



MONASH University
Castan Centre for Human Rights Law



Castan Centre for Human Rights Law

Monash University

Melbourne

**Submission to the Panel on Indigenous Constitutional
Recognition**

September 2011

Prepared by Melissa Castan

Introduction

This submission examines some of the constitutional deficiencies in the protection of Indigenous peoples' rights, in order to demonstrate the real need to grasp the opportunity offered by the 'constitutional moment' and reform our foundational document. Then, it considers the problems with the races power (s 51(xxvi)), and the need to replace it with a clear federal power to make laws for the benefit of Aboriginal and Torres Strait Islander peoples. Suggestions for a 'non-discrimination' clause are then considered. Finally the option of an agreement-making power is discussed. This submission makes only passing mention of the issues of altering the preamble, achieving citizen engagement, and the modern referendum process. These are important issues but we are unable to address them fully in this submission.

Does the Constitution Protect Indigenous Rights?

Our Constitution currently fails to safeguard the basic human rights standards that we might (mistakenly) assume are recognised and enforced. The federal Constitution generally expresses protection for few fundamental rights and freedoms, and even those that are expressed provide fairly weak protection because of the limited scope given to the relevant sections by the High Court.¹ Aboriginal and Torres Strait Islander people have 'borne the brunt' of this neglect, and been 'marginalised by both the terms and effect of the Constitution'.² The consequences of the absence of express constitutional protection of human rights were highlighted when the Federal Parliament enacted the *Northern Territory National Emergency Response Act 2007* (Cth). This Act was explicitly discriminatory against the Aboriginal people of the Northern Territory, contrary to International Human Rights standards (such as in the *Convention on the Elimination of All Forms of Racial Discrimination*)

¹ Sarah Joseph and Melissa Castan, *Australian Constitutional Law: A Contemporary View* 2010. Chapter 12. Many aspects of this submission are drawn from the ideas expressed by the authors in that book, particularly chapter 14, and from Melissa Castan "Constitutional Deficiencies in the Protection of Indigenous Rights: Reforming the 'Races Power'" (2011) *Indigenous Law Bulletin* Special Edition (forthcoming).

² Megan Davis and Dylan Lino "Constitutional Law and Indigenous People" (2010) 7 *ILB* 3.

and to Federal legislation – the *Racial Discrimination Act 1975* (Cth).³

An earlier example of the lack of rights protection arose in *Kruger's* case.⁴ The plaintiffs contested the constitutional validity of a Northern Territory Ordinance (enacted under s 122 of the Commonwealth Constitution) that had empowered authorities to remove Indigenous children from their parents, as well as the compulsory detention of Indigenous people on reserves on alleged 'welfare' grounds.⁵ The High Court rejected the plaintiffs' submissions, as they were unable to rely on the Constitution as a source of protection or enforcement of their political, civil or religious rights.⁶

The Race Power

There are aspects of all of the constitutional heads of power that may generally support legislation regarding Indigenous Australians,⁷ but the most relevant is s 51(xxvi), particularly the post-1967 version. The scope of the Commonwealth's power under s 51(xxvi), the so called 'race power,' is currently unsatisfactory and ineffective at protecting Indigenous Australians.⁸ There are few cases on the scope of the race power, and none clearly resolve the issue over whether the amended s 51(xxvi) allows for Commonwealth laws which discriminate against Indigenous Australians.⁹ The High Court has not considered the issue directly, but there is the

³ See s 132 of the *Emergency Response Act*. See also Marcia Langton 'Trapped in the Aboriginal Reality Show (2008) 19 *Griffith Review* 143, and cf Jon Altman and Melinda Hinkson *Coercive Reconciliation : stabilise, normalise, exit Aboriginal Australia* (Arena 2007).

⁴ *Kruger v Commonwealth* (the *Stolen Generation* case) (1997) 190 CLR 1.

⁵ The Plaintiffs submitted that the Ordinance violated a number of express and implied Constitutional rights: namely freedom from arbitrary detention, rights of equality, freedom of religion (s 116), freedom of movement and association and freedom from genocide. All of these claims failed, and the reasons are discussed elsewhere in detail See Joseph and Castan, above 5. Also see Sarah Joseph, 'Kruger v Commonwealth: Constitutional Rights and the Stolen Generations' (1998) 24 *Monash Law Review* 486, 495. See also *Cubillo and Gunner v Commonwealth* (2000) 103 FCR 1, and *Trevorrow v South Australia (No 5)* [2007] SASC 285.

⁶ Sarah Joseph, *ibid*

⁷ Such as the External Affairs power, The Corporations power, the Taxation power, the Grants power and the Acquisition of Property power.

⁸ An unusual problem here is the concept of 'race'; it is difficult to find any legal or scientific benchmark of what constitutes a 'race' today (no doubt it seemed clear to the drafters of the Constitution). See Justin Malbon, 'The Race Power under the Australian Constitution: Altered Meanings' (1999) *Sydney Law Review* 80, esp 81-85.

⁹ See *Commonwealth v Tasmania* (1983) 158 CLR 1. Later in *Western Australia v Commonwealth* (1995) 183 CLR 373 all of the Justices agreed that the *Native Title Act 1993* (Cth) had been validly enacted under s 51(xxvi). They also found that the Act was for the benefit of Indigenous Australians,

strong suggestion that the Commonwealth has plenary power over the people of any race, so as to make laws for those people, whether those laws are entirely, or partially beneficial, or even detrimental. Limitations to the 'race power' may be construed from the requirement within the head of power that 'special' laws for 'the people of any race' be *necessary*,¹⁰ and from consideration of the underlying benevolent intentions of the electorate in 1967 (at least with regard to laws affecting Indigenous Australians). But the High Court in *Kartinyeri v Commonwealth* (1998)¹¹ resisted an interpretation of the race power as restricted, or permitting laws which only *benefit* the people of the particular race.

In *Kartinyeri* no majority emerged on that crucial beneficial/detrimental law issue.¹² Three Justices (Brennan CJ and McHugh J, with Gaudron J agreeing on this point) found the *Bridge Act* was a partial repeal of the *Heritage Protection Act*, as its effect was in part to reduce its scope. As the *Heritage Protection Act* was indisputably a law validly enacted under s51(xxvi), the same head of power could support its whole or partial repeal (thus illustrating the principle that what Parliament can enact, it can repeal, in whole or in part).¹³ On this point, Brennan CJ and McHugh J stated (at356):

Once the true scope of the legislative powers conferred by s 51 are perceived, it is clear that the power which supports a valid Act supports an Act repealing it.

This decision meant that these three Justices did not need to consider the scope of s 51(xxvi); Gaudron J still did deliver some obiter views on that issue.¹⁴

Gummow and Hayne JJ, also in the majority, did not accept the 'repeal' argument, but did find the law validly enacted under s51(xxvi).¹⁵ Kirby J did not agree that the

so there was no need to consider whether s 51(xxvi) authorised the enactment of detrimental laws.

¹⁰ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

¹¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337. The background to this case is intricate, as explained in Joseph & Castan, above at n5, chapter 14.

¹² Only six Justices sat, as Callinan J excused himself, having previously given advice as legal counsel to the government on the validity of the Hindmarsh Island Bridge Bill 1997. Kirby J wrote a dissenting judgment.

¹³ See Peter Johnston and James Edelman, 'Beyond Kartinyeri: drawing the flame close to Wik' (1998) 1 *Constitutional Law and Policy Review* 41, 42.

¹⁴ (1998) 195 CLR 337 at 365-367.

¹⁵ Gummow and Hayne JJ found that only laws that expressly repeal certain provisions of a prior Act can be presumed valid on the basis of the "repeal" argument. The *Bridge Act* did not show a

Bridge Act was a simple repeal of the *Heritage Protection Act*, and found it invalid. Thus, Gaudron, Gummow, Kirby, and Hayne JJ all considered the scope of s 51(xxvi), dividing on whether s 51(xxvi) only authorises laws for the benefit of the people of a race or, in the alternative, for the benefit of the people of the Aboriginal race. Gummow and Hayne JJ suggested that the power could be used to impose a disadvantage on Aboriginal people, while Gaudron and Kirby JJ disagreed with them.¹⁶

The case illustrates the tendency of the High Court to adopt quite divergent interpretive approaches to constitutional issues, and how those various judicial interpretations can lead to a diminution of Indigenous rights. Notably Kirby J in dissent found the law to be beyond the scope of the race power because it was detrimental to Indigenous people by reference to their race. He said (at 417);

The purpose of the race power in the Australian Constitution, as I read it, is therefore quite different from that urged for the Commonwealth. It permits special laws for people on the grounds of their race. But not so as adversely and detrimentally to discriminate against such people on that ground.

Kirby J also referred to the proper place of human rights standards drawn from comparative or international law in assisting the resolution of constitutional ambiguities.¹⁷

In *Kartinyeri*, when the validity of a modern law having detrimental impact and clearly based on distinctions of race was raised, the High Court failed to interpret the races power in the Constitution so as to protect Indigenous people from overt racial discrimination.¹⁸ This demonstrates the need to reform s 51 (xxiii) in order to redress the ‘detrimental’ interpretation of the Constitution.

Notably, in his final judgment prior to his retirement Kirby J expressed his palpable frustration at the position adopted by the High Court in *Kartinyeri*, and the

textual repeal, and therefore needed to be independently characterised under s 51(xxvi).

¹⁶ The different perspectives of the Justices are examined in detailed in Joseph and Castan above n 5 chapter 14.

¹⁷ See Kirby J, in *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513, 657 ff, and for the contrary view, see McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562, 578.

¹⁸ See also the discussion in Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Australian Constitutional Law: Materials and Commentary* (8th ed, 2009), 271-279.

treatment of Indigenous people by the Court in general:

History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that criterion [citing *Kartinyeri*]. The history of Australian law, including earlier decisions of this Court, stands as a warning about how such matters should be decided. Even great judges of the past were not immune from error in such cases. Wrongs to people of a particular race have also occurred in other courts and legal systems. In his dissenting opinion in *Falbo v United States*, Murphy J observed, in famous words, that the "law knows no finer hour" than when it protects individuals from selective discrimination and persecution. This Court should be especially hesitant before declining effective access to the courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny.¹⁹

There has not been a case unambiguously addressing the scope of the races power since *Kartinyeri*. The *Native Title Amendment Act 1998* (Cth) diminished native title property rights when compared to other people's property rights (thus acting to the detriment of Indigenous people), and that Act is unlikely to be characterised as a partial repeal (as opposed to an amendment) of the *Native Title Act 1993* (Cth).²⁰ The *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth) abolished the Aboriginal and Torres Strait Islander Commission, to the detriment of Indigenous peoples' political participation rights.²¹ A challenge to either of these Acts would oblige the Courts to finally resolve the scope of s 51(xxvi), but no

¹⁹ Justice Kirby's frustration appears to be as a result of the decision of the majority to reject "the claimants' challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race and does so in a ruling on a demurrer" *Wurridjal* (2009) 237 CLR 309, 394-5. Kirby's criticism was met with a terse rebuke by the Chief Justice French at 337. A demurrer is an old legal pleading where the defendant (here the Commonwealth) challenges the "legal sufficiency" of the claim or cause of action. A demurrer is not a challenge to the ultimate merits of a case or claims, as the facts expressly or impliedly asserted in the statement of claim might be taken as admitted for purposes of demurrer.

²⁰ See, for speculation regarding the constitutional validity of the *Native Title Amendment Act 1998* (Cth), Johnston and Edelman, above n 16, 47-48.

²¹ For further details see Larissa Behrendt, Chris Cunneen & Terri Libesman *Indigenous Legal Relations in Australia* (2009), Chapter 13.

decision regarding the constitutional validity of either Act has emerged.²² This uncertainty regarding the scope and stability of s 51(xxvi) has led to considerable uncertainty as to the validity of these Acts and others, for both lawmakers and the parties regulated by such laws.

Just Terms

Another head of power that is particularly relevant to the consideration of Indigenous people in the Australian Constitution is the 'just terms' requirement for Commonwealth acquisitions of property, found in s 51 (xxxi). This section has two aspects: it confers power on the Commonwealth to acquire property for certain purposes, and it limits the Commonwealth's acquisition power by requiring that such property can only be acquired on 'just terms'.²³

The jurisprudence on this area of constitutional law is complex, and somewhat unstable, in that predicting the outcome of disputes that come before the High Court is difficult.²⁴ Indigenous claimants have invoked this section to resist Commonwealth dealings with traditional country, asserting that there has been an 'acquisition' and thus a requirement for 'just terms'.²⁵ This aspect of the so-called 'Northern Territory Intervention' came under constitutional challenge in the *Wurridjal* case, in particular whether the *Northern Territory National Emergency Response Act 2007* satisfied the 'just terms' part of s 51 (xxxi) of the Constitution.²⁶ The *Emergency Response Act* granted a five year statutory lease to the Commonwealth over property previously granted in fee simple to Aboriginal Land Trusts under the *Land Rights Act*, and also abolished a system of access by permit operating on Aboriginal Land Trust land.

The Majority in *Wurridjal* found these measures amounted to 'acquisitions of property' under s 51 (xxxi), and also found that 'just terms' were provided for those

²² The scope of s51 (xxvi) did not arise in *Wurridjal v Commonwealth* (2009) 237 CLR 309, which dealt with the scope of s51(xxvi) and s122.

²³ See Joseph and Castan above at n 5 at 384 ff.

²⁴ *Ibid*, 384-406.

²⁵ See for instance *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495.

²⁶ The details of this case are explored by Joseph and Castan, above n 5 at 386, 405, and in greater detail by Sean Brennan 'Wurridjal v Commonwealth The Northern Territory Intervention And Just Terms For The Acquisition Of Property' (2010) 33 *Melbourne University Law Review* 957.

acquisitions. The Court also overturned the old case of *Teori Tau v Commonwealth*²⁷ and found that the just terms requirement of s51 (xxxi) does apply to s 122 of the Constitution. However, the judicial interpretation in that case of 'just terms' has not adequately explained what might be 'just' for Indigenous traditional owners, or how a requirement to meet the Commonwealth in court to argue about reasonable compensation could be considered fair terms.²⁸ In addition, the 'just terms' requirement of the Constitution does not control the States in their acquisition of property; since most extinguishment of Indigenous native title comes about by State governments making grants inconsistent with the Native Title holder's interests, the constitutional requirement of 'just terms' is a frail shield.²⁹

Necessary Changes

When former Prime Minister Kevin Rudd made a formal apology to the stolen generations his actions were widely acclaimed as an acknowledgement that was long past due, and of significant value.³⁰ Although the Apology did not seek to directly address any of the constitutional or legislative deficiencies residual in our legal system, it did hold great symbolic and therapeutic meaning, not only for those to whom the Apology was directed, but for many in the broader Australian community. We suggest that the time is well overdue to modernise and reform our Constitution to reflect the reality of prior Indigenous ownership, custodianship and sovereignty of Australia, as well as recognition of rights of equality, non-discrimination and difference.³¹ It is important to find the right balance between identifying appropriate constitutional reform, and communicating the importance of the reform message to the wider Australian community. To remedy the injustices and omissions of the past, the

²⁷ (1969) 119 CLR 564.

²⁸ See further Sean Brennan *ibid*.

²⁹ Sean Brennan "Native Title and the Acquisition of Property under the Australian Constitution" 28 *Melb University Law Review* 28 (2004).

³⁰ See 'Australia, House of Representatives, Parliamentary Debates (Hansard), 13 February 2008, 167-173 (the Hon K M Rudd MP, Prime Minister). We note that Kirby J considered the Apology not to be 'legally irrelevant'; see *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 70.

³¹ Further matters of substantive economic and social inequality, such as standards of health, education, housing and employment still must be addressed, and programs to meet these needs are still of course critical. See Melissa Castan, "Reconciliation, Law, and the Constitution", in Michelle Grattan (ed), *Reconciliation* (Bookman Press, Melbourne, 2000), pp 202, 206.

‘recognition referendum’ should include a number of reform options. Having said that, we recognise that with a range of reforms will come the risk of community and political division on the content and impact of the proposed changes.

At the least a new preamble to the Constitution should embrace the true history and the special culture of Indigenous Australians, and their unique contribution to Australia.³² Some State constitutions already have already successfully been altered to include such acknowledgement.³³

Also, section 25, an antiquated and redundant section with racist overtones, which reflects past discrimination against Indigenous peoples’ rights to vote.³⁴ It should be deleted, even if deletion would make no particularly great change to the ways the Commonwealth parliament makes laws regarding Indigenous Australians

Suggestions have been made to include specific constitutional protection of Indigenous rights, a guarantee of free prior and informed consent, or a guarantee of self-determination.³⁵ The protection adopted by Canada is often raised as a possibility. There, common law Aboriginal rights including native title interests, and rights derived from treaties have had constitutional protection since 1982. Section 35(1) of the *Constitution Act 1982* (Canada) recognises and affirms ‘the existing aboriginal and treaty rights of the aboriginal peoples of Canada’. This clause protects the rights existing at the time of the 1982 Act, and can be overridden in specified circumstances, allowing for balancing Indigenous rights against proportionate Government development or enterprise. It is the Canadian courts that evaluate that

³² This is explored in detail by Anne Twomey, *Constitutional Recognition of Indigenous Australians in a Preamble* (2011 Reform Unit, Sydney Law School).

³³ The Victorian Constitution was altered in 2004 to acknowledge the absence of Aboriginal participation in the creation of that instrument, and to recognise Victoria’s Aboriginal people as the original custodians of territory. See *Constitution Act 1975* (Vic), s 1A. The Queensland Constitution was similarly altered in 2010 to include a Preamble which honours ‘the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community’. See *Constitution Act 2001* (Qld), similarly see *Constitution Act 1902* (NSW) s 2 (also amended in 2010).

³⁴ This was proposed by the Council for Aboriginal Reconciliation, *Final Report* (2000), 21 <<http://www.austlii.edu.au/orgs/car/finalreport/contents.htm>> at 1 March 2010. It was also proposed by the Constitutional Commission *Final Report* Canberra 1988, 155-57.

³⁵ See James Anaya ‘The right of Indigenous People to Self Determination in the Post Declaration Era in Claire Charters and Rodolfo Stavenhagen *Making the Declaration Work: the UN Declaration on the Rights of Indigenous People* (2009 IWGIA Copenhagen) 184.

balance, rather than the federal or provincial parliaments.³⁶

The inclusion of specific Indigenous rights in the Australian Constitution would be appropriate and would strengthen the validity and integrity of our constitutional system. They would also be consistent with our approval in 2009 of the United Nations General Assembly *Declaration on the Rights of Indigenous Peoples*.³⁷ However, we recognise that such clauses will not easily attract the requisite multi-party backing or popular support needed to generate the ‘double majority’ demanded by s 128 of the Commonwealth Constitution.

Substantive Reform

There are some aspects of constitutional recognition of Indigenous Australians that are more than merely symbolic, long overdue and very achievable. To make the Commonwealth legislative powers work effectively for Aboriginal and Torres Strait Islanders, a change to Section 51 is needed. Section 51(xxvi) could be altered to authorise the Commonwealth to make special laws only for the benefit of any race, but then we would still be reliant on the High Court’s interpretation of ‘benefit’, a value judgment that the High Court is not always ready to embrace.³⁸ It would be preferable to amend that section to explicitly grant the Commonwealth the power to make laws “with respect to Aboriginal and Torres Strait Islander people” (it seems it has only ever used the races power regarding Aboriginal and Torres Strait Islander people so far) so as to avoid the possibilities of discriminatory laws ‘for’ Indigenous people.

It is not sufficient to simply delete s 51(xxvi). If the section were repealed and no positive grant of power to make laws for Aboriginal and Torres Strait Islander people replaced it, the very issue the 1967 referendum sought to redress would arise again and the Commonwealth would face a deficit of legislative power. The

³⁶ *Sparrow v The Queen* (1990) 1 SCR. 1075. Importantly the Canadians have also recognised the inherent Aboriginal rights to self-government, and thus negotiate with Canadian Aboriginal communities to achieve genuine self-determination.

³⁷ United Nations General Assembly Declaration on the Rights of Indigenous Peoples, adopted in 2007, (A/RES/61/295).

³⁸ See *Leask v Commonwealth* (1997) 187 CLR 579 where the High Court explained the appropriate use of proportionality tests in the characterisation of Commonwealth laws.

Commonwealth is not likely to be able to rely on other heads of power, such as the External Affairs power, to compensate for that deficit. Nor can we leave s 51(xxvi) as it is, but add a clause prohibiting discrimination on the basis of race or ethnic origin. This would be unsatisfactory, for we would be left with a ‘race’ power and a prohibition on making racially discriminatory laws – this would be an inconsistent and incoherent use of the concept of ‘race’. Thus the removal of s 51(xxvi) must be accompanied by a positive grant of power to make laws for Aboriginal and Torres Strait Islander people.

A Prohibition on Racial Discrimination

To ensure the Commonwealth makes only ‘beneficial’ laws, there must be a constitutional prohibition on racial discrimination inserted, perhaps sitting in place of the deleted s 127. As Mick Gooda rightly said:

... if Australians were aware that their Constitution did not protect its citizens from discrimination, the nation would take collective action to bring about reform to enshrine the principles of non-discrimination and equality.³⁹

Many Constitutions contain such guarantees against racial discrimination,⁴⁰ and this would be consistent with Australia’s international commitments under the *Convention on the Elimination of All Forms of Racial Discrimination*, and other human rights treaties. A general ‘equality clause’ is a desirable inclusion in our Constitution that seriously lacks human rights standards. Such a clause would guarantee ‘equal treatment before and under the law, and equal protection and benefit of the law without discrimination’ as found in many comparable nations’ constitutions. However, we recognise that this would present considerable political challenges in terms of achieving approval at referendum, and it goes further than recognising the Indigenous people of Australia.

³⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011) 44. Available at: http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html.

⁴⁰ In the Bill of Rights in the South African Constitution, “Everyone is equal before the law and has the right to equal protection and benefit of the law” and has protection from racial discrimination (clause 9). In the Canadian Charter of Rights and Freedoms, section 15 guarantees equal treatment before and under the law, and equal protection and benefit of the law without discrimination.

A more focused 'anti-discrimination' clause, specifically one that prohibits racial discrimination in the terms Australia has already adopted in the *Racial Discrimination Act 1975* (Cth) or the *Convention on Elimination of All Forms of Racial Discrimination* should be adopted. Such a clause prohibiting racial discrimination should also provide that the Commonwealth, States and Territories are still able to make laws that redress disadvantage, or are protective of Indigenous culture, language and identity.⁴¹ This proviso is important in order to allow laws that address strategies that promote substantive (as opposed to formal) measures of equality, and that promote the special place of Australian Indigenous culture within Australia. Protecting 'culture, language and identity' is also consistent with Australia's obligation to protect Indigenous culture under Article 27 of the *International Covenant on Civil and Political Rights* (Australia signed on to this in 1972 and ratified it in 1980) and the United Nations' *Declaration on the Rights of Indigenous People*).

An Agreement-making Power

In addition to these constitutional amendments, it would be appropriate to include the capacity for the Commonwealth (and the States and Territories) to make legally enforceable agreements with Indigenous communities. Agreements are currently being made all around Australia, such as Indigenous Law Use Agreements, Native Title determinations, Land Rights awards as well as many other kinds.⁴²

This agreement-making power might ultimately also apply to a Treaty, or a wide ranging negotiated settlement agreement, which could recognise the distinct rights of Australian Indigenous people, and set national standards.⁴³ Such an agreement is only realistic if there is widespread community momentum in favour of embarking on the process; however enshrining an agreement-making power in the Constitution (in a section modelled on s 105A on state agreements) would permit the Commonwealth to

⁴¹ Many national constitutions contain clauses that protect against discrimination based on racial or ethnic grounds, and that preserve cultural and linguistic integrity. See Bradford Morse "Indigenous Provisions in Constitutions Around the World" 2011 Paper located at <www.youmeunity.org>.

⁴² See the Agreements, Treaties, Negotiated Settlements database at <www.atns.edu> for a wide selection of these agreements.

⁴³ Some treaty proposals can be found in documents such as G Clarke, 'From Here to a Treaty', *Hyllus Maris Lecture*, Latrobe University, September 2000; Marcia Langton 'A Treaty between our Nations', *Inaugural Professorial Lecture*, University of Melbourne, November 2000; Patrick Dodson, *Wentworth Lecture*, 12 May 2000, Canberra.

make such a comprehensive agreement without recourse to a second referendum.⁴⁴

Conclusion

The failed referendum on alteration of the Preamble to the Constitution in 1999, and the general difficulty in achieving reform through referenda generally, are often mentioned when constitutional amendment is discussed, and it is always important to consider how the political and social context impacts on any referendum's success. We can also see that the referendum process itself can have wider, and sometimes unforeseen, impacts in Australia, much as the 1967 referendum result and the national Apology each generated a broad shift in national attitudes.⁴⁵ This may also be the time for other worthwhile amendments, such as to the *Referendum (Machinery Provisions) Act 1984 (Cth)*.⁴⁶

We urge the Panel and the political leadership in Australia to embrace the opportunity to recognise the special place of Indigenous people in our constitutional and legal framework, and not to allow arguments about timing or political timidity to eclipse the 'constitutional moment,' Coherent and concrete changes to our governing legal instrument are now past overdue to properly and accurately meet our contemporary legal requirements, and to positively recognise and reflect our national identity.

⁴⁴ Legal issues regarding a treaty are explored at length in the book by Sean Brennan, Larissa Behrendt, Lisa Strelein, and George Williams, *Treaty* (2005).

⁴⁵ See Melissa Castan, above n 33, 206. See also Bain Attwood and Andrew Markus *The 1967 Referendum, or when Aborigines didn't get the Vote* 1997 Aboriginal Studies Press.

⁴⁶ As suggested by George Williams in 'Thawing the Frozen Continent' 2008 (19) *Griffith Review*