

A HISTORY OF SECTION 127 OF THE COMMONWEALTH CONSTITUTION

GREG TAYLOR*

Until 1967, s 127 of the Australian Constitution excluded Aboriginal people from being counted constitutionally. This article demonstrates that it was largely practical problems with counting itinerant or even unknown Aboriginal peoples that lay behind this provision. Sir Samuel Griffith, its drafter, did not think it inconsistent even with voting rights for Aboriginal people. At the same time, a few people in the 1890s appreciated the possible symbolic meaning that could be conveyed by s 127 and objected to it on that basis — such principled resistance should not be forgotten. By the 1960s the practical problem dealt with by s 127 had not quite finally disappeared, but was much smaller than it had been in the 1890s; only s 127's symbolic meaning was available to contemporaries. It was therefore rightly repealed, but not before it made one final appearance on the stage of Australian electoral politics as part of the background to the rejection of the 1962 federal redistribution.

I INTRODUCTION

Until its repeal by referendum in 1967,¹ s 127 of the *Australian Constitution* provided:

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.²

As we approach the 50th anniversary of that referendum, and consider proposals to mention Aboriginal people specifically in the *Constitution* again³ — the only other specific reference to them, in s 51(xxvi), having been deleted as a result of the same referendum — it is curious to find that no full-scale contextual history

* Professor (Hon), Marburg University, Germany; Associate Professor, Graduate School of Business and Law, RMIT University. The author thanks the anonymous referees for their thoughtful comments.

1 See generally Russell McGregor, '27 May 1967: The 1967 Referendum: An Uncertain Consensus' in Martin Crotty and David Andrew Roberts (eds), *Turning Points in Australian History* (UNSW Press, 2009) 171.

2 This was directly reflected in federal statute law: *Representation Act 1905* (Cth) s 4(1)(c). In this article I shall refer to this provision as 's 127' even if it bore another number in earlier drafts of the *Constitution*.

3 See Joint Select Committee, Parliament of Australia, *Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Final Report* (2015).

of the motives behind the decision to exclude Aboriginal people from the census for constitutional purposes⁴ has ever been written.⁵

This has nevertheless not hampered some from projecting present-day preoccupations on to the past, without any attempt at empirical research into the motivations behind s 127. Thus one author, who also quite erroneously states that ‘[i]n 1900 in all colonies Indigenous people were excluded from state franchises’ — it is very regrettable that such an inaccurate statement has appeared in a learned journal where it will forever remain available as an apparently factual statement to uninformed readers⁶ — has declared that:

Excluding Indigenous peoples from the census meant their *homo sacer* [roughly: outcast] status as non-persons was empirically assured. Counting them would have shown that this supposed terra nullius was the land of someone, and might even have led to argument that their numbers entitled them to representation in the democratic institutions of the new order-building state.⁷

In our day, it is not merely ‘the poor stockinger, the Luddite cropper, the “obsolete” hand-loom weaver, the “utopian” artisan, and even the deluded follower of Joanna Southcott, [who need rescuing] from the enormous condescension of posterity’.⁸

In fact, so far from trying to suppress news of their existence, the colonial census authorities put considerable effort into counting Aboriginal people in the 19th and 20th centuries, and the results were published with other census data, given that s 127 excluded Aboriginal people only from being counted for constitutional purposes, not from general population censuses.⁹ Nor were the founders concerned to deny the reality of prior Aboriginal presence in Australia, let alone their basic humanity: ‘the inference that “aboriginal natives” are not “people” never seems to have occurred to any of the hundreds of delegates, officials and members of the colonial parliaments who perused the draft *Constitution* in its various forms ... between 1891 and 1899.’¹⁰ There was even an exhibition of Aboriginal dance at

4 There was nothing to prohibit Aboriginal people being included in the general population census, and this was in fact done after Federation (see the text corresponding to n 136 below). Section 127 said nothing about the general population census as such, but about population counts for constitutional purposes. Nevertheless, it is frequently and not entirely inaccurately stated that Aboriginal people could not be counted in the census under s 127. This usage is sometimes adopted here, but should be read subject to the qualifying statement just made. See also the text corresponding to n 137 below.

5 There are, however, good accounts of the in-Convention proceedings in Elisa Arcioni, ‘Excluding Indigenous Australians from “the People”: A Reconsideration of Sections 25 and 127 of the *Constitution*’ (2012) 40 *Federal Law Review* 287, 298–300; John Williams and John Braden, ‘The Perils of Inclusion: The *Constitution* and the Race Power’ (1997) 19 *Adelaide Law Review* 95, 110–13; and see Brian Galligan and John Chesterman, ‘Aborigines, Citizenship and the *Australian Constitution*: Did the *Constitution* Exclude Aboriginal People from Citizenship?’ (1997) 8 *Public Law Review* 45, 50–7.

6 The true position may be found in Pat Stretton and Christine Finnimore, ‘Black Fellow Citizens: Aborigines and the Commonwealth Franchise’ (1993) 25 *Australian Historical Studies* 521, 522.

7 Paul Havemann, ‘Denial, Modernity and Exclusion: Indigenous Placelessness in Australia’ (2005) 5 *Macquarie Law Journal* 57, 67.

8 E P Thompson, *The Making of the English Working Class* (Victor Gollancz, 1964) 12.

9 See above n 4.

10 Geoffrey Sawer, ‘The *Australian Constitution* and the Australian Aborigine’ (1966) 2 *Federal Law Review* 17, 18.

the celebration in Sydney of the inauguration of the Commonwealth on 1 January 1901.¹¹ Moreover, had the drafters of the *Constitution* intended s 127 to confirm the terra nullius theory, they would hardly have done so by the obscure method of inserting a section, tucked away with other miscellaneous provisions at the end of the *Constitution*, prohibiting Aboriginal people from being included in the constitutional count of the population, but not broader censuses. In fact, there is no evidence at all that they saw a need to confirm terra nullius (which, it will be recalled, relates to ownership — not to people) given that, by the end of the 19th century, very few people doubted that classification of Australia.¹²

The other reference to Aboriginal people in the original *Constitution* — their exclusion from s 51(xxvi) — occurred not in order to deny their personhood, but rather in recognition of their special status: the races power was one to deal with alien imported races — which the Aboriginal peoples were clearly not.¹³ Although s 51(xxvi) has, of course, a history of its own, the original exclusion of Aboriginal people from it, unlike their exclusion from the constitutional population count, is barely in need of explanation, despite occasional contemporary commentary which seems to assume that it requires one or even constitutes a deliberate snub or downgrading. It was simply not seen in the 1890s as an insult to any person or activity to leave it to the states' administration. They were not to be second-class governments for less significant matters.

Rather than indulge in *a priori* reasoning liberated from the incubus of actual data, we must recall, in looking at the reasons behind s 127, that '[t]o unravel this past is to deal with complex causes rather than simple generalisations which mask the past rather than promote clarification'.¹⁴ We shall see that the main reason for s 127 was simply the practical difficulty of counting all Aboriginal people accurately combined with the low marginal benefit of doing so given their comparatively small numbers.¹⁵ Although it is certainly true that occasionally the justifications given for s 127 verged on stating that '[t]he Aborigines did not count, hence they did not need to be counted',¹⁶ for Sir Samuel Griffith A-G QC,

11 Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 16.

12 Merete Borch, 'Rethinking the Origins of Terra Nullius' (2001) 117 *Australian Historical Studies* 222, 237–9.

13 Galligan and Chesterman, above n 5, 51; see also the lengthy speech of Sir S W Griffith, 'Federation', *The Brisbane Courier* (Brisbane), 27 May 1899, 4, in which he deals with the topic at length (but never mentions s 127).

14 Gordon Briscoe and Len Smith, 'The Aboriginal Population in South Australia 1921–1944' in Gordon Briscoe and Len Smith (eds), *The Aboriginal Population Revisited: 70 000 Years to the Present* (Aboriginal History, 2002) 16, 19.

15 Cf Galligan and Chesterman, above n 5, 52, although, in concentrating on public expenditure, their statement overlooks that the calculation required by s 24 was also affected by the removal of Aboriginal people from it in those states in which they had the vote and s 25 did not achieve that result anyway. Section 24's method of calculating the number of members of the House of Representatives changed somewhat during the course of debates on the *Constitution* but the main competing method proposed, a quota of a certain number of members of the House for a fixed number of people, also referred to population numbers.

16 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 3.

who conceived the section, it is clear that it was a solution to a practical problem and consistent even with a possible conferral of the franchise on those Aboriginal people who did not already have it.¹⁷

But it is also not quite true to say that no one in the 1890s realised the possible symbolic message that s 127, if (mis)understood not as a solution to a practical problem but rather as a statement about ‘the constitutional identity of the nation’,¹⁸ might be seen to be sending. Some people appreciated the symbolic meaning that s 127 could be seen to bear and thought the exclusion of Aboriginal people from the constitutional census wrong because it did not reflect their equal personhood. Recovering the historical memory of such dissenting views is also an objective of this article. In doing so, the intention is to recall that history is a complicated affair and, whatever we might assume or imagine the position in past ages to have been, it was no more frequent for elites to be unanimously agreed upon a single party line in past times than it is in our own day. Nevertheless, such dissenters were not answered by any supposed need to confirm the terra nullius doctrine.

II HISTORICAL BACKGROUND

A Constitutional Precedents

As far as I am aware there had been only two major explicit uses of population figures in Australian constitutional documents in the decades preceding Federation. One had virtually passed out of living memory, but some South Australians in particular might have remembered that that province’s founding Act, the *South Australia Act 1834* (Imp) 4 & 5 Wm 4, c 95 had promised, in s 23, ‘a Constitution or Constitutions of Local Government’ for the province on its

17 See text corresponding to n 89 below.

18 Arcioni, above n 5, 315; and see Russell McGregor, *Indifferent Inclusion: Aboriginal People and the Australian Nation* (Aboriginal Studies Press, 2011) xxi. This is to say nothing of how the provision, once shorn of its original specification of Aboriginal natives of *Australia* (see text corresponding to n 76 below), appeared to any New Zealanders who remained interested in federation with Australia after the die had been cast; F R Chapman commented in ‘Australian Federation: Presidential Address to the Otago Institute’, *Otago Witness* (Dunedin), 4 January 1900, 44:

Among the minor questions raised by the form of Constitution adopted for Australia, I find one which will be found to be a palpable obstacle in the way of our accepting it. One clause declares that in reckoning the numbers of the people of the Commonwealth, or of a State, aboriginal natives shall not be counted. This at once deprives us of 5 per cent of our representation, though singularly enough it would not disfranchise the Maoris, or prevent us from returning one or more to the Federal Parliament. It also inflicts a stigma upon an intelligent and patriotic section of the community, which their white fellow-countrymen will feel disposed to resent. For this mischievous or thoughtless piece of legislation, which can have no real significance except in connection with New Zealand, we are apparently largely to blame, as had this country sent delegates to the last conference it would not have appeared. No doubt if we were to come forward now with a clearly expressed desire to join the Commonwealth, the Imperial Parliament would remove it. I, therefore, place this and the question of Appeal to the Privy Council in the category of remediable blots ...

With the possible exception of the speculative comment about the Imperial Parliament, most of this is accurate, but it is interesting to find the effect on Aboriginal Australians dismissed so lightly as of ‘no real significance’.

‘possessing a Population of Fifty thousand Souls’. This promise, as expressed in the words of E G Wakefield, is still commemorated in an inscription at the top of the steps in Parliament House, Adelaide. Aboriginal people were not excluded from that total, although s 23 was a mere agreement to agree rather than a provision that could have operated of its own force to create the promised local government, and thus precision was perhaps not very important. Of course, by the time the *Commonwealth Constitution* came to be written the promise had already been redeemed as long ago as 1857, and its statutory expression in the Imperial Act of 1834 had been repealed even earlier by the *South Australia Act 1842* (Imp) 5 & 6 Vict, c 61 as part of the reorganisation of South Australian government effected after the financial collapse of the infant colony.

A more recent provision that would definitely have been in the forefront of the minds of West Australians in the debates on the *Commonwealth Constitution*, and also of other Australians who had followed the debates about the campaign for responsible government in the west in the 1870s and 1880s, was s 42 of the *Constitution Act 1889* (WA). This provided a population test for the conversion of the upper house of the Western Australian Parliament from a nominated to an elective body in a form which explicitly excluded Aboriginal people. Under s 42 the nominated body was to be converted to an elected Council:

When six years shall have elapsed from the date of the first summoning, under section six of this Act, of persons to the Legislative Council, or when the Registrar General of the Colony shall have certified, by writing under his hand to be published in the *Government Gazette*, that the population of the Colony has, to the best of his knowledge and belief, exclusive of aboriginal natives, attained to Sixty thousand souls, whichever event shall first happen ...

The target figure of 60 000 was, as a matter of history, reached much more quickly than expected owing to the gold rush,¹⁹ and as a result pt I of the *Constitution Act Amendment Act 1893* (WA) converted what was, for a brief time, Australia’s third nominated upper house into an elective body.

The background to this compromise involving an initially nominated, and then an elected, upper house was the question of whether a community as small as Western Australia’s was capable of supporting more than one House of Parliament, and, if it were so capable, whether it was further capable of supporting not just one, but two elective houses. In 1888 Sir Henry Holland (later Lord Knutsford), the Colonial Secretary, had suggested making do with one house at first, and deferring the question of a second ‘until the white population of the Colony has increased to (say) 80 000 inhabitants, or to such date as Her Majesty may decide’.²⁰ The counter proposal of the local Governor, Sir Frederick Broome, was the one embodied in s 42 of the final constitution just quoted. In dispatches to London putting forward this suggestion, his Excellency referred only to the population having reached

19 Western Australia, *Government Gazette*, 18 July 1893, 727f.

20 *Correspondence Respecting the Proposed Introduction of Responsible Government into Western Australia*, House of Commons Paper No C5743, Session 1889 (1889) 25.

‘60 000 souls’,²¹ but given the earlier reference by the Colonial Secretary to ‘the white population’ it is no great stretch to see that figure as referring, as s 42 of the final *Constitution* explicitly did, to the European population, or at least to the population minus the Aboriginal population.

That is not to say that this exclusion was universally welcomed. During the brief time of its existence, there was a ‘general feeling’ in Western Australia that the nominated upper house ‘was a bar to progress’²² and a desire to democratise it. This aim could only be retarded by excluding Aboriginal people from the population count. Thus *The West Australian*, unwilling to wait for the remaining few years until s 42’s alternative six-year period for automatic conversion would expire, commented in July 1891:

Unlike the neighbouring colony of South Australia, West Australia does not include those aborigines who are in the employ of the whites in the population returns. If this were done, the colony of course would be very much nearer that magic number, 60 000, which is to enable her to obtain for herself an important alteration in the constitution of the Upper House, as it is fully believed that fully 5000 would be added to the present total ... It is held by some that this inclusion ought to be allowed, as these men are all consumers, and many are producers, and are consequently, as much entitled to be counted amongst the population of the colony as their white brethren. This right, as many consider it, is not, however, allowed them, and the colony loses the benefit it might otherwise have derived from it.²³

A few days earlier, the newspaper had pointed out that Aboriginal people ‘are certainly part of the population of the country, and were a part of it before the Englishman was heard of’.²⁴

The newspaper’s article is clearly based largely on the 1891 census report itself, which went into something of an aria on this subject:

COMPLETE EXCLUSION OF ABORIGINES FROM PRESENT CENSUS

131. In the present Census the aborigines have been altogether excluded from the returns. A later portion of this report deals with the civilised natives of our community, but their numbers and the particulars respecting them have been kept entirely separate from the rest of the returns.

21 Ibid 72; there was little debate on this provision in the Legislative Council: see Western Australia, *Parliamentary Debates*, Legislative Council, 27 March 1889, 156–8. No doubt this was because the matter had already been settled out of doors.

22 J S Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth* (Oxford University Press, 1924) 401. This work is somewhat dated, but it is well worth quoting as the author reached Western Australia in 1894 and probably had good firsthand sources for his ‘general feeling’.

23 ‘The Census of West Australia’, *The West Australian* (Perth), 3 July 1891, 6.

24 Editorial, *The West Australian* (Perth), 26 June 1891, 3.

132. In South Australia, at the present Census, the whole of the black population in the employ of the white,²⁵ and in Victoria all aborigines, have been added to the population and other returns. Had either course been pursued in this Colony it would be seen that our numbers would have been largely augmented.

133. It has, however, been customary at the recent enumerations of the Western Australian population to exclude all aborigines from the Census, and consequently a similar course has been adopted upon the present occasion.

134. Nevertheless, it appears to be manifestly unfair not to recognise our civilised natives as a portion of our population. A few of them, as a glance at that portion of the Report devoted to them will show, are able to read and write, and profess the religions of the country; many are producers of our exports, and contributors to our revenue and expenditure, and all of them are, to a greater or less extent, consumers of our imports.

135. However, as the *Constitution Act* of 1889 makes distinct reference to the population of Western Australia, 'exclusive of aborigines,' it would not have been possible to add them to our numbers on the present occasion. So great care has been taken in this respect that even the civilised aborigines of other colonies, present in our own at the time of the Census, have been eliminated from our population.²⁶

Of course, no mere change of heart would have sufficed to bring the desired constitutional inclusion of Aboriginal people about; an amendment to s 42 would have been required to achieve the constitutional goal, as distinct from the broader goal of treating Aboriginal people as equally entitled to be enumerated in the general census. But (as later under s 127) there was nothing stopping the local government from including Aboriginal people in the broader census, as distinct from the calculation required under the constitutional provision, despite this bizarre extrapolation of a constitutional measuring stick for a single, if important, purpose to a universal commandment.

The reason for the exclusion of Aboriginal people in the hurdle set by s 42 is nowhere stated explicitly, but it is noteworthy that Sir Frederick Broome, the Governor by whom the 60 000 hurdle had been suggested, stated before a parliamentary committee in 1890 that 'any figures given as to the native population of the whole colony must be the most absolute guess-work. It is quite impossible to fix a figure'.²⁷ A newspaper report of the following year, before the 1891 census had been conducted, states that the nomadic habits of Aboriginal people and the vast tracts of unexplored land in the colony had made it 'wholly

25 This statement presumably refers to the South Australian census for 1891, the results of which had been published earlier than those of the West Australian census conducted on the same day (below n 57). If so, it is inaccurate: there was a separate column for Aboriginal men employed by settlers, but the enumeration was not confined to them.

26 Walter A Gale, *Census of Western Australia, April 1891: General Report with Appendices* (Government Printer, 1892) 17.

27 *Report from the Select Committee on the Western Australia Constitution Bill*, House of Commons Paper No 160, Session 1890 (1890) 29 [539].

impracticable' to carry through a plan to enumerate the Aboriginal population in 1881.²⁸ The census report from that year itself stated that

each resident or police magistrate was desired to obtain, if possible, information as to the number of Aborigines who, in his district, were not depending on the settlers for their subsistence; but the particulars that have been given on this point do not appear to be sufficiently reliable to be made use of in this report.²⁹

This basic problem of 'known unknowns' is doubtless what lay behind the decision to exclude Aboriginal people from the population count for constitutional purposes.

On the other hand, in 1893, the same Act which converted the Legislative Council into an elective body also excluded Aboriginal people (and Asians and Africans) from the vote for both houses unless they qualified as freeholders, which few, if any, could have managed to do — they were excluded even from the lower householder and leaseholder qualifications, which included renters above a much lower threshold than for the freehold qualification.³⁰ Despite the earlier advocacy by the newspapers of treating Aboriginal people as full citizens, this provision was hardly debated in Parliament at all; Sir John Forrest contented himself with the observation that 'I do not think anyone will object to' his proposal.³¹

B Aboriginal Policy in the 19th Century

Section 127 was adopted against a broader background of legislative and administrative practices in the Australian colonies on Aboriginal matters that often differed widely from one another. While, on the one hand, Aboriginal policy varied considerably among the various Australian colonies in the 19th century, on the other hand s 127 was a rule considered suitable for all of them, despite these differences. Given that s 127 was in the *Commonwealth Constitution* and the states were to have responsibility for Aboriginal affairs, s 127 naturally is not a source of information about how the future of Aboriginal policy was conceived at the time of its drafting. It would, finally, barely be possible here to give a full account of each colony's approach to Aboriginal policy before Federation. To some extent the differences among them reflected different conceptions of Aboriginal peoples' present and future, but as the thesis of this article is that s 127

28 'The Census of the Empire', *The West Australian* (Perth), 27 March 1891, 4.

29 Laurence Eliot, *Census of the Colony of Western Australia Taken on 3 April 1881* (Government Printer, 1882) 3.

30 *Constitution Act Amendment Act 1893* (WA) ss 12(a), 21(1), 26; Galligan and Chesterman, above n 5, 49. These qualifications still existed not because manhood suffrage had not been introduced for the lower house — it had — but because plural voting had not been abolished (this occurred in the *Electoral Act 1904* (WA) s 15). Thus the situation in relation to the lower house is even worse than it looked: Aboriginal people were not entitled to vote as people like everyone else, unless they were property owners. In the upper house, the property qualification continued to apply to everyone for many decades to come. See also below n 79.

31 Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 1892, 108 (Sir John Forrest, Premier).

was a machinery provision without any close connections with broad matters of policy it is beyond the scope of this article to investigate such differences in detail.

Nevertheless, a full account of the background to s 127 must include a brief look at Aboriginal policy in the colonies and in particular those aspects of it that affected the capacity to locate and to count Aboriginal people — a task which is fortunately greatly facilitated by an excellent recent analysis by Dr Jessie Mitchell and Professor Ann Curthoys.³²

Those authors conclude that Victoria was distinctive among the colonies owing to its early concern with benevolent Aboriginal policy, smaller geographical extent, wealth and rapid occupation of the land. It had also developed the most comprehensive system of reserves at an early date. For present purposes, it is important that all these factors increased the opportunities available to colonial authorities to locate and to count Aboriginal people. South Australia was equally rapid in its pursuit of Aboriginal welfare, largely owing to its self-image as a superior colony without the convict taint, but, unlike Victoria, it had a vast and moving frontier — all the vaster after the Northern Territory was added to its responsibilities. Compared to Western Australia and Queensland, which had, to put it gently, the frontier but much less of the humanitarian instinct, in Victoria and South Australia ‘a form of humanitarianism survived that, at one end, was concerned with protection and education and, at the other, with stricter management and control of Aboriginal people within a new colonial order’.³³ Education, management and control all facilitated enumerations, whereas in both Western Australia and Queensland their area and later expansion along with the comparative lack of such ambitions made it considerably harder to be confident even that all Aboriginal people had been located by the government. In New South Wales, speaking broadly, the Victorian approach begins to be found from about the early 1880s, although it spread through the state very slowly: only in 1909 did New South Wales legislatively adopt the ‘protection’ approach pioneered in Victoria in the 1860s, which, whatever its other merits or demerits might have been, tended to make Aboriginal people easier to count.³⁴

In terms of pre-Federation constitutional law, the standout provision relating to Aboriginal people was, without a doubt, s 70 of the *Constitution Act 1889* (WA), under which a fixed amount of the colony’s revenue was to be devoted to the welfare of Aboriginal people. Detested by the colonists as a sign of lack of trust in them and no doubt also because of the revenue it diverted from other possible purposes, this unique provision was repealed by 1905 in circumstances

32 Jessie Mitchell and Ann Curthoys, ‘How Different was Victoria? Aboriginal “Protection” in a Comparative Context’ in Leigh Boucher and Lynette Russell (eds), *Settler Colonial Governance in Nineteenth-Century Victoria* (ANU Press, 2015) 183.

33 *Ibid* 200.

34 *Aborigines Protection Act 1909* (NSW); Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 21; Anna Doukakis, *The Aboriginal People, Parliament and ‘Protection’ in New South Wales 1856–1916* (Federation Press, 2006) chs 3–4.

that have been well documented and criticised elsewhere.³⁵ In itself the provision and its rapid demise have little or nothing to do with enumeration, and Western Australia had already adopted the Victorian ‘protection’ approach in 1886 which indicated where it thought its Aboriginal policy should be heading before s 70 was adopted.³⁶ However, as it happened, the initiative for s 70 came from none other than the very same Lord Knutsford and Sir Frederick Broome who we have previously encountered as excluding Aboriginal people from the population count for a constitutional purpose.³⁷ This then is our first, but not last encounter with the idea that benevolent intent towards Aboriginal people might go hand in hand with the idea that they should not be included in a population count for the simple reason that their existence or location was not wholly known. The two officials’ attitude is also the mirror image of the widespread view in Western Australia that Aboriginal people should be counted in the population figures when they helped to reach the target figure for the conversion of the upper house to an elected body, but this did not for a moment imply that they should actually have any rights once they had served that purpose.

These differences among the colonies should be borne in mind in what follows, and will occasionally be mentioned specifically. On the other hand, all of them shared to considerably varying extents — as we have just seen in relation to Western Australia and shall now observe in relation to the other colonies — the problem that produced the reluctance to include them in the federal constitutional population count: an incapacity to count Aboriginal populations with tolerably complete accuracy. That is why, despite all these differences, colonies with very considerable variations in their approaches to Aboriginal affairs, geographical challenges and so on, could agree upon s 127 as a common rule for all of them.

C Colonial Censuses

The obvious sources for the drafters of s 127 were colonial practices in conducting the ordinary censuses. One writer refers to there being ‘[c]onsiderable variation’ in the practice of colonial censuses as far as Aboriginal people were concerned, and labels their efforts to count them ‘feeble’.³⁸ Although this commentator is of a somewhat more empirical bent than that quoted in the introduction, both these

35 *Yougarla v Western Australia* (2001) 207 CLR 344; Steven Churches, ‘Put Not Your Faith in Princes (or Courts) — Agreements Made from Asymmetrical Power Bases: The Story of a Promise Made to Western Australia’s Aboriginal People’ in Peter Read, Gary Meyers and Bob Reece (eds), *What Good Condition?: Reflections on an Australian Aboriginal Treaty 1986–2006* (ANU E Press, 2006) 1; Peter W Johnston, ‘The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust’ (1989) 19 *Western Australian Law Review* 318. As this article went to press, its author learnt that Issue 30 [2016] of *Studies in Western Australian History* would contain several articles on this topic, but they were not available to the author at the time of publication.

36 Australian Law Reform Commission, above n 34.

37 *Yougarla v Western Australia* (2001) 207 CLR 344, 381–2; Churches, above n 35, 3–13.

38 Jack Camm, *The Early Nineteenth Century Colonial Censuses of Australia* (Australian Reference Publications, 1988) 19, 21. Despite its name, this monograph deals not only with the early 19th century censuses, but with all of them.

claims are, in relation to the coordinated Australia-wide census of 1891 and also in relation to many earlier censuses, something of an exaggeration, as we shall now see — although it is certainly true to say that colonial practices before 1891 did vary considerably.

It is fortunate that my subject is the census of the Aboriginal population after contact rather than its numbers beforehand, for the number of Aboriginal people in pre- and immediate post-contact years is a highly controversial and uncertain field of debate.³⁹ After writing had arrived in Australia and censuses accordingly became possible, they were conducted at more or less regular intervals pursuant to colonial legislation. After 1836, no colonial legislation (and certainly not Western Australia's constitutional s 42, correctly read) had excluded Aboriginal people from being counted in the census.⁴⁰ But there was the problem of how to count Aboriginal people who were itinerant or unknown to the authorities, even assuming, as was admittedly usually the case, that the desire to count them existed. Despite the great differences in their approach to the general subject of Aboriginal welfare, practices also developed in all colonies which resulted in Aboriginal people being either counted separately, only partially or even not at all, as has already been shown by the Western Australian census report from 1891 which referred to their exclusion as 'customary'.⁴¹ However, I shall start with Queensland because, as we shall see, it was Sir Samuel Griffith who was responsible for the initial insertion of what was to become s 127.

A year or so before the first appearance of what was to become s 127 in 1891, an inter-colonial conference of statisticians was held in March 1890 in Hobart at which common Australasian guidelines were agreed upon for the conduct in Australasia of the Empire-wide census of 5 April 1891. Queensland did not send a delegate as the government — not then led by Griffith but by one B D Morehead, whose greatest claim to fame is perhaps as the uncle of the author of the *Mary Poppins* series — did not think the expense justified; but it adopted the resolutions anyway.⁴² Resolution 9 at the Conference provided '[t]hat the Chinese and the Aborigines, as far as possible (including half-castes), be tabulated apart from the general population under every head of enquiry, so that it may be possible to combine their numbers therewith or separate them therefrom, as

39 Two fairly recent discussions may be found in John Mulvaney, "'Difficult to Found an Opinion": 1788 Aboriginal Population Estimates' in Gordon Briscoe and Len Smith (eds), *The Aboriginal Population Revisited: 70 000 Years to the Present* (Aboriginal History, 2002) 1; Len Smith, 'How Many People Had Lived in Australia before It Was Annexed by the English in 1788?' in Gordon Briscoe and Len Smith (eds), *The Aboriginal Population Revisited: 70 000 Years to the Present* (Aboriginal History, 2002) 9.

40 According to the table in Camm, above n 38, 20, the last Australian colonial legislation that exempted Aboriginal people from being counted in the census was the *Census Act 1836* (NSW) s 2, which required census collectors 'to take an account in writing of the number of persons at that time being within the limits of their respective districts the aboriginal natives alone excepted'. I have also not found any later census legislation that excluded Aboriginal people.

41 See above n 26.

42 'The Census of 1891', *The Brisbane Courier* (Brisbane), 1 April 1891, 5.

may be desired'.⁴³ Queensland, however, appears to have gone its own way to some extent on this point, and continued issuing instructions to the enumerators which ran: 'Chinamen, Malays, Polynesians and all other foreigners, of whatever nation or colour, are to be counted; but the aboriginal natives of Australia are not to be included'.⁴⁴ (It is well known that the 'blackbirding' controversy was one of the greatest issues in the politics of Queensland at the time, but its ins and outs can clearly be put to one side for the purposes of this history given that a clear distinction is here drawn between Aboriginal Australians and the Pacific Islanders). This direction was issued despite the fact that the *Quinquennial Census Act 1875* (Qld), like all colonial legislation since 1836, was silent on the topic of Aboriginal people and thus did not authorise the exclusion of anyone from the census.

In so doing the Queensland census officials were merely following the practice of the 1886 census, and some attention should be devoted to this census also given that it was the last census for which results appeared before the prototype of s 127 was inserted into the *Constitution* and, moreover, Griffith was Premier of Queensland when it was conducted. In the official Final Report on the census of 1886, the Registrar-General, William Blakeney — the son of a controversial judge — explained what had occurred and why:

The aboriginal inhabitants of Queensland are not in any way included in the population ... as it would be utterly impossible to collect a census of them. An attempt was made, however, to get an estimate of their numbers by directing census collectors to apply to police officers and others having knowledge of this subject in the different districts. The result of the estimate made by persons competent to judge is that there are about 11 906 aborigines in the Colony.⁴⁵

On this figure, *The Brisbane Courier* commented that it 'is, we fear, too much of a guess to possess any statistical value. It is, however, interesting as an attempt to reduce to a solid basis the wild imaginings that have been put forward in connection with the subject'.⁴⁶

In reporting on the previous census, that of 1881, more detail had been given by the Registrar-General for omitting an enumeration of the Aboriginal population, although it should be noted that the Registrar-General at this previous census was not Blakeney but one Henry Jordan, a dentist who had come to Australia as

43 *Census of Australasia, 1891: Conference of Statists held at the Parliamentary Buildings, Hobart, March 3rd to 18th, 1890* (Government Printer, 1890) 15 (a report also appears in 'Census Conference', *Launceston Examiner* (Tasmania), 15 March 1890, 3). At page 9 of the *Census of Australasia, 1891: Conference of Statists* document, we learn that the words 'as far as possible' were inserted into the resolution during the meetings of the conference, presumably in order to reflect the difficulty of counting all Aboriginal people.

44 'The Census', *Morning Bulletin* (Rockhampton), 18 February 1891, 5. I have not found any official source in which these instructions were published, but they are very similar to those for the 1876 census published in Queensland, *Fifth Census of Queensland, 1876*, Parl Paper No 73 (1877) 107 [15], and thus I am willing to give credence to the newspaper report.

45 Queensland, *Seventh Census of the Colony of Queensland*, Votes and Proceedings: Legislative Assembly (1887) 880. But see also 'The Census of 1886', *The Brisbane Courier* (Brisbane), 26 July 1886, 5.

46 *The Brisbane Courier*, above n 45, 4.

a missionary to Aboriginal people. Nor was Griffith Premier; his longstanding opponent, Sir Thomas McIlwraith, was. Nevertheless, in a passage which is rich with references to the competing considerations involved in this field and hardly needs further commentary, it was reported that the Aboriginal population had again not been enumerated:

difficulties which appeared insuperable having hitherto barred any attempt to count them. Perhaps but little practical benefit would result from ascertaining in any year the number of these unfortunates, who seem destined to die out before advancing settlement; though, if only as a means of delaying for a little time the extinction of the race, or as a question of mere humanity, it seems desirable to know in what proportions they are melting away before the onward march of civilisation.⁴⁷

Perhaps the only thing that needs to be said about this for the present purpose is that persons holding all sorts of views and prognoses about Aboriginal Australians were all agreed that it was a good idea to count them at least.

In other colonies' records, further references to the difficulty of taking a census of Aboriginal people may be found. In New South Wales, the Aborigines Protection Board complained in its report for 1894 of:

the great difficulty in taking a correct census, owing to the wandering habits of the race, more especially in the remote districts; by the border tribes crossing into the other Colonies ...

The aborigines on the Paroo and other rivers are continually moving from one station to another, both in this colony and Southern Queensland. A number of aborigines had also returned to the Coranderrk Mission Station, Victoria, which place they were induced by Mr D Matthews to leave some years back, to take up their residence at Malega, in the Moama district.⁴⁸

Returning to this theme in the following year, the Board referred to:

the great difficulty in taking a correct census, owing to the wandering habits of the race, more especially in the remote districts; by the border tribes crossing into the other colonies; and by the fact that at the time the returns were collected a very large number of the aborigines had left their own districts and were on their way to shearing sheds in various parts of the colony for employment which was offering.⁴⁹

47 Queensland, *Sixth Census of the Colony of Queensland*, Votes and Proceedings: Legislative Assembly (1882) 873.

48 New South Wales, *Protection of the Aborigines (Report of Board for 1893)*, Parl Paper No 264-A (1894) 895; very similar: 'Aboriginal Population', *The Sydney Mail and New South Wales Advertiser* (Sydney), 9 December 1893, 1217. According to its online catalogue, the State Archives of New South Wales also has two volumes of 'Tabulated Expenditure at Aboriginal Stations' dating from 1887 to 1890 (7/3640-41), which 'also act as a form of census' of Aboriginal people on the stations, although not as a general census — which is why I did not make any further attempt to view the document when the State Archives of New South Wales was unwilling to lend the microfilm to me due to its lending policy.

49 New South Wales, *Protection of the Aborigines (Report of Board for 1894)*, Parl Paper No 560-A (1894-5), 499; very similar: 'The Aborigines', *Evening News* (Sydney), 3 May 1895, 3. The concluding words of this quotation are not an error for 'was being offered', but an example of a now obsolete grammatical feature known as the 'passival'.

Again, in its 1898 report the Board returned to the difficulties for census-taking posed by ‘the migratory habits of the Aborigines, and by the border tribes crossing into the other colonies’.⁵⁰ The census report for 1891, issued in 1894, tells us that at the census of 1861 Aboriginal people had not been enumerated (although, as we have seen, statutory authority for that course had not existed since 1836), while in 1871 and 1881 ‘wandering tribes were passed over and only those who were civilised or in communication with Europeans were enumerated’.⁵¹ The implication appears to be that the old practice was not followed in 1891, but by that time the prototype of s 127 had already appeared. Why some Aboriginal people were not included in earlier censuses is not stated, but the obvious reason for the exclusions stated is the difficulty of finding them.

Victoria, as already noted, faced the smallest challenges of aridity and area of all Australian colonies, had a number of other advantages and had started earlier with attempting to convert benevolent intentions towards Aboriginal people into ‘protection’ policies that had the side effect of making it easier to determine how many Aboriginal people there were; but even there, reasonable accuracy was found to be an impossible goal. As early as 1861 the Central Board Appointed to Watch over the Interests of the Aborigines (the first of its type in Australia)⁵² reported that it had ‘selected a person who appears to be fully qualified by experience and character to ... obtain an almost perfect census of the Aboriginal population’.⁵³ Despite this ambition and all the advantages enjoyed by Victoria in locating and counting Aboriginal people, the Victorian Board stated in succeeding years that its figures, far from being ‘almost perfect’, were only approximate,⁵⁴ and as late as the 1881 census the Victorian Government Statist (ie statistician) may be found complaining of the incompleteness of the census returns of Aboriginal people in all colonies, no doubt including his own.⁵⁵ The census returns for 1881 and 1891 included Aboriginal and Chinese people in the general population figures but also provided a separate total for those two groups.⁵⁶ In South Australia, which had similar ambitions to Victoria as far as the treatment of Aboriginal people was

50 New South Wales, *Protection of the Aborigines (Report of Board for 1898)*, Parl Paper No 21-A (1899, third session) 397.

51 *Results of a Census of New South Wales Taken for the Night of 5 April 1891* (Government Printer, 1894) 436 n 2. This is not, in fact, exactly what the 1881 census report said, which was: ‘Roving Aborigines were not included under the denomination of houseless persons or travellers, but a separate account was taken of these individuals, and an approximate estimate of the numbers and sexes of the wild tribes was directed to be given in each district’ (New South Wales, *Census of 1881: Report, Summary Tables, Appendices and Conspectus Tables*, Parl Paper No 42-a (1883-4) 13). It is, however, true to say that the ‘wandering tribes were passed over’ in the sense that no enumerators appear to have been sent to them.

52 Mitchell and Curthoys, above n 32, 186.

53 Victoria, *First Report of the Central Board Appointed to Watch over the Interests of the Aborigines in the Colony of Victoria*, Parl Paper No 39 (1861) 6.

54 Victoria, *Second Report of the Central Board Appointed to Watch over the Interests of the Aborigines in the Colony of Victoria*, Parl Paper No 11 (1862) 17; Victoria, *Third Report of the Central Board Appointed to Watch over the Interests of the Aborigines in the Colony of Victoria*, Parl Paper No 8 (1864) 13.

55 Henry Heylyn Hayter, *Victorian Year-Book for 1885-6* (Government Printer, 1886) 40 [67].

56 Victoria, *Victoria Government Gazette*, No 42, 4 May 1881, 1209-10; Victoria, *Victoria Government Gazette*, No 71, 27 May 1881, 2205-10.

concerned but also a much vaster territory as it then included not merely its own extensive and arid interior but also the Northern Territory, only Aboriginal people in settled areas were counted in the 1881 census,⁵⁷ no doubt largely because of the simple difficulty of finding them in remote areas.

These difficulties did not disappear with Federation. Owing to the practical problems, the enumeration of the Aboriginal population remained ‘far from complete’ in the first half of the 20th century.⁵⁸ As late as 1961, it was only 89% complete in the Northern Territory and 80% complete in Western Australia, although ‘virtually’ complete elsewhere.⁵⁹ By the census of 30 June 1966, when s 127 was doomed anyway, ‘extensive arrangements were made’ and what was described as ‘fairly complete’ coverage of all Aboriginal people was obtained.⁶⁰

III THE GENESIS OF S 127

A Sir Samuel Griffith

As previously noted, the origins of s 127 may be traced back to the pen of Sir Samuel Griffith. Before pursuing the ins and outs of the drafting, we should ask: what were his attitudes towards Aboriginal people?

His biographer declares that ‘[a]t no time was Aboriginal policy at the forefront of Griffith’s programmes’ and that, if they were exterminated, Griffith’s ‘liberal conscience was not unduly worried so long as this process was slowed down, and legally supervised rather than being hastened by uncontrolled violence’.⁶¹ But the citation of the latter summary alone would perhaps do an injustice to Griffith; the same biographer, while recording instances of indifference on the part of his subject to the plight of individual Aboriginal people, also records some very firm measures taken by him in cases of police violence towards them.⁶² On the other hand, Griffith probably lost no sleep over Aboriginal affairs and spoke rarely on the topic in Parliament. Most notably for present purposes, in moving the second reading of the Bill for what became the *Quinquennial Census Act 1875* (Qld), Griffith A-G wasted no words on the special position of Aboriginal people (although admittedly he was deputising for an ill Premier at the time rather than

57 South Australia, *Census, 1881*, Parl Paper No 74 (1881) 3; Briscoe and Smith, above n 14, 18. However, South Australia, *Census of 1891*, Parl Paper No 74 (1891) 70–3, contains what seems to be a complete account of Aboriginal people, with no restriction to any settled areas.

58 F Lancaster Jones, ‘The Demography of the Australian Aborigines’ (1965) 17 *International Social Science Journal* 232, 233.

59 Ibid. The exact figures may be found in K M Archer, *Official Year Book of the Commonwealth of Australia: No 53, 1967* (Commonwealth Bureau of Census and Statistics, 1967) 206. See also the reference to continuing difficulties with locating all Aboriginal people in Commonwealth, *Report from the Joint Committee on Constitutional Review*, Parl Paper No 108 (1959) 55.

60 K M Archer, *Official Year Book of the Commonwealth of Australia: No 54, 1968* (Commonwealth Bureau of Census and Statistics, 1968) 150.

61 Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 176.

62 Ibid 113–15.

introducing his own measure).⁶³ But when Aboriginal affairs were forced upon his attention, as Chief Justice of the Supreme Court of Queensland, he could show some considerable gestures towards cultural sensitivity. In dealing with a case of murder by sorcery in an Aboriginal community, Griffith CJ stated that ‘it was unfortunate that we who had settled in a new country found an ancient people, and were now asked to deal with a case relating to their customs’, and suggested a verdict of manslaughter rather than murder to the jury — no mere quibble in the days of the death penalty.⁶⁴ Although they were scarcely of the same level as Aboriginal peoples’, Griffith had his own memories of being the outsider on the fringes — as a Welshman, a Dissenter, a man from a small colony and a country boy.⁶⁵

Perhaps the episode which best represents Griffith’s very moderate level of concern for Aboriginal people involves their rights to give evidence in court, especially if they were unable to take the standard religious oath which, at common law, required belief in supernatural punishment for perjury in this life or the next. In 1876, Griffith A-G QC had sponsored the *Oaths Act Amendment Act 1876* (Qld), which aimed to provide greater facilities for oath-taking by the otherwise incompetent. In moving the second reading of the Bill for this Act, Griffith A-G QC said:

It was, he thought, highly important for the good fame of this colony, where they had so many Polynesians and others trusting to their laws for protection, that the law should be amended in such a way as to deal with offences against them. He understood there might be some objection with regard to aboriginal natives giving evidence, but he thought it was entirely an unfounded dread. At the same time, however, if the House should think it was important that they should be excepted, there was no reason why a provision to that effect should not be added.⁶⁶

This is hardly passionate activism, but it was also not the case that Griffith A-G QC was willing to secure passage for the legislation by the safe but unjust course of excluding Aboriginal people from the Bill to begin with; nor, as it happened, did the House so require.

When the *Oaths Act Amendment Act 1876* (Qld) had, by 1884, proved impractical, Griffith QC, now Premier, again supported (although it was proposed by the Opposition) amending legislation to cure the defects. Although no reference was made in the debates on it to Aboriginal people, the resulting *Oaths Act Amendment Act 1884* (Qld) also applied to them; Griffith QC commented that the 1876 Act ‘was admitted to be an imperfect measure, and Parliament was invited

63 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 June 1875, 482–3.

64 ‘Curious Aboriginal Superstition: Murder at Roma’, *The Brisbane Courier* (Brisbane), 22 February 1895, 3, quoted in Heather Douglas and Mark Finnane, ‘Obstacles to “a Proper Exercise of Jurisdiction” — Sorcery and Criminal Justice in the Settler-Indigenous Encounter in Australia’ in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2013) 59, 62.

65 Geoffrey C Bolton, ‘Samuel Griffith: The Great Provincial’ (1991) 14 *Royal Historical Society of Queensland Journal* 350, 352.

66 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 May 1875, 129 (Samuel Griffith).

to go further, but it was with the greatest reluctance that it went as far as it did'.⁶⁷ If the laws of nature decreed, as many in the 19th century thought they did, the imminent final extinction of Aboriginal peoples, no doubt Griffith thought that nothing he or even the law as a whole could do would avert that outcome; but he was also far from wishing to promote that outcome or from seeing Aboriginal people as subhuman.

B In and Out: The Drafting History of s 127

It would be impossible to improve upon Professor Geoffrey Sawer's description of the role of population figures in the final *Constitution*:

There are four sections of the Constitution under which a reckoning of the numbers of the people is of operational importance — 24, 89, 93 and 105. Section 24 is of permanent importance; it requires the membership of the House of Representatives to be distributed among the States in proportion to the respective numbers of their people. Sections 89 and 93 required the allocation of certain Commonwealth expenses in proportion to population when calculating the payment to the States of the balance of customs duties collected by the Commonwealth. Section 89 operated only until the imposition of uniform customs duties, which occurred in 1901. Section 93 operated for five years after such imposition and thereafter until Parliament otherwise provided; Parliament otherwise provided by measures which came into full operation in 1910. Section 105 provides for a population-proportion method of taking over part of State debts, but in practice the section has been superseded by section 105A, which has no such provision. Hence only in relation to section 24 does section 127 have any present [1966] *operational* importance.⁶⁸

However, it should also be noted that, until quite late in the process of drafting the *Constitution*, it had not been ruled out that the surplus revenue clause — now s 94, which provides for the distribution of the Commonwealth's surplus revenue 'on such basis as it deems fair' to the states after five years had elapsed from the imposition of the uniform tariff — would be so written as to require distribution on the basis of population numbers.⁶⁹ Sections 89 and 93 involve population-based tests for the period before the imposition of uniform customs duties and the first five years thereafter; s 94 would, under this plan, have set up the same test for the distribution of the surplus in perpetuity.

During drafting, this was considered an important provision of the *Constitution*, although we now know that the Commonwealth, if it ever does have surplus revenue, is easily able to subvert the intention of s 94.⁷⁰ If population numbers had been chosen as the criterion, which seemed possible during various portions of s 94's gestation, s 127 would obviously have been important in relation to that

67 Queensland, *Parliamentary Debates*, Legislative Assembly, 31 July 1884, 231 (Samuel Griffith).

68 Sawer, above n 10, 25–6 (emphasis in original).

69 See, eg, the draft in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 605.

70 *New South Wales v Commonwealth* (1908) 7 CLR 179.

distribution as well as the distribution of seats in the House of Representatives. In addition, s 105 was clearly not practically superseded by s 105A until s 105A was added in 1929; on the other hand, the words in s 105 requiring states' debts to be taken over in proportion to population were not added until 1897, long after s 127 was conceived.⁷¹ Finally, as Professor John La Nauze points out, Griffith A-G QC had toyed early on, at around the same time as s 127 was conceived, with the idea of introducing a provision requiring federal taxation receipts to be returned to the states if they exceeded what was 'in proportion to their population, exclusive of aboriginal natives'⁷² (the baseline for this calculation being the state with the lowest return).⁷³

Some of the population-based clauses which survived into the final *Constitution* began their lives, as that abandoned provision lived all of its, with express exclusions from the population count of Aboriginal people — notably, however, the proto-ancestor of s 24 contained no such exclusion and provided for one member of the House of Representatives for every 30 000 people.⁷⁴ This was curious, and possibly a simple oversight, given that the Constitutional Committee chaired by Griffith A-G QC himself, which had drawn up a series of principles on which the *Constitution* was to be based, had expressly added that the 30 000 people were not to be 'aliens, Asiatics, or Polynesians',⁷⁵ although admittedly there was no mention of Aboriginal people. During the voyage of the *Lucinda* in late March 1891, perhaps realising this omission as well as being concerned to remove the need for repeated references to excluding Aboriginal people from the population count and to remember to add such a provision in if further population-based tests were added to the draft, Griffith A-G QC added a new clause to the draft which ran: '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'.⁷⁶

This clause, the first sign of what was to become s 127, was to stand in the 'Miscellaneous' chapter, and would thus have applied to what is now s 24 as well as the financial clauses. Had it been intended to apply only to the latter, we might expect to find it at the end of the 'Finance and Trade' chapter.

But another product of the voyage of the *Lucinda* was the ancestor of s 25 on the non-counting of races wholly disqualified for voting in any state.⁷⁷ In relation to Queensland (and Western Australia), s 25 might have been thought to do the work of s 127 as far as Aboriginal people were concerned and make its transfer

71 *Official Report of the Debates of the Australasian Federal Convention*, Adelaide, 21 April 1897, 1098–103.

72 The draft clause may be seen in some versions in Williams, above n 69, 182, 210, 284.

73 J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 55–6, 63.

74 Williams, above n 69, 141, 150.

75 *Ibid* 59.

76 *Ibid* 211, 235, 258; see also Chapman, above n 18.

77 Williams, above n 69, 209. However, the word 'all' now found in s 25 was not then in the draft, and thus there was perhaps something more of an opening, at this point, for the argument that the theoretical prospect of voting in Queensland and Western Australia by an Aboriginal freeholder would still count as a disqualification of the race.

to the ‘Miscellaneous’ chapter superfluous. Probably Griffith A-G QC knew of difficulties in counting Aboriginal people in the other colonies as well and was concerned to avoid interstate disputes in both financial and representational calculations based on the uncertainty of the number of Aboriginal people in each state. The debates had already indicated how jealous the states would be of their proportionate share of the anticipated surplus, and the last thing that was needed was an ongoing dispute even about the population figures themselves, the very basis of the calculation, based on the uncertainty about the numbers of Aboriginal people which all colonial censuses to that date had shown. As far as s 25, each state’s proportionate number of members in the lower house and the franchise were concerned, uncertainty about numbers also needed to be avoided, and Griffith A-G QC may also have wondered whether all Aboriginal people were excluded from voting in Queensland — they had the vote there, in theory, as they did in Western Australia,⁷⁸ if qualified by possession of freehold.⁷⁹ However unlikely this may have been, it was therefore strongly arguable that, in strict point of law, not all Aboriginal people were disqualified from voting because of their race and therefore s 25 did not operate to exclude them in those two States either. (When the point came up early in the life of the Commonwealth, however, the existing provision for a freehold franchise only was read as amounting in practice to a full disqualification, as indeed Alfred Deakin A-G considered it to be in an opinion of 18 November 1902.)⁸⁰ There was also the possibility of further population-based tests being added to the *Constitution* as it proceeded through various drafts, as indeed was to happen with s 105 in 1897.

Nevertheless, the next event to occur supports the supposition that financial rather than franchise matters were still at the forefront of Griffith A-G QC’s mind. The newly drafted clause, the ancestor of s 127, was almost immediately deleted in its entirety by the Constitutional Committee which still had its eyes on the financial aspects and substituted for the population basis of distributing federal surpluses a method of calculation based on the amount of revenue raised in each state.⁸¹ Section 127, as it became, was accordingly struck through on the Committee’s copy of the draft, as were the financial clauses that referred to population numbers.⁸² In the full Convention, however, Sir Thomas McIlwraith, Griffith A-G QC’s former sparring but now coalition partner in the ‘Griffithwraith’ government, succeeded in persuading the Convention that

78 See above n 30.

79 *Elections Act 1885* (Qld) s 6. This theoretical possibility was not removed until the enactment of the *Elections Acts Amendment Act 1905* (Qld) s 9, when all indigenous peoples of Australia, Africa, Asia and the Pacific Islands were wholly excluded from the franchise. The background, as in Western Australia (above n 30), was the final abolition of plural voting which made the possession of any property wholly irrelevant for electoral purposes.

80 Patrick Brazill and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General’s Department — Volume 1: 1901–14* (Australian Government Publishing Service, 1981) 138.

81 Williams, above n 69, 281, 309, 333. The Finance Committee, reporting on the same day as the Constitutional Committee, disagreed, and thought that the expenditure should be charged by head of population (at 261, 342), and it was its scheme that was adopted by the full Convention on this point.

82 *Ibid* 282, 288.

making the ... colonies contribute to the general expenditure according to the amount of their customs revenue is a wrong principle, will be unequal, will depart from the principle of payment according to population, and will fall very heavily on some of the colonies, for instance, on Queensland and Western Australia.⁸³

Accordingly the draft was amended to re-insert the principle of notionally charging the states for the expenditure of the federal government ‘in proportion to the numbers of their people’ before calculating their shares of the hoped-for federal surplus.⁸⁴ With almost no discussion, on the following day Griffith A-G QC secured the re-insertion of the prototype of s 127 also on the ground that it was required by the reinsertion of the payment-by-population principle in the financial clauses.⁸⁵ There was, importantly, still no mention of s 25 or the right to vote in connection with s 127.

Matters rested there for some years on the all-Australian front, but in 1892 Griffith A-G QC introduced a scheme for Queensland itself to become a federation of at first three, and then, in a revised Bill, two provinces. Copies of the Bills were not available to me,⁸⁶ but parliamentary debates show that they also contained a provision for excluding Aboriginal people from population counts.⁸⁷ The debates on this scheme show clearly what he was thinking on this topic and have not been referred to in any previous discussion. Griffith A-G QC, perhaps more to demonstrate the consistency of, and logic behind, his drafting (which also contained a version of s 25), but also without any recorded sign of irony on his part or hilarity on anyone else’s, asked in the debate on the clause excluding Aboriginal people from the population counts: ‘Suppose one province [of the Queensland federation] was to make a law giving a vote to aborigines?’⁸⁸ Working this out we can see that, in such a case, the equivalent of s 25 would not apply to Aboriginal people in that province, meaning that all Aboriginal people in that province, including itinerant or unknown ones, would have to be counted unless there were an equivalent of s 127 — the need for a separate provision excluding all Aboriginal people from the count alongside s 25 thus assumed that at least some Aboriginal people might one day somewhere be enfranchised, which would then, without s 127, trigger an obligation, perhaps impossible of fulfilment, to count them all. Admittedly Griffith A-G QC went on to add, rather equivocally, that ‘it was not proposed to allow aborigines a vote. The question of the voting of coloured races was becoming a very serious matter in some parts of

83 *Official Report of the Debates of the National Australasian Convention*, Sydney, 7 April 1891, 810 (Sir Thomas McIlwraith).

84 *Ibid* 830; Williams, above n 69, 405, 429, 453.

85 *Official Report of the Debates of the National Australasian Convention*, Sydney, 8 April 1891, 898–9 (Sir Samuel Griffith); Williams, above n 69, 409, 433, 457.

86 Nor has any comprehensive analysis of the scheme ever been published, but there is some useful information and analysis in John Williams, ‘Samuel Griffith and the Australian Constitution: Shaking Hands with the New Chief Justice’ (1999) 4 *The New Federalist* 37, 38f. After the draft of this manuscript was finished I also noticed a reference in Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 156–7.

87 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 October 1892, 1505–6 (Sir Samuel Griffith).

88 *Ibid* 1505.

the Empire, and must be dealt with'.⁸⁹ It is easy to see what he is thinking here. Queensland's electoral law had just decreed that Aboriginal people were not to have the vote unless freeholders,⁹⁰ but in this constitutional instrument, which might have to deal with a later change of heart on the matter, the question was not forever settled by a merely mechanical provision about the census, no more than the franchise was determined in unitary Queensland by existing practice in taking the census. Aboriginal people might one day, as pressure from the Empire mounted and views changed, conceivably be enrolled to vote on the same footing as everyone else if known to the government, but the census used to determine the number of representatives could not include people whose very existence or location was unknown. As we have already seen, both the size and policies of Queensland made it one of the colonies with the severest problems on this front. For Griffith A-G QC then, s 127 was a means of solving a simple practical problem and ensuring that there was no obligation to count unknown people, not a means of forever denying Aboriginal people the vote — a question which he thought 'must be dealt with' independently of the census — let alone a means of negating their humanity.

The scheme for a Queensland federation failed, and Chief Justice Griffith, as he became the following year, was no longer in a position to pursue it from the bench. Before Constitutional Conventions on the all-Australian scheme resumed in 1897, the Bathurst People's Convention⁹¹ proposed the addition of 'unnaturalized persons of coloured races'⁹² to the exclusion from the census proposed by what is now s 127. The reasoning behind this was not stated, but it was probably an attempt to turn a mechanical provision about the census reflecting the difficulty of counting persons yet to be located or itinerant into a broad general statement about the nature of the Australian community. If so, we can now see that the Bathurst People's Convention had misunderstood the purpose of s 127, and this suggestion, although it was to re-surface, was doomed. Both the Legislative Council of Tasmania⁹³ and both houses of the New South Wales Parliament⁹⁴ adopted what was in effect the same suggestion, with one important variation:

89 Ibid. This prediction came true shortly after its author's death: Stretton and Finnimore, above n 6, 528.

90 *Elections Act 1885* (Qld) s 6; see text corresponding to n 78 above.

91 On this convention, see Irving, above n 11, 144–7; John Hirst, 'A Novel Convention: Adelaide 1897' (1998) 1 *The New Federalist* 5, 6.

92 *Proceedings, People's Federal Convention, Bathurst, November, 1896* (Gordon & Gotch, 1897) 30; 'Evening Session', *Bathurst Free Press and Mining Journal* (NSW), 20 November 1896, 2.

93 Tasmania, Votes and Proceedings, 20 August 1897, 10; 'Draft Commonwealth Bill', *The Mercury* (Hobart), 21 August 1897, 1. There was no Hansard report of the Tasmanian Parliament at this time. The Tasmanian House of Assembly disagreed with this amendment but its reasons are not apparent (Tasmania, Votes and Proceedings of the House of Assembly, 20 August 1897, 97; 'Draft Commonwealth Bill', *The Mercury* (Hobart), 21 August 1897, 1; various other newspapers also consulted without success).

94 New South Wales, *Parliamentary Debates*, Legislative Council, 26 August 1897, 3477; New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 July 1897, 2279. See also the exchange — which remained unrecorded in Hansard — in the Legislative Assembly of Victoria in 'Parliament', *The Argus* (Melbourne), 22 August 1891, 5 in which the exclusion of the Chinese specifically is suggested and the debate moved on to whether they should be counted if naturalised and had the vote.

they omitted the Bathurst reference to ‘coloured races’ — but their exclusion of unnaturalised aliens still misunderstood the purpose of the clause.

The most elaborate reasoning in favour of such an amendment was that of a New South Wales Member of Parliament coincidentally also named Griffith, one of the pioneering Labour members — but from the middle class, rather than being of the working men who formed such a great pool of talent for the infant Labour party. Arthur Griffith’s concerns were more than merely to make a symbolic statement about the nature of the Australian community; he feared that

if five years hence one-fifth of the population of Queensland consisted of kanakas and Chinamen they would count in its representation. That was what he wished to prevent. It was also right to shut out the aboriginals of Western Australia, whom nobody could count or get to vote.⁹⁵

Hansard records that he spoke at 1.15 am to ‘a handful of members’,⁹⁶ so the acceptance of his proposal for amendment of the federal Bill may not have accorded with the wishes of all the members of the Legislative Assembly, as distinct from those who were actually there. The difficulty of counting Aboriginal people had clearly not escaped Arthur Griffith’s attention either, but the main reasoning behind his proposal was clearly different — the need to prevent Queensland from profiting representationally from mostly Pacific Islander labourers and thus possessing constitutional as well as other incentives to import them.

Dealing with this proposed amendment in the Convention on 8 February 1898, Edmund Barton pointed out the error in words that put the final seal upon the idea that s 127 was intended as a solely mechanical provision and that reflect what has just been said with reference to the scheme for Queensland federation:

Under clause 25, in ascertaining the number of the people of the states, so as to determine the number of members to which the state is entitled, there is to be deducted from the whole number of the people of the state the number of the people of any race not entitled to vote. In other parts of the Bill, where the provision is merely for statistical purposes, it is only considered necessary to leave out of count the aboriginal races. The two provisions are for different purposes, and I think the thing is tolerably clear.⁹⁷

With the exception of this skirmish there is little more to report on the drafting history of s 127.⁹⁸ More and more complicated provisions referring to population counts and relating to the states’ contributions towards federal expenses and their share in the hoped-for federal surplus were proposed and rejected,⁹⁹ but during their life validated the decision to move the exclusion of Aboriginal people out of specific provisions into a more general clause.

95 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 July 1897, 2279 (Arthur Griffith). Arthur Griffith MP was also the eponym of the town in south-western New South Wales.

96 *Ibid* 2277, 2279.

97 *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 714.

98 Successive stages of the draft may be followed in Williams, above n 69, 524, 552, 581, 609, 663, 703, 792, 840, 904, 938, 970, 1002, 1054, 1112–13, 1140.

99 One example is at *ibid* 604–6.

IV RESISTANCE

Although s 127 was not intended to reflect upon the personhood of Aboriginal people, some of those whose lot it was to consider the draft *Constitution* in the colonial Parliaments offered objections to it on that basis. These must not be dismissed because the premise from which they proceeded was wrong, for, as we have seen in the introduction, it was and is certainly possible to read s 127 in that way. It always had the potential for a symbolic reading alongside the one actually intended.

On one occasion the mistake upon which opposition to s 127 proceeded was patent. The advanced democrat (Sir) John Cockburn, a Minister in the South Australian government and former Premier, objected to s 127 in the Convention on 20 April 1897 on the ground that Aboriginal people should not be ‘debarred from voting’ given the exercise of the franchise by several hundred Aboriginal people in his colony.¹⁰⁰ On being informed of his error, he still maintained his objection ‘as a matter of principle’. James Walker from New South Wales, later a senator for that State and a financier, was ideally placed to respond to the objection in financial terms, given his background as a businessman: he pointed out that if s 127 was enacted and Aboriginal people excluded from the population count ‘South Australia will have so much the less to pay, whilst if they are counted South Australia will have so much the more to pay’.¹⁰¹ There the debate ended. It was certainly true to say that South Australia stood to gain from the provision, given that it was responsible for the Northern Territory.¹⁰² Taken together the two units were estimated to have 26 433 Aboriginal people in 1901,¹⁰³ more than double the average of the six jurisdictions (11 158). It was also certainly true that many South Australians hoped to palm off the expensive territory on to the Commonwealth; the resources of South Australia were never really sufficient to develop the territory properly, and it was a substantial drain on the colonial budget. But the prospect of surrendering the territory to the Commonwealth was, in 1897, in the uncertain future, and for the time being the estimated 3070 Aboriginal people of South Australia proper were not all that it was responsible for.

Nevertheless, Dr Cockburn’s advanced democratic views may lead us to suspect that the financial cost was not his prime concern even after his mistaken view of the purpose of s 127 had been corrected, and despite his silence on being informed of the true position. In 1893 he had presided, in the absence of its chairman, over the annual meeting of the Aborigines’ Friends’ Association, where he had seen fit to remark: ‘With regard to the wider and nobler humanitarian aspect, they recognised that the natives had claims upon them in every possible way

100 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1020 (Sir John Cockburn).

101 *Ibid* (James Walker).

102 Irving, above n 11, 113.

103 Galligan and Chesterman, above n 5, 59.

as members of the great human family, and claims especially on those who had superseded them in their native land.¹⁰⁴

In Tasmania objections were offered by Harry Rooke MLC when the draft *Constitution* came before the Legislative Council of that State for debate. He too was a businessman, but thought it ‘a very melancholy thing that the aboriginal natives of a country should not be counted at all — the original owners of the soil’, given that ‘[w]e kill them with so-called civilisation — kill them with drink — and yet they are not to be counted’. He asked, ‘[d]o you regard the natives as kangaroos? Are they marsupials or what?’¹⁰⁵ But, as we have seen, the house was of a different view, and indeed passed a further amendment disqualifying unnaturalised aliens from being counted in the census as well as Aboriginal people. Rooke’s motion to delete s 127 was ‘negatived on the voices’.¹⁰⁶

Pride of place should, however, go to the House of Assembly of South Australia, whose electors included numerous Aboriginal people and which on 25 August 1897 suggested to the central Constitutional Convention the complete deletion of s 127. This occurred without a division, although divisions immediately beforehand and afterwards included Dr John Cockburn, who was presumably present for this debate as well although he did not speak and certainly did not argue against the proposed deletion on the ground that it would save money. Rather, the charge was led by Robert Caldwell and E L Batchelor — the latter also a Labour man. The former moved the complete deletion of the clause; he thought that ‘[t]here were many aborigines on the electoral roll who were intelligent men, and to exclude these from the census was an insult’.¹⁰⁷ Batchelor agreed that the clause constituted an ‘insult’ but worried about the inaccessibility of Aboriginal people in the Northern Territory — clearly the pragmatic aim of s 127 had not escaped him. Several suggestions were made to the effect that Aboriginal people should be counted only if enrolled, which would have obviated the procedural difficulties, but Caldwell would have none of it: ‘the aboriginals were human beings, ... every man, woman, and child, and not only those on the roll’.¹⁰⁸ T H Brooker MP also supported deletion of the clause: ‘It seemed an anomaly to ignore the original holders of the country, after allowing them to vote for delegates to the Convention’,¹⁰⁹ as of course had occurred in South Australia. The proposed exclusion of Aboriginal people from the census was proposed without a division for complete deletion from the draft *Constitution*.¹¹⁰

It has to be said, however, that little trace can be found in the newspapers of the day of any broader discussion of this topic even in the days after the parliamentary

104 ‘Aborigines’ Friends’ Association: Annual Meeting’, *South Australian Register* (Adelaide), 24 October 1893, 7.

105 ‘Draft Commonwealth Bill: Further Consideration in Committee’, *The Mercury* (Hobart), 21 August 1897, 1.

106 ‘Parliament: Yesterday: Legislative Council: The Commonwealth Bill’, *Tasmanian News* (Hobart), 21 August 1897, 3.

107 South Australia, *Parliamentary Debates*, House of Assembly, 25 August 1897, 518 (Robert Caldwell).

108 *Ibid.*

109 *Ibid* (Thomas Henry Brooker).

110 South Australia, *Votes and Proceedings*, House of Assembly, 25 August 1897, 145.

debate, nor did the upper house, the Legislative Council, join in and suggest the deletion of s 127.¹¹¹ Reflecting a widely held view in New South Wales that the Bill would sell it short, the Sydney *Evening News* drew a parallel with South Australia's overnight doubling of its voting strength via the enfranchisement of women and continued:

the South Australian Assembly wishes that in reckoning the number of people in a state with a view to apportioning its amount of representation, aboriginals shall be taken into account as well as white people. South Australia in making this suggestion must have an eye to West Australia as well as herself. But the proposal is likely to be strongly resented by the other 'small' state, Tasmania, where there are no aboriginals at all.¹¹²

In fact, the eye was to basic principle, not to its own advantage. Obviously, though, the South Australian House of Assembly's suggestion did not win over the Australasian National Convention, which retained s 127 with perfunctory debate¹¹³ — although neither Griffith, by then Chief Justice, nor any Queensland delegates attended the Convention.

Who was the now almost forgotten Robert Caldwell, who led the charge against s 127 with such firmness and principle? Although he had come to Australia as a small child with his family, he was born a Scotsman who still retained some traces of his native accent¹¹⁴ which we must imagine in reading the quotations above. He had spent many years farming to the north and north-west of Adelaide in newly settled areas, and he must surely have come into contact with Aboriginal people while doing so, although in 1897 he was the member for Onkaparinga in the hills east of Adelaide, where he had moved after finding that his health could no longer stand the heat of the plains. He was a Methodist lay preacher and amateur poet who published volumes of his own verse, some of it on religious topics.¹¹⁵ In line

111 It did not even consider the clause: South Australia, *Parliamentary Debates*, Legislative Council, 17 August 1897, 159.

112 'Difficulties', *Evening News* (Sydney), 31 August 1897, 4.

113 In fact, no reference was made to the South Australian suggestion to delete s 127 in debate: *Official Report of the National Australasian Convention Debates*, Melbourne, 8 February 1898, 713–14.

114 'Death of Mr Robert Caldwell: A Useful Citizen', *The Advertiser* (Adelaide), 3 November 1909, 10. This obituary is the source of much of what follows. See also 'Death of Mr R Caldwell: Politician and Poet', *The Register* (Adelaide), 3 November 1909, 6.

115 As in Robert Caldwell, *Interpretations and Musings* (Burden & Bonython, 1890), in which the first poem, 'Simeon, or the Holy Quest' at 1–18, is a long work based on St Luke's account of the Presentation of Christ in the Temple. However, even an earnest man such as Caldwell occasionally must be taking the 'mickey' out of himself in his doggerel. He commences his poem on the travails of the Pastoral Lands Royal Commission (South Australia, *Report of the Pastoral Lands Commission*, Parl Paper No 33 (1891)), of which he was chairman, thus:

The Pastoral Lands Commissioners,
Heaven aid them in their quest!
The Pastoral Lands Commissioners
Have started for the west.

(Robert Caldwell, *In Our Great North-West, or, Incidents and Impressions in Central Australia* (J L Bonython, 1894) 1, which refers to these verses as 'a few pages of rude verse by way of camp-fire entertainment for my companions' (at v) during the outback travels of the Royal Commissioners.)

with his religious part-time vocation, he was noted for his earnestness.¹¹⁶ He was generally speaking a conservative, but a very early supporter of female suffrage, well before it became a popular cause — at least suffrage for propertied women, which represented perhaps a compromise between the two hearts that dwelt in his breast. One author speculates that he might have supported suffrage for propertied women only to keep the Labour interest down,¹¹⁷ but his involvement appears too early and persistent to justify that conclusion. Indeed, what he said about s 127 of the *Constitution* a few years after the fight for female suffrage had been won also strongly suggests that he was not pursuing some nefarious anti-worker plan in seeking to have some women enfranchised either, but had a principle about humanity in mind. It was, rather, probably the need for caution and gradualism that had him adopt a compromise position on female suffrage that might also attract more supporters than an absolute one. Caldwell would have been unusually dim if unable to grasp that, if his plan to enfranchise some women had succeeded, the dam wall would soon burst and the rest would surely follow.

Some pen portraits of Caldwell refer to him as ‘kindly ... mild and ... sweet’ although a little impractical¹¹⁸ — and others paint him as indecisive or lacking in force.¹¹⁹ None of those characteristics, with the possible exception of an impractical disregard of the problem of counting remote Aboriginal people, could be said to have been on display either in his attack on s 127. His characterisation as indecisive no doubt goes back to an incident in the fight for women’s suffrage which the Premier, C C Kingston, was still making hay out of at the next election two and a half years later:¹²⁰ Caldwell had found himself greatly conflicted by his support for adult suffrage in general but his personal opposition to the idea of a referendum on it as proposed — much to the disappointment of most proponents of women’s suffrage — in the government Bill of 1893 introduced by Dr John Cockburn. As a result, Caldwell did not vote in a crucial division,¹²¹ owing to his and others’ absences in the vote on the Bill, which required an absolute majority

116 In addition to the two obituaries cited above n 114, see also J J Pascoe (ed), *History of Adelaide and Vicinity: With a General Sketch of the Province of South Australia and Biographies of Representative Men* (Hussey & Gillingham, 1901) 353.

117 Audrey Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle?* (Cambridge University Press, 1992) 174, ch 2. The author is also wrong to claim (at 39) that Caldwell did not record his vote at the final triumph of the Bill for female suffrage; she must have been misled by the earlier incident referred to in ‘The Public Salaries Bill’, *South Australian Register* (Adelaide), 4 October 1893, 5. ‘Work in the Assembly: New Railways Proposed: A Grave Constitutional Point: More Land Legislation’, *The Advertiser* (Adelaide), 4 October 1893, 5.

118 A Scribbler, ‘Echoes from the Smoking Room’, *South Australian Register* (Adelaide), 10 August 1885, 6.

119 ‘Letters to Public Men: Robert Caldwell, Member of Parliament and Poet’, *Quiz and the Lantern* (Adelaide), 14 May 1896, 8; Orr, ‘Town Tattle’, *Bunyip* (Gawler), 5 November 1909, 2.

120 ‘General Elections: The Premier at Stirling West: Criticism of Mr Symon’, *The Advertiser* (Adelaide), 23 April 1896, 7. Caldwell, for his part, was so wounded by the criticism of him by the government for his conduct in 1893 that, when it introduced the ultimately successful Bill without the referendum proviso in 1894, he voted to require a referendum: South Australia, *Parliamentary Debates*, House of Assembly, 17 December 1894, 2913.

121 ‘The Public Salaries Bill’, above n 117, 5; ‘Work in the Assembly: New Railways Proposed: A Grave Constitutional Point: More Land Legislation’, above n 117, 5.

to pass,¹²² the cause was therefore lost until the following year, when the Bill without provision for a referendum passed, and New Zealand rather than South Australia had the honour of first enfranchising women.

One of the plainest impressions I have is that Caldwell was one who considered each issue on its merits rather than taking a party line on everything (this was, of course, the period in which organised modern political parties were only just beginning to form).¹²³ One pen portrait makes much of his ‘general disregard for popular methods of arriving at conclusions’,¹²⁴ and another says, as if he were a raging socialist which he assuredly was not, that ‘he champions the cause of the oppressed’.¹²⁵ In the 1893 election, the last before women were enfranchised, his programme included such disparate items as a state bank, civil service retrenchment, a property tax and, of course, votes for women.¹²⁶

In part, the variance in the colour of Caldwell’s views on different topics was due to the familiar process of increasing conservatism with age — a phenomenon which certainly affected Caldwell — but then his objection to excluding Aboriginal people from the census was near the end of his political career when he was well into his fifties. On the other hand, we must not make the error of assuming that today’s categories apply automatically to past ages as well. Reflecting on the labour movement’s and other reformers’ views in the 1890s, Caldwell the poet, writing in 1898, deprecated reformers in the following words, putting into their mouths the sentiment that the land belonged to all,

But not to the ‘Coloured Races’,
Who own’d the country first,
We turn from these our faces,
They are by us accurst.¹²⁷

Caldwell’s exit from the stage occurred in 1903 on a sour note, as he lost an election for the Senate and was then jeered, shouted down and drowned out at the declaration of the poll by the crowd’s singing of songs such as the National Anthem, *Roll the Old Chariot Along* and *John Brown’s Knapsack is Number Ninety-Nine* — all because he had jested, in accordance with what was apparently

122 *Constitution Act 1856* (SA) s 34.

123 However, some reports have Caldwell endorsed by the National Defence League, the conservative proto-party formed as an answer to Labour: see, eg, ‘National Defence League’, *The Advertiser* (Adelaide), 20 April 1896, 7.

124 ‘Letters to Public Men: Robert Caldwell, Member of Parliament and Poet’, above n 119, 8.

125 Pascoe, above n 116.

126 ‘Onkaparinga’, *Adelaide Observer* (Adelaide), 10 June 1893, 15; ‘The New Parliament: Mr R Caldwell’, *South Australian Chronicle* (Adelaide), 10 June 1893, 7.

127 Robert Caldwell, ‘The Pioneers’ in Robert Caldwell, *The Pioneers and Other Poems* (Sands & McDougall, 1898) 47. Similar reflections on the racial policies of the infant labour movement may be found in his personal papers in the State Library of South Australia: in PRG 1241/1 he contrasts Keir Hardie’s horror at native massacres in South Africa with the possible consequences of the Australian labour movement’s desire to be rid of all Pacific Islander labourers without any regard to their welfare.

a ‘time-honoured joke’, that the most intelligent electors had voted for him.¹²⁸ In the final analysis, his political career ended in failure because he was one of the many politicians who had been left behind by the rise of modern parties.

V THE END

In *Kruger v Commonwealth*, Gaudron J declared that s 127 was ‘completely contrary to any notion of equality’.¹²⁹ This is an example of ‘presentism’, and there is also no human right to be counted in the census. In the 1890s only a few people such as Robert Caldwell had such a perspective on s 127; most cared little, if at all; but above all, those who introduced and supported s 127 did so largely because of well-known practical difficulties in counting all Aboriginal people, not in order to discriminate or contradict principles of equality nor to deny them the franchise. For the brains behind s 127, Sir Samuel Griffith, the provision was quite compatible with Aboriginal franchise. This point was repeated several times in the lead-up to the enactment of the *Constitution*.

It was clear, therefore, that advances in knowledge and communications, not in the understanding of equality, had rendered s 127 largely superfluous by 1967; the ‘yes’ case for the referendum of that year rightly presented the repeal of the section not primarily as the correction of past discrimination, but simply as removing a provision that had been overtaken by later developments.¹³⁰ Not that the symbolic angle was forgotten; in 1959 the Joint Standing Committee on Constitutional Review had pointed out the possibility of continuing symbolic misinterpretations of s 127, especially its liability to be misconstrued abroad.¹³¹ As the practical problem that s 127 dealt with faded away, only its symbolic meaning was left; in the referendum campaign of May 1967, full use was, quite properly, made of the opportunity to denounce s 127 as implying that Aboriginal people were not fully citizens (although in the strict legal sense, they unarguably were).¹³²

By this time, and indeed since the question had first arisen in 1901, s 127 was construed strictly. Alfred Deakin A-G, in an opinion of 29 August 1901 that was adopted by the Conference of Statisticians in 1906,¹³³ had ruled that persons of mixed heritage (‘half-castes’) did not fall under s 127.¹³⁴ Torres Strait Islanders

128 ‘Declaration of Senate Poll’, *The Register* (Adelaide), 30 December 1903, 3.

129 *Kruger v Commonwealth* (1997) 190 CLR 1, 113.

130 The ‘yes’ case on this point may be found in Attwood and Markus, above n 16, 127; Williams and Bradsen, above n 5, 124–5.

131 *Report from the Joint Committee on Constitutional Review*, above n 59, 56.

132 McGregor, above n 1, 177.

133 Briscoe and Smith, above n 14, 18–19. There is also an interesting and acute note on the meaning of the phrase ‘aboriginal native’ in this period in Tom Clarke and Brian Galligan, ‘“Aboriginal Native” and the Institutional Construction of the Australian Citizen 1901–48’ (1995) 26 *Australian Historical Studies* 523, 524–9.

134 Brazil and Mitchell, above n 80, 24. Deakin A-G might also have pointed out, in addition to the need for this section to be strictly construed, that it contained no express ruling on the question comparable to that of the *Constitution Act Amendment Act 1893* (WA) s 26 (‘[i]n this Act the words “aboriginal native” shall include persons of the half-blood’).

were also, by an interpretation adopted by the census authorities, included in the constitutional count from the start as not falling under s 127.¹³⁵ By 1921 a census of ‘civilized or semi-civilized’ Aboriginal people who were employed or living on or near reserves was occurring alongside the usual census and using the same forms as for the rest of the population.¹³⁶ As Professor Geoffrey Sawer pointed out, this was perfectly legitimate, as s 127 applied to enumerations for constitutional purposes only — it did not adopt some sweeping view that Aboriginal people were non-people for all purposes, but merely affected enumerations for the purposes of the *Commonwealth Constitution*.¹³⁷

In the debates on the federal franchise just after Federation,¹³⁸ s 127 occasionally surfaced as a reason why it should be denied to Aboriginal people — if they could not be counted for constitutional purposes, how could they possibly have the vote? This was the same confusion that Dr John Cockburn had exhibited at the 1897 Convention¹³⁹ and is fully answered by what Griffith A-G QC had said about the equivalent clause in the Queensland federation Bill. But it is daydreaming to imagine that s 127, or any confusion about its meaning, tipped the scales against the Aboriginal federal franchise in 1902. The same decision would have been made if it had never existed.

In 1965, Queensland, as the last state to do so, removed provisions discriminatory against Aboriginal people from its electoral qualifications.¹⁴⁰ Had s 127 never existed or been repealed much earlier, Queensland (along with Western Australia, which had maintained the exclusion from the franchise until 1962)¹⁴¹ would in theory have had an incentive to take this step earlier, because its population count for the purposes of calculating the number of seats it had in the House of Representatives would have been added to by Aboriginal people — assuming the law was changed so that the whole race was not excluded from the state vote and s 25 did not therefore operate to remove Aboriginal people from its population total for representational purposes independently of s 127.¹⁴² (The three other sections of the *Constitution* in which population counts were mentioned — ss 89, 93 and 105 — had long since passed into history.)

However — and even assuming that state rather than party-political interests would have been at the forefront of the responsible politicians’ minds — the

135 Archer, *Official Year Book of the Commonwealth of Australia: No 53, 1967*, above n 59; Sawer, above n 10, 26–7.

136 Jones, above n 58.

137 Sawer, above n 10, 25–6. As we saw earlier, this error was also made by the West Australian authorities at the end of the 19th century: Gale, above n 26.

138 Denied to Aboriginal people, except those entitled under s 41 of the *Constitution*, by the *Commonwealth Franchise Act 1902* (Cth) s 4.

139 See Stretton and Finimore, above n 6, 525–6.

140 Margaret Reid, ‘Caste-ing the Vote: Aboriginal and Torres Strait Islander Voting Rights in Queensland’ (2004) 30(2) *Hecate* 71, 77.

141 *Constitution Acts Amendment Act (No 2) 1962* (WA) s 3.

142 Arcioni, above n 5, 306; Jennifer Clarke et al, *Hanks Australian Constitutional Law: Materials and Commentary* (Lexis Nexis Butterworths, 9th ed, 2013) 205; Sawer, above n 10, 29–30.

incentive would normally have been quite small: until 1964,¹⁴³ the constitutional and statutory test required a remainder of greater than one-half of the quota for an additional seat to be provided to a state; for the brief interlude between 1964 and the repeal of s 127 in 1967 any remainder was to suffice for the provision of the extra seat. This would have made it possible but, normally, unlikely that relatively small numbers of Aboriginal people could have given an extra seat to a state that did not disqualify all Aboriginal people from voting and thus engage s 25, had s 127 not prevented Aboriginal people from being counted at all anyway, regardless of state franchise laws. By 1961 the quota required for one seat in the House of Representatives had reached around 90 000;¹⁴⁴ in both Queensland (8686 Aboriginal people) and Western Australia (10 121) the number of Aboriginal people excluded by s 127 was around one-tenth of a quota, and in the other states it was far smaller.¹⁴⁵

However, it so happened that s 127 played a big part in political life in its dying throes. In the proposed redistribution following the 1961 census, the unusual case occurred, not once but twice: Queensland (17.44 quotas) and Western Australia (8.47 quotas) were both slated to lose a seat each on the 'round up only more than half' rule applicable before 1964. Had Aboriginal people been counted, on my calculations that would not have been the case in either State:¹⁴⁶ both States would have had a remainder just greater than, rather than just under, half a quota with the extra Aboriginal people added and would thus have kept their existing eighteen and nine seats, respectively. By another freakish coincidence, these were the very two States that had for many decades denied equal voting rights to Aboriginal people by law and whose Aboriginal populations could not therefore have been counted in their population totals anyway under s 25, even if s 127 had never been conceived of. (This representational near miss on the part of both states in 1961 explains the reason for the change to the rule in 1964, which restored to both States their previous entitlement to representation: 17.44 quotas suddenly entitled a state not to seventeen, but to eighteen members.)

Even if the symbolic aspects of s 127 are ignored, Professor Geoffrey Sawer was therefore not quite on the mark when he argued that, while he would vote for the repeal of s 127 if he had the vote in the forthcoming referendum, its repeal was not urgent, for its 'immediate practical effect is slight and repeal could well have waited for a cheaper occasion — the money saved to be given to Abschol or some such purpose'.¹⁴⁷ (As a Territorian, he had no vote in the referendum under s 128

143 *Commonwealth Constitution* s 24(ii); *Representation Act 1964* (Cth) s 3, amending *Representation Act 1905* (Cth) s 10(b). When the invalidity of the 1964 amendment was revealed by the decision in *A-G (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527, the original 'round up more than one-half' rule was restored to the statute book by the *Representation Amendment Act 1977* (Cth) s 5; see now *Commonwealth Electoral Act 1918* (Cth) s 48(2)(b).

144 The number of people of the Commonwealth for these purposes was determined to be 10 415 654 on 30 June 1961: Commonwealth, *Gazette*, No 2, 11 January 1962, 114. Dividing this total by 120, being twice the number of senators then elected, produces approximately the result stated in the text.

145 Archer, *Official Year Book of the Commonwealth of Australia: No 53, 1967*, above n 59.

146 Gough Whitlam, *The Whitlam Government 1972–1975* (Penguin Books, 1985) 462 refers to Western Australia only.

147 Geoffrey Sawer, 'Between the Lines', *The Canberra Times* (ACT), 17 May 1967, 2.

as it then stood, so it is understandable that he ignored symbolic aspects of s 127 when faced with his own real exclusion not merely from the census, but from the franchise. How much, indeed, might be made of that exclusion were it theorised in the same way as s 127 sometimes is!)

It was, however, largely opposition from the Country Party to the loss of its own seats and co-operation from the Labor Party that both brought about the change in the law in 1964 and resulted in the abandonment of the proposals for redistribution of 1962, not any lobbying from the two State governments for the maintenance of their states' federal representation.¹⁴⁸ Therefore, it is questionable whether the existence of s 127 removed any real possibility that the two States might otherwise have enfranchised Aboriginal people, by doing so avoided the provisions of s 25 and thus also avoided the loss of a federal seat for the State. Perhaps, if s 127 had not existed, Queensland's Country/Liberal coalition in particular, no stranger to electoral jiggery-pokery at state level, would have ended its vacillation on the Aboriginal franchise¹⁴⁹ and responded to a suggestion from its friends in Canberra to fix the party-political problem caused by Queensland's imminent loss of a federal seat in the proposed 1962 redistribution by following Western Australia and enfranchising Aboriginal people in 1962 rather than waiting, as it did, until 1965. Without s 127, that step would then have removed Queensland's Aboriginal population from the exclusion effected by s 25 and in one stroke¹⁵⁰ lifted its quota above the threshold necessary to retain its existing representation. On the present hypothesis this would not have been of much importance to the State government itself, but would have instantly solved the problem faced by party allies in Canberra. Or perhaps Queensland would not have brought forward its enfranchisement of Aboriginal people even for that purpose, and s 127 actually caused no harm in its last few years — it is not possible to know what would have happened had it been repealed five or six years earlier than it was.

Certainly, though, the abortive 1962 redistribution had highlighted the importance of population figures and fractions of quotas. The repeal of s 127 was kept on the agenda and perhaps even hurried along by the need for a redistribution, well overdue by 1967, along with the desire not to hold it until a new basis for population figures had been established with the outcome of the referendum to repeal s 127.¹⁵¹

Aside from the details of constitutional quotas and population figures, however, the history of s 127 and even its short-lived West Australian predecessor shows

148 At this time, unlike today, redistributions required parliamentary approval to take effect. On the 1962 redistribution in particular, see 'Australian Political Chronicle January–June 1963' (1963) 9 *Australian Journal of Politics and History* 235, 240–2; Alan Reid, *The Power Struggle* (Shakespeare Head Press, 1969) 40–1; Whitlam, above n 146, 662–87.

149 Reid, above n 140, 76.

150 Federal legislation might have been needed in order to re-start the redistribution process on the basis of the new figures, but that could easily have been procured.

151 See the Prime Minister's answer to a question from the Leader of the Opposition in Commonwealth, *Parliamentary Debates*, House of Representatives, 28 April 1965, 923. The post-repeal population figures are shown in Commonwealth, *Gazette*, No 73, 24 August 1967, 4528; a redistribution then occurred in time for the following election, that of October 1969.

that constitutional provisions, while they may mean one thing to lawyers, are, sometimes quite wrongly in the lawyers' eyes, taken by the general public and even officials as hints at greater truths. This is a lesson that should not be forgotten as we face the prospect of again mentioning Aboriginal people in our national rule book.

