

ABORIGINALITY UNDER THE MICROSCOPE: THE BIOLOGICAL DESCENT TEST IN AUSTRALIAN LAW

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I INTRODUCTION

In the era of colonial and post-colonial government, access to basic human rights depended upon your race. If you were a ‘full blooded Aboriginal native...[or] any person apparently having an admixture of Aboriginal blood’,¹ a half-caste being the ‘offspring of an Aboriginal mother and other than Aboriginal father’ (but not of an Aboriginal father and other than Aboriginal mother),² a ‘quadroon’,³ or had a ‘strain’ of Aboriginal blood you were forced to live on Reserves or Missions, work for rations, given minimal education, and needed governmental approval to marry, visit relatives or use electrical appliances.⁴ The legacy of denial of education, self-government and dignity is omnipresent today.

In an effort to redress the disadvantage of the past,⁵ equal opportunity legislation has been passed to provide certain statutory rights and privileges for the exclusive benefit of indigenous people. These Acts offer the opportunity to claim native title, stand for election to the Aboriginal and Torres Strait Islander Commission (ATSIC), have indigenous cultural heritage protected, apply for specified government-funded jobs and receive financial assistance while studying. However to access these legislative benefits Aboriginal people must prove their Aboriginality by means of a test devised not by the legislatures, but by judges.

The test has three elements, all of which must be proved by the person claiming to be Aboriginal: the person must identify as Aboriginal, the Aboriginal community must recognise the person as Aboriginal, and the person is Aboriginal by way of descent.⁶ Descent has been judicially interpreted to mean genealogical descent provable by

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¹ *Liquor (Amendment) Act 1905* (NSW) s 8(4).

² *The Aborigines Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 4.

³ *Aborigines Act Amendment Act 1936* (WA) s 2.

⁴ By virtue for example of the Queensland *Aboriginal Protection Acts* which continued in force until 1984.

⁵ Preamble and s 3 of both the *Native Title Act 1993* (Cth) and the *Aboriginal and Torres Strait Islander Commission Act 1989*.

⁶ *Tasmania v Commonwealth* (1984) 158 CLR 1, 273-4.

quantum of 'Aboriginal genes'.⁷ This test reflects a misunderstanding of the scope of genetic science. Though science can show a person is descended from particular ancestors it cannot prove that that descent is Aboriginal. A test of eligibility for benefits based on proof of Aboriginality according to Aboriginal laws and customs and administered by Aboriginal people would serve the same purpose as the biological descent test without its potentially divisive effects.

II CONQUER AND DIVIDE

The story begins where it ends: Tasmania. In 1984 the State of Tasmania challenged the constitutional power of the Federal Parliament to pass the *World Heritage Properties Conservation Act 1983* (Cth).⁸ This Act aimed to protect caves of historical and religious significance where Aboriginal people had lived for tens of thousands of years from being flooded under a state hydro-electricity scheme. The Commonwealth argued *inter alia* that the Act was a special law made under the 'race' power⁹ necessary to protect Aboriginal heritage. The matter was heard by the Full Court of the High Court. Only two of the judges, Brennan and Deane JJ, discussed the meaning of 'Aboriginal race'. Both based their analyses on the popular or common meaning of race as observable human differences derived from common ancestry. Brennan J referred to a 1971 UNESCO study which found

that all men living today belong to a single species and are derived from a common stock (Art I); that pure races in the sense of genetically homogeneous populations do not exist in the human species (Art III); and that there is no national, religious, geographic, linguistic or cultural group which constitutes a race *ipso facto* (Art XII). The proposals [from the study] concluded:

'The biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any scientific foundation'.¹⁰

In open contradiction to these findings however, his Honour held that a culturally determined test of identification was not conclusive or exhaustive of what 'race' means.¹¹ Biology was the underlying 'essential element of membership of a race'.¹² While self and group identification might create a sense of identity with the group, it was not proof of belonging to it. The biological element was essential:

Membership of a race imports a biological history or origin which is common to other members of the race...Actual proof of descent from ancestors who were acknowledged members of the race or actual proof of descent from ancestors none of whom were members of the race is admissible to prove or to contradict, as the case may be, an assertion of membership of the race...genetic heritage is fixed at birth; the historic,

⁷ *Queensland v Wyvill* (1989) 90 ALR 611, 615.

⁸ *Tasmania v Commonwealth* (1984) 158 CLR 1.

⁹ Section 51(xxvi) of the Australian *Constitution* provides that the Federal Parliament has power to make laws with respect to 'The people of any race for whom it is deemed necessary to make special laws'. The phrase 'other than the aboriginal race in any State' had been deleted as a result of the 1967 referendum.

¹⁰ *Tasmania v Commonwealth* (1984) 158 CLR 1, 243.

¹¹ *Ibid* 244.

¹² *Ibid*.

religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide.¹³

However it was Deane J's more succinct test of descent, self-identification and community identification which became the current test of Aboriginality. His Honour held that to understand the meaning of 'Aboriginal' it was necessary to look at the common understanding of the word:

Plainly, the words ['people of any race' in s 51(xxvi)] have a wide and non-technical meaning...The phrase is, in my view, apposite to refer to all Australian Aboriginals collectively...The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aboriginals. By "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal.¹⁴

The sting in the tail is still there. Deane J gauges Aboriginality, first by reference to the conventional (meaning non-indigenous) definition, and second, against a norm in which race is defined by 'blood', the references to racial sub-groups and mixed descent being gratuitous examples of a legal analysis based on the very divisions rejected by the UNESCO study.

One hundred and fifty-four years earlier, in 1830, a notorious military operation known as the 'Black Line' engaged 2000 men to sweep across Tasmania from north to south.¹⁵ The aim was to herd all Aboriginal people into two small peninsulas. However many escaped into the bush. Others were taken to Victoria or kidnapped and taken to offshore islands.¹⁶ The government and the history books recorded that there were no Tasmanian Aborigines left.¹⁷ The Aboriginal groups, now geographically separated, each believed they were the only survivors. Culture, descent and customary laws were severely disrupted. In the face of the official policy that no Aboriginal people were left on the island, indigenous people concealed their Aboriginality from outside view.¹⁸ Dark skin, brown eyes and black hair were explained to outsiders as being inherited from migrants to Tasmania such as Maoris¹⁹ or Indians.²⁰ Despite this, the people themselves maintained their Aboriginal culture and identity.²¹

The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) aims to provide maximum participation of Aboriginal persons and Torres Strait Islanders in their own self-determination and self-management. This includes the right to stand for election and to vote for quasi self-governing regional councils which fall under the umbrella of the Aboriginal and Torres Strait Islander Commission. The Commission itself is a government-like structure with both elected positions and its own bureaucracy. The

¹³ Ibid.

¹⁴ Ibid 273-4.

¹⁵ *Shaw v Wolf* (1999) 163 ALR 205, 217.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ L Ryan *The Aboriginal Tasmanians* (2nd ed, 1996) extracts of which were tendered in evidence by the petitioners in *Shaw v Wolf* (1999) 163 ALR 205, 217 et seq.

¹⁹ Evidence of the 8th respondent in *Shaw v Wolf* (1999) 163 ALR 205, 248.

²⁰ Evidence of the 3rd respondent in *Shaw v Wolf* (1999) 163 ALR 205, 232.

²¹ *Shaw v Wolf* (1999) 163 ALR 205, 217.

process of appointment to the bureaucracy or election to the councils, having been drafted by Canberra, does not necessarily reflect Aboriginal customary governance by elders who have passed through stages of understanding and knowledge.

Section 4(1) of the Act defines ‘*Aboriginal person*’ as a ‘person of the Aboriginal race of Australia’ and ‘*Torres Strait Islander*’ as a ‘descendant of an indigenous inhabitant of the Torres Strait Islands’. This distinction also exists in other beneficial legislation, for example the *Native Title Act 1993* (Cth) and the *Indigenous Education (Targeted Assistance) Act 2000* (Cth). The difference in wording has produced two separate tests of eligibility for the same legislative benefits. Merkel J offered an explanation in *Shaw v Wolf*: the word ‘race’ imports a meaning of community and self-identity and implies more than descent.²² Therefore descent alone is not sufficient to prove Aboriginality.²³ There have been few cases which have demanded proof of identity of Torres Strait Islanders; in *Mabo v Queensland (No 2)*, for example, the identity of the plaintiffs as Torres Strait Islanders was not in issue.²⁴ It is not possible therefore to say definitively by what means Torres Strait Islanders would prove their descent. As there are over 10,000 people who identify as both Torres Strait Islander and Aboriginal,²⁵ it would be a moot point as to which test of eligibility they would be subjected to.

The issue of who is and who is not Aboriginal for the purposes of voting and being elected to the Tasmanian regional councils of the Commission has split the Tasmanian Aboriginal population as Aborigine challenges Aborigine. An elder, obviously distressed, told the court in *Shaw v Wolf*:

I am 60 years old and found it absolutely heartbreaking that all my life, myself and my family have identified as Aboriginals and that two people can come along and try to take that away from me.²⁶

A former ATSIC regional councillor who was rejected as Aboriginal by the Tasmanian Aboriginal Corporation has offered to “prove” his Aboriginality by DNA testing.²⁷

In 2002, after acrimonious public debate including the 1998 Federal Court case of *Shaw v Wolf*, the Aboriginal and Torres Strait Islander Commission instituted an indigenous electoral roll for Tasmania. To be placed on the roll people must prove not only that they identify as Aboriginal but that they are recognised by Aboriginal communities and are descended by means of a direct genealogical link from the original Tasmanians. The Act provides that a voter or elector must be an Aboriginal person or a Torres Strait Islander.²⁸ One thousand one hundred Tasmanians had their Aboriginality challenged when they tried to enrol.²⁹ On 18 October 2002 Downes J of the Administrative Appeals

²² Ibid 210.

²³ Ibid; also *Attorney General (Cth) v State of Queensland* (1990) 94 ALR 515.

²⁴ (1992) 175 CLR 1, 16-20.

²⁵ According to the Australian Bureau of Statistics *1996 Census of Population and Housing Australia*, <<http://www.abs.gov.au/websitedbs/d3310108.nsf/ASGC/415515B4E63DCBA64A25650600139F9C/>> at 4 November 2002, 3% or 10,106 indigenous people identified as both Aboriginal and Torres Strait Islanders.

²⁶ *Shaw v Wolf* (1999) 163 ALR 205, 246.

²⁷ S Bevilacqua, ‘Aboriginality under the microscope’, *Sunday Tasmanian*, 17 February 2002, 6-7.

²⁸ *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), ss 101,102.

²⁹ ABC Online, ‘DNA tests divide Aboriginal community’ Thursday 15 August 2002

Tribunal overturned 130 of these objections by holding that oral history could outweigh archival material.³⁰ Nevertheless the decision was not universally accepted: the Secretary of the Tasmanian Aboriginal Corporation called the ruling ‘a disgrace’ and asserted that ‘everyone who is a true Aboriginal can prove archival evidence’.³¹

Rather than opening up opportunities of self-government to Aboriginal people, the three-part test is undermining Aboriginal identity and self-regard and creating distress and division. Many Aboriginal people will walk away from such humiliation rather than have their identity challenged.³²

III THE GENESIS OF THE TEST

The genesis of the test of descent lies in outdated scientific method that has no place in twenty-first century law. It is a ‘throw-back’ to perceptions of race where the peoples of the world were defined as sub-species of humans according to their physical characteristics rather than their cultural differences. Furthermore, the test is in direct contravention of international human rights instruments which hold that one of the most basic human rights of any group is the right to define themselves according to their own customs and laws.³³ International conventions to which Australia is a signatory utterly reject racial classification of humans according to genetics. So how did the genetic test of descent come about?

In October 1987 the Commonwealth of Australia set up a Royal Commission to investigate Aboriginal deaths in Australian police and corrective custody since January 1980.³⁴ Twenty-seven percent of the deaths investigated occurred in Queensland, a state with about 18% of the overall population.³⁵ Darren Wouters, a 17 year old youth, had hung himself in the Brisbane Watch House. His father had been Dutch, his mother Aboriginal. As a child he had experienced his father’s tragic death and his mother’s attempts to commit suicide because of her husband’s death. The boy had been subject to neglect and abuse, and at age 12 he had been seriously injured when he walked in front of a train in an attempt to kill himself. He had been taken into care and had been fostered out, but those arrangements had broken down. In the latter part of his life he had spent 18 months in a charitable institution where he was observed to be withdrawn, had few friends, and was struggling with his Aboriginal identity.³⁶

Aiming to have one fewer death levelled at it, the State of Queensland challenged³⁷ the inclusion of Wouters on the basis that the youth was not Aboriginal according to the

<http://www.abc.net.au/news/australia/2002/08/item20020814143136_1.htm> at 4 November 2002.

³⁰ ABC Radio PM ‘Indigenous law resolved in Tasmania’, 18 October 2002.

³¹ AAP Newsfeed ‘Tribunal backs oral history claim by Tassie Aborigines’, 18 October 2002.

³² For example the 9th respondent in *Shaw v Wolf* (1999) 163 ALR 205, 250-1 did not appear and provided no evidence to rebut the petitioners’ claim that he was not Aboriginal.

³³ For example Article 9 *Draft Declaration on the Rights of Indigenous Peoples, 1994* <<http://www.usask.ca/nativelaw/ddir.html>> at 4 November 2002.

³⁴ Australia, *Royal Commission into Aboriginal Deaths in Custody National Report* AGPS Canberra 1991.

³⁵ Though 27% of Australia’s indigenous population.

³⁶ Australia, *Royal Commission into Aboriginal Deaths in Custody. Individual Death Reports: Report of the Inquiry into the Death of Darren Steven Wouters* AGPS Canberra 1991.

³⁷ *Queensland v Wyvill* (1989) 90 ALR 611.

Tasmanian Dams test. It argued that though descent could be proved, Wouters would not have met the other two elements because of his appearance, apparent denial of his Aboriginality and lack of Aboriginal community affiliations. At first instance Pincus J of the Federal Court agreed: though Wouters had a 'significant infusion of Aboriginal genes',³⁸ he did not pass the tests of self-identification and community identification. These were necessary components of Aboriginality and traces of descent alone were not sufficient.

The Commonwealth appealed.³⁹ The Full Court of the Federal Court overturned the first instance decision. It distinguished the *Tasmanian Dams case* on the basis that while proof of cultural identity might have been necessary to protect the cultural heritage of the Tasmanian caves, the test was inappropriate where issues of confused identity may have been the very cause of the suicide.

In the circumstances, the focus of their Honours' attention was naturally on Aboriginal descent. As 'Aboriginal' was not defined in the Letters Patent which established the Royal Commission they looked to dictionary definitions⁴⁰ or the vernacular.⁴¹ There 'Aboriginal' is defined as a person descended from the earliest or original inhabitants of Australia; therefore to prove Aboriginality required proof of descent. Expert opinion or evidence was not necessary,⁴² nor was proof beyond a reasonable doubt.⁴³ Jenkinson J held that a person need only prove a possibility, not a certainty⁴⁴ of descent. He even went so far as to suggest that a person's belief about their genetic history would be sufficient.⁴⁵

A *How much is enough? Quantum of genetic material*

Their Honours' use of terms such as 'genetic input' and 'genetic claims' shifted the focus of proof of Aboriginality from descent *per se* to descent as genetic inheritance. Once this was established, proof of Aboriginality became an issue of quantification. How much is enough? The majority, Spender and Jenkinson JJ, held that 'significant genetic inheritance' would override denial of Aboriginality or lack of community recognition, the reason being that lack of these elements could not take the person out of the ordinary dictionary meaning of 'Aboriginal' as a descendant of the original inhabitants of Australia. On the other hand, where 'descent [was] uncertain or insignificant',⁴⁶ or 'genetic claims [to be called Aboriginal] are exiguous or uncertain of proof...on or near the boundaries of the racial classification as ordinarily understood',⁴⁷ or 'the proportion of Aboriginal blood in a person of mixed race is thought to be small, or where uncertainty exists as to whether a person is in any degree of Aboriginal

³⁸ Ibid 620.

³⁹ *Attorney General (Cth) v State of Queensland* (1990) 94 ALR 515.

⁴⁰ Ibid 523 (Spender J), 536 (French J).

⁴¹ Ibid 517-9 (Jenkinson J).

⁴² Ibid 520 (Jenkinson J).

⁴³ As the majority of decisions which test Aboriginality fall within the civil law or as defences to criminal charges (eg *Yanner v Eaton* (1999) 201 CLR 351 where Murradoo Yanner was charged with killing a protected animal) proof of descent is only required on the balance of probabilities.

⁴⁴ *Attorney General (Cth) v State of Queensland* (1990) 94 ALR 515, 518.

⁴⁵ Ibid 519.

⁴⁶ Ibid 523 (Spender J).

⁴⁷ Ibid 518 (Jenkinson J).

descent’,⁴⁸ a person could prove his or her Aboriginality by reference to whether they conducted themselves as an Aboriginal person. French J took a narrower view: ‘where the Aboriginal genetic heritage is so small as to be trivial or of no real significance’⁴⁹ in relation to the purpose of the legislation then a court could hold that the person was not Aboriginal. On these tests Darren Wouters was held to be Aboriginal.

This was government against government contesting the scope of a Royal Commission. In *Gibbs v Capewell*⁵⁰ however the focus turned to the eligibility of people claiming to be Aboriginal in order to vote and be elected to the Aboriginal and Torres Strait Islander Commission. The sole issue in the case was the meaning of ‘Aboriginal person’ in s 4(1) *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). Drummond J referred to the Preamble to the Act which provided that the Act’s benefits were available for descendants of the inhabitants of Australia before European settlement.⁵¹ This, his Honour said, and dictionary definitions, confirmed that the legislature intended the ordinary meaning of Aboriginal as persons connected by “common descent”.⁵² Therefore he concluded the Act required proof of descent.⁵³

Like the judges in *Wouters’ case* his Honour gives descent the meaning of genetic inheritance from the original ancestors. Genetic factors are no longer merely proof of descent, but *are* descent. Drummond J uses the terms interchangeably: “without any Aboriginal genes...without any Aboriginal descent”,⁵⁴ “small quantum of Aboriginal genes...small degree of Aboriginal descent”,⁵⁵ “a reading of the Act...requires acceptance of the proposition that the expression ‘Aboriginal person’ comprehends not only full blood descendants of the original inhabitants, but also persons who possess some Aboriginal genetic material.”⁵⁶

Nowhere in these cases is there an explanation or a definition of “genetic” or “genes”. The words have become code for “blood”. They can be interpolated as such into every reference to genes in the cases. While cloaked in the scientific terminology of the late 20th century the concept is as offensive as it is scientifically incorrect. Not only that, by focussing on bloodlines, Drummond J has excluded the possibility of a person being able to prove Aboriginality according to Aboriginal custom and law.

IV ‘IN ACCORDANCE WITH THEIR OWN CULTURAL PATTERNS, SOCIAL INSTITUTIONS AND LEGAL SYSTEMS’

The issue of descent is a matter of vital importance to Aboriginal people for it provides the framework in which rules are set regarding obligations to one’s land and one’s kin. Songs, dances and mythology tell of the evolution of the world and the place of Aboriginal people within it.⁵⁷ As stated in the *Cobo Report*, presented to the United Nations in 1986,

⁴⁸ Ibid 519 (Jenkinson J).

⁴⁹ Ibid 539.

⁵⁰ *Gibbs v Capewell* (1995) 128 ALR 577.

⁵¹ Ibid 579-580.

⁵² Ibid 580.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid 584.

⁵⁶ Ibid 581.

⁵⁷ R and C Berndt, *The World of the First Australians: Aboriginal Traditional Life: Past and Present* (1992).

this focus is a distinguishing feature of the world's indigenous peoples. Though in international forums indigenous peoples have resisted attempts to prescribe an exhaustive definition of 'indigenous',⁵⁸ they do assert that being able to define their own identity for the purposes of preserving their lands and their beliefs for future generations is fundamental to their existence:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories...They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁵⁹

This right of indigenous peoples to belong to an indigenous community or nation in accordance with their own traditions and customs is recognised as a fundamental exercise of self-determination in Article 9 *Draft Declaration on the Rights of Indigenous Peoples, 1994*.⁶⁰ Non-indigenous Member States in the United Nations, including Australia, have also endorsed this right. Australia is signatory to the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. Article 1(1) of both Covenants provides:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

While Aboriginal people may generally be direct descendants of the original inhabitants of their particular part of Australia, their lines of descent are not necessarily biological.⁶¹ Indigenous customary law does not rely on linear proof of descent in the Judeo-Christian genealogical form of 'Seth begat Enosh begat Kenan'. An indigenous person from Central Australia, for example, will have many fathers and mothers.⁶² A person may have been adopted into a kinship group where there is no direct or suitable offspring to carry out ceremonial obligations.⁶³ The place where a woman was when she first felt the quickening of her child within her womb

⁵⁸ On the debate of definition of Indigenous peoples see: E-I Daes, *Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People* E/CN.4/Sub.2/AC.4/1996/2 10 June 1996

<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/2b6e0fb1e9d7db0fc1256b3a003eb999?Opendocument>> and

<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/6e33127002ffb222c1256b3a00413db8?Opendocument>> at 4 November 2002.

⁵⁹ J Martinez Cobo, Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations* E/CN.4/Sub.2/1986/7/Add.4 United Nations Publication, Sales No. E.86.XIV.3, "The Cobo Report", para 379.

⁶⁰ Article 9 *Draft Declaration on the Rights of Indigenous Peoples, 1994* <<http://www.usask.ca/nativelaw/ddir.html>> at 4 November 2002.

⁶¹ R and C Berndt, *The World of the First Australians: Aboriginal Traditional Life: Past and Present* (1992), Chapters II and III.

⁶² D Bell, *Daughters of the dreaming* (2nd ed, 1993).

⁶³ *Ibid.*

links a person not only with a Dreaming and its track, but also with a place on the track where a particular ancestral event took place. This place is often referred to as the 'conception site'. A person retains a life-long association with his or her conception site and Dreaming.⁶⁴

United Nations General Recommendations on the interpretation of international instruments state that the way in which members of a particular racial or ethnic group or groups are to be defined shall be based upon self-identification by the individual concerned if no justification exists to the contrary.⁶⁵ An explanation of the descent test offered in *Gibbs v Capewell* was that it was necessary to circumvent "opportunistic" claims by non-indigenous people.⁶⁶ In *Shaw v Wolf* Merkel J suggested that some criterion was necessary to define the group of beneficiaries of the legislation.⁶⁷ In practice, however, the possibilities for fraud are slight as recognition by an Aboriginal community will provide the requisite checks and balances. In a political environment where both the Right and the Left oppose expansion of welfare programs, providing extra benefits for indigenous people, who make up fewer than 2.5% of the overall population of Australia,⁶⁸ may carry political risks and have little electoral support. This is not a justification for Australia to impose a test which is not only contrary to international human rights principles, but is scientifically untenable.

V THE ORIGINS OF SPECIATION

The 'biological origins and physical similarities'⁶⁹ to which Brennan J referred in the *Tasmanian Dams case* is grounded in a biology where living organisms are classified according to differences which are detectable either by the naked eye, such as skin pigmentation or eye shape, or under the microscope, such as blood type. These physical observable phenomena are called phenotypes.

The phenomenological system of identification was devised by Carl von Linneaus, a Swedish biologist of the eighteenth century. In his system, physiological and observable phenomena (the phenotypes), for example the beaks of birds, were the basis of divisions into species and subspecies. These species were fixed, immutable and given by God.⁷⁰ The discovery in 1781 of an old skull in the Caucasus Mountains of Russia provided the catalyst for applying scientific method to the classification of peoples into racial subspecies. Johan Blumenbach, a German professor of medicine, drew the conclusion from the skull that, as it resembled German skulls, Europeans must have originated in the Caucasus Mountains which geographically divide Europe from Asia. Thus Europeans

⁶⁴ *Hayes v Northern Territory* (1999) 97 FCR 32, 43-44.

⁶⁵ *International Human Rights Instruments: Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies* General Recommendation VIII on the interpretation and application of Article 1, paras 1 and 4 of Convention of the Elimination of All Forms of Racial Discrimination: (1990) HRI/GEN/1/Rev.5 26 April 2001, 180.

⁶⁶ *Gibbs v Capewell* (1995) 128 ALR 577, 584.

⁶⁷ *Shaw v Wolf* (1999) 163 ALR 205, 268.

⁶⁸ Of the 352,970 indigenous Australians counted at the June 1996 census, Aborigines comprised approximately 88%, Torres Strait Islanders 8% and persons who identified as both Aboriginal and Torres Strait Islanders 3%. Source: Australian Bureau of Statistics *1996 Census of Population and Housing Australia*

<<http://www.abs.gov.au/websitedbs/d3310108.nsf/ASGC/415515B4E63DCBA64A25650600139F9C/>> at 4 November 2002.

⁶⁹ *Tasmania v Commonwealth* (1984) 158 CLR 1, 244.

⁷⁰ C Ronan, *The Cambridge Illustrated History of the World's Science* (1984) 398-9.

were classified as Caucasians, a taxonomy that continues today in Australia.⁷¹

At first humankind was classified into five sub-races based on place of origin: Caucasian, Asian, African, American and Australasian.⁷² Later taxonomy⁷³ overcame the classificatory problems produced by migration and intermarriage by classifying races on the basis of skin colour: white, black, yellow, brown and red (the natives of the continents of America).⁷⁴ The peoples of Oceania were an enigma because Polynesians were sometimes classified as “white”. Generally however Oceanians were “brown” and included Melanesians and Australian Aborigines.

Using the most rudimentary superficial features such as hair, skin and eye colour, face morphology and skull shape, nineteenth century biologists constructed the human family tree. Those drawing the distinctions of course set the parameters: European biologists claimed that their race was more highly evolved than others, this higher level of evolution being proved by lightness of skin, hair and eye colour, narrow skulls and straight hair.⁷⁵

Nineteenth century racial classification found justification not only in science but also in religion. The prevailing Christian view was that Europeans had a divine mission to take their civilisation and religion to the rest of the world who had not been ‘saved’. This missionary zeal found its affirmation in a Darwinian-Protestant notion of a hierarchy of creatures at the top of which is God, closely followed by Man in God's own likeness.⁷⁶ That likeness, having been promulgated by white men, gave a God-like endorsement to the Northern European male. The coloured races fell further down the hierarchy, just above the animals.⁷⁷ Law followed suit: in Australia people were classified by degrees of coloured blood. Genealogical descent was important as it defined whether a person was full blood,⁷⁸ half caste⁷⁹ or quarter caste.⁸⁰

VI CAN SCIENCE PROVE RACE?

Judicial language such as ‘genetic heritage’, ‘genetic input’ and ‘genetic claims’ is strongly reminiscent of past distinctions. The terms suggest to the public that Aboriginal people are phenotypically different from non-Aboriginal people and that this difference is susceptible to proof. But phenotypes as the sole basis for classification became obsolete in the 1980s when it became possible to read the genetic code in quantity and

⁷¹ ‘Redcliffe police are looking for two men described as caucasian.’[sic] *Peninsula Post*, Thursday March 12 1998, 2.

⁷² These classifications are discussed in more detail in I Haney Lopez, *White by Law: the Legal Construction of Race* (1996) 76.

⁷³ Haney Lopez (ibid 96-98) writes that the most influential of these theories was set out in A H Keane’s comprehensively named *The World’s People: a popular account of their bodily and mental characters, beliefs, traditions, political and social institutions* (1908). This work was extensively referred to by the US judiciary in deciding migration cases.

⁷⁴ For an example see A Nason *Textbook of Modern Biology* (1965) 770-1.

⁷⁵ W Jordan, *White Over Black: American Attitudes towards the Negro 1550-1812* (1969) Chapter XIII.

⁷⁶ Ibid Chapter V.

⁷⁷ Ibid Chapter XVIII.

⁷⁸ See, eg, *Sugar Bounty Act 1905* (Cth) s 2; *Liquor (Amendment) Act 1905* (NSW) s 8(4).

⁷⁹ See, eg, *The Aborigines Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 4.

⁸⁰ See, eg, *Aborigines Act Amendment Act 1936* (WA) s 2 defined ‘quadroon’ as a person ‘who is one-fourth of the original full blood’.

classify by genotype, the numerous inherited genetic differences in DNA, rather than by a few simple observable features.^{81,82} These differences between individuals by reference to their DNA are called polymorphisms.

DNA is the storage medium for the inherited instructions which describe how to make and sustain life. It encodes these instructions in genes made from a linear combination of four organic molecules. Each molecule is represented by a letter of the “DNA alphabet”: A (Adenine), C (Cytosine), G (Guanine) and T (Thymine).⁸³ The total complement of human DNA is about 3,000,000,000 letters encoding approximately 40,000 genes.⁸⁴ The ability to read the DNA sequence revealed that phenotypic analysis as a basis for classification by descent was far from accurate. A simple example illustrates this. The similar physical appearance of a mouse and a marsupial mouse would suggest they are closely related, however they are extremely distantly related.⁸⁵ Instead, evolutionary pressure has shaped both animals to a similar optimal design, just as the evolutionary pressure of the tropical sun may influence a population’s skin colour.⁸⁶ Inherited observable characteristics such as skin colour and physical appearance may suggest ‘racial’ difference but in terms of genetic variability they are negligible, representing small changes in a minuscule fraction of the human genome.

From the vast quantities of data from the Human Genome Projects,^{87,88} it has been possible to compare the differences between the so-called ‘races’.⁸⁹ Results show that the DNA between ‘races’ is virtually identical and that all humans are closely related.^{90,91} Genetic research thus shows that classification of the peoples of the world into ‘genetically distinct’ races on the basis of their external features is spurious. Only a small number of the genetic differences between people are responsible for the very obvious external differences. Indeed at the DNA level there is more genetic difference between any two individuals within a ‘race’ than there are group differences between two ‘races’.⁹² The nineteenth century hypothesis of genetically segregated racial groups has no basis in reality.

⁸¹ F Sanger and A R Coulson, ‘A rapid method for determining sequences in DNA by primed synthesis with DNA polymerase’ (1975) 94(3) *Journal of Molecular Biology* 441-8.

⁸² See, eg, G Ruano and K K Kidd, ‘Genotyping and haplotyping of polymorphisms directly from genomic DNA via coupled amplification and sequencing (CAS)’ (1991) 19(24) *Nucleic Acids Research* 6877-82.

⁸³ See Bruce Alberts et al, *Molecular Biology of the Cell* (3rd ed, 1994).

⁸⁴ M Das et al, ‘Assessment of the total number of human transcription units’ (2001) 77(1/2) *Genomics* 71-8.

⁸⁵ J Graves and M Westerman, ‘Marsupial genetics and genomics’ (2002) 18(10) *Trends Genet Libr Ed* 517.

⁸⁶ J H Relethford, ‘Apportionment of global human genetic diversity based on craniometrics and skin color’ (2002) 118(4) *American Journal of Physical Anthropology* 393-8.

⁸⁷ J C Venter et al, ‘The sequence of the human genome’ (2001) 291(5507) *Science* 1304-51.

⁸⁸ International Human Genome Sequencing Consortium, ‘Initial sequencing and analysis of the human genome’ (2001) 409(6822) *Nature* 860-921.

⁸⁹ W H Li and L A Sadler, ‘Low nucleotide diversity in man’ (1991) 129(2) *Genetics* 513-523.

⁹⁰ E Marshall, ‘DNA Studies Challenge the Meaning of Race’ (1998) 282 (5389) *Science* 654-655.

⁹¹ C Romualdi et al, ‘Patterns of human diversity, within and among continents, inferred from biallelic DNA polymorphisms’ (2002) 12(4) *Genome Research* 602-12.

⁹² *Ibid.*

VII CAN SCIENCE PROVE ABORIGINALITY?

In *Wouters' case* Pincus J said:

There must be many people in Australia with, say, 1/64th or 1/32nd Aboriginal genes, the presence of which is unknown to them and undetected by others. Even if such a trace of Aboriginal ancestry were proved, in my opinion the person concerned would not ordinarily be called an 'Aboriginal'.⁹³

This suggests that there are genes which are peculiar to Aboriginal people. This however is not true. In the last twenty years there have been remarkable advances in our ability to perceive relatedness of people using DNA technologies. It is now possible to analyse DNA directly and gather information on the ancestry of an individual.⁹⁴ Statistically, if two people share many identical polymorphisms then there is a high likelihood that they are related. This genetic technology is already being used to reunite separated family members and identify human remains.⁹⁵

By taking blood samples from many people in different geographic regions the relatedness within geographically distinct groups can also be assessed.⁹⁶ This analysis also gives clues as to the origin of those groups. As new polymorphisms appear only slowly in a population through natural mutation, it is possible to identify mutations which have been inherited from a single common ancestor. Tracing these inherited features gives some idea of the movements of a population.⁹⁷ Another technique is to measure the diversity of polymorphisms in isolated populations and from this data it is possible to estimate the number of founders and gain some idea as to their point of origin.⁹⁸ Using these sources of information, a tree of human relatedness with approximate times between geographically isolating events can be made.⁹⁹ The movements of human populations can be traced through time and space.

As the African population has the greatest polymorphism diversity, Africa is most likely to be the birthplace of humanity; everywhere else displays a more limited repertoire of polymorphisms.¹⁰⁰ What we call 'Caucasian' is really a sub-set of African polymorphisms. Presumably Caucasians are a population of Africans who walked north

⁹³ *Queensland v Wyvill* (1989) 90 ALR 611, 615 quoted with approval by Drummond J in *Gibbs v Capewell* (1995) 128 ALR 577, 582.

⁹⁴ See S D Pena et al, 'DNA diagnosis of human genetic individuality' (1995) 73(11) *Journal of Molecular Medicine* 555-64.

⁹⁵ See, eg, K Crainic et al, 'Skeletal remains presumed submerged in water for three years identified using PCR-STR analysis' (2002) 47(5) *Journal of Forensic Science* 1025-7.

⁹⁶ See, eg, A J Redd and M Stoneking M, 'Peopling of Sahul: mtDNA variation in aboriginal Australian and Papua New Guinean populations' (1999) 65(3) *The American Journal of Human Genetics* 808-28.

⁹⁷ See, eg, O A Derbeneva et al, 'Analysis of mitochondrial DNA diversity in the aleuts of the commander islands and its implications for the genetic history of beringia' (2002) 71(2) *The American Journal of Human Genetics* 415-21.

⁹⁸ See, eg, A Sajantila et al, 'Paternal and maternal DNA lineages reveal a bottleneck in the founding of the Finnish population' (1996) 93(21) *Proceedings of the National Academy of Sciences of the United States of America U S A* 12035-9.

⁹⁹ See, eg, Z H Rosser et al, 'Y-chromosomal diversity in Europe is clinal and influenced primarily by geography, rather than by language' (2000) 67(6) *The American Journal of Human Genetics* 1526-43.

¹⁰⁰ M Stoneking, 'Alu insertion polymorphisms and human evolution: evidence for a larger population size in Africa' (1997) 7(11) *Genome Research* 1061-71.

and lost much of their skin pigment so as better to synthesise vitamin D in the less sunny high latitudes.

The Australian Aboriginal population also has a great genetic diversity, second only to Africa, which suggests a migration from Africa to Australia along the tropics before any admixture was possible with the current inhabitants of the tropic regions.¹⁰¹ Nevertheless it is likely that the Aboriginal population is probably composed of many waves of migration into Australia, bringing in different subsets of the original African diversity.¹⁰² The significant genetic diversity in the Aboriginal populations means that it is unlikely that there are a number of polymorphisms uniquely common to all Aboriginal people which could be identified as a set of “Aboriginal genes”.

VIII BARRIERS TO USING GENETIC SCIENCE TO PROVE ABORIGINALITY

In our present state of knowledge there are four major barriers to proving Aboriginality by means of genetics. Firstly, as shown above, there is no such thing as a genetically differentiated ‘race’, we are all one species. Secondly, the finding of significant genetic diversity in the Aboriginal population is supported by evidence of more than the 200 Aboriginal language and culture groups pre-white settlement, many more than in the whole of Europe.¹⁰³ If race is to be defined by cultural and genetic context, then it would be impossible to prove membership of *the* ‘Aboriginal race’ as on this definition there were hundreds of Aboriginal races pre-white settlement.

Thirdly, unless there is access to genetic material of the ancestors, it is only possible to prove that a particular claimant is related to other living persons who also claim to be descendants of the ancestors. But this just defers the problem of whether those people related to the claimant are Aboriginal or not.

Fourthly, against whom could the claimant’s genetic inheritance be tested? It would be necessary to construct DNA reference groups based on ‘pure blood’ Aboriginal people covering all geographic groups in Australia. If by chance one of the reference DNA groups was very similar to the claimant’s then we can show descent. But how can we verify that the reference set contains ‘pure blood’ Aboriginal people? As the Australian Aboriginal population is so genetically diverse, there would need to be a large reference set of people for all genetically distinct groups. Furthermore there is no way of proving ‘pure blood’ so the reference population would need to know their entire family tree. Inclusion in the reference set of members of the Stolen Generation, estimated to be between one in three¹⁰⁴ and one in ten¹⁰⁵ of Aboriginal people over the age of 25, would create uncertainty as many of these people have little precise information on their ancestry. Where there has been the extermination of entire groups of people, claimants

¹⁰¹ Ibid.

¹⁰² See, eg. A J Redd and M Stoneking, ‘Peopling of Sahul: mtDNA variation in aboriginal Australian and Papua New Guinean populations’ (1999) 65(3) *The American Journal of Human Genetics* 808-28.

¹⁰³ R M W Dixon, *The Languages of Australia* (1980).

¹⁰⁴ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Australia) *Bringing them home* Human Rights and Equal Opportunity Commission Sydney 1997, Ch. 2.

¹⁰⁵ Australian Bureau of Statistics *Characteristics of the Aboriginal and Torres Strait Islander Population, 1994 Family and culture* Catalogue 4190.0 AGPS Canberra 1997.

attempting to prove their Aboriginality may not be related to any of the reference groups because there is no longer a reference group for them.

In summary, there is no way to prove Aboriginality using genetic techniques. The approaches suggested by the judges do not work, but not for lack of technological sophistication. What they are looking for is a 19th century misconception called race. They are trying to find something that is not there.

IX TESTS OF 'RACE' BASED ON IDENTITY AND CULTURE

In 1979 a New Zealander called King-Ansell was charged under the *Race Relations Act 1971* (NZ) with vilifying and inciting hatred against Jewish people. He pleaded not guilty on the grounds that 'race' meant a particular species of humans distinguishable from other groups by a generally uniform genetic inheritance. He argued that Jews could not be regarded as belonging to a separate race and therefore were not protected by the Act. Richardson J of the Court of Appeal held that the word 'race' was used in the legislation in its vernacular sense of a group of people different from the majority:

Race is clearly used in its popular meaning...The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group...[A] group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.¹⁰⁶

In his Honour's view 'race' therefore was a distinct *social* identity defined by the social parameters of identification by the group itself and identification of them by others in the general community. That identity was grounded in a belief about a common history. That history did not have to be biological. Richardson J dismissed 'genetic' evidence as both unnecessary and unprovable:

It does not follow that the identifying characteristics [of race] must be genetically determined at birth. The ultimate genetic ancestry of any New Zealander is not susceptible to legal proof.¹⁰⁷

The House of Lords approved this test in *Mandla v Dowell Lee*.¹⁰⁸ A school principal refused to enrol a Sikh boy in his school because the boy wore a turban and therefore would not be able to wear the compulsory school uniform cap. The headmaster argued that any discrimination fell outside the definition of 'race' in the UK *Race Relations Act 1976*. Their Lordships held that a Sikh was a member of a particular ethnic group and was covered by the legislation. Lord Fraser outlined the characteristics which would distinguish an ethnic group. It was essential that the group prove a long shared history and its own cultural traditions which included family and social customs and manners and

¹⁰⁶ *King-Ansell v Police* [1979] 2 NZLR 531, 542-543.

¹⁰⁷ *Ibid* 542.

¹⁰⁸ [1983] 2 AC 548.

usually religious observance. A common geographical origin, or descent from a small number of common ancestors were non-essential factors which might help distinguish the group from the surrounding community.¹⁰⁹

Both Richardson J and Lord Fraser's tests reject a biological definition of race. They adopt a position consistent with recognising that race is socially constructed, a fluid concept where people may choose to identify and be identified as members of a culturally separate group. These characteristics conform to the definition by which indigenous people have sought in the United Nations to distinguish themselves from others.

X PROOF OF DESCENT BY A PAPER TRAIL: *SHAW V WOLF*¹¹⁰

In *Shaw v Wolf* the right of eleven individuals to stand for the Hobart Regional Council of ATSIC was challenged in the Federal Court on the ground that they could not prove their Aboriginal descent from certain named Aboriginal women whom the petitioners claimed were the only ancestors of living Tasmanian Aborigines. Merkel J held that the onus of proof lay on the petitioners to show that the respondents were not Aboriginal, rather than on the eleven to show they were Aboriginal. His Honour held that as the decision would have grave consequences for a person's cultural identity, the Court had to scrutinise the evidence with great care and not lightly make a finding that a person was not Aboriginal. Nevertheless the evidentiary proof for the respondents was heavy and one person was held not to be Aboriginal, to some extent because he did not appear to rebut the petitioners' evidence against him.¹¹¹

Evidence of descent presented to the Court was found in reams of paper: government documents, church records, letters, books and family Bibles, all interpreted by expert witnesses. Where descent was uncertain, which was in most cases, Merkel J referred to the elements of self- and community-identification. A summary of the probative value of the three elements taken together led him in 9 of the 11 cases to find that the petitioners had not discharged their onus of proof. The approach, while painstaking and sympathetic, still falls short of a test of Aboriginality defined by its own cultural traditions.

His Honour mentions the 'genetic element' only once – in his concluding observations. While he agreed that some descent was necessary as a criterion to access the benefits of the *Aboriginal and Torres Strait Islander Commission Act*, he was critical of searching for a genetic interpretation of the element:

In truth, the notion of 'some' descent is a technical rather than a real criterion for identity, which after all in this day and age, is accepted as a social, rather than a genetic, construct.¹¹²

Unfortunately, as recent events in Tasmania have shown, this view is not shared by those clamouring to prove their Aboriginality by genetic testing.¹¹³

¹⁰⁹ Ibid 562.

¹¹⁰ *Shaw v Wolf* (1999) 163 ALR 205.

¹¹¹ Ibid 250-1.

¹¹² Ibid 268.

¹¹³ See, eg, S Bevilacqua, 'Aboriginality under the microscope', *Sunday Tasmanian*, 17 February 2002, 6-7; ABC TV 7.30 *Report*, Wednesday 21 August 2002.

XI 'ACCORDING TO THE LAWS AND CUSTOMS OF THE INDIGENOUS PEOPLE':
PROOF IN NATIVE TITLE CLAIMS

For indigenous people the most important political benefit any Australian government can bestow is access to the right to claim native title. In 1992 the High Court in *Mabo v Queensland [No. 2]*¹¹⁴ recognised that a special property right, native title, had existed prior to British settlement and had continued over land which had not been alienated by the Crown. To establish a claim for this land Brennan J adopted the three-part test. However the test was qualified by proof according to indigenous laws and customs:

Native title to particular land...its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land...Membership of the indigenous people depends on *biological descent* from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among these people.¹¹⁵

This test was restated in s 223 *Native Title Act 1993* (Cth). The fundamental human right of access to land is thus apparently dependent upon proof of biological descent from the Aboriginal inhabitants of the land. In native title cases however the practice has been to accept evidence of descent by reference to indigenous kinship rules according to Aboriginal claimants' own laws and customs, not biology. In *Ward v Western Australia* Beaumont and von Doussa JJ concluded that Brennan J in *Mabo No 2* had not intended a strictly biological descent test.¹¹⁶ Proof of native title required that the tribunal be able to identify a community by its connections to the land. A link between the ancestors and the claimant community could establish the necessary legal proof of connection to a group which had acknowledged and observed its laws and customs at the time of the imposition of British sovereignty.¹¹⁷ The ancestral connection did not have to be patrilineal, but could be through other relationships including adoption.¹¹⁸ A 'broad spread of links [with ancestors would be]...sufficient proof of "biological" connection between the present community and the community in occupation at the time of sovereignty'.¹¹⁹ On appeal to the High Court,¹²⁰ Brennan J's judgment in *Mabo (No 2)* was extensively re-examined because 'so much of the language of the *Native Title Act* has its genesis in [his] judgment'.¹²¹ However the issue of biological descent was not discussed so it may be presumed that the Federal Court's interpretation of 'descent' as not strictly biological is correct. As for the composition of the groups, to date, tribunals and courts have left it to the claimants to sort out who is and who is not within the group.¹²² This complies with international human rights

¹¹⁴ (1992) 175 CLR 1

¹¹⁵ Ibid 70 (Brennan J), italics added.

¹¹⁶ (2000) 170 ALR 159, 218.

¹¹⁷ Ibid.

¹¹⁸ Ibid 218-220.

¹¹⁹ Ibid 219 (Beaumont and von Doussa JJ).

¹²⁰ *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 [Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 8 August 2002] <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/28.html> at 4 November 2002 (copy on file with authors).

¹²¹ Ibid [670] per Callinan J.

¹²² *Rubibi Community v Western Australia* [2001] FCA 607 [Unreported Merkel J, 29 May 2001] <http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/607.html> at 4 November 2002 (copy on file with authors).

standards in relation to the self-identification of indigenous people and the priority of their collective rights over individual rights. This test should be adopted in relation to the interpretation of the other beneficial legislation.

XII CONCLUSION

As an exercise in self-determination, the test of Aboriginal identity drafted by Parliament and interpreted by judges (neither of whom as Merkel J points out in *Shaw v Wolf*¹²³ is representative of Aboriginal people) is a signal failure. Its reference to biology is contrary to accepted international human rights principles. A genetic test of descent affects the most disadvantaged, those who will have the most difficulty asserting their Aboriginality - people taken from their parents as children and placed in welfare or adopted out, or persons whose ancestral group has been virtually exterminated - for against whom can they be genetically tested?

As for redressing the wrongs of the past by providing equality of opportunity in the present, the three-part test is not applied to any other ethnic group in Australia including Torres Strait Islanders. The identity of other disadvantaged groups wanting to access government benefits for example, the unemployed, the uneducated or the disabled is not undermined by such stringent and expensive requirements of proof. Indeed generally social welfare legislation is based on the premise that it is better that a few fraudulent claims slip through the net than to deny benefits altogether.

If a test of descent is necessary, and we would suggest that cultural identification should be sufficient, then proof should be according to indigenous peoples' own customs and laws, not outdated science and offensive views of 'race'.

¹²³ (1999) 163 ALR 205, 268.