THE AUSTRALIAN CONSTITUTION AND THE AUSTRALIAN ABORIGINE

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(1) THE NEGATIVISM OF THE CONSTITUTION

The Australian Founding Fathers paid no attention at all to the position of the Australian aboriginal race, and the only two references to aborigines in the Constitution are highly negative in character. They are:

> s. 51. 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:
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> . . . . .
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> (xxvi.) The people of any race, *other than the aboriginal race in any State*[1], for whom it is deemed necessary to make special laws.
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> s. 127. 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.

Today there is a public conscience concerning the aborigines; since about 1956, steps have been taken to give them increased citizenship rights and liberties, to atone for wrongs done them by the white man, and to secure their full participation in government, and in this atmosphere it may seem shocking that the Federal Conferences and Conventions of 1890, 1891 and 1897-8 should have paid so little attention to their position. It is not merely that the Founders treated aboriginal questions as a matter for the States. The Commonwealth was not initially given any independent territory on the mainland and its ultimate acquisition of such territory, though likely, was by no means certain; general questions of land settlement, industrial development, employment relations and education were also left to the States, and few of the powers given to the Commonwealth had any obvious or direct relevance to aboriginal policy, so that a decision to leave aboriginal questions to the States was rationally defensible. What is surprising is that the position of the aborigines was never even mentioned. The Conventions contained many men who were in general sensitive, humane, and conscious of religious and social duties to the less fortunate sections of the community, and Alfred Deakin in particular had an agonising sensitivity to such matters, as shown in his 'prayer diary'.[2] Yet so far as I can ascertain

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[1] My emphasis.

[2] See La Nauze, *Alfred Deakin* (1965) 1, 72.

neither Deakin nor any other delegate ever suggested even in passing that there might be some national obligation to Australia's earliest inhabitants, nor does Deakin appear in any other context to have taken an interest in this question. As we shall see, the references in the Convention Debates to the abovementioned sections are of the scantiest. In those concerning section 51 (xxvi.) the exclusion of the aborigines was never mentioned at all—it was simply taken for granted that they should be excluded; in those concerning section 127, the aborigines were mentioned, barely. But the inference that 'aboriginal natives' are not 'people' never seems to have occurred to any of the hundreds of delegates, officials and members of the colonial parliaments who perused the draft Constitution in its various forms—all containing these provisions in one wording and another—between 1891 and 1899.

When giving evidence on aborigine questions before the 1927-9 Royal Commission on the Constitution,[3] the Chief Protector of Aborigines, Western Australia, suggested that the indifference of the Founders to such questions was due to two main reasons; firstly, there were no reliable counts of the aboriginal population then available and contemporary guesses grossly underestimated their probable numbers,[4] and secondly it was widely thought that the aborigines were a dying race whose future was unimportant. To this it should be added that the debates on section 51 (xxvi.), while not referring directly to aboriginal problems, did 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.

Nevertheless, it is worth examining the sections of the Constitution mentioned above for at least three reasons. Firstly, in contemporary discussions about the aborigines, an exaggerated *negative* importance has been attached to these sections, and such doubtful interpretations have to some extent influenced official policy. Secondly, amendment of both sections and particularly of section 127 has been actively canvassed, so it is well to try to achieve a reasonably clear idea of the difference which amendment might make. Thirdly, the inquiry will illustrate some of the methods available for constitutional interpretation when, as in this case, judicial authority is non-existent and the comments of text-writers of standing are extremely scanty. The inquiry leads to some odd legal byways.

(2) SECTION 51 (xxvi.)

This provision appeared in the first printed draft of the Constitution considered by the Sydney Convention in 1891; it was then numbered sub-clause 1 of clause 53 of Chap. 1, and read: 'The affairs of people

[3] Royal Commission on the Constitution (1927-1929), Minutes of Evidence, 488.

[4] Also suggested by Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 984.

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.*'[5] The words italicised are the principal substantive expressions which disappeared in the course of redrafting in 1897-8; the reference to Maoris became unnecessary when New Zealand withdrew from the federal movement, and the other expressions, though giving some help with interpretation, were deleted in the course of redrafting not because of any specific objection during debates but because they were thought by the drafting committee to be redundant. The course of debate showed that Sir Samuel Griffith had first suggested the clause.[6] In its earliest forms, the Constitutional Committee drafts, prepared before the Convention met, did not have the excluding clause; it appeared in the penultimate draft before the one produced to the Convention.[7] Clause 53 was equivalent to the present section 52; it gave exclusive powers to the Commonwealth. In 1891 and again at the Melbourne session of 1898, this was challenged, on the ground that until the Commonwealth acted it was desirable that States should be free to deal with such matters;[8] delegates accepted the view that when the Commonwealth acted, its legislation would prevail—an early adumbration of the ' covering the field ' test for present section 109—but were not satisfied with assurances from Griffith and Barton that until the Commonwealth acted, the equivalent of present section 108 would preserve sufficient State power, even if this was an exclusive head. Following the sense of the debates, the provision was moved to the present section 51, so as to become a concurrent instead of exclusive power.

Quick and Garran provided a short but illuminating commentary on the section.[9] I shall return to this, but note now that their observations introduced the unfortunate expression ' alien race ' to describe the objects of the power; probably they 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. But their reference to ' aliens ' may be the origin of the view of Wynes,[10] who implies that the power relates to aliens in the nationality sense; he goes further and says, citing no sources, that the placitum refers to ' foreigners not living under a government in the civilised sense '—meaning presumably not that the Australian

[5] *National Australasian Convention Debates*, Sydney (1891) 953.

[6] *National Australasian Convention Debates*, Adelaide (1897) 832, *per* O'Connor.

[7] *Griffith Papers*, Dixson Lib. Add. 501, Item 8, 12, 13.

[8] *National Australasian Convention Debates*, Sydney (1891) 702 (Deakin), 704 (Griffith); *Debates of the Australasian Federal Convention*, Melbourne (1898) 230 (Deakin), 232 (Barton).

[9] Quick and Garran, *op. cit.* 622.

[10] Wynes, *Legislature, Executive and Judicial Powers in Australia* (3rd ed. 1962) 403.

government is uncivilised but that the 'foreigners' come from a place of origin with such a non-government. Inglis Clark[11] and Nicholas[12] ignore the section, and Kerr[13] treats it along with placita (xix.), (xxvii.), (xxviii.), (xxix.), and (xxx.) (naturalisation and aliens, immigration and emigration, influx of criminals, external affairs, relations of the Commonwealth with the islands of the Pacific) in such a way as to give no guide to the meaning of (xxvi.) considered alone. Quick[14] remarks only that (xxvi.) appears by itself not to have been the basis for any Commonwealth legislation, though he thought it may be called in aid of Acts, based mainly on the naturalisation and pensions powers, in which discrimination against 'special races' appears;[15] the amusing feature of this suggestion is that the pensions example he gives[16] discriminates against *aboriginal natives of Australia*, the very race excluded from Commonwealth competence under (xxvi.). Harrison Moore[17] comments at greater length and more to the point. This exhausts the secondary material, all of which may be cited with suitable circumlocutions in Court. None of it provides any suggestions about the possible significance of the exclusion of aborigines. However, it may be of some importance, when considering the significance of such exclusion, to consider what the positive part of the placitum means, and to this I now turn.

The secondary sources mentioned above, and in particular *Quick and* Garran and Harrison Moore, make it clear that (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.'[18] 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'.[19] Quick and Garran illustrate the position by citing *Yick Wo* v. *Hopkins*,[20] in which the Supreme Court of the U.S.A. held invalid a San Francisco bylaw which conferred on officials

[11] Inglis Clark, *Australian Constitutional Law* (2nd ed. 1905).

[12] Nicholas, *The Australian Constitution* (2nd ed. 1952).

[13] Kerr, *The Law of the Australian Constitution* (1925).

[14] Quick, *The Legislative Powers of the Commonwealth and the States of Australia* (1919).

[15] The Constitutional Table of Commonwealth Acts e.g. Commonwealth Acts (1963) 891, continues to recite scattered sections of this type ; all are mainly referable to other heads of power—elections, immigration, posts and telegraphs.

[16] *Invalid and Old Age Pensions Act* 1908-1912, s. 12 (Cth).

[17] Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed. 1910) 462.

[18] *Ibid.* 464.

[19] Quick and Garran, *op. cit.* 622.

[20] (1886) 118 U.S. 356.

an arbitrary power to license laundries; the power was exercised so as to refuse licences to Chinese while issuing them to other applicants. The ground of the decision was denial of equal protection of the laws, guaranteed by the Fourteenth Amendment. Quick and Garran observe that no such guarantee is contained in the Australian Constitution, so that the law held invalid in *Yick Wo v. Hopkins* could validly be enacted by an Australian State. They imply that such a law could also be validly enacted by the Commonwealth; this, however, is very doubtful. If the *policy* by which the San Francisco licensing power was *administered*—no Chinese to conduct a laundry—were specifically embodied in a Commonwealth law, then perhaps this might be valid under (xxvi.). But plainly a general Commonwealth law requiring laundries to be licensed would be invalid in peacetime, as lacking any head of power under which it could be brought, and the method of its administration would be irrelevant to the question of characterisation.

Harrison Moore, with a greater feeling for the problem of characterisation, refers to the conflicting Privy Council decisions on the Canadian Constitution, *Union Colliery v. Bryden*[21] and *Cunningham v. Tomey Homma*.[22] In *Bryden* the Board (*per* Lord Watson) held invalid a British Columbia law which prohibited the employment of Chinese underground in coal mines; their Lordships said this was a law concerning ' naturalization and aliens ', a power exclusive to the Dominion under section 91 (25) of the *British North America Act* 1867. In *Tomey Homma*, the Board (*per* Halsbury, L.C.), held valid a British Columbia law which denied the vote in provincial elections to Japanese, whether aliens, naturalised or natural-born, as being exclusively related to provincial matters under section 92. These two decisions have since puzzled and divided Canadian judges;[23] thus a Saskatchewan law prohibiting the employment of white women by Chinese was held valid,[24] but strong doubts were cast on the validity of a British Columbia Act which made Japanese and Chinese ineligible to receive mining leases.[25] These Canadian difficulties, however, arise from the constitutional necessity for assuming that an Act can have one and only one characterisation, so that it can be classified as coming either under the exclusive Dominion powers (section 91) or the exclusive Provincial powers (section 92). This can be done only if the Courts engage in inspired guesses as to the dominant purpose of an Act; Lord Halsbury illustrated the inspirational process when in *Bryden* he said that the Act considered in *Tomey Homma* was intended to prevent Chinese from living in British Columbia at all—one of those Board observations which help to explain the lack of enthusiasm for Privy Council decisions

[21] [1899] A.C. 580.
[22] [1903] A.C. 151.
[23] See Laskin, *Canadian Constitutional Law* (2nd ed. 1960) 959ff.
[24] *Quong-Wing v. The King* (1914) 49 S.C.R. 440.
[25] *Attorney-General of British Columbia v. Attorney-General of Canada* [1924] A.C. 203.

among Canadian constitutional lawyers. In Australia, this sort of logical balancing feat is less necessary,[26] and in any event as Harrison Moore points out, Australian section 51 (xxvi.) seems in terms designed to avoid in similar contexts the necessity for agonising about the scope of the 'aliens' power (xix.), which is in identical terms with the Canadian and involves similar difficulties of interpretation. Hence it may be *a fortiori* that Dominion laws held valid in Canada under their section 91 (25), and Provincial laws held invalid because invading the exclusive Dominion competence under that head, could be enacted by the Commonwealth under (xxvi.); on the other hand, it does not necessarily follow that competence denied the Canadian Dominion under section 91 (25) or permitted to Provinces, although the law touches aliens or naturalised persons, would necessarily be invalid if enacted by the Commonwealth, because (xxvi.) has a wider scope. And since both the aliens and the 'special races' powers in Australia are concurrent, conflict between Commonwealth and State laws in such matters can arise only as a matter of inconsistency under section 109.

The Convention Debates on the earlier forms of (xxvi.), which may not be officially available for argument in Court,[27] confirm the views expressed by Quick and Garran and Harrison Moore and go a little further. Griffith in particular made a most illuminating statement in 1891;[28] he said: '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. The Dutch and English governments in the east do not allow their people to emigrate to serve in any foreign country unless there is a special law made by the people of that country protecting them, and affording special facilities for their going and coming. I am not sure that that applies to Japan. It might apply to the Government of China, but I do not know whether it does. 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.' The statement also shows that neither Griffith nor his colleagues were supermen, and that they sometimes, in the pressure of the work, missed obvious points. Everything Griffith was concerned about could have been achieved under the immigration aliens and external affairs powers; his anxiety about State action (which explained his fight to make the 'special races' power exclusive) was particularly groundless, since plainly the Commonwealth had ample authority under the immigration power to prevent such State action, and indeed it is surprising that

[26] See *The British Commonwealth* (1952) 2, Australia, 52ff.

[27] Wynes, *op. cit.* 25. However, it is to be hoped that the High Court will forget its earlier inhibitions on this topic and treat the Convention Debates as contemporary evidence of meanings. It is absurd to allow reference to the speculations of Quick and Garran and Harrison Moore, themselves obviously based on Convention history, but deny reference to the history itself.

[28] *National Australasian Convention Debates*, Sydney (1891) 703.

Griffith did not press to have the *immigration* rather than the 'special races' power made exclusive to the Commonwealth. However, what he says serves to emphasize that (xxvi.) need not be concerned with laws discriminating *against* minority races or imposing restrictions on them; it can authorise laws for their benefit. In 1898 at Melbourne, Forrest did not want the power to be given at all,[29] and Bernard Wise shrewdly suggested[30] that Griffith's purpose would be met if the power was confined to circumstances in which the Commonwealth had made an *immigration* law on the lines indicated by Griffith. The discussion on this occasion tended to be in terms of 'aliens', but Barton showed clearly[31] that the power was not confined to aliens in any legal sense; the persons coming under it might well be British subjects. Nor need they be migrants; they could well be born in Australia. Nor need they be coloured, nor from uncivilised countries. Thus there is nothing in the constitutional context nor in the history to suggest that the placitum should be given any narrower meaning than its words suggest. The difficulty rather is to give reasons why the placitum should not be the basis for laws on almost any subject at all and applicable to the *majority* 'race'—every person, say, of 'Caucasian origin'. The elimination of the phrase 'not applicable to the general community' may have been unfortunate, since while it was there such a wide construction would have seemed implausible, and in its absence, one can only point to the history and to the general consideration that a construction making the other express grants of power almost unnecessary is unlikely to be adopted. The debates make it plain that the power was regarded as important and that the delegates, gazing in a clouded crystal ball, thought the power was likely to be exercised early in the history of the Commonwealth; no one suggested that laws discriminating against racial minorities were in any degree undesirable.

The exclusion of the aborigines may not necessarily have been against their interests in accordance with the ideas of the time; while they might have lost the possibility of Commonwealth laws for their protection and advancement, so far as such laws had to depend on (xxvi.), they were also saved from the sort of laws *against* their interests which were uppermost in the minds of the delegates as likely to be passed pursuant to the placitum. But in more recent discussions, fears have been expressed that the exclusion of aborigines from (xxvi.) might by inference restrict the competence of the Commonwealth to make special provision concerning aborigines in laws enacted under other powers. Thus Mr. Gordon

[29] *Debates of the Australasian Federal Convention*, Melbourne (1898) 1, 240. He recounted pathetically that his State had been compelled to abolish hawking altogether, rather than discriminate against Indian hawkers as he had wished, because the latter course would have offended the Indian and British governments. See *Hawkers and Pedlars Act*, (1892) 55 Vic. No. 35 (W.A.).

[30] *Ibid.* 229.

[31] *Ibid.* 229.

Bryant, M.P., Vice-President of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders, has written that because of their exclusion from (xxvi.), the aborigines ' have not the full benefit of Commonwealth law or the fundamental protection available to any other person in Australia, whether Australian born, migrant, or even illegal entry ', and he adds : ' The Commonwealth has established secondary and tertiary scholarships for a wide variety of Australian students including, of course, Aborigines, but because of s. 51 (xxvi.) could not make a special case for Aborigines, although one doubts whether it would be challenged if it decided to do so.'[32] Similarly the Select Committee of the Commonwealth House of Representatives on the Voting Rights of Aborigines, which sat in 1961, feared that a law extending the franchise to aboriginals in federal elections might be invalid because of an inference from (xxvi.). The Committee accordingly obtained opinions from the Solicitor-General, Sir K. H. Bailey, and myself on this point. We independently advised that the exception to (xxvi.) must be read as confined to that placitum, and does not constitute any basis for restricting Commonwealth competence under other heads of power.[33] I added that any conceivable fear based on (xxvi.) would be met by making the aboriginal franchise uniform with the general franchise, but I did not regard the power to make a special franchise provision for aboriginals as open to serious doubt, nor did the Solicitor-General. The Commonwealth had, indeed, for long made special electoral laws about aborigines; it did so when *excluding* aborigines from the vote, unless they already had it for a State lower House (which most did not),[34] in the *Commonwealth Franchise Act* 1902 section 4; and again in 1949 when the federal vote was extended to aboriginal natives of Australia who were or had been a member of the Defence Force.[35] Nobody had ever challenged these provisions. The Select Committee of 1961 recommended extension of the vote to all aborigines, but with a differentiation from non-aborigines to this extent: a qualified aboriginal should not (like other electors) be compelled to enrol, but once enrolled should like others be compelled to vote. This was duly carried out in the *Commonwealth Electoral Act* 1962, sections 2 and 3, and has likewise been unchallenged. Hence the doubts expressed by the Mr. Bryant as quoted above are probably without foundation. For example, it would be quite competent to the Commonwealth to make laws under section 51 (xxiiiA.) (social services) by which scholarships were made available for aborigine students on more favourable terms than apply to other students. However,

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[32] Smoke Signals (1965) vol. 4, No. 2, 13-14.

[33] Compare the rule as to provisos : *Jennings v. Kelly* [1940] A.C. 206. For the opinions see the Report of the Committee, F8478/61, Appendices 4 and 5, and see further *post*, under (5).

[34] This was based on the assumption that s. 41 of the Constitution required it.

[35] Commonwealth Electoral Act 1949, s. 3.

this by no means disposes of all Mr. Bryant's criticisms of the present position, contained in the article mentioned ; it is certainly the case that because the aborigines are excluded from (xxvi.), they cannot have the benefit of laws, executive acts and expenditure of money which would have to be validated solely by reference to that section. Thus, as Mr. Bryant says, the Commonwealth has no general power to establish schools ; it can and does conduct courses in English in connection with the migration program, and this is obviously valid as incidental to (xxvii.) (migration) and perhaps (xxiv.) as well. Mr. Bryant is probably correct in saying that the Commonwealth could not, if acting within the strict limits of its powers, set up schools solely for aborigines in the States. However, it could make conditional grants to the States for such a purpose under section 96, and it may be doubted whether the establishing of schools solely for aborigines is sound policy. On the other hand, provision of specialised medical services for aborigines would certainly be within (xxiiiA.), and as suggested here no negative implication from (xxvi.) is likely to stand in the way.

(3) SECTION 127

On its face, this extraordinary clause demands interpretation and restriction. To whom is it addressed—States, Commonwealth or both? Does it prevent the private student of demography from estimating the aboriginal population, or from publishing a total Australian population which includes the aborigines? When faced with such questions, even the most literal-minded constitutional Judge would, I expect, say at once that the section must be related to the rest of the Constitution. Perhaps it should be read thus : ' When for the purposes of this Constitution it is necessary to reckon the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.' There are four sections of the Constitution under which a reckoning of the numbers of the people is of operational importance—24, 89, 93 and 105. Section 24 is of permanent importance; it requires the membership of the House of Representatives to be distributed among the States in proportion to the respective numbers of their people. Sections 89 and 93 required the allocation of certain Commonwealth expenses in proportion to population when calculating the payment to the States of the balance of customs duties collected by the Commonwealth. Section 89 operated only until the imposition of uniform customs duties, which occurred in 1901. Section 93 operated for five years after such imposition and thereafter until Parliament otherwise provided; Parliament otherwise provided by measures which came into full operation in 1910. Section 105 provides for a population-proportion method of taking over part of State debts, but in practice the section has been superseded by section 105A, which has no such provision. Hence only in relation to

section 24 does section 127 have any present *operational* importance. In the event of a new State being admitted under section 121, or sections 121 and 124 in conjunction, representation of that State in Parliament might (though it need not) be in proportion to population, and so might the representation of Territories under section 122; in those cases section 127 would likewise apply. Notice also that section 25, designed after a U.S. model[36] to discourage racial disqualifications in State franchise laws, uses the expression ' in reckoning the numbers of the people of the State or of the Commonwealth ', and it is specifically a qualification of section 24; its effect overlaps that of section 127 in relation to section 24.

But from an early date, the Commonwealth authorities acting under the *Census and Statistics Act* 1905 took the view that section 127 was also a qualification on the census and statistics power—section 51 (xi.)—and that accordingly when taking censuses and publishing population figures, the Bureau must not include full-blooded aborigines. A note to this effect has appeared in the published censuses since the first in 1911.[37] No State statistical bureau has ever felt itself bound by such a restriction,[38] although as indicated above a construction of section 127 having this consequence for the Commonwealth bureau might just as easily be considered binding on the States.

The Constitution does not provide any definition of ' aboriginal natives '. Bureau of Census interpretation, based upon an opinion from the Attorney-General, restricts the expression to full-bloods; this is sensible, but itself required a process of construction which might well have been carried further. Yet the Bureau has presumed to treat the Torres Strait Islanders as *not* being ' aboriginal natives ' within section 127. But if a lunatic literalness is to prevail, these Islanders plainly come within the ban of section 127. Perhaps if the section had referred to ' aborigines ', it might have been interpreted as applying only to the mainland ethnographic stock ; perhaps too if the original phrase ' aboriginal natives of Australia ' had been retained there would have been some basis for excluding the Islanders. But ' of Australia ' was dropped. The indigenous Melanesians of those Torres Strait Islands which are part of Queensland assuredly fall within the present expression.[39]

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[36] Fourteenth Amendment, para. 2.

[37] *Census of the Commonwealth* (1911) 222. It seems a reasonable guess that legal opinion—probably of the Attorney-General—was obtained, but if so it has never been published. No such restriction was inserted in the *Census and Statistics Act* itself.

[38] Until 1921, the States attempted to count only aborigines in close contact with settlements or the administration, but since then they have—where the question arises—estimated 'wild' aborigines as well and the figures have regularly appeared in State Year Books, Statistical Registers etc.

[39] For the ethnographic history of the islanders, see *Reports of the Cambridge Expedition to Torres Straits* (1935) i, and Beckett, J.R., *Politics in the Torres Straits Islands* (Thesis in the Menzies Library, A.N.U., 1963) chaps. 1 and 2.

Nor does the fact that a majority of the indigenes of the Queensland islands have since migrated to the mainland affect the question.[40]

Quick and Garran give us a brief summary of the drafting history of section 127, but offer no opinion about its meaning. Inglis Clark, Quick, Kerr, Nicholas and Wynes ignore the section ; by the same token, none suggest that it restricts the census power. Harrison Moore can hardly be said to discuss the meaning of section 127, but he does refer to it twice, solely in the context of section 24 and the machinery by which enumerations of the people are carried out for the purpose of redistributing the House of Representatives constituencies among the States. He makes no mention of a possible connection between section 127 and the census power.

If the question ever did come before the High Court, it is to be hoped that the Court would relax the old rules about Convention history, because, on this matter, the history is unusually helpful. Section 127 was not a part of the first draft of the Constitution put before the 1891 Convention on 31 March. It was moved for inclusion by Griffith on 8 April, the day before the Convention closed, and adopted, and then became clause 3 of Chapter VII of the 1891 draft, in the following form: 'In reckoning the numbers of the people of a State or other part of the Commonwealth aboriginal natives of Australia shall not be counted.' When moving the insertion of the clause, Griffith said: 'I intend to propose a new clause, dealing with the mode of reckoning the population. The clause was in the bill as prepared by the drafting committee, but the general committee struck out the clauses to which it referred. Those clauses having been re-inserted, it is necessary that this clause should also be re-inserted.'[41] There is no official record of the commitee proceedings mentioned, but some idea of their activities can be gleaned from Quick and Garran,[42] from Deakin's *Federal Story*,[43] from Wise's *Making of the Australian Commonwealth*,[44] from the Griffith papers,[45] and from the *Sydney Morning Herald*, 20 March-4 April, 1891. The 1961 Select Committee on Aboriginal Voting Rights commissioned the National Library of Australia to trace the Convention history of (xxvi.) and section 127, and in its report the Library attempts a reconstruction of the events referred to by Griffith on 8 April 1891.[46] The Library report

[40] It probably follows from Covering Clauses 3, 4 and 6 that aboriginals of Papua-New Guinea are not included in s. 127, but even this is arguable.

[41] *National Australasian Convention Debates*, Sydney (1891) 898.

[42] Quick and Garran, *op. cit.* 133-135, 139.

[43] La Nauze, *op. cit.* ch. vii.

[44] Wise, *Making of the Australian Commonwealth.*

[45] *Griffith Papers*, Dixson Lib. Add. 501.

[46] The Library report was not published by the Committee. I am deeply indebted to the Library staff for making it available to me, and I have made extensive use of it in preparing this paper.

shows that there were two occasions when changes in draft clauses might have occurred as suggested by Griffith, and that the most likely clauses to have been changed in this way were those dealing with financial relations between the Commonwealth and the States; these are known to have adopted at different stages a basis of revenue contributed (under which section 127 would be irrelevant) and a population basis, the latter being the final form. Nothing in the records or in the general history of the time suggests that the then form of the census power (Chapter 1, clause 52 (12)) was ever debated in Committee, or was in the slightest degree contentious, and it was certainly in the original Griffith draft. There was at that stage no great reason to bother about the question of representation under the equivalent of the present section 24, because the deduction of aborigines was attended to in one form by the equivalent of the present section 25, which was also in from the beginning. Hence this part of the history strongly supports the view that section 127 was not a literal blanket prohibition of counting aborigines, but was related to specific operational clauses of the Constitution. The successive drafts of the Constitution in Australia did not have an interpretation clause at the beginning, as is the present Australian drafting practice. At that stage of drafting, it was difficult to be sure how many clauses would eventually involve population proportions. Hence it was natural enough to place the clause in a miscellaneous chapter towards the end.

The clause, amended by deleting the words ' of Australia ', appeared in the same relative position in the draft with which the 1897 Adelaide Convention began, the numbering now being 120. For the first time the clause was debated, as follows.[47]

> *Dr Cockburn*: As a general principle I think this is quite right. But in this colony ' (*sc.* South Australia) ' and I suppose in some of the other colonies, there are a number of natives who are on the rolls, and they ought not to be debarred from voting. *Mr Deakin*: This only determines the number of your representatives and the aboriginal population is too small to affect that in the least degree. *Mr Barton*: It is only for the purpose of determining the quota. *Dr Cockburn*: Is that perfectly clear ? Even then as a matter of principle, they ought not to be deducted. *Mr O'Connor*: The amendment you have carried already preserves their votes.[48] *Dr Cockburn*: I think these natives ought to be preserved as component parts in reckoning up the people. I can point out one place where 100 or 200 of these aboriginals vote. *Mr Deakin*: Well, it will take 26,000 to affect one vote. *Mr Walker*: I would point out to Dr Cockburn that one point in connection with this matter is, that when we come to divide the expenses of the Federal Government *per capita*, if he leaves out these aboriginals South Australia will have so much the less to pay, whilst if they are counted South Australia will have so much more to pay.

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[47] *National Australasian Convention Debates*, Adelaide (1897) 1020.

[48] This refers to the then equivalent of present s. 41.

The clause was then agreed to. In 1898 at Melbourne, the clause was briefly referred to because the Tasmanian and New South Wales Legislative Councils had suggested adding aliens to aborigines as persons not 'fit to be counted'. In a somewhat confused exchange between Barton and Isaacs, it was eventually agreed that so far as the State Houses had a point of any importance, it was sufficiently attended to by section 25, now identical with the present section 25. Actually section 25 dealt and deals with the different question of persons disqualified by *race*, irrespective of nationality; if the delegates had thought more carefully, they would have seen that the Councils were groping towards a calculation of quotas for the purposes of section 24—representation in Parliament— by reference to persons qualified to vote rather than by a count of the total population. But the views of Legislative Councils were not especially popular at the Conventions, and were least likely to receive sympathetic treatment from men like Barton and Isaacs, so the question raised by the Councils, about which there could be several rational points of view, was not argued out. At first reading, Barton might be taken as meaning that the then clause 120 had no relation to the quota question under clause 24 at all. I think, however, that this was not his intention; he was meaning to say only that the sort of problem raised by the Councils should be dealt with, if at all, under clause 25 rather than clause 120. Otherwise Barton's main statements on clause 120 were: 'This has reference to the reckoning of the number of people of the states of other parts of the Commonwealth. There are various other clauses, dealing with finance and other questions, under which it becomes necessary to count the people of the States.' If he had been pressed, the only questions he could have pointed to would have been financial ones. He also said: 'In other parts of the Bill, where the provision is merely for statistical purposes, it is only considered necessary to leave out of count the aboriginal races.' This reference to 'statistics' is the nearest approach in all the sources to a justification for the view that present section 127 qualifies the census power, but it is clear enough from the context that he meant statistics relevant to the working of the financial clauses. Clause 120 was not again discussed. In committee, drafting changes produced the reference to the numbers of the people of the Commonwealth as a whole, which re-emphasised the relation of the clause to section 24, and the present numbering was adopted.

Since the Founders showed some confusion over the relation between sections 127, 25 and 24, it is desirable to clarify this relation. If section 24 were qualified only by section 25, then during the long period in which *all* full-blooded aborigines were denied the vote under State law in Queensland and Western Australia, the whole of the numbers of those full-bloods would have had to be deducted from the population of the State for the calculation of electoral quotas under section 25. But

during the same period, at least *some* full-bloods had the vote in each of the States New South Wales, Victoria and South Australia.[49] Hence in those States, section 25 had no application to aborigines, and the *whole* of the full-blooded aboriginal populations would properly have been included in the count of the State populations for the purpose of section 24. But with section 127 also applicable, the whole of the full-blooded aboriginal populations had to be deducted in *all* States for the purpose of section 24, and this was in fact done.

The conclusion is that common sense and history combine to indicate a very restricted scope for section 127, notwithstanding its apparent generality. In 1900, both the prevailing attitude towards the aborigines, and the practical difficulties in enumerating their numbers with even approximate accuracy, made their exclusion from relevant population counts defensible. Even in 1911, the timorous attitude of the federal census authorities had some justification; the Commonwealth was still feeling its way with the States, who might easily have been upset about any move which could have been considered relevant to electoral quota questions, and the practical difficulties of enumerating aborigines were still formidable. But this timorousness has steadily become less defensible. It is now clear that no individual citizen would have standing to object to a census count of aborigines.[50] Conceivably a State Attorney-General could obtain a declaration, but he would find it difficult to assign the Commonwealth law which he claimed was invalid and there are considerable doubts about the availability of such a remedy in respect of an administrative action having no clear injurious impact on the legal right of any State;[51] injury could not be shown unless there was reason to believe that the count of aborigines would be used contrary to section 24 or some other specific relevant section, and as shown above there is no other such section. Hence an effective legal challenge is likely to arise only if an aborigine was prosecuted under section 11 or section 20 of the *Census and Statistics Act*, for failing to make a return or making a false return. But this also is a remote possibility; the census authorities depend on persuasion in preference to prosecution. Having regard both to the interpretative problems and the procedural difficulties that any objector to a census of aborigines would face, a Commonwealth administration would be very well justified in proceeding on the narrowest possible interpretation of section 127 and should rather welcome the opportunity for testing the section judicially which any opposition might produce.[52]

[49] There were no full-bloods left in Tasmania.

[50] Cf. *Anderson v. Commonwealth* (1932) 47 C.L.R. 50.

[51] See Wynes, *op. cit.* 585ff.

[52] The full Commonwealth Census report for 1961 is not available, but an advance Bulletin (No. 36) gives both an enumeration of full-blooded aboriginals for all States, and an estimate for Western Australia and the Northern Territory of full-bloods said to be 'out of contact' at the census date.

(4) NEGATIVE IMPLICATIONS

Since the notion that negative implications form sections 51 (xxvi.) and 127 may affect other powers has gained currency, the general position as to such implications needs consideration. In Australian federal constitutional history, implications of this type have been important, the most celebrated example being the rise, fall, and partial revival of the negative restrictions on power implied from the concept of federalism.[53] There is no formal reason why exactly the same mental process should not be used in order to arrive at wide general implied prohibitions based upon sections 51 (xxvi.) and 127: this is a system in which the aborigines are to be left to the States, and therefore all federal powers should be subject to an implied prohibition against meddling with that topic. But legal reasoning is rarely formal in this sense, in spite of the constant efforts of some judges and commentators to make it appear so. Legal reasoning is shot through with explicit or covert references to value considerations, including in constitutional questions considerations of politics and political common sense. The federal implications which have survived concern basic questions of the relations between governments considered as political and administrative machines, without regard to the details of the area of competence in which they operate; the implications which have not survived are those by which an attempt was made to curtail specific federal powers not by reference to protecting the State governmental apparatus but by reference to protecting its area of competence. Another area in which negative implication has played a considerable role is that of judicial power.[54] In the *Boilermakers'* Case, the joint judgment of Dixon, C.J., McTiernan, Fullagar and Kitto JJ.,[55] which has heavily stamped on it the style of the Chief Justice, says of Chapter III of the Constitution (The Judicature):

> 'It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap. III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III. The fact that affirmative words appointing or limiting an order or form of things may also have a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation',[56]

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[53] Else-Mitchell (ed.), *Essays on the Australian Constitution* (2nd ed. 1961) 22ff.

[54] See especially *Waterside Workers' Federation v. J. W. Alexander Ltd.* (1918) 25 C.L.R. 434; *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257; *R. v. Kirby ex p. Boilermakers' Soc.* (1956) 94 C.L.R. 254 (H.C. affd. P.C., 95 C.L.R. 529).

[55] (1956) 94 C.L.R. 254, 266.

[56] *Ibid.* 270.

and they refer to *dicta* in *Townsend's* Case, a decision of the Court of Wards and Liveries given in 1553.[57] The *dicta* are unintelligible without an account of the case, which concerned one of the most gnarled and knotty branches of the old real property law.

Simplified, the issue in *Townsend's* Case was as follows. Amy held Blackacre in fee tail; she married Roger who conveyed Blackacre to feoffees to uses, to the use of Amy and himself for lives and after further life remainders, to Catherine the wife of a grandson in fee tail. Amy survived Roger, then died, and the intervening lives also fell in, so Catherine now claimed. Roger's conveyance of his wife's property was tortious, but under the old law such conveyances had a presumptive validity which could be destroyed only if effective action were taken in due time by the persons wrongfully deprived by the tortious feoffment, and the time for taking such action had passed. If Amy or those claiming under her had acted in due time, so as to procure a 'remitter' of the estate tail to Amy and the heirs of her body, then in the events which had happened Blackacre would have descended to Roger Junior, an infant. The King was entitled to wardship of Roger Junior's estates; this is why the claim came before the Court of Wards, where it was argued by a distinguished bar. The basis of the claim on behalf of the King and Roger Junior was that although proceedings to nullify the dead Roger's tortious feoffment had not been taken in due course, nevertheless a remitter to Amy and the heirs of her body had been brought about by construction of law because of the effect of the *Statute of Uses* of 1536. That statute converted the interest of the *cestuy que use* into a legal estate of the same quantity and quality as the use she would otherwise have had; hence it was argued that on Amy surviving her husband, the vesting of a sole legal estate of life in her force of the statute had the same result as other forms of entry or recovery by her would have had, and caused her estate tail to revive. This argument was met by the following counter-argument:

> 'Although the statute (of Uses) is in the affirmative, yet in sense and substance it contains in itself a negative, and these words—*that the estate and possession, which was in the tenant of the land, shall be adjudged in the cestuy que use, according to the quality, manner, form, and condition as he had before in the use*—contain in themselves a negative, viz. in no other quality, manner, form and condition, which is as strongly contained in the affirmative words, as if it had been put in express words. And so do all other statutes, which in affirmative words appoint or limit an order or form in things which were not at the common law.'[58]

The scope of the negative implication here is extremely limited, and indeed it could be said that no question of implication arises at all; the

[57] 1 Plow. 111, 113 ; 75 E.R. 173, 176.

[58] This is probably the passage intended by the High Court reference.

question is merely one of giving effect to the statute in its own terms and not permitting it to have further consequences by fitting it into a pre-existing set of common law rules.[59] The narrowness of the implication is shown by a further passage, as follows:

> ' But if a thing is at the common law, a statute cannot restrain it, unless it be in negative words . . . And so if a statute was made, that it should be lawful for a tenant in fee-simple to make a lease for 21 years, and that such lease should be good, the statute so made in the affirmative might not restrain him from making a lease for 60 years, but a lease made for more than 21 years should be good, because it was good by the common law, and therefore if the statute would restrain him, it ought to have negative words, as, that it shall not be lawful for him to make a lease for more than 21 years, or that a lease made for a longer time shall not be good. And so is the diversity, where a statute makes an ordinance by affirmative words, touching a thing which was before at the common law, and which was not before at the common law.'[60]

This illustrates the proposition that implications can never be based simply on the words of a statute. A wider range of premises is required than the statute provides—accustomed methods of thought, value assumptions about the relative worth of common law and statutes and many other assumptions, explicit or unstated.

In the *Boilermakers' Case*, the problem as it appeared to the Court was whether a body exercising the judicial power of the Commonwealth, and satisfying the conditions for such exercise stated in Chapter III of the Constitution, or derived from it by judicial interpretation, could also be required to exercise quasi-legislative functions. The considerations here relevant include very few ' things at the common law '. The Commonwealth is a governmental authority created wholly by statute. The general assumption of our system is that governmental powers require to be established by law, which in Australia means, generally speaking, enacted law. Hence if you like to put the matter in terms of scholastic logic, you can say that the provisions of the Constitution not only establish affirmative powers as stated but also imply a negative that the Commonwealth has no other powers and that the powers so given must be exercised on the conditions and in the manner stated by the Constitution, and no other. This however, is only a rhetorical way of saying that the Constitution means what it says. If the matter rested there, it would follow that legislative power had to be exercised by the Parliament, since Chapter I vests such power in that body, and similarly executive power must be exercised by the Governor-General and Ministers under Chapter II, and judicial power only by Courts under Chapter III. No other conclusion could be reached from the document and the other assumptions

[59] Compare the mens rea problem in crime, as discussed in *Thomas v. R.* (1938) 59 C.L.R. 279 and *Proudman v. Dayman* (1941) 67 C.L.R. 536.

[60] 1 Plow. 111, 113; 75 E.R. 173, 177.

just mentioned. The problem arose only because of further assumptions of the Australian system, drawn from the history and common understandings of government and the men concerned with it in both English and Australian constitutional history; these assumptions concerned the possibility of an intermingling of governmental functions which the words of the Constitution do not suggest at all. In particular it was confidently assumed that legislative power could be delegated extensively, and more particularly that it could be delegated to the executive; the practice followed the assumption and the Courts had confirmed its legality.[61] Why, then, should not this *extensive* implication authorise the delegation of legislative powers to a Court? No answer can be given to this question merely in terms of logical implication from the terms of the Constitution. The High Court held against such a possibility, and the Privy Council affirmed their decision, for reasons of political policy. The Courts considered that owing to the special responsibilities of Courts in a federal system, they should be given a high degree of insulation from the other organs of government and should not be expected to discharge functions markedly different in character from those associated with judicial work. But the problem would never have arisen if it had not been for the general understanding that so far as legislative and executive functions are concerned, the Constitution does *not* mean what it says. Hence the High Court majority erred in saying:

> 'If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of sections 1, 61 and 71.'[62]

You would be quite unable to understand the constitutional provisions mentioned unless you knew a good deal about the Anglo-American history of the notion of separation of powers, because it is only in the light of that history that the expressions 'legislative', 'executive' and 'judicial' can be given approximate meanings relevant to this Constitution. If, for example, you were familiar only with the quite different categories of governmental power postulated by Chinese political theory,[63] or even by a man so close to our tradition as Montesquieu,[64] our categories would be unintelligible. In addition, the logical inference referred to by the Court becomes possible only if you are given the further information that in the system under consideration, governmental power must be

[61] Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177.

[62] (1956) 94 C.L.R. 254, 275.

[63] See Hsieh, *Government of China* 1644-1911, and the table at p. 17 of Linebarger & Ors., *Far Eastern Governments and Politics*.

[64] Montesquieu, *Spirit of the Laws*, Book xi.

established by reference to either common law or statute, that common law has little relevance here and that this is the only relevant statute. It may also be noticed that as in the case of the surviving federal implications, we are here concerned with broad, fundamentally important questions as to the relations between principal organs of government, and that the organ mainly concerned—the judiciary—is important not only because of its place in the set of Commonwealth instrumentalities, but because it polices the distribution of competence between the Commonwealth and the States.

Hence when the full set of premises relevant to the implications, actual or supposed, from federalism or from a separation of powers, is sketched in, one sees by contrast why no similar implications need be drawn from sections 51 (xxvi.) and 127. They do not deal with organs of government, important or unimportant. There are no traditional modes of thought or social values associated with them which require special attention or are likely to have a profound influence on judicial attitudes. It is contrary to common sense to attribute to them any more significance than they possess considered individually and in relation to the disparate considerations with which history suggests they were intended to deal.

(5) AMENDMENT

A majority of the Royal Commission of 1927-1929 reported 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 actively dissent from this view; they only observed that the financial burden of making special provision for the advancement and welfare of the aborgines should not fall wholly on the States in which they were most numerous, a view which could be sufficiently met by conditional federal grants to the States—Queensland and Western Australia—where the largest number of full-bloods outside the Northern Territory is to be found. The Joint Parliamentary Committee on Constitutional Review of 1957-1959 expressed no view on this section. Having regard to the dubious origins of the section, and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would seem preferable to any amendment intended to extend its possible benefits to the aborigines. There is much to be said for the Commonwealth taking over complete responsibility for the welfare of the aboriginal people, since it is already responsible for the largest single group—in the Northern Territory—and is less likely to be inhibited by local built-in prejudices against the aboriginal people that exist in several areas of State electoral representation, government and administration. But the Commonwealth is not well placed to handle the integration of the aborigines, where that is the main object of policy, and since 1961 there

has been a trend towards co-operative federalism in this sphere, which might be better than sole action by any government. Lacking the support of any Commission or Committee report, and having regard to the formidable difficulty of explaining the issues, including the meaning of section 51 (xxvi.), to an Australia-wide electorate, it would still seem best to leave these issues alone.

The 1927-1929 Commission made no recommendation concerning section 127, but the 1957-1959 Joint Committee unanimously recommended its repeal, and at the time when this was written it seemed likely that a proposal for this purpose would be put to the people under section 128 of the Constitution within the life of the twenty-fifth Parliament. It is difficult to see any case against repeal. Now that all aborigines have the federal vote, and are likely soon to have the vote in all States, there is no sense in excluding them from the calculations of quotas under section 24, and there is no other relevant purpose for section 127. The practical difficulties in the way of counting the 'wild' ones must be overcome. However, it should be emphasized that the repeal of section 127 will make a minimal difference to anything that matters, and least difference of all to the aborigines. If this were the only proposal before the electors, it would not be worth the cost of the referendum; the money would be better spent directly on aboriginal welfare. And it will take a fairly substantial additional proposal or proposals to make the package deal worth the cost of a referendum.