Chapter Four

The People of any Race

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On previous recent occasions I have prefaced my paper with a disclaimer to the effect that the views I expressed were mine alone, and were not to be taken in any sense as those of my Minister or the Victorian Government. I still hold the position of Crown Counsel. Accordingly the same disclaimer applies.

My subject today is s.51(xxvi) of the Constitution, the power of the Australian Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to the "people of any race for whom it is deemed necessary to make special laws". Until 1967 the power made an exception of people of "the aboriginal race in any State", but in that year the exception was removed by amendment.

The original wording remains interesting and important nevertheless, because it clearly reflects a belief, or at least an assumption, that Aboriginal Australians are demonstrably a different race from non-Aboriginal Australians. The 1967 amendment did not depart from this belief. On the contrary, it confirmed and reinforced it, for the effect of the amendment was to widen the power to enact laws which draw distinctions between different sections of the community on the basis of race.

There is considerable irony in this, because the large majority of the electorate who voted in favour of the 1967 amendment undoubtedly did so because they disapproved of racial bias, at all events as applied to Aborigines. That superficially self-contradictory position however proceeds from a much deeper difficulty: what exactly does the Constitution mean when it refers to the people of any race?

At the time of federation people had more robust and less confused ideas about race than we do nowadays. The propriety of racially discriminatory legislation was not in question. What exercised the minds of the framers of the Constitution was not the moral character of such laws, but who should have the power to enact them.

A demonstration of this, which led to the original exclusion of Aborigines from the race power, happened more or less by accident. Colonial Queensland made extensive use of Polynesian labourers, over whom it maintained close control to ensure that they departed on completion of their contracts. Possibly because Queensland did not altogether trust the other future States not to interfere in its internal affairs, Sir Samuel Griffith at the 1891 Convention proposed a clause to give the Commonwealth exclusive power to make special laws.

At that date New Zealand was showing tentative interest in the mooted federation and had sent a delegation of three. When Griffiths' clause came on for debate, one of the New Zealand delegation, a certain Captain Russell, objected that, should New Zealand join the federation, such a provision would mean that the Commonwealth could make special laws for the Maoris. Captain Russell's caution, incidentally, was clearly an inherited characteristic. His parents, not content with their son bearing the proud surname Russell, made doubly sure by christening him Russell as well.

The Australians were not going to buy into Maori problems, so the clause was altered to make clear that the Maori race was excepted from the special laws power. This intervention however

directed people's minds to the Australian Aborigines. There had never been any intention to remove legislative power over Aborigines from the States. So an exclusion for Aborigines went in as well. Then the Maori problem solved itself when New Zealand lost interest in federation, and the exception was removed. This left Aborigines in unduly conspicuous isolation to no purpose.

I say "to no purpose" because the entire race power question could and should have been avoided by relying on the immigration power, which follows immediately after the race power in s.51(xxvii) of the Constitution. It is clear that the race power was conceived of as a protection against outsiders. There seems to be no sound reason why the immigration power, the motivation for which centred on Chinese immigration, could not have accommodated Polynesians, Indians or aliens of any other description without adopting the elusive concept of race.

This was not done, and so we are left with the resulting problem. This I described earlier as being what the Constitution means when it refers to the people of any race. An alternative formulation would be to ask what meaning should be attributed to the Constitution by the High Court. However the problem is expressed, the difficulty remains that the framers of the Constitution gave no indication what are the criteria to be applied to decide whether an identified category of people is a race for the purpose in hand.

So far as the original intention is concerned, two things seem nevertheless to be clear: that the framers of the Constitution thought that identifying a different race was merely a statement of the obvious; and that Aborigines, Maoris, Polynesians, Chinese, Indians and Afghans were unambiguous examples. The assumption evidently was that, in common with most of the heads of legislative power in s.51 of the Constitution, the central content of the word "race" is reasonably self-explanatory and therefore, like tax, trade, commerce, banking, insurance and so on, brings its criteria of validity with it.

Unfortunately, that assumption has turned out to be not only mistaken, but also mistaken in a singularly embarrassing way. Whatever its precise content in any particular context, a central characteristic of the concept of race is that it emphasises difference, the differences which distinguish one race from another. It is true that it also emphasises the resemblance between the members of a race which makes them a separately identifiable group, but the differences from everyone else are necessarily implied because, if they were not there, the resemblances would have no significance.

The shortcoming of the concept of race applied by the framers of the Constitution is that it can be applied, in the relatively simple manner that they envisaged, only by adopting criteria which are likely to be seen nowadays as accurate but offensive. Such criteria would include colour, physique, cultural development, language and social standing, whether by conquest or otherwise.

The fact that the use of such criteria as these in order to distinguish between different peoples arouses such widespread disapproval nowadays brings to light another awkward circumstance. This is that, by implication, the critics are asserting that as far as human beings *(homo sapiens sapiens)* are concerned there is only one race, the human race. This standpoint has respectable anthropological support.

I do not need today to speculate how far back along the evolutionary trail we need go to see whether less successful species have a rational claim to be included in the concept of the human race. Nevertheless it is notable that *homo sapiens neanderthalensis* shares with us the identification *homo sapiens* , and that *homo habilis* and *homo erectus* also have the *homo* . All of which amply illustrates the unwisdom of including the nebulous concept of race in a Constitution.

Returning now to more familiar territory, until the *Native Title Act Case* [1] the High Court had had occasion only twice to consider the scope of the race power: in *Koowarta v. Bjelke Petersen* [2] and the *Tasmanian Dam Case* . [3]

In *Koowarta* the main question was whether ss.9 and 10 of the *Racial Discrimination Act* 1975, which prohibit racial discrimination, were within the external affairs power of s.51(xxix) of the Constitution. It was argued further that, alternatively or additionally, they were within the race power, as special laws for the benefit of Aborigines and Torres Strait Islanders. It was held by a 4:3 majority that they were within the external affairs power, but by a 5:1 majority that they were not within the race power.

The basis of the race power decision was that ss.9 and 10 were not limited in their application to the people of any particular race, but applied to everyone equally, and hence were not special laws for the people of any race. The contrast is with the later *Native Title Act Case* , in which it was held that the *Native Title Act* ("the *NTA* ") is a special law because it operates for the benefit of holders of native title, who by definition are persons of a particular race distinguishable from the rest of the population.

The main question in the *Tasmanian Dam Case* was whether Commonwealth conservation legislation, which was being relied on to prevent Tasmania from proceeding with the construction of a dam and associated works, was within the external affairs power. Certain provisions sought specifically to protect from damage certain sites, relics and artefacts of cultural significance to Aborigines. One question was whether these provisions were special laws within the race power.

By identical 4:3 majorities, each of the foregoing questions was answered in the affirmative. So far as the race power was concerned, it had been argued that a law about sites, relics and artefacts was not a law with respect to people. The majority held that there is nothing in s.51(xxvi) that requires a distinction to be drawn between the people of a race and objects of significance to them as part of their cultural heritage. The significance of this to the *Native Title Act Case* in due course was that it meant there was little point in arguing that the *NTA* is a law about native title and not a law about people.

You will have noted, no doubt, that nothing that I have said so far about *Koowarta* and the *Tasmanian Dam Case* bears on what is meant by "the people of any race". I am concealing almost nothing from you. It was a Hamlet without the Prince situation. The question central to s.51(xxvi) was almost entirely ignored. It can be conceded that, having regard to the ground of decision, it did not require the Court's attention in *Koowarta* , but that is certainly not true of *Tasmanian Dam* .

The only two members of the Court to mention the matter in *Tasmanian Dam* were Deane J and Brennan J. [4] The former did so only for the purpose of observing:

> "It is unnecessary, for the purposes of the present case, to consider the meaning to be given to the phrase `people of any race' in s.51(xxvi). Plainly, the words have a wide and non-technical meaning ...".

Brennan J was a little more discursive but achieved no greater precision, and similarly gives the impression of finding the concept of race difficult to come to grips with. None of which, with respect, is much help, although understandable.

The next opportunity to tackle the question was the *Native Title Act Case* in 1995. The opportunity was not taken, but the small attention given to it revealed an advance in the technique of evasion. The majority judgment (six Justices) picked up, and adopted, [5] a suggestion made by Stephen J in *Koowarta* . [6] He said:

> "Although it is the people of `any' race that are referred to, I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises; without this particular necessity as the occasion for the law, it will not be a special law such as s.51(xxvi) speaks of."

I much admire the ingenuity of this technique. Hence I mean no disrespect when I say that it is a bootstrap operation. Consider the following Socratic exchange. Why must a race be identified? For the purpose of making a special law. Why do we need a special law? Because it has been deemed necessary for the identified race. But how do we identify the race? We look at the special law to find out what harm it remedies, for that must reveal the race at whom the law is directed. Who deems the special law to be necessary in the first place? Parliament, for that is a political decision and hence not for a court. So Parliament decides what is a race? Yes.

This may be a convenient way out of the race problem for the High Court for the time being, but it is hardly satisfactory as an exercise in constitutional interpretation. It cannot be the case that Parliament can define for itself whatever group of people it likes and declare that they are a race for the purpose in hand. In the *Native Title Act Case* the majority judgment refers [7] to the possibility of the Court retaining "some supervisory jurisdiction ... against the possibility of a manifest abuse of the races (sic) power", but that observation was directed at abuse of the requirement of necessity, not race identification.

The technique of seeking to by-pass the race problem by including in the special law a definition of the relevant race was resorted to in the *NTA* . One might have thought it elementary that such a definition should strive to achieve as much precision as possible, even though it might result in some people who identified with the race in question being excluded. The *NTA* definitions passed scrutiny by the High Court, notwithstanding that their most striking characteristic is that very vagueness which should have been avoided.

Indeed, with all respect to the High Court, their lack of precision is such as to raise a doubt whether they can be properly described as definitions at all. If not, the Court in the *Native Title Act Case* went even further in circumventing the race requirement of s.51(xxvi) than I have described already, for it went beyond effectively referring that requirement to Parliament and ignored it altogether. I say that because, if the so-called definitions do not make it possible to identify members of the relevant race by some objective criterion, the statute lacks an essential requirement for validity under s.51(xxvi).

The definitions to which I am referring are in s.253 of the *NTA* . The expression "Torres Strait Islander" is defined as "a descendant of an indigenous inhabitant of the Torres Strait Islands". The expression "Aboriginal peoples" is defined as "peoples of the Aboriginal race of Australia". For many purposes these expressions would no doubt sufficiently indicate two groupings of people distinct from the rest of the population. Even in the context of the race power, many individuals self-evidently fall within these general descriptions. The difficulty lies with people, particularly those of mixed ancestry, who do not follow a native way of life but nevertheless identify with one of the two races.

It should be noted that this problem is not necessarily confined to people of mixed ancestry, although clearly this is likely to be the usual situation. Nevertheless the possibility exists of a person who wishes to identify with a group to which he or she would not normally be regarded as belonging, but by whom he or she has been accepted. A simple example is marriage, or

cohabitation, between two people neither of whom is of mixed ancestry, one being an Aborigine and the other not. The non-Aborigine henceforth identifies as an Aborigine and is accepted.

The question arises whether, in terms of the *NTA* definition, such a person is part of the Aboriginal race of Australia. At the moment we do not know. It may be argued that this does not matter, because such a person cannot possibly maintain a native title claim. This is not necessarily the case. Aboriginal law or custom may provide that, in the case of death, the asserted title passes to the survivor. Whatever the outcome, the *NTA* definition of Aboriginal peoples does not assist.

The definition of Torres Strait Islander seems to avoid this problem by speaking in terms of being descended from an indigene. It shares with the Aboriginal definition however the greater deficiency of omitting to provide for people of mixed ancestry. No indication is given of how many generations of indigenous ancestors are required to attain the status of descendant. Similarly absent is any rule of residence or ancestry to determine whether an Islander is indigenous in the first place, an omission which not only reduces the so-called definition to incoherence, but also reflects the underlying problem about race in a different guise.

Further, the word "an" in the expression "an indigenous inhabitant" may or may not mean that a distant solitary ancestor turns someone a century later who has never been near the Torres Strait into a relevant descendant. If it can or does have any such effect, it becomes impossible without absurdity to describe the *NTA* , in its purported application to Torres Strait Islanders, as a law for the people of a race.

In one sense, the comparable problems in the case of Aborigines are simpler, because the so-called definition is not a definition at all but a tautology, which tells the reader nothing beyond the unsurprising likelihood that Aborigines are Aborigines. It totally lacks a criterion whereby one can determine whether a given person is a member of the relevant group or not. This means that there is no criterion whereby either the High Court or anyone else can rationally decide whether the *NTA* is within the race power of s.51(xxvi).

As a practical matter, this is an even more damaging defect in the case of Aborigines than Torres Strait Islanders, because it seems obvious that there are many more of the former of mixed ancestry, they are far more widespread, and a substantial proportion of them are indistinguishable from non-Aborigines. It becomes correspondingly more important to be able, as a matter of law, to distinguish between persons who are, and persons who are not, people of the Aboriginal race within the meaning of the *NTA* .

A further possibility (which I do not support, but mention in order to leave no stone unturned) is to take up again the suggestion made by Stephen J in *Koowarta* , discussed already, and apply it by analogy to the *NTA* instead of to s.51(xxvi). Section 223(1) of the *NTA* defines native title in terms of interests to which the holders are entitled under their own laws and customs. As a matter of statutory construction, it may be that the so-called definitions of race have to be read down to be co-extensive with the interests identified in s.223(1). In effect, only persons who have proved native title are people of the relevant races for the purposes of the Act.

The first weakness of this approach is that, even if it assists with the concept of the Aboriginal race, it cannot be applied to Torres Strait Islanders, because they are to be identified by ancestry, not by a general reference to race. If there is no sufficient ancestry, inferences to be drawn from native title cannot arise, because native title cannot be claimed. The numerous defects in the Islander definition, which I regard as fatal to its validity, remain.

Secondly, the suggested approach will not, on closer examination, overcome the difficulties of the Aboriginal definition either. What it in effect suggests is that, to find out whether a claimant

is an Aborigine, the assumption be made at the outset that he or she is. If the claim succeeds, the assumption is confirmed, and if it fails, it is not. But this takes us nowhere. The claim cannot succeed unless the claimant at some stage proves that he or she is an Aborigine. Nothing can be proved without evidence, and in the case of an Aborigine of mixed ancestry no-one knows what has to be proved.

Claims are of course proceeding, even though the success rate up to now has not been far above nil. They do not seem to have been failing however on racial grounds. The inference I draw from that is that the standard of proof of the race point is not exactly high. It may well be also that both judges and advocates are reluctant to rely on an argument which is unlikely to meet with favour in the present High Court. It may also be seen by some as not going to the heart of the matter. Needless to say, that latter point of view is not one with which I can agree because, for the reasons I have given already, I am entirely of the opposite opinion.

One last word about the possibility of seeking assistance from the definition of native title. It makes no allowance for the great variety of native laws, customs and languages across the country. One might have thought that, by failing to do so, s.223(1) endangered the *NTA* 's claimed character as a law with respect to any particular race, or indeed as a special law.

Lastly, it may be argued that all the foregoing is irrelevant, because the High Court has held the *NTA* to be a valid special law, and anyway native title is here to stay for the foreseeable future. That misses the point. The difficulties inherent in s.51(xxvi), and the ineffective manner in which the High Court has sought to dismiss them, remain and will come back to haunt us.

I have long held the view that an express power to make racially based laws should have no place in an Australian Constitution. The only remedy in this country for the harm done to our social and constitutional fabric by s.51(xxvi) is to complete the job of repealing it. It is ironical to reflect that such a step would undoubtedly attract the greatest opposition from people who conceive themselves to be opponents of racism.

Endnotes:

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1 . *Western Australia v. Commonwealth* (1995) 183 CLR 373.
2 . *Koowarta v. Bjelke Petersen* (1982) 153 CLR 168.
3 . *Commonwealth v. Tasmania* (1983) 158 CLR 1.
4 . At 158 CLR 273Ä4 and 243Ä4, respectively.
5 . At 183 CLR 460.
6 . At 153 CLR 210.
. At 183 CLR 461.
