

# EXCLUDING INDIGENOUS AUSTRALIANS FROM 'THE PEOPLE': A RECONSIDERATION OF SECTIONS 25 AND 127 OF THE CONSTITUTION

*Elisa Arcioni\**

## ABSTRACT

Until 1967, Indigenous Australians were excluded from being counted as amongst 'the people' in the *Australian Constitution*, by s 127. That section was deleted by referendum. However, s 25 remains in the *Constitution*, and allows for the reintroduction of such exclusion. This article is a detailed reconsideration of both sections in light of an understanding of 'the people' as a reference to the constitutional community represented by the Parliament. Exclusion of Indigenous Australians prior to 1967 is considered, highlighting the way in which s 127 operated. Then, the position post-1967 is addressed to show that the deletion of s 127 did not result in equality because s 25 continues to provide for racial exclusion. This article argues that this ongoing possibility of exclusion by s 25 affects the nature of the Australian constitutional community, by indicating that it can be racially discriminatory.

## INTRODUCTION

On 16 January 2012, the Expert Panel on Constitutional Recognition of Indigenous Australians presented its report to the federal government.<sup>1</sup> The report contained proposals for constitutional amendment in order to recognise Indigenous Australians<sup>2</sup>

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\* Senior Lecturer, Sydney Law School. Thanks to Helen Irving, Ed Muston and the anonymous referees for their comments on earlier versions of this work.

<sup>1</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (2012) ('Expert Panel Report'). The Panel had been created in order to comply with the agreement between the Australian Greens and the Australian Labor Party which governs the Greens' support of the current federal Labor minority government. See *The Australian Greens & The Australian Labor Party Agreement* (1 September 2010), which includes a commitment to work together and with other parliamentarians to 'Hold referenda during the 43<sup>rd</sup> Parliament or at the next election on Indigenous constitutional recognition...' <sup>cl</sup> <sup>3(f)</sup> <[http://greens.org.au/sites/greens.org.au/files/Australian%20Greens\\_ALP%20agreement.pdf](http://greens.org.au/sites/greens.org.au/files/Australian%20Greens_ALP%20agreement.pdf)>.

<sup>2</sup> The phrase 'Indigenous Australians' is used in this work to refer to Aboriginal and Torres Strait Islander peoples.

in the *Constitution*. The proposals were introduced with references to nationhood and citizenship, recognition of history and the desire to expunge racial discrimination from the constitutional text.<sup>3</sup> The Expert Panel proposed a single referendum question, containing five changes to the *Constitution*.<sup>4</sup> The least controversial proposal is the deletion of s 25. Section 25 provides:

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

The 'reckoning' referred to in s 25 is a determination of numbers of 'the people' for the purpose of a calculation in s 24. That calculation is required to determine the number of members of the House of Representatives to be chosen in each State. Section 25 countenances exclusion from being counted as among the relevant 'people' on the basis of race.

Criticisms, and calls for the deletion, of s 25 have been made on many occasions.<sup>5</sup> Arguments in favour of deletion either focus on the racist tone of the section being unacceptable to current Australians, or the fact that it is a dead-letter that has no operation. There seem to be no strong arguments made against deletion.

This article is a reconsideration of s 25, together with s 127 of the *Constitution*. Section 127, which was removed by referendum in 1967, stated "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." This article provides a detailed analysis of both sections as they applied to Indigenous Australians prior to 1967, and addresses the ongoing significance of s 25. I argue that the proposed deletion of s 25 is more than the removal of a reference to 'race' which sits uneasily with current community sentiment, or a dead-letter whose work is done. Its deletion would remove the last vestige of exclusion of Indigenous Australians from the constitutional 'people'.

This article focuses on parts of the *Constitution* which have received little attention, either in the High Court or in academic commentary.<sup>6</sup> However, lack of attention does

<sup>3</sup> See Expert Panel Report, above n 1, 13–42.

<sup>4</sup> Ibid, xviii. The proposals are: 1. Repeal s 25; 2. Repeal s 51(xxvi); 3. Insert s 51A 'Recognition of Aboriginal and Torres Strait Islander peoples'; 4. Insert s 116A 'Prohibition of racial discrimination'; and 5. Insert s 127A 'Recognition of Languages'. Each of the proposals is addressed in detail in the Report. See Expert Panel Report, above n 1, ch 4, 5, 6.

<sup>5</sup> Joint Committee on Constitutional Review, Parliament of Australia, *Report from the Joint Committee on Constitutional Review* (1959), 18–19, albeit noting that 'Whilst the Committee considers it appropriate to repeal [s 25] ... the matter is not of any great importance'; *Proceedings of the Australian Constitutional Convention*, Melbourne, 24–26 September 1975, 174; *Proceedings of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 206; Commonwealth, *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution*, Parl Paper No 306/87 (1987) 74; Commonwealth, *Final Report of the Constitutional Commission*, Parl Paper No 229/88 (1988) 157; Constitutional Centenary Foundation, *The Australian Constitution* (Constitutional Centenary Foundation, 1997) 37; Council for Aboriginal Reconciliation, 'Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament' (Report, December 2000) ch 10.

<sup>6</sup> Examples of commentary on ss 25 and 127 prior to 1967 include Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 26–30.

not necessarily mean lack of significance. I argue that these often-neglected sections are central to understanding one aspect of the constitutional status of Indigenous Australians. Regardless of whether some or all of the relevant text is relegated to constitutional history, it is important to understand how some groups have been, and can still be, excluded from the constitutional 'people'.

References to 'the people' span the history of the case law of the High Court. The earliest cases come from the first few decades after federation.<sup>7</sup> From then on, judges have variously identified 'the people' as holders of rights or bearers of duties under the *Constitution*,<sup>8</sup> and as those bound by the *Constitution* and the institutions created or recognised by that document.<sup>9</sup> 'The people' have been identified within a theory of popular sovereignty.<sup>10</sup> Yet, as recently as 1996 the expression 'the people' was referred to as 'that vague but emotionally powerful abstraction'.<sup>11</sup> The legal implications of membership of 'the people' remain vague to some extent.<sup>12</sup> Nevertheless, the phrase 'the people' can be understood as a reference to the constitutional community.

The constitutional community is a phrase which recognises that every constitution governs a community of people, who exist separate from the document, but whose

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For commentary since 1967, see Brian Costar, 'Odious and Outmoded? Race and Section 25 of the Constitution' in John Chesterman and David Philips (eds), *Selective Democracy: Race, Gender and the Australian Vote* (Melbourne Publishing Group, 2003) 89; Anne Twomey, 'Indigenous Constitutional Recognition Explained - The Issues, Risks and Options' (January 2012 ) Constitutional Reform Unit, University of Sydney Law School 3-4 <[http://sydney.edu.au/law/cru/documents/2012/Indigenous\\_Recognition.pdf](http://sydney.edu.au/law/cru/documents/2012/Indigenous_Recognition.pdf)>; Expert Panel Report, above n 1, ch 6. Since the writing of this article, a forthcoming publication was brought to my attention: Anne Twomey, 'An Obituary for Section 25 of the Constitution' (2012) 23 *Public Law Review* 125.

<sup>7</sup> *Potter v Minahan* (1908) 7 CLR 277, 308, 312; *R v Smithers; ex parte Benson* (1912) 16 CLR 99, 113; *Donohoe v Wong Sau* (1925) 36 CLR 404, 407-8.

<sup>8</sup> *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 256; *Attorney-General (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559, 634 (Murphy J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 661-2 (Deane J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 232; *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248, 279; *Re Governor, Goulburn Correction Centre; ex parte Eastman* (1999) 200 CLR 322, 378 [142]; *Truong v The Queen* (2004) 223 CLR 122, 178 [158]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 363-4 [75] (McHugh J). See also *Rex v The Commonwealth Court of Conciliation and Arbitration and the Merchant Service Guild* (1912) 15 CLR 586, 609; *JC Williamson Ltd v Musicians Union of Australia* (1912) 15 CLR 636, 654; *The Queen v Pearson; ex parte Sipka* (1983) 152 CLR 254, 274, 277.

<sup>9</sup> *Re Macks; ex parte Saint* (2000) 204 CLR 158, 213 [142]; *Pfeiffer v Stevens* (2001) 209 CLR 57, 88-89; *Re McBain; ex parte Catholic Bishops Conference* (2002) 209 CLR 372, 454 [220].

<sup>10</sup> See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137-8 (Mason CJ); *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171-3 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J). For a discussion of this thesis, see G J Lindell, 'Why is Australia's Constitution Binding? The reasons in 1900 and now, and the effect of independence' (1986) 16(1) *Federal Law Review* 29.

<sup>11</sup> *Langer v The Commonwealth* (1996) 186 CLR 302, 342-3 (McHugh J).

<sup>12</sup> See, eg, the relationship between the concept of 'the people' and those of 'subjects of the Queen' in s 117 and 'alien' in s 51(xix), in the context of claims under Australian citizenship law and challenges to deportation: *Singh v Commonwealth* (2004) 222 CLR 322; *Hwang v Commonwealth* (2005) 222 ALR 83; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439.

constitutional identity is affected by the constitution itself.<sup>13</sup> In the Australian context, and specifically with respect to the focus of this article, an understanding of who is included or excluded from that group indicates the nature of the constitutional community. The notion of the constitutional community, and who is within it and who is outside of it, can have both legal and symbolic implications. The legal element of exclusion from the constitutional community addressed in this article is concerned with the State communities under s 24 of the *Constitution*. As is addressed later, the calculation in that section does not affect any individual rights, but rather the number of members of the House of Representatives to be chosen in each State. The legal impact of exclusion is a change in the representative-ness of the Parliament, by excluding some individuals from being counted as amongst the represented State communities. The symbolic impact of exclusion affects the nature of the constitutional community. By allowing for exclusion on the basis of race, the text indicates that the community itself can be framed by reference to race. Thus, the constitutional identity of the Australian constitutional 'people' can countenance racial exclusion.

The first step in developing the central thesis of this article is to consider the constitutional concept of 'the people' and its relationship to representative government. This is done in Part I. The centrality of 'the people' to constitutional representative government is addressed and the different layers of representation within that system of government are highlighted. In Part II, the historical exclusion of Indigenous Australians from the constitutional 'people' in the calculation in s 24 is addressed. That Part provides a detailed analysis of the operation of s 127, to explain the nature and operation of that historical exclusion. In Part III, the ongoing possibility of exclusion of Indigenous Australians is explained by reference to s 25. First, the interaction between s 127 and 25 is explained, to reveal the limited operation of s 25 prior to 1967. Upon deletion of s 127, the operation of s 25 with respect to Indigenous Australians was revived. The current operation of s 25 is then discussed.

## I THE CONSTITUTIONAL 'PEOPLE' AND REPRESENTATIVE GOVERNMENT

The preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp) begins: 'Whereas the people [of the colonies] ... have agreed to unite in one indissoluble Federal Commonwealth...'. That statement reflects the referenda held in each Australian colony to accept the draft *Constitution*.<sup>14</sup> Section 7 requires that senators be chosen by the 'people of the States' and s 24 requires that members of the House of Representatives be chosen by the 'people of the Commonwealth'. Those choices occur

<sup>13</sup> See Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, *Discourses of Law* (Routledge, 2010).

<sup>14</sup> See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901) 286. Western Australia was the last colony to do so. The referendum in that colony took place on 31 July 1900, 29 days after the *Constitution Act* had been assented to by the Queen, but before the Commonwealth was established by proclamation, on 1 January 1901. That the preamble was a reference to the historical referenda held in each colony has been referred to by the High Court: *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, 534 (Griffith CJ); *Joose v Australian Securities and Investment Commission* (1998) 159 ALR 260, 264 (Hayne J).

by election. The federal electors who vote in those elections also vote in referenda to change the *Constitution*, under s 128.<sup>15</sup>

**'The People' are central to Representative Government – the first sentence of s 24**

The identification of a system of representative government within the *Constitution* occurred over a number of cases. The centrality of 'the people' to that system is most evident in the development of the implied freedom of political communication. That implied freedom was recognised as a result of the importance of 'the people' in choosing members of Parliament. It was precisely because 'the people' are given that role in the first sentence of s 24 that the High Court implied an area of communication that was to be protected by the *Constitution*. The development of this freedom culminated in a unanimous judgment of the Court in *Lange v Australian Broadcasting Corporation*.<sup>16</sup> The decision in *Lange* clarified that s 24, amongst other sections, was to 'give effect to the purpose of self-government by providing for the fundamental features of representative government.'<sup>17</sup> The heart or 'bedrock' of that system is that 'the Parliament of the Commonwealth will be representative of the people of the Commonwealth.'<sup>18</sup>

The centrality of 'the people' has not been questioned by the Court. It has been reaffirmed in the most recent High Court cases concerning electoral law, where the concept of 'the people' has been used to invalidate federal legislation. Those cases are *Roach v Electoral Commissioner*<sup>19</sup> and *Rowe v Electoral Commissioner*.<sup>20</sup> *Roach* was a challenge to the blanket disenfranchisement of prisoners from the federal franchise,<sup>21</sup> on the basis that it breached ss 7 and 24 of the *Constitution*. The majority, made up of Gleeson CJ, Gummow, Kirby and Crennan JJ, struck down the legislation.<sup>22</sup> The Court reasoned that the power of the Parliament to determine the franchise was restricted by the requirement of ss 7 and 24 that parliamentarians be 'directly chosen by the

<sup>15</sup> In 1977, s 128 was amended by referendum to extend voting rights in referenda to electors in the territories 'in respect of which there is in force a law allowing its representation in the House of Representatives'. The Australian Capital Territory and Northern Territory both receive such representation: see *Commonwealth Electoral Act 1918* (Cth) s 48(2B). Therefore, electors in those two territories may vote in federal referenda. However, referenda voting rights have also been extended to *all* voters in all Australian territories. That is, territories beyond the NT and the ACT: see *Referendum (Machinery Provisions) Act 1984* (Cth) s 4(1) which states that 'An elector is entitled to vote at a referendum where, if the referendum were an election, the elector would be entitled to vote at the election.'

<sup>16</sup> (1997) 189 CLR 520.

<sup>17</sup> Ibid 557.

<sup>18</sup> Ibid 558. See reference to this 'bedrock' in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 12 [1] (French CJ) quoting *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198 [82] (Gummow, Kirby and Crennan JJ).

<sup>19</sup> (2007) 233 CLR 162.

<sup>20</sup> (2010) 243 CLR 1.

<sup>21</sup> *Commonwealth Electoral Act 1918* (Cth) s 93(8AA). 'Sentence of imprisonment' meant 'detention on a full-time basis': s 4(1A)(a). That section had replaced the earlier prisoner disenfranchisement regime, which applied to 'a person who ... is serving a sentence of three years or longer for an offence against the law of ... a State': s 93(8).

<sup>22</sup> The earlier legislative position, noted above, was revived.

people'.<sup>23</sup> The constitutional 'people' were the centrepiece of representative government and to disenfranchise *all* prisoners was beyond the justifiable limits on the federal franchise.

*Rowe* was a case which challenged the timing of the closing of the electoral rolls prior to the 2010 federal election. Parliament had passed legislation which reduced the amount of time within which eligible persons could enrol to vote following the calling of an election.<sup>24</sup> The Court struck down the legislation as being inconsistent with the constitutional mandate of choice by 'the people'. The detriment caused by the legislation outweighed any potential benefits of the early closing of the rolls. Once again, 'the people' would have been prevented from choosing their Parliament.

At the heart of these cases is the first sentence of s 24 of the *Constitution*, which requires that the "House of Representatives shall be composed of members directly chosen by the people of the Commonwealth". That phrase had been recognised as one of the central textual sources for the constitutional system of representative government in many earlier cases.<sup>25</sup> That first sentence is directed to the people acting as electors, and has led to members of the Court noting that universal adult suffrage may now be protected, in that any restriction on that general principle has to be justified by the Commonwealth.<sup>26</sup>

However, s 24 not only contains the requirement that the members of Parliament be directly chosen by 'the people', but also that '[t]he number of members chosen in the several States shall be in proportion to the respective numbers of their people.' It is 'the people' in that part of s 24 that is affected by s 25 and s 127. As is argued later in this article, Indigenous Australians were excluded from that group by operation of s 127 until 1967, and s 25 accommodates the continuation of that exclusion.

### **'The People' and proportional representation – the second sentence of s 24**

At the heart of the cases referred to above is the principle that 'the Parliament of the Commonwealth will be representative of the people of the Commonwealth.'<sup>27</sup> The precise ways in which such representation is to occur was the subject of debate in the drafting of the *Constitution*. There were competing visions of national representation, meaning representation of the majority of Australians counted equally, versus representation of the States or peoples of the States, where the States were to be treated equally regardless of population. Most discussion of State representation occurs in relation to the Senate, which is to be "composed of senators for each State directly chosen by the people of the State",<sup>28</sup> and in which each Original State<sup>29</sup> has an equal

<sup>23</sup> *Roach* (2007) 233 CLR 162, 4 [6] (Gleeson CJ), 15–16 [46]–[49] (Gummow, Kirby & Crennan JJ).

<sup>24</sup> *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

<sup>25</sup> See, eg, *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140; *Langer v The Commonwealth* (1996) 186 CLR 302. See also the implied freedom of political communication cases culminating in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>26</sup> This is in contrast to the limited franchise that existed at federation. See Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125.

<sup>27</sup> *Lange* (1997) 189 CLR 520, 558.

<sup>28</sup> *Constitution* s 7.

<sup>29</sup> 'Original States' are defined in covering clause 6 of the *Constitution* as 'such States as are parts of the Commonwealth at its establishment'. All six Australian colonies accepted the

number of senators. The House of Representatives can be understood as the House representing the national population, because of the reference to the members being chosen by 'the people of the Commonwealth'. However, it is 'the people', grouped and counted within State boundaries, which affects the composition of that House.<sup>30</sup> It is that aspect of s 24 to which ss 25 and 127 are directed.

Section 24 sets out an arrangement for determining the number of members of the House of Representatives and grants the Parliament the power to change that method. However, any legislation doing so must abide by the 'permanent and absolute provisions of the section',<sup>31</sup> namely the requirement of proportionality between the numbers of people of each State and the number of members chosen in each State.

This requirement of proportionality can be understood as the representation of communities within the overall constitutional community. In drafting this part of the *Constitution*, the question of 'precisely who or what would be represented in the House was ... a contested issue. ... The House could represent the Australian people as a whole, the majority of the people as a whole, the people grouped in localities, or the people as individuals.'<sup>32</sup> The text of the second sentence of s 24 reflects the recognition of communities grouped according to State boundaries, within the overall constitutional community, who must receive proportionate representation in the House of Representatives. This is consistent with the understanding at federation of the Commonwealth as 'a community made up of communities'.<sup>33</sup>

As argued by Nicholas Aroney, the historical materials concerning the drafting of the *Constitution* reveal the complexity of the federal union. The Commonwealth was framed as a federation, with the States at its heart. The federal nature of the Commonwealth was consistent with the idea of 'a political community in which there are multiple loci of partly independent and partly interdependent political communities, bound together under a common legal framework'.<sup>34</sup> The constituent entities were the peoples of the States, who were to receive representation as groups through the Parliament, in proportion to population.<sup>35</sup>

The struggle to combine popular representation and representation of State communities can be seen throughout the drafting debates, from the 1891 Convention through to the later 1897–98 Convention. In both periods, the concepts were combined through a reference to numerical proportionality of representation within each State, as well as minimum representation of each State.<sup>36</sup> In the later Convention, an additional federal element was imposed – that of the nexus. The nexus in s 24 requires that the

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draft *Constitution* by referenda prior to the proclamation of the Commonwealth (see covering clause 3) and thus are all 'Original States'. See Quick and Garran, above n 14, 458–9.

<sup>30</sup> See Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 224–237, from which the following argument is developed.

<sup>31</sup> Quick and Garran, above n 14, 453.

<sup>32</sup> Aroney, above n 30, 224 and see 225–237.

<sup>33</sup> See *ibid* 34–5, 344–5, 368–9.

<sup>34</sup> See *ibid* 34.

<sup>35</sup> This was a common feature of other federal systems: *ibid* 49.

<sup>36</sup> Compare the text of the 1891 version of s 24, set out in: John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 442, with the final version of the section.

number of members of the House of Representatives 'shall be, as nearly as practicable, twice the number of the senators'. This was to overcome a perceived fear that if the lower House were allowed to grow without limit, it would affect the 'integrity of' the Senate. That is, that the representation of the States in the Senate would be overwhelmed by the representation of the majority of Australians through the House of Representatives. Aroney characterises the final version of the text of s 24 as being 'a balance between local, federal and democratic principles. In this way, section 24 embodied the principle of federalism as much as the principle of national democracy'.<sup>37</sup>

The compromise reflected in the wording of the second sentence of s 24 is therefore about representing groups of people, not individuals. That representation need not reflect individual numerical equality. Section 24 requires that each Original State have a minimum of 5 members, regardless of population. Even at federation, this meant that there was significant numerical disparity between the States, due to the differing size of their respective populations.<sup>38</sup> Further, the High Court has rejected any constitutional requirement of absolute numerical equality. In two cases<sup>39</sup> a majority of the High Court rejected the requirement of such equality in either population or electors between electoral divisions within each State, in relation to either the Commonwealth or State Parliaments.<sup>40</sup> However, members of the Court have acknowledged that any legislative choices regarding electoral law must be consistent with the command that members of Parliament be chosen by 'the people' and that gross disproportionality may breach that command.<sup>41</sup>

While strict numerical equality between electoral divisions is not required by virtue of s 24, the basic command remains – that the number of members chosen in each State 'shall' be proportionate to the respective number of people of each State. It is that calculation that is affected by ss 127 and 25. Exclusion from 'the people' in that calculation, because of the operation of either s 127 or s 25, signifies exclusion from the represented 'people', organised according to State boundaries. It is not any individual right which is at stake, nor is it the individual exercise of the franchise which is affected. Rather, it is the representative-ness of the Parliament that is the focus of the exclusion discussed in this article. By excluding a category of individuals from the

<sup>37</sup> Aroney, above n 30, 237.

<sup>38</sup> See Quick and Garran, above n 14, 455 with respect to Tasmania and Western Australia, and the number of members in relation to the States' populations (excluding 'aborigines') at 459.

<sup>39</sup> *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

<sup>40</sup> This conclusion was foreshadowed by P A Paterson, 'Federal Electorates and Proportionate Distribution' (1968) 42(4) *Australian Law Journal* 127 and P H Lane, 'Constitutional Law - Commonwealth Electors' Voting Rights' (1968) 42(4) *Australian Law Journal* 139. See also Geoffrey J. Lindell, 'Judicial Review and the Composition of the House of Representatives' (1974) 6(1) *Federal Law Review* 84, where Lindell canvassed many of the arguments addressed in the cases noted above. Note that in 1974, a requirement of equality of electoral divisions of both State and Federal legislatures was defeated at referendum: see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 1403, (Proposal 3 of the 18 May 1974 referendum).

<sup>41</sup> *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 36–37 (McTiernan and Jacobs JJ), 61 (Mason J). Gaudron J expanded on this in *McGinty v Western Australia* (1996) 186 CLR 140, 218–9.



calculation in s 24, that group is excluded from the community being represented proportionately by the Parliament.

This exclusion has symbolic force in three ways. First, the mere exclusion itself, which means that individuals are not counted as amongst the constitutional community, understood in this context as the communities within the States. As is developed above, the peoples within the States were the constituent entities in the making of the *Constitution*, and are at the heart of the federal Commonwealth. Thus, exclusion from this group means exclusion from the core of the constitutional community. The second aspect of the symbolic significance centres on the basis of exclusion. By allowing for racial exclusion, the constitutional community can itself be understood as one whose boundaries may be determined by race. The third aspect concerns representation. As argued by Aroney, the people of the States were to be the 'beneficiaries' of representation in Parliament.<sup>42</sup> Exclusion from that group affects the representation which flows from membership of the group in the sense of no longer being counted as part of the State communities referred to in that part of s 24. In Part II, I explore the exclusion of Indigenous Australians from the constitutional 'people' by operation of s 127, and the subsequent Part addresses how s 25 provides for such exclusion.

## II THE IMPACT OF SECTION 127

Section 127 of the *Constitution* was titled 'Aborigines not to be counted in reckoning population' and stated: '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.' On its face it appeared to countenance categorical exclusion of Indigenous Australians and is sometimes mistakenly understood to mean that Indigenous Australians were not counted in the census.<sup>43</sup> In order to understand the operation of that section, one must address who was counted as an 'aboriginal native', from what they would be excluded, and how the exclusion was put into effect. This Part addresses each of those elements in order to explain *how* s 127 required exclusion of Indigenous Australians from the calculation of 'the people' in s 24.

### Who Was Excluded?

Section 127 referred to 'aboriginal natives'. That term was not defined in the *Constitution*, Commonwealth legislation, or by the High Court. Legislation regarding Indigenous Australians was predominantly a State concern prior to 1967, which used a variety of definitions across and within jurisdictions.<sup>44</sup> The definition adopted for the

<sup>42</sup> Aroney, above n 30, 226.

<sup>43</sup> See for example: Christopher Cunneen and Terry Libesman, *Indigenous Peoples and the Law in Australia* (Butterworths, 1995), 42; Paul Havemann, 'Denial, Modernity and Exclusion: Indigenous Placelessness in Australia' (2005) *Macquarie Law Journal* 57, 67.

<sup>44</sup> For a comprehensive summary up to 1985, see John McCorquodale, *Aborigines and the Law: A Digest* (Aboriginal Studies Press, 1987), based on John Colin McCorquodale, *Aborigines: A History of Law and Injustice, 1829-1985* (PhD thesis, University of New England, 1985). For earlier work, see C D Rowley, *The Destruction of Aboriginal Society: Aboriginal Policy and Practice - Volume 1, Aborigines in Australian Society* (Australian National University Press, 1970) and for a more recent survey: John Gardiner-Garden, 'The Definition of Aboriginality' (Parliamentary Library, 2000). For an outline of definitions at the time of federation, see

purpose of s 127 was that outlined by the Commonwealth Attorney-General or Solicitor-General of the time.

Advice on s 127 was first given on 29 August 1901, to the effect that 'half-castes' should *not* be counted as 'aboriginal natives'.<sup>45</sup> That advice was consistent with the way in which 'race' was understood. A person was considered to be of a particular race if they had a 'preponderance' of the relevant blood.<sup>46</sup> That meant a person was an 'aboriginal native' if they were a 'full-blood aboriginal'. They were not 'aboriginal' for the purposes of s 127 if they were a 'half-caste'.<sup>47</sup> This distinction was difficult to apply. The official Commonwealth yearbook, published in 1908, noted that 'half-castes', living in the nomadic state, are practically indistinguishable from aborigines, and up to the present it has not always been found practicable to make the distinction, and no authoritative definition of "half-caste" has yet been given.<sup>48</sup> Further, the application of any such distinction could be affected by the extent of administrative discretion or practical control of relevant officials involved in the implementation of the definition.<sup>49</sup>

### Excluded From What?

#### *The relevant sections*

Section 127 operated to exclude 'full-blood aborigines', from being counted when 'reckoning the numbers of the people of the Commonwealth, or of a State, or other part of the Commonwealth.' This had practical significance because the *Constitution* requires the calculation of 'the people' for a number of purposes, seen in ss 24, 89, 93 and 105.<sup>50</sup> The first section includes a calculation of the number of members of the

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Brian Galligan and John Chesterman, 'Aborigines, Citizenship and the Australian Constitution: Did the Constitution Exclude Aboriginal People from Citizenship?' (1997) 8(1) *Public Law Review* 45, 48–9.

<sup>45</sup> Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, with Opinions of Solicitors-General and the Attorney-General's Department* (Australian Government Publishing Service, 1981) vol 1, 24 (Opinion 13 of Alfred Deakin). This was agreed with by Attorney-General Isaacs on 2 October 1905, in an unpublished opinion, set out at 560 nn 2:

'to exclude all full-blooded aborigines and persons in whom there is a preponderance of aboriginal blood, and to include half-castes and others in whom there is not a preponderance of aboriginal blood.'

See also 75 (Opinion 57 of Alfred Deakin). While use of the term 'half-caste' may be confronting and even offensive, it is used here because it was the term adopted at the time and explains how the constitutional term 'aboriginal native' was understood prior to its deletion in 1967.

<sup>46</sup> See *ibid*, vol 1, 626 (Opinion 485 of R R Garran), and vol 2, 637–9 (Opinion 1049 of R R Garran).

<sup>47</sup> This is in contrast to the range of restrictions imposed on 'half-caste aborigines' under colonial and then State legislation: see McCorquodale, above n 44.

<sup>48</sup> Commonwealth Bureau of Census and Statistics, *Official Year Book of the Commonwealth of Australia* (Commonwealth Bureau of Census and Statistics, 1908) 145.

<sup>49</sup> See, eg, John McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions' (1997) 2 *Australian Aboriginal Studies* 24; Regina Ganter and Ros Kidd, 'The Powers of Protectors: Conflicts Surrounding Queensland's 1897 Aboriginal Legislation' (1993) 25(101) *Australian Historical Studies* 536.

<sup>50</sup> Section 127 does not operate to exclude people from being counted as among the constitutional 'people' in other sections of the *Constitution*, such as the 'people of the State'

House of Representatives chosen in each State, as outlined above. That calculation has an effect on the number of members of the House of Representatives to be chosen in each State. It also has symbolic effect by identifying who is to be considered a part of those constitutional communities within the States, represented in Parliament. The last three sections concern financial calculations regarding State debt and Commonwealth surplus.<sup>51</sup> That is, they affect the distribution of finances throughout the Commonwealth, as negotiated at federation. The calculation of the relevant State peoples for these sections had the practical effect of determining how much money each State would receive from the Commonwealth, or have to pay to the Commonwealth. Excluding Indigenous Australians from those calculations signifies exclusion from the community affected by those financial distributions, in the sense of not being considered relevant individuals to be counted. Those financial sections are outlined below, but all of them had practical effect for only a limited period.

Section 89(ii)(b) established that 'Until the imposition of uniform duties of customs ... the Commonwealth shall debit to each State ... the proportion of the State, *according to the number of its people*, in the other expenditure of the Commonwealth'.<sup>52</sup> That section operated until 8 October 1901, after which uniform customs duties came into force.<sup>53</sup>

Section 93(ii) required that:

During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides – ...

(ii) subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

The 'prescribed' manner in which the calculations were to take place referred back to s 89, and therefore to the reference to the number of the States' people. In 1908, the Commonwealth passed the *Surplus Revenue Act 1908* (Cth), which concluded the operation of subsection (ii).<sup>54</sup>

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in s 7. The reference to 'the people' in that section is to the people acting as electors. Membership of that group depends on the franchise in effect at the time.

<sup>51</sup> For discussion of these sections in the context of the financial arrangements between the States and Commonwealth, see Cheryl Saunders, 'Government Borrowing in Australia' (1989) 17 *Melbourne University Law Review* 187; Denis James, 'Federal-State Financial Relations: The Deakin Prophecy' (Research Paper No 17, Parliamentary Library, Parliament of Australia, 2000) later published as Denis James, 'Federal-State Financial Relations: The Deakin Prophecy' in G J Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Federation Press, 2001) 210; Cheryl Saunders, 'The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution' in Gregory Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books, 1986) vol 6, 149.

<sup>52</sup> Emphasis added.

<sup>53</sup> Commonwealth Bureau of Census and Statistics, above n 48, 145, with reference to legislation having been introduced into the House of Representatives with a resolution to protect revenues from that date, 9 October 1901.

<sup>54</sup> Section 3 provided that:

'The provision made by section ninety-three of the Constitution in relation to the crediting of revenue, the debiting of expenditure, and the payment of balances to the several States, shall continue until the commencement of this Act and no longer.'

Section 105 states that 'The Parliament may take over from the States their public debts ... or a proportion thereof according to the respective numbers of their people'.<sup>55</sup> In 1929, s 105A was inserted by referendum to provide an alternative method of determining how the Commonwealth could take over State debts.<sup>56</sup> That new section allows for agreements between the Commonwealth and the States regarding those debts. It is not limited by anything in s 105<sup>57</sup> and contains no reference to the number of 'the people' of the States.

*The purpose of s 127 as seen in its history*

To the extent that the meaning of s 127 can be ascertained from the drafting process and debates, it seems that the section was intended to exclude 'aboriginal natives' from being counted when determining the numbers of 'the people' for particular constitutional calculations.<sup>58</sup> There was little debate regarding this section. The first hint of s 127 appears in additions, by Sir Samuel Griffith, to a proof of the draft *Constitution* of 1891, which read: 'In reckoning the numbers of the people of a State or Territory aboriginal natives of Australia or of any Island of the Pacific shall not be counted'.<sup>59</sup> That addition was made on the famous voyage on the *Lucinda*,<sup>60</sup> during which a concentrated period of drafting occurred. However, this clause was removed prior to the draft's presentation to the 1891 Convention.<sup>61</sup>

The clause was then reinserted during the course of the 1891 Convention Debates. Griffith introduced it, saying:<sup>62</sup>

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<sup>55</sup> It originally stated that the Parliament may take over the debts 'as existing at the establishment of the Commonwealth'. That qualification was deleted by referendum in 1910: *Constitution Alteration (State Debts) 1909*.

<sup>56</sup> This reflected an agreement between the Commonwealth and States reached in 1927. See *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155.

<sup>57</sup> See sub-ss 105A(5) and (6).

<sup>58</sup> This is consistent with the view of Galligan and Chesterman, above n 44, 52 citing J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 67–8. It is also consistent with Sawyer, above n 6, 25ff, and the opinion of the Joint Committee on Constitutional Review, above n 5, 54–6.

<sup>59</sup> John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005), 211, dated 28 March 1891. That clause appears in the revised version of 30 March 1891, but does not appear in any form in either Inglis Clark's or Charles Kingston's drafts of 1891, which provided inspiration for much of the later drafting.

<sup>60</sup> See Helen Irving (ed), *The Centenary Companion to Australian Federation* (Cambridge University Press, 1999), 395–6.

<sup>61</sup> Therefore, it did not appear in the full draft presented to the Convention although it had remained in the earlier forms: Williams, above n 59, 235, 258.

<sup>62</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney 8 April 1891, 898–9 ('1891 Convention Debates').

I intend to propose a new clause, dealing with the mode of reckoning the population. The clause was in the Bill as prepared by the drafting committee, but the general committee struck out the clauses to which it referred. These clauses having been reinserted, it is necessary that this clause also should be reinserted. I move:

That the following clause be inserted, to stand clause 3 of chapter VII: —

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

The clause was inserted without debate or amendment, and appeared as such in the final draft accepted by the 1891 Convention.<sup>63</sup> The 'clauses to which it referred', that were 'struck out' and then 'reinserted', were most probably the financial clauses discussed above.<sup>64</sup>

The commitment to adopting the 1891 draft faltered, with the relevant legislation failing to pass through the colonial Parliaments.<sup>65</sup> After renewed efforts in the Australian colonies, a second Convention was held, which led to the eventual enactment of the *Constitution*. That later Convention began its work with a draft drawing heavily upon the 1891 draft, despite the stated intention of the new Convention to start afresh.<sup>66</sup> A version of s 127 appeared in the first draft *Constitution* presented to the 1897 Convention in its first session, in Adelaide.<sup>67</sup>

Concern was raised that s 127 affected the right of Indigenous Australians to vote. Dr John Cockburn said 'there are a number of natives who are on the [electoral] rolls [in South Australia], and they ought not to be debarred from voting.'<sup>68</sup> That concern was put to rest when Alfred Deakin explained the section only 'determined the number of your representatives'. Sir Edmund Barton confirmed '[i]t is only for the purpose of determining the quota', being a reference to the calculation in s 24. James Walker added that s 127 affects how 'we come to divide the expenses of the Federal Government *per capita*' and if 'aboriginals' are left out of that equation, 'South Australia will have so much the less to pay'.<sup>69</sup>

This understanding of s 127 as being related to the calculation in s 24 or financial calculations was then confirmed by Barton in the Melbourne session in 1898. He said that s 127 was a reference to 'the reckoning of the number of people ... There are various other clauses dealing with finance and other questions, under which it

<sup>63</sup> Williams, above n 59, 433.

<sup>64</sup> This view is shared by La Nauze, above n 58, 67–8 and Sawyer, above n 6, 17–26. See National Library of Australia, *An Investigation of the Origins and Intentions of Section 51, placitum xxvi, and Section 127 of the Constitution of the Commonwealth of Australia* (National Library of Australia, 1961) 12–13, outlining the parallel work of the Financial Committee and the Constitutional Machinery Committee conducting various tasks of drafting parts of the Constitution. For details of the disagreements between the two committees regarding financial arrangements on the basis of population see Quick and Garran, above n 14, 133–5, 139–141.

<sup>65</sup> See Williams, above n 59, 461–2.

<sup>66</sup> La Nauze, above n 58, 136–7 and see Williams, above n 59, 479.

<sup>67</sup> Williams, above n 59, 524. The only difference between the 1891 version and the 1897 version was the removal of the words 'of Australia', and a change in numbering.

<sup>68</sup> *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 1020 ('1897–8 Convention Debates').

<sup>69</sup> *Ibid.*

becomes necessary ... It relates to determining the number of members. ... the provision is merely for statistical purposes.<sup>70</sup>

The National Library, in their report in 1961 to the Select Committee on Voting Rights of Aborigines, gives the following summary of the whole drafting process:<sup>71</sup>

It can be said, in conclusion, that during the framing of the Constitution some uncertainty appears to have existed as to the purpose of Section 127. Its incorporation under the Chapter 'Miscellaneous' in the Bill of 1891 and on all later occasions and the relative unimportance of the aboriginal question in the Conventions may have been contributory factors. It was variously considered to relate to the finance provisions of the Constitution and to the establishing of the quota [in s 24 of the Constitution].

### How Was Exclusion Put Into Effect?

Section 127 operated to exclude 'full-blood aboriginals' from being counted as among 'the people' of the States or Commonwealth, for use in the constitutional calculations in ss 24, 89, 93 and 105. Those calculations were determined on the basis of Commonwealth statistics, which were in turn developed from the Commonwealth census. The Commonwealth Parliament was given power to make laws with respect to 'census and statistics' under s 51(xi) of the *Constitution*. It exercised that power by passing the *Census and Statistics Act 1905* (Cth) and the first Commonwealth census was held in 1911.

Contrary to popular misconceptions, Indigenous Australians have been enumerated in every census, albeit only approximately and according to inconsistent definitions. Indigenous Australians have been enumerated in some form in every Commonwealth census, as well as having been counted in some form in the earlier State and colonial censuses.<sup>72</sup> Every Commonwealth census from 1911 to today has included either a general question about racial identification, or a more specific question regarding Indigenous Australian status.<sup>73</sup> It was through the race question

<sup>70</sup> 1897–8 *Convention Debates*, Melbourne, 8 February 1898, 713–14. Following that debate, the words 'of the Commonwealth or' were inserted, so the exclusion would occur in reckoning not only the constituent parts of the Commonwealth ('the states or other part of the Commonwealth') but the overall national count as well. This addition occurred without debate or explanation.

<sup>71</sup> National Library of Australia, above n 64, 15. The reference to the 'quota' is to a part of the calculation of the number of members of the House of Representatives to be chosen in each State. The 'quota' is ascertained 'by dividing the number of the people of the Commonwealth ... by twice the number of senators': *Constitution* s 24.

<sup>72</sup> However, this occurred sporadically and many of the figures are incomplete or approximations considered to be under-approximations. See Commonwealth Bureau of Census and Statistics, above n 48, 144–145, and consolidated statistics presented in Australian Bureau of Statistics, 3105.0.65.001 *Australian Historical Population Statistics, 2008, 2. Indigenous Population*, (Released at 11.30am (Canberra time), 23 September 2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012008?OpenDocument>>.

<sup>73</sup> The questions have changed over time and are set out in Kate Ross, *Population Issues, Indigenous Australians* (Australian Bureau of Statistics, 1996) 9. The first Commonwealth census simply asked for "Race" in addition to asking whether a person was a British subject by birth or naturalization (see Q10). The 1933 census asked 'Race. — For all persons of European race wherever born write "European." For non-Europeans state the race to which they belong as Aboriginal, Chinese, Hindu, Negro, Afghan, &c. If the person is a half-caste

that the number of Indigenous Australians was recorded. In order to ascertain the relevant 'numbers' for the constitutional calculations outlined above, 'aboriginal natives' were then excluded from the overall number of people.

The definitions used, and the process for collection of data, regarding population statistics in Australia have not been consistent.<sup>74</sup> The definition regarding Indigenous Australians prior to the 1966 census was that applied above regarding s 127 – those with a 'preponderance of blood'. This can be seen in the questions asked in the census at various times, requiring a quantification of racial descent from the recorded group.<sup>75</sup> It is reflected in the recording of two categories of 'aborigines' in the census – 'full blooded' and 'half-caste'.<sup>76</sup> There were changes over time regarding the status of Torres Strait Islanders. Prior to 1947 and in 1966 they were counted as 'aboriginal', with the consequent constitutional exclusion if 'full-blooded'.<sup>77</sup> In 1947 they were counted as Polynesian, and in 1954 and 1961, as Pacific Islanders, all of which meant they were included in the constitutional population count for those periods.<sup>78</sup>

Section 127 did not impose a limitation on the census power of the Commonwealth in the sense of prohibiting an enumeration of Indigenous Australians.<sup>79</sup> However, the number of 'full-blooded aborigines' was excluded from the overall figures of the Australian population, within each State and Territory and nationally, in order to

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write also "H.C.", as "'H.C. Aboriginal," H.C. Chinese," &c'. (Q12). The first census after 1967 asked: 'What is this person's racial origin? (If of mixed origin indicate the one to which he considers himself to belong) (Tick one box only or give one origin only) 1 European origin 2 Aboriginal origin 3 Torres Strait Islander origin 4 Other origin (give one only) ..... (Q5). The most recent census asked whether the person is 'of Aboriginal or Torres Strait Islander origin' (Q5, see the 'Household Form' for the 2011 census)

<[http://www.abs.gov.au/ausstats/abs@nsf/lookup/2903.0main%20features162011/\\$file/SAMPLE\\_PRINT\\_VERSION\\_F1.pdf](http://www.abs.gov.au/ausstats/abs@nsf/lookup/2903.0main%20features162011/$file/SAMPLE_PRINT_VERSION_F1.pdf)>. While there were questions relating to Australian citizenship, birthplace and ancestry, there was no general 'race' question asked.

<sup>74</sup> For an overview, see Ross, above n 73.

<sup>75</sup> In 1933, 1947, 1954, 1961, the questions asked for racial identity to be noted as either of a particular race, or 'half-caste'. In 1966, the question asked for relevant fractions to be provided regarding racial descent, giving examples: '½ European-½ Aboriginal, ¾ Aboriginal-¼ Chinese ...'. The questions are outlined in *ibid*, 9.

<sup>76</sup> See, eg, the records of the First Commonwealth census in 1911: Census 1911, Vol III, Part XIV, 2054, Table 1 'Full-blooded Australian Aborigines Enumerated in the Several States and Territories of the Commonwealth of Australia – At the Census of the 3<sup>rd</sup> of April 1911'. Recognition of the limitations to the accuracy of the enumeration is noted at the bottom of the table, particularly that 'An enumeration of Aborigines living in a purely wild state was not undertaken.' See also Census 1911, Vol II, Part VIII, 903, Table 2 – 'Persons of Non-European Race Enumerated in the Commonwealth of Australia – At the Census of 3<sup>rd</sup> April 1911 (Exclusive of Full-blooded Aborigines). Summary by Races'. The first race listed is 'Australian – Aborigines' and the numbers appear under the category 'Half-castes'.

<sup>77</sup> After 1966 they were counted as a separate category of Indigenous Australians: Ross, above n 73, 5.

<sup>78</sup> *Ibid*.

<sup>79</sup> See Sawyer, above n 6, 26.

satisfy the exclusion mandated by s 127 for the purposes of the constitutional calculations.<sup>80</sup>

### Significance of section 127

The exclusion of 'aboriginal natives' from the constitutional calculations discussed above had no impact on legal rights or entitlements of those 'aboriginal natives'. Formal legal citizenship, and the right to vote, although complex in their application to Indigenous Australians, were independent of, and unaffected by, s 127.<sup>81</sup> Section 127 was also independent of the legal status of Indigenous Australians as subjects of the Queen. Section 127 meant that 'full-blood aborigines' were excluded when determining the number of 'the people' for specific constitutional calculations.

The rationale behind that exclusion was not made clear in the Convention Debates. Barton, in explaining the meaning of the provision in the Melbourne session in 1898, made the enigmatic comments that s 127 is related to determining the 'whole population ... where it would not be considered fair to include the aborigines', and that 'it is only considered necessary to leave out of count the aboriginal races' (rather than any other races, as may fall within s 25 discussed below).<sup>82</sup> No further explanation was given, by Barton or anyone else.

While the delegates gave little attention to the exclusion, the exclusion is significant in terms of the status of 'aboriginal natives' as members of 'the people' of the *Australian Constitution*. The most significant impact can be seen through the exclusion from the calculation in s 24. As is developed above in Part I, the second sentence of s 24 reflects representation according to State communities. The exclusion by s 127 of 'aboriginal natives' reflects an exclusion from the constitutional communities within the States, which must be represented proportionately to their population by members in the Parliament. The symbolic impact of this exclusion is significant, and becomes striking when those excluded by s 127 had a right to vote.

This can be seen in the concern raised by Cockburn in the Convention Debates in 1897. Cockburn was speaking from the perspective of a colony which enfranchised women and Indigenous Australians, in contrast to the majority of the Australian colonies at the time.<sup>83</sup> He received clarification that s 127 would not affect voting rights and stated: 'Even then, as a matter of principle, they ought not to be deducted. ... I think that these natives should be preserved as component parts in reckoning up the people.'<sup>84</sup> This reflects the disjunction between the exercise of a vote by some Indigenous Australians, yet their exclusion from being counted as amongst 'the people' represented in the second part of s 24. The same comment was made in the 1959 Report of the Joint Committee on Constitutional Review. That Committee recommended the deletion of s 127 as being an 'injustice to many', 'at this stage of our national development'<sup>85</sup> and '[i]f aborigines are to become qualified as electors then, as a matter

<sup>80</sup> This understanding of the use of the statistics and s 127 was applied from the Conference of Statisticians in 1900: National Library of Australia, above n 64, 14–15, and is seen in the official records of Commonwealth statistics: Commonwealth Bureau of Census and Statistics, above n 48, 145.

<sup>81</sup> See Galligan and Chesterman, above n 44.

<sup>82</sup> 1897–98 *Convention Debates*, Melbourne, 8 February 1898, 713–4.

<sup>83</sup> See Twomey, above n 26, 144–5.

<sup>84</sup> 1897–98 *Convention Debates*, Adelaide, 20 April 1897, 1020.

<sup>85</sup> Joint Committee on Constitutional Review, above n 5, 55 [394].



of principle, they should be recognized as forming part of the population of the State in which they live.<sup>86</sup> These comments highlight ideas of membership of the community, seen through the exercise of the vote, as being connected to inclusion amongst the State communities to be represented by Parliament.

Another aspect of the drafting of s 127 provides some insight into how 'aboriginal natives' were considered with respect to membership of the constitutional communities as understood in the second sentence of s 24. That is the comparison between their exclusion and the contemporary inclusion of other groups resident in Australia at the time. In the Melbourne session of the Convention Debates in 1898, the New South Wales and Tasmanian Parliaments proposed extending the exclusion in s 127 to aliens who were not naturalized.<sup>87</sup> The proposal was not directly debated, and was defeated.<sup>88</sup> Thus, aliens were to be *included* while Indigenous Australians were to be *excluded*. At federation, Indigenous Australians were formally subjects of the Queen, by virtue of being born within the realm<sup>89</sup> and therefore not aliens. However, they were excluded from a calculation of 'the people' while aliens were to be counted as amongst the relevant population. This is consistent with other historical examples where aliens received greater legal protection and recognition than Indigenous Australians.<sup>90</sup>

Section 127 is often described as the section which excluded Indigenous Australians from being counted as citizens. That is incorrect to the extent that 'citizenship' is

<sup>86</sup> Ibid 56 [396]. The operation of the franchises in the colonies, States and Commonwealth with respect to Indigenous Australians is complex. Some Indigenous Australians were enfranchised prior to federation, within the States and federally after federation. However, disenfranchisement on the basis of race continued for many decades, and there were anomalous instances of some Indigenous Australians being given the federal vote temporarily (related to war service), others losing their former federal voting rights (as did non-Indigenous Australians) with the creation of the Northern Territory. See Murray Goot, 'The Aboriginal Franchise and Its Consequences' (2006) 52(4) *Australian Journal of Politics and History* 517.

<sup>87</sup> See Williams, above n 59, 703 (South Australia proposed the deletion of the clause) and 1897-98 *Convention Debates*, Melbourne, 8 February 1898, 713.

<sup>88</sup> See 1897-98 *Convention Debates*, Melbourne, 8 February 1898, 714.

<sup>89</sup> However, those born prior to the assertion of British sovereignty may fall outside that category. See David A Wishart, 'Allegiance and Citizenship as Concepts in Constitutional Law' (1986) 15 *Melbourne University Law Review* 662 for the general principles regarding subject status. Some raise doubts regarding whether this status applied to Indigenous Australians in the early period following colonisation: see Alessandro Pelizzon, *Respecting Indigenous Legal Protocols: the Impact of Native Title* (PhD thesis, University of Wollongong, 2010), 104, now published as Alessandro Pelizzon, *Laws of the Land: Traditional Land Protocols, Native Title and Legal Pluralism in the Illawarra* (Lambert Academic Publishing, 2012); David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991), 17. Claims against the status of subject applying to Indigenous Australians today are based on challenges to the valid assertion of British sovereignty, which have been rejected by the High Court: see *Coe v Commonwealth* (1979) 53 ALJR 403. Most analysis of the status of subject of the Queen as applicable to Indigenous Australians identifies a disjunction between the status and the usual legal incidents of such status, rather than questioning the application of the status per se: John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

<sup>90</sup> Chesterman and Galligan, above n 89.

understood as a formal legal status to which rights attach. However, that idea of exclusion is accurate if citizenship is used in the sense of membership of the constitutional community – a broader notion of being one of the 'people' of the *Commonwealth Constitution*, represented by Parliament.

### III SECTION 25

Section 127 has thus been explained as an exclusionary section, which operated to exclude 'full-blood Aborigines' from being counted as among the constitutional 'people' for particular purposes. Section 127 was deleted in 1967, in the celebrated referendum which also altered s 51(xxvi), the 'racess' power. Section 51(xxvi) previously gave the Commonwealth legislative power with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The exclusion 'other than the aboriginal race in any State' was removed in 1967. The changes to ss 51(xxvi) and 127 received the highest 'yes' vote in any federal constitutional referendum in Australia<sup>91</sup> and the referendum success was heralded as an event of equality, an overturning of historic disadvantage of Indigenous Australians.<sup>92</sup> After that referendum, there was no longer any mention of Indigenous Australians in the text of the *Constitution*.

The deletion of s 127 led to the removal of the exclusion explored above in Part II. The expected result would therefore be that Indigenous Australians are now considered to be part of the constitutional 'people'. That is certainly the case with respect to the impact on the statistics used for the purpose of constitutional calculations. The Commonwealth census continued to ask a question about race, but the results no longer led to constitutional exclusion of Indigenous Australians. The changes in 1967 have been described as resulting in a neutral citizenship for Indigenous Australians.<sup>93</sup> Explicit exclusion was removed, so the constitutional position of Indigenous and non-Indigenous Australians was relevantly the same.

<sup>91</sup> For details, see Blackshield and Williams, above n 40, 1402. See also George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010), 140–154.

<sup>92</sup> Catch-cries of the day, featured in advertisements in favour of the 'Yes' vote, included phrases such as: 'Right wrongs, write yes', 'No apartheid for our aborigines, give them full citizenship and education', 'vote yes for aboriginal rights', 'equal rights, equal pay'. The point is often made that the legal impact of the referendum in 1967 was not what people commonly believed, or have come to believe. That the 'myth' of those changes is strong but misinformed see: Bain Attwood and Andrew Markus, '(The) 1967 (Referendum) and All That: Narrative and Myth, Aborigines and Australia' (1998) 29(111) *Australian Historical Studies* 267; John Gardiner-Garden, 'The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum' (Department of the Parliamentary Library, 1997); Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007), 288.

<sup>93</sup> Noel Pearson, 'Aboriginal Referendum a Test of National Maturity', *The Australian*, 26 January 2011, reproduced in Expert Panel Report, above n 1, 32:

However, the existence of s 25 in the *Constitution* means that there is neither pure equality nor neutrality. Indigenous Australians, as well as other groups defined as 'races',<sup>94</sup> can be excluded from being counted as amongst 'the people'. Section 25 requires that if a State disqualifies people from voting on the basis of race, all persons of that race resident in the State must be excluded from being counted as among the 'people of the State' for the s 24 calculation. That is, the exclusion of Indigenous Australians that was mandated by s 127, but overcome in 1967, is countenanced by s 25. If a State legislated in a relevant manner, the practical legal effect of s 127 would be reinstated. Further, the symbolic element of exclusion continues by the maintenance of a section which allows for such exclusion to occur.

It is unlikely today that a State would enact relevantly discriminatory legislation. While it can be argued that legislation may operate with disproportionate effect on particular groups, or fail to address indirect discrimination, a law which directly disenfranchises individuals simply on the basis of race is beyond what I believe would be politically acceptable in any Australian State today. Nevertheless, the constitutional text in s 25 indicates such legislation is permissible. Even if such legislation is never enacted in the future, the symbolic implications of that constitutional text justify a detailed consideration of s 25. The symbolic effect of allowing exclusion on the basis of race, with consequential restriction on representation by the Parliament, remains of concern despite the absence of State legislation enacting such exclusion.

### Section 25 Prior to 1967

Most of the Convention Debates regarding s 25 assume that the section was directed towards alien races.<sup>95</sup> However, the possibility that s 25 might apply to Indigenous Australians was mentioned. Sir Joseph Carruthers, in addressing a possible ambiguity in the wording of the section, stated: 'What was intended was to exclude from the [s

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The original Constitution of 1901 established a negative citizenship of the country's original peoples. The reforms undertaken in 1967, which resulted in the counting of Indigenous Australians in the national census and the extension of the races power to Indigenous Australians, can be viewed as providing a neutral citizenship for the original Australians.

What is still needed is a positive recognition of our status as the country's Indigenous peoples, and yet sharing a common citizenship with all other Australians.

<sup>94</sup> This article focuses on the constitutional position of Indigenous Australians. The overriding significance of race, and discrimination on that basis, is beyond the scope of this article. For discussion of the relevance of race and the *Constitution*, see eg, John M Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95; John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment'' (1996) 42(1) *Australian Journal of Politics and History* 10; George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643; Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, first published 1997, updated ed, 1999), ch 6. Most recently, of note is the proposal to incorporate a general prohibition of racial discrimination within the Constitution: see Expert Panel Report, above n 1, ch 6.

<sup>95</sup> See for example: 1891 *Convention Debates*, 2 April 1891, 637 (Cockburn): 'The clause seems to have been framed with the idea of excluding only alien races' and see 1897-98 *Convention Debates*, 13 September 1897, 453 (Barton).

24] computation aboriginals, or others who might be expressly disqualified by parliamentary enactment.<sup>96</sup>

'Parliamentary enactments' did discriminate against Indigenous Australians with respect to State franchises until 1965.<sup>97</sup> Therefore, if s 25 was considered in isolation, it would have had some application with respect to Indigenous Australians. That is, in those States where legislation discriminated against Indigenous Australians with respect to the State franchise, Indigenous Australians would have been excluded from 'the people' in the calculation in s 24. However, the operation of s 127 until 1967 meant that s 25 had no effect with respect to Indigenous Australians. This is significant when considering what could be characterised as the benevolent underlying purpose of s 25.

Section 25 imposes a numerical disadvantage on a State if the State discriminates against a race with respect to the State franchise. The State cannot count the people of that race for the purpose of determining the number of members of the House of Representatives to be chosen in that State. Therefore, the State may have fewer members chosen in that State if the number of people discriminated against is significant enough to affect the calculation set out in s 24. Section 25 can thus be understood as a disincentive against discrimination. However, a careful analysis of ss 25 and 127 demonstrates that this potential disincentive did not apply with respect to Indigenous Australians prior to 1967.

The view that s 25 had a purpose of reducing racial discrimination comes from the American inspiration for the text. Quick and Garran begin their discussion of s 25 with a reference to the Fourteenth Amendment of the *Constitution* of the United States. That Amendment states:<sup>98</sup>

When the right to vote at any election ... is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States ... the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Quick and Garran explained:<sup>99</sup>

That amendment was passed after the Civil War, in order to induce the Governments of the States to confer the franchise on the emancipated negroes, who were declared citizens of the United States. It was designed to penalize, by a reduction of their federal representation, those States which refused to enfranchise the negroes.

In the Convention Debates regarding s 25, only indirect mention is made of the connection between the section and the American text. Cockburn sought to extend s 25

<sup>96</sup> 1897-98 *Convention Debates*, 13 September 1897, 453. The meaning of 'aboriginal' has changed over time. In the colonial era, it was used to refer to the original inhabitants of a place, while 'native' was used to refer to someone born in Australia - usually a reference to white Australians of British heritage: Chesterman and Galligan, above n 89, 87 and see Irving, above n 94, ch 7. In the context of the debate on s 25, and given the wording of the colonial franchise legislation, it is likely that Carruthers was referring to Indigenous Australians. It is of note that the interaction between ss 25 and 127 does not seem to have been considered by the delegates.

<sup>97</sup> Queensland was the last State to remove its racially discriminatory franchise legislation. For details regarding the franchise in place at various times, see Goot, above n 86.

<sup>98</sup> Quick and Garran, above n 14, 456.

<sup>99</sup> Ibid.

to exclude anyone disenfranchised, regardless of race. In response, Griffith noted the similarity between that proposal (which was defeated) and the American text, in the context of recommending against Cockburn's amendment.<sup>100</sup> Despite the lack of exact equivalence, the effect of s 25 is the same as for the American clause — to act as a disincentive to disenfranchisement.

Despite this beneficial purpose of s 25, it did not operate with respect to Indigenous Australians. The overlap with respect to s 127 prior to 1967 meant that s 25 could not operate as a disincentive to discrimination against Indigenous Australians. As is explained above, s 127 had the effect of excluding all 'full-blooded aboriginal' people from being counted as amongst the relevant people of the States for the purpose of s 24. That was so regardless of whether or not the States enfranchised that group. That is, no State could count 'aboriginal natives' as amongst their 'people' for the purpose of determining the number of members of Parliament to be chosen in their State because s 127 excluded all of those people.

Further, the definition of 'aboriginal native' and 'race' adopted prior to 1967 meant that if discrimination occurred against persons who were considered 'half-caste aboriginal', the State would not be penalised under s 25. This can be seen in the following example of Western Australia. That State imposed a disqualification in the following terms:<sup>101</sup>

s 18: Every person, nevertheless, shall be disqualified from being enrolled as an elector, or, if enrolled, from voting at any election, who —

(d) is an aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific, or a person of the half blood.

In 1921, Robert Garran, as Solicitor-General, was asked for advice regarding which groups should be excluded from the calculation in s 24. He confirmed that all 'aboriginal natives' were excluded by s 127. Garran adopted the 'preponderance of blood' idea of race. He stated that '[p]ersons of the half-blood cannot, I think be regarded as persons of any race and should, therefore, in my opinion be counted [in the calculation under s 24].'<sup>102</sup> Those who fell within the notion of 'persons of the half-blood' were therefore counted as amongst the relevant people in Western Australia, giving that State the numerical benefit of their inclusion for the purpose of the calculation in s 24. At the same time, Western Australia could deny those people the vote in their State without any disadvantageous effect by virtue of s 25, as those people were not considered to be of a 'race' for the purpose of that section.

Thus, the beneficial purpose of s 25, to act as a disincentive to discrimination, did not apply with respect to Indigenous Australians prior to 1967, whether classified as 'full-blood' or 'half-caste' according to the definitions applied at the time. Section 25, can therefore only be considered as a section having a negative connotation with respect to the status of Indigenous Australians.

The section assumes that racial discrimination may occur and implicitly allows it to continue. This allowance of racial discrimination is particularly significant given the constitutional importance of the State franchise. The interim constitutional franchise prior to Commonwealth legislation was that which applied for the lower House of the

<sup>100</sup> 1891 *Convention Debates*, 2 April 1891, 638.

<sup>101</sup> *Electoral Act 1907* (WA), s 18(d).

<sup>102</sup> Brazil and Mitchell (eds), above n 45, Vol 2, 637–9, Opinion 1049.

Parliament in each State.<sup>103</sup> Therefore, s 25 implicitly allowed for the interim federal franchise to be racially discriminatory.<sup>104</sup> It did so by contemplating that such discrimination might occur, and which as is shown above, did not necessarily have a disadvantageous numerical impact with respect to *all* racial discrimination. This acceptance of racial discrimination should not be surprising for any reader of the Convention Debates or early federal Parliamentary Debates. The question of race at the time was clearly based on a distinction between 'desirable' and 'undesirable' races.<sup>105</sup>

### The paradox of s 25 after 1967

The significance of s 25 prior to 1967, with respect to Indigenous Australians, is indirect. It had no effect with respect to Indigenous Australians' exclusion from State franchises on the basis of race, as any 'full-blood aboriginal' was already excluded under s 127, and anyone of the 'half-blood' was not counted as of any race at all. However, the implicit allowance for racial discrimination, with a flow-on effect at least initially for the federal vote, gives some guidance regarding the constitutional status of Indigenous Australians.

This part of this article addresses the significance and effect of s 25 *after* 1967. When s 127 was deleted in 1967, the overlap in operation of that section with s 25 was removed. This part explains the ongoing role of s 25 in relation to Indigenous Australians and exclusion from 'the people' in the calculation in s 24. Paradoxically, post-1967, s 25 has a broader effect of exclusion than s 127 previously had. This is due to the adoption by government of a different approach to defining who is an Indigenous Australian.

The significance of possible exclusion by s 25 from the calculation in s 24 is that discussed above in Part I, and considered in Part II with respect to the operation of s 127. As Griffith stated in the Convention Debates, in introducing the draft *Constitution* to the 1891 Convention, the section which was to become s 25 provided that 'in any state where there is a race of people not admitted to a share in the representation there, it shall not be counted in reckoning the number of members to be elected to the parliament of the commonwealth'.<sup>106</sup>

Griffith was drawing attention to the notion of representation through exercising the vote, that is, acting as an elector. In turn, being excluded from that aspect of representation leads to exclusion from another, being part of 'the people' represented by Parliament, as identified in the second sentence of s 24. As is developed above, any potential exclusion of Indigenous Australians under s 25 was overridden by the effect of s 127. However, with that section's removal in 1967, the application of s 25 with respect to Indigenous Australians was revived.<sup>107</sup>

<sup>103</sup> See ss 30, 8 of the *Constitution*.

<sup>104</sup> The initial uniform federal franchise established in 1902 was also racially discriminatory, disenfranchising all Indigenous Australians unless they already had the right to vote at the State level: see *Commonwealth Franchise Act 1902* (Cth), s 4. This allowed the continuation of discrimination at the federal level which did not attract any constitutional disadvantage compared to the equivalent discrimination at the State level.

<sup>105</sup> See for example George Williams, above n 94; Irving, above n 94, ch 6.

<sup>106</sup> *1891 Convention Debates*, 31 March 1891, 523.

<sup>107</sup> Cf Sawyer's comment that deleting s 127 would make little difference to Indigenous Australians: Sawyer, above n 6, 36. See Attwood and Markus, above n 92, 270, 272, 277 regarding Indigenous Australians as 'people'.

The text of s 25 was unchanged by the 1967 referendum, despite a proposal being put to the electors at the time which, if successful, would have led to its deletion. In addition to the celebrated referendum question, which led to the deletion of s 127 and the amendment of s 51(xxvi), was a lesser known question concerned with the nexus between the number of members of the House of Representatives and the number of senators. The Bill underlying the nexus proposal included the deletion of s 25, but that section was not mentioned in the referendum question itself or in the Yes and No cases regarding the proposal.<sup>108</sup> The referendum on the nexus proposal failed.<sup>109</sup> A number of other referendum proposals to delete s 25 were passed by at least one House of Parliament, with two further (unsuccessful) proposals being put to the electors.<sup>110</sup>

While s 25 was retained in 1967, one significant change in addition to the deletion of s 127 was the change regarding legislative power with respect to Indigenous Australians within the States.<sup>111</sup> The amendment to s 51(xxvi) meant that from 1967 the Commonwealth had express legislative power with respect to that group, concurrently

<sup>108</sup> The Question asked 'Do you approve the proposed law for the alteration of the Constitution entitled- "An Act to alter the Constitution so that the number of members of the House of Representatives may be increased without necessarily increasing the number of senators"? The proposal would have deleted ss 24-27 of the Constitution and replaced them with a new s 24, which contained no reference to race. See *Constitution Alteration (Parliament) 1967* (Cth), s 2. The details of the Yes and No cases appear in the pamphlet authorised by the Chief Electoral Officer for the Commonwealth, dated 6 April 1967. A 'Statement showing the proposed alterations to the Constitution' accompanied the arguments for and against the referendum proposals, which included the deletion of s 25: see 15. A copy of the pamphlet is held in the National Archives, A463 - 1965/5445, see 3-18 of that file.

<sup>109</sup> That proposal achieved a majority of votes only in NSW, was defeated in every other State and nationally. For the details of the results, see Parliamentary Library, *43th Parliament Parliamentary Handbook of the Commonwealth of Australia* (Department of Parliamentary Services, 2011), 388.

<sup>110</sup> In 1974, the following question was put to the electors at referendum: 'Proposed law entitled "An Act to alter the Constitution so as to ensure that the members of the House of Representatives and of the parliaments of the states are chosen directly and democratically by the people". Do you approve the proposed law?' The relevant Bill, *Constitution Alteration (Democratic Elections) 1974* (Cth), clause 3, would have deleted s 25 of the Constitution. That Bill was rejected by the Senate and therefore went to the electors following the application of the second paragraph of s 128: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 1974, 755 (E G Whitlam). A similar proposal was put to the electors in 1988: 'A Proposed Law: To alter the Constitution to provide for fair and democratic parliamentary elections throughout Australia. Do you approve this proposed alteration?' The Bill, *Constitution Alteration (Fair Elections) 1988* (Cth), s 4 would have deleted s 25 of the Constitution. Neither proposal succeeded at referendum: for details of the results see Parliamentary Library, above n 109, 391, 395. There has been at least one other attempt by Parliament to delete s 25 via referendum. The *Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983* (Cth) would also have deleted s 25: see the Explanatory Memorandum to that Bill, 3. It is of note that the attempts to delete s 25 outlined here, together with the earlier one in 1967, have sometimes been overlooked. For example, see Williams and Hume, above n 91, 141. I am grateful to Helen Irving and Anne Twomey for having brought the proposals to my attention.

<sup>111</sup> The Commonwealth already had legislative power with respect to Indigenous Australians in the territories, that could have been exercised either by reference to 'race' under s 51(xxvi), or under s 122 (the 'territories power').

with the States. The Commonwealth set up a Department of Aboriginal Affairs and, significantly, adopted a new definition of Indigenous Australians to move away from the 'preponderance of blood' notion.<sup>112</sup> The working definition, as adopted by federal Cabinet in 1977, was: 'an Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (sic) lives.'<sup>113</sup>

That three-part definition has been accepted within administrative, legislative and judicial contexts.<sup>114</sup> There has not yet been a judgment of a majority of the High Court with respect to the new definition. Nevertheless, statements of several individual justices have supported the combination of descent, self-identity and community recognition in determining the meaning of 'Indigenous Australian' or the 'aboriginal race'.<sup>115</sup>

Other changes have occurred since 1967, that alter the context in which s 25 operates. The idea of race has been challenged by being put in doubt as a valid or useful means of distinguishing between individuals and groups.<sup>116</sup> Attitudes to discrimination, as seen within legislation, have also changed. Rather than explicit discrimination against groups on the basis of race featuring in State, Territory and federal legislation, in 1975 the Commonwealth Parliament enacted legislation prohibiting such discrimination.<sup>117</sup> The States and Territories followed suit.<sup>118</sup>

Section 25 remains in the *Constitution* despite these changed circumstances. It is likely that it would be considered in a different manner today compared to its application prior to 1967. The acceptance of a new, more nuanced definition of Indigenous Australians, affects the application of s 25 to that group. Rather than s 25 only applying to discrimination which restricts the ability of 'full-blood aborigines' to

<sup>112</sup> See the development of that definition as set out in Department of Aboriginal Affairs, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islander* (1981).

<sup>113</sup> *Ibid*, 1.

<sup>114</sup> See Gardiner-Garden, above n 44, but note the difficulties in incorporating a single administrative definition across Commonwealth government departments, as explored in: Ann-Mari Jordens, 'An Administrative Nightmare: Aboriginal Conscription 1965-72' (1989) 13(2) *Aboriginal History* 124.

<sup>115</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70 (Brennan J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 273-4 (Deane J), 180-1 (Murphy J), 243-4 (Brennan J). See *Shaw v Wolf* (1998) 83 FCR 113 for a more recent application of the three-part definition, in the context of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), s 4(1) which defined 'Aboriginal person' as "a person of the Aboriginal race of Australia". While that Act has been effectively replaced by the *Aboriginal and Torres Strait Islander Act 2005* (Cth), the legislative definition of 'Aboriginal person' has remained the same – see s 4(1) of the more recent Act.

<sup>116</sup> See Laura E Gomez, 'Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field' (2010) 6 *Annual Review of Law and Social Science* 487, 490-1; Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009), 435-440, considering the contribution to this area of critical race theory.

<sup>117</sup> *Racial Discrimination Act 1975* (Cth) ('RDA').

<sup>118</sup> South Australia introduced anti-discrimination legislation operating on the ground of race in 1976, NSW and Victoria did so in 1977. The other States and territories were slightly slower, with the last being Tasmania enacting legislation in 1998. See Chris Ronalds & Rachel Pepper, *Discrimination Law and Practice* (Federation Press, 2<sup>nd</sup> ed, 2004) 3-6.



vote, legislation which applies to Indigenous Australians as understood under the broader definition would be caught by that section. Thus, paradoxically, by being more inclusive regarding who is an Indigenous Australian, and having a different approach to notions of 'race', s 25 would have a broader application than previously.

While some of the underlying concepts may have changed in application, the basic consequence of s 25 remains the same. Exclusion from the State franchise on the basis of race leads to exclusion from being counted as amongst the 'people' referred to in the second sentence of s 24. Section 25 remains in the *Constitution* with the possible application to Indigenous Australians. Even if relevant State legislation is not introduced, s 25 still signifies that exclusion on the basis of race from 'the people' in the s 24 calculation is constitutionally permissible.

It might be thought that s 25 is a dead-letter, a section which can have no legal effect. All States had removed racial discrimination from their franchise laws by the end of 1965. However, State legislatures can reinstate such discrimination, even if it is politically unlikely at present. One argument against that possibility is that the combined operation of the *Racial Discrimination Act 1975* (Cth) ('RDA') and s 109 of the *Constitution* would prevent the operation of any such legislation. The RDA prohibits discrimination on the basis of race with respect to, amongst other things, elections.<sup>119</sup> Section 109 of the *Constitution* provides that: 'When a law of a State is inconsistent with a law of the Commonwealth, the later shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' Thus, any reintroduction of racial discrimination with respect to the State franchise would be invalid.<sup>120</sup>

There are three problems with the argument that the RDA prevents s 25 from having any effect. The first problem is that the RDA may be amended, or discriminatory measures may be exempt from the general prohibition of discrimination if they constitute 'special measures'<sup>121</sup> or if a federal Act explicitly excludes the operation of the RDA. One controversial example of avoiding the RDA was the legislation to implement the 'Northern Territory Intervention' in 2007.<sup>122</sup>

<sup>119</sup> See s 9(1) which prohibits discrimination in relation to fundamental rights, defined in s 9(2) as those referred to in Article 5 of the Convention, in turn defined in s 3(1) as the *International Convention on the Elimination of All Forms of Racial Discrimination* that was opened for signature on 21 December 1965 and entered into force on 2 January 1969, set out in the Schedule to the Act. That Convention provides in Art 5(c) that relevant rights include 'Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage'.

<sup>120</sup> The RDA allows for some continuing operation of State and Territory laws, but only if they further the objects of the Convention (see s 6A). It is difficult to see how discrimination against Indigenous Australians with respect to the franchise could satisfy that test.

<sup>121</sup> See s 8(1) of the RDA, referring to Article 1(4) of the Convention, which in turn refers to special measures with the 'sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals'.

<sup>122</sup> The primary Act was *The Northern Territory National Emergency Response Act 2007* (Cth), which defined the provisions to be 'special measures' under the RDA: see s 132(1). Section 132(2) then provided: 'The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.' Other legislation implementing the Intervention included: *The Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *The*

There are also two plausible constitutional arguments that neither the RDA, nor any other federal legislation, can in any event restrict a State's choice of its franchise.<sup>123</sup> The High Court has accepted that there is an implied limitation to federal legislative power in that the Commonwealth cannot destroy a State or a State's ability to function as a government.<sup>124</sup> In the most recent cases concerning this principle, the Court has struck down legislation because it impaired the ability of a State to determine the entitlements of senior members of its judiciary or legislature.<sup>125</sup> A similar argument could be made that the autonomy of a State is impermissibly impaired by federal legislation restricting the State's choice of electoral system. Therefore, the RDA may not prevent racial discrimination in relation to the franchise of a State. Alternatively, or in addition, s 25 could be read as permissive, in the sense that it gives the States the ability to discriminate on the basis of race, albeit with a consequential numerical disadvantage.<sup>126</sup> If s 25 is read in this light, then it is plausible that Commonwealth legislative power is limited to the extent that it could not interfere with the permission given to the States by the text of the *Constitution*.

Two constitutional arguments could be made against the possibility of s 25 applying with respect to Indigenous Australians today, although neither appears particularly strong. One is to consider whether the federal protection of a universal adult franchise could be extended to the State franchise. The decisions of *Roach* and *Rowe* have strengthened earlier statements of the Court that it would be difficult to justify gender or race discrimination with respect to the federal vote. In these recent cases, a majority of the Court relied on the phrase 'chosen by the people' to imply limits on the Federal Parliament's ability to restrict the federal franchise.<sup>127</sup> The *Australian Constitution* does not impose such an explicit requirement of 'choice by the people' onto State legislatures.<sup>128</sup>

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*Social Services and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth). The effective 'suspension' of the RDA was reversed in 2010 by the repeal of ss 132, 133 of the primary Act by the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010*, (Cth), Schedule 1(2), with effect 31 December 2010: see s 2(1).

<sup>123</sup> Thanks to Helen Irving for suggesting these arguments.

<sup>124</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 and see *Austin v Commonwealth* (2003) 215 CLR 185.

<sup>125</sup> *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

<sup>126</sup> See the comments of the Court regarding s 25 as an example of constitutionally-permissible discrimination, in the course of rejecting an argument that the Constitution protects equality: *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 20 (Barwick CJ), 58 (Stephen J); *Kruger v The Commonwealth* (1997) 190 CLR 1, 64–66 (Dawson J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 114 [353] (Crennan J); cf *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 254 (Kirby J).

<sup>127</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162, [6] (Gleeson CJ), [85] Gummow, Kirby and Crennan JJ, *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [18] (French CJ), [123] (Gummow and Bell JJ), [368] (Crennan J).

<sup>128</sup> It might be suggested that State constitutions would prevent such discrimination, through an implication mirroring the federal limitation, in a manner analogous to the extension of the implied freedom of political communication to the State of Western Australia on the basis of the Western Australian Constitution in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. However, there are difficulties associated with drawing implications

Extensions of federal constitutional limitations to State Parliaments are possible, as seen in relation to the implied freedom of political communication<sup>129</sup> and Chapter III concerns.<sup>130</sup> However, in those instances it is because federal issues are at stake – either discussion regarding *federal* political issues, or impacts upon *federal* judicial power. It is unlikely that the internal electoral arrangements of a State would have the relevant federal aspect in order to justify extending any implied limit on legislative power to State legislation.<sup>131</sup>

The second possible constitutional argument depends on an implied limitation on s 25 by virtue of the deletion of s 127.<sup>132</sup> That is, if s 127 is understood as the removal of the exclusion of 'aboriginal natives' from the constitutional calculations, then s 25 cannot be understood as being capable of reintroducing that exclusion. This argument prioritises the purpose of the deletion of s 127 over the continuing text of the *Constitution*. The Court has already shown itself unwilling to give great weight to the supposed common understanding of the referendum in 1967 with respect to s 51(xxvi).

In *Kartinyeri*, members of the Court considered the argument that s 51(xxvi) was restricted to allowing only legislation for the benefit of Indigenous Australians, because that was the purpose of the amendment in 1967. Gummow and Hayne JJ rejected this argument, stating that 'it is the constitutional text which must always be controlling'.<sup>133</sup> Gaudron J also rejected the relevance of the 1967 referendum. She stated that 'the 1967 referendum did not, in my view, alter the nature of the power ... the amendment ... discloses nothing as to the nature of the power'.<sup>134</sup> Only Kirby J argued for a reading of the section which took into account the intention of the Parliament and the electors.<sup>135</sup>

Unless the Court changes its approach, one would assume that s 25 would be read to allow the words to have their ordinary meaning, without being affected by the intention of the Parliament or federal electors with respect to a *different* section, s 127.<sup>136</sup> Therefore, it is unlikely that s 25 would be 'read-down' so as to not allow the exclusion of Indigenous Australians in the event of relevant State discrimination. Even

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from State constitutions because of questions of entrenchment and the consequences of breaching any entrenched provisions: see Anne Twomey, 'Manner and Form' (Paper presented at Gilbert + Tobin Centre of Public Law 2005 Constitutional Law Conference, Sydney, 18 February 2005) 2–4 <[http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/5\\_AnneTwomey.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/5_AnneTwomey.pdf)>.

<sup>129</sup> *Coleman v Power* (2004) 220 CLR 1.

<sup>130</sup> See, eg, *Wainohu v New South Wales* (2011) 243 CLR 181. For another possible restriction on State legislative power, see the suggestion of Heydon J in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 238–9 regarding the application of s 51(xxxi).

<sup>131</sup> Cf *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

<sup>132</sup> Thanks to Ed Muston for suggesting this argument.

<sup>133</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 382.

<sup>134</sup> *Ibid* 364. Her Honour concluded that it would be difficult to find a valid exercise of that power which operated to the detriment of Indigenous Australians, but that was based on reasoning unrelated to the amendment in 1967. See 361–3.

<sup>135</sup> See 413.

<sup>136</sup> Especially where the historical record shows that the electors have voted against referendum proposals which would have deleted s 25, both in 1967 when s 127 was deleted, and since.

if this argument of implied limitation on s 25 were upheld, it would not affect the ability of States to discriminate, only the consequential effect of exclusion of Indigenous Australians from the constitutional 'people' in the calculation in s 24. That is, acceptance of an implied limitation would have the ironic consequence of removing the disincentive to discrimination, as States could discriminate but would not be penalised for it with respect to Indigenous Australians.

There appear to be no strong arguments against the possibility that s 25 could validly operate to exclude Indigenous Australians from the constitutional 'people' as referred to in the calculation in s 24. Despite the political improbability of legislation bringing s 25 into action, the *Constitution* allows for this exclusion. Even in the absence of relevant legislation, this possibility signifies a racially exclusive element to the community under the *Australian Constitution*.

## CONCLUSION

This article has focused on the constitutional significance of s 25 and s 127. The latter section has already been repealed, and it is likely that if an explicit proposal to repeal s 25 were put to the electors at a referendum such a proposal would be successful.<sup>137</sup> While both sections may therefore be relegated to *former* text of the *Constitution*, the significance of both should be understood for what they reveal regarding the constitutional status of Indigenous Australians as members of the constitutional 'people'. The concept of 'the people' within the context of representative government has received renewed force in recent High Court decisions, and is likely to continue its development as a source for understanding the constitutional status of Australians. Understanding who has been included, and who has been excluded from that group in a variety of constitutional contexts throughout history and today, gives a richer understanding of our constitutional identity. It also provides a firm basis upon which to make accurate constitutional arguments for future reform, or at least analysis of proposals for change.

This article began with a consideration of 'the people' in constitutional representative government. The focus of the most recent cases in that area has been 'the people' acting as electors, in choosing members of Parliament in accordance with the first sentence of s 24. However, the system of representative government includes a number of layers of representation. One is the people choosing the Parliament, with the consequential expectation that the Parliament represents the people. Another, being the notion of representation addressed in this article, comes from the second part of s 24 whereby the number of members of the House of Representatives chosen in each State must be proportionate to the number of people in each State. That part of s 24 recognises the representation of people organised into groups within the States. It is the calculation of 'people' for the purpose of that representation that is affected by ss 25 and 127. This article has focused on 'reckoning' the numbers of those constitutional 'people' understood in that context and the operation of sections which excluded Indigenous Australians from that number.

Section 127 operated to exclude Indigenous Australians from a number of constitutional calculations, the most significant being the one in s 24. That exclusion

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<sup>137</sup> See the surveys conducted by the Expert Panel regarding support for the repeal of s 25: Expert Panel Report, above n 1, ch 6.

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meant that Indigenous Australians were excluded from being counted as amongst the relevant constitutional communities represented by the Parliament. With the repeal of s 127, most would have assumed that the time of exclusion was over. However, the continued existence of s 25 countenances the same exclusion if a State enacts relevant racially discriminatory laws. The purpose of s 25 to act as a disincentive to such laws did not apply with respect to Indigenous Australians prior to 1967. Although that disincentive aspect was enlivened in 1967, s 25 remains a section which countenances future exclusion of Indigenous Australians.

Noel Pearson has argued that pre-1967 was a period of exclusion, post-1967 is a neutral period and that we should move to an era of positive recognition of Indigenous Australians in the *Constitution*. I argue that the amendments in 1967 did not truly lead to a neutral position, as the survival of s 25 signifies the possibility of ongoing exclusion on the basis of race. The exclusion is of a symbolic nature, as it does not directly affect any legal rights of Indigenous Australians, such as the federal right to vote. That right would today appear to be protected by an implication from the first part of s 24. However, symbolic exclusion speaks to the composition and nature of the Australian constitutional community — as one which is inclusive of all its citizens or as one which countenances exclusion on the basis of race. The repeal of s 25 should be supported not only because it makes distinctions on the basis of race, and is unlikely to be of effect because of expected legislative choices. Its repeal should also be supported because of what it signifies regarding exclusion from 'the people' of the Australian *Constitution*. 'The people' can be understood as the community under the *Constitution*. Exclusion from that group is more than a matter of calculation of the number of members of Parliament, it affects the constitutional identity of the nation.