CHAPTER 7

ABORIGINES UNDER THE CONSTITUTION

THE SPECIAL LAWS POWER s.51 (xxvi)

In a referendum conducted in 1967, certain changes were sought in relation to two sections of the Commonwealth Constitution, in which aborigines and members of the aboriginal race were mentioned – s.51 (xxvi) and s.127.

S.51 (xxvi) of the Constitution provided:
51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
(xxvi) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;

The amendment to the Constitution considered in the referendum in 1967 sought to strike out the words "other than the aboriginal race in any State," where they appeared in the section.

ARGUMENTS DURING THE 1967 REFERENDUM

Owing to the fact that none of the Parliamentary Parties opposed the proposed change, no official "No" case was circulated to the electors. The only case presented to the electors was the "Yes" case. The most vocal group advocating a "Yes" vote was the Federal Council for Aboriginal and Torres Strait Islanders (the precursor of the present ATSIC). This group claimed that the two major arguments why the words of exclusion should be deleted from s.52 (xxvi) were:
First, that the Commonwealth had no power to benefit aborigines by legislation, Second, that the change would give such power to the Commonwealth, and that "the assumption of legislative power in respect of aboriginal affairs would result in beneficial legislation."[1]
E.G. Whitlam, the Leader of the Labor Opposition in the House of Representatives, claimed that "excision of the words from s.51 (xxvi) would mean that "members of this Parliament will be able for the first time to do something for aboriginals."[2]
The reasoning supporting these two major arguments was overstated and misleading.
It was claimed that the exclusion of aborigines from s.51 (xxvi) deprived the Commonwealth of the power to make **beneficial laws** with respect to aborigines, and that, consequently, they were the subject of discrimination under the Constitution. This section gave the Commonwealth the power to legislate in respect to "the people of any race, other than the aboriginal race in any State for whom it was deemed necessary to make special laws."
The underlying assumption of this reasoning was that the term "special laws" meant laws making special **beneficial provisions** in respect of the people covered by the power, and that the exclusion of the aboriginal race from that provision was a clear discrimination, and that the removal of the words from the placitum would give the Commonwealth Parliament the power to make special beneficial laws for aborigines.
The concept of "special laws" in the minds of the framers of the Constitution was not a concept of "special beneficial laws." It was rather a concept of "special restrictive laws" from which it was desired to relieve the Aborigines who were not one of the races for whom the provision was designed. Therefore, it is clear that the proposal put to the referendum was unnecessary for the purpose of removing a supposed disability from the aborigines.
On a literal reading, the constitutional amendment to s.51 (xxvi) made in 1967 gave the Commonwealth a power, over and above the general power, within the heads of Commonwealth power, to make special laws for all citizens who could be classified as being members of a race in need of special legislation. This was certainly not the intention of the framers of the Constitution. The Commonwealth had power, within the scope of the matters vested in it by s.51 of the Constitution, to legislate for all Australians, be they Aborigines or otherwise, as individuals. The races in contemplation under s.51 (xxvi) were those who were immigrants.
Reference to the Convention Debates establishes that the "special laws" which were contemplated were not "beneficial laws." If this intention were carried into the amended s.51 (xxvi), it would mean

that the amendment would give the Commonwealth a wide power of making, where it considered it necessary, restrictive laws in respect of any race, including the aboriginal race.
In 1891, when it was still considered that New Zealand might join the Federation, the Maori race, as well as the Aboriginal race, was excluded from s.51 (xxvi) (which was then part of s.53). After the Convention of 1897-8 the exception of the Maori race became unnecessary when New Zealand did not join the federation.

Apart from the supporters of the 1967 referendum proposals, it must be conceded that some eminent legal academics and commentators assert that the special laws power at all times included a power to make beneficial as well as restrictive laws. In particular, Professor Sawer supports this view in a lengthy article in the *Federal Law Review*.[3] He agrees that an extensive analysis of secondary sources shows that restrictive laws were certainly in the minds of the framers of the Constitution.

The secondary sources mentioned above, and in particular Quick and Garran and Harrison Moore, make it clear that (xxvi) was intended to enable the Commonwealth to pass the sort of laws which before 1900 had been passed by many States concerning 'the Indian, Afghan and Syrian hawkers; the Chinese miners, laundrymen, market gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland and Western Australia. Such laws were designed 'to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.[4]
Professor Sawer in discussing the United States case of *Yick Wo v Hopkins* doubted the validity of the claim that the arbitrary licensing power in the American case could be validly made under a Federal law. However, he sees that there would be a way of enacting such a law under s.51 (xxvi).
If the *policy* by which the San Francisco licensing power was *administered* — no Chinese to conduct a laundry—were specifically embodied in a Commonwealth law, then perhaps this might be valid under (xxvi).But plainly a general Commonwealth law requiring laundries to be licensed would be invalid in peacetime, as lacking any head of power under which it could be brought, and the method of its administration would be irrelevant to the question of characterisation.[5]
Sawer argues that the power encompassed both beneficial and non-beneficial laws. In support of this position he relied on the fact that some of the earliest Constitutional Committee drafts in 1891 did not have the exclusion clause. However, this omission was soon remedied, and the form which went before the Convention for debate had the exclusion clause clearly within it. Professor Sawer agrees that the origin of the section was attributable to Sir Samuel Griffith, and the original concept had nothing to do with legislation referable to aborigines.
Professor Sawer makes an assertion to the effect that the power was equally intended to be applied to people who were born in the colony.

In 1898 at Melbourne, Forrest did not want the power to be given at all, and Bernard Wise shrewdly suggested that Griffith's purpose would be met if the power was confined to circumstances in which the Commonwealth had made an immigration law on the lines indicated by Griffith. The discussion on this occasion tended to be in terms of 'aliens', but Barton showed clearly that the power was not confined to aliens in any legal sense; the persons coming under it might well be British subjects. Nor need they be migrants; they could well be born in Australia.[6]
The comment that 'they could well be born in Australia' is not substantiated by reference to any positive statement to this effect in the Convention Debates. Such a view may be implied from statements to the effect that the section was to apply to certain races who are present in the Commonwealth when the Commonwealth was established. At the Melbourne Session of the Convention of 1897-8 Isaac Isaacs argued that the section applied to what were considered by many to be "inferior races": who may be in the Commonwealth at the time it is brought into existence, or who may under the laws of the Commonwealth regulating aliens come into it.[7]
However, the significant fact is that the groups which were in contemplation were migrant groups who differed culturally and otherwise from the local population, and the concern of that local population was their behaviour after they had entered the country. Whatever reliance Sawer places on this last statement, his final conclusion is consistent with the matters urged in the present context. It does not detract from the contention that the prime purpose was to give the Commonwealth power to

enact the same type of restrictive laws in respect of immigrants after they had arrived as had already been enacted by the separate colonies. Despite his view that the power also had a beneficial potential, he still recognises its equally restrictive potential.

The exclusion of aborigines may not necessarily have been against their interests in accordance with the ideas of the time; while they might have lost the possibility of Commonwealth laws for their protection and advancement, so far as such laws had to depend on (xxvi), they were also saved from the sort of laws against their interests which were uppermost in the minds of the delegates as likely to be passed pursuant to the placitum.[8]

This opinion would certainly open up the argument that, once the exclusion of aborigines was removed, the Commonwealth could pass special laws which were against the interests of aborigines, as well as those which were in their interests. Electoral laws adverse to the rights of Aborigines had been passed in 1902, but these did not depend on the race power.

In 1891 Sir Samuel Griffith took the view that a law restricting the franchise to British subjects would not be a law under the special laws clause.

I do not think that an electoral law saying that only British subjects shall vote can be said to be a special law applicable to the affairs of any race for whom it is considered necessary to make special laws.[9]

The Commonwealth had plenary power to enact laws dealing with the Federal Franchise.

All Aborigines were granted the vote in 1962 by a Federal Franchise Act, but this provision did not depend on the special laws power. Professor Sawer fairly concedes that, in relation both to s.51(xxvi) and s.127, "an exaggerated negative importance has been attached to these sections."[10]

Despite his view that there was no doubt that "beneficial laws" could be enacted under s.51(xxvi), Professor Sawer expressed some concern as to the method used to ensure that the Commonwealth had such power by removing the words of exclusion from the section.

Having regard to the dubious origins of the section, and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would seem preferable to any amendment intended to extend its possible benefits to the aborigines.[11]

In the emotionally charged atmosphere of the 1967 referendum this caution was ignored.

Professor Sawer added a more extensive opinion to this caution.

There is much to be said for the Commonwealth taking over complete responsibility for the welfare of the aboriginal people, since it is already responsible for the largest single group— in Northern Territory— and is less likely to be inhibited by local built-in prejudices against the aboriginal people that exist in several areas of State electoral representation, government and administration. But the Commonwealth is not well placed to handle the integration of the aborigines, where that is the main object of policy, and since 1961 there has been a trend towards co-operative federalism in this sphere, which might be better than sole action by any government. Lacking the support of any Commission or Committee report, and having regard to the formidable difficulty of explaining the issues, including the meaning of section 51(xxvi) to an Australia-wide electorate, it would still seem best to leave these issues alone.[12]

Origin of Provision for Special Laws for Certain Races

The original form of this clause had been included by Sir Samuel Griffith in a scheme he proposed for a Queensland federation in 1890. It arose out of a movement for the separation of the Northern part of Queensland from the rest of the colony. In 1887 and in 1890 Hugh Murtagh Macrossan (Townsville) brought forward a motion affirming the desirability of the separation of the north from the south of Queensland. In 1890 Sir Samuel Griffith moved an amendment to this motion in which he sought a Queensland federation. The whole matter was stood over for want of support from the Southern members.

A year later on 15 September 1891, after the conclusion of the 1891 Constitutional Convention, Sir Samuel Griffith moved the Lower House of the Queensland Parliament to sit as a Committee to consider the following motion to establish a Queensland federation:

That it would be to the advantage of the Colony to constitute Southern, Central, and Northern Districts of Queensland as separate and autonomous provinces with separate legislatures… but so that matters of general concern, including the administration of the public debt should remain under the control of one legislative and executive authority for the united provinces... until the establishment of an Australian Federal Government.[13]

Sir Samuel said that the substance of this Motion had been before the House for over one year. In the list of powers he considered should be allocated to the central government was the following:
26. Affairs of people of any race with respect to whom it is necessary to make special laws not applicable to the general community, but not including the aboriginal native race.
Dealing with a reference by Sir Samuel Griffith to a vote against separation, A. Rutledge, during a lengthy debate, commented:
But the Hon. Member did not inform the House that on that occasion the feeling which dominated the minds of the people of Charters Towers was the fear that in the event of territorial separation taking place, or the new colony as it would then be, would be inundated by black labour.[14]
The relationship of this provision (No 26 above) to the question of the control of the entry of black labour into Northern Queensland was quite clear. It originated in Griffith's amendments to Macrossan's Motion in 1890. It was then incorporated in the 1891 Draft Commonwealth Constitution Bill, including the provision that the power should be one which was exclusive to the Federal Parliament. It was reinforced when Sir Samuel Griffith in 1892 introduced into the Queensland Parliament his Queensland Constitution Bill, which set out in detail the proposed division of Queensland into three provinces, and their union in a Queensland Federation. Under s.63 of this Bill the central government would, inter alia, have exclusive power to make special laws not applicable to the general community in respect of the affairs of any race with respect to whom it was necessary to make special laws.
Griffith explained the main outlines of the Bill:
It is a Bill to radically alter the Constitution of the Colony — to substitute for the present Constitution with its Parliament consisting of a Legislative Council and Legislative Assembly an entirely different Constitution — that is, three autonomous provinces, with a federation of those three provinces, and one central legislature and one Governor. ...it is framed to a great extent upon the lines of the Commonwealth Bill adopted by the Convention in Sydney last year.[15]
In support of his Bill, Sir Samuel Griffith advanced two major arguments.
First, he argued that separation movements had developed strongly in north Queensland and central Queensland over the previous twenty years. Queensland governments, in which members from the south predominated, feared that separation of the north of Queensland would result in the importation of huge quantities of Kanakas, or "tropical labour." One of the main objects of Griffith's 1892 Bill was to head off this possibility by creating a federation of three provinces.
Second, he referred to the various sections of the proposed s.63 of the Bill:
The first deals with the affairs of the people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community, but not including aboriginals. I have always maintained, and I think it will be maintained by all who take any part in this discussion, that it is very desirable that the power of dealing with races, with respect to whom it is necessary to make special laws, should be in the hands of the general government, and not in the hands of the legislatures of the particular provinces.[16]
Griffith explained the purpose of this provision:
Hon. Members who objected to territorial separation on the ground that the North might introduce coloured labour will see that the matter of alien races, which has so long been a bogey to many persons, is by this Bill to be dealt with by the central government; so that nothing can be done by the North against the expressed wish and desire of the other provinces.[17]
Doubt was thrown upon the necessity for any such clause as an exclusive aspect of the powers of the proposed central government. In the light of the problem which has subsequently arisen from the 1967 Constitutional amendments, and of many of the arguments later put in the 1897-9 Convention, this criticism may well have been merited.

Races For Whom Special Laws Were Considered Necessary

In elucidating the intentions of the framers of the Constitution in relation to the **special laws power**, it is important to determine who were the races for whom the framers considered it might be necessary to make special laws, and why it was so necessary. The concern behind Griffith's proposal, both in 1891 and 1892, was not solely limited to the Kanakas, but also involved concern about the activities of Chinese and other Asiatics. They were all aliens in more than one sense. They were aliens because they were coming into Australia from abroad. They were aliens because they were coming from cultures which were entirely different to what was considered to be the local culture, that arising from

what Sir Henry Parkes described as the "crimson thread of kinship"[18] which bound all the colonists together. In short these other races were aliens in the sense that many aspects of their cultural behaviour and values were alien to values dearly held by Australian colonists.
The original Griffith proposal for the **special laws power** which was carried into s.53 of the Draft Constitution bill of 1891 contained the words "special laws not applicable to the general community." These words, were dropped during the Convention of 1897-8 because of objections by Isaac Isaacs that the words were ambiguous It was not clear whether or not the words meant the general community of the Commonwealth as a whole.
The omission of these words, however, did not alter the general nature of what was intended to be covered by the term "special laws," viz, that they should be laws which did not apply to everyone in the community. Isaacs also argued successfully that there was no need to make the special laws power exclusive to the Commonwealth Parliament, because it could only relate to Commonwealth laws, and would not affect the power of the States to legislate in the same field so far as it affected the interests of a particular State. He indicated that, if the intention of the section was to debar the States from legislating in the field he would oppose it. Isaacs pointed out that all the States had the power to enact such laws, and had done so. As instances of such "special laws," he mentioned factory legislation restrictive of Chinese, laws licensing hawkers restrictive of Afghans, and laws restricting the employment of Kanakas in some States.

Edmund Barton, the leader of the 1897-8 Convention, replied to these objections by saying that the section intended to extend the Commonwealth power over immigration and aliens so as to make them subject to special laws **after they arrived**. A number of delegates suggested it would be more appropriate to make the **special laws power** concurrent under s.52 (now s.51), and to rely on Section 109 to override inconsistent State legislation. Barton, however, raised a quite different matter in opposition to such suggestions:
However it becomes exclusive it is desirable because international relations may exist in relation to such races.[19]

Question of Treaty Obligations and Special Laws for Certain Races

Bernard Ringrose Wise (New South Wales) wanted to restrict the **special laws power** to races "for whom laws have been passed by the Commonwealth in respect of their immigration into and emigration out of the Commonwealth."[20] He intended this to make the relationship with the immigration power clear, so that it would leave "domestic control to the States" in such fields as the employment of Chinese. This view was supported by Alfred Deakin (MLA Victoria) by agreeing that the special laws power should be made concurrent. He argued that it would be unwise to vacate the local laws in respect of Chinese, Afghans and Kanakas on the establishment of the Commonwealth, which would be involved if the **special laws power** were made exclusive.
Edmund Barton again defended his position on the ground of the possibility of external relations being involved:
You may have the complication, if you do not insert a provision of this kind, of having the States continuing to legislate in respect of a matter in which they have no responsibility, while the external relations, the explanation of all these matters, and the responsibility for them to the Imperial Government will rest with the Commonwealth.[21]
Barton was mindful of the problem that arose in relation to the accession of the colonies to the Anglo-Japanese Trade Treaty of 1894, and when the renewal of that treaty came up for discussion. The Japanese Government had sought exemption from the effect of Australia's policy of excluding non-white immigration in so far as it might restrict the free movement of Japanese businessmen in and about the colonies for purposes of trade, if the Colonies acceded to the Anglo-Japanese Treaty of 1894, and to the later Treaty on the same subject. The reason that the Anglo-Japanese Treaty was important was that Japan had passed a general tariff of a seriously restrictive nature applicable to all countries which had no commercial treaty with Japan. To avoid such restrictions it was necessary for the colonies to accede to the Anglo-Japanese Commercial Treaty of 1894, and any subsequent Treaty on the same subject. The United Kingdom was responsible, as the Treaty Making authority, for the enforcement of any undertakings given by the colonies as part of the renewal of the Trade Treaty with Japan, and the accession of the colonies to the Treaty. The Imperial Government was concerned to

meet the complaints of the Japanese Government that the "White Australia" immigration restrictions of the colonial governments would restrict the movements of Japanese businessmen visiting the colonies for the purpose of trade. The Imperial Government had pressed the colonies to abandon their explicit 'White Australia' policies, and to frame any immigration restrictions in terms of the Natal Act, which made the main condition of entry a knowledge of the English language.

The difficulty was set out in a note dated 10 May 1897 from Francis Bertie to the Secretary of the Colonial Office:

As Mr Chamberlain is aware, the Japanese Government, in the negotiations which have recently taken place in regard to the adhesion of the Colonies to the Anglo-Japanese Commercial Treaty of 1894, have agreed to legislation by the Colonies for the exclusion of Japanese artisans and labourers, and I am to suggest that no bill should be confirmed which does not in one way or another provide for the exemption of Japanese merchants, tourists etc. from the restrictions imposed upon Asiatics as regard to admission to the Colonies.[22]

The same file includes a Minute initialled by Joseph Chamberlain, in which the Colonial Secretary, noted the existence of treaties with countries like Borneo, Dominican Republic, Liberia, Morocco, Persia, Samoa, Tonga and others which applied to the Australian colonies and which guaranteed certain travel and residential rights to nationals of those countries. In supporting the use of the Natal Act as a model, the Colonial Secretary stated:

I have some doubt whether legislation excluding Japanese specifically, and not by some general test as the Natal law lays down, would not be a contravention of Art I and III of the Treaty, the protocol notwithstanding.[23]

The Protocol was the agreement that labourers and artisans could be excluded from entry without breaching the Treaty. Under this Protocol the Imperial government could not prevent legislation excluding Japanese labourers, but it was essential that the freedom of movement of Japanese businessmen should be secured.

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It was to meet these objections that Barton pressed for making the provision exclusive to the Commonwealth. By this means the Commonwealth would avoid complications of this sort:

Questions which relate to the whole body of the people, to the purity of race, to the preservation of the racial character of the white population are Commonwealth questions, and should be so exclusively.[24]

He saw no reason why the Commonwealth should have to wait until it had legislated with regard to the introduction of aliens, or of coloured races not being aliens, before it could deal with the affairs of those people of coloured race who are already settled in Australia:

But the very reason which makes the preservation of the continent as a continent to the Federation as a whole Federation so necessary as one of the powers is a reason that applies with just as much force to the affairs of the people of such races who have already been admitted and are at present in the commonwealth.[25]

A number of underlying themes emerged from the Debates. There was general appreciation that some States had more pressing problems in regard to the presence of and activities of certain groups or races which came from overseas. In the tropic areas of Australia, the use of black labour from the pacific islands was the main problem. In the more developed States, such as Victoria, the local population were concerned about the effect of significant numbers of Chinese artisans upon the economic prosperity of non-Chinese manufacturers and workers. In States where significant mining operations were proceeding after the discovery of gold, large numbers of Chinese miners had been attracted. In urban areas, the local population were disturbed by the presence and activities of hawkers and street sellers from Pakistan and Afghanistan.

The concern of the local population in all areas was that social tension would result from the continuous presence of these groups whose cultural background, values, and languages were totally "alien" and "foreign." These concerns had occasionally resulted in violence such as that which occurred in anti-Chinese riots on the goldfields There were strong feelings that coloured and Asian people should not be allowed to remain in Australia and should be deported. Where they were allowed to remain there was a demand that they should conform to local laws and customs, and as far as possible that they should "integrate" with the local community.[26] To enforce these demands, stringent local laws and regulations had been enacted in a number of the colonies to govern the conditions which should be observed by those foreign groups who were permitted to remain.

Some of the laws on the gold fields and in industrial areas were so stringent that they acted, occasionally, as totally prohibitive of the activities considered to be unacceptable, and were suggestive that their real purpose was to induce the groups to leave Australia altogether.
From the viewpoint of organised Labor and Industry, perceived unfair competition was the motivating force towards these restrictive laws applicable to these foreign or alien groups, which were identified as races by reference to appearance, language, and customs.

Residual Role of the States re Special laws power

The final outcome of the debate in the Convention of 1897-8 was that the need for a **special laws power** was confirmed but it was reduced to the terms of the present provision in the Constitution. By being placed in s.52 (now s.51), it was made a concurrent power, thereby preserving the right of the States to legislate until such times as the Federal Parliament exercised the **special laws power**.
It is quite clear that, in both the Conventions of 1891 and 1897-8, what the framers of the Constitution had in mind, when they used the term "special laws," was legislation which would ensure that any persons admitted to the country would not act in any way that could be detrimental to the interests of the existing population. This legislation involved laws to prevent competition by cheap imported labour with local workers, laws to ensure that the conditions under which businesses, for example, Chinese Laundries and furniture factories, were conducted would conform to the conditions imposed on all local businesses, and laws to prevent, what were considered to be, undesirable practices on the gold fields by people whose cultural values were different from those of the local population.
The liberal contention of some delegates, that those coming into the country should be dealt with in the same way as local residents, was considered to be ineffective in dealing with people whose cultural values were so distinctly different. Even liberals and democrats expressed reservations about giving such races the right to vote.[27]
Additional light can be thrown on the meaning of the **special laws power** in the minds of the framers of the Constitution by considering the terms of the election program of George Reid, Premier of New South Wales, when he stood as a delegate to the 1897 Convention. In this program, he set out a list of points, which he considered were central to its deliberations. In Part VI, Powers of Parliament, he listed a number of points, the relevant one for this discussion being No 7 - "Power over coloured races and immigration."[28] The coupling of the two subjects together shows that the **special laws power** was designed to enable the Commonwealth to legislate as to the conduct of immigrants after their admission to Australia, either as permitted aliens or settlers.
The exclusion of Maoris as well as aborigines in the 1891 Draft Constitution demonstrates the same point. Neither Maoris nor Aborigines were immigrants. There is nothing in the Debates at, either, the 1891 Convention, or the 1897 Convention, which would suggest that the framers of the Constitution had laws of a beneficial nature in mind.
They were concerned to place any necessary restrictions upon new arrivals to ensure that they observed both the laws and customs of the community into which they were being admitted. They were mindful of the fact that many of the values accepted by society in Australia were not necessarily accepted by many of the races with which they were concerned when proposing to give to the Commonwealth Parliament powers, which were possessed by the federating colonies, to enact special laws not applicable to the general community, but applicable to particular groups recognised at the time as alien races who were entering the country. Special licensing laws were common in those of the States where there were significant numbers of Chinese, Afghan, Pakistani, Indian, and South Sea Island people.
Further insight into the reasoning behind the introduction of s.51 (xxvi) can be obtained from the Report on the Conditions of the Chinese Population in Victoria in 1868 detailed in the Appendix. None of the considerations raised in this Report were concerned with making beneficial provisions for alien races. On the contrary, it was contemplated that restrictive, and even penal, provisions should be made to protect local industrial conditions of work, and local cultural and social behaviour against people from alien cultures, who did not think and act in accordance with local social mores.
Such attitudes have been frowned upon in recent times under the influence of pronouncements by International Agencies. The Commissioner of Police in New South Wales was criticised in 1999 for linking certain types of drug, extortion, and immigration crimes to particular racial groups. The

framers of the Constitution would not have blushed at the suggestion that special laws might be necessary particularly to combat the activities, for instance, of Chinese Triads, or Italian Mafiosi in organised criminal activities. They did not have in mind any beneficial legislation for the purpose of assisting migrant groups who were permitted to enter the country.

The Exclusion of Aborigines from the Special Race Power

The **special laws power** in s.51 (xxvi) of the Federal Constitution agreed to at the 1987-8 Convention was clearly limited to matters specifically discussed by the delegates in the Conventions. It was from the effects of legislation for these purposes that the people of the aboriginal race were excluded. If the section was intended to be discriminatory against aborigines, they would not have been excluded from the effect of its provisions.

Hence the reasons given to the voters in the 1967 referendum for the omission of the words of exclusion in s.51 (xxvi) [29] had no real relationship to the purpose for which the words were originally included in the Section.

The earlier provision for the **special laws power** of 1891 differed from the final provision for the **special laws power** of 1897-8 in that the earlier one was directed to the "affairs of people of any race," whereas the final provision was directed to "the people of any race." To judge by the Convention debates, the intention of the framers of the Constitution was that the **special laws power** should deal with people after they had arrived in Australia not with their affairs generally. Henry Bournes Higgins at the Adelaide Session of the Convention of 1897-8 explained the reason for the omission of the word "affairs":

I apprehend it is to provide for the Parliament dealing with the kanaka question, for instance. I would suggest that the object of the clause is not to allow the Federal Parliament to deal with the affairs of kanakas, but rather with the relations of kanakas towards Australia.[30]

He added that he considered that the section was aimed to allow the Federal Parliament to:

"deal with the important question of the exclusion of the kanakas."[31]

It was because it could be said that the use of the word "affairs" would give the Commonwealth Parliament power to deal with "the affairs of the kanakas in their own islands" that he supported their removal.

The main problem with both provisions was that the framers did not define what they meant by a "race" in the context of the Constitution. They undoubtedly had a clear view of the "races" they intended should be **included** - races who were fairly easy to distinguish as of a different racial and cultural origin from the bulk of the already resident population, for example, Kanakas, Chinese, Pakistanis, and Afghans.

Although aborigines could easily be distinguished as of a distinct race, they were **excluded** from the provision of the **special laws power because they were not immigrants**.

They were a settled part of the local population. Thus the **exclusion of aborigines** from the impact of possible laws enacted under the **special laws power** was a **beneficial exclusion not a discriminatory one**.

When the reformers of 1967 formed an incorrect view of the nature of the **special laws power** of s.51(xxvi) from which the aboriginal race had been excluded, the obvious change which should have been sought, particularly by those representing the aborigines, was the repeal of the whole section, a suggestion made by Professor Sawer at the time.[32] That this was not sought, particularly by those representing the Aborigines, was due to the misconception that the special laws power was intended to encompass only beneficial laws, exclusively or at least in part, which would give benefits to the aborigines not given by the same legislation to anyone else, and which would confer on the Commonwealth a power appropriate for this purpose. This is by no means certain. What is certain is that the removal of the words in the 1898 provision, incorrectly thought to be denigratory of the aboriginal race, has dissociated the section from its original meaning and intention.

The Original Intention of the Race Power

Whether the hopes of beneficial action by the Commonwealth would be realised by the enactment of special Federal Legislation was a matter which the amended provision would not guarantee. If the original intention were to be preserved, it would mean that special laws would only be enacted for the

purpose of making sure that any race which by its culture or social attitude acted in a way inconsistent with the general rights and obligations of all other citizens could be restrained from so acting by the enactment of special laws.
In the sense that the section was conceived as discriminatory in purpose, it was confined to making provision to ensure that immigrants conformed with the laws and customs of the local community. It was not intended that they should be subject to discrimination of such a nature as to enslave them, or gratuitously injure them. They would be under no threat if they behaved like everyone else in the community. They may have been kept out by the use of discriminatory immigration laws, but once admitted, what was expected of them was that they behaved like everybody else, as in the case of the "assimilated" Chinese-Australian Citizen, Quong Tart. As described by Professor Irving:
he rose to eminence in his adopted country, adopting its customs and mores and eschewing the more undesirable activities and perceived characteristics of less sophisticated Chinese.[33]
This merging of immigrants into the local community was both accepted and expected at the time. During the course of the *Hindmarsh Island Bridge Case*, it was suggested that the omission of the words excluding aborigines from the provisions of s.51 (xxvi) would entitle the Commonwealth Parliament to enact penal laws as violently discriminatory as those enacted by the Nazis in Germany. Kirby J. countered this argument by asserting that the High Court would not uphold such laws because they would be in breach of international treaty obligations. On the basis of the expressed opinions of the delegates at the Convention of 1897-8, such an approach would be unnecessary. There was no intention on the part of the framers to invest the Commonwealth with any such power. If immigrants did not conform to the laws and customs of the country, then the Government could make special laws to ensure that they did. It is certain that laws of a gratuitously draconian nature, having no relation to the matters which were desired to be corrected, were not in any way contemplated by the framers of the Constitution.
At the Melbourne Session of the Convention of 1897-8 Charles Cameron Kingston was advocating a liberal approach to immigrants irrespective of their racial origin:
if you do not like these people you should keep them out, but if you do admit them, you should treat them fairly—admit them as citizens entitled to all the rights and privileges of Australian citizenship.[34]
In reply to this statement William A.Trenwith, the only Labor delegate, interjected:
"And compel them to observe the same rules as other citizens?"
Kingston replied:
Yes, compel them to observe the same rules as other citizens, but impose no special rules intended for their special injury and to emphasize what some may consider the degradation of their position.[35]

Despite these liberal sentiments Kingston when questioned said:
I do not think we ought to give them the right to vote.[36]

It is clear from these expressions of opinion that it would not have been in the contemplation of the framers of the Constitution that the special laws power could be used to support laws of the kind enacted by the Nazi regime in Germany before their defeat in 1945. Consequently, there would be no need to resort to the external affairs power to defeat any such legislation. Many of the possible consequences of the amendment of the special laws power in 1967 came before the High Court for consideration in the *Hindmarsh Island Bridge case*.

1 *Kartinyeri and Anor v The Commonwealth of Australia (The Hindmarsh Island Bridge case.)* (1998) 195 CLR 337.
2 *Ibid.,* para.132, p.401.
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1 *The Case for Yes. The 1967 Referendum.* Mitchell Library Q.323, 1191/11.
2 *Ibid.,* p.110.
3 "The Australian Constitution and the Australian Aborigine," Geoffrey Sawer, (1996-7) 2 *Federal Law Review,* p.17.
4 *Ibid.,* p.20.
5 Sawer, Op. Cit., p.21.
6 *Ibid.,* p.23.
7 *Convention Debates*, Melbourne, 1898, p.228.
8 *Ibid.,* p.23. Emphasis added.
9 *Convention Debates,* Sydney, 1891, p.701.
10 Sawer, *Op. Cit.,* p.18.
11 *Ibid.,* p.35. Emphasis added.
12 *Ibid.,* p.35.
13 *Queensland Parliamentary Debates,* 1891, Vol. LXlV, p.1045.
14 *Queensland Parliamentary Debates,* 1891, Vol. LXIV, p.1045.
15 *Queensland Parliamentary Debates,* 1892, Vol. LXCVII, p.794.
16 *Queensland Parliamentary Debates,* Vol LXVII 1892 p.794.
17 *Queensland Parliamentary Debates,* Volume LXVll, 1892 p.794.
18 Speech of Sir Henry Parkes at a banquet in the Queen's Hall of the Victorian Parliament on 6 February 1890. Quoted by La Nauze, *The Making of the Australian Constitution,* p.11.
19 *Convention Debates,* Melbourne, 27 January 1898, p.228.
20 *Ibid.,* p.229.
21 *Convention Debates,*Melbourne,1898, p.232.
22 *C.O 418/4*, Public Records Office, Kew, London.
23 *Ibid., C.O. 418/4.*
24 *Convention Debates*, 1898, Melbourne, p.232.
25 *Convention Debates*, 1898, Melbourne, p.232.
26 In a Memorandum dated 8 July 1897 Joseph Chamberlain, the Colonial Secretary, indicated that he was aware of the determination of the Premiers, which was shared by the colonies they represented, to "preserve unmistakably the European character of Australian Colonisation, and so set up a barrier once for all against the introduction into the population of the colonies of an element incapable of assimilation and at the same time capable of indefinite expansion." He felt that there was force in the argument that unless the colonies were able to limit Asiatic immigration it would be impossible to avoid outbreaks of anti-colour riots such as happened in America, thereby damaging the relations of the colonies with Asiatic countries. *C.O. 318/4,* Public Records Office, Kew, London.
27 See C.C. Kingston, *Convention Debates, Melbourne,* 1898, p.247.
28 "The Outlook for Federation," by The Hon G.H. Reid, Premier of NSW, in *Review of Reviews*, January 20, 1897. Australian National Library.
29 Section 51(xxvi) originally provided that the Commonwealth should have legislative power in respect of "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws."
30 *Convention Debates,* Adelaide, 1897, p.831.
31 *Convention Debates,* Adelaide, 1897, p.831.
32 Sawer G, "The Australian Constitution and the Australian Aborigine," (1966-67) 2 FLR 17, p.35.
33 Professor Helen Irving. *To Constitute a Nation,* p.105.
34 *Convention Debates,* Melbourne, 1898, p.246.
35 *Convention Debates,* Melbourne, p.246.
36 Ibid., p.247.