

The Racial Discrimination Act: A 40 Year Perspective

Inaugural Kep Enderby Lecture

Chief Justice Robert French AC
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Introduction

Keppel Earl Enderby QC, who died on 8 January 2015 at the age of 88, was a dedicated servant of the Australian people. He was a libertarian and a law reformer. In 1975, as Attorney-General for the Commonwealth, he introduced into the Parliament the Bill that became the *Racial Discrimination Act 1975* (Cth) ('RDA'). This evening we celebrate the 40th anniversary of that Act and Kep Enderby's life of service in the presence of his widow, Dorothy Enderby and his son, Keir.

He was born in Dubbo in 1926. He was educated at the Dubbo High School. He served with the RAAF as a trainee pilot in 1944 and 1945 and gained a law degree from Sydney University in 1950. He went to the United Kingdom for a few years where he married and had two children. He returned to New South Wales and took up practice at the Bar there in 1955. In 1962, he was appointed as a lecturer in law at the Australian National University. In Canberra he met his second wife, Dorothy, a university librarian. He recommenced practicing law in Canberra in 1966 and became an active member of the Australian Labor Party. He was appointed Queens Counsel in 1973.

Kep Enderby was elected to the House of Representatives representing the Australian Capital Territory from 1970 to 1974 and the new seat of Canberra from 1974 to 1975. He held a number of ministerial portfolios during the time of the Whitlam Government. In February 1975, after the appointment of the Commonwealth Attorney-General Lionel Murphy to the High Court of Australia, he became Attorney-General and Minister for Customs and Excise. He lost his seat in the 1975 federal election and went back to Sydney where he resumed practice at the New South Wales Bar. In 1982, he was appointed a judge of the Supreme Court of New South Wales, an office which he held until 1992. He was appointed in 1997 to head the Serious Offenders Review Council. He held that office until the year 2000.

Kep Enderby was described by one of his obituary writers as a 'good man without a malevolent bone in his body, ... [who] had passion, courage and firm convictions, but lacked guile and cynicism, [and] any instinct for compromise or patience ...'¹ Another described him as '[g]ifted, ebullient, imaginative, well dressed, with a razor sharp mind, gaunt face and beautiful speaking voice ... [who] seemed assured of the supreme merit and justice of any opinion he formed.'² The same writer described him as 'one of Australia's most significant and interesting left liberal intellectuals, who was widely respected, despite disagreements, for the passion and honesty he brought to his convictions'.³

Not all of Kep Enderby's attributes were of the kind that assures success in politics as traditionally practiced. In today's Australia they might be thought of as indicative of the presence of that political asset called 'authenticity'. Lionel Murphy, as Attorney-General for the Commonwealth, was a moving force behind the RDA but it was Kep Enderby, his successor as Attorney-General, who saw it through to enactment. It has become part of our national human rights architecture which is to be found in various anti-discrimination statutes of the Commonwealth, the States and the Territories, in implications drawn from the Constitution, in the application of the common law of Australia to the interpretation of statutes, in the Human Rights Commission and in the more recent provision for parliamentary scrutiny of national laws affecting human rights and freedoms.⁴

This lecture reflects upon the enactment and implementation of the RDA as one of a number of historic developments in Australian attitudes to race relations generally and indigenous issues in particular. The RDA was a landmark, but a landmark in a much larger and changing social, political and legal landscape. The place of the RDA in that landscape must be informed by the history of change in the 115 years that have passed since Federation.

¹ Jack Waterford, 'Kep Enderby — a good man lost in the political thicket', *The Canberra Times* (Canberra), 17 January 2015.

² Michael Easson, 'Former federal Attorney General, Kep Enderby remembered among his peers', *The Sydney Morning Herald* (Sydney), 15 January 2015.

³ Ibid.

⁴ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The idea of race

The RDA is and always was concerned not only with discrimination by reason of race, but discrimination by reason of 'race, colour, descent or national or ethnic origin'.⁵ That collocation reflects a prudent approach to the rather slippery and perhaps limiting meaning of the word 'race'. Nevertheless, that is the word in the title and the first word in the collocation of protected attributes. It is necessary to say something about its history and content.

The idea of 'race' has been described as 'controversial and complex'.⁶ Historians disagree about when it emerged as a concept. It was not used by the ancient Greeks or Romans, or by the Jews, Christians and Muslims of the Middle Ages.⁷ There were many other ways in which one group of people could characterise others to their disadvantage.

A concept of 'race' appeared in a work entitled *A New Division of the Earth*, published in 1684 by Francois Bernier who proposed that mankind could be divided into what he called 'four or five species or races of men in particular whose difference is so remarkable that it may be properly made use of as the foundation for a new division of the earth'.⁸ Their differences were defined by such features as skin tones, hair texture, bone structure and other physical attributes. Later, theories asserting and explaining racial differentiation, some of them claiming to be scientifically based, were to emerge.

A conference of experts convened by UNESCO in August 1964 adopted a set of propositions to the effect that humanity comprises a single species derived from a common stock and that pure races, in the sense of genetically homogeneous populations, do not exist in the human species. Racist theories could not pretend to have any scientific foundation, a proposition reflected in the recitals to the *International Convention on the Elimination of all Forms of Racial Discrimination*⁹ ('the Convention'). The conference, however,

⁵ *Racial Discrimination Act 1975* (Cth), s 9.

⁶ Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-discrimination Law* (The Federation Press, 2nd ed, 2014) 181.

⁷ Michael James, 'Race', in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Fall 2015 Edition), <<http://plato.stanford.edu/archives/fall2015/entries/race>.

⁸ Ibid.

⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

acknowledged the reality that popular notions of race frequently disregard the scientific evidence.¹⁰

Contemporary thinking about race seems to be divided into a number of schools. There are sceptics who say that the term does not refer to anything real and should be discarded altogether. Others say, in effect, that races exist because humans invent them. They are, to use a polite term, cultural constructs. Race is distinguished from ethnicity, which is taken to refer to common ancestry based on cultural attachments, past linguistic heritage, religious affiliations, claimed kinship and some physical traits. One racial category may encompass multiple ethnic identities. The so-called 'negro race' has been described as created by white colonisers to bring under one heading the many ethnic groups in the African colonies or who had been taken as slaves to America.

The meaning of 'race' for constitutional purposes was discussed by Sir Gerard Brennan in the *Tasmanian Dam case*.¹¹ He was there concerned with the nature of the power conferred upon the Commonwealth Parliament by s 51(xxvi) of the Constitution to make special laws for the people of any race. He described 'race' as 'not a precise concept'.¹² He accepted that membership of a race imported a biological history or origin common to other members of the race. He described the interface between the concept of race and the race power, saying:

As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power ...¹³

Those who believe in the existence of 'race' as a valid cultural construct are not on that account racist although the categorisation is indispensable to racism. That term, applied to human conduct and attitudes, is said to have emerged in the early 1930s. It was used to

¹⁰ *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1, 243 citing Herman Santa Cruz, 'Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres UN Doc E/CN. 4/Sub 2/307/Rev.1 (1971), 12–13.

¹¹ *Ibid* 243–44.

¹² *Ibid* 243, reflecting a similar observation by Lord Simon of Glaisdale in *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362.

¹³ *Ibid* 244.

describe and attack the doctrines of racial superiority and inferiority and the anti-Semitic policies of the Nazi Party in Germany.¹⁴ Its roots in individual and social psychology are complex and the subject of a substantial literature.

Each of the categories — race, colour, descent or national or ethnic origin — used in the RDA overlap. Their important characteristic is that they describe classifications of people based upon factors of ancestry, culture and history which are largely beyond the control of the people so classified, except perhaps to the extent that the category of race includes persons who self-identify as members of a particular race. It is the largely involuntary feature of those categories and their irrelevance to the human dignity and to the fundamental rights and freedoms of people within those classifications that are critical. They inform the prohibitions against adverse discrimination found in innumerable international instruments and domestic constitutions and, of course, in the RDA itself. Before turning to the RDA and its international setting, it is necessary to put it briefly into a larger historical context of changing attitudes to race in Australia.

In the beginning — British Australia

A starting point for that consideration is late 19th century Australia. The vision of Australians as a people of British stock and exclusive of perceived non-white races was an important element of pre-federation colonial societies. Legislation restricting non-white immigration, particularly Chinese immigration, was a feature of the colonial statute books before federation. The colonial vision of Australian demography was reflected in the inclusion in the Constitution of the race power. In the Constitution as adopted and as in force in 1901, s 51(xxvi) conferred upon the Commonwealth Parliament the power to make laws for the peace, order and good government of the Commonwealth with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.

¹⁴ Rees, Rice and Allen, above n 5, 182, citing Anne-Marie Mooney Cotter, *Race Matters: an international legal analysis of race discrimination* (Ashgate, 2006) 8–9.

Sir Samuel Griffith was the principal proponent of the inclusion of the race power and that it should be exclusive of the power of the States. Sir Edmond Barton, later to become Australia's first Prime Minister and one of the three founding members of the High Court, led by Griffith as first Chief Justice, explained the original intention of the race power as being:

to deal with the affairs of such persons of other races—what are generally called inferior races, though I do not know with how much warrant sometimes—who may be in the Commonwealth at the time it is brought into existence, or who may under the laws of the Commonwealth regulating aliens come into it.¹⁵

Barton argued that there were 'few questions of more importance than this'.¹⁶

The views expressed in the Convention Debates reflected cultural attitudes which informed a nascent nationalism. Professor Helen Irving, while observing that 'the issue of colour was unequivocally a racist issue', said it was 'also a type of cultural strategy in the process of nation building'.¹⁷ Bob Birrell in similar vein wrote of Deakin's parliamentary call in 1901 for 'a united race' as reflecting an 'aspiration for a shared sense of peoplehood ... to be expected from a nationalist initiating the process of nation building'.¹⁸ To say that is not to say that colonial attitudes to race were good or useful. It is simply to say that they were an historical reality which played a part in the shaping of our Constitution.

The significance of the race issue in the context of immigration was reflected in the alacrity with which the newly created Commonwealth Parliament enacted the *Immigration Restriction Act 1901* (Cth), described in its long title as:

An Act to place certain restrictions on Immigration and to provide for the removal from the Commonwealth of prohibited Immigrants.

¹⁵ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 228.

¹⁶ *Ibid* 238.

¹⁷ Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, updated edition, 1999) 100.

¹⁸ Bob Birrell, *Federation: The Secret Story*, (Duffy & Snellgrove, 2001) 287.

The Act prohibited the immigration into Australia of '[a]ny person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer.'¹⁹ The 'dictation test' was a device for the implementation of a racially discriminatory policy. As Evatt J said in *R v Carter; Ex parte Kisch*:

as we all know, the dictation test was a means devised in order to confer a discretion upon the authorities concerned with the administration of the Act.²⁰

It remained in force until the 1950s and the enactment of the *Migration Act 1958* (Cth) which introduced a system of entry permits, the precursor of today's visa system.

It is a singular feature of the Convention Debates on the race power that there was barely any reference to the indigenous people of Australia. The power had nothing to do with them. It was all about 'coloured people of "inferior races" from outside Australia who had been or might in the future be admitted to the country'. The affairs of indigenous people were to be left to the States — not to their advantage.

Changing the race power

There is a long history of efforts to change the race power to remove the exclusion of Aboriginal people from it so that the Commonwealth could legislate for their benefit.²¹ Those efforts date back to 1910. They did not gain real momentum until the 1960s. Public awareness and discussion of indigenous issues generally and about the place of Aboriginal people under the Constitution²² increased and was no doubt enhanced by events such as the Yirrkala people's bark petition and the Gurindji people's walk off from the Wave Hill cattle

¹⁹ *Immigration Restriction Act 1901* (Cth), s 3(a).

²⁰ (1934) 52 CLR 221, 230.

²¹ See generally on the history and interpretation of the race power: Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180–212.

²² J Summers, 'The Parliament of the Government of Australia and Indigenous Peoples 1901-1967' in G Lindell and R Bennett (eds) *Parliament: The Vision in Hindsight* (Federation Press, Sydney 2001) 149.

station. There were some unsuccessful attempts to amend the Constitution in relation to the race power.

In 1967, Prime Minister Harold Holt introduced, into the House of Representatives, a Bill which proposed the removal of the words 'other than the aboriginal race in any State' from s 51(xxvi). He described the object of the amendment as giving the Commonwealth Parliament power to make special laws for Aborigines which, in cooperation with the States, would secure the widest measure of agreement with respect to Aboriginal advancement.²³ The Leader of the Opposition, Mr EG Whitlam, supported the Bill. The amendment went to a referendum and the exclusion of Aboriginal and Torres Strait Islander peoples from the scope of the race power was finally removed. The rather odd result was that a legislative power conceived with adverse discrimination as an important element of its purpose was broadened with a beneficial purpose to enable its application to Aboriginal and Torres Strait Islanders.

Despite that broadening, the race power has been construed in the High Court as still authorising the enactment of laws which impose obligations or disadvantages upon people of a particular race as well as laws for their benefit.²⁴ Sir Ninian Stephen described the power in uncompromising terms in his judgment in *Koowarta v Bjelke-Petersen*:

The content of the laws which may be made under it are left very much at large; they may be benevolent or repressive; they may be directed to any aspect of human activity; so long as they are with respect to the people of a race such as is described in par (xxvi) they will be within power.²⁵

Race generally was a national political issue in the 1960s and early 1970s. Australia's discriminatory migration policy came under increasing pressure. A prominent public figure on the conservative side in the debate about immigration policy was BA Santamaria, who employed several arguments including the proposition that Christian principles were inconsistent with a discriminatory and exclusive policy and that there was a need to have a

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, 263 (Harold Holt).

²⁴ *Western Australia v Commonwealth (Native Title Act case)* (1995) 183 CLR 373, 461–6; a decision which accepted as 'special' the laws conferring rights or benefits or imposing obligations or disadvantages especially on the people of a particular race.

²⁵ (1982) 153 CLR 168, 209.

policy reflecting the realities of our region.²⁶ He called for the adoption of 'Cultural pluralism', an idea ahead of its time in Australia in 1959 when he expounded it.²⁷ Gradually the discriminatory policy was abandoned. Today, Australians come from 180 different countries. According to the 2011 census, 46 per cent of Australians were either born overseas or had at least one parent born overseas. The proportion of the overseas born population originating from Europe had declined to 40 per cent from 52 per cent in 2001. The proportion born in Asia was 33 per cent of the overseas population. The largest growing groups between 2001 and 2011 came from India and China.²⁸

Race relations in the 1970s

The beginning of the 1970s saw significant community debate and protest activities associated with the tour of the racially selected Springbox rugby team from South Africa and later a cricket team. Supporters of the tours argued that politics should be kept out of sport. Given that the teams were racially selected as an apparent expression of the South African regimes apartheid policy that was a difficult position to maintain. Nevertheless, it gave a deal of comfort to those who did not want to confront the moral questions raised by welcoming a team which was, in an institutional sense, a travelling embassy for white South Africa.

There was also in the 1970s an increasing recognition of the disadvantage faced by Australia's indigenous people in a variety of ways and in particular in their interactions with the criminal justice system. Government Ministers in Western Australia at the beginning of the decade rebuffed proposals for special training for police officers and justices of the peace who had frequent contact with indigenous people. They argued that everybody was equal before the law. Their responses reflected a common misunderstanding of the difference between formal equality before the law and equal justice. In the event, attitudes changed. The 1970s saw the establishment of Commonwealth Government funded Aboriginal Legal Services. Much later, attitudes to judicial education were to shift nationally in the direction of indigenous cultural awareness training for judges and magistrates, programs which have

²⁶ BA Santamaria, 'What is to be done?' *Rural Life*, (June 1959) 52, 52.

²⁷ Ibid 55.

²⁸ Australian Bureau of Statistics, *Cultural Diversity in Australia - Reflecting a Nation: Stories from the 2011 Census* (16 April 2013).

now been in place for many years. More recently, the establishment of the Judicial Council on Diversity, supported by the Council of Chief Justices and the Migration Council of Australia, is directed to developing programs for diminishing the disadvantages suffered by members of different ethnic groups in their interaction with the judicial system.

Land rights, native title and the RDA

Another strand in the legal history of race relations in Australia, which interacted in an important way with the enactment and operation of the RDA, was the recognition at common law of customary native title. That history began unpromisingly in 1971 when Blackburn J in the Supreme Court of the Northern Territory in *Milirrpum v Nabalco Pty Ltd*²⁹ held that there was no common law doctrine of native title in Australia. He held that on the basis of a Privy Council decision in 1889, which he was bound to apply. That was so even though the evidence of indigenous law and custom before him showed what he called a 'subtle and elaborate system highly adapted to the country in which the people led their lives', a system which he was prepared to characterise as a government of laws and not of men.³⁰ The national conscience was moved to some extent by that case and in 1974 the Woodward Royal Commission was established which led to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* ('Land Rights Act'). That Act established a regime for the grant of statutory land rights to traditional land owning groups in the Northern Territory. It led to much litigation. No less than 14 cases in the High Court concerned the administration of the Act between its enactment and 1993. Ron Castan QC, who was to appear for John Koowarta in the successful defence against Queensland's challenge to the validity of the RDA in 1982, appeared in no less than seven of those land rights cases. The litigation exposed the High Court repeatedly to the concept of traditional land ownership which was embedded in the Land Rights Act. The values underlying the Act which had been expounded in the Woodward Report, as including 'simple justice', would not have been lost on the Court when it held in *Mabo (No 2)* that the common law of Australia could recognise traditional native title.³¹

²⁹ (1971) 17 FLR 141.

³⁰ Ibid 267.

³¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

Looking forward briefly to the 1980s, the RDA was to play an important part in the establishment and maintenance of the native title regime defined by the common law and the *Native Title Act 1993* (Cth). In *Mabo (No 1)*,³² decided in 1988, four years before common law recognition of native title, the High Court held that a legislative attempt by Queensland to extinguish native title in that State, if it existed, was invalid for inconsistency with the RDA. That decision marked a vital intersection between the RDA and customary native title and one which was to be of significance for all dealings under State or Territory laws since 1975 which had extinguished or impaired native title rights and interests without compensation. It also had significance for future Acts having such effects. Western Australia, undaunted by the fate of the Queensland statute struck down in *Mabo (No 1)*, enacted a *Land (Titles and Traditional Usage Act) 1993* (WA) to extinguish common law native title and replace it with statutory titles. The provision having that effect was held in the *Native Title Act case*³³ in 1995, to be invalid for inconsistency with s 10(1) of the RDA. That section provides:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

The RDA to this day acts as a protection against the uncompensated extinguishment or impairment of native title, other than as authorised by the *Native Title Act 1993* (Cth). More generally the RDA overrides inconsistent State laws by operation of s 109 of the Constitution. To that extent it can be said to have constitutionalised a norm of international law against racial discrimination.

³² *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

³³ *Western Australia v Commonwealth* (1995) 183 CLR 373.

The international law setting for the RDA

International recognition of fundamental human rights and freedoms and the norm of non-discrimination on grounds of race, national or ethnic origin, can be traced from the *Charter of the United Nations*,³⁴ through the *Universal Declaration of Human Rights*,³⁵ to the *United Nations Declaration on the Elimination of all Forms of Racial Discrimination*,³⁶ the *International Covenant on Civil and Political Rights*³⁷ and the *Convention*. Numerous other international and regional treaties derived their content from those basic documents or contained similar provisions.

The *Convention* recites that the *Charter of the United Nations* is based on the principle of the dignity and equality inherent in all human beings and that everyone is entitled to all the rights and freedoms set out in the *Universal Declaration of Human Rights* without distinction of any kind, particularly as to race, colour or national origin. The *Convention* also recites the conviction of the States Parties that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous and that there is no justification for racial discrimination in theory or in practice.

A central operative provision is Art 2.1(d) in which each State Party agrees to:

Prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization ...

By Art 5 all State Parties undertake to prohibit and to eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, national or ethnic origin, to equality before the law, notably in the enjoyment of an extensive list of rights, civil, political, social, economic and cultural.

³⁴ *Charter of the United Nations* arts 1(3), 13(1)(a), 55(c) and 76(c).

³⁵ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) arts 2 and 16(1).

³⁶ *United Nations Declaration on the Elimination of all Forms of Racial Discrimination*, GA Res 18/1904, UN GAOR 18th session, 126th plen mtg, Agenda Item 43, UN Doc A/Res/18/1904 (20 November 1963).

³⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 4(1), 24(1) and 26.

An important qualification on the operation of the *Convention* and on that of the RDA was pointed out by Sir Anthony Mason in his judgment in *Gerhardy v Brown*³⁸ when he said:

The Convention does not impose an obligation on a nation which is party to the Convention to introduce such human rights and fundamental freedoms; instead, it imposes an obligation to eliminate racial discrimination in relation to such rights and freedoms and to guarantee equality before the law in the enjoyment of them.³⁹

Against that background we can look to the enactment history of the RDA.

The enactment of the RDA

Four versions of the Racial Discrimination Bill were introduced to Parliament between 1973 and 1975. The first three versions of the Bill were introduced by then Attorney-General Lionel Murphy on 21 November 1973, 4 April 1974 and 31 October 1974. None of them reached the stage of debate in the Senate, the third Bill lapsing with the general election in 1974.

On 13 February 1975, following Gough Whitlam's re-election, the *Racial Discrimination Bill 1975* (Cth) was introduced for a fourth time into the House of Representatives, this time by the new Attorney-General Kep Enderby. That Bill was identical to the Bill introduced on the 31 October 1974. The Bill was fiercely debated in the House before passing into the Senate in May 1975 where it was again debated over a number of days, returned to the House of Representatives with amendments and eventually passed, receiving Royal Assent on 11 June 1975.

In his second reading speech to the 1975 Bill, Kep Enderby linked the proposed legislation to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*, and outlined the role which it was hoped the legislation would play in the elimination of racial discrimination. He said:

³⁸ (1985) 159 CLR 70.
³⁹ Ibid 97.

Legislation has a vital role to play in the elimination of racial discrimination and the enactment of this Bill is a fundamental step, a condition precedent, it could be said, that must be taken if Australia is to ratify the Convention. The common law provides few effective remedies against discrimination in the exercise of human rights, whether it is based on race or colour or on any other grounds. The proscribing of racial discrimination in legislative form will require legal sanctions. These will also make people more aware of the evils, the undesirable and unsociable consequences of discrimination - the hurtful consequences of discrimination - and make them more obvious and conspicuous.⁴⁰

Like Lionel Murphy, he believed that the Bill would perform an important educative function. Like Murphy, he also saw the Bill as a causative factor in changing community attitudes.

The time at which the RDA became law was propitious. Australians had come a long way since the White British nationalism that informed the race power and the *Immigration Restriction Act 1901* (Cth). They had come a long way in relation to indigenous relations, although in race relations and indigenous issues generally there was still a long way to go.

The challenge to validity — Koowarta's case

The distance yet to be travelled in 1975 was reflected in the first challenge to the validity of the RDA in *Koowarta v Bjelke-Petersen*.⁴¹

In 1974 the Aboriginal Land Fund Commission agreed to take a transfer of a Crown Lease of a pastoral property in Queensland for the benefit of an Aboriginal Group of which John Koowarta was a member. The Queensland Government refused consent to the transfer under the *Land Act 1962* (Qld) in furtherance of a government policy opposing the acquisition by Aboriginal people of large areas of land in the State. Koowarta sued the Premier and other members of the Queensland Government for damages under s 25 of the RDA, a provision repealed in 1999. The defendants asserted that the Act was invalid. At the same time the

⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (Kep Enderby).

⁴¹ (1982) 153 CLR 168.

State of Queensland brought an action in the High Court against the Commonwealth claiming a declaration that the Act was invalid.

John Koowarta was represented in the High Court by Ron Castan QC who had already featured prominently, and was to feature prominently, in the Northern Territory land rights cases, as counsel for the Merriam People in *Mabo (No 1)* and in *Mabo (No 2)*. As junior counsel appearing with Ron Castan in *Koowarta* were Paul de Jersey, later to become Chief Justice of Queensland and now the Governor of Queensland and Tony Skoien, who later became a judge of the District Court of Queensland. The Commonwealth intervened to support the validity of the Act. The Solicitor-General, the late Sir Maurice Byers QC, represented the Commonwealth. Ian Hanger from Queensland and I were his junior counsel. Queensland was represented by David Jackson QC, with Martin Moynihan QC, who was later to be the trial judge hearing the evidence and finding the facts upon which the High Court founded its recognition of native title in *Mabo (No 2)*. Darryl Dawson QC, then the Solicitor-General for the State of Victoria, intervened on behalf of both Western Australia and Victoria supporting Queensland's challenge. He was later appointed to the High Court. His junior, Ross Sundberg was later a member of the Federal Court of Australia.

The sections of the RDA in issue were ss 9 and 12. Section 9(1) relevantly provides:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Section 12 prohibits racial discrimination in relation to the disposal of estates or interests in land or residual or business accommodation.

Two provisions of the Commonwealth Constitution were in issue. The primary provision relied upon by the Commonwealth was the power of the Parliament to make laws with respect to external affairs conferred by s 51(xxix). That was invoked upon the basis that the RDA gave effect to the Convention. That was the basis upon which four of the seven Justices held that the challenged provisions of the RDA were valid. This might be seen as

globalisation at work through the nation's Constitution. The High Court upheld the validity of laws made by the Australian Parliament which imported norms of conduct derived from international law and applied them to the way in which Australians were to deal with each other. Sir Ninian Stephen, who was part of the majority, encapsulated the point:

The great post-war expansion of the areas properly the subject-matter of international agreement has ... made it difficult indeed to identify subject-matters which are of their nature not of international but of only domestic concern ... But this does no more than reflect the increasing awareness of the nations of the world that the state of society in other countries is very relevant to the state of their own society.⁴²

The race power was held not to support the RDA, because the Act applied equally to all persons and was therefore not a special law for the people of any one race.

The Bjelke-Petersen government deprived Koowarta of the fruits of his victory by converting the pastoral lease to a national park. Koowarta died in 1991. In 2010, Premier Anna Bligh procured the enactment of a law revoking part of the national park. In 2012, her successor Premier Campbell Newman went to Cape York with the title deeds and apologised for what he described as a great injustice perpetrated 35 years before.⁴³

Co-existence with State anti-discrimination laws

In the years since its enactment, the RDA has been tested and applied in a variety of ways in the courts. A year after *Koowarta* the High Court held a provision of the *Anti-Discrimination Act 1977* (NSW) to be inconsistent with the RDA and therefore invalid pursuant to s 109 of the Constitution.⁴⁴ That was on the basis that the RDA was intended to be exhaustive and exclusive and 'intended as a complete statement of the law for Australia relating to racial discrimination'.⁴⁵

⁴² *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 217.

⁴³ Gerhardt Pearson, 'Newman Closes 35 years of Injustice with return of land', *The Australian* (Australia), 26 May 2012.

⁴⁴ *Viskauskas v Niland* (1983) 153 CLR 280.

⁴⁵ *Ibid* 292 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ).

The RDA was amended in 1983 to include a provision that it was 'not intended and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory' that furthered the objects of the Convention.⁴⁶ That cured the ongoing problem, but in *University of Wollongong v Metwally*⁴⁷, the Court held that the amendment did not give the State Act a valid operation prior to the coming into effect of the amendment. In the event, there is an array of Commonwealth and State anti-discrimination statutes which co-exist and provide overlapping protections not just with respect to race but with respect to other classifications such as gender, marital status, age, and disability.⁴⁸

Special measures

The prohibition of various forms of racial discrimination reflected in ss 9 and 11 to 18 of Pt II of the RDA were subject to an exception in s 8(1). The section provided that Pt II does not apply to 'special measures to which paragraph 4 of Article 1 of the Convention applies...'. That encompasses special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms. Such measures under the *Convention* will not be deemed to be racial discrimination provided that they don't lead to the maintenance of separate rights for different racial groups and shall not be continued after the objects for which they were taken have been achieved.⁴⁹

The High Court in *Gerhardy v Brown*⁵⁰ held that s 9 of the *Pitjantjatjara Land Rights Act 1981* (SA), which restricted access by non-Pitjantjatjara people to Pitjantjatjara lands, was a 'special measure' within s 8 of the RDA and therefore a valid law of the parliament of South Australia. If it had not been a special measure it would have been invalid for inconsistency under s 10 of the RDA.

⁴⁶ *Racial Discrimination Amendment Act 1983* (Cth).

⁴⁷ (1984) 158 CLR 447.

⁴⁸ *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act* (NT).

⁴⁹ *Convention* art 1(4).

⁵⁰ (1985) 159 CLR 70.

The application of the special measures exemption was considered more recently in the High Court in *Maloney v The Queen*.⁵¹ There the Court held that legislative restrictions upon the possession of alcohol in an Aboriginal community on Palm Island were valid. The special measures exemption is not without difficulty because, as framed in Art 1 of the Convention, it involves evaluative judgments about which there may be vigorous disagreement. Nevertheless, the criterion is imported into the Act and where its application is contested and the contest comes to court, the court must decide it.

The remedial provisions

Part III of the Act provides for remedies for contraventions. They were the subject of comment in the High Court in a case in 1997 concerning a Vietnamese man of limited fluency in English who had allegedly breached a community-based order for which he had been sentenced for a criminal offence. He claimed that by reason of his language difficulties and the absence of an interpreter he was unable properly to instruct his lawyers and was a victim of racial discrimination. He relied upon s 9 of the RDA. He sought declarations and certiorari in the original jurisdiction of the High Court naming judicial officers as defendants. His application was dismissed on a variety of grounds. The Court observed of the remedial provisions of Pt III of the RDA that its elaborate and special scheme:

was plainly intended by the Parliament to provide the means by which a person aggrieved by a contravention of s 9 of the Act might obtain a remedy, and thus was regarded by Parliament as fulfilling Australia's treaty obligations, bearing always in mind the legal structure and system which formed the context in which the Act was to operate.⁵²

Part of that context was the availability of appeal and review processes in the Victorian State courts. His failure in those courts 'resulted not from any inability of the general law, or the

⁵¹ (2013) 252 CLR 168.

⁵² *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 365 [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

legal system, to provide a remedy for the alleged unfairness or injustice, but from the view which the Victorian courts took of the facts of the case.⁵³

Racial vilification

A particularly contentious area of the RDA in recent times has been Pt IIA, which was inserted by the *Racial Hatred Act 1995* (Cth). That Part is entitled 'Prohibition of offensive behaviour based on racial hatred'. It includes s 18C which provides that:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate, or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.

These provisions may be related, in part although not entirely, back to Art 4(a) of the *Convention* under which the States Parties agree that they:

Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

The Article required that in imposing such prohibitions, the States were to have due regard to the principles embodied in the *Universal Declaration of Human Rights* which, of course, include freedom of speech and association.⁵⁴ The drafting of the Article was difficult and

⁵³ Ibid 365 [27].

⁵⁴ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), arts 19 and 20.

some 18 States Parties entered reservations and/or interpretive reservations with respect to it.⁵⁵

The tension that was associated with the drafting of Art 4, between prohibition of racial vilification and the protection of freedom of speech and association, is reflected in debates about the offensive conduct limb of s 18C in Australia. I do not express any view about the policy questions with which those debates are concerned. I simply note that there have been a number of decisions dealing with the application of the provision at the Federal Court level, one of which I participated in in 2004 concerning a satirical cartoon and in which a good faith defence, for which s 18D provides, was held to apply.⁵⁶ No doubt the debate will continue.

Conclusion

The RDA has become a well-established part of Australia's national human rights architecture. I have emphasised the highly visible aspects of its operation in high profile litigation. However, the great bulk of its work is done administratively in the complaint and conciliation process and, more broadly, in educative processes including those undertaken by the Human Rights Commission. The last Annual Report of the Commission recorded that there were some 380 complaints received under the RDA in 2013-2014, down from 500 in the previous year. Thirty six per cent of the complainants were Aboriginal people. A significant proportion of the complaints are from people born outside Australia, but a roughly equivalent number from people born in Australia. Complaints have related to employment, the provision of goods and services and allegedly racial hatred conduct. Of the 380 complaints received in 2013-2014, eighteen were categorised as vexatious or lacking in substance, 101 were discontinued or withdrawn and 209 were conciliated.⁵⁷

The legislative and institutional arrangements that now exist at Commonwealth and State level in relation to discriminatory conduct have marked a significant advance in race relations in Australia. They have not eliminated prejudice or discrimination, nor are they

⁵⁵ Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *The International Comparative Law Quarterly* 966, 1021–24.

⁵⁶ *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

⁵⁷ Australian Human Rights Commission Annual Report 2013–2014 (Australian Human Rights Commission, 4 March 2015) 132-154.

likely to in the foreseeable future. Surveys conducted by the Scanlon Foundation in 2014⁵⁸ and by the University of Western Sydney, in collaboration with Macquarie University, Melbourne University and Murdoch University between 2001 and 2008, found a significant number of Australians who agree that racial prejudice continues to exist in this country.⁵⁹ There is a significant number of people who claim to have experienced verbal racial abuse and some who claim to have experienced violence in physical form.⁶⁰

It is necessary to take a long view of the future as well of the past. The elimination of racial prejudice and discrimination will not be achieved by laws alone. It is only the generational changing of attitudes that will bring us closer to that goal. The RDA has played its part in promoting that change over the last 40 years. Kep Enderby, as one of its architects, would have much to be proud of in what has been achieved.

⁵⁸ Professor Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2014*, Monash University, <<http://scanlonfoundation.org.au/wp-content/uploads/2014/10/2014-Mapping-Social-Cohesion-Report.pdf>>.

⁵⁹ University of Western Sydney, *Challenging Racism: The Anti-Racism Research Project – National Level Findings*, <http://www.uws.edu.au/__data/assets/pdf_file/0007/173635/NationalLevelFindingsV1.pdf>.

⁶⁰ Tim Soutphommasane, *I'm Not Racist But...40 Years of the Racial Discrimination Act* (New South Publishing, 2015) 7.