

**MELBOURNE CITY COUNCIL
RECONCILIATION VICTORIA & LAW INSTITUTE OF VICTORIA
INDIGENOUS ISSUES & RECONCILIATION COMMITTEE
MELBOURNE CONVERSATIONS
MELBOURNE 1 JUNE 2007
THE 1967 REFERENDUM: DON'T GET CARRIED AWAY
Justice Michael Kirby***

THE REFERENDUM IDEAL

It was Prime Minister Harold Holt who in March 1967 proposed a referendum to change the Constitution to remove exclusions of Aboriginals from federal powers. He did so out of a belief that the exclusion of federal power to enact laws with respect to people of the Aboriginal race looked discriminatory.

Mr Holt explained that, if the qualifying words were removed, it would mean that the Federal Parliament would obtain the power to make laws that would "secure the widest measure of agreement with respect to Aboriginal *advancement*". His proposal was supported by the then

* Justice of the High Court of Australia. Text for an address by videofilm for a Melbourne Conversation at RMIT Capitol Theatre, Melbourne, 1 June 2007 at 6 p.m.

2.

Leader of the Opposition, Mr Gough Whitlam. It passed the House of Representatives and the Senate without a single dissenting voice. Senator Lionel Murphy, Opposition Leader in the Senate, stated that: "In this proposed law there is no suggestion of any intended discrimination in respect of Aboriginals except for discrimination *in their favour*".

The 'yes' vote was supported at the referendum by all of the major Australian political parties. The Deputy Leader of the Australian Country Party, Mr Doug Anthony, explained that the amendment of the Constitution would give the government of the Commonwealth, for the first time, the power to make special laws *for the benefit of* the Aboriginal people throughout Australia.

It is against this background that the referendum was conducted and overwhelmingly carried on 27 May 1967. No other constitutional referendum has come close to the unique political and popular consensus demonstrated in the referendum of 1967 on Aboriginals. The Commonwealth of Australia has sometimes been described, constitutionally speaking, as a "frozen continent". However, on this occasion the ice thawed. The requirements for amendment were overwhelmingly satisfied with almost 90% of the electors voting in favour of the change. Of forty-four proposals to change the Constitution since 1901, it is one of only eight that have succeeded

3.

The goodwill that existed in 1967 was an astonishing political phenomenon. I believe that there is still a great fund of goodwill towards the indigenous peoples of the Commonwealth. But we should try to recapture the mood, enthusiasm and political consensus about targets and objectives that existed forty years ago.

A LEGAL QUESTION

Nearly ten years ago, a case came before the High Court in which the amended provision of the Constitution had to be interpreted: *Kartinyeri v The Commonwealth* (1998) 195 CLR 337. The question was whether, following the referendum, a special law could be enacted which, upon one view, was detrimental to, and discriminated adversely against, a group of Aboriginal Australians solely by reference to their race. This question had never previously arisen in relation to the 'races power' of the Constitution. Still less had it arisen after the referendum in which political leaders of all persuasions had repeatedly emphasised that their purpose was to arm the Federal Parliament with the power to make laws for the *benefit* of Aboriginal Australians, not to their *detriment*.

In 1997, the Federal Parliament enacted the *Hindmarsh Island Bridge Act*. That Act concerned the construction of a bridge to Hindmarsh Island in South Australia. It forbade the making of a declaration under an earlier federal law, the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984, in relation to the preservation or protection of Aboriginal lands in the Hindmarsh Island bridge area. A

4.

group of Aboriginal Australians were seeking such a declaration, claiming that building the bridge to Hindmarsh Island would cause injury and desecration to their land and heritage. Their claim might have been justifiable or unjustifiable. The claimants applied to have it decided under the previous law. The decision of the Parliament, to exclude the Hindmarsh Island Bridge Project from the earlier *Protection Act*, was, on one view, a law detrimental to, and discriminatory against, Aboriginal Australians solely by reference to their race. Specifically, it was detrimental to those indigenous people living on and near Hindmarsh Island, who objected to the bridge on the basis of their claims which were founded in their indigenous land, culture and status.

In this way, the Amending Act presented a stark question to the High Court - whether the 'races power', in the Australian Constitution, as amended by the referendum, permitted enactment of a federal law arguably discriminatory *against* an Aboriginal community and harmful to their asserted interests. The point was one of constitutional principle and meaning. In the course of the argument of the case in the High Court, I asked the representative of the Federal Government whether the 'races power' would permit the Parliament to enact a law discriminatory *against* indigenous Australians (or Asian Australians or any other racial group) similar to the racist laws that had been passed in Nazi Germany (against the Jews) or in apartheid South Africa (against black South Africans). The answer given to me was that such a law would be valid under the Constitution of the Commonwealth. I was told that I did not need to worry about it because no Federal Parliament

5.

would ever enact such extreme laws. Democracy, it was said, would protect Australia against any such possibility.

By reference to the history of the referendum, the alteration to the 'races power' as first adopted, the international principles of human rights and the perceived will of the Australian people, I rejected the government's submissions. I held that the 'races power' only permitted special laws that could be judged to be 'for', in the sense of for the benefit of, Australia's indigenous peoples. Discriminatory and adverse laws would not fit within the power as granted and as amended, with such enthusiasm and goodwill, in 1967.

My approach was not accepted. All of the other judges of the High Court, for varying reasons, concluded that the challenged federal statute was valid. Only Justice Gaudron reserved to a future case the possible need for intervention by the High Court in the case of a "manifest abuse" in the use of that power.

It is not my purpose to re-debate the court decision made a decade ago. One can understand the argument that appealed to the majority of the High Court that a Parliament that makes a law must have the power to amend, qualify and even repeal it as circumstances are seen to change. Still less is my purpose to question the authority of a majority ruling of the High Court. In our system, both in the Parliament and the High Court, it is the majority that prevails. The plurality states the law that binds all Australians.

6.

However, whilst we celebrate the fortieth anniversary of the 1967 referendum, we should not get carried away with our enthusiasm. Australian law, as presently stated in the Hindmarsh bridge case, is that it is open to the Federal Parliament, under the provision of the Constitution amended in 1967, to make laws "*for the benefit of*" Australia's indigenous people. But also special laws that are *against* them and *against* their interests.

The 1967 referendum on Aboriginals was a great symbolic event. Yet we should not exaggerate its importance. The Constitution does not oblige justice and equality for all indigenous people in Australia. That goal can only be met by the Australian people and those whom they elect to Parliament. We must therefore look to ourselves and not to our Constitution for just laws and respect for basic rights. Where there is injustice in Australia—to women, to gays, to religious minorities, to Aboriginals and other groups, we can only blame ourselves and the laws made by our parliaments. We need to accept our responsibility as a free people to put things right.

**MELBOURNE CITY COUNCIL
RECONCILIATION VICTORIA & LAW INSTITUTE OF VICTORIA
INDIGENOUS ISSUES & RECONCILIATION COMMITTEE
MELBOURNE CONVERSATIONS
MELBOURNE 1 JUNE 2007**

**THE 1967 REFERENDUM: DON'T GET CARRIED AWAY
Justice Michael Kirby**

EMBARGOED UNTIL 27 MAY 2007