CONSIDERATION OF THE PROPOSED REFERENDA ON LOCAL GOVERNMENT AND RECOGNITION OF INDIGENOUS PEOPLE.

LOCAL GOVERNMENT REFERENDUM PROPOSALS.

Machinery has been set in motion to conduct a referendum, under Section 128 of the Commonwealth Constitution, on the question of recognition of local government, as a third arm of government, to permit the making of grants, by the Commonwealth Government, directly to local councils. The referendum is to be held at the same time as the next Commonwealth elections in
2013.

The fact that proposals of this type have been presented to, and rejected by the people on prior occasions, illustrates the propensity of both international bodies and Australian Labor governments to persist in re-presenting rejected proposals until such times as the electors change their minds, or are worn down and surrender. The mindset behind such persistence is more typical of totalitarian regimes and bodies, rather than that essential to Democracies.

It is important, in considering the necessity and substance of any such proposal, to understand clearly the nature and form of the Constitution itself. Failures in this regard in the past have led to botched results and unforeseen consequences which have nullified the very purpose of the proposed change. I will return to this matter when dealing with proposals in relation to Aboriginal people.

The Commonwealth Constitution records the terms of a Compact between the pre-existing essentially sovereign independent States to create a Federal Government with powers more suitable to a Government speaking for the whole of Australia. This was achieved by transferring to the new Federal Government specific, and limited, powers leaving the States to continue to exercise their authority over their own affairs.

Prior to this Agreement, the various State Governments had created, by statute, local government bodies to deal with local affairs under the supervision of the State Government.

These bodies did not form part of the formal Constitutions of the States, being, merely; creatures of Statute, From time to time local government bodies have been suspended and placed under the control of Commissioners where corruption has been discovered. They could be abolished by the simple act of repealing the Statutes that created them. At the time of the creation of the Federation, local governments were not, and could not be contracting parties to the Compact which created the Commonwealth Constitution. They did not have the status and characteristics of self- governing bodies, being subordinate to the States themselves.

Power over local governments was NOT handed to the new Commonwealth Government.

It is questionable whether power over local government in every State could be given to the Commonwealth Government, by a referendum under Section 128 of the Commonwealth Constitution. It is arguable that such a transfer of power could not be forced upon an unwilling State.

The change would be more in the nature of a renegotiation of the original Compact, rather than an amendment within the terms of the original Compact.

However that may be, there are serious arguments against such a change in any case.

In June of this year the President of the Samuel Griffith Society issued a statement opposing the referendum proposal. He stated, inter alia:

> The proposal will, if adopted, enable the Commonwealth government to side line the states and divide and rule a multiplicity of clamoring councils swollen in ego and, inevitably in bureaucracy.

The degree to which some local councils have become "swollen with ego" can be seen from the ease with which councils have sought connection by "twinning" with overseas bodies, justifying junket overseas trips by councilors at the expense of ratepayers. Local government policy has been increasingly influenced by United Nation bodies and international NGO's, not specifically authorised by the ratepayers. The phenomenon of local councils acting like sovereign governments was illustrated recently by Marrickville council, which purported to institute a boycott against the State of Israel. Declarations by councils of their local areas as nuclear free zones are ridiculous, apart from being in excess of their powers as local governments with limited powers, and subject to supervision by State governments.

The push to increase the power and role of local governments and Regions has always been Labor Party policy as a step towards the abolition of the States. This was exemplified during the Whitlam Government.

At present any provision of funds to assist local governments by the Commonwealth Government can only be made through the States. Were the Commonwealth able to make direct grants of funds to local governments, the purpose of such grants could be counter to the policy of a particular State. There is currently a conflict between the Commonwealth and

the State of New South Wales, where the State desires to develop its transport plans in one direction, and the Commonwealth desires to develop it in a totally different direction, and is refusing funds until the State agrees to the proposals of the Commonwealth. There is enough conflict, and potential litigation, between Federal and State policy without creating another area of conflict over local government policy.

I would commend the detailed presentation of the "Case against Recognition of local government in the Constitution by The Honourable Michael Mischin in Volume 23 of the Proceedings of the Twenty Third Conference of the Samuel Griffith Society in August 2011.

In this paper he pointed out that the purpose of the prior attempts in 1974 and 1988 was to increase Commonwealth power at the expense of the States. Mr. Whitlam in proposing the 1974 change made no secret of this, pressing for a "new federalism.'~

He went on to argue:

> In short, the recognition of, and ability to fund, local government "bodies"—whatever that term might embrace—was calculated to circumvent State governments and incorporate local governments into substitute quasi-States.'

This proposal was overwhelmingly defeated, as was the similar proposal in 1988. Notwithstanding these unequivocal expression of opinion on behalf of the electors, a third attempt is now proposed to browbeat the electors into agreement, at no little expense.

THE PROPOSAL TO RECOGNISE THE ABORIGINAL PEOPLE IN THE CONSTITUTION.

This proposal has been deferred until after the 2013 general elections. However, in view of the fact that the Media has already presented arguments in favour of such proposal, it is not irrelevant to review some of these arguments now, if only to point out the importance of having a full understanding of the nature of the Commonwealth Constitution. Failures in this regard have resulted, in the past, in botched results and unforeseen consequences, which have nullified the purpose of the changes made.

As previously stated the Constitution resulted from a 10 year period of consultation between the States as to the need, or desirability, of establishing some form of Australia-wide governmental structure to deal with matters of common concern.

Impetus to the movement was given by the report of a British military Officer on the state of defence of the then separate colonies. Some form of union, or federation, was urged in order to meet the common defence requirements of the whole of Australia.

Formal discussions were started initially by an interstate conference in 1890, which recommended the calling of a State-wide Constitutional Convention in 1891. The members of this Convention consisted of delegations from the parliaments of the various States appointed by the separate parliaments from their members.

At this Convention a draft Constitution was prepared. Owing to various economic disasters, including bank failures, the subject of federation was sidelined and did not proceed further. The movement revived in subsequent years and, following a conference in Corowa, it was proposed that a new Convention be called, consisting of members elected by eligible voters. Many of the original parliamentary political protagonists of the federal idea were elected to attend the Convention which commenced its proceedings in 1897, delivering a completed Constitution in 1898. This Constitution was put to the electorates of the various States in stages until after its adoption by the major States with provision for the remainder of States to come into the compact, It became law when adopted with few alterations by the British Parliament.,

It should be clearly understood that the Constitution, which was set out in Section 9 of the British Act, was not and did not purport to be a broad declaration of political principle and human rights, such as is found in the American Constitution. The form of government in the various States had been well settled since the establishment of responsible government from and after 1856. Individual rights and the likes were brought to the colonies with the first settlers and were well known and established. It was unnecessary to list those who were recognised in the Constitution.

In dealing with Recognition in relation to Aboriginals, it is necessary to know what Recognition involves.

It would be incongruous to ask whether or not women, or men, are recognised in the Constitution. Not all women or all men had the right to take part in voting for the Constitution. To this extent it could be said that some men and some women needed some formal act of recognition even though all laws applied to them. A similar test might be applied to aboriginal members of the country. Some aboriginals in some States had the vote at the time of the referenda to establish the Constitution. Those who did not have the vote might argue that, for this reason, some act of recognition was required.

Under Section 16 Aboriginals who had the right to vote and who were natural born (obvious) and 21 years if age could qualify for election as a Senator.

Section 25, deals with the fixing of the quota to keep the proportion of the number members of the Senate to the numbers of members of the House of Representatives to the ration of 1 to 2.

To determine the quota the numbers of the people of any State has to be ascertained. For this purpose, it provides that

> if by any law of a State all persons of any race are disqualified from voting at the 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.

No State had disqualified the aboriginals as a race from voting for the lower House of the State Parliament. A State may not have given the right to vote to the Aboriginals, but none were disqualified as a race.

Indeed some States had given the right to vote to Aboriginals. That this was so was recognised by Section 41 of the Constitution which provided:

> 41 No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented from voting at elections for either house of the Parliament of the Commonwealth

It was the new Commonwealth Parliament, not the Constitution, which deprived Aboriginals of the vote in 1901, but even here, those who already had the vote were protected against losing it.

The case for aboriginal recognition as prior occupiers of the Country is based on some more broad feeling that it should be a significant act in support of a broad feeling of the need for Reconciliation, for which there is widespread support.

In advocating this support, both at the time of the last attempt to include such a provision in the Constitution, much of the arguments were based on a total misinterpretation of the present Constitution in regard to Sections where the aboriginal people are mentioned. In a recent article by Ian Smith and Natasha Stott Despoja, appearing in the Australian Newspaper on July 8 2013, similar misconceptions are used in support of the proposed change.

> The constitutional silence about the very existence of indigenous Australians over such a long history holds us back from a more united and productive future. As do the sections that still give governments the power to treat any racial group within our community as lesser citizens, potentially able to be stripped of that most fundamental of rights —the vote—at the whim of any State. In these two important respects, Australia's Constitution remains as a colonial document entrenched in modern 21'~ century society.

Such arguments, and those of a similar kind advanced during the 1987 referendum, were misconceived and have led to the botched results of that referendum which has created the situation about which the columnists complain and which they foist upon the original Constitution.

The Section referred to by the columnists I Section 51(xxvi) of the Constitution. In its original form, the provision was as follows:

Section 51 (xxvi)

The people of any race, OTHER THAN THE ABORIGINAL RACE IN ANY STATE, for whom it is deemed necessary to make special laws.

It is not the original Section which has the consequences of which the columnists complain but it has resulted from the removal by the 1987 referendum of the words of exclusion.

The original Section had no adverse consequences for the aboriginals because they were excluded from its consequences. (as were the Maori race when it was contemplated that New Zealand would enter the Federation)

Despite the view of the High Court that the Section could also be used for beneficial purposes, there is no doubt that the Section was intended to apply to immigrants whose conduct after admission as settlers required punitive action including deportation. The Section was taken over from existing State provisions which had in contemplation such races or groups as Chinese workers and Kanakas in Queensland. As clearly expressed in the 1897-8 Convention immigrants were expected to conform to the laws and customs of the local community. Failing such compliance punitive action could be taken against them, including revocation of citizenship, deprivation of the vote, and deportation apart from the normal penal law provisions applicable to everybody. [2]

The misconceptions behind these arguments were drawn to the attention of the Federal Parliament at the time of the 1987 referendum, particularly by the then Minister for Aboriginal Affairs, Mr. Wentworth. He pointed out the unintended consequence of the removal of the words of exclusion having the reverse effect than that intended. He suggested that, if it was thought that it was necessary to include some provision to enable benefits to be conferred on aboriginals, Section 51(xxvi) should be repealed in toto, and a specific new section inserted for the specific purpose. This advice, and that of some reputable Constitutional lawyers, was ignored by the government of the day and the words of exclusion were removed, to the detriment of the aboriginals.

The other Section which was attacked at the time and was removed was Section 127.

This Section provided as follows:

> Section 127.
>
> In reckoning the number of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

At the time of the 1987 referendum it was argued that this Section related to the keeping of the Census and, consequently, as also argued by Messrs.' Smith and Despoja, this implied that even the existence of the aboriginals was ignored, or even denied.

As is quite clear from the Debates of the 1897-8 Convention, this Section related only to the financial clauses of the Constitution where it dealt with the method of

redistributing surplus revenue collected by the Commonwealth from customs and excise duties. This clause, under the Braddon "blot", was to exist for a limited period before uniform duties of customs and excise were enacted by the Commonwealth Parliament. The Section therefore was virtually a sunset clause, and would cease to exist in no less than 10 years.

That this was so was explicitly explained by Edmund Barton, the chairman of the constitutional drafting committee. The omission of the Section by the referendum was unnecessary but there was no harm in its removal. The removal, in no way, reversed some implied denial of recognition of Aboriginals.

In the 1987 referendum, it was proposed to place certain words of recognition of the aboriginals in the Preamble to the Constitution. It is doubtful if the Preamble is an appropriate place to deal with this matter. After all, the Preamble is the Preamble to the Constitution Act of the British Parliament, containing within it the Constitution which came into effect in 1901. It cannot be altered retrospectively.

Before any such proposal is framed, careful consideration should be given to the precise meaning of the Recognition proposal. It should be made clear precisely what substantive effect, if any, is contemplated, so that unforeseen consequences should not result, as was the case after the 1987 referendum. We should be clear on what Recognition means, what substantive consequences are intended to flow from such Recognition.

Finally, it would be unfair, if not improper, for such a question to be put to the people at the same time as another contentious proposal. There is likely to be a lot of support for the aboriginal referendum on historical, moral or sentimental grounds.

In my opinion it would be improper for a government to link two such referenda together for the purpose of getting a yes vote for an unpopular proposal on the back of one that has merit. The subject matters of such referenda a quite distinct and should be kept separate.

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[1] Mischin. Vol 23 Proceedings of the Twenty-Third Conference of The Samuel Griffith Society June 2011 P.243

[2] I have fully dealt with this Section in my book *The Framers of the Commonwealth Constitution. Their intentions.*