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Expert Panel on Constitutional Recognition of Indigenous Australians
PO Box 7576
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Dear Panel Members

**Submission on Constitutional Recognition of Indigenous Australians**

Thank you for the opportunity to make a submission.

Indigenous peoples have long sought recognition in Australia’s national and State Constitutions. They have done so because these fundamental laws have either ignored their existence or permitted discrimination against them. They rightly argue that the story of our nation is incomplete without the histories of the peoples who inhabited this continent before white settlement.

**Recognition in State Constitutions**

Since the failed 1999 referendum, the States have taken the lead, bolstered by the advantage of not needing to hold a referendum to recognise Indigenous peoples in their constitutions. Victoria and then Queensland brought about this reform to their Constitutions by way of a simple act of Parliament. New South Wales is the most recent State to do so.

The change made in 2010 to the New South Wales Constitution takes the form of a new section 2. It states:

**Recognition of Aboriginal people**

1. Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State’s first people and nations.
2. Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
   (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
(b) have made and continue to make a unique and lasting contribution to the identity of the State.

(3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.

These are fine words, and the language used is generous and inclusive, but it must be remembered that they are just words. The section does no more than make a symbolic change to the State Constitution. In fact, some of that symbolic effect is undermined by subsection 3. It makes clear that, in case the words might any actual legal effect, such as by assisting with the interpretation of other parts of the Constitution, this is not permissible. This is a very unfortunate inclusion in removing any possible substantive benefit to Aboriginal people from the new section. It is not needed in any event given the very limited role that such symbolic words play in the interpretation of a constitution. It must be hoped that it is not copied in any federal wording.

Race and the Australian Constitution

The Gillard government may look to the New South Wales change as a starting point. However, in its case, symbolic change by way of a new section or new preamble to the Australian Constitution will not be enough. If federal recognition of Aboriginal Australians is not to ring hollow, it must also involve the removal of the last vestiges of racial discrimination from the document.

The problem for Aboriginal people when it comes to the Australian Constitution lies deeper than mere recognition. The Constitution was drafted more than a century ago to deny Aboriginal people their rights, their voice and even their identity as peoples.

The Constitution was written in the 1890s against a backdrop of racism that led to the White Australia policy and a range of other discriminatory laws and practices. The result was a Constitution that referred to Aboriginal peoples only in negative terms. Section 127 even made it unlawful to include ‘aboriginal natives’ when counting the number of ‘people’ of the Commonwealth.

Section 127 was removed by the 1967 referendum, but other problems were left untouched. The result is a Constitution that in its text and operation still runs counter to the idea of Aboriginal Australians as equal members of the community.

The first problem is section 25. Headed ‘Provision as to races disqualified from voting’, the section acknowledges that the States can disqualify people from voting due to their race. This reflects the fact that at Federation in 1901, and for decades afterwards, States denied the vote to Aboriginal people. Unfortunately, the Constitution still recognises this as being a legal possibility. The section is repugnant and should be deleted.

The second problem is the races power in section 51(26). As drafted, the section stated that the Federal Parliament could make laws 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’.

Section 51(26) was intended to allow the Commonwealth to restrict the liberty and rights of some sections of the community on account of their race. By today’s standards, the reasoning behind the provision was clearly racist. Sir Edmund Barton, later Australia’s first prime
minister and one of the first members of the High Court, made the position clear when he told the 1897–98 constitutional convention that the races power was necessary to enable the Commonwealth to ‘regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.’

One framer, Tasmanian Attorney-General Andrew Inglis Clark, supported a provision taken from the US constitution requiring the ‘equal protection of the laws.’ But the framers were concerned that Clark’s clause would override laws such as those in Western Australia, under which ‘no Asiatic or African alien can get a miner’s right or go mining on a gold-field.’ Sir John Forrest, the premier of Western Australia, summed up the mood of the convention when he stated:

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.

Clark’s provision was rejected, and section 117, which merely prevents discrimination on the basis of state residence, was inserted instead. In formulating the words of section 117, Henry Higgins, one of the early members of the High Court, said that it ‘would allow Sir John Forrest … to have his law with regard to Asiatics not being able to obtain miners’ rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based on colour and race.’

In the 1967 referendum, Australians chose to strike out the words ‘other than the aboriginal race in any State’ in section 51(26). While the referendum meant that Indigenous peoples could be the subject of laws made under the power, nothing was put in the Constitution to say that such laws had to be positive. In effect, the racially discriminatory underpinnings of the races power were extended to Aboriginal people without any indication that the power can be applied only for their benefit.

Nearly a century after the Constitution came into force, the Federal Parliament used the races power to pass the *Hindmarsh Island Bridge Act 1997* (Cth). A group of Aboriginal women belonging to the Ngarrindjeri people had sought to protect an area near Hindmarsh Island in South Australia from development. They argued that they were the custodians of secret ‘women’s business’ for which the area had traditionally been used. The Act overrode their claim.

The Ngarrindjeri women brought a case against the Commonwealth in the High Court, arguing that the *Hindmarsh Island Bridge Act* was invalid. They argued that the races power only allows parliament to pass laws that are for the benefit or advancement of a particular race. Hence, the parliament could pass legislation directed at providing health care for the specific needs of a racial group. On the other hand, the power could no longer support Nazi-style laws banning people of a race from working in certain professions or from attending particular schools.

In response, the Commonwealth asserted that the power enabled it to do just that. It argued that there are no limits to the power so long as the law affixes a consequence based on race. In other words, it was not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Federal Solicitor-General, Gavan Griffith QC
suggested that the races power ‘is infected, the power is infused with a power of adverse operation.’ He also acknowledged ‘the direct racist content of this provision using ‘racist’ in the expression of carrying with it a capacity for adverse operation.’ The following exchange then occurred:

Justice Michael Kirby: Can I just get clear in my mind, is the Commonwealth’s submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or whatever the words say or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.

Mr Gavan Griffith QC: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.

In this case, the Howard government argued that the Commonwealth has the power to pass laws that discriminate against Australians on the basis of their race. This possibility is obviously abhorrent to most Australians, and is also inconsistent with accepted community values such as equality under the law. But this is exactly what the framers of the constitution had intended in conferring the races power.

A divided High Court handed down its decision in the Hindmarsh Island bridge Case on 1 April 1998. Justice Mary Gaudron found that ‘it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid,’ and Justice Michael Kirby found that the power ‘does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race.’ Two of the judges, Chief Justice Sir Gerard Brennan and Justice Michael McHugh, did not address the issue, and Justices William Gummow and Kenneth Hayne left room for the power to be used in an adverse as well as a beneficial way. The result was that the Hindmarsh Island Bridge Act was upheld, with the court split on whether the races power can still be used to discriminate against Indigenous or other peoples. This fundamental question remains unresolved.

The ambiguous result in the Hindmarsh Island case highlights the tenuous position of Aboriginal peoples and Torres Strait Islanders under the races power. As a result of the 1967 referendum, laws can be made by the Federal Parliament with respect to them. However, nothing was put into the Constitution to indicate that such laws should be for the benefit, or that such laws should not discriminate against them on the basis of their race.

What Change is Needed?

When the history and current text of the Constitution is taken into account, Aboriginal and Torres Strait Islander peoples should be recognised in the Australian Constitution by way of:

1. Positive mention of Indigenous peoples and their culture in a new preamble to the Constitution;
2. The deletion of:
   (i) section 25; and
   (ii) section 51(26).
3. The insertion of new sections that:
(i) grant the Commonwealth Parliament the power to make laws with respect to ‘Aboriginal and Torres Strait Islanders’;
(ii) prohibit the enactment of racially discriminatory laws by any Australian Parliament (while also providing that laws may be made to redress historic disadvantage).
(iii) permit the making of legally binding agreements between Indigenous peoples and Australian governments.

These changes would recognise Indigenous peoples in a positive way in the Australian Constitution for the first time. More fundamentally, they would provide a form of recognition that grants symbolic benefits and at the same time removes the possibility of legal discrimination on the basis of race.

The possibility of racial discrimination under the Constitution is removed by deleting section 25 and recasting the races power. It is important that the races power not simply be repealed. An important achievement of the 1967 referendum was to ensure that the Federal Parliament can pass laws for Indigenous peoples in areas like land rights, health and the protection of sacred sites. The power ought to be rewritten so that it can be exercised only in a non-discriminatory manner.

The most appropriate way of ‘fixing’ the races power is to grant power to the Federal Parliament to pass laws for ‘Aboriginal and Torres Strait Islanders’. Such a grant, consistent with the way that the High Court interprets the Constitution, would be broad enough to cover laws enacted in the past, and those that might be enacted in the future, for Indigenous peoples.

However, in this form, the power could still be used to pass negative laws. To avoid this, the Constitution should also contain an overriding freedom from racial discrimination. Such a guarantee is a standard feature of other constitutions, and is lacking only in Australia because Australia is now the only democratic nation the world not to have a national Bill of Rights. The freedom would not only protect Indigenous Australians. It would protect all people in Australia from laws that discriminate against them on the basis of their race. The freedom could be drafted only to apply to federal laws, and not also to State and Territory laws. It would be preferable for it to have the widest operation given the past record of discrimination by the States and Territories, and the fact that as a matter of principle racial discrimination ought be prohibited at all levels of Australian government.

There is a possibility that a freedom from racial discrimination might be interpreted by the High Court to strike down laws and programs that provide special benefits or recognition to Aboriginal and Torres Straight Islanders. At might be held that these discriminate against non-Indigenous people. This could affect programs which, for example, provide accelerated entry into university in order to redress the long-term shortage of Indigenous doctors and lawyers. To avoid this, the freedom from racial discrimination should be made subject to a clause that it does not affect laws and programs aimed at redressing historic disadvantage. Such a clause is typically found in other nations as part of their protection from discrimination or equality guarantee.

The practical impact of these constitutional changes would be significant. A freedom from racial discrimination in the Australian Constitution applying to all laws passed by an Australian parliament would mean that any law could challenged in the courts if it breached the guarantee. Examples of recent federal laws that might be challenged on this basis include the Native Title Amendment Act 1998, which implemented the Howard Government’s ‘ten point plan’ for native
title after the Wik decision. In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, ‘bucket-loads of extinguishment, the Act overrode the Racial Discrimination Act 1975. This was achieved through section 7 of the new Act, which provides that the Racial Discrimination Act has no operation where the intention to override native title rights is clear. A similar suspension of the Racial Discrimination Act was achieved in 1997 under the legislation that brought about the Northern Territory intervention. Both of these statutes are examples of laws that could not stand in the face of a constitutional guarantee of freedom from racial discrimination. It would also not be possible in the future to suspend the Racial Discrimination Act so as to permit racial discrimination.

Any change to the Australian Constitution should be clear and specific as to how it will protect Indigenous rights. A freedom from racial discrimination is an example of this. A more open ended statement that the Constitution protects ‘Indigenous rights’ is not. The latter runs the risk of being read very narrowly by the High Court. If this occurred, the general statement of ‘Indigenous rights’ might actually not amount to much of value.

The Australian Constitution should also speak to the longer term settlement that has yet to be achieved between Australian governments and Indigenous peoples. In other nations, as set out in the book Treaty (Federation Press, 2005), such a settlement is normally expressed in a treaty or like instruments. Australia is alone in the Commonwealth in not having entered into such agreements with its Indigenous peoples.

The Constitution is not the right place to set out the specific terms of a treaty. The best role that the Constitution can play is to facilitate the making of such agreements in the future. Hence, the Constitution should contain a provision that permits the making of agreements between governments and Indigenous peoples. It should also give those agreements, once ratified by the relevant parliament, the force of law. This would not guarantee that a treaty would be made. However, it would provide, for the first time in Australia, a clear path for doing so, and could also create an expectation that this is a necessary and desirable part of Australia's future constitutional development.

**Changing the Constitution**

There is a major hurdle standing in the way of the attempt to change the Australian Constitution to recognise Indigenous peoples. That change can only be made by way of a referendum. The process as set out in section 128 of the Constitution requires that an amendment to the Constitution be:

1. passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and
2. at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states.

Since Federation in 1901, 44 referendum proposals have been put to the Australian people with only eight of those succeeding. Significantly, no referendum has been passed by the people since 1977 when Australia voted, among other things, to set a retirement age of 70 years for High Court judges. As at 2011, 34 years have passed since Australia changed its Constitution. At around one-third of the life of the nation, this is by far the longest period that Australia has gone without amending its Constitution (The next longest period was 21 years between the 1946 and 1967 referendums).
The Australian Labor Party has been the political party most likely to champion constitutional reform. Twenty-five of 44 proposals (about 57 per cent) for constitutional change have been put by Labor governments, despite Labor having been in office for less than a third of Australia’s federal political history. On the other hand, proposals sponsored by Labor governments have almost always been unsuccessful. Just one of 25 Labor proposals – the 1946 (Social Services) referendum put by the Chifley government – has succeeded, a failure rate of 96 per cent. By contrast, seven of 19 non-Labor proposals (36.8 per cent) have been passed.

In People Power: The History and Future of the Referendum in Australia (University of New South Wales Press, 2010), David Hume and I examine Australia’s record of failed and successful referendums in detail, and how this experience might be applied to hold referendums with greater prospects of success. We conclude that Australia must avoid repeating, yet again, the same past mistakes, and that there are realistic prospects that the Australian people will vote Yes if a referendum is approached in the right way. To win the coming referendum on Indigenous recognition, we find that the process should be based upon the following five pillars.

1 Bipartisanship

Bipartisan support has proven to be essential to referendum success. Referendums need support from the major parties at the Commonwealth level. They also need broad support from the major parties at the State level. The history of referendums in Australia provides many examples of proposals defeated by committed opposition from a major party at either level. This has been a particular feature of failed referendums put by the Australian Labor Party. Its proposals have tended to be opposed by either or often both of the Opposition and the States.

The proponents of constitutional reform have long known of the need for that bipartisan support. The challenge has always been how to achieve it. It is very easy for a federal Opposition to decide to oppose a referendum. Defeating the government at a referendum not only stymies the government’s agenda, but can inflict lasting electoral damage. In this way, referendums can operate like by-elections. They can be a useful means for an Opposition to generate a negative public reaction to the government. Equally, they can enable voters to indicate their dissatisfaction in a way that does not threaten the government’s hold on power. State-level parties can also find it easy to oppose a proposal. They can have strong political incentives to champion local State interests over the national interest, and no need to secure support from the residents of other States.

To secure bipartisanship, it is not enough merely to involve a range of political groups in the process; the process must also commit those groups to reform. This can be very difficult to achieve. In 1920 and 1929, the Commonwealth thought it had reached agreement with the states on proposed reforms, but several states backed out and the Commonwealth ultimately never put the proposals to the people. Similarly, in 1977, Queensland and Western Australia extricated themselves from an ‘agreement’ to support simultaneous elections. The problem in each of those cases was not a failure of ‘involvement’, but a failure to achieve a binding political commitment.

2 Popular ownership

Just as deadly as partisan opposition is to constitutional reform is the perception that a reform idea is a ‘politicians’ proposal’. From the 1967 nexus proposal, which was felled by the cry of ‘no more politicians’, to the Republic referendum, which was killed off by the claim that it was the ‘politicians’ republic’, Australians have consistently voted No when they believe a proposal
is motivated by politicians’ self-interest. This reflects a well-known undercurrent of distrust of Australian politicians. The constitutional design of Australia’s reform process exacerbates this problem. Politicians, and only politicians, can initiate constitutional reform through the federal Parliament. This renders every referendum proposal at risk of being perceived as self-serving, especially of those interests aligned with the Commonwealth.

Popular ownership is often used as a catch-cry, with little content. That is because popular ownership is an outcome, and an unquantifiable outcome at that. There is no one way of engendering popular ownership. What will always be essential, however, is popular participation, both in the process of generating ideas, and the consultation and deliberation that follows. This might include:

- extended national debate and consultation on a proposal;
- debate and consultation occurring across a wide variety of forums;
- a process that is open and responsive;
- a process that makes full use of available media; and
- above all, a commitment that public engagement will permeate and drive the whole process.

3 Popular education

Surveys of the Australian public show a disturbing lack of knowledge about the Constitution and Australian government. Rather than being engaged and active citizens, many Australians are know little of even the most basic aspects of government. This is often a reflection of the fact that disengaged citizens tend to have less knowledge about their system of government and any reform being proposed. The problem has been demonstrated over many years. For example:

- A 1987 survey for the Constitutional Commission found that almost half the population did not realise Australia had a written Constitution, with the figure being nearly 70 per cent of Australians aged between 18 and 24.
- The 1994 report on citizenship by the Civics Expert Group found that only one in five people had some understanding of what the Constitution contained, while more than a quarter named the Supreme Court, not the High Court, as the ‘top’ court in Australia.

These problems can be telling during a referendum campaign. A lack of knowledge, or false knowledge, on the part of the voter, can translate into a misunderstanding of a proposal, a potential to be manipulated by the Yes or No cases and even an unwillingness to consider change on the basis that ‘don’t know, vote No’ is the best policy.

Overall, the record shows that when voters do not understand or have no opinion on a proposal, they tend to vote No. Polls from the 1999 referendum showed that many people had not read the official pamphlet distributed by the Commonwealth to explain the proposals, and that people who had not read the pamphlet were far more likely to vote No. Polling in the lead-up to the 1967, 1977 and 1988 referendums also suggested that those who did not know which way they would vote shortly before the referendum swung heavily into the No column on the day of the vote.

Misunderstanding of the Constitution can also mean that people can cast a Yes or No vote to a proposal in a way that does not reflect their real beliefs. Hence, a person may vote No out of concern about what the proposal might do, even where they would have supported the proposal had they fully understood it.
Governments will never be entirely effective at educating Australians about the Constitution and the referendum process. The Constitution is a complex document. People can spend many years studying it and still have only an imperfect understanding. The basic principles that illuminate it – federalism, representative government, responsible government and more – are vague and contested ideas.

The project of educating Australians about the Constitution may be difficult, and it will never be perfectly completed, but it is a project that must be undertaken. Australians deserve access to the information they need to understand their system of government and any proposal for reform. They must be given the opportunity to cast an informed vote.

4 A sound and sensible proposal

As important as it is to get the process of generating proposals right, it is equally important to get the proposals themselves right. A major weakness in Australia’s referendum record to date is that attempts at reform have been dominated by what have been (often rightly) perceived by the population to be a grab for extra federal power.

Good proposals can also be generated where they are based upon past experimentation and practice. Australians are more likely to agree to such changes. The successful 1928, 1946, 1967 and 1977 (Senate Casual Vacancies) referendums were all based upon, to a greater or lesser extent, the people being asked to ratify pre-existing arrangements.

There is a lesson in this: constitutional change is easiest when it codifies a principle that has already been tried and tested. This has long been acknowledged in the United States, where national constitutional reforms have often followed constitutional or legislative change in a majority of the States, thereby giving people the time to assess new ideas on a smaller scale. For example, before the United States amended its Constitution in 1920 to guarantee women the right to vote, female suffrage had already been recognised in 29 states.

The Australian States can play a particular role here. Successful State reform, such as the recent recognition of Indigenous peoples in several State constitutions, makes the effects of national constitutional change much less of an unknown. It makes change incremental, rather than abrupt. It can also turn those States that have adopted the reform (and people in those States) into advocates of the reform. The States are a logical place to ‘test’ potential nationwide reforms. The effects of good reform are easier to see; the consequences of bad reform are less widespread. Further, because States usually do not require a referendum to reform their Constitution, constitutional change at the State level is often much easier to achieve. In this way, one of the advantages of having a federal system, the capacity for diversity and experimentation, can be turned to improving the proposals ultimately to be put to a national referendum, and thus the prospects of success of such change.

5 A modern referendum process

Australia’s present system for the holding of referendums is set out in the Referendum (Machinery Provisions) Act 1984 (Cth). That law was adopted in 1912, and has changed little since. It was designed at a time when voting was not compulsory, Australia’s population was far smaller and far less diverse, and the print media and public speeches were the dominant modes of communication. The system is showing its age and is not suited to contemporary Australia. To modernise Australia’s referendum process, the Act should be changed to:

- abolish expenditure restrictions on the Commonwealth Government;
• rethink the official Yes/No pamphlet; and
• continue the Yes and No committees from the 1999 referendum.

These changes are reflected in the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs made in 2009 in its inquiry into the holding of referendums.

**Conclusion**

Australia ought to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. It does not speak well of our nation that after more than a century we have yet to achieve this, and have not removed the last elements of racial discrimination from the document. It is past time that we had a Constitution founded upon equality that recognises Indigenous history and culture with pride.

Australia’s long record of past failed attempts at constitutional reform do not mean that winning such a referendum is ‘mission impossible’. Instead, it shows that we should expect a referendum to fail whenever our major political parties disagree, or when poor management means that the Australian people feel left out or confused about what is being changed. People will also vote No to a proposal that is dangerous or has been poorly thought out. A lot of this of course is common sense, yet the referendum record displays a tendency to repeat these same mistakes time after time. Australia’s referendum history contains few successes for good reason.

These points also suggest a path to winning the referendum. Reform of Australia's Constitution to recognise Indigenous peoples is achievable. Despite the pessimism that often pervades the idea of holding a referendum in modern Australia, the vote can be won. If nothing else, we should not forget the achievement of the 1967 referendum which deleted discriminatory references to Aboriginal people from the Constitution. Not only was that referendum passed, the Yes vote reached a record high in securing over 90% support from the Australian people. That and other successful referendums confirm that, if the change is based upon the pillars set out in this article, it has a strong prospect of success.

Yours sincerely

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