Frozen Continent

A few weeks ago Al Gore led a stellar cast by boat from the Argentinean Port of Ushuaia, often referred to as the end of the world, on a voyage to Antarctica jointly organised by his Climate Reality Project and National Geographic. It has received little publicity in Australia to date, but you will be hearing more about this voyage in due course, both in writing, in photographs and film. The trip was full of icebergs, minke whales and emperor penguins, all being inspected by a celebrity cast including Sir Richard Branson and Ted Turner.

It would be nice to think that it was Al Gore’s whimsical sense of humour that made him invite James Cameron, director of the The Titanic movie, to look at icebergs and to invite the President of Iceland to go to the opposite end of the world to see ice melting. However, having heard Mr Gore in person deliver his lecture on climate change, I suspect he did not think this was just a kind of pun.

Antarctica contains something like ninety percent of the world’s ice. It is has long been known as the Frozen Continent.

In a few years it will be half a century since Geoffrey Sawer declared that the absence of constitutional change made Australia, “constitutionally…” the Frozen Continent. This metaphor has frequently been applied by constitutional lawyers since, perhaps most clearly some 2 years ago in the liber amicorum for George Winterton. It remains apt.

The point of Al Gore’s recent expedition to Antarctica was, of course, to prove that the effects of a global warming would lead to the melting of ice on the Antarctic land mass, leading to substantial increase in global sea levels. The dramatic pictures of island size icebergs breaking off at sea have no relevant effect, as they are already in the water.

Inevitably, the minds of constitutional lawyers will turn to the possibility of a similar thaw in our sphere of discourse. The metaphor of a constitutionally “frozen continent” was not intended as a compliment. The difficulty of change has often been discussed. George Williams’ emissions in the cause have sought to create a one-man greenhouse effect.
Expert Panels

Over the course of a century there have been many attempts to engage in a process of consultation and to draft ideas for constitutional change including: a Joint Parliamentary Committee, two Constitutional Commissions, one Royal the other not so regal, a rolling Constitutional Convention and a single issue Convention. Now a new mechanism has been invented: we have had two Expert Panels, whose recent reports are presently under consideration. I was Chair of the Expert Panel on Constitutional Recognition of Local Government, which is why I am here this evening. The other, as every constitutional lawyer is anxiously aware, is the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islanders.

I was in London when the then head of the Prime Minister’s Department rang asking me to chair an “Expert Panel”, which I then envisaged would be a small group of experts like the five-member Constitutional Commission, chaired by Sir Maurice Byers. In the end the Government found 18 “experts”.

In honour of Charles Dickens bicentennial, which we celebrate this week, I have entitled this address: A Tale of Two Panels. That is because, for constitutional lawyers facing prospect of two referenda in a fraught political landscape, this is both “the best of times” and the “worst of times”: to use the opening words of A Tale of Two Cities. I speak of course as someone who has long since come to regard politics as a spectator sport.

Local Government Recognition

The background to the Local Government Panel is the longstanding policy of the Australian Labour Party to some form of recognition. That had lead the Whitlam and Hawke Governments to put a proposal to the people, which they rejected in 1974 and 1988, on the second occasion resoundingly so. The immediate background, however, was the commitment of the Rudd Government to work towards constitutional recognition. That commitment became more definite for the Gillard Government, which undertook to conduct a referendum in this respect in the written agreements it entered into with both the Independents and the Greens, in order to form Government.

As a direct result, both Bob Brown and Tony Windsor were members of my Panel. Most of the members of the Panel had current or past associations with local government and in particular, with the representative institutions of local government, including at a national level.

It was the Australian Local Government Association, to which I will refer by its somewhat clunky acronym ALGA, that created the political push to give the people of Australia a third chance to get this “right”. Successive political leaders from all the parties addressed ALGA conferences, indicating support for some form of recognition.
Originally the ALGA preference was for recognition in a number of respects but, after the decision by the High Court in *Pape v The Commissioner of Taxation*\(^v\), the campaign focussed on empowering the Commonwealth to make direct grants to local government. In the event, and perhaps not surprisingly, because of the composition of the Panel, this was the option which the Panel eventually put forward.

In *Pape*, the High Court, declared that the constitutional basis on which the Commonwealth had traditionally relied to support the legality of direct grants to local government did not do so. The Commonwealth maintains an argument — being an argument which I classify as “aspirational” — that it still has a wide-ranging power to spend money on whatever it likes. It is possible that this may be determined in *Williams* presently reserved before the Court. Suffice it to say that in the view of a number of constitutional lawyers, including in submissions to the Panel, and in my own view, there is a real doubt about the Commonwealth’s capacity to make direct grants, unless supported by some other express head of power.

ALGA and the many local councils which made submissions to the Panel, have seized upon this constitutional doubt, which could affect a number of longstanding Commonwealth programmes, particularly the Roads to Recovery Scheme, where the Commonwealth makes grants directly to local councils for roads. This is a programme of considerable significance to most rural councils, although it is of less salience in urban areas.

ALGA had done its political background work well. In the course of the Panel’s consultations, all the major political parties represented in the Commonwealth Parliament indicated support for a limited form of financial recognition, empowering the Commonwealth to make grants direct to local government. Not all the State political leaders from whom the ALGA had obtained similar indications of support, some of whom had moved from opposition to government in the interim, reiterated that support in quite the same way.

It is clearly possible for similar practical results to be achieved by making grants to the States on strict conditions that they be passed on to local government. Many of those in the local government community asserted that such indirect grants are unsatisfactory because of delays and the ability of the States to skim off some of the grant for their “administrative” purposes. However, when challenged to give examples of this, local councils and their representative organisations were unable to convince the Panel that this had been a serious problem.

The Panel considered a number of other options which it did not, in the event, believe to be feasible: The inclusion of some form of symbolic recognition, either in a preamble or otherwise, was rejected on the basis that it would make no practical difference and, if only for that reason, would have little chance at a referendum. Some form of democratic recognition — namely a guarantee at a national level that local councils must be elected — was also rejected. It had no significant political support and considerable opposition.

Finally, the Panel raised the possibility of including an explicit reference to the significance of co-operation between State and Federal Governments in the Constitution. Co-operation with local government could easily be annexed to such a
proposal. This is a matter that has long been debated as a result of cases such as *Wakim and Hughes.* As Justice McHugh asserted, the idea of co-operative federalism is, at present, a mere “political slogan” of no legal affect. vi

This option travelled well beyond the terms of reference of the Panel. It is obviously a longer term and more complicated project, with respect to which local government would merely an appendage. In any event it received no real support in the submissions to the Panel.

Our conclusion was that the only proposal with any kind of prospect of success was to add a reference to local government to section 96, which empowers the Commonwealth to make conditional grants to the States. In the submissions to the Panel this option received explicit bipartisan support or, as our Panel member Bob Brown emphasised, tri-partisan support.

The position of the Liberal Party at a national level was clearly stated, but it is, perhaps, not quite as committed as the other parties. The Western Australian Branch of the Liberal Party is strongly against any such idea. In contrast, perhaps unusually with respect to federalism issues, there is a very high level of support in Queensland for some form of recognition.

Nevertheless, overcoming the effects of the High Court’s decision in *Pape* may not resonate with the public as strongly as some might hope. The majority of the Panel concluded that there is a reasonable prospect of success in a referendum within the period leading up to the next election 2013, to which our term of reference referred. A minority, whilst indicating support for the proposition, made a different political judgment. In any event the majority position was subject to conditions to which I will revert.

If this proposal is put to the Australian people, it seems clear that a critical component of the opposition argument will be the issue of Federalism. However minimalist the change may appear to be, it will no doubt be characterised as an attack on the dualist structure of our Federal Constitution.

It may well be that the majority of Australians would prefer a two tier, rather than a three tier, system of government. Over the years many have advocated a system of regional governments, including a single authority to govern each of our major urban areas. One can point to the success of the Brisbane City Council, which continues to call itself a local government, although it is a regional government by any reasonable description.

Mischievously, I can say that the s.128 referendum – which requires both a national majority and a majority of States – most likely to succeed in this respect would ask the following question: Either State Governments or Local Governments should be abolished and the Governor General should toss a coin to determine which. That could very well resonate with the Australian psyche.

I can’t see how a two tier system of national and regional government could be brought about except on a State by State basis. I refer to the provisions for the creation of new States in chapter VI of the Constitution. Section 121 allows the
Parliament to admit or establish new States. Section 124 permits a new State to be formed by the separation of territory from a State with the consent of the Parliament thereof. It is an open question whether section 123, which authorises the Commonwealth Parliament to vary the boundaries of a State with the approval of the Parliament of that State and the approval of the majority of electors of that State, qualifies s.124. In any event a referendum would seem to be politically essential.

I do not underestimate the potential impediments to such a process. Getting a State Parliament to abolish itself is, obviously, not easy. However, anyone who wants to pursue the idea of creating regional governments in substitution for State governments and local governments may find Chapter VI more flexible than Chapter VIII. I would start in Queensland. No doubt special provision would need to be made for the continuation of State of Origin events.

**Indigenous Recognition**

The Panel on Local Government was a low key affair compared with the parallel proceedings of the Panel on Recognition of Indigenous Australians. This is, of course, understandable in view of the salience and significance of the latter from the point of view of Australia’s social cohesion and international reputation. Our public consultations were not as extensive and did not attract much in the way of public response. We visited a regional centre in each State, but the attendance was almost exclusively by local councillors.

There was also a basic difference in the process. We were able to identify a few, specific options at the very outset. The Discussion Paper of the Indigenous Recognition Panel was understandably more wide-ranging and more open to change than ours.

Furthermore, our constituency was more organised and focussed. ALGA’s campaign over recent years had led to the position where local councils gave virtually unanimous support to the specific proposal which ultimately emerged from the Panel. We did not have to engage in a process of negotiation amongst stakeholders of the character which was undertaken by the Indigenous Recognition Panel. This narrower, more precise focus enabled us to obtain the views of all national political parties and of the Government and Opposition in each State.

The Indigenous Recognition Panel process was not such as could evoke a clear commitment to a specific proposal from the key political actors at national and State level. Nevertheless, it does appear that there is broadly based support for some change: specifically the repeal of section 25 and of the race power.

The debate on a replacement legislative power enabling the Commonwealth to make laws with respect to indigenous Australians and, perhaps more controversially, about the proposal to introduce a constitutional prohibition on discrimination, has commenced. The Report of the Indigenous Panel is the foundation for this debate. The Panel, itself, acknowledges that what is eventually put to the Australian people may differ from its recommendations, albeit subject to the qualification that a process of consultation with indigenous Australians must occur.
There is one aspect with which I have had some personal involvement and about which I wish to make some comments.

**A New Legislative Power**

The Report asserts, as if it was not open to argument, that the race power in s51 (xxvi) can be used to discriminate against the people of a race.\(^\text{vii}\) It refers to the High Court Judgement in *Kartinyeri*\(^\text{viii}\) as authority for that proposition. The point may or may or may not be correct, but that judgement is by no means clear in this respect.

I was Senior Counsel for the Ngarrindjeri women who brought those proceedings. The case was decided by six judges. The only success I had in that case was to have Justice Callinan recuse himself. Two of their Honours suggested, without needing to decide, that the power was of that character. Two others did not refer to the point at all. However, two indicated that the proposition was either wrong or had to be significantly qualified.

It may well be that the proposition is right. At the very least there is a significant doubt about the scope of the power and, accordingly, change is justified.

There were two relevant submissions in *Kartinyeri*: First, we submitted, with reference to authority, that the denotation of constitutional expressions, as the High Court now refers to constitutional terminology,\(^\text{ix}\) can alter and indeed contract from the meaning as it would have been understood in 1901. Since *Kartinyeri* this proposition has been reinforced in a number of significant cases in the High Court, including decisions as to whether or not Great Britain should now be regarded as a foreign power\(^\text{x}\), whether “plant variety rights” are within the copyright, patents etc, power\(^\text{xi}\) and whether the concept of an “alien” means the same as it did in 1901\(^\text{xii}\).

Our proposition was supported by the clear purpose of the 1997 Constitutional amendment which, in our submission, did much more than delete words from placitum 51(xxvi). It altered its original scope. A further amendment, as now proposed, would powerfully reinforce this submission.

Nothing in the judgments in *Kartinyeri* suggests that the Court accepted the bold submission by the Commonwealth in argument that the race power could justify something like the Nuremberg laws. To be fair to the then Solicitor General for the Commonwealth, he did not submit that such a law would be valid. His submission was that any restriction would be based on considerations external to the race power.

The proposition, for which we contended in that case and which has remained a feature of the debate, was that the power should only be used “for the benefit” of indigenous Australians or, to use the terminology proposed by the Panel, for their “advancement”. The problem with this terminology is that it borders on the non-justiciable.
The Indigenous Recognition Panel is quite correct not to include such terminology in the operative part of its recommended replacement for the race power, in a new section 51A. The language of “advancement” is to be found in a new mini preamble to that section, not in its text.

It is clear that the race power, given its origins and history, is a blot on Australia’s system of governance which should be repealed. The structure of a replacement section 51A proposed by the Panel is fine, but it bears its unfortunate history on its face.

Like the race power or the aliens power, the Panel’s proposal is a law with respect to people, not with respect to a subject matter. I believe we should be reluctant to give Parliament any legislative power with respect to people. It is this characteristic, more than anything else, which may enable discriminatory laws to be enacted pursuant to the power.

Characterisation of a statute is one of the most difficult and contested tasks in constitutional law. A subject matter power is, in my opinion, more likely to be read down in accordance with contemporary requirements of the rule of law and the rights of citizenship than a people power.

The focus of political debate that seems to have emerged is critical of the proposal to enact an express prohibition of discrimination. It may be advisable to have another think about the terminology of the proposed section 51A, if the proposed section 116A proves to be unacceptable.

There is much wisdom in the submission to the Panel from Allens Arthur Robinson, to which the Panel refers but does not further discuss, that the new power should be a subject matter power. The text they suggested was: “to make laws with respect to the cultural, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples”. As the Panel’s Report itself acknowledges, this “has the virtue of focusing on subject matter, and thus potentially avoiding the issue of “advancement” or “benefit”.” Something along these lines may also do the work of the proposed prohibition of discrimination, albeit only with respect to indigenous Australians.

I realise that one of the issues, not fully analysed by the Panel in its Report, is the need to avoid casting any doubt on existing legislation which was passed on the basis of the race power. Nevertheless, sufficiently wide terminology must be able to be devised expressed instead of subject matter.

**The Referendum Process**

There is one thing that both Panels proposed, because of the history of failed referenda and the small library of works analysing the reasons for the refusal of the Australian people to amend the Constitution. The Panels recognised that the success of any referendum depends on a preparatory ground work, requiring the expenditure of resources. This would constitute a significant change from past practice with respect to referenda, where public resources did little more than support publication of a Yes/No case.
There is a certain paternalism involved in the proposition that the people have to be “educated” before they can be trusted to vote in a referendum in a rational manner. Nevertheless, experience does suggest that illogical, indeed on occasions mendacious, “No” campaigns can prove effective in a context where the general public is not motivated to spend much time or energy an understanding the issues. This occurs against the background of a high level of ignorance about the content, indeed about the very existence, of our Constitution.

In the Local Government Panel the division between the majority and the minority turned on a judgment as to whether or not the indifference and, ignorance about the issues involved could be turned around within the timeframe of the Government commitment identified in our terms of reference i.e. on or before the election due in 2013. The majority shared those doubts but came to a different judgment about prospects of success. However it did so on two conditions.

The first condition was that the Commonwealth negotiate with the States to achieve their support for the financial recognition option. In the event only two State Governments opposed the proposal and only one, Western Australia, did so in such vociferous terms as to suggest that no Commonwealth negotiation could prove successful.

Secondly, the majority indicated that its recommendation was conditional on the Commonwealth adopting a range of measures suggested by ALGA in its submissions and in its previous statements on this issue. These included:

- The appointment of Joint Select Committee of the Commonwealth Parliament to consider and further develop the proposal.
- The adoption of recommendations of a parliamentary Inquiry into the machinery of referendums, proposing a nationally funded education campaign about the Constitution generally, i.e. not focussed on any particular referendum question.
- The removal of the legislative limit on spending.
- The apportionment of Commonwealth funds for both “yes” and “no” cases for each referendum based on the number of Parliamentarians voting for and against the Referendum Bill and that such funding would be equivalent to that provided for elections.

To similar effect are some of the recommendations of the Indigenous Recognition Panel including:

- Government consultation with the Opposition, the Greens and the independent members of Parliament and with State and Territory Governments in relation to the timing and content of any referendum question.
- A condition that the referendum should only proceed “when it is likely to be supported by all major political parties and a majority of State Governments”.

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• That a “properly resourced public education and awareness programme” occur before the referendum and, if necessary, the legislation be changed to allow adequate funding of such a programme.

• There be a specific allocation of financial resources to “maintain momentum for recognition…and to educate Australians about the Constitution and the importance of Constitutional recognition of Aboriginal and Torres Strait Islander Peoples”.

There is a significant overlap between the two sets of conditions. This is a matter which will require detailed consideration by the Government.

**Conclusion**

This is only the second legal speech I have given since my retirement on 31 May last year. I used to give one, virtually, every week. I don’t miss it.

I have now twice in my career made the transition from rooster to feather duster: the first on the demise of the Whitlam Government. As I now face my Guillotine of jurisprudential irrelevance and contemplate my fate, I find comfort in the concluding words of Dickens’ *A Tale of Two Cities*:

“It is a far, far better thing that I do now than I have ever done; it is a far, far better rest that I go to than I have ever known”.

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1 Geoffrey Sawer *Australian Federalism in the Courts* Melbourne University Press, Melbourne, 1967
4 *Pape v The Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1
5 *Re Wakim ex parte McNally* 1999 198 CLR 511; *R V Hughes* 2002 202 CLR 535
6 See Wakim ibid at 566
7 See e.g. George Williams, “Thawing the Frozen Continent” 2007 Griffith Review Edition 19; George Williams and David Hulme *People Power: The History and Future of the Referendum in Australia* UNSW Press, Sydney, 2010
8 *Kartinyeri v The Commonwealth* 1998 HCA 22; 1998 195 CLR 337
9 See J J Spigelman “The Centrality of Jurisdictional Error 2010 21 PLR 77 at 78 to 79; J J Spigelman “Public Law and the Executive 2010 34 Australian Bar Review 10 especially at 14 to 15
10 *Sue v Hill* (1999) 199 CLR 462
11 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479
13 See *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* supra at page 151
14 Ibid