MAKING SENSE OF INDIGENEITY, ABORIGINALITY AND IDENTITY: RACE AS A CONSTITUTIONAL CONUNDRUM SINCE 1983

Mark McMillan[1] *with* Martin Clark[2]*:*

This article is a conversation and encounter between an Indigenous and a non-Indigenous constitutional law scholar attempting to make sense of 'race' as it is written and interpreted in the Australian Constitution through a close re-reading of the Tasmanian Dams Case and the race power in s 51(xxvi). The conversation is intended to perform a conduct of jurisprudence in which the experience of law and the interpretation of law as a matter of doctrine are brought into relation. We first try to make sense of the significance of 1967 as a constitutional moment shifting the meaning of race in the Constitution, before turning to a close reading of the judgments in Tasmanian Dams on the race power. We argue that through analysis of these judgments it is possible to understand better the constrictions of Australian canons of constitutional interpretation as applied to race, with its focus on 'special' characteristics, heritage and culture. We also argue that a close reading of Tasmanian Dams offers a good starting place from which to question the possibilities of what meaning race might carry if the political and social experiences of Indigenous peoples with the Constitution are joined to more easily accepted interpretative conventions.

I. INTRODUCTION

When it comes to constitutional interpretations of the concept of 'race', the extent and reach of the 'race power' as considered by Australian judges, and the constitutional relationship between Indigenous peoples and the State, two cases decided by the High Court join in a way that constitutional scholars have spent little time investigating.[3] In the academy, the *Koowarta* and *Tasmanian Dams* decisions must be conjoined through the constitutional lens of 'race'. In 2012 and 2013, two symposia were convened to commemorate the 30th anniversaries of each case.[4] Mark participated in both, and Martin in the *Tasmanian Dams* event only. As Ann Genovese notes in the introduction to the special edition of the *Griffith Law Review* commemorating *Koowarta*[5] the symposia aimed to create a meeting place where conversations could be had amongst academics, jurists and interested people. It was also a meeting place where jurisprudences could be exercised and new ways of knowing the cases could be created. The symposia were public considerations not only about how constitutional law operates, but also of how law is lived and experienced by people in Australia, in the 1980s and

---

[1] LLB; GDLP (ANU); LLM; SJD (Arizona), Senior Lecturer, Melbourne Law School.

[2] LLB(Hons)/BA(Hons) (Melb), MPhil Candidate and Research Fellow, Melbourne Law School. We thank the anonymous reviewers, Ann Genovese and Ed Mussawir for comments on an earlier draft.

[3] This may be beginning to shift with new scholarly interest in Australian constitutional culture: see Arcioni and Stone (2015).

[4] The symposia were convened by Associate Professor Ann Genovese at Melbourne Law School and were co-hosted by the Institute for International Law and the Humanities (IILAH), the Centre for Comparative Constitutional Studies (CCCS), and the Centre for Resources Energy and Environmental Law (CREEL): 'Turning Points: Remembering *Koowarta v Bjelke-Petersen* (1982) 153 CLR 16' held on Friday 11 May 2012 and 'Turning Points: Remembering *Commonwealth v Tasmania* (1983) 158 CLR 1' held on 28 June 2013.

[5] Genovese (2014).

since. In particular, the symposia joined *Tasmanian Dams* and *Koowarta* together by emphasising how these cases can be understood as an account of the relationship between Indigenous peoples, the Constitution, and the State in the 1980s. Emphasising this historical and political fact about what *Tasmanian Dams* and *Koowarta* carried as a question for law, and as a lived experience of law, the symposia created space to think through the collective effect of the cases. It also produced space for conversations between Indigenous and non-Indigenous Australian public lawyers, about the possibilities of different relationships between laws for example: a meeting place of jurisdictions, equally esteemed. Above all, the events allowed participants to story-tell how past constitutional experiences exist in a relationship with the legal present.

In this paper, we draw out some of these concerns. What we offer is a conversation between Mark McMillan (a constitutional scholar and jurist of the Wiradjuri nation and Australian law) and Martin Clark (an non-Indigenous Australian public and international law scholar) that we would like you to witness as a conduct of jurisprudence and as a meeting of our lived experiences and practice of law. Following the work of Shaunnagh Dorsett and Shaun McVeigh Mark has argued for the the assertion of indigenous jurisdiction or "speaking the law" as an activity, [6] 'an activity that must be practiced to be maintained"[7]. The form and tenor of the conversation, what each of us bring through our own learning, teaching, and acting with the Australian Constitution, is intended to demonstrate that constitutional jurisprudence is about more than doctrinal or analytical interpretation, conventionally practised or understood. We want to argue, in particular, that how Indigenous Australians understood, and politically experienced, s 51 (xxvi) in the 1967 referendum and since then, has supplied alternate possibilities for constitutional interpretation of race. By placing this ontological and historical constitutional experience into conversation with a more traditional Anglo-Australian interpretative convention (a close reading of the race power arguments in the judgments in *Tasmanian Dams*), we suggest that the lived effects of law carry possibilities and challenges to the usual limits of accepted thinking about what 'race' means for Indigenous and non-Indigenous Australians in our Constitution today. Our conversation, in other words, seeks to place lived experiences of Indigenous peoples back into *Tasmanian Dams*, and to demonstrate that the constitutional conception of 'race' has since 1967 become more than an issue about a 'subject' of the law and more than a mere head of legislative power for the Commonwealth.

Our contribution to this issue of the *Griffith Law Review* in some ways takes up the questions raised by Sean Brennan and Megan Davis in the *GLR* special edition on the Koowarta Symposium.[8] Brennan and Davis are also concerned with how 'race' is a constitutional question that requires judicial attention despite and after *Koowarta*, and remains an important basis from which the constitutional relationship between Indigenous peoples and the State can be understood. They argue that the *Koowarta* decision is in one sense a 'lost opportunity'; that the High Court could have dealt with the form and content of section 51(xxvi) in

[6] Dorsett and McVeigh (2012).
[7] McMillan (2014), p 118.
[8] Brennan and Davis (2014).

ways that would make race a 'proper matter for constitutional law'.[9] Brennan and Davis sought to do this by arguing how that opportunity might have turned out differently, within the bounds of 'legitimate' constitutional arguments.[10]

We also understand that race remains a proper matter for constitutional law. Our focus, however, lies with how race is grappled with conceptually in *Tasmanian Dams* through a re-reading of the judgments. We emphasise 're'-reading not just because of the temporal distance between 2013 and 1983 that runs through the contributions to this symposium, but also because of the intervening silence around a constitutional concept of race heard in Australia's courts and law schools alike. Unlike *Koowarta*, the majority in *Tasmanian Dams* did conclude that the challenged provisions were supported by the races power. In doing so, however, both minority and majority judges did not necessarily, or satisfactorily, deal with race as a constitutional concept that carried renewed, or altered, meanings, after the public engagement of Indigenous and non Indigenous Australians about 'race;' that were opened up by the referendum in 1967. Some judges refused to deal with race at all; for others they limited, or were limited by the forms of questions asked by the litigants in *Tasmanian Dams*, to a consideration of race that bound its meaning and jurisprudence to an ossified understanding of heritage or culture. We use *Tasmanian Dams* to explore these complexities, and how the traditions of interpretation and argument before the High Court, in 1983 at least, could not yet allow 'race' to carry any real content without recourse to racialised generalisations or inappropriate group categorisations.

The method and intent of our conversation, then, is intended to interrupt the course of the existing conversation about race in Australian scholarly constitutional debates. Western trained Australian constitutional lawyers remain comfortable at the level of arguing over the scope of a head of power. They ask, in relation to s 51 (xxvi), for example: What is a 'special' law? How is it 'deemed necessary'? Does 'for' the people of any race include beneficial as well as detrimental laws? What characteristics can distinguish racial groups? Must the law apply to all members of a race, or can subgroups be included? Focusing solely on these questions of constitutional interpretation absolves Anglo-Australian lawyers of the need to ask questions that Indigenous peoples and Indigenous jurists might want answers to. For example, what exactly is 'a race' for the purposes of the Constitution? Is there a dominant race? And is it from that determination (of which there is no explicitly stated determination) that all other races may be constructed? Can there ever be a law passed for white people based solely on a racial classification? Does the inscribing of racial superiority – of whiteness – into the Constitution make whiteness dominant for all time, due to the reasons for including the section in that form in 1901? What are the bases for determining the racial classification by which other races are constructed as being something that is particular to that racial group? And, importantly for this paper, does the experience of contesting the race power in 1967 change the conversation from race to indigeneity? A meeting of jurisprudences means all these questions are important for all participants. Rather than explore the parameters of 'legitimate' constitutional argument bounded by the first set of questions, we want

[9] Genovese (2014).
[10] Brennan and Davis (2014).

to also explore what *Tasmanian Dams* both allows us to think – and prevents us from thinking – about possible constitutional concepts of race put into relation with Indigenous political experience in Australia. In this way, our conversation is intended to open up not only the limits and possibilities of what was said by the High Court in 1983, and in judgments since then, but to also show how this might matter to different audiences and participants of law.

In this spirit, Part I considers the role of 'race' as a concept before and after the 1967 Referendum, arguing that this change made race the 'everyday' for Aboriginal and Torres Strait Islander peoples in the exercise of their distinct jurisdictions with respect to 'race' and their relationship(s) with non-Indigenous people and institutions. Part II moves to try to make sense of race as a constitutional concept, bringing 1983 into conversation with today and suggesting that acknowledging race as a social construct means it no longer refers to anything that is either real or knowable — to society, to Parliament, and to the High Court. Part III moves to closely re-read the *Tasmanian Dam* decision. The difficulties of a constitutional concept of race quickly turn to an impossible task for legal interpretation, one which we hope the removal and replacement of s 51(xxvi) will mean no Australian Court will have to contemplate again in interpreting the fundamental law of the Anglo Australia legal system.

II. Making Sense of Race as a Constitutional Concept by Making Sense of the 1967 Referendum

There have been only a few attempts by judges to interpret the content of the constitutional concept of a race. Despite some such endeavours in *Tasmanian Dams* and in later cases such as the *Native Title Act Case*[11] and *Kartinyeri*[12] which clarified some questions and muddied others, we remain no closer to a judicial pronouncement of what a 'race' is for the purposes of the Constitution.'

Brennan J in *Tasmanian Dams* may well offer the best content to a concept of race that could be hoped for. Later decisions in the *Native Title Act Case* and *Kartinyeri* simultaneously clarified some questions and muddied others about the construction of the race power. Yet we remain no closer to a judicial pronouncement of what a 'race' is for the purposes of the *Constitution*. Rather than urging such a pronouncement we try to clarify a concept of race that connects heritage and Indigenous identity to race. We then look to special distinctions attaching to races – both of which emerge in *Tasmanian Dams* and are taken up by some judges in *Kartinyeri*[13] – and conclude that race is indeterminate as an ordinary and as a constitutional concept. This is not a new suggestion. We return to this idea as a conclusion. In what follows we explore how the strictures of constitutional interpretation prevent the Court from approaching race as anything besides an 'everyday' idea, which ultimately prevents it from really dealing with the significance of the 1967 Referendum as a constitutional moment that rearranged what race means within Australian public law.

[11] *Western Australia v Commonwealth* (1995) 183 CLR 373 *(Native Title Act Case).*

[12] *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[13] See Gaudron J in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, an approach discussed and endorsed in, eg, Malbon (1999).

What we take to be the most difficult conceptual question – what is a 'race' for the purposes of the *Constitution*? – does not receive a thorough answer from any judge in *Tasmanian Dams* for a myriad of reasons. The attention that it does receive is largely spent noting both the importance and difficulty of analysing it, without any real advance as to what it means. Race is acknowledged and assumed as a real category signifying some 'truth' that connects groups in Australian society, even as its demerits are noted alongside lamentations for Australia's brutal treatment of indigenous people – as if the maintenance of race as a concept tracking something 'real' about 'inferior peoples' was not used to justify exactly that conduct.

Australian canons of constitutional interpretation make the Court's elision of any close consideration the notion of race seem understandable. Questions of constitutional interpretation are only to be tackled if necessary for resolving the dispute before the court. In neither case was the argument raised that 'Aboriginal Australians' did not constitute a race.[14] Moreover if that question did arise then, like the 'deemed necessary' aspect of the power, it might best be left to the resolution of the parliament (as Gibbs CJ arguably suggests in *Koowarta*).[15] While the many other intricacies of the wording of the power were relevant for resolving that issue, the dividing question in both cases was the specificity or generality of the laws purportedly for protection of a race. But attention to the complexities of race as a constitutional concept was ignored in favour of platitudes about the difficulty of its resolution. Where the judges in *Tasmanian Dams* do expand on what might connect a racial group, their common language is that of heritage: the shared spiritual and religious beliefs, history and culture, and the preservation of each of these things, and as applied here, special to the Aboriginal race. The variety of Indigenous nations is regarded as a constitutional race only through its placement into a landscape, as indistinct museum pieces enduring – and enduring together as a race rather than as individual nations or tribes – only through whatever artefacts or relics of their heritage remain. The link to heritage is more palatable than assessing characteristics or disadvantages based on race – questions and purported realities more familiar to the founders than Australians of the 1980s – but those characteristics still sit in the background of the heritage approach. What can be said, in the majority's mind, is that the Aboriginal race has a particular link to kinds of practices and objects relevant to the commonalities of their race: rituals, spiritual and religious beliefs, artefacts, culture.[16] But these are linked to the Aboriginal race, rather than to indigeneity or cultural or racial identity. A focus on *the Aboriginal race* as a monolithic entity, rather than overlapping or shared patterns of identity retains the same interest in

[14] The argument that Tasmanian Aboriginals were extinct, and therefore no law could be passed for their benefit, was, however, raised by Mr Gleeson during argument in *Tasmanian Dams*: see *Commonwealth v Tasmania* [1983] HCATrans 24 (3 June 1986) 361. See also the response of Tasmanian Aboriginal Centre disputing that suggestion: *Commonwealth v Tasmania* [1983] HCATrans 26 (8 June 1983) at 517–9.

[15] See *Koowarta* (1982) 153 CLR 168, 187 (Gibbs CJ): 'may well be a law of the kind described in par (xxvi), if the definition of Aboriginal and Torres Strait Islander is not so wide as to include persons who are not of either race'. The comment might suggest that resolving a clear definition of a racial group is not an important question for the Court to resolve, and that in most instances it should defer to Parliament as the decider of what a racial group is.

[16] See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 on standing being based on a custodianship interest held by the Aboriginal plaintiffs in that case.

origins, genealogy, biology and fixedness – the suggestion that something about this purported race includes a need for particular objects – that keeps that idea of special disadvantage central, alive and doing crucial constitutional work.

The history of the 'race' power has been told (and experienced) differently by Aboriginal peoples, Australian historians and constitutional scholars. Bringing these into relation is part of having this conversation. Australian historians Bain Attwood and Andrew Markus have made clear in their work that one purpose of the 1967 referendum was to educate the populace about the impact of excluding Aboriginal people from the *Constitution.* [17] Those activists did this by demonstrating that Aboriginal people were not considered part of the constitutional meaning of race in 1901; that at that point race related to sinister 'outsider' qualities that had to be controlled. As Bain and Attwood suggest, the referendum campaign was responsible for educating the majority about the 'race' power and its effect or reach *for* and *to* Aboriginal people.[18] It is little wonder then that outsider views of 'race' were used to implement and sustain the 'white Australia' policy. Today when we think of 'race' in constitutional terms we subconsciously connect Aboriginal and 'race' together. This is because of the 1967 referendum. 1967 changed the nature of the conversation about the constitution, race and Aboriginal people. This was not always the case. We must be mindful that Aboriginal people were specifically and consciously excluded from the 'race' power. More importantly we must remember that Aboriginal people were excluded from any social understandings of 'race' or the social and legal developments of the conception itself.

In its pre-1967 wording, s 51(xxvi) authorised the Commonwealth parliament to make laws for the 'peace, order, and good government of the Commonwealth with respect to the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The framers were entirely unconcerned about the status of Aboriginal people, their inclusion in the *Constitution*, or the need for federal parliament to legislate in relation to them.[19] It is argued that the framers' concerns were all about non-white immigrant workforces.: Kirby J stated in *Kartinyeri*[20]

> The Convention Debates, particularly that of the Melbourne Convention of 1898, show that some delegates wanted to retain power for the States, and to permit the Federal Parliament, to enact laws far from beneficial for people of minority races (such as Chinese in factories and shops(282), "Asiatic or African….miner[s] and so on

[21] The race power is said to relate to 'persons' — not individual humans, but a collective legal person of a 'race' — referred to in the same breath as constitutional corporations and foreign sovereigns.[22] The only other reference in the text to 'aboriginal' appeared in s 127, which excluded 'aboriginal natives' from Commonwealth and State census counts. The 1967 Referendum reshaped s 51(xxvi) by removing 'other than the aboriginal race in any State', and repealed s

[17] Attwood and Markus (2007).
[18] Attwood and Markus (2007).
[19] See, eg, Sawer (1966).
[20] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 as per Kirby J p403
[21] Sawer (1966) at p 20.
[22] As in, eg, *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 507 (Menzies J).

127 entirely. It is important to remind people of the severity of these clauses. We deal with them in reverse order.

Section 127 directly ensured that Indigenous Australians were irrelevant to the mechanics of Anglo-Australian law-making in the federal parliament, so the State rules, laws and processes developed to keep them less than human could not bechallenged Constititionally. Making us human at Federation would have effectively acknowledged that the acquisition of the territory that is now Australia was incorrect at law; both international and common. The doctrine of *terra nullius* is implicated in the *Constitution*, not because of its lack of attention to it, but because allowing Aboriginal and Torres Islander people to exist within the *Constitution* itself would be legal recognition that the mode of acquisition was – in *fact* and *law* – incorrect. By excluding the Commonwealth from the State legislatures' desire to 'smooth the pillow of the dying breed' – or said another way, genocide[23] – was more than just the States wanting control of the land on which Aboriginal peoples were confined, and then policed (though this was certainly the purpose of s 51(xxvi)). Section 127 is a reminder of how sinister the legal system was (and remains, despite its removal) in ensuring that its own legal shortcomings would not and could not be addressed, thereby perpetuating the justification that Australia was indeed *terra nullius.* Not counting Aboriginal and Torres Strait Islander peoples in the census for the purpose of democratic ideals and the advancement of the rule of law was more about the shaky foundations of the acquisition itself than it was about racial superiority.

Likewise, s 51(xxvi) had a severe and sinister purpose of leaving Aboriginal and Torres Strait Islander peoples to the States to control, police, quarantine and eliminate. State responsibility for governing Aboriginal peoples stemmed from each State's interest in retaining control over powers of land management and policing. Indigenous people remain part of the landscape as wildlife or property to be managed – albeit capable of crime – soon to disappear; by dying out, being bred out, or being socialised out of Australia forever. The reference to 'aboriginal race' for the purpose of s 51(xxvi) forbade the humanising of Aboriginal people. The purpose of leaving Aborr allowing us to become real, a result enlivened by s 127 removing Aborigines from census counting that is fundamental to democracy and the rule of law. But to what 'other' races – other than the 'white' race or the 'aboriginal' race – was s 51(xxvi) intended to apply? The conventional narrative holds that immigrant worker races were the major subjects of s 51(xxvi) and that Indigenous people were presumed by the drafters and white Australia alike to be a small, dwindling and soon to be dead race, whose passing could be managed adequately by the States.[24] The drafters' discussions were close to silent on Aboriginal peoples in general, and entirely silent on their interests in the new nation. This new nation, whilst denying them individual legal personality, recognised their existence in the text as a collective 'the aboriginal race'; but only for the purpose of excluding them as a collective concern for white Australia. The silence of 1901 is partly about federal–State relations. But the neglect also reflects an inability to conceive of how the new federal government could or would have any capability or interest in dealing with Indigenous peoples. Understanding the

[23] 'Genocide' was used in the draft report in the *Bringing them Home* inquiry, headed by Sir Ronald Wilson. It was removed as too harsh for the white audience. See Tatz (1999).

[24] See, eg, Williams and Bradsen (1997) 105–113; French (2010) 181–185; Castles (1982).

significance of 1967 is also partly about federal–State relations, but with the sentiments of 1901 somewhat reversed. In removing the words 'other than the aboriginal race in any State' from s 51(xxvi) and deleting s 127, the 1967 Referendum gave the Commonwealth power to legislate for Aboriginal peoples and solidified a constitutional status of formal equality and concern matching that granted to white Australia. But that status was not equal but instead 'special'. Changing the original words of s 51(xxvi) placed the Commonwealth's capacity in the language of problems: 'special', 'deemed necessary' – also meaning 'deficient', 'less than', 'other' from the white race – with Indigenous peoples now the only race left to legislate for.

For Aboriginal lawyers attempting to live with and do justice to the legacy of 1967 – because 1967 changed the expectations and demands of our families, communities and nations' lives – is the permanent reminder of the efforts (including demands and expectations) of Indigenous activists that represented our families and communities that led to the referendum, and entrusted the *Constitution* itself to remind all Australians of the place and role of Aboriginal peoples as a distinct group worthy of a national relationship that is distinct from any other segment of Australian society – that is what the acquisition of the land mass demands in Western legal systems and international law.

To return to our interest in race as a constitutional concept, 1967 is not just a removal of the 'aboriginal race' from State responsibility, but also involves a profound change in the constitutional concept of race. The way in which the *Constitution* of 1901 dealt with race and Aboriginality is acknowledged as a reprehensible failure; and the overwhelming majority of the nation voted for a move towards inclusion and the recognition of us as having our own 'law and customs' that must exist within the constitutional framework. The High Court in *Tasmanian Dams* moves too – yet in its construction of the power it remains unable to deal with the significance of 1967 or the complexities of a constitutional concept of race.

The High Court has also struggled with the social – or humanising – impacts of the constitutional referendum when deploying constitutional interpretation rules. Constitutional interpretation – both then and now – requires a focus on text and structure. This leaves the High Court ill-equipped to make any significant assessment of the significance of social movements or changes in political worldviews that might affect how we understand our *Constitution*. *Koowarta* and the *Tasmanian Dam Case* show that however we might understand that significance, it is not something that slips easily into canons of constitutional interpretation. Even after sensitivity to historical texts and context is acknowledged as important for constitutional interpretation, [25] the problem remains the same. In the later case of *Kartinyeri v The Commonwealth of Australia*.[26], in which the justices employ a range of approaches to constitutional construction, only Kirby J made a significant attempt to embed into s 51 (xxvi) the unspoken requirements to see the 1967 referendum as being about people (Aborigines) not just 'law'. The other judgments exemplify that the Court in 1998 still seems no better placed to grapple with that significance, other than to focus

[25] *Cole v Whitfield* (1988) 165 CLR 360.

[26] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 as per Kirby J pp386 - 422

on how the text itself was changed in 1967.[27] Gaudron J, for example, characterises the 1967 amendment as 'minimalist':

> As a matter of language and syntax, it did no more than remove the then existing exception or limitation on Commonwealth power with respect to the people of the Aboriginal race. And unless something other than language and syntax is to be taken into account, it operated to place them in precisely the same constitutional position as the people of other races.[28]

In holding that 1967 changed only the limits and not the nature of the power in s 51(xxvi), Gaudron J avoids the need to inquire into the significance and aims of 1967. The issue of the intention of the electors could be put to one side, because at stake is the scope of the power, whether it permits beneficial laws only – and not whether 1967 changed the meaning of 'race': '[w]hatever the international standards and community values in 1967 and whatever the intention of those voting in the 1967 referendum, the bare deletion of an exception or limitation on power is not, in my view, capable of effecting a curtailment of power'.[29] This might seem dismissive of the efforts of 1967, but we read it as simply acknowledging that there is no judicial language with which the High Court can evaluate social movements and their impact on texts.

Legal education is also part of the inability to work through some of the difficult issues about race that arose in *Koowarta* and *Tasmanian Dams*. Western legal education is premised on two things: first, that there is *only* one legal system and that system recognises only those jurisdictions that exist independently and outside it; and secondly, that the *only* role of a lawyer is to perpetuate that legal system. Ann Genovese and Maureen Tehan teach a subject at the Melbourne Law School called *Encounters*. Its aim and purpose is to train students away from thinking about laws as passive and outside of the reach of people. They propose that the legal system and people are in a different relationship to Aboriginal systems of law and ways of knowing. The course takes its cues from, and bases its reading list around the work of, Indigenous jurisprudents, to see what we can learn about how to conduct western jurisprudence in a different way that takes responsibility for its own traditions, and remains open to a lawful encounter with indigenous peoples. Their point, also shared by many others,[30] is that Western legal education itself creates an ontology – a way of being and knowing – but that this is unacknowledged or obscured by the system of law itself. Legal training can transform or even sever an individual's relation to social change. Too often Western lawyers are removed from popular movements: their focus on public and private institutions lead them to think about laws reach of, and to, people. They propose that the legal system and people are in a different relationship to can become or replace the actual historical event.[31] In understanding law's involvement in social change, the focus remains on the 'landmark' rather than the social upheavals that predate it. Those questions do not interest judges and lawyers within their institutional roles; and the more sophisticated response is that

[27] We raise this point briefly. An interesting and thorough reading of *Kartinyeri* that takes a perspective from Gadamer's hermeneutics can be found in Reilly (1999).

[28] *Kartinyeri* (1998) 195 CLR 337, at 361.

[29] *Kartinyeri v Commonwealth* (1998) 195 CLR 337, at 363.

[30] See eg Curthoys, Genovese and Reilly (2008); Dorsett and McVeigh (2007); Black (2011)

[31] See Rajagopal (2003) 233.

they cannot be of interest for the determination of legal questions because it is said they must stay irrelevant to those determinations. This is not the only possible ontology, and a crucial purpose of these symposia has been to challenge this singularity.[32] As a Wiradjuri jurist and Western trained lawyer, I do not have that same ontology. The conversation between the current authors is a meeting place of the ontologies, a place of hope; that complex issues raised in the cases can be engaged with differently. This meeting of ontologies seeks to provide other constitutional lawyers with the willingness and ability to see these two cases differently; when it comes to Indigenous peoples and our relationship to the 'people' this can – and in our view *must* – be characterised differently. Otherwise for other constitutional lawyers and scholars the issues of the Indigenous space in the cases will be one of a wasted constitutional opportunity. Judges sometimes lament academic opinions on 'wasted opportunities', but judicial refusal or inability to think through race as a constitutional concept is itself revealing about the links and silences lying between Australian constitutional law and Indigenous peoples.

Re-thinking and re-characterising the race power and the Indigenous–State relationship likely starts with a new constitutional attitude towards 1967. How might we re-think the 1967 referendum as a social movement taken up by law? The referendum required and demanded that the relationship between Indigenous peoples and the Commonwealth can be characterised in the language of 'benefits' that may come from nationally mandated laws, policies and practices aimed at ameliorating the interruptions to our very lives – as individuals, and as distinct governing bodies. 1967 was the social mandating of a particular relationship between Aboriginal and Torres Strait Islander peoples and nations. The effect must be that constitutional arrangements *must* be capable of recognising that Aboriginal and Torres Strait Islander peoples as exercising their own jurisdictions independent of the Western legal system. The 1967 referendum was the constitutional requirement to pay attention to society's demand that the Commonwealth – through legislative power (that is, the 'people') – have a unique and distinctive legal relationship with Aboriginal and Torres Strait Islander peoples and nations. The 1967 referendum was not merely a grant of legislative power to the Commonwealth. Articulating it as simply allowing the Commonwealth a head of power denigrates the role and place of the 'people' in the *Constitution*. Further, such characterisation of the legal effects of the 1967 referendum diminishes Aboriginal and Torres Strait Islander legal and jurisdictional capacity within the constitutional framework, placing them *within* the legal framework and *subjected* to the Commonwealth's legislative whim. That was *not* the purpose of the referendum and it certainly was not the understanding of Aboriginal and Torres Strait Islander peoples' expectations when they were encouraging the 'people' to amend their *Constitution*.

Such explanations of the legal effect of the decisions by the High Court in both *Koowarta* and *Tasmanian Dams* misunderstands and diminishes the expectation and demands of Aboriginal and Torres Strait Islander peoples' relationship with the 'people' in Australia's constitutional form. Legal scholars that participate in the perpetuation of legal orthodoxy around Indigeneity and 'race' and the role of the constitutional demand of the 'people' in amending s 51(xxvi) in 1967 are

[32] See for example Bauman and Glick (2012), Genovese (in this issue) and Genovese (2014).

actively perpetuating the misunderstanding of the Court about the legal demands and expectations of Aboriginal and Torres Strait Islander peoples since 1788 and the constitutional relationship that was demanded of the 'people' since 1967. It is frustrating as an Indigenous constitutional lawyer that such connections and conceptions of the relationship between the 'people' and Aboriginal and Torres Strait Islander peoples must be explained in such nuanced terms. For Aboriginal and Torres Strait Islander peoples that have had to experience the *Constitution* in intimate (and often conflicting ways) this *is* the way *we* understand the 1967 referendum. This is the *only* way that I understand s 51(xxvi) as a Wiradjuri jurist and academic and a Western legally trained constitutional and public law scholar. And why? Because this is the way Indigenous people *experience* the race power. It is not merely a change that is observed to give the Commonwealth a head of legislative power. It is the place where I have a constitutional relationship with the 'people'. The referendum created the space in which the Western legal system *must* accept Aboriginal and Torres Strait peoples' distinct legal rights to retain and maintain our distinct place within the Australian governing framework and that any laws passed with respect to us are for our relationship *with* the state and that such laws are fair and do not harm us as Aboriginal and Torres Strait Islander peoples: as all laws should aim to do for all people.

III. *Tasmanian Dams*: Heritage, Special Distinctions and the Concept of Race

Both *Koowarta* and *Tasmanian Dams* had at their core a fundamental disconnection between Aboriginal peoples (as human beings) and the laws that sought to 'protect' them,[33] supported by the race power. To make any sense of the complexity of this one issue alone (and there were many other legal issues before the Court in both cases) was a monumental judicial undertaking. Each judge one issue alone (and there were many other legal issues) *Tasmanian Dams* reveals a different set of uncertainties and peculiarities about what race actually means in constitutional interpretation. These problems were raised briefly in *Koowarta* and further developed in *Tasmanian Dams*, but what passes as answers to them ultimately remain divergent and unclear. The lack of clarity in both cases may well be explicable through several factors: the strictures of constitutional jurisprudence; the time within the century that such matters came before the Court; the legal and policy environment in which the cases were being litigated; and the public discourse more generally about rights and their placement within the structure of constitutional arrangements.

In the *Tasmanian Dam Case*, four judges held that ss 8 and 11 of the *World Heritage Properties Conservation Act* were supported by the race power. The general conclusion among the majority — though supported by different reasoning — was that a law protecting cultural heritage is a special law for the purposes of the power because the Aboriginal race has a special need for the protection of its cultural property. For the majority, the fact that the cultural and archaeological sites were of significance to the whole of humankind as well as to the Aboriginal race did not prevent the race power from supporting the law. For

[33] The *Racial Discrimination Act 1975* (Cth) and the *World Heritage Properties Conservation Act 1983* (Cth), respectively.

the minority, the sites were of significance to all Australia, not just Indigenous peoples, and therefore were not 'special' to the latter. In *Tasmanian Dams* we see further exploration of the difficulties of the race power and now an explicit and close link between race and heritage. Certainly the case did focus on a law protecting heritage, so a close discussion of heritage is to be expected. But ideas of heritage now become a central part of the way a constitutional concept of race is articulated (as nascent as that concept was). The language of heritage as an attribute of the 'Aboriginal' race worth 'protecting' operates to dehumanise us as living humans and limits the possibility of a constitutional exploration of the race power that is not grounded in the intention of the power as enlivened and modified by the 'people' with the 1967 referendum. Each of the judgments, to which we turn now, insofar as they consider race at all examine it through heritage and, in more sophisticated analyses, culture and identity. We deal with them in order of the attention and consideration they devote to race.

3.1 The Majority

The majority in Tasmanian Dams laid the foundation for the conceptions of race that we use today in constitutional interpretation. It may be easy to forget that *at the time* the judges were advancing and grappling with a constitutional conundrum – not of their making – about the silence of 'race' in the courts and in the constitution for 82 years. They were working within the limitations and strictures of judicial decision-making: the issues and arguments as presented to them by the parties, and within the rules of interpretation. Instead of dealing with what is missing in the judgments in comparison with today's understandings, we seek to demonstrate the conundrums that each judge struggled with.

We deal with Mason J first because his judgment does not engage with race as a concept, but instead connects race, culture and heritage through a language of protection, which we suggest is problematic. Rejecting Tasmania's narrow construction that suggested a law supported by s 51(xxvi) must focus on rights between or within racial groups, Mason J took an expansive view of the power, stating that it could support laws '(a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community, and (b) to protect the people of a race in the event that there is a need to protect them'.[35] The power is about threats, problems or protection connected to a racial group. Mason J accepted that a distinction between injury to individual members of a race and broader injuries to cultural heritage can be drawn, but rejects any need to draw it for a power so broadly expressed. Rather than separating race and heritage, Mason J draws a close association between them, so much so that for the purposes of the law at issue in *Tasmanian Dams*, race becomes effectively synonymous with heritage:

> [T]he cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make

[35] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 158.

> laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.[36]

The 'inseparable connection' between culture and race extends the reach of the power, articulated as protection. Mason J then moves from the general to the specific: 'A law which protects the cultural heritage of the people of the Aboriginal race constitutes a special law for the purpose of par (xxvi) because the protection of that cultural heritage meets a special need of that people'.[37] Applied here, people of the Aboriginal race have a special need for the protection of cultural heritage. Relics of significance to humankind as a whole may have 'a special and deeper significance' to a particular race: 'Thus an Aboriginal archaeological site which is part of the cultural heritage of people of the Aboriginal race has a special and deeper significance for Aboriginal people than it has for mankind generally'.[38] Besides making this close connection between race, culture and heritage, Mason J avoids any inquiry into the concept of race itself, and ends his analysis there. What is glossed over in this approach is that sites have particular significance for particular groups of Indigenous Australians, as markers of the place and ontology of a particular group. Certainly, the overall heritage of Indigenous Australia is important for people of all Indigenous nations (or really any person), and as Mason J rightly notes, special and deeper significance should not detract from general significance. But connecting particular sites to the 'Aboriginal race' across Australia ignores the diversity of Indigenous nations as political bodies with individual histories and membership. It posits race as the first connection where a national one should lie.

Unlike Mason J, the judgments of Murphy J, Deane J and Brennan J each consider the meaning of race itself, albeit in stilted ways. We deal with them in order of increasing attention to the complexities of race as a constitutional concept: Murphy J offers brief reflections, Deane J some consideration, and Brennan J the most consideration that foregrounds race's centrality as a concept though in an ultimately unsatisfactory way.

Murphy J does so briefly, with a simplistic gesture towards the complexity of the idea that draws explicitly on the 1967 Referendum:

> Whatever technical meaning 'race' might be given in other contexts, in the *Australian Constitution* it includes the Aboriginal and Torres Strait Islanders and every subdivision of those peoples. To hold otherwise would be to make a mockery of the decision by the people to delete from s 51(xxvi) the words 'other than the aboriginal

[36] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 159.

[37] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 159.

[38] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 159.

> race in any State' which was manifestly done so that the Parliament could legislate for the maintenance, protection and advancement of the Aboriginal people.[39]

Murphy J likewise looks to the protection of history and culture as a special circumstance. After canvassing a similar dispossession story to that told by Deane J, Murphy J states that

> Because of the attempted genocide of the Aboriginal race in Tasmania, which extended to their customs, tribal structures and culture, a law aimed at the preservation, or the uncovering, of evidence about their history is a special law with respect to the people of this race.[40]

In Murphy J's formulation, the preservation of heritage is not just connected to Aboriginal racial identity, but also a means of redressing past injustices and attempted genocide. An imputed special characteristic of Indigenous people is that they are a race that has suffered wrongs, which may be partly redressed by laws protecting their culture that thereby ensure it – and hence them as a race – is not destroyed.

After briefly considering the Constitution's relationship with Indigenous peoples in Australia and the 1967 Referendum,[41] and placing the movement towards 1967 in the idea that 'Australia, as a nation, must be diminished until acceptable laws be enacted to mitigate the effects of past barbarism' to be achieved by a federal power to pass laws beneficial to the Aboriginal race, Deane J states that it is 'unnecessary, for the purposes of the present case' to consider the meaning of 'people of any race':

> Plainly, the words have a wide and non-technical meaning. The phrase is, in my view, apposite to refer to all Australian Aboriginals collectively … By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.[42]

Deane J a expanded have a wide and non-technical meaning. The phrase is, in my view, apposite to refer to all Ae Executive branch since the late 1970s. This case was the first opportunity for the High Court to delve into this test judicially, but it appears here as an aside. It was not central to the resolution of the question in

---

[39] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 180. Indeed, the only reference to 1967 in *Koowarta* is an anodyne one by Gibbs CJ: *Koowarta* (1982) 153 CLR 168, 186.

[40] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 181.

[41] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 272–3.

[42] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 273–4. Citing, like Brennan J, *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] QB 1.

Tasmanian Dams, but it is taken up and developed in later cases that do not address s 51(xxvi) but rather statutory references to Aboriginality.[43] The three-part test is placed on us all today: I [Mark] have a certificate that outlines my fulfilment of this criteria. This test does not make someone a Wiradjuri, Yorta Yorta, Barkindji (or whichever nation that you are born into). The test allows the Western legal system to place you as an Aborigine or Torres Strait Islander. Aboriginal and Torres Strait Islander jurisprudences were still clear and being exercised out of the view of the Western legal system. The test is also a reminder that these jurisdictions and jurisprudences are not predicated or exercisable because of the Western legal system. Turning to race and heritage, Deane J acknowledges the importance of connection to land for 'traditional' Aboriginal culture and life, before stating that, following dispossession and brutal treatment and the establishment of the Australian nation,

> Aboriginal sites which once would have been of particular significance only to the members of a particular tribe are now regarded, by those Australian Aboriginals who have moved, or been born, away from ancient tribal grounds, as part of a general heritage of their own race.[44]

A constitutional rethink of connection to place would have been of particular significance. Lawful connections to place give us our very identity. Indigenous people have long been excluded from Western concepts of ownership. That is not dispossession of our status as Aborigines either. From that we can never (nor must we) navigate away. To suffer dispossession suggests that those connections could have been lawfully taken, and concedes that Indigenous peoples might only be repossessed of those connections at the bequest of the Western legal system. Indigenous people could, nor can, ever be dispossessed of those connections. It is a shortcoming of the Western legal construct to think it could. And yet here, all Indigenous sites, regardless of actual connection to country, are imputed to have significance for all Indigenous people as an 'aboriginal race'.[45] According to Deane J the protection requirement is a dual one: a site must be both of outstanding universal value as well as particular value to people of the Aboriginal race – it is then a law both 'for all Australians' as well as a special law for Aboriginal Australians.[46] Again, a close connection is made between heritage and race as a concept: 'people of any race' covers 'all that goes to make up the

---

[43] See, eg, *Queensland v Wyvill* (1989) 90 ALR 611, 515 (Drummond J); *Attorney-General (Cth) v Queensland* (1990) 25 FCR 79, 127 (Jenkinson J); 132 (Spender J); 140, 146 (French J); *Gibbs v Capewell* (1995) 54 FCR 503, 506ff; and recently in *Eatock v Bolt* (2011) 197 FCR 261, 302 (Bromberg J).

[44] *Commonwealth v Tasmania* (1983) 158 CLR 1, 275.

[45] This can be contrasted with the discussion of 'custodian' connections to relics in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 37.

[46] This 'dual' approach, had it been raised in *Koowarta*, might arguably support the *Racial Discrimination Act* as a law both for all Australians as well as having special significance to racial minorities which the law aims to protect; as a 'special law' aimed at races that, by virtue of their race, suffer an additional disadvantage of being subject to racial abuse than white Australians.

personality and identity of the race: spirit, belief, knowledge, tradition and cultural and spiritual heritage'.[47]

While Brennan J makes a significant step forward in locating 'race' as conceptually fundamental for interpreting the race power — indeed, he is the only judge in *Tasmanian Dams* to explicitly deal with race as a concept — his analysis remains ultimately unsatisfactory because it falls back to heritage and culture as a marker of race. After a brief discussion of the original meaning of the race power, the 1967 amendment is interpreted as 'an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end'.[48] Rejecting the narrow focus on changes to 'legal rights, powers or privileges' afforded as a discriminatory benefit to a racial group, Brennan J takes up and extends Stephen J's point in *Koowarta* that special qualities might lie in 'facts dehors the legislation' and also in the concept of race:

> Is it sufficient that the discriminatory benefit is found in the special importance or significance which the people of a race attach to the rights, powers or privileges generally conferred? ... The concept of 'race' suggests the answer.[49]

That concept is 'not a term of art; it is not a precise concept'.[50] Relying on English, New Zealand and international law, Brennan J held that while race had a biological element contained in genetic history and commonality, racial membership extended to common identity found in history, beliefs and culture:

> Membership of a race imports a biological history or origin which is common to other members of the race, but Richardson J is surely right in denying the possibility of proving ultimate genetic ancestry … I do not think his Honour was propounding his 'real test' of common regard as being conclusive or exhaustive … Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race … [these commonalities indicate] the scope and purpose of the power granted by par (xxvi). The kinds of benefits [are ones] which tend to protect or foster their common intangible heritage or their common sense of identity.[51]

Commonalities underpinning racial identity inform the scope and purpose of the power. Brennan J appears to take up Stephen J's suggestion in *Koowarta* that the focus should be on effect not form: the law need not be special in its terms, but

---

[47] *Commonwealth v Tasmania* (1983) 158 CLR 1, 276.

[48] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 242.

[49] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 242–3. See *Koowarta* (1982) 153 CLR 168, 211 (Stephen J).

[50] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 243.

[51] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 244. Referring to *King-Ansell v Police* [1979] 2 NZLR 531, at 542ff (Richardson J).

may simply be special in operation.[52] The Act protects sites that are of 'particular significance', which, though incapable of precise definition, means those that are of 'neither minimal nor ephemeral' importance.[53] Applied to Aboriginal and Torres Strait Islanders, the significance of the site may be 'found by the Aboriginal people in their history, in their religion or spiritual beliefs, or in their culture'.[54] The relevant special group then, is 'a group of whatever size who, having a common Aboriginal biological history, find the site to be of that significance', and to conclude otherwise would be inconsistent with 'the high purpose which the Australian people intended' in 1967.[55] Here there is certainly an advance on Mason J's formulation; the significance of a site need not attach to the 'Aboriginal race' as a whole, but only to a specific group holding a connection to a particular place. But the invocation of 1967 here is hollow. We read it as acting only as a 'brake' on less favourable interpretations; its significance beyond simply broadening protection – and in particular as changing the concept of race itself that Brennan J acknowledges is important for the races power – is not explored.[56] Brennan J's concept of a constitutional race, then, is a group with biological commonalities that share culture, beliefs, history. Section 51(xxvi) supports laws that 'protect or foster' that identity or heritage of such a group. Identity and heritage form the core of Brennan J's concept of a constitutional race. Again, while this formulation of the concept is articulated in the context of heritage laws at issue in *Tasmanian Dams* and a strong link between race and heritage is understandable, it remains problematic for the reasons outlined above regarding Mason J's connection between race, culture and heritage. More fundamentally, articulating the constitutional concept of race as partly subsumed under heritage seems unthinkable when applied to other races, and particularly the white race: for what could be considered 'white culture' and what measures would serve to protect it? Aboriginality, Indigeneity and identity are not heritage, and do not derive their enduring power from the past alone. They have agency and reality today, evidenced by Indigenous peoples in their thousands, citizens of hundreds of distinct nations. Brennan J grapples with these problems far better than the other judges — and in its most favourable light his concept joins heritage with identity — but nonetheless we still find the presence of heritage in a constitutional concept of race, that is to be forward looking and apply equally beyond the posited 'Aboriginal race' to be a problematic conclusion. Finally, the majority judges do not contemplate the possibility of Indigenous laws, existing, operating, and connected to place. Nor should they have. At that time, the judges do not have the modern concept of race nor Indigenous jurisdictions and jurisprudence. This case – and witnessing the struggles of the judges – allowed us to form new understandings and opportunities of, and for, understanding Indigenous laws and jurisdictions. Current judges should be able to take the difficulties expressed by the judges in the case and now contemplate such Indigenous laws and their relationship to the Anglo Australian legal system. Law

[52] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 245. See *Koowarta* (1982) 153 CLR 168, 211 (Stephen J).

[53] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 245.

[54] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 245.

[55] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 245.

[56] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 245–6.

is not among the several aspects of racial identity raised by the majority. The significance of these sites is drawn from the past; their importance does not extend into the future, even though new custodians and responsibilities are created within indigenous jurisdictions.

3.2 The Minority

The Minority Judges each ignore race as a concept, and resolve the s 51(xxvi) issue on the 'special' law requirement of the paragraph by subsuming 'particular' significance for Indigenous people under general significance for Australian heritage as a whole. Like the majority, the minority judges link race and heritage. In denying 'specialness', however, they also appropriate indigenous culture and heritage into Australia as a whole, eliding any significance to particular Indigenous nations. A nation founded without national concern for Indigenous peoples or culture, becomes the wider beneficiary of the culture it sought to destroy, on behalf of the people it sought to destroy. Further still, Indigenous culture in the minority judges' treatment seems to hold the glint of museum pieces: these things belong to us all because their cultural significance is fixed and generated from the past, rather than as part of an enduring, living culture contributed to and continued by today's Indigenous peoples. For Gibbs CJ, universal heritage trumped local importance:

> Although the protection or conservation of a site to which s 11 applies must be of particular significance to the people of the Aboriginal race, the site itself must be of outstanding universal value, since otherwise it cannot form part of the cultural heritage or natural heritage. A site which may be of very great significance to the people of the Aboriginal race will not be within the section if it is not of outstanding universal value.[57]

Site protection attaches to this universal significance, and 'not to the preservation of any particular feature of the site which may give it significance to members of the Aboriginal race'.[58] Most importantly for Gibbs CJ, special significance is not connected to the regulations because Aboriginal people gain no special rights, privileges or obligations in relation to a site, and hold no better rights of access or special immunity from s 11 than any other person.[59] The narrow, legalistic need for a connection between special rights and racial characteristics precludes any wider appreciation of significance for particular people: 'Artefacts and relics of such antiquity are of significance to all mankind; a law for their protection is not a special law for the people of any one race'.[60] Wilson J, like Gibbs CJ, focused on the generality of the law and subsumed specific significance under universal significance:

[57] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 110.

[58] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 110.

[59] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 110.

[60] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 111.

> … the law serves the interest of the Aboriginal people in the sites in question and any artefacts or relics on them by protecting them against damage or destruction. But in so doing it is serving, at the same time and by the same law, the interest of a much wider constituency, the whole of mankind.[61]

Special laws must be aimed at 'a problem that is peculiar to the people of a particular race'. Dawson J similarly distinguished between 'special application' in the sense of a law having greater significance or importance for one racial group and 'special application in a legal sense' in creating a distinction between 'those people and others in the rights which [the law] confers or the obligations which it imposes'.[62] Protected Aboriginal sites 'are, by definition, part of the cultural or natural heritage of the nation … There may be, and probably are, Aboriginal sites or artefacts or relics which are far more significant to the people of the Aboriginal race, but the Act has nothing to say about them'.[63] What is common to the minority judges is a strict emphasis on legalism, playing out in various ways: the universal excludes the particular, connections must be made between rights and obligations and racial characteristics, the Act must treat these explicitly as having special operation in a legal sense. Race is just another word.

IV. Conclusions

Writing extra-curially of the chimerical nature of the race power, Chief Justice French noted in 2010 that it reflects 'both the nineteenth-century social Darwinism which gave it birth in 1901 and the inclusive worldview that led to its amendment in 1967'.[64] While social Darwinism is not endorsed in the judgments in *Koowarta* or *Tasmanian Dams*, and the purportedly 'scientific' gloss associated with theories of race is explicitly disapproved in some of the judgments,[65] the assumptions central to that worldview – that races exist, that they have shared characteristics, some of which are disadvantages – remain. Those assumptions are then linked to the possibility that races might have 'special' characteristics, disadvantages, threats or problems that legislation may address. Certainly some acknowledgement of non-racial factual bases for these characteristics is made – particularly by Stephen J in *Koowarta* and Brennan J in *Tasmanian Dams* – but there is still an assumption that specialness might inhere in a race as a whole. For all the recognition of 'an outdated, false and harmful taxonomy of humanity' made with undoubted sincerity,[66] the operation of this power, as capable of supporting *any* law at all, still requires taking up and giving effect to an assumption that race is capable of disclosing truths about special disadvantages, threats, problems, fears, protection.

---

[61] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 203.

[62] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 320.

[63] *Commonwealth v Tasmania* (1983) 158 CLR 1, at 321.

[64] French (2010) 180.

[65] See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 243ff (Brennan J).

[66] See, eg, French (2010) 181.

If we take seriously the reality of socially constructed racial groups, then the race power construed through special characteristics must be seen as incoherent and incapable of supporting any law because we can no longer speak of characteristics tracking anything meaningful in a race. Race – as either an ordinary or constitutional concept – is indeterminate. Such an approach would not require the Court to substitute its own evaluation for the Parliament's as to what is necessary or special.[67] Instead it would acknowledge that s 51(xxvi) no longer refers to anything known to our society or the members of it who sit in Parliament. The legacy of 1967 might be finally realised. A best result would be the repeal of the race power and its replacement with a power specifically aimed at advancing the interests of Aboriginal and Torres Strait Islander peoples.[68] This repeal is warranted because the question of the meaning of the term 'race', however the text is formulated, cannot be competently addressed by any court or any parliament with the definiteness that constitutional interpretation demands. Any attempt to give it content falls back to the legacies of centuries we thought were left behind. But in the absence of that repeal, acknowledging the indeterminacy of race is the only development we might expect. None of this is how Aboriginal and Torres Strait Islanders view your jurisprudence and bear witness to your lawfulness. This is what we expect of your constitutional interpretation of 'race' and 'Aboriginality'.

[67] See *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
[68] Expert Panel (2012) ch 5.

Reference List

Books, Articles, Reports

Elisa Arcioni and Adrienne Stone, 'Australian Constitutional Culture and the Social Role of the Constitution' (2015) *International Journal of Constitutional Law* (forthcoming).

Bain Attwood and Andrew Markus (2007) *The 1967 Referendum: Race, Power and the Australian Constitution*, Aboriginal Studies Press, 2nd ed.

C F Black (2011) *The Land is the Source of the Law : A Dialogic Encounter with Indigenous Jurisprudence*, Routledge-Cavendish.

Sean Brennan and Megan Davis (2014) '*Koowarta*: Constitutional Landmark, Transition Point or Missed Opportunity?' 23(1) *Griffith Law Review* 79.

Alex C Castles (1982) *An Australian Legal History*, Law Book Co.

Dorsett, Shaunnagh and Shaun McVeigh (2012) *Jurisdiction,* Routledge.

Expert Panel on Constitutional Recognition of Indigenous Australians (2012) 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution'.

Robert French (2010) 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks*, Cambridge University Press, 180.

Ann Curthoys, Ann Genovese and Alexander Riley (2008) *Rights and Redemption: History, Law and Indigenous People* Sydney, University of New South Wales Press.

Ann Genovese (2014) 'Critical Decision, 1982: Remembering *Koowarta v Bjelke-Petersen*' 23(1) *Griffith Law Review* 1.

Ann Genovese (2015) 'TITLE FOR INTRODUCTION TO THIS SYMPOSIUM'

Justin Malbon (1999) 'The Race Power under the Australian Constitution: Altered Meanings' 21 *Sydney Law Review* 80.

Mark McMillan (2014) 'Koowarta and the Rival Indigenous International: Our place as Indigenous Peoples in the International' 23 (1) *Griffith Law Review* 110-126.

Shaun McVeigh and Shaunnagh Dorsett (2007) 'Questions of Jurisdiction' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* Routledge-Cavendish, 3.

Balakrishnan Rajagopal (2003) *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press.

Alexander Reilly (1999) 'Reading the Race Power: A Hermeneutic Analysis' 23 *Melbourne University Law Review* 476.

Geoffrey Sawer (1966) 'The Australian Constitution and the Australian Aborigine' 2 *Federal Law Review* 17.

Colin Tatz (1999) 'Genocide in Australia', Research Discussion Paper No 8, Australian Institute of Aboriginal and Torres Strait Islander Studies.

John Williams and John Bradsen (1997) 'The Perils of Inclusion: The Constitution and the Race Power' 19 *Adelaide Law Review* 95.

Case Law

Attorney-General (Cth) v Queensland (1990) 25 FCR 79

Cole v Whitfield (1988) 165 CLR 360.

Commonwealth v Tasmania (1983) 158 CLR 1

Eatock v Bolt (2011) 197 FCR 261

Gibbs v Capewell (1995) 54 FCR 503

Kartinyeri v Commonwealth (1998) 195 CLR 337
King-Ansell v Police [1979] 2 NZLR 531
Koowarta v Bjelke-Petersen (1982) 153 CLR 168
Western Australia v Commonwealth (1995) 183 CLR 373 *(Native Title Act Case)*
Mandla v Dowell Lee [1983] QB 1
Queensland v Wyvill (1989) 90 ALR 611
Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468.

Legislation, Conventions and Transcripts

Commonwealth v Tasmania [1983] HCATrans 24 (3 June 1986)
Commonwealth v Tasmania [1983] HCATrans 26 (8 June 1983)