinformed, uneducated and racist member from Queensland !

Howard was responsible, although not alone because he was masterful in reaching the darkest corner of the Australian psyche, for the resurgence of 'views' not suppressed but controlled for a short time which seemed to be competing with each other to show belligerence and hostility on the issue of immigration and 'integration'. Out of this miasmatic atmosphere came the more revealing manifestations of what the 'conservatives' are all about.

Such *animus* was for the time being directed mostly against Muslims. In August 2005 Ms. Bronwyn Bishop, a former senator for the New South Wales Liberal Party who after the Liberals' defeat at the [1993 election](#) began to be seen as a possible leadership candidate and for that purpose had moved to the House of Representatives, called for Muslim headscarves to be banned from public schools, an opinion also expressed by another prominent Liberal, now Shadow Minister, [Sophie Mirabella](#). Prime Minister [Howard](#), said that he did not agree with this view, on the ground that "as a ban would be impractical." "Impractical" - see !

In November 2005 Ms. Bishop expressed the view that "she is opposed to the wearing of the Muslim headscarf, where it does not form part of the school uniform." This is because "in most cases the headscarf is being worn as a sign of defiance and difference between non Muslim and Muslim students" and then went on to say that she "does not believe that a ban on the Jewish skull cap is necessary, because people of the Jewish faith have not used the skull cap as a way of campaigning against the Australian culture, laws and way of life."

Ms. Bishop, cosseted on and representing a leafy northern suburb of Sydney, demanded the ban of headscarves in schools because they made women subservient; then, when confronted with the fact that many headscarved women felt perfectly free, she said they were like Nazis who felt free in Nazi Germany.

Such deep-seated, light-headed, blind anti-Semitism would turn absolutely orgasmic at the opportunity to display her 'Queen's English'. Her main concern has always been the 'correct elocution' - and never mind what is being said. When she was a young girl, she aimed at speaking like her worshiped monarch. So in 1952, at the time of 'The Ascension to the Throne', Ms. Bishop, having lost the rightful hat of her uniform, would have made an effort to say: "*I've lorst thet bleck het.*" As with a view on the headscarf or on the skull cap, Ms. Bishop has not moved one centimetre - pardon me, one inch. Today those o's and a's would not sound more rounded. In the same way - while "*orf*" was left behind and "*off*" ushered in, "*veddy*" became "*very*", and a y sound no longer followed the s in such words as super - 'conservative' sounds would still flow from Ms. Bishop's lips. She will continue to speak the 'Queen's English' that even the Queen no longer speaks - such 'principles' being foremost.

Just about the same time as Ms. Bishop was orating, Dr. Brendan Nelson - a truly 'versatile' politician, former Labor Party member, former Leader of the Liberal Opposition,

former Howard's [Minister for Education, Science and Training](#), later [Minister for Defence](#), and later still Rudd-appointed Ambassador to the European Union, Belgium and [Luxembourg](#) as well as Australia's Special Representative at the [World Health Organisation](#) and [N.A.T.O](#) – would tell Muslims who did not know the story of Simpson and his donkey to “clear off.” ‘Simpson’ was a [stretcher bearer](#) with the [Australian and New Zealand Army Corps](#) during the glorious defeat at [Gallipoli](#) in the first world war. He obtained a [donkey](#) and began carrying wounded soldiers from the frontline to the beach, for evacuation. *Simpson and his donkey* are a key part of the '[Anzac legend](#)'.

Now there is the still young Liberal Senator for South Australia Cory Bernardi. Having publicly questioned global warming as caused by human activities, he went on to advocating a ban of the wearing of the *burqa* in public and said that: “Islam itself is the problem – it's not Muslims”, and that multiculturalism had failed. Under pressure from his leader, he subsequently clarified his remarks by stating: “When I say I'm against Islam, I mean that the fundamentalist Islamic approach of changing laws and values does not have my support.” He could not help associating with far-right Dutch politician [Geert Wilders](#) who shares anti Islamic views. Bernardi has been offering to assist Wilders in a visit to Australia.

And what should one say about the Liberal Party Representative for the seat of Menzies, now Shadow Minister for Families, Housing and Human Services, with his pledge, while Howard's [Minister for Immigration and Citizenship](#), to cut the immigration intake from Africa in 2007 because “Africans fail to integrate.” ? This was – it seems – in response to the murder of a young Sudanese refugee by young white men; an impressive victim-blaming manoeuvre !

As the saying warns: prejudice will not grow old but will live forever !

* * *

A posing of detached neutrality, of benign tolerance, was by no means the hallmark of the Howard Government attitude to Indigenous Peoples and the 'white' Australians problem. The 'real stuff' was to come, yet again close to federal election time, with the Northern Territory National Emergency Response – also referred to as 'the Intervention'. The Response involved the Australian Government seizing direct responsibility for Indigenous affairs in the Territory. It was a package of changes to welfare provision, law enforcement, land tenure and other measures, ostensibly introduced to address claims of rampant [sexual abuse](#) and neglect of children in the [Northern Territory](#) Indigenous communities. The package was the federal government's response to the [Territory government's](#) publication of [Little children are sacred](#), but implemented only two out of ninety-seven of the report's recommendations.

Actually, it should have been called 'the re-occupation of Indigenous lands'. It was aimed at gathering the vote of the red-necks at the then forthcoming election. 'Naturally', both the parties of 'The System' supported it. Later Prime Minister Rudd would make minor adjustments to the implementation of the Response. Prime Minister [Julia Gillard](#) continues to support it in principle. The Response has been given a new and more fashionable name: *Stronger futures* policy. Nasty voices whisper *Stolen futures*.

As from 27 June 2007 the Response was supported by *Operation Outreach* – an infelicitous name if ever there was one: there is an *Operation Outreach* in devastated

Afghanistan !

Operation Outreach provided support to other Government agencies including the Department of Families, Housing, Community Services and Indigenous Affairs, the Department of Health and Ageing, Centrelink – the Australian Government social security system, the Department of Education, Employment and Workplace Relations, the Northern Territory Police and the Territory Department of Health and Community Services.

The *Operation* was conducted with the assistance of 600 personnel of the Australian Defence Force. They were drawn from the Army, Navy and Air Force including approximately 400 soldiers from the Army's North West Mobile Force, a Regional Force Surveillance Unit based in the Northern Territory and the Kimberley Region of Western Australia. The commander was a Major General. The *Operation* concluded on 21 October 2008.

At the same time, as he was ordering the re-occupation of Indigenous Land in 2007, Prime Minister John Howard reiterated his support for recognition of indigenous Australians in the Constitution.

Following its election in November 2007, the Rudd Government maintained a modified Northern Territory Emergency Response, and implemented the '*Closing the gap*' policy.

On 13 February 2008 Prime Minister Rudd moved a 'motion of Apology' to Australia's Indigenous Peoples in the Parliament, with specific reference to the 'Stolen Generations'. The Prime Minister described it as an occasion for "the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence in the future."

As he said " ... today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history.

We reflect on their past mistreatment.

We reflect in particular on the mistreatment of those who were Stolen Generations – this blemished chapter in our nation's history.

The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.

We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.

We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.

For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.

To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.

And for the indignity and degradation thus inflicted on a proud people and a proud culture,

we say sorry.

We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.

..."

The 'Apology' passed with the usual support of both parties of 'The System'. There were tears inside and outside Parliament, old and young abused Black People 'cried their heart out', yet again, *but*: as one would expect in tort law, in the case there was no promise of reparation, no consideration, no plan for provision of appropriate restitution to the communities and individuals who have been injured by historical policies. Just stentorian words !

As the old Black man told Professor Stanner some fifty years ago: "You are very clever people, very hard people, plenty *humbug*."

Once again, the harsh reality is that on 13 February 2008 0.5 million Indigenous People in Australia were still mostly living in 'Third World' conditions, and the Aboriginal Genocide - 9,000 Aboriginal excess deaths annually, more than 90,000 Aboriginal excess deaths in the 11 years of the Howard Government - is continuing. Just a few hours after the 'Sorry' vote in the Australian Parliament, the 'Australian Greens' Leader Bob Brown moved to amend the historic 'Sorry motion' by adding a commitment to offer "just compensation to all those who suffered loss." The amendment was lost by a vote of all the non-Green Australian Senators.

It took 220 years for 'white' Australians finally to say 'Sorry' - not for the Aboriginal Genocide that they do not acknowledge or about which they do not talk, but for the 'collateral' abuse of Indigenous children. However it only took them several hours to show the world that they did not actually mean it !

The Australian Labor Party prepared a policy for the 2007 federal election and called it Closing the gap.

This catchy phrase was intended to sum up a strategy aiming to reduce Indigenous disadvantage in life expectancy, child mortality, access to early childhood education, educational achievement and employment.

The plan was endorsed by the Australian Government in March 2008 as a formal commitment developed in response to the call of the [Social Justice Report 2005](#) to achieve Indigenous health equality within 25 years. Then the Howard Government had remained indifferent to suggestions - perhaps because morally deaf.

To monitor change, the [Council of Australian Governments](#) set measurable targets to

improve the health and wellbeing of the Indigenous population. These targets focus on health, housing, early childhood, education, economic participation, and remote service delivery. The achievement of substantial improvements in the health and wellbeing of Indigenous Peoples would depend largely on the effective implementation of these targets as they reflect some of the substantial disadvantages experienced by Indigenous Peoples.

The timeframes for the *Closing the gap* targets recognise the enormity of the challenge facing a serious government and a willing nation in that effective, integrated, comprehensive strategies and policies will need to be sustained for a long time - improvements to the extent set in the various targets will not occur in the short-term.

After the ousting of Prime Minister Rudd, the new Prime Minister, Julia Gillard, released the third report in February 2011 and the fourth in February 2012.

Between the elections, both in 2007 and 2010, the panorama of acronyms and *formulae* increased with the kind of propensity that bureaucrats display.

Prime Minister Gillard must be held accountable - and not the intended beneficiaries who were hardly meaningfully consulted on the plan - if only for what the last two reports say. This is not the place to develop a detailed critique. But so much should be said: the reports are getting longer every year; the first report in 2009 was only [33 pages](#), the 2012 report was 127 pages, admittedly with many more flashy pictures.

It is in these reports that one is confronted with the new, magic expressions of “the Government determination”: of course, one is met with the inevitable Summit - this time on Indigenous Health, and for a “holistic view of health, addressing many of the underlying social determinants that influence and affect health.”

Then there are the earnest ‘Statement of Intent’, [National Indigenous reform agreement and National partnership agreements](#), articulated into ‘targets’, ‘building blocks ... interconnected and [to] address several targets’; following ‘enabling transition pathways’, and all to be met in ‘specific timeframe[s]’, with the usual respect for the ‘many financial, structural and social incentives’.

Only bureaucrats would like to have their work expressed and measured that way: more pictures = more activity = more progress in *Closing the gap*. But what are the achievements ?

What few data are presented seem to fall back on the 2011 *Closing the gap* report.

But there is no indication that the planners have met in any way the very strong and unfavourable comments by Amnesty International to the 2011 report.

Very damaging is Amnesty International’s statement that the federal and territorial governments policy ignores the

connection Indigenous Peoples have to their land. Internationally acclaimed Indigenous artist, *Anmatyerr* elder Kathleen Ngal, 78, was quoted as saying that if Utopia residents are forced to move to “hub towns” they will become “third-class, non-existent human beings.” She explained: “My paintings are maps of our country ... through my art I am educating the world about my country and my culture.” adding: “*I cannot paint when I’m not on my land.*” [Emphasis added]

“Country owns you or holds you, not you holding the country and becoming master of the land.” she said, and she added that the federal government’s Northern Territory Intervention had been a “traumatising” land grab.

During the 2007 Northern Territory Intervention the federal government had taken over homelands under a five-year lease which is due to expire this year.

Amnesty International said that the focus on “hub towns” also went against medical research which said that there were health benefits to living on homelands. And there was limited access to alcohol in the Utopia region, A.I.’s report said.

A Medical Journal of Australia study from 2008 had indicated that despite increasing levels of obesity and diabetes among Indigenous Peoples nationally, Utopian residents were healthier.

The Northern Territory Government placed a moratorium on money for homeland housing in 2006, creating a backlog of under-investment, Amnesty International said.

“Growth towns”, with about 24 per cent of the Northern Territory Indigenous population, are receiving \$772 million for new housing and maintenance in 2010-11.

That was 100 times more than remote homeland communities, which have 35 per cent of the Territory Indigenous population but only receive \$7.1 million for maintenance - the report said.

Amnesty International found that there is severe housing overcrowding in Utopia homelands with about 85-100 people living in makeshift shelters known as “humpies” without power, running water or sanitation.

Where there are houses, as many as 15-18 people sleep in some two-bedroom homes each night.

Houses in Utopia communities have become dilapidated because of “decades of neglect” and low levels of maintenance funding. Most have dodgy electrical wiring, no insulation, no fans or air coolers, limited kitchen facilities and malfunctioning toilets and sewerage systems. “There are incidents of raw sewage leaking from inadequate systems.”

Amnesty International recommended ending the *Closing the gap* policy’s discrimination of homeland people. It said funding should be distributed equitably to include homelands and rectify the backlog of under-investment in housing.

In relation to life expectancy, the 2011 *Closing the Gap* report confirmed that the life expectancy in 2005 for an Indigenous man was 67.2 years and 72.9 years for an Indigenous woman. The gap in life expectancy between Indigenous and non-Indigenous persons in Australia was estimated at 11.5 years for men and 9.7 years for women. Understandably, the gap has narrowed only slightly in comparison in one year, but this is not quantified or mentioned. However, available data suggest that the gap in life expectancy between Indigenous and non-Indigenous persons in Australia is larger than in other countries where Indigenous Peoples suffered a similar history of relatively recent English invasion. For instance, in Canada, in 2011, there were gaps of between 5 and 14 years for ‘native’ people and all Canadians. In 2005-07, in Aotearoa-New Zealand, the life expectancy gap between Maori and non-Maori closed slightly from 9.1 years (in 1996-97) to 8.2 years. By now similar data should be available for Australia. They are not - or not presented.

In other words, one has the feeling of being offered some kind of glossy spin. More: one would be at a loss in searching for an up-date of information on what was already reported by the Productivity Commission - the Australian Government’s principal review and advisory body on microeconomic policy and regulation - on data available for the period

2005-09 when the mortality rate for Indigenous persons in New South Wales, Queensland, South Australia, Western Australia and the Northern Territory combined was twice the rate for non-Indigenous persons.

To remain with solid figures: in relation to infant mortality, although there has been a progressive decrease since 1998, the Productivity Commission reported that the mortality rate for Indigenous infants is still 1.8 to 3.8 times higher than that of non-Indigenous infants.

In relation to the basic education tools of reading, writing and numeracy, the Productivity Commission reported that a substantially lower proportion of Indigenous students achieved the year 3, 5, 7 and 9 national minimum standards for reading, writing and numeracy in 2010 compared to non-Indigenous students. In relation to year 12 attainment, the Productivity Commission reported that the proportion of Indigenous young people who received a year 12 certificate increased from 20.2 per cent in 2001 to 25.8 per cent in 2008, while the non-Indigenous rate remained constant at around 56.1 per cent.

All this should be viewed in a broad picture of what education – as opposed to indoctrination – has become during last, say, 50/60 years, that is since the advent of the television as ‘surrogate parent’. By international standards of education, one should regard the ‘educational system’ in Australia as a sequence of minding centres at primary school, bad jokes at secondary stage, and solemn farce at tertiary level.

Result ? By importing the ‘standards’ of the rarefied-air of southern California through trashy television infotainment Australia is being re-colonised by modern barbarians.

Still, the federal government ‘banks’ on that type of education as the ‘third export industry’. Such is the language of the federal budgets and that of an enfeebled ‘academia’.

Of course, those families which can afford it, move their children to private schooling, where the uniform – most of the time the ‘cadet uniform’ – and the amenities draw a distinction with public so-called education. The tie and some farcical hat are the external signs of a class distinction which preserves or opens the way to employment.

And so grow the sequential illogical steps: ‘education’ for employment – not for real life.

As to employment, the Productivity Commission’s data showed a small increase in the employment to population *ratio* for both Indigenous (50.7 per cent to 53.8 per cent) and non-Indigenous (74.2 per cent to 76 per cent). But overall, there was no significant change in the gap between Indigenous and non-Indigenous employment.

Beyond the *Closing the gap* targets, the headline indicators of social and economic outcomes demonstrate the profound gulf which exists between Indigenous and non-Indigenous persons in Australia in the areas of imprisonment and juvenile detention, post-secondary education, disability and chronic disease, household and individual income, substantiated child abuse and neglect, and family and community violence.

The *hiatus* is even wider in certain states, Queensland and Western Australia, where the abuse of Indigenous Peoples has been more savage in the past and continues to be tolerated by the ‘white’ community, practiced by its institutions, and enforced by its tools of enforcement of ‘law-and-order’. ‘Law-and-order’ was not the sole prerogative of the eleven years of the Howard Government. Here is an example: some time ago, in 2010, and not long after he delivered the ‘Apology’ to the Indigenous People, Prime Minister Rudd referred

to the 'people smugglers' - those who assist the asylum seekers into Australia on rickety boats and at enormous physical risk - with these words: "People smugglers are the vilest form of human life, they trade on the tragedy of others, and that is why they should rot in jail and, in my own view, rot in hell." The poor, *minor* Indonesians who simply serve on those boats are now rotting in Her Royal Majesty's Australian gaols - forever if the Rudd and Gillard governments have their way, because that savagery keeps governments in favour with red-necks in 'good Christians', 'compassionate' Australia; and damn the 'International Bill of Human Rights' !

At the time of writing the *Stronger futures* in the Northern Territory Bill 2012 has not been passed.

It has encountered strong opposition from individuals and institutions. Eight *Yolngu* nations in Arnhem Land have called for the rejection of the 'new intervention'. The main objection is that the Act, if enacted as proposed, would once again disregard the right to self-determination and only continue the discriminatory practices which began under the Howard Government's Northern Territory Intervention legislation. It seems that, despite its feel-good name, the Bill is about extending the Northern Territory Intervention, not only throughout the Northern Territory, but beyond.

* * *

At community consultations and in submissions, the Expert Panel was also referred to the recognition of Indigenous Peoples in international law, specifically the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly on 13 September 2007 and endorsed by Australia on 5 April 2009.

In a country which remains lazily and self-satisfyingly mono-lingual - despite all the multicultural hullabaloo pretensions - it would be only fatal that comparison with other countries would only be towards similarly originally invaded parts of the world: Aotearoa-New Zealand, Canada, South Africa and the United States. But, they speak English there and available literature makes for easier access.

A look was given, however, into Bolivia, Brazil, Colombia, Denmark, Ecuador, Finland, Mexico, Norway, the Philippines, the Russian Federation, and Sweden.

Finland is the country which has the newest Constitution; it was amended as recently as 1 March 2012. It has a somewhat similar provenance to Australia's - but an infinitely more active brain and a stronger back-bone. It gained its independence from Imperial Russia in 1917 and from then has progressed to become a secular, democratic republic, with a parliament which is elected through a system of proportional representation - hence truly guaranteeing the foundation of democracy: one head = one = vote = one value. One needs only look at the outcome of the 17 April 2011 election. There being eight competing and successful parties, the distribution of seats in parliament produced the following results:

% of votes

% of seats

seats

[National Coalition Party](#)

20.4

22.0

44

[Social Democratic Party](#)

19.1

21.0

42

[True Finns](#)

19.1

19.5

39

[Centre Party](#)

15.8

17.5

35

[Left Alliance](#)

8.1

7.0

14

[Green League](#)

7.3

5.0

10

[Swedish People's Party](#)

4.3

4.5

9

[Christian Democrats](#)

4.0

3.0

6

Others

0.4

0.5

1*

* The Province of Aland is guaranteed one seat by law.

That is democracy in action, even if the ultimate result is that of securing a large number of seats to the True Finns, who gather the vote of those who prefer a right-wing [populist](#) and [nationalist](#) representation – a recent phenomenon due to the common resurging of European authoritarian parties.

As for the recognition of the Sami people, also spelled Sámi or Saami, of whom there are about 9,350 in Finland – with some 2,000 in Russia, 24,600 in Sweden, and between 60 and 100 thousand in Norway – Finland proceeded this way:

1) A 9 November 1973 act establishing the Finnish Sami Parliament, representing 0.16 per cent of a total population of some 5.4 million;

2) the Sami were recognised as a ‘People’ in 1995;

3) since 1970 Sami have begun to have access to Sami language instruction in any of the three languages spoken in Finland: Inari Sami, North Sami and Skolt Sami; 'language rights' were established in 1992.

In addition, Sami are protected by the Constitution of Finland, which in Chapter 2 has incorporated basic rights and liberties for all, expressed into articles from 6 to 23: on equality before the law, the right to life, personal liberty and integrity, the principle of legality in criminal cases, freedom of movement, the right to privacy, freedom of religion and conscience, freedom of expression and right to access to information, freedom of assembly and freedom of association, electoral and participatory rights, protection of property, educational rights, right to one's language and culture, the right to work and the freedom to engage in commercial activity, the right to social security, the duty of responsibility for the environment, the right of protection under the law, the guarantee that public authorities will observe those rights, and the basic rights and liberties in situations of emergency.

One would recognise in these declarations the fundamental elements of the International Bill of Rights, by which Finland strictly abides. Even the True Finns, the farthest-right party in the Finnish Parliament would not dare to object to any of the provisions in that chapter on the totally medieval, and most certainly specious ground that it would introduce a 'one-section Bill of Rights'. One has to come to Australia to witness such wisdom – and from an undoubtedly intelligent and law-trained Leader of the Opposition. Maybe it was the schooling by the Jesuits which provided him with such flexible polyvalence.

To date Finland has not gone through the perfunctory ceremony of signing The United Nations Declaration on the Rights of Indigenous Peoples which was adopted by the [United Nations General Assembly](#) during its 62nd session at [UN Headquarters](#) in New York City on 13 September 2007, as Australia did. The reasons are unknown. Perhaps, fundamental guarantees in the Constitution seem sufficient to Finns. Anyway, signing or not signing, what would that do to a place like Australia ?

What is certain is that any comparison between a free, secular, and democratic republic and a Governor-Generalate such as Australia would be grossly offensive – to truth and intelligence.

What matters, and ultimately distinguishes the Finnish from the Australian experience, is that a country wrecked by civil war at the beginning, severely damaged during three wars between 1939 and 1945, a relative latecomer to [industrialisation](#), which remained a largely [agrarian](#) country until the 1950s, thereafter would progress to a rapid economic development, guaranteeing an extensive welfare state. Finland has the best educational system in Europe. It has recently ranked as one of the world's most [peaceful](#), [competitive](#) and [liveable](#) countries.

* * *

An outsider who has lived in Australia as a visitor for over forty years, and has regularly done the best to 'behave like a tenant', should be very cautious in coming to conclusions about such a sad affair as 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' - *that* Constitution.

The Expert Panel's recommendations for changes even of *that* Constitution are a source of concern. They are:

- 1) That section 25 be repealed.
- 2) That section 51(xxvi) be repealed.
- 3) That a new 'section 51A' be inserted, along the following lines:

"Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples."

The Panel further recommended that the repeal of Section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

- 4) That a new 'section 116A' be inserted, along the following lines:

"Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.”

5) That a new ‘section 127A’ be inserted, along the following lines:

“Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.”

The Gillard Government has not yet pronounced itself on the recommendations, but it is fair to assume that it would support all of them.

Even some of those who support changes may cultivate facile illusions. It is not true – as a sympathetic and very active group’s spokesperson said – that “The Expert Panel’s historic report presents a sound and practical proposal for bringing our [a contemporary] Constitution into the 21st Century.” This is pie-in-the-sky stuff, plain nonsense. And that 63 per cent of Australians were in favour of recognition, with 37 per cent against as at 20 January 2012 – the day the Expert Report was mentioned in the press – means absolutely nothing. The wise men – and women, too – of the Right are out with their doubts: but what if ? What if the proposed clauses ‘open the gate’ to litigation ? Could the prohibition of discrimination based on race, ethnicity or nationality not become ‘a dog’ (translation: risk) ? Is it not better to do nothing ? Are we not afraid of ‘creating a precedent’ ? Why should we challenge *the principle of the dangerous precedent* whereby nothing should be done for the first time ?

As far as the Opposition is concerned, and subject to one last minute *volte-face*, quite possible in the vagaries of ‘The System’, and so long as doubt is raised about the implications in the proposed Section 116A, it is possible that it may join the Government in preparing a ‘Yes’ suggestion.

It is also possible that the cavillous objection that the proposed section could introduce a “one-clause Bill of Rights” could supply a pretext to the Opposition to torpedo the proposals. Just one day after the presentation of the Report, the Leader of the Opposition warned that “In examining the report we will be looking closely at the potential legal ramifications of any specific anti-discrimination power.” With the present Opposition one should keep in mind that ‘The end justifies the means’. Wrongly attributed to Machiavelli, the saying better characterises the Jesuits – of whom, with or without visible frock, there are several among the ‘Liberals’.

Maybe the simple-mindedness of most ‘reluctant voters’ could accept the proposal because ‘social conservatives’ almost always agree with laundry lists of statements of no consequence, such as: “I would not mind working with people from other races.”

On the other hand, strict Right-wing, law-and-order types may be attracted to negative solutions simply because they have trouble grasping the complexity of the world. There are too many of them among ‘real’ Australians.

More worrying, perhaps, for the proposals is the disparity of views among representatives of the Indigenous Peoples.

Opinions there, despite the apparent enthusiasm, vary considerably; voices are discordant – and the ‘whites’, genuine or red-necks, will no doubt take advantage of those conflicting attitudes, thoughts, positions.

There is first of all the view of the highly respected co-chair of the Expert Panel; then there are the firm observations by a relatively young Indigenous person, truly a public intellectual who speaks not only outstanding English but also his father’s language, his mother’s language and two or three other local languages, that “We need to address the social and economic disadvantage of Indigenous Peoples on the same basis as other citizens: on the basis of social need, not ethnicity, colour or origin.” Obviously he does not believe that there is some kind of social alchemy in constitutional reform. As an intended panacea it would do nothing to remove the intractable and ghettoised poverty of Indigenous communities and the gleaming, near but not too near to the material affluence of boom-time mining communities.

The same exponent did say, however, that “If the proposed reform does not meet with [a very well known Indigenous leader]’s blessing, as an Indigenous [and woman] elder of Australia, then it will go nowhere. ... At the same time, if it does not meet with John Howard’s blessing, as a conservative elder of Australia, it will be equally doomed.” John Howard’s blessing ?! Heaven forbid !

Two well known Indigenous academics, attached to prestigious universities, have written advising caution, because of “the state of our citizens’ understanding of the issues.” They also referred to the Constitution as ‘democratic’ and to Australia as a ‘modern nation.’ Hmmm ... They wrote: “The loss of the referendum would brand Australians to the world as racists, and self-consciously and deliberately so.” The first part of this sentence offers nothing new, and the second is open to serious doubt.

One of those academics listed three camps in Indigenous Australia pushing three different viewpoints about the form of the referendum question. One wants a radical form of sovereignty; another wants a conservative model which only includes mention of Indigenous Australians in the preamble; and the third – which is the speaker’s camp – believes in more fundamental change which would remove the ‘race power’ in the Constitution. She suggests that a preliminary vote of Indigenous Australians would settle which position was most deeply held by black Australia.

Coming from a different direction, the former chairwoman of the federal Intervention, and an Indigenous leader at that, warned that the recommendations might be too complex to sway voters at a referendum. Australians are ‘not ready’, yet. If not now, when ?

From the so-called Labor side of politics, another prominent Indigenous leader said that the Panel had overreached and it was unlikely that the proposals would succeed.

There are, finally, voices from the Resistance against the English invasion. They talk about ‘Aboriginal sovereignty’ on the very basic, fundamental point that sovereignty was never discussed, negotiated, ceded. They understand for sovereignty not ‘the power over others’ but the right – the rock-solid-right, though – to retain *their* culture as *they* understand it. “Traditional life – they say – is about the custodians’ role of caretakers of the rocky outcrops, desert plains and sacred mystical waterways which belong to the people of the Seven Wonders of the World.” Fancy that !?!?

On 16 May 2012 an Aboriginal sovereignty movement asked the United Nations to send peacekeepers to Australia to protect them against “increasing aggression by the Australian authorities.”

“We have already put the United Nations Secretary-General, Ban Ki Moon, on notice that we are in need of U.N. peacekeepers as the Australian authorities are increasing their aggression against our sovereignty movement.” wrote Michael Anderson in a media release approved by the main actors resisting the construction of a huge natural gas industry at James Price Point, near Broome in Western Australia.

Mr. Anderson is the last survivor of the four men who set up the Aboriginal Embassy in Canberra in 1972. Early in February 2012 he had announced that he intended to travel all over the country, meeting people with the aim of forming a national unity government. He said he would be looking at having talks with non-Indigenous people so as to explain that the National Unity Government was for “making Australia an independent republic, totally separate from England, as we are now mature enough to stand alone amongst the nations of the world. Included in these discussions will be the finalisation of an independent constitution which will set up the independent republican state.” Mr. Anderson is the *interim* spokesperson for the ‘Sovereign Union’ formed at the 40th anniversary *corroboree* of the Aboriginal Embassy in January 2012. Several more such embassies have been set up across the country since then, including one at *Walmandany* (James Price Point), north of Broome. All are being harassed by local authorities.

The protesters accuse the Premier of Western Australia, Colin Barnett, in conjunction with Western Australia police, of applying dictatorial methods in dealing with Indigenous Peoples, local families and protesters at James Price Point by sending in around 250 police with riot gear to secure clear access for the Woodside company’s staff and equipment to the proposed gas hub site on the West Kimberley coast. Yet, over 600 members of Broome’s rich and diverse multicultural community presented flowers at Broome Police Station on Mother’s Day as a peaceful protest against the heavy police presence. Police were later seen dumping the bouquets in a bin, rather than taking them to a hospital or an aged care facility. On 14 May 2012 fifty riot squad police escorted the Woodside convoy of workers and equipment past a handful of locals protesting the destruction of the land, ocean and cultural landscape.

“The next move will presumably be the destruction of the *Walmandany* Aboriginal Embassy and another camp on Cape Leveque Road. These camps were established to make a vocal statement about the atrocity of the nature of the proposed Woodside gas hub on the pristine land and sea ecology, and defend the rights of Aboriginal people and locals to have a say in the future of the state of the environment in the Kimberley.” the media release prepared by Mr Anderson said. “The proposed development site would have significant negative impacts on the Aboriginal heritage values, environmental values and the value of the National Heritage Listed dinosaur footprint trackways.” All this is lost to representatives of one of the crudest business *cabals*.

“Police have been intimidating and harassing local families and their supporters by deregistering cars suspected of having involvement with the *Walmandany* Embassy, and have been performing additional drug and alcohol testing on them. ...”

The media release concluded: “We again state that the Australian government has no sovereignty over Australia and no jurisdiction over Aboriginal people, who have never signed a treaty nor ceded their sovereignty to a colonial force. The Australian government continues to fail to provide any protection against gross misuse of police powers towards Aboriginal people. We call for the immediate scrutiny and involvement of the United Nations in the many human rights violations perpetrated by the so-called ‘Australian Nation’ towards Aboriginal people in Australia.”

On 23 to 24 May 2012 a conference was held at the University of Wollongong’s Innovation Campus, organised by legal academics of the University of Wollongong and Southern Cross University. The theme was this year’s renewed interest in the issue of sovereignty, defined in different ways: at the gathering of 26 January in Canberra it was intended as ‘self-determination’; in Wollongong it was rather explained as ‘the ultimate power to govern or have authority over land or territory’.

The workshop specifically concentrated on discussing the complexities of litigating claims of sovereignty, which refers to having supreme independent authority over a geographic area, as a public interest issue by bringing together leading Indigenous activists, legal practitioners and scholars in the areas of law, politics and public culture.

Speakers at the event included Mr. Anderson, who gave an introduction to sovereignty claims before exploring the case study of the Provisional Constitution/ Advisory opinion to the International Court of Justice.

Speaking at the symposium on the first day, Mr. Anderson said that Indigenous Peoples have a legal right to sovereignty, which would lead to a complete change in the legal and political dynamics of Australia. “Sovereignty – he said – was not a matter of if, but when.” ... “When our claims are upheld, Australia has to come and talk with us and we have to negotiate how we live together in this country.” he said. And he warned: “We just have to change the whole dynamics of this country and our relationship ... but it’s not going to be a change to the detriment of the nation, it will be a change for the betterment of the nation.”

Mr. Anderson was followed by the Chair of the Northern Murray-Darling Basin Aboriginal Nations, Mr. Fred Hooper, who gave a case study on the Northern New South Wales Local Alliance and local elder Roy ‘Dootch’ Kennedy, who spoke about the Sandon Point Aboriginal Tent Embassy.

Mr. Hooper said the claim to continuous sovereignty, uninfluenced by any proclamations to the contrary made by Captain Cook and Captain Phillip in 1770 and 1788 and uninterrupted by the ever-changing colonial policies of the last two centuries, is supported by the use of cases, documents and doctrines which illustrate the possible existence of multiple coexisting sovereign claims on the same territorial jurisdiction.

One aspect of the claim, for example, would rely on the *Pacific Islanders’ Protection Act* 1872 [NB and 1875 Act] and the impact of the ‘doctrine of discovery’ on international Indigenous sovereignty, matters to be discussed at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues in May this year.

Dr. Alesandro Pelizzon, one of the co-conveners of the meeting and a lecturer at Southern Cross University, agreed with Mr. Anderson. He said: “We are actually beginning a dialogue, a legal dialogue, on the issue because it is undeniable that there is a claim to sovereignty, it

is a fact, and it is not something that can be denied.” and went on: “So what we are exploring here is ‘what are the implications?’ ”

“It is not a new discourse,” – he said – “but it is a newly supported claim, which has not been supported like that from the grassroots movement so far, and the testimony to that is that 40 years ago there was one tent embassy in Canberra ... but since January 26 more Aboriginal tent embassies have [been formed].”

Professor Elena Marchetti, the other co-convenor of the symposium, said that the gathering had received a very positive response from attendees and focused on the next steps needed to support the claim to sovereignty.

On 24 May 2012 a meeting of Indigenous representatives from across the continent gathered to confirm their intent to form a National Unity Government of the Sovereign Union of First Nations Peoples in Australia.

This intent was confirmed by the representatives formally signing an Act of Sovereign Union among First Nations Peoples in Australia. Mr. Anderson, spokesperson for the Sovereign Union said from Wollongong the following day: “The delegates acknowledged that having now stepped up to the plate of taking on this enormous task of nation building, not just at the national level, but at our local and regional levels as well. The most pleasing aspects of this movement is that nation building has now become organic within our communities throughout Australia. The grassroots people are using their own personal resources to bring their people together to rebuild their own nations and governance.

It is important to acknowledge this effort because the Sovereign Union is a Peoples’ movement and they own it. This is not Australian government inspired nor funded. It was decided that any funds for the further advancement of the Sovereign Union movement is to operate on the basis of goodwill from the people of Australia through donations or bequests.”

The gathering concluded that the political significance of Aboriginal Embassies is vital to the sovereignty movement, in that those embassies represent a sovereign stand against the invader State and are an assertion of the Indigenous Peoples’ rightful place in their country. Moreover, those embassies are not protest sites; Indigenous Peoples call upon both the domestic and international community to recognise them as authentic diplomatic missions, to be afforded standard diplomatic immunities. It is also important to understand that when those embassies are assaulted by superior forces of the invader State, the people have a right to defend their sovereign independence. The sacred fire which burns at those embassies is the sacred spiritual essence uniting Indigenous Peoples through their ancient *songlines* and *Dreamings*. The Indigenous Peoples will defend this spirit life which comes from that sacred fire.

The delegates to the Wollongong gathering asked Fred Hooper of the *Murrawarri* (at Weilmoringle) to head the establishment of the constitutional framework for the National Unity Government, including regional and local assemblies. He is to be supported by Judulu of the *Kunghi (Grubunna) Djunkun* – *Yarrabah* North Queensland. Jululu was also delegated to communicate with tribal ceremonial Elders across the nations to co-ordinate the joining of ancient songlines. Vanessa Colbong of the *Wdjuk*, Wilmen and Ingarda from southwest Western Australia were delegated to co-ordinate the unification of the nations in the southern half of Western Australia. Peter Skuthorpe of the *Gomeroi* nation, from

northwest New South Wales was put in charge of co-ordinating youth action and education. Roy 'Dootch' Kennedy of the *Yuin/Monaro*, from *Kuradji* Sandon Point was held responsible for the unification of the nations from La Perouse down the south east coast of Australia and Maureen Brennan was asked to assist 'Dootch' Kennedy in bringing the people together. Michael Anderson was appointed the national co-ordinator and responsible for all diplomatic relations both domestic and international.

Thus far the media release; attached to that release was the *communiqué* containing the 'Act of Sovereign Union between First Nations and Peoples in Australia'.

There is a distinct opening reference to the American Declaration of Independence:

"Whereas in the course of human events and history there are times when it becomes absolutely necessary for one Nation or People to dissolve the political and legal bonds which have connected them with another;

Whereas we now call upon the powers of the Creators of the Dreaming to enforce the natural authority that establishes a decent respect of humankind. It is required that we should declare the causes which impel us to the separation from our oppressor and to now declare our unity under our Dreaming and songlines, as we have since time immemorial;

Whereas we hold the Law of the Dreaming, as evidence of authority that all people are born equal, and that they were granted by the Creator certain sovereign inalienable rights; among these are the right to life, liberty, the right to maintain the Law of the Dreaming and the pursuit of spiritual wholeness and personal wellbeing;

Whereas to secure these rights in the modern world, governments are instituted among different Nations and Peoples, deriving their just powers from the consent of the people and the spiritual authority of the Dreaming. Whenever any form of government becomes destructive, it is the right of the Peoples to alter or to abolish it, and to institute new government, ensuring that at the very foundation of this process are principles based upon the rule of Law of the Peoples and organising its powers to ensure the most pleasing of outcomes for peaceful existence, safety of the Peoples' happiness and wellbeing;

Whereas prudence will dictate that governments long established should, without prejudice, support the objective of the Peoples who choose to exercise their inalienable sovereign right to be governed by their own peers in accordance with their Laws and under their authority;

Whereas all experience has shown that humankind is more disposed to suffer, while the wrongs are sufferable, than to correct them by abolishing the entrenched subjugation. But, when a long train of abuses and usurpations derides the rights of Peoples, which reduces them to absolute despotism, it is the right of the oppressed, it is their sacred duty, to reject and throw off such tyrannical governance and to provide new guards for their future security and to pursue their own goals and objectives. Such has been the patient sufferance of First Nations Peoples of this island continent now known as Australia; and such is now the necessity which requires us to dispel the existing destructive systems that oppress us; and to reinforce our own systems of governance, in accordance with our Law of the Dreaming;

We resolve to adopt and adhere to the following Statement of Principles:

1. Our Peoples are equal in dignity and rights to all other Peoples, while recognising the rights of all other Peoples to be different and to be respected as such.
2. We recognise that the diversity of Nations and other Peoples contributes to

cultures and civilisations, which constitute the heritage of all humankind.

3. As First Nations and Peoples we assert the right to freely exercise our basic human rights free from discrimination of any kind.
4. It is recognised and accepted that we as First Nations Peoples have been deprived of our basic human rights and fundamental freedoms, which resulted from British colonisation and dispossession.
5. The colonial usurpation of our lands, waters, and natural resources has prevented us from exercising our right to development in accordance with our sovereign inherent cultural, socio-economic and spiritual interest in these modern times.
6. As First Nations and Peoples it is our sovereign inherent right to have control of our lands, including our natural resources, our environment, our waters, which is derived from our ancient political, economic, religious and social structures in accordance with our culture, Law and philosophies.
7. It is our inherent sovereign right to declare and advance our interests in all lands, waters, natural resources, subsurface and airspace as decreed by our *Dreamings* and *songlines*, through our obligation to Mother Earth and Creation.
8. We have an ancient inherent obligation to protect our heritage and to control and regulate its use.
9. It is recognised and accepted that we have an ancient sovereign inherent right to protect, control and regulate our ancient practices that ensure their sustainability and thereby establishes equity in development and management of our natural environment and ecosystems.
10. We recognise and accept that our Nations and Peoples have a sovereign inherent right to freely determine our future and way of life, with each other and with other sovereign nation states, in a spirit of co-existence and co-operation, thereby ensuring mutual benefit and respect.
11. Any and all such agreements, arrangements, 'treaties' shall be consistent with all international laws that govern human rights and human interaction.
12. We have a right to engage all human rights covenants and conventions in order to promote our hopes and aspirations as Nations and Peoples.
13. Nothing in this set of principles may be used to deny any Nations or Peoples their sovereign inherent rights to freely pursue their right of self-determination while asserting sovereignty.
14. This statement of principles is a step forward for the recognition, promotion and protection of our sovereign inherent rights and freedoms in respect to our future development and wellbeing.

Signed this 24th day of May 2012 at *Kuradji* Aboriginal Embassy, Sandon Point, New South Wales."

In the words of that Indigenous Declaration of Independence one can hear the echo of the immortal words of Thomas Jefferson, and of another Declaration – a more recent one.

On 2 September 1945 [Hồ Chí Minh](#), revolutionary, statesman, later Prime Minister and first President of the Democratic Republic of Vietnam, delivered an address to the Vietnamese People, then freed from the Japanese occupation.

[Hồ Chí Minh](#), too, evoked Thomas Jefferson's words. He said:

“All men are created equal. They are endowed by their Creator with certain inalienable rights, among these are Life, Liberty, and the pursuit of Happiness.

This immortal statement was made in the Declaration of Independence of the United States of America in 1776. In a broader sense, this means: All the peoples on the earth are equal from birth, all the peoples have a right to live, to be happy and free.

The Declaration of the French Revolution made in 1791 on the Rights of Man and the Citizen also states: ‘All men are born free and with equal rights, and must always remain free and have equal rights.’ Those are undeniable truths.”

[Hồ Chí Minh](#) went on:

“Nevertheless, for more than eighty years, the French imperialists, abusing the standard of Liberty, Equality, and Fraternity, have violated our Fatherland and oppressed our fellow-citizens. They have acted contrary to the ideals of humanity and justice. In the field of politics, they have deprived our people of every democratic liberty.

They have enforced inhuman laws; they have set up three distinct political regimes in the North, the Centre and the South of Vietnam in order to wreck our national unity and prevent our people from being united.

They have built more prisons than schools. They have mercilessly slain our patriots- they have drowned our uprisings in rivers of blood. They have fettered public opinion; they have practised obscurantism against our people. To weaken our race they have forced us to use opium and alcohol.

In the fields of economics, they have fleeced us to the backbone, impoverished our people, and devastated our land.

They have robbed us of our rice fields, our mines, our forests, and our raw materials. They have monopolised the issuing of bank-notes and the export trade.

They have invented numerous unjustifiable taxes and reduced our people, especially our peasantry, to a state of extreme poverty.

They have hampered the prospering of our national bourgeoisie; they have mercilessly exploited our workers.

In the autumn of 1940, when the Japanese Fascists violated Indochina’s territory to establish new bases in their fight against the Allies, the French imperialists went down on their bended knees and handed over our country to them.

Thus, from that date, our people were subjected to the double yoke of the French and the Japanese. Their sufferings and miseries increased. The result was that from the end of last year to the beginning of this year, from Quang Tri province to the North of Vietnam, more than two million of our fellow-citizens died from starvation. On March 9, the French troops were disarmed by the Japanese. The French colonialists either fled or surrendered, showing that not only were they incapable of ‘protecting’ us, but that, in the span of five years, they had twice sold our country to the Japanese.

On several occasions before March 9, the Vietminh League urged the French to ally

themselves with it against the Japanese. Instead of agreeing to this proposal, the French colonialists so intensified their terrorist activities against the Vietminh members that before fleeing they massacred a great number of our political prisoners detained at Yen Bay and Cao Bang.

Notwithstanding all this, our fellow-citizens have always manifested toward the French a tolerant and humane attitude. Even after the Japanese putsch of March 1945, the Vietminh League helped many Frenchmen to cross the frontier, rescued some of them from Japanese jails, and protected French lives and property.

From the autumn of 1940, our country had in fact ceased to be a French colony and had become a Japanese possession.

After the Japanese had surrendered to the Allies, our whole people rose to regain our national sovereignty and to found the Democratic Republic of Vietnam.

The truth is that we have wrested our independence from the Japanese and not from the French.

The French have fled, the Japanese have capitulated, Emperor Bao Dai has abdicated. Our people have broken the chains which for nearly a century have fettered them and have won independence for the Fatherland. Our people at the same time have overthrown the monarchic regime that has reigned supreme for dozens of centuries. In its place has been established the present Democratic Republic.

For these reasons, we, members of the Provisional Government, representing the whole Vietnamese people, declare that from now on we break off all relations of a colonial character with France; we repeal all the international obligation that France has so far subscribed to on behalf of Vietnam and we abolish all the special rights the French have unlawfully acquired in our Fatherland.

The whole Vietnamese people, animated by a common purpose, are determined to fight to the bitter end against any attempt by the French colonialists to reconquer their country.

We are convinced that the Allied nations which at Tehran and San Francisco have acknowledged the principles of self-determination and equality of nations, will not refuse to acknowledge the independence of Vietnam."

And [Hồ Chí Minh](#) concluded:

"A people who have courageously opposed French domination for more than eighty years, a people who have fought side by side with the Allies against the Fascists during these last years, such a people must be free and independent.

For these reasons, we, members of the Provisional Government of the Democratic Republic of Vietnam, solemnly declare to the world that Vietnam has the right to be a free and independent country and in fact it is so already. The entire Vietnamese people are determined to mobilise all their physical and mental strength, to sacrifice their lives and property in order to safeguard their independence and liberty."

Little [Hồ Chí Minh](#) knew. The struggle for the liberation of Vietnam would continue for another thirty years, against the Americans and their coerced allies - the Australians who

were all victims of the servility of their governments. And so 521 conscripted Australians died as a result of the war and over 3,000 were wounded. The war was the cause of the greatest social and political dissent in Australia since the conscription referendums of the first world war. Many draft resisters, conscientious objectors, and protesters were fined or gaoled, while some soldiers met a hostile reception on their return home. Hundreds of thousands of Vietnamese were contaminated with Agent Orange, napalmed, made homeless, killed.

Thirty years are a long time, but only one seventh of the English occupation of Indigenous Land.

The Blacks will be up for a long struggle. They should well think thrice before accepting what could be one more swindle.

Dr. Venturino Giorgio Venturini devoted some fifty years to study, practice, teach, write and administer law at different places in four continents. Over forty years of residence in Australia he has come to conclude with Samuel Beckett that: "Quand on est dans la merde jusqu'au cou, il ne reste plus qu'à chanter." George.Venturini@bigpond.com thanks Diet Simon for editorial suggestions.

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