

## Week 1: Australian Constitutionalism: Introduction and History

### *What is a constitution?*

- Creation of the State
- Rules that constitute the State and by which power is used
  - All public power comes from the Constitution
  - An exercise of power outside of the Constitution is invalid
- Legal and political document
- Gives power
- Rights to political speech and protest and the government have introduced laws that prohibit it

### **Constitutions**

- Political and legal constitutionalism
  - Political → UK
  - Legal → US
- Written vs unwritten
  - Constitutions can also be a combination of both
  - UK and NZ → no formal document titled 'the constitution'
  - Australia have a document and much of it is in the document
- Flexible vs rigid
  - Flexible → amended by parliament
  - Rigid → requires a different approach to amendment (requiring a referendum)
- Categorisations are imperfect and each jurisdiction will adapt its own model

1. Doctrinal understanding of Australian constitutional law
2. Normative reflection on what Australian constitutional law should be

### **Comparative examples**

- Cultural and socioeconomic rights

### **The Australian Constitution**

#### *Framing and Adoption*

- The Constitution records a *deal* made between the 7 former independent colonies (the States)
- Late 1800s, the colonies moved towards Federation with the approval of the UK government
- Emphases was on what powers would be given to the new Commonwealth Government
- Commonwealth Constitution
  - Section 9 of the *Commonwealth of Australia Constitution Act 1900*
- State constitutions
  - *Constitution Act 1902* (NSW)
- Statutes
  - Statute of Westminster
  - Australia Acts
- Supplemented by common law and unwritten constitutional conventions
- Constitutional conventions
- Common law

### **Preamble**

- Refers to desire to federate and the consent of the UK

### **Constitutional Actors**

1. The Legislature
2. The Executive
3. The Judiciary

### Section 51

- Legislature can pass laws, as long as they come within these heads of power
- For example: defence power → government can take national position on defence
- Several have become very critical
- Most powers are concurrent
- If state law is inconsistent with a Commonwealth law, it is invalid

### The Legislature

- Voters elect Parliamentarians
- Bicameral:
  - House of Representatives → proportional representation
  - Senate → two senators per State or Territory

### The Executive

- The leadership of the Executive Government - Prime Minister and Ministers – are drawn from the parliament
- S 64: requirement that the ministers responsible for the departments of government must be members of Parliament

### Judicial power

- Strict separation of judicial power
- *Marbury v Madison*
- *Communist Party* case

### Amendment

- Requirement for referendum (section 128)
- Since 1991, only 8/44 proposals have been successful
- Approval of Bill in referendum

### A Constitutional Hybrid

- Influence of the British and American constitutional traditions
  - Elaine Thompson - the “Washminster” Mutation
- What concepts were ‘borrowed’ from each of those models?

### Rule of Law

- A.V. Dicey
  - Man can only be punished if prove in court he breached the law
  - No man is above the law and everyone is equal
  - Constitution is drawn from the rights of private persons
- Ivor Jennings
  - Limitation of power on every authority and no sovereign acting on state can exercise power

### UK: Parliamentary sovereignty

- "Parliament means, in the mouth of a lawyer (though the word has often a different sense in conversation) the King, the House of Lords, and the House of Commons: these three bodies acting together may be aptly

described as the "King in Parliament", and constitute Parliament. The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever. and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament"

- A. V. Dicey, Introduction to the Study of the Law of the Constitution (1885) (emphasis added)
- Doesn't apply to the Australian concept
- Example:

### **Constitutional monarchy**

- Queen Elizabeth II of Australia

### **Federalism**

- Powers are distributed between a central government and regional government
- In Australia, the Constitution establishes a federal system of government with powers distributed between the Commonwealth and the States
  - Section 51

### **Cf US Constitution Article 1 Section 8**

- The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
- To borrow Money on the credit of the United States;
- To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes;
- To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- To establish Post Offices and post Roads;
- To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- To constitute Tribunals inferior to the supreme Court;
- To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water, To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy:
- To make Rules for the Government and Regulation of the land and naval Forces;
- To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- To provide for organising, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
- To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;-And

- To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
  - 36

### **US: Strict separation of powers**

- "The accumulation of all powers, legislative, executive and judicia[l] in the same hands, whether of one, a few, or many, and whether hereditary, self- appointed, or elective, may justly be pronounced the very definition of tyranny" (James Madison, Federalist No. 51, 1788).
- Checks and balances

### **Australia: A partial separation of powers?**

- Relationship between Executive and legislature

### **The Australian High Court**

- New appointments:
- Chief Justice Gageler AC, 9 October 2012 - sworn in as Chief Justice, 10 November 2023
  - Justice Beech-Jones - sworn in November 2023
- Note: the significance of joint judgments, dissents etc.
  - In several weeks of the unit we will trace divergent reasoning over time, before explaining the current position (which can, of course, later be overturned-e.g NZYQ!)

### **The Principle of Constitutionality**

- Must conform to the Constitution
- *Marbury v Madison*: US case) invalidity of laws that contradict the Constitution
- The Constitution as higher law
- My experience: Judicial supremacy, constitutional courts, abstract and concrete constitutional review

### **The Principle of Constitutionality in Australia**

- Australian statutes must conform to the Australian constitution
- *Marbury v Madison* in Australia: it is ultimately the courts, particularly the High Court as the highest court in the land, who are charged with interpreting and applying the principles of the Constitution.

### **Judicial Review**

- Australian courts therefore have the power of judicial review over Acts of Commonwealth and State Parliaments, and the consequent power to strike such statutes down for want of constitutionality.
- Is it undemocratic? What about institutional stability? Preventing abuse of power?

### **The High Court of Australia**

- Ultimate guardian of the Constitution
- Independence from political authorities guaranteed by the principle of separation of powers
- It is not apolitical: its decisions may obviously have huge political ramifications, as they can constitute a insurmountable hurdle for executive government agendas
- Influence of the executive government: Section 72 (i) states that Federal Justices are appointed by "the Governor-General in Council" in fact they are appointed by the Governor-General on the advice of the Executive, normally the Attorney-General.
- A conservative trend of High Court Justices (because of their connection to the bench)
- Ideological trends: closer or farther from the protection of constitutional rights

## Constitutional Interpretation

- Interpretation: From signs to meanings
- Legal interpretation: from statements to norms
- Similar principles and techniques to the principles ruling the interpretation of ordinary statutes: strictly textually, by reference to history, purposive approach, originalism, and the living Constitution
- Constitution is more open-textured
- Also: apex courts have a mission

## Case Study

### *Territorial Senators*

- S 7: The Senate shall be composed of Senators for each state
- S 122: The Parliament ... may allow the representation of [Territories] in either house of Parliament or to the extent and on the terms which it thinks fit.
- Issue: is the *Senate (Representation of Territories) Act 1973* (Cth) constitutionally valid?
- The majority (4): The creation of Territorial Senators was authorised by s 122. To this extent, they read s 7 down as only providing for the *initial* composition of the Senate.
- The minority (3) however read s 7 as prescribing that the Senate would be exclusively composed for all time of State representatives.
- The minority read s 122 of the *Constitution* down so as not to permit the creation of Territorial Senators with full voting rights

## Text

### Principle

- Literal interpretation of the text's words is the least controversial method of statutory interpretation.
- It involves the least amount of "judicial innovation" and potential "judicial law-making" and intervention in the legislative domain, as the interpretations are tied to either the text of the relevant provisions, or the text of the surrounding provisions.
- In the *Engineers case* (1920), the High Court emphasises that constitutional interpretation should be primarily based on the express provisions of the Constitution, rather than on a desire to promote or avoid certain social or political consequences.

### Problems

- Open texture: different readings
- Different provisions that can collide: In the *Territorial Senators* case, both sides resorted to textual or literal arguments to support their views.
- The majority interpreted the words in s 122 according to their natural meaning while the minority did the same with s 7.

## Context

### Principle

- Looking at the words in the context of other constitutional provisions
- Minority:
  - S 122 could not be interpreted so as to undermine the essential federal nature of the *Constitution*, which included the maintenance of the Senate as the "States" house.
  - S 7 was not a transitional provision
- Majority:
  - Parliament was given extensive powers regarding "representation" in both Houses of Parliament for both Territories under s 122, and the new States s 121.

- Systematic interpretation: Kirby J: The *Constitution* should be read as an “entire, interrelated and coherent instrument”. Context and interpretation.

## Originalist Arguments

### Principle

- At common law, the ordinary rule of interpretation is that the judge must attempt to “give effect to the intention of the [lawmaker]”
- Statutes are generally to be interpreted in accordance with the meaning that they had on the day they were passed. If Judges fail to construe statutes in accordance with the original legislative intent, the meaning of statutes would then change over time without legislative intervention, which would amount to a usurpation of the legislative function.
- The High Court has long confirmed that originalism applies in the context of constitutional interpretation.
- Thus, the Court generally endeavours to interpret constitutional provisions in accordance with the intentions of the drafters of the *Constitution*.

### Criticism

- Originalism in constitutional interpretation may be criticised for freezing the Constitution according to values, such as 19th century racist and sexist assumptions, which may have been long abandoned.
- Originalism would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations.
- Deane J (*Theophanous v Herald and Weekly Times Ltd* (1994)): the Constitution must be construed as a “living force” representing the will and intentions of all contemporary Australians, both women and men, and not as a lifeless “declaration of the will and intentions of men long since dead”.

### Defence

- Goldsworthy responds that s 128 empowers the represent generation to change the *Constitution*.
- Furthermore, “a Constitution cut loose from its actual historical meaning is adrift on an uncharted sea of judicial discretion”
- Interpretation in accordance with “contemporary standards” might mean that our constitutional system of government would become overly dependent on the “armchair sociological guesswork” of the judiciary
- Regardless of the arguments in favour of and against originalism, Goldsworthy writing in 1997, argued that no recent Australian High Court Justice has seriously repudiated its application in constitutional interpretation.

### Contextual arguments against

- The difficulty of formal constitutional change can be compensated by informal constitutional change
- This implies departing from originalism and updating the *Constitution* by means of change in constitutional interpretation.

### Convention debates

- From which sources may Judge draw their evidence of original intent?
- The record of Convention Debates.
- However, the courts shied away from using the Debates as an interpretational aid until 1988.
- The records of those Debates are of course external to the *Constitution*.
- Under the predominant textual approach to interpretation, the meaning of a law should be readily ascertainable and available, rather than hidden in a separate source.
- In 1988, the High Court unanimously endorsed the limited use of the Debates in *Cole v Whitfield* (1988).

## Comparative arguments

- In the absence of Australian precedents, and even in their presence, judges sometimes look to comparable overseas precedents for guidance.
- Aim: In the search of best practice?
- Problem: Discovering a comparator?
- Federalism: USA
- England: Historical reasons (persuasive precedents)

### **Policy arguments**

- Traditional interpretative techniques are designed to ensure that judges resort to “legal” rather than political reasoning in making their decisions.
- Policy decisions regarding the social or economic outcomes of a decision are traditionally the domain of the legislature and the executive, rather than the judiciary.
- However, occasionally policy will compel a judge to choose one meaning over a competing meaning, due to the consequences of the latter meaning.
- In the absence of a clearly “correct” or “clearly wrong” answer to constitutional interpretation questions, Justices decide cases based on personal preferences for competing values.
- It is perhaps a fiction that judges ignore policy considerations in constitutional decision-making though that judge will not always admit this.
- Mason J: It is misleading to deny the relevance of policy considerations in judicial decision-making.
- Dworkin and why it is necessary to disclose and debate about the judges ideology in the confirmation process.

### **State Decisis**

- Through the High Court is not bound by its own decisions, it will ordinarily follow existing precedents.
- The strong policy consideration of legal stability and predictability dictates that precedent should be followed.
- There are numerous instances of justices disapproving of relevant precedents, but nevertheless feeling compelled to follow them.
- However, it is ultimately a judge’s personal value judgement as to whether pre-existing case law is “plainly wrong” and to try to change it.

### **Implication**

- In the *Engineers case*, the HCA ruled that judges should primarily interpret the Constitution according to the express words therein.
- Implied meanings could only be construed where such a meaning was necessarily or logically implied from the text of the *Constitution*.
- Otherwise judges should not overlay the *Constitution* with implications which they feel should be there.
- The boundaries of this approach to implication were certainly pushed, if not breached, in some of the “implied rights” cases before the Mason Court in the early 1990s.

### **International Law**

- At common law, judges are required to resolve ambiguities in statutory interpretation in favour of compliance with Australia’s international law obligations.
- In *Newcrest Mining*, Kirby J extended that rule to apply to constitutional interpretation.
- He repeated this view in numerous cases, such as *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417-8 and *Thomas v Mowbray* (2007) 233 CLR 307, 440-1. So far no other High Court Justice has expressly endorsed his view.
- However there is a debate about it, because of dualism.

## **The consequences of invalidity**

### General rule

- When a court pronounces governmental action, legislation or decision to be invalid, the act or decision is generally treated as void ab initio. It will be treated that way, even though it was presumed to be valid until the finding of invalidity was made.
- When the court, including an appellate court, finally rules on the meaning and effect of valid legislation, that ruling will normally be treated as representing the law as from the time the legislation was made.

## **The Consequences of Invalidity**

### Qualifications to the General Rule

- In *New South Wales v Kable* (Kable No 2) [2013] HCA 26: a finding of statutory invalidity may not affect the legality of actions taken pursuant to an earlier court order made under that legislation, when it was presumed valid.
- A finding of constitutional invalidity will mean that the relevant statutory provision is void. However, courts will adopt various techniques to try and save as much of a law as possible. One technique is to "read down" a law. The other technique is to "sever" a law.
- In *Public Service Association of SA v Industrial Relations Commission of SA* (2012) 249 CLR 398, Heydon J described the process of "reading down" (at 431):
- A statute is to be construed bearing in mind the constitutional limits on the powers of the relevant legislature. If the impugned statute is capable of bearing two meanings, one which would render it invalid and the other which would render it valid, the latter is to be preferred.
- If certain provisions of a law, or applications of those provisions, are found to be unconstitutional, the remaining provisions can continue to operate, if the offending provision can be "severed".
- For example, if a provision of a statute is found invalid, it might be capable of being separated from the valid provisions, meaning that the valid portion of the statute may continue.

## **Week 2: Indigenous People's Rights Across Constitutional Law**

### *The fiction of Terra Nullius*

- Captain Cook's claim of 'discovering' this continent
- Claimed the land was 'terra nullius' - empty land / a land belonging to no one
- (see *Cooper v Stuart* (1989) 14 App Cas 286) – applied terra nullius – 'territory practically unoccupied with settled inhabitants'
- Though occupied, Aboriginal peoples were considered too primitive by the British
- so taken not to have effective possession of the land
- No formal military conquest nor any formal surrender of Indigenous sovereignty or lands no treaty or succession of rights
- Fiction of terra nullius wasn't legally rejected till the landmark HHC decision in the Mabo case (*Mabo v Queensland (No 2)* (1992) 175 CLR 1

### *Was Australia Conquered, Ceded or Settled?*

#### **International law methods of acquisition**

- Conquest (by military force)
- Cession (by treaty)
- Settlement/Discovery/Terra Nullius (vacant land)
- If treated as conquered or ceded land, the land rights and laws of previous occupants would continue to apply until the colonisers changed them
- In Australia terra nullius was applied in expanded form because it was perceived to be occupied by peoples without local law. This was despite Cook's instructions of 1768 to obtain 'the consent of the natives' to take possession of convenient territory

- By the time Phillip was given his instructions in 1787, he was to 'conciliate their affections'; punish any offenders against them; and distribute lots of land to emancipated convicts.

*Mabo (No 2) '[T]he enlarged notion of terra nullius'*

Brennan J, 40

- Traditional legal position in Australia - the land was inhabited but considered unsettled because the inhabitants were low on the social scale of intelligence and ability to form a legal system.
  - Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions of legal ideas of civilised society
- Determined it was unreal to consider the continent as effectively uninhabited when the Br arrived.
- Tension → Australia was traditionally considered settled, but the Court established the country was inhabited and by people with existing normative structures of obligation and interests.

### **Resolution**

- Brennan J: the rules for a 'settled' colony, where there was an existing population, should be assimilated to the rules for a 'conquered' colony.
- Meaning - existing rights and interests can continue in the absence of a contrary act by the sovereign power (e.g. inconsistent legislation).
- However, still 'settled' but confined the shift to 'their rights and interests in land' (57).
- Brennan J: (justification for modifying the CL on settlement)
  - 'The theory that indigenous peoples of a 'settled' colony have no proprietary interests in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs' (39-40)
- Must move out of an age of racial discrimination (at 41-2):
- 'It is imperative in today's world that the common law should neither be nor seem to be frozen in an age of racial discrimination.'
  - (citing Advisory Opinion on Western Sahara (1975) ICJ Rep 39)

### **RESISTANCE AND THE MASSACRES**

- Barunga Statement - 1988
- Tent Embassy
- Indigenous Resistance
- Yirrkala Bark Petition - 1963

### **EFFECTS OF COLONISATION**

- Indigenous peoples became British subjects
- should be treated equal before the law. But in practice treated outside the law, could not give evidence in court, subject to vigilante justice outside the law.
- European Diseases (Chickenpox, Smallpox, Influenza, Measles)
- Violence
- Dispossession and Displacement (terra nullius applied to dispossess land) Segregation and Assimilation
- Trauma

*Stolen Generations and trauma*

- The Human Rights and Equal Opportunity Commission's National Inquiry into the Separation of ATSI children from their families was tabled in Federal Parliament in May 1997.
- 'Bringing them Home Report'

## INDIGENOUS PEOPLES AND THE CONSTITUTION

### *Sovereignty*

- Mabo does not overturn the notion of 'settlement' - why not?
  - 1) Native title is common law doctrine a doctrine of 'rights and interests' (Brennan J, Mabo 40)
  - 2) Disputing settlement would raise questions of pre-existing sovereignty
- 'The theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the lore of England including the common law became the law of the Colony (so far as it was locally applicable) as though New South Wales were 'an uninhabited country... discovered and planted by English subjects.' *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Brennan J (at 37-38)
- 'The acquisition of a territory by a sovereign state for the first time is an active state which cannot be challenged, controlled or interfered with by the courts of that state.'
- *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Brennan J (at 31)

### *Claims for Indigenous Sovereignty Rejected by the HCA*

- *Coe v Cth (No 2)* (1993) 214 CLR 422 Mason CJ at 200:
  - 'Mabo (No 2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia.'
- *Walker v New South Wales* (1994) 182 CLR 45
  - attempts to recognise other aspects of Indigenous law have failed eg criminal law. Reason: all persons must be equal before the law.
- Members of the *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 Gleeson, Gummow and Hayne JJ at 443-4:
  - 'The assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty.' (rejecting a pluralistic notion of sovereignty)

### *Western and Indigenous Conceptions of Sovereignty*

- Western conceptions → exclusive territorial domain, hierarchal, central authority
- Indigenous conceptions → organised according to kinship structures, customs and law, decriminalised, not hierarchical as understood in Western law.

## THE CONSTITUTION AND INDIGENOUS PEOPLE AT FEDERATION

### *Australian Constitution - 1901*

- United the colonies as a single Federation • Power-sharing / sovereignty-sharing compact created the Australian Commonwealth
- Recognises and represents the pre-existing political communities (colonies - States) No bill of rights strong parliamentary supremacy and federal power-sharing
- PROBLEM: Indigenous peoples were not involved
- No fair relationship with the First Nations established
- Discriminatory and exclusionary sections included and remain today.

### *1967 Referendum*

- *Commonwealth of Australia Constitution Act* (1900) (Imp)
- 51. The Parliament shall...have power to make laws... 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 (known as the race power)

- REPEALED 427. 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.
- 25. Provisions as to races disqualified from voting 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 that race resident in that State shall not be counted.

#### *Impact of the 1967 Referendum*

- Overwhelming support for the referendum proposal, (unlike the 2023 referendum)
- 90.77% voted yes, and a majority of people in all states voted yes to the changes.
  - s51 (xxvi) deleted Indigenous exclusion from the Race Power - this then meant that Indigenous affairs were transferred from State to Commonwealth Jurisdiction
  - Removed s 127 - this then enabled Indigenous people to be counted in the Census

#### *1967 Referendum Left Unresolved Problems*

- No positive recognition or protection of Indigenous rights and interests
- No protection against racial discrimination (the RDA has been suspended 4 times)
- Gave Parliament a power to make laws about Indigenous affairs but didn't ensure Indigenous people a voice or a say in those laws. Confirmed "top-down" power relationship

#### *Racist Sections of the Australian Constitution*

Section 51(xxvi) The Race Power	Section 25: Provision disqualifying races from voting
<ul style="list-style-type: none"> <li>• 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:</li> <li>• (xxvi) the people of any race, <del>other than the aboriginal race in any State</del>, for whom it is deemed necessary to make special laws;</li> </ul>	<ul style="list-style-type: none"> <li>• 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 that race resident in that State shall not be counted.</li> </ul>

### **VOICE REFERENDUM IN 2023**

#### *Australian Constitution - 1901*

- United the colonies as a single Federation
- Power-sharing / sovereignty-sharing compact created the Australian Commonwealth
- Recognises and represents the pre- existing political communities (colonies - States)
- No bill of rights - strong parliamentary supremacy and federal power-sharing
- PROBLEM IS: Indigenous people were not at the negotiating table
- No fair relationship with the First Nations established
- Discriminatory and exclusionary clauses in relation to Indigenous people

### *Section 128*

- This Constitution shall not be altered except in the following manner:--
- ...if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.
- Only 8 out of 44 referendums have succeeded
- Usually requires bipartisan support to succeed

### *What does constitutional recognition aim to achieve?*

- It's never been just about symbolism for Indigenous people. It has always been about practical constitutional reform to ensure a fairer power relationship between Indigenous peoples and the Australian state.
- Four ways this happens:
  1. Rights guarantees
  2. Representative mechanisms
  3. Agreement making / treaties
  4. Cultural/language recognition

### *1967 Referendum*

- Removed s127, deleted Indigenous exclusion from the Race Power s 51
- Transferred Indigenous affairs from State to Commonwealth jurisdiction
- Allowed Indigenous people to be counted in the Census
- 90% of Australians voted 'yes'
- But left unresolved issues:
  - Racial non-discrimination clause did not succeed (Billy Wentworth MP) - rejected: would create "fertile ground" to challenge laws
  - Still no recognition or protection of Indigenous rights
  - Race power has only ever been used for Indigenous people - positive or adverse laws (Kartinyeri)
  - Parliament could still discriminate (RDA suspended 4 times)

### *Current clauses in the Constitution*

### Section 51(xxvi) The Race Power

- 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:

### Section 25: Provision disqualifying races from voting

- 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 that race resident in that State shall not be counted.

#### 1967 Left Unresolved Problems

- No positive recognition or protection of Indigenous rights and interests: no rules to ensure the relationship is fair
- No protection against racial discrimination (though there was a clause proposed by Billy Wentworth - it was rejected)
- Gave Parliament a power to make laws about Indigenous affairs, but didn't ensure Indigenous people a voice or a say in those laws.
- Kartinyeri case (1998)
  - Hindmarsh Island Bridge Act 1997 overrode parts of the
  - Aboriginal and Torres Strait Islander Heritage Protection Act 1984
  - Applicants argued that s51(xxvi) was confined to laws for the benefit...
  - Brennan & Justice McHugh used general constitutional principles to hold that the power to make a law necessarily includes the power to repeal it or to amend it. So 1997 Act was valid.
  - Gaudron noted that the original intention was to authorise laws which would discriminate against people of particular 'coloured' or 'alien races'. But the power in s51(xxvi) is not a bare power, and the words 'for whom it is deemed necessary to make special laws must be given some operation, but agreed that 'a plenary power to legislate ... carries with it the power to repeal or amend existing laws...
  - Gummow & Hayne said the power to enact a law includes the power to repeal or amend that law, but the phrase 'deemed necessary' might mean exclude laws in 'manifest abuse' of that power of judgement. (para 83).

#### Expert Panel 2012

- Racial non-discrimination guarantee
- Remove preferences to 'race' replace the power
- Insert symbolic language
- Objections
  - One clause bill of rights
  - Would empower 'unelected judges' to strike down laws

- Undermine parliamentary supremacy

*2015: Professor Anne Twomey drafting*

Chapter 1A Aboriginal and Torres Strait Islander Body

- 60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [TITLE], which shall provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.
- (2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, functions and procedures of the [TITLE].
- (3) The Prime Minister shall cause a copy of the [TITLE]'s advice to be tabled in each House of Parliament as soon as practicable after receiving it.
- (4) The House of Representatives and the Senate shall give consideration to tabled advice of the [TITLE] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

*Constitutional Voice*

- Constitutionally guaranteed Indigenous body
- Symbolic statements in an extra-constitutional Declaration
- Settlements Commission: legislation

*Uluru Statement*

- Consensus of 250 delegates (7 dissented, citing preference for "sovereign treaties")
- But a 97% consensus is powerful!
- Uluru Statement: called for the establishment of a First Nations Voice enshrined in the Constitution...AND
- Makarrata Commission to supervise a process of agreement- making between governments and First Nations and truth-telling about our history
- REFERENDUM COUNCIL: First Nations constitutional voice • Extra-constitutional Declaration

*We seek to be heard*

- These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.
- We seek constitutional reforms to empower our people and take a rightful place in our own a country...
- We call for the establishment of a First Nations Voice enshrined in the Constitution.
- Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.
- We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.
- In 1967 we were counted, in 2017 we seek to be heard....

*Garma 2022: Prime Minister proposed draft amendment*

1. ..There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.
2. The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples.
3. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.

*Aboriginal and Torres Strait Islander Voice*

- In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;

2. The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples; and
3. The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

*14 October 2023 Referendum*

- 60% voted No, 40% voted yes
- Discussion
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