

Paperlet on the Non-Citizen, Non-Alien Aborigine, Francesca Merlan

Epigraph:...*politics exists only when there are subjects who are marked as different and that, in the final analysis, the difference that creates a political subject always comes down to counting the uncounted, with all the paradoxes that may entail.* Jacques Rancière 1997. *Radical Philosophy*

Politics operates on difference. The decisions in this case, cumulatively, question what kind of difference 'being Aboriginal' may or may not make to the question of belonging to or being outside the polity (however defined).

I think it would be misguided and perhaps impossible for an analyst of this decision to come up with another judgment on who is right and wrong. I do not intend to do so. I am not a lawyer; and in general, anything I would say would, from my perspective as an anthropologist, be much more related to questions of realities on the ground, how indigenous people are living today, than are these formal judgements – however 'sympathetic' they may apparently present themselves in some cases. I do have some ideas about what is present and absent in the judgments as they stand, and thus what sort of politics this is. I think that may be useful.

In very general terms, this case and its 7 different judgements all have to do with findings concerning difference. The case opens up questions which (in some respects) have arguably never before been the subject of High Court determination. Among the questions raised are:

- To what extent are or have persons been all the same as 'subjects' (or later) 'citizens' of Australia? And what significance does any argued equivalence have with respect to specific questions arising in this case (such as deportability)?
- Is not being a citizen equivalent to being an 'alien'?
- If a person is not a citizen, but also argued not to be 'alien', on what basis may that be the case?
- In what ways may the quality of being indigenous be definitive of a distinctive form of relation to the polity (and what form of polity)?
- To what extent do (some of) these decisions implicate concepts of 'race' (or, relationship to land and waters, reliant on a basis of descent) ?
- What are the implications of these decisions for Constitutional recognition of indigenous people (especially given contestation of any 'racial' elements in the Constitution)?

This recently determined High Court case (narrowly determined, by 4 to 3) begins from the circumstances that two plaintiffs, both of whom have indigenous (and mixed) ancestry, were clearly not citizens of Australia (one had New Zealand citizenship, and the other PNG citizenship). They pleading that neither should be subject to deportation, and that they did not fall within the scope of 'alien' in terms of the Constitution. Section 51 (xix). They might otherwise, as convicted felons, have been exposed to deportation.

These elements relate to the main questions examined by each justice: (1) citizenship, and what this entails; (2) 'alien' status and what this implies; (3) where examination of the first two issues leaves room for it, the basis for imputing to one or both plaintiffs a connection (to what? remains to be discussed) that leads to the findings of each justice (and in particular, those who argued that there is a connection which precludes findings of the men as alien, and thus, their deportation).

The case presents a fascinating array of opinion. The justices were not unanimous. All see themselves as obliged to answer the specific question, whether these two men are alien and deportable, or not. The determination that both were alien and deportable was found by Kiefel,

Gageler and Keane, that neither was alien by Bell, Gordon, Nettle and Edelman, but that the cases of Thoms and Love differed (in fact relating to their personal histories and family backgrounds, not in principle) by Bell and Nettle (such that more inquiry into the case of Love was required in order to ascertain his situation).

The bases of difference are even more fascinating. In addition to eventually answering the specific question concerning deportation, the decisions reveal a gamut of opinion concerning citizenship from its being a determinate legal status which fully comprehends the set of issues that require address here, to its being a socially and historically shaped construct, a statutory and not Constitutional status, which does not fully cover the ground of issues to be addressed. For those who did not take citizenship to coincide with issues of alienage, the discussion broadens into wider consideration of what 'alienage' may not be, with respect to Australian Aboriginal people, and the kinds of relationships imputed to them. Consequently, too, the ideas of 'alien' status range from views of it as the full opposite of citizenship with no remainder (i.e., non-citizen=alien); to wider questions of what 'alien' may imply if it is taken, not as opposite of a legal status of citizenship, but as a wider concept which is subject to kinds of variation, and relating to questions of belonging and not belonging. Many of the decisions refer to or have implications for findings concerning indigenous distinctiveness, the concept of 'race', and the extent to which being (identified as) indigenous implies relationship to Australia in some sense of that designation.

My examination here includes: a review, not merely of each justice's findings but also the forms of argumentation (each differs from the other in some respects). This is followed by evaluative consideration of the sense in which the principal finding (of the men not being aliens) is progressive, as well as the senses in which it is regressive. As above, the idea is not to come out with a definitive right/wrong view of each decision as if I were a lawyer; but to consider the decisions from an evaluative social perspective.

**Kiefel** begins with a characterization of what is to be investigated, immediately thrusting away a wider examination of 'alienage' and foregrounding as primary the question of citizenship. The following para. 4 makes this point:

4 It is not for this Court to determine whether persons having the characteristics of the plaintiffs are aliens. Such an approach would involve matters of values and policy. It would usurp the role of the Parliament. The question is perhaps best understood to be directed to whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non-citizens for the purposes of the Migration Act.

Kiefel's specific (or narrow) framing is thus: are the plaintiffs non-citizens? (not, allegedly, are they aliens, which is said to be too wide an ambit).

However, despite this start, the question of alien status shortly re-emerges in Kiefel's judgment. Kiefel points out (as do others) that in 'political' terms, Aborigines were treated as (British) subjects the same as everyone else; and that, upon independence, 'alien' became equivalent to non-citizen. Thus, from about para. 9, the direction of argument is clear: that both men are non-citizens for the purposes of the Migration Act.

Kiefel (17) points out, as do others, that long connection with Australia is NOT sufficient to erase 'alien' status. There is seen to be settled precedent on this (ranging from Singh, where the circumstance was of a person who, though long in Australia, had immediately had access to another citizenship; to other cases). In Kiefel's argumentation, this principle undercuts any claim either man might have to negating the 'alien' status they are presumed to have as non-citizens.

But (20) Thoms and Love seek to distinguish their circumstances from the plaintiffs in those other cases by reference to the special connection which they, as Aboriginal persons, have to Australia. 31 (such connections may not be used) to answer questions of a constitutional kind about the relationship between an Aboriginal group and its members and the Australian body politic.

Kiefel observes that native title relates to questions of traditional attachment to particular areas of land, not to 'Australia' in its modern political or continental acceptance; and that many indigenous people, in any case, do not or would not meet this criterion. She also observes that it depends upon the usual three Commonwealth criteria (descent, recognition, self-identification). But, in any case:

31 (such connections may not be used) to answer questions of a constitutional kind about the relationship between an Aboriginal group and its members and the Australian body politic. Native title, in any case, is grounded in traditional laws and customs.

Further to the question of the relevance of laws and customs, Kiefel says:

37 The common law cannot be said by extension to accept or recognise traditional laws and as having force or effect in Australia. They are not part of the domestic law. To suggest that traditional laws may be determinative of the legal status of a person in relation to the Australian polity is to attribute sovereignty to Aboriginal groups contrary to Mabo [No 2] and later cases, as has earlier been explained. (It is native title that is given effect).

The plaintiffs' case covertly makes, or requires clear expression of a 'new principle', not clear heretofore:

43 the new principle: that persons of Australian Aboriginal descent who have, or whose ancestors had, some connection with land in Australia are to be permitted to be physically present and not be subject to removal from Australia.

In order to determine a positive basis of relationship, the cases are seen to rest on the idea of association with Australian land and waters by virtue of indigeneity. That relationship would have to rest on a 'higher principle' which is not part of the Common Law nor recognized by it. Mabo is (wrongly) understood to impute an indelible relationship but does not do so. In Kiefel's view. Mabo gives effect to native title, when found; it does not give effect to laws and customs in terms of which it is to be found. Kiefel's reasoning here resists accepting any version of an indelible connection by 'descent'.

I (FM) may anticipate some of my later comments by noting that, if this principle of general association by virtue of indigeneity (rather than specific proof of laws and customs, and association with a particular area) were to be advanced, it would clearly be a 'post-contact' kind of relation, rather than one which (like land claims and native title cases) attempts to establish a 'traditional' (and usually temporally prior) situation. It would also be a matter on which there would be, very likely, considerable difference among indigenous groups and people. Kiefel does not leave an opening for imputation of a relationship by virtue of descent (alone), but some other decisions do.

The tenor of Kiefel's decision is to treat 'citizenship' as a determinate, legal status with a determinate logical structure which conforms with alien status as follows: citizen=non-alien; non-citizen=alien. This leaves little room for other kinds of relationships; but the implications of native title remain to be dealt with. The structure of argument here is: native title is given effect by findings of continuity of laws and customs. Laws and customs are not part of customary law; hence Mabo is not relevant, and is particularly not relevant to any finding of relationship to the Australian polity. That is, native title is entirely encompassed by the Australian polity.

Instead of proceeding sequentially through the decisions, it is instructive at this point to move to the arguments of Bell which are most similar to Kiefel in some respects; and then those of Nettle which go furthest to counter some of the implications of encompassment as sketched just above.

## **BELL**

Bell posits that 'alien' is the opposite of citizen:

62 'alien'[is] the obverse of citizen; so the double negative [non-citizen, non-alien] is not possible

Bell further spells out the task for this case:

63 no decision of this Court has addressed the question of whether the aliens power extends to the exclusion of an Aboriginal Australian from the Australian body politic, i.e. 'allows of the possibility that a person may not hold Australian citizenship and yet not be an alien'

Bell however, leaves open the question of whether these plaintiffs are or are not alien. He concludes that there is a relationship between indigenous people and country in some broad sense, but that native title is essentially irrelevant: in many cases the more specific kind of relation may not exist (any longer).

73 It is not offensive, in the context of contemporary international understanding, to recognise the cultural and spiritual dimensions of the distinctive connection between indigenous peoples and their traditional lands, and in light of that recognition to hold that the exercise of the sovereign power of this nation does not extend to the exclusion of the indigenous inhabitants from the Australian community.

An Aboriginal Australian cannot be said to belong to another place (Bell, 74). Neither plaintiff is an alien.

In sum, this is a very different way of handling the 'alien' question compared to Kiefel, which leaves it not encompassed by the citizenship issue. Bell also broadens the question of relationship to land, holding that the kind of demonstration required in native title may not persist, but is not relevant. This decision appears to leave open the prospect of 'distinctive connection' on the basis of 'indigeneity', but in exactly what sense(s)? The Commonwealth definition of indigenous persons has three elements: descent, recognition, self-identification.

The judgment of **Nettle** takes a slightly different direction, in treating the implications of Mabo as far-reaching (quite differently from Kiefel and Bell).

Nettle asks the question to be decided thus: can the Commonwealth detain/deport these men as unlawful non-citizens? He goes through some discussion of alienage, and sees it as not entirely untrammelled, but concludes that (252) some who are not citizens may not be aliens. In fact, the Commonwealth owes them permanent protection; and Aboriginality (in its various requirements of demonstration, descent, recognition, self-identification) attracts this protection.

With Bell and others, Nettle agrees that 'absorption' (or long-term experience of Australia) does not make the difference between being formally an 'alien' or not; even some with long-term experience of Australia may remain such. But the consequences of the acquisition of sovereignty, do matter. Nettle argues that native title must imply the recognition of Aboriginal societies (whose laws and customs are at issue in native title). In order to take part in such a society, a person must be resident in Australia (271). What is of greatest significance are the laws and customs by which

membership is determined, along with acceptance and descent. These are places at which laws and customs intersect with the common law (271).

Permanent exclusion of persons (or, deportation) would have abrogated the common law's recognition of laws and customs (and especially this most important one, of determining who belongs), says Nettle, and would have logically been impossible. (276) Underlying the Crown's unique obligation of protection to Australian Aboriginal societies and their members as such is the undoubted historical connection between Aboriginal societies and the territory of Australia which they occupied at the time of the Crown's acquisition of sovereignty. This should not be taken to imply connection with PARTICULAR land and waters, but rather with Australia in general.

(Thus Nettle frees the determination of any hesitation about the scale of association, being to the continent as a whole). Nettle says further:

279 it is implicit in the common law's recognition of the status of membership of such an Aboriginal society, and the obligation of permanent protection owed by the Crown in right of Australia that it entails, that those who are recognised as having the status of membership of an Aboriginal society eo ipso owe permanent allegiance of which the recognised incidents include prescriptive jurisdiction in international law and liability for treason in domestic law. Otherwise, they would not be within the Crown's protection.

The connections seem to be: the Crown recognizes Aboriginal societies; AS members of such societies, Aboriginal people owe allegiance to the Crown, otherwise they would not be protected by it, hence each 'resident member of a relevant Aboriginal society in his or her capacity as such owes to the Crown an obligation of permanent allegiance in the sense described'. (Questions of renunciation of such allegiance, says Nettle, do not arise here).

To conclude this does not mean that a resident non-citizen member of such an Aboriginal society is to be accounted an Australian citizen or other than a "noncitizen" as that term is defined -- so in other words, no finding of the above kind of relation will turn such a non-citizen into a citizen. But a non-citizen of this kind cannot be cast out as if alien.

Comment: Nettle's path to special, protected status is thus via the native title relation. Unlike Bell, he does not say that native title is irrelevant and Aborigines have a particular relation to Australia at large. Instead, he argues that there must logically be (or have been) a recognition of Aboriginal societies to which laws and customs belong. There is thus a direct intersection with the common law, in terms of which all Aborigines are owed special protection and cannot be alien. Nettle's finding of distinctive connection is thus embedded in the claim that the Mabo finding MUST imply the recognition of indigenous societies as bearers of law and custom.

It seems consistent with this that Nettle finds that more information about Love is needed, as a matter of fact not principle.

GAGELER, like several others, argues that Aborigines have historically been treated (in terms of formal status) as British subjects like others; and the further Australian history is one in which alien has become synonymous with 'non-citizen'.

He reads the plaintiffs as putting forward three grounds on which their indigenous status might be seen as making them non-alien, or not subject to alienage.

None of these can be countenanced; on this basis Gageler finds the plaintiffs' case to fail; they are aliens and deportable. On the three counts he says:

117 The plaintiffs argue that the common law's recognition of the continuing existence of self-determining indigenous societies maintaining a spiritual and cultural connection with land within Australia through observance of traditional laws and customs is inconsistent with the treatment of members of those societies as strangers to that land or as foreigners to Australia.

122 The second variation postulates as sufficient for a person to "belong" to the land, and hence to be one of or to be uniquely connected with "the people" of Australia, that the person identifies with and is acknowledged to be a member of an existing community that is comprised of descendants of persons who were members of indigenous societies at the time of the acquisition of Imperial sovereignty. The third variation postulates the sufficiency merely of the person being descended from a person who was a member of an indigenous society at the time of the acquisition of Imperial sovereignty

Gageler views these as follows:

125 Insofar as the plaintiffs treat membership of an indigenous society as exhaustive of the question of whether they are non-aliens, the first two variations of the argument come perilously close to an assertion of Aboriginal and Torres Strait Islander sovereignty, albeit that the argument is deployed to assert not independence from, but an indelible connection with, the polity of the Commonwealth of Australia. The third variation of the argument would constitutionalise a form of nationality by descent (*jus sanguinis*), which was unknown to the common law though it may have parallels in some other legal systems.

Here Gageler explicitly denies the viability of any argument (he grants that he has rephrased these arguments to make them as clear as he thinks necessary) based principally or solely on a criterion of descent.

He further argues concerning the incompatibility of 'levels' between the kinds of finding made in native title process (arising from findings of the continuity of laws and customs) and link to the Commonwealth as political community:

128 The common law antecedents of the Constitution provide no basis for extrapolating from common law recognition of a cultural or spiritual connection with land and waters within the territory of the Commonwealth to arrive at constitutionally mandated membership of or connection with the political community of the Commonwealth. The considerations which informed the common law development in *Mabo* cannot be transformed by any conventional process of constitutional interpretation or implication into a constitutional limitation on legislative power.

That is, there is a lack of 'fit' between the common law antecedents of native title and the question of membership with the political community, which exists at a rather different level. Gageler cautions against allowing that lack of congruity to inform the status of persons in a way that places them outside constitutional normativity:

131 Section 51(xix) is not to be read as admitting of the existence of a further category of non-aliens who are non-aliens by force of the Constitution itself, whose status is for that reason and to that extent off-limits to the Parliament, and who are consigned to inhabit a constitutional netherworld in which they are neither citizens, who are full and formal members of the body politic of the Commonwealth.

This unwillingness is also informed by Gageler's view that the non-conformity is race-based:

133 Nor can I be party to a process of constitutional interpretation or constitutional implication which would result in the inference of a race-based constitutional limitation on legislative power.

Mindful (as are other justices) that there are on-going debates and tensions about any part of the Constitution which might be seen as race-based, Gageler explicitly puts aside concepts of connection based (solely) on descent, or 'race'. Were one to want a basis for regarding a non-citizen as non-alien, and thereby attributing special status, this would have to be determined by referendum, Gageler argues.

KEANE also finds that both are aliens within the power of 51(xix) 'no less than any other child who is born abroad of an Australian parent and does not apply for Australian citizenship'.

There is no basis for a claim that any ethnic or racial category has a claim on a determination of the kind being sought (not to deport). Keane also refers to the disparity that exists between relationships based on traditional, territorially quite specific lands and the 'body politic' resulting from Federation, a quite different entity:

195 The plaintiffs' argument confuses the body politic that was brought into existence at Federation with lands and waters, parts of which were occupied by particular Aboriginal groups long before that body politic came into being. The plaintiffs' argument also confuses the spiritual connection of an indigenous person to particular lands and waters with a connection to the body politic that is inconsistent with alienage. In this regard, the plaintiffs' submission is fatally imprecise. If, as is the case here, one is speaking of the body politic being the Commonwealth of Australia, the "Australian community" is not 50,000 years old: the Australian community, the Commonwealth of Australia, was established only at Federation.

Further, Keane argues that to assert that persons or groups have any right to make the kind of determination of non-alienage is to attribute to them political sovereignty. There have been native title cases (like *Yorta Yorta*) in which the dimension of biological descent is patent but the claimants have been unsuccessful. (Thus, descent cannot be seen as necessarily determining a finding of connection). Although Keane does not explicitly say it, this seems to highlight the problem of treating biological descent (by itself) as a criterion of 'belonging' to an indigenous category, or rather one that makes claims of 'belonging' to lands and waters. Having separated the issue of biological descent from belonging (in some way), Keane asserts that Thoms is NOT relieved of alien status by being a native title holder. This is presumably because, as he has argued, Thoms' connection is to a territorially specific area and group, and not via this connection to the polity at large.

He firmly rejects anything that he sees as implying that the plaintiffs are capable of exercising sovereignty with respect to the Commonwealth, or standing apart from it in any kind of conceptual space left by their being non-citizens but indigenous.

GORDON says that Mabo has revealed a deeper truth: that Aboriginal people have a connection with Australian land and waters which has not been severed. He makes clear the general, even abstract level, at which he understands this to obtain.

Like others, he addresses the question of citizenship. His view is that 'non-citizenship' should NOT be seen as equivalent to being alien. Indeed, there is a gap between them, which hangs on the fact that citizenship itself is not a static category, nor a constitutional one:

305 ...the Constitution ultimately did not include a concept of "citizen"... Citizenship is a purely statutory concept. As has been observed, statutory concepts cannot control constitutional concepts. The Court, therefore, does not defer to Parliament's opinion to determine the scope of a constitutional concept like "aliens"... Put in different terms, a statutory concept cannot, in all cases, be the obverse of a constitutional concept. As Gaudron J stated in *Chu Kheng Lim v Minister for Immigration, Australian citizenship is:*

"not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes".

Gordon argues that it has nothing to do with Aboriginal status; that there obtains a relation of 'belonging' (301); the fundamental issue is that of otherness (333); Aborigines occupy a sui generis status.

Citing authorities concerning the widespread dispossession of indigenous Australians, Gordon asserts that the connection has nonetheless not been severed (337-8). It is wrong to see that connection as one of property; it is of a different character (341). Aboriginal people have in various ways been included (355, in voting etc.) as part of the people of Australia; this is a denial of their separate sovereignty (356). Sovereignty over the country brought with it common law, and the Mabo finding that Aborigines have a separate and distinct relation to the place, and/but to them as part of the 'people' of Australia. In other words, they are part of the Commonwealth or political system, not 'alien' to it; but the bringing of that political system has established the (possibility of a) distinct relation to lands and waters.

No arguments (about particular cases of Aboriginality) are relevant to the basic finding of a distinctive relationship, in Gordon's view. To say this is not to challenge the constitution; in fact the Constitution envisions the possibility of making laws in relation to and on behalf of indigenous people. In Gordon's view, evidently, for a person of Aboriginal descent to 'renounce' their connection with Australia (not citizenship per se) would have to involve a deliberate act of renunciation.

Comment: The thrust of Gordon's reasoning is to put the question of the KIND of relation that indigenous people have to Australia/land and waters beyond the reach of any constitutional or statutory arrangement, except for the recognition that this relationship was the basis of the Mabo judgement (as a potential finding, contingent on continuity of laws and customs).



Questions arising from Gordon's kind of position include: if dispossession has, in many cases occurred, then what of the 'unique connection', especially at the (usually, fairly regional or specific) level at which Aboriginal people have by and large understood it? In other words, many Aboriginal people have, according to Gordon's authorities, been dispossessed, presumably in the sense of not having a special or distinctive relationship to land/waters. This seems to leave room for a view that descent is a (sufficient?) criterion for imputing a 'relationship' to lands and waters to indigenous people. His position attempts to take care of the dispossession issue (i.e., patent lack of relation to land and waters in any specific way) by saying: the specificity of that relation, and its empirical existence, are not at issue; it is a finding (e.g. of Mabo) and in that sense exists. On another different but related count I would observe: many indigenous people who DO sustain connections to specific lands and areas arguably see the correct understanding of (their, and wider indigenous) 'law' as involving a distinctive relation to specific areas; and encroachment by others on this is seen as 'unlawful' in their terms. For such relationships NOT to exist (through dispossession, for instance) is thus, from their point of view many indigenous people, not to have a culturally meaningful relation to lands and waters. The question of whether 'biological' or 'kin relationship' to people who DO sustain such a connection can be drawn upon to 'include' them (e.g. in any given land-related case) is always complex, and there is no simple, one-stop answer to it (especially because efforts to include people usually occur at local levels on the basis of pleadings by relatives that certain people and/or families should be included; NOT because they have the relevant connections to land per se, but because they are kin). The 'distinct' and separate relation to lands and waters is, however, evidently contingent on findings of laws and customs and their continuity via the common law, not on the fact of being (in genealogical terms) indigenous (as Gageler had also said).

## EDELMAN

Edelman takes the fundamental question (concerning alienage) to be one of otherness, and says that it is not determinable as a question of citizenship. The correct opposition is of alien, who does not 'belong', and 'belonger',

Aborigines, however treated, have always been considered part of the body politic (even if, for a long period, treatment of them was largely managed by the states, 414, not the Commonwealth). Aboriginal people differ in this respect from many others, for whom 'absorption' into Australian society does not overcome alienage. There are also common understandings of the meaning of 'alien' that need to be reckoned with:

433 "Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word".

Aborigines cannot be included under this concept of 'alien'. They have a powerful 'personal' attachment to land which needs to be considered. Edelman, like Gordon, argues that this persists at a broad level even if specific persons (or groups?) have lost that attachment (been dispossessed of it).

Thus Edelman argues that

'the expansion of Aboriginal rights has [over time, viz. the Referendum etc.] assimilated Aboriginal people within a unitary, homogenous political community that

is defined almost entirely by legislative norms of citizenship. This view reflects a human inclination toward homogeneity ... To treat differences as though they were alike is not equality.'

In Edelman's view, neither man comes within reach of the aliens power.

#### Comment

On taking citizenship as fully determinate – e.g. as does Kiefel, makes the determination of alien status definitive and does not open questions about that status.

On not taking citizenship as fully determinate and thus leaving other openings

- Issue of whether the fact of native title sufficiently adumbrates a kind of relationship that allows indigenous people to be regarded as 'not alien'
- Those who argue it does not, and is in fact not relevant; native title implies relationship to country and waters of a more specific kind; there is a misapprehension of levels of relationship, and those to the Commonwealth are not implicated.
- Those who take citizenship as not determinate and there therefore call on other kinds of relationship. If they say that native title or specific relationship is not relevant, then some turn to the notion of 'indigeneity'. When considered by itself, the issue of 'descent' is seen to be race-based, and contrary to efforts to purge the Constitution of race-based inferences
- Constitutional issues: when the High Court presents ATSI as non-aliens, a category defined by the tripartite test of descent/community recognition/subjective identification, it enshrines a notion of peoplehood defined partly by descent – by 'race' –
- The Expert panel had attempted to purge any constitutional mentions of race (sections 25, 51 (xxvi)).

There are a variety of views one can take of this. Does one want to endorse treatment of people of some indigenous heritage like everyone else? Many would answer 'yes' (as does Kiefel).

Does one want to leave open room for differential treatment, and if so, on what basis? 'Race' and 'racism' have become odious terms but some of the decisions lead in that direction: identification of indigenous Australians by descent. This is especially true of those justices who argue that the empirical question of relationship to lands and waters is rendered irrelevant (by their understanding of Mabo, or the implications of Mabo).

Does one want to open a different path, to say that people of indigenous background are very variegated in their formation, connections to country or otherwise; but should not be treated as alien on the historical-and-sociological grounds that they come from the indigenous people who were in Australia prior to any of this? They are in that sense not alien.

The questionable aspect of some of these decisions seems to me to impute a relation to 'lands and waters' to people of indigenous descent without further ado, insofar as they say it does not matter, effectively, what the contemporary and empirical relation is to land and waters.

The question of what one wants to make of the historical-social relation seems a social justice issue, not one that can be decided directly, or shaped adequately, by the issue of relation to lands and waters.

Also, sociologically speaking, those decisions are regressive which attribute to people on (mainly, solely, descent) a relationship with land and waters, unrealistic and unacceptable

Questions of how to make the constitutional recognition issue align with international law, in which effort the notion of 'race' is regressive