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The 1967 Referendum—history and myths

On 27 May 1967 a referendum was put on removing the impediment in s.51 (xxvi) to the Commonwealth Government making special laws with respect to Aborigines and on removing the impediment in s.127 to counting Aboriginal people in the census. The result, a 90.77% 'yes' vote, opened the way for much greater Commonwealth Government involvement in the area of Aboriginal affairs. The significance of the referendum has, however, been obscured by popular myths. These include that it was whole-heartedly supported by both sides of politics, that it conferred the vote, equal wages and citizenship on Indigenous Australians and that it ended legal discrimination. None of this was the case. The Menzies Government had not been enthusiastic about altering s.51(xxvi) and the Holt Government's motives were mixed. The repeal of the discriminatory state legislation, clarification of the Indigenous right to vote, securing of equal wages and access to full citizenship entitlements involved a process which had begun earlier and was independent of the 1967 referendum. Moreover, the referendum did not automatically make the Commonwealth more involved and indeed little changed for five years.

Although it is possible to question the efficacy of having both the Commonwealth and the states involved in Indigenous affairs, it is not possible to question the fact that the referendum provided a head of power for some significant Commonwealth legislation. Similarly, although it is possible to question the referendum's practical significance, it is not possible to question the referendum's symbolic significance. The referendum has, indeed, come to act as a form of historical shorthand for a decade of change which began in the early 1960s and ended in the early 1970s.

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Introduction

Forty years ago, on 27 May 1967 a referendum question concerned with amending s.51(xxvi) and s.127 of the Australian Constitution received a massive 90.77% 'yes' vote and passed in all six states. The result opened the way for much greater Commonwealth Government involvement in the area of Aboriginal affairs and the referendum has been called a watershed 'changing forever the social and political relationship between Aborigines and non-Aborigines'.[1] Such is the significance of the referendum that the National Museum of Australia has devoted part of its web-site to bringing together links to a wealth of relevant archival material[2]. The significance of the referendum has, however, been obscured to some extent by popular myths. These include that it was whole-heartedly supported by both sides of politics and that it conferred the vote, equal wages and citizenship on Indigenous Australians and ended legal discrimination. This Research Brief[3] examines both the referendum's historical context and the myths that have subsequently become associated with it.

Part I: The History

The 1890s–1900s—the situation at Federation

Aborigines were barely mentioned in the deliberations of the Federal Conferences and Conventions of the 1890s. Although many involved were known for their humanity, no delegate spoke of a national obligation to Australia's earliest inhabitants.[4] The resulting Constitution of 1901 mentioned Aboriginal people only twice, and on both occasions did so in the negative.

The original Section 51 provided that:

> 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 original Section 127 provided that:

> In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted.

There is hardly a word recorded which throws light on why the above sections were so worded. Alternate explanations have been put for both provisions.

Some have advanced a benign explanation for the wording of s.51(xxvi)—that the 'founding fathers' wished to spare Aborigines from adverse discrimination of the type that had already been passed in 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 the various coloured races employed in the pearl fisheries of Queensland and Western Australia'.[5] These 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'.[6]

It is clear, however, that at the time of Federation it was thought desirable for governments to have the power to discriminate against people on the basis of their race. Thus the Commonwealth's passage of legislation such as the *Invalid and Old-age Pensions Act 1908* and *Commonwealth Franchise Act 1902* which excluded Aboriginal people from its benefits. Thus also the rejection by the Constitutional Conventions of the clause (no.110) proposed by the Tasmanian Parliament which would have prohibited a state depriving 'any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of its laws.'

A more probable explanation for the wording of s.51 (xxvi) is that Aborigines were thought to be a dying race and their welfare the responsibility of the states, just as were all the areas of land settlement, employment, education or health.

In a similar vein, some have offered a benign explanation for the wording of s.127 – that it was physically too difficult to count Aboriginal people. Kim Beazley Sr, who supported the campaign to amend the Constitution, argued the exclusion of Aborigines from the census was only out of the physical difficulty and not intended to be an affront.[7]

Counting against this explanation is the fact that data had been collected on Aboriginals (including on their number) long before 1967 and was being published in Commonwealth Year Books. When the Commonwealth Bureau of Census and Statistics was created in 1905 they took the view that although they should not tabulate the number of full-blood Aboriginals, they were allowed to enumerate them and did so in the 1911 to 1966 census. Those deemed to have less than half Aboriginal blood were classified as Europeans and included in the statistics for the general population. Those deemed to be 'half-castes' were fully tabulated as a category in the 'race' analysis. The population of those deemed to be 'full-bloods' was estimated for separate analysis, but the data was excluded from published statistics on the general population.[8] Indeed, given that in the 1920s Aboriginal people who had been counted for voting in certain state elections were having their names marked for disqualification from voting in federal elections (to be discussed later)[9], it is clear that there was more to not wanting to count Aboriginal people in the census than physical difficulty.

A more probable explanation for the wording of s.127 is that it was intended that Aboriginal people have no role in Federal politics, and as the census was the basis of how many House or Representative seats were to be allocated to each state, it was decided not to count, for this purpose, the Aboriginal people. Moreover, states with few Indigenous people were keen that those states with more should not be able to claim more of any division of the new Commonwealth Government's surplus finances.[10]

In the end the Constitution left little room for Commonwealth involvement in Indigenous affairs and for the next sixty years the states pursued policies which could be broadly called 'assimilationist'. Although legislation in this period varied greatly by state, in every jurisdiction it tended to touch on similar areas and in every area laws intended for the 'protection' or 'welfare' of Aboriginal people became laws which dispossessed, oppressed and alienated Aboriginal people.[11]

The 1910s–1940s—the advent of Commonwealth involvement

As early as August 1910 the Australian Board of Missions had called on 'Federal and State Governments to agree to a scheme by which all responsibility for safeguarding the human and civil rights of the aborigines should be undertaken by the Federal Government'.[12]

In 1911 the Commonwealth Government became involved in Aboriginal affairs when it took over from the State of South Australia responsibility for the Northern Territory. Prime Minister Fisher was urged that very year by 'a delegation of scientific, commercial, religious and political men' to be very pro-active in the new territory for the benefit of the Indigenous inhabitants[13]. However, for the next thirty years the Commonwealth's approach to 'native welfare administration' differed little from that of the state governments. During that time, however, there was a growing difference of opinion on the question of whether the Commonwealth should have the power to be involved directly in Indigenous affairs in the states.

In 1928 the Association for the Protection of the Native Races of Australasia and Polynesia (later called the Association for the Protection of the Native Races) argued that:

> The method of relying upon State and Colonial Governments has been tried from the earliest days of colonisation, and has undeniably failed…. It is a recognised political principal that the wider the area from which the governing power is derived, the larger the task set, the wider and more statesmanlike the policy is likely to be. It follows as a corollary that the Federal government is likely to deal with the whole problem more adequately than the State Governments …[14]

The 1929 Royal Commission into the Constitution found that 'on the whole the states are better equipped for controlling aborigines than are the Commonwealth', but a dissenting report stated that the national parliament 'should accept responsibility for their well-being'.[15]

Although the Commonwealth Government accepted the majority view, the campaign for constitutional change accelerated in the 1930s as humanitarian, scientific and feminist organisations were joined by such Aboriginal activists as William Cooper, secretary of the Australian Aborigines' League:

> We feel it but right that our people should be the responsibility of the Federal Administration … We know that the Commonwealth can discharge its responsibilities and we appreciate that the States cannot …[16]

In January 1938 Cooper's Aboriginal League joined forces with Jack Patten and Bill Ferguson's Aborigines Progressive Association to instigate an Aborigines 'Day of Mourning' and call for a 'National Policy for Aborigines' and 'Commonwealth Government control of all Aboriginal Affairs'.[17]

In the 1940s the Curtin Labor Government sought to include making laws with respect to 'the people of the aboriginal race' in a list of 14 powers that the Commonwealth sought to take over from the states for the duration of the war and five years after. Commonwealth Attorney-General Evatt noted at the 1942 Constitutional Convention that 'Strong representations have been made that the Commonwealth should undertake this responsibility'.[18] Although this transfer may not have been that controversial, most of the other envisaged transfers were and the referendum failed to pass. The failure of the 1944 referendum and end of war did nothing, however, to reduce the pressure for greater Commonwealth involvement in Indigenous affairs across the country.

The 1950s—greater Commonwealth interest

The pressure for greater Commonwealth involvement continued to grow in the 1950s and the desirability of such involvement was recognised on both sides of politics. From the different sides, however, came different ideas on the form that involvement might take.

The Menzies Coalition Government was not prepared to disturb state powers, and was concerned only with the balance in responsibilities.[19] In 1950 Paul Hasluck moved in a private member's motion:

> That this House is of the opinion that the Commonwealth Government, exercising a national responsibility for the welfare of the whole Australian people, should co-operate with the State Governments in measures for the social advancement as well as the protection of the people of the Aboriginal race throughout the Australian mainland; such co-operation to include additional financial aid to those states on whom the burden of native administration falls most heavily …[20]

The House of Representatives responded positively and unanimously moved that the Government:

a. Exercises national responsibility for Aboriginal people and cooperates with the States.
b. Works towards the social advancement as well as the protection of Aborigines.
c. Provides additional finance and effective administration.[21]

Following his appointment in 1951 as Minister of Territories Hasluck did much to rouse his department from an administrative torpor, but did not advocate a transfer of state powers to the Commonwealth.[22]

The Labor Party was keener for greater Commonwealth responsibility in the area of Indigenous affairs. In 1957 Gordon Bryant suggested that if a constitutional amendment was not possible, perhaps use could be made of either s.51 (xxxvii) by which the states could cede

particular powers to the Commonwealth, or s.96 which gave the Commonwealth the right to make grants to the states for specific purposes. He urged the Menzies Government to intervene where mining operations on Aboriginal reserves were unwelcome and declared that 'power to control native affairs should reside in this Parliament'.[23] Bryant also drew parliament's attention to the fact that Aboriginal people did not receive an equal share of social welfare benefits, something he believed could only be remedied if the Commonwealth had greater responsibility in the area.[24] In this same debate the Labor leader, Dr Evatt, declared:

> … that the only thing to be done with the Australian Aboriginal, full-blood or otherwise, is to give him the benefit of the same laws as apply to any other Australian.[25]

The Commonwealth Government was not, however, in the course of the 1950s able to secure greater state co-operation.

The early 1960s—pressure for change

In the early 1960s interest in Aboriginal affairs grew rapidly. The reasons were many. Aborigines were increasingly becoming fringe-dwellers to non-Aboriginal communities, the resource boom brought activity unwelcomed by traditional Aboriginals, many missionary groups were starting to question their earlier paternalistic practices, and a new educated and articulate Aboriginal leadership was emerging. It was also the case that there was a growing international interest in human rights issues (not least in the U.S.), a growing domestic awareness of Aborigines' poor socio-economic situation, and a growing awareness among policy makers of a world-wide movement towards decolonisation.

As the interest in the subject grew, so too did the number of voices drawing attention to the meagre achievements of the assimilation policy, the denial of civil rights which it entailed and the poor international image it gave Australia. These voices were both Aboriginal and non-Aboriginal. In 1963 the Yolngu people from Yirrkala in the Northern Territory sent a bark petition to the Commonwealth Government protesting against plans to grant mining leases in Arnhem Land. In 1965, 30 Sydney University students, including Charles Perkins, future head of the federal Department of Aboriginal Affairs, began a 3,200 km 'Freedom Ride' to expose discrimination in rural New South Wales. In this same period the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), an alliance of predominantly non-Aboriginal people and associations, campaigned on a range of issues and many senior Labor Party members urged a wider recognition of Aboriginal need and a wider role for the Commonwealth Government.[26]

Faced with this rising tide of public concern and action, many state governments began to repeal their most discriminatory pieces of legislation and Aborigines were guaranteed the right to vote in Western Australia and Queensland in 1965. The Commonwealth Government too began to lift its restrictions on Aboriginal rights. The *Commonwealth Electoral Act 1962*, opened the way for 'Aboriginal Natives of Australia' to enrol and vote as electors of the

Commonwealth (and this applied also to the Northern Territory where few Aborigines had previously been able to meet the property ownership or defence force service requirements).

The federal bi-partisanship which had started to emerge on some indigenous issues did not, however, stretch to the bigger one of shifting responsibility from the states to the Commonwealth, something urged by FCAATSI.[27] In 1962 ALP frontbencher Kim Beazley Sr raised a Matter of Public Importance in which he urged the deletion of s.127 and s.51(xxvi) from the Constitution. Gordon Freeth, Minister for the Interior and Minister for Works, accused Labor of grandstanding and argued that though such changes might enhance Australia's international status, the states were better equipped to handle Aboriginal affairs.[28] Faced with this political stand off, FCAATSI began a major campaign in support of a referendum to change the constitution to enable the Commonwealth Government to legislate for the benefit of Aboriginal people in the states.

The 1965 Constitutional Amendment Bill

In 1965 the Menzies Government presented a Bill which provided for the repeal of s.127. Cabinet minutes reveal that in proposing this reform the Government had two motivations in mind that were quite apart from the need to address injustice. The first was the need to soften the electorate up to vote 'yes' on an envisaged question to deal with the number of senators relative to the number or House of Representative members (known as the 'nexus' or s.24 issue). The second was the threat posed to Australia's international standing by Australia's racially discriminatory laws. The Department of External Affairs files at the time were filled with instances where bureaucrats and politicians discussed this matter.[29] It was also a particularly awkward time for the Government in international affairs as they wished, for example, to be able to criticise South Africa's racial discrimination without being seen to be hypocritical.[30]

Both the above reasons were touched on by Attorney-General Billy Snedden when arguing in minutes presented to Cabinet that 'the inclusion of this proposal would … tend to create a favourable atmosphere for the launching of the proposal regarding section 24' and that 'its repeal could remove a possible source of misconstruction in the international field'. [31]

Mr Snedden's suggestion that s. 51 (xxvi) also be amended was, however, rejected by Cabinet.[32] According to Prime Minister Menzies in the House of Representatives, the words of s. 51 should remain unchanged because:

> The words are a protection against discrimination by the Commonwealth parliament in respect of Aborigines. The power granted is one which enables the Parliament to make special laws, that is, discriminatory laws in relation to other races—special laws that would relate to them and not to other people. The people of the Aboriginal race are specifically excluded from this paper. There can be in relation to them no valid laws which would treat them as people outside the normal scope of the law, as people who do not enjoy benefits and sustain burdens in common with other citizens of Australia ...[33]

He said the repeal of s.51(xxvi) in its entirety had some attraction, but he felt the Commonwealth should retain the power in case it were needed sometime in the future, for instance in order to assist the Nauruans re-establish themselves outside their existing island.

The leader of the Labor Opposition, Arthur Calwell, supported changing both s.127 and s.51(xxvi). He argued that although giving the Parliament specific power to legislate on behalf of the Aboriginal people might be discriminatory in the literal sense, it was not true in practical terms—meaning it would only be used for the benefit, not detriment of indigenous people.[34]

Strong support for the amendment of s.51(xxvi) came also from the Government member W.C. Wentworth. Since the Bill before the House referred only to s.127 he intended moving a Private Member's Bill proposing that s.51(xxvi) be deleted and a new section added as follows:

> Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin.[35]

ALP frontbencher Gordon Bryant pointed out that as the Constitution stood the Commonwealth was able to discriminate in favour of various sections of the community such as migrants or pensioners but was unable to do so on behalf of Aborigines. He said:

> … Although it is important for the Aboriginal people of Australia to be counted, there are many in the Aboriginal community … who want not only to be counted but also to count. And they will not count until the Commonwealth accepts a greater and wider responsibility for these people. The need for this greater acceptance of responsibility for the Aborigines by the Commonwealth has been before this Parliament continually, for my part, for eight years.[36]

Kim Beazley Sr, agreed that the Commonwealth should have a positive power to make laws for the benefit of Aborigines:

> I think it is regrettable that it is quite possible for the States to continue what are marked discriminations against Aborigines, and that we as a national Parliament, supporting a national Government—which is answerable internationally on race issues—are so powerless to legislate to make a meaningful Australian citizenship not only have force in the Commonwealth in regard to voting rights but also where a State has not enacted voting rights for people who are fully of the Aboriginal race.[37]

Although both houses of Federal Parliament passed the *Constitution Alteration (Repeal of Section 127) Bill* in March 1966, the Government decided to postpone its introduction. The reason was possibly that the incoming Prime Minister, Harold Holt was to a degree in agreement with those who did not believe s.127 should be addressed without also addressing s. 51.[38]

1966—continued pressure for change

Governments continued to feel the pressure for change in 1966. For example, in that year Aboriginal stockmen and women at Wave Hill in the Northern Territory walked off the job in protest at their working conditions and wages, established a camp at Wattie Creek and demanded the return of some of their traditional land. FCAATSI also continued to campaign for a range of rights and a referendum. In that same year the South Australian Parliament passed the *Prohibition of Discrimination Act 1966* and the Commonwealth extended eligibility for social security benefits to all Indigenous Australians (the Commonwealth Government had extended the entitlement to social security benefits to Indigenous Australians in 1959, but not those classed as 'nomadic or primitive').

The 1967 Constitutional Amendment Bill

In February 1967, following the presentation of yet another FCAATSI petition calling for a referendum on both sections 127 and 51 (xxvi), the Holt Liberal-Country Government decided to introduce a reworked Bill. The *Constitutional Alteration (Aboriginals) Bill* was introduced on 1 March 1967. In addition to removing s.127, this Bill would provide for the amending s.51(xxvi) by deleting the words 'other than the Aboriginal race in any State'. Mr Holt said in Parliament that:

> …the Government has been influenced by the popular impression that the words now proposed to be omitted from section 51(xxvi) are discriminatory—a view which the Government believes to be erroneous but which, nevertheless, seems to be deep rooted.[39]

Mr Holt stated that the removal of the words would enable the Commonwealth Government to make special laws for the Aboriginal people if it were deemed necessary. The Government would regard it as desirable to hold discussions with the states to secure the widest measure of agreement with respect to Aboriginal advancement.[40] The Government did not propose to adopt Mr Wentworth's suggestion that a section should be included giving a guarantee against discrimination on the ground of race. Although such a guarantee would 'provide evidence of the Australian people's desire to outlaw discrimination it would also provide a fertile source of attack on the Constitutional validity of legislation which we, at this point in time, would not consider discriminatory'.[41]

That the Holt Government did not see the referendum as a way to effect a radical new level of Commonwealth involvement in Indigenous affairs is clear. A Cabinet Minute of 22 February 1967 records that:

> It took the view that if the referendum was carried the Commonwealth's role in general should not be to legislate itself but rather to participate with the states in the forming of policy. [42]

The Leader of the Opposition, Gough Whitlam, in supporting the Bill pointed to the fact that the Labor Opposition had been calling for this action since 1961. He said that with the excision of the words in s.51(xxvi):

> … the members of this Parliament will be able for the first time to do something for Aboriginals—Aboriginals representing the greatest pockets of poverty and disease in this country.
>
> … The Commonwealth can at least bring the resources of the whole nation to bear in favour of the Aboriginals where they live.[43]

Mr Whitlam also pointed to the important international implications of the Constitutional alteration:

> … if any international convention touches the position of Aboriginals it will be possible for the Commonwealth forthwith and directly to implement the obligations which it has undertaken and which only the Commonwealth Government can undertake internationally. The states have no international standing at all.[44]

The Bill was passed unanimously—at the same time as some more controversial bills related to the breaking of the nexus between the size of the Senate and the size of the House of Representatives.

The Government prepared the 'yes' case for this proposal and since no Parliamentarian had voted against the proposals in the Bill relating to Aborigines there was no 'no' case prepared.

The Referendum Campaign

In the campaign leading up to the referendum there was virtually no opposition to either the s.127 or s.51 proposal. On the s.127 proposal, the President of the Victorian Section of Amnesty International said that the Government was in fact asking if the people of Australia wished to acknowledge that the Aborigines do exist and that their existence should be recognised.[45] The prominent Professor of Aboriginal anthropology, A.P.L. Elkin, argued that the increasing number of full-blood Aborigines and the fact that they now possessed the right to vote were additional reasons for including them in the total reckoning of the Australian population.[46] Support for the s.51 was also widespread. The Country Party Premier of Queensland was able to agree with the Labor Premier of Tasmania that this slight adjustment to the balance of federal-state power was necessary.[47] Nearly all agreed that it would enable the Commonwealth to take positive action for the welfare of Aborigines throughout Australia, to remove discrimination against Aborigines and to make it plain to the rest of the world that Australia was not a racist country.

Support for both proposals came from all quarters. The heads of all the major church denominations publicly pledged their support for the 'yes' vote. Regional newspapers ran supportive editorials. Commercial radio stations gave air play to a song with the lyric:

> Vote 'Yes' for Aborigines, they want to be Australian too.
> Vote 'Yes' to give them rights and freedoms just like me and you.
> Vote 'Yes' for Aborigines, all parties say they think you should.
> Vote 'Yes' and show the world the true Australian brotherhood.[48]

The Federal opposition campaigned strongly in favour of a 'yes' vote, their leader Mr Whitlam, saying that it would clear the way for financial initiatives to improve the condition of Aborigines and remove an impediment to the Commonwealth doing all they would like to do in the Northern Territory.[49]

In general, 'yes' advocates did not see the Commonwealth as taking over the states' role in Aboriginal Affairs but as assisting the states. Thus Dr Barrie Pittock, Convenor of the Legislative Reform Committee, argued:

> The deletion of section 51(xxvii) … may raise doubts in the minds of some Australians… on the grounds that such deletion will detract from the powers of the States. We need to make clear that this need not be so, but rather that one of its most important effects will be to enable the Commonwealth to make finance available for State projects such as Aboriginal housing or vocational training.[50]

The Age also argued:

> A Yes vote will pave the way for improving their health, education and housing; it will give them opportunities to live normal lives. A No vote will frustrate any vigorous programme to end discrimination against Aborigines; it will be a brutal rebuff to the first Australians and bring this country into international disrepute.[51]

Similarly the South Australian Attorney-General, Mr Dunstan (ALP), said that the only Parliament with sufficient resources was the Commonwealth Parliament and a 'yes' vote would enable the Commonwealth to carry out welfare activities which were at present outside its power. He also said that large numbers of Aborigines had come into South Australia from the Northern Territory and their welfare was basically the Commonwealth's responsibility.[52]

Aborigines generally were reported to have supported the referendum proposals seeing them as the beginning of a move towards equality and an opportunity to put more power in the hands of a government which they and the international community might be more able to influence.[53] Faith Bandler, the campaign director in New South Wales for the FCAATSI, was concerned that the political parties had conducted poor campaigns and not explained the issues clearly, but was gratified by the way the campaign had rallied Aboriginal people together.[54]

The Government received some criticism for not promoting the 'yes' vote for the Aboriginal questions as vigorously as they were the 'yes' case on the 'nexus' question. Indeed, the pamphlet prepared for the referendum had only one and a half pages devoted to the Aboriginal questions compared with four for the nexus issue. On 22 May 1967 *The Age* editorial commented that 'the Aboriginal issue has been, and still is, almost ignored'. The

Holt Government, moreover, articulated no plan as to what it would do with a new head of power in the area of Aboriginal affairs.[55]

Few people publicly advocated a 'no' vote but some did in letters to editors. One correspondent to *The Advertiser* believed s.127 helped Aborigines remain 'free in their nomadic state':

> Now progress requires that they be counted, which clearly means controlled, put on an electoral role, be fined if they don't vote, submit an income tax return and generally come under all the controls that go with civilised progress.[56]

Some opposed the changes to s.51 on the grounds that the changes eroded state rights, that states were closer to Aboriginal needs than the Parliament in Canberra, and that if the Commonwealth wanted to help the states they could already do so using the grants provision in s.96 of the Constitution.[57]

Others opposed the changes to s.51 on the grounds that it risked greater discrimination. One correspondent to the *Sydney Morning Herald* wrote:

> (The) section as it stands is in fact an important protection for the Aborigines: it excludes them from the application of any Commonwealth law such as has been included in the White Australia Policy. It is their best protection against racial discrimination.[58]

The Referendum Result

The Referendum was held on 27 May 1967. Residents of the Northern Territory and the Australian Capital Territory did not have the right to vote in referenda at that time. Many Northern Territorians were annoyed that they did not have a vote on an issue that was of such direct relevance to them and on polling day there was a protest march in Alice Springs.[59]

In all states except New South Wales the electors voted 'no' on the question to do with the composition of the Parliament. The question on the status of Aborigines was, however, carried overwhelmingly in all states. The overall 'yes' vote was 90.77%. The 'no' vote was largest in the three states with the largest Aboriginal populations. In Western Australia 19.05 per cent voted against, in South Australia 13.74 per cent and in Queensland 10.79 per cent. In New South Wales the No vote was heaviest in the country electorates with racial problems.[60]

The strong inverse relationship between the percentage of electors agreeing with the proposals and ratio of Aboriginal to European population was noted at the time. It was inferred that the 'no' vote had probably not been so much out of concern for the Aborigines or for state powers, but out of prejudice. One editorial suggested that these figures showed how urgent it was for the Commonwealth to use its new powers to help remove the economic and social deprivations of Aborigines which foster racial prejudice.[61]

The *West Australian* in an editorial said that the overwhelming 'yes' vote revealed a deep seated national conscience on the Aboriginals' lot and a nationwide desire that the Commonwealth should take positive action about it.[62]

1967–1972—Initial Implications of the Referendum

The referendum initially changed little. The referendum had not given the Commonwealth Government exclusive responsibility for Aboriginal affairs, or even any explicit responsibility in the area. It had simply cleared the way for some form of Commonwealth involvement in an area which had hitherto been the sole, and would hereafter remain primarily, the responsibility of the states.

FCAATSI urged the Federal Government to immediately: establish a national policy on Aboriginal affairs; create a bureau of Aboriginal Affairs; provide for a survey team of experts to inquire into all matters relevant to Aboriginal affairs; make provision for the establishment of a national secretariat involving all state Aboriginal authorities: establish a national Aboriginal education foundation; and establish a national Aboriginal Arts and Crafts Board.[63]

Prime Minister Holt set up an Office of Aboriginal Affairs within his own Department, appointed Mr Wentworth Minister-in-Charge of Aboriginal Affairs and appointed a Commonwealth Council for Aboriginal Affairs. Mr Wentworth was able to initiate several Federal programs aimed at satisfying some desperate Aboriginal needs, but Mr Holt's successor, John Gorton, made no advance on these initiatives. In his address at the Conference of Commonwealth and state Ministers responsible for Aboriginal Affairs at Parliament House in Melbourne on 12 July 1968, Prime Minister Gorton said:

> I believe that the Minister and the Council, in their relations with the States, should seek to discharge three main functions:
>
> 1. To allocate funds from the Commonwealth to the State for Aboriginal advancement, using State machinery to use these funds for an agreed purpose to the greatest possible extent.
>
> 2. To gather information regarding Aboriginal matters (especially welfare) and to act as a clearing house for such information both as between the various States and as between States and Commonwealth.
>
> 3. Where appropriate to assist the States in coordination of their policy and in setting the general direction of the Australian approach to Aboriginal advancement.
>
> We propose to give the fullest cooperation to the States, and I am sure we will get the fullest cooperation in return.

In 1972 the McMahon Government announced a policy which recognised the rights of individual Aboriginals to effective choice about the degree to which, and the pace at which, they might come to identify themselves with the wider society. There were, however, few

actions to match the rhetoric. Indeed, Prime Minister McMahon made a new general purpose lease for Aborigines conditional upon their 'intention and ability to make reasonable economic and social use of the land', and had it 'exclude all mineral and forest rights'.[64]

Subsequent Developments

Prior to the referendum Indigenous issues did not clearly divide the major political parties. This changed when the passage of the referendum raised Indigenous expectations that the Federal Government would act to improve their situation and when in the five years following, the Federal Government seemed to do little. Indeed, the McMahon Government's attitude to land rights was positively discouraging to the new generation of Indigenous leaders. This led simultaneously to the birth of a new more activist Indigenous rights movement (e.g. the raising on 26 January 1972, of a 'Tent Embassy' on the lawns in front of Parliament House in Canberra[65]) and to the Labor Party finding it could distinguish itself from its parliamentary opponents on many Indigenous related questions.

The referendum went on to have several longer term implications. Though a full discussion of all subsequent developments is beyond the scope of this paper, three implications of the referendum down the track were the following.

Firstly, the changes enabled the introduction of administrative programs. When the Federal Government changed in 1972, the Office of Aboriginal Affairs was upgraded to a Department and more programs were developed to address needs in a wider range of areas.

Secondly, the newly worded s.51 (xxvi) offered a possible Constitutional head of power for a range of indigenous related Commonwealth legislation.

Thirdly, the Commonwealth Government was able to introduce a new, more enlightened and practical administrative definition of 'Aboriginal'. The Commonwealth was not, like the states, burdened with a raft of pre-existing restrictive, technical, or blood-quantum definitions.[66]

The above developments did not occur in a void of continued state interest and involvement. To some degree, therefore, the referendum also set up the potential for Commonwealth-State policy conflict in the area of Indigenous affairs and for 'buck passing' when policies failed.

Part II: The Myths

The passage of time, along with some of the emotional statements broadcast at the time of the referendum itself, appears to have ensured that many popular notions associated with the 1967 Referendum belong in the category of myths. These range from a belief that it gave Aborigines the right to drink to a belief that it removed all discrimination. Half a dozen of the most significant myths might be addressed in turn.

That it had whole-heart support from both sides of politics

Although held up as a moment of national unity, the Menzies Government had been less than enthusiastic about altering s.51 and the Holt Government focused most of its attention on other non-Aboriginal related questions being put in referenda on that same day.

That it gave Aboriginal people citizenship

From 1902 until well into the 1960s and even 1970s successive governments and administrators, through legislative provisions and administrative practices, excluded indigenous people from a range of what might today be regarded as citizenship rights and entitlements. This exclusion was not, however, the result of an exclusion explicit in the 1901 Constitution and it did not need the 1967 Constitutional amendment to change this situation. Most of the provisions and practices relevant to the denial of what might be thought of as citizenship rights was able to be dismantled in processes preceding and unrelated to the referendum of 1967.[67]

It is worth noting, moreover, that 'citizenship' was not a term used in the 1901 Constitution. It was not by creating a notion of 'citizenship' with core attendant values, rather than by explicitly excluding Aborigines from citizenship, that the Constitution was able to allow the subsequent systematic discrimination against Aborigines by state and Commonwealth governments. Thus, even the passage of the *Nationality and Citizenship Act 1948*, though creating for the first time the legal status of Australian Citizen, had little impact upon the effect of legislation and practices which discriminated against Aborigines.[68]

FCAATSI had campaigned for a plethora of 'citizen rights' in the decade before the referendum, but never intended to give the impression there was one single right which would make indigenous people citizens let alone that the 1967 referendum would grant it. The only 'right' of relevance that was denied by the 1901 Constitution and instated by the 1967 referendum, was that to be counted in the Federal Census. Nevertheless, it is apparent that FCAATSI's energetic 'talking-up' in the course of the campaign of the implications of a 'yes' vote, contributed to the myth that 'citizenship' itself was at stake.[69]

That it gave the Commonwealth the right to make laws for the benefit, but not the detriment, of Indigenous people.

The 1967 Constitutional changes, as some such as W.C.Wentworth had suggested would be the case, empowered the Commonwealth to make laws not only for the advantage but also disadvantage of Indigenous Australians. In the *Kartinyer v Commonwealth* (the Hindmarsh Island Bridge case) (1998) 195 CLR 337 Justice Kirby was the only judge to argue that the 'races power' did not extend to making legislation that was detrimental to Aboriginal people. Justice Gaudron said that while there was much to recommend the idea that the race power could only be used beneficially, that proposition could not be sustained, and Justices

Gummow and Hayne held that the power could be used to withdraw a benefit previously granted to Aboriginal people and thus to impose a disadvantage.[70]

It is also noteworthy that the 'race power' offered by the new section 51 (xxvi) was not the head of power behind the Federal *Racial Discrimination Act 1975*. The head of power invoked when passing that legislation (in the context of Australia signing the United Nations' *Convention for the Elimination of Racial Discrimination*) was the external affairs power, section 51(xxix) of the Constitution. Thus, the Commonwealth could have passed a Race Discrimination Act and through it influenced Indigenous affairs (e.g. by presenting grounds for challenging discriminatory state practices) even if there had been no 1967 referendum.

That it gave Aborigines wage equality

Wage equality was the result of an unrelated process which started in 1965 and ended in 1968.[71] In 1965 applications which would bring about equal pay for Aboriginal pastoral workers were made under the Federal *Pastoral Industry Award*, the Northern Territory *Cattle Station Industry Award*, and the *Queensland, Station Hands' Award*. The *Northern Territory Cattle Station Industry Award* became the test case, and although the Centralian Pastoralists' Association put up vigorous opposition, on 7 March 1966 the full bench of the Commonwealth Conciliation and Arbitration Commission found that Aborigines employed on Northern Territory cattle stations would be covered by the Cattle Station Industry (Northern Territory) Award and would be paid the same rates as non-Aboriginal workers. The governing award was to be amended to this effect, but the change would not take place until 1 December 1968 to give the industry and workers time to adjust to this new clause.[72] This was not the end of the equal pay struggle, but over the next few years other discriminatory awards and ordinances were changed. The effect flowed through to the Conciliation and Arbitration Commission's decision on 15 September 1967 to extend award coverage to Aboriginal workers under the Pastoral Award, also starting on 1 December 1968.[73]

That it gave Aborigines the right to vote.

Technically male Aboriginals had the right to vote since colonial times. When Victoria, New South Wales, Tasmania and South Australia framed their constitutions in the 1850s they gave voting rights to all male British subjects over 21. In 1895 when South Australia gave women the right to vote and sit in Parliament, Aboriginal women shared the right. Few Aborigines knew their rights so very few voted, but Point McLeay, a mission station near the mouth of the Murray, got a polling station in the 1890s. Aboriginal men and women voted there in South Australian elections and voted for the first Commonwealth Parliament in 1901.

A proposal, however, to use the *Commonwealth Franchise Act 1902* (Cth) which was being framed to extend the federal franchise to women, to extend it also to Aborigines, failed[74] and in the end, section 4 of the 1902 Act specifically denied the voting rights of 'Aboriginal native[s] of Australia ... unless so entitled under Section 41 of the Constitution'.

The first Solicitor-General, Sir Robert Garran, later interpreted this as giving Commonwealth voting rights only to people who were already state voters in 1902. Accordingly, in the 1920s and 1930s some Aborigines even lost their voting rights. Even South Australian Aborigines enrolled before 1902, were having their right to vote taken away. In 1921 South Australia adopted a joint Federal-State electoral roll, as did other states during the 1920s, and the wording of the new enrolment form implied that no Aborigines, Asians or Pacific Islanders could vote in Commonwealth elections. On the new, joint roll a small circle beside any name indicated 'not entitled' to vote for the Commonwealth'.

Garran's interpretation of section 41 was first challenged in 1924—not by an Aborigine but by an Indian who had recently been accepted to vote by Victoria, but rejected by the Commonwealth. He went to court and won. The magistrate ruled that section 41 meant that people who acquired state votes at any date were entitled to a Commonwealth vote. The Commonwealth passed an Act giving all Indians the vote (there were only 2 300 of them and the then immigration policy would see there were no more), but continued to reject Aborigines and other 'coloured' applicants under its own interpretation of section 41. Exclusions multiplied in the 1930s. In 1945 the Chief Electoral Officer had erroneously declared that to vote in Federal elections an Aborigine must not only have obtained state enrolment before the *Franchise Act* of 1902 was passed but must have 'retained that enrolment continuously since'.[75]

In the early-1940s Professor Elkin at the University of Sydney questioned the Electoral Office's interpretation of the law and his case was taken up by Group Captain Thomas White, Federal member for Balaclava. The then Minister for the Interior, Herbert Johnson, declared that he was interested in extending the franchise 'as early as possible to Aborigines whose education has reached such a standard that they are able to appreciate its value'. The Menzies Government gave the Commonwealth vote to all Aborigines in the *Commonwealth Electoral Act 1962*. Western Australia gave them state votes in the same year and Queensland, the last jurisdiction to do so, followed in 1965.

That it gave Aboriginal people access to Social Security.

The extension of Commonwealth Social Security benefits to Indigenous people began three decades before the 1967 referendum and was completed in the year of the referendum.

As the following overview reveals,[76] Aboriginal access to the earliest Social Security benefits was either explicitly prohibited or severely curtailed.

A national **Child Endowment** scheme was introduced with the passage of the *Child Endowment Act 1941*. It could be granted to Aboriginal Australians except those who were nomadic or whose children in respect of whom endowment was claimed were wholly or mainly dependent upon Commonwealth or state government support. With the passage of the *Child Endowment Act 1942*, child endowment became payable to mission stations, which were approved institutions, for Aboriginal children who for not less than 6 months in any calendar year, or for any continuous period of not less than 6 months, were supervised and

assisted by, although not mainly maintained by, that mission station. Various other adjustments to eligibility criteria ensued in subsequent years. With the giving of assent in 1960 to the *Social Services Act* 1959, child endowment became payable to all Aboriginal Australians unless the children were wholly or mainly dependent on government support. The whole or a portion of the child endowment could be paid to a person, institution or authority on behalf of the endowee if considered desirable, for any reason, by the Director-General. The restrictions were partially removed in 1959 legislation which amended the *Social Services Consolidation Act 1947,* and were then fully lifted by amending legislation in 1966.

Maternity allowance was introduced by the *Maternity Allowance Act 1912*. Women, other than Asiatics or Aboriginal natives of Australia, Papua or the Islands of the Pacific, who were residents or who intended to settle in Australia, were eligible to claim a lump sum payment on the birth of a child. With the passage of the *Maternity Allowance Act 1942* the allowance became payable to those Aboriginals exempt from the provisions of the law of the state or territory of the Commonwealth in which they resided relating to the control of Aboriginal natives, or if residing in a state or territory whose laws did not provide for such exemption the Commissioner was satisfied that those Aboriginals were of character, standard of intelligence and development which made payment of the allowance desirable. The allowance payable to an Aboriginal could be paid to an authority of a state or territory or some other authority or person if such payment were considered desirable for the benefit of the Aboriginal. The *Social Services Act 1959* extended eligibility for maternity allowance to all Aboriginal women except those who were in the opinion of the Director-General living a nomadic or primitive life. This later exclusion was repealed in the *Social Services Act 1966*. The whole of the maternity allowance provision was repealed by the *Social Services Amendment Act 1978.*

Similarly, 'aboriginal natives of Australia' were among the 'races' not eligible for benefits under the *Commonwealth Widows' Pensions Act 1942* and they were only entitled to receive benefits under the *Unemployment and Sickness Benefits Act 1944* if the Director-General of Social Services was satisfied that, having regard to the applicant's character, standard of intelligence and development, it was reasonable that he or she should. The *Social Services Consolidation Act 1947* removed the earlier disqualification directed against particular races, but left the position of Aboriginal natives unchanged. Amending legislation in 1959, which came into effect in February 1960 repealed the earlier provisions and made all Aboriginal natives, other than those who are nomadic and primitive, eligible for most social security benefits. As noted above, all discriminatory restrictions were lifted in amending legislation in 1966.

Conclusion

The 1967 Referendum's practical import and technical significance have been somewhat obscured by myths. However, to the extent that it raised the expectations of both Indigenous and non-indigenous alike, its practical import is clear. To the extent that it has come to represent a decade of change which began in the early 1960s and ended in the early 1970s, its

symbolic significance is also clear.[77] Those raised expectations have helped set agendas which have still to be addressed to the satisfaction of all and that decade of change came to fore-shadow the increased Commonwealth involvement in other policy areas also previously the sole province of the states (e.g. health, education, conservation).

To the extent that the referendum enabled the Commonwealth to enter the field of Indigenous affairs alongside the states without clarifying the respective responsibilities of the two levels of government, the referendum might also be conceived of as producing a framework for shirking responsibility for bureaucratic and policy failure.

Is s.51 (xxvi) needed? Forty years ago some advocated deleting that clause in its entirety or replacing it with a prohibition on the making of racial discriminatory laws. Is there merit in revisiting this idea, given that it is true, as was then being suggested, that the power could be abused to make laws that are to the detriment of Indigenous people, and given that the absence of this power might not greatly affect the Commonwealth's current direction in the administration of Indigenous affairs? Factored into any answer would have to be an appreciation that Indigenous people themselves generally see merit in the Commonwealth having a race power. Moreover, this power has given the Commonwealth an easily defensible right (even if it is not the only relevant constitutional power) to benchmark a certain level of protection for Indigenous people under state laws in areas ranging from Native Title to Heritage Protection.

Leaving all else aside and coming back to the actual vote on 27th May 1967, the overwhelming nature of the 'yes' vote has ended up carrying an import all of its own. As Prime Minister Howard said in a speech on 7 March 2007:

> This was an event where in overwhelming numbers the Australian people affirmed that it was completely unacceptable to regard Aboriginal and Torres Strait Islander people as anything other than full participants in our national community.

He went on to say 'If that moment of great hope spoke of anything, it spoke of the need to remedy the disadvantage of the first Australians' and we need 'As a nation … to recapture the spirit of the 1967 referendum'.[78]

Endnotes

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4. Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine', *Federal Law Review*, vol. 2, 1966–67, p. 17.
5. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edition, 1910), p. 462, as quoted in Geoffrey Sawer, ibid. p. 20.
6. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p. 622, as quoted in Geoffrey Sawer, ibid.
7. Hansard, House of Representatives, 1962, vol. 35, p. 1710.
8. L. R. Smith *The Aboriginal Population of Australia* (Canberra: 1980) pp. 10–34
9. Bain Attwood and Andrew Markus, '(The) 1967 (Referendum) and All That: Narrative and Myth, Aborigines and Australia', *Australian Historical Studies*, vo.29 (111), October 1998, p. 277.
10. See J. Chesterman and B. Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship*, Cambridge University Press, 1997, pp.70–73. The same point is made in the introduction to *Citizenship and Indigenous Australians, Changing Conceptions and Possibilities*, ed. by Nicolas Peterson and Will Sanders', Cambridge University Press, 1998, p.8.
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13. An open letter 'The Aborigines' to the *Sydney Morning Herald*, 25 January, 1911, quoted in Attwood and Markus, ibid., p. 73.
14. ibid, p. 6
15. Report of the Royal Commission on the Constitution, *Parliamentary Papers*, 1929–30–31, vol., part 1, pp. 270, 303.
16 A letter to Rt Hon. the Minister for the Interior, Mr Paterson, 31 October 1938 quoted in Attwood and Markus, 1997, op. cit. p. 8.
17. ibid.
18. *Convention of Representative to the Commonwealth and State Parliaments on Proposed Alteration of the Commonwealth Constitution. Held at Canberra, 25th November to 2nd December, 1942, Record of Proceedings*, Canberra, p. 178.
19. Scott Bennett, 'The 1967 Aborigines Referendum', *Year Book Australia 2004*, p. 42
20. Hansard, House of Representatives, 8 June 1950, vol. 208, p. 3976.
21. Quoted by Max Griffiths, *Aboriginal Affairs, a Short History 1788–1995*, Kenthurst, Kangaroo Press, 1995, p. 72.

22. See Paul Hasluck, *Shades of Darkness*, Melbourne University Press, 1988.
23. Hansard, House of Representatives, 9 May 1957, vol. 15, p. 1223.
24. Hansard, House of Representatives, 9 May 1957, pp. 1221–4.
25. Hansard, House of Representatives, 9 May 1957, vol. 15, p. 1227.
26. See Sue Taffe, *Black and White Together FCAATSI: The Federal Council for the Advancement of Aborigines and Torres Straight Islanders, 1958–1972*, University of Queensland Press, 2005.
27. The next three sections of the paper draw heavily on work done in an unpublished paper by Dorothy Bennett entitled 'The Constitution Alteration (Aboriginals) 1967 Referendum', 19 November 1982.
28. ibid., p. 85.
29. John Chesterman, 'Defending Australia's Reputation, How Indigenous Australians Won Civil Rights. Part I', *Australian Historical Studies*, 116, 2001, p. 26.
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33. Hansard, House of Representatives, 11 November 1965, p. 2639.
34. Hansard, House of Representatives, 23 November 1965, p. 3067–8.
35. ibid., p. 3070.
36. ibid., p. 3072.
37. ibid., p. 3077.
38. Bain Attwood and Andrew Markus, '(The) 1967 (Referendum) and All That: Narrative and Myth, Aborigines and Australia', *Australian Historical Studies*, vo.29 (111), October 1998, p. 272.
39. Hansard, House of Representatives, 1 March 1967, p. 263.
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47. *Cairns Post*, 25 May 1967 and *Advocate (Burnie)*, 22 May 1967 – cited by Bennett, op. cit., p. 49.
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49. 'Yes Vital to Help Aborigines', *The Age*, 26 May 1967.
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53. 'Shoulder to the Wheel', *The Age*, 26 May 1967.
54. 'Public Confusion Evident on Aboriginal Issue', *Sydney Morning Herald*, 24 May 1967.
55. See D. Hill, 'Nuggets of History', *Sydney Morning Herald*, 26 August 1995. According to an article 'After the Vote', in the *Australian* 3 June 1967, the Minister for Social Services, Mr Sinclair, reported soon after the referendum that the Government had nothing specific in mind and that its policies would be worked out during the Budget discussions.
56. Letter to the Editor, *The Advertiser*, 22 May 1967.
57. For more on the campaign see Scott Bennett's 'The 1967 Aborigines Referendum', *Year Book Australia 2004*, and Attwood and Markus, 1997, op. cit.
58. Letters to the Editor, *Sydney Morning Herald*, 16 May 1967.
59. Scott Bennett, 'The 1967 referendum', *Australian Aboriginal Studies*, 1985, no. 2, p. 31. An advertisement complaining about Territorians' exclusion from the vote was published in the *The Advertiser* on 27 May 1967 and a petition signed by 600 protestors was published by *The Centralian Advocate* on 1 June 1967.
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62. Editorial, *West Australian*, 29 May 1967.
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