



THE UNIVERSITY OF  
MELBOURNE

Secretariat  
Expert Panel on Constitutional Recognition of Indigenous Australians

By email:

11 October 2010

Dear Secretary

Thank you for the opportunity to make a submission in relation to proposed amendments to the *Constitution*.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies and staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

If you have any questions relating to this submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

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THE UNIVERSITY OF  
MELBOURNE

Centre for Comparative Constitutional Studies

## **Submission to the Expert Panel on Constitutional Recognition of Indigenous Australians**

### **1 Introduction**

We welcome the Federal Government's formation of the Expert Panel. We note that the Expert Panel is to 'report to the Government on possible options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for each option by December 2011.'<sup>1</sup>

We note that the Expert Panel has established the following principles to guide its assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander peoples:

- It must contribute to a more unified and reconciled nation.
- It must be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples.
- It must be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums.
- It must be technically and legally sound.<sup>2</sup>

We note that the Expert Panel is to have regard amongst other things, to 'the implications of any proposed changes to the *Constitution* and advice from constitutional law experts'. It is this aspect of the Expert Panel's work that is the focus of this submission. The submission also touches upon 'the form of constitutional change and approach to a referendum likely to obtain widespread support'.<sup>3</sup>

Seven ideas for constitutional change have been raised in the Expert Panel's Discussion Paper, *A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition* (May 2011) (the 'Discussion Paper'):

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<sup>1</sup> Australian Government, *Constitutional Recognition of Indigenous Australians: Expert Panel Terms of Reference*

<[http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Documents/Constitutional\\_recognition6.pdf](http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Documents/Constitutional_recognition6.pdf)>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

- a statement of recognition in a preamble;
- a statement of recognition in the body of the *Constitution*;
- a statement of values in a preamble;
- a statement of values in the body of the *Constitution*;
- repeal or amendment of the race power;
- repeal of s 25 of the *Constitution*; and
- an agreement-making power.

## **2 Summary of Submissions**

We make the following submissions:

### **2.1 *Statement of Recognition or Values***

- A statement formally recognising Aboriginal and Torres Strait Islander people should be inserted into the *Constitution*.
- The statement should be acceptable to and supported by a majority of Aboriginal and Torres Strait Islander people.
- The statement should be expressed in general terms that enable it to command broad support and to endure over time.
- The statement should not be subject to a ‘limitation clause’.
- A statement in the *Constitution*’s body is preferable to a statement in a constitutional preamble.
- The statement should be accompanied by, and explicitly linked to, operative provisions (such as a new s 51A giving the Federal Parliament the power to make laws with respect to Aboriginal and Torres Strait Islander people).

### **2.2 *Section 25***

- Section 25 should be repealed.

### **2.3 *The Race Power***

- A new power should be inserted into the *Constitution* giving the Federal Parliament the power to make laws with respect to Aboriginal and Torres Strait Islander people.
- The power could be contained in a new s 51A and be accompanied by, and explicitly linked to, a statement of recognition.
- There are both advantages and disadvantages to the race power, and careful consideration should be given as to whether it should be repealed.
- There are both advantages and disadvantages to imposing additional constitutional limits on legislative power in Indigenous affairs, such as through a prohibition on racial discrimination. Careful consideration should be given as to whether any such new limits should be imposed.
- Consideration should be given as to whether there should be a new head of power to make laws with respect to the prevention of racial discrimination.

### **2.4 *An Agreement-Making Power***

- An agreement-making power should be inserted into the *Constitution*.
- Careful consideration should be given as to the form an agreement-making power should take. The model based on s 105A of the *Constitution* contains several benefits but also a number of potential problems.

### 3 Statement of Recognition or Values

The Discussion Paper raises the possibility of inserting a statement recognising ‘Aboriginal and Torres Strait Islander peoples’ distinct cultural identities, prior ownership and custodianship of their lands and waters’, possibly also alongside mention of ‘the Australian people’s fundamental values’.<sup>4</sup> The statement could be included either in a preamble or the body of the *Constitution*.

We are of the view that a statement formally recognising Aboriginal and Torres Strait Islander people should be inserted into the *Constitution*. The benefits of providing such recognition have been outlined in the Discussion Paper.<sup>5</sup>

In relation to this proposal we note as follows:

#### 3.1 *Form of Words*

There are complex, ongoing (and presumably unending) debates, including within Indigenous communities themselves, about the nature of Indigenous identity. This fact reflects the great diversity in the historical and contemporary circumstances of Aboriginal and Torres Strait Islander people.

As a consequence, it is unlikely that any form of wording for a statement of recognition will satisfy all interested parties. Just as there was debate in the 1999 preamble referendum over the use of ‘kinship’ versus ‘custodianship’, the Expert Panel will have to grapple with debates over ‘Indigenous’ versus ‘Aboriginal and Torres Strait Islander’, ‘people’ versus ‘peoples’, whether the noun ‘Australians’ is used (eg, ‘Aboriginal Australians’), whether and how to refer to Indigenous relationships to lands and waters, whether to refer to Indigenous sovereignty, and so on.

In our view, the Expert Panel should have especial regard to finding a form of words that:

- can be accepted by a majority of Aboriginal and Torres Strait Islander people. In this regard, the Expert Panel should pay careful attention to the views of Aboriginal and Torres Strait Islander people, their representatives and their organisations as to wording. Indigenous people should be afforded as much say as possible over their own collective identity, including in official acknowledgements of that identity.
- is ‘capable of being supported by an overwhelming majority of Australians from across the political and social spectrums’.<sup>6</sup>

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<sup>4</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, ‘A National Conversation About Aboriginal and Torres Strait Islander Recognition’ (Discussion Paper, May 2011) 17.

<sup>5</sup> *Ibid* 6–7, 10–13.

The inevitable tension between these two goals – that the wording be accepted by both a majority of Indigenous people and a majority of all Australians – means that any form of recognition will be a compromise or an incomplete form of recognition. It is important nonetheless that it has substantial support among Aboriginal and Torres Strait Islander people.

Finally, to achieve its goals, a statement of recognition or values is likely to be expressed in somewhat general terms and to appeal to abstract concepts. If the statement is expressed in narrow and precise terms it may not be able to achieve the central goal of providing meaningful recognition.

A statement of recognition or values is a statement of the special place that Aboriginal or Torres Strait Islander people have in Australian history and their special relationship with the Australian nation. It is neither possible nor desirable to express these ideas in precise terms.

### **3.2 *Limitation Clauses***

The Constitutional Alteration (Preamble) 1999 included a new s 125A stipulating: ‘The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.’ The proposal failed at referendum.

In all three State jurisdictions that have now provided constitutional recognition of Indigenous people, similar provisions have been used.<sup>7</sup> The evident purpose is to ensure that unintended legal consequences of this recognition are minimised.

We are strongly opposed to including a clause limiting the legal effect of a statement of recognition or values. Such a clause is inconsistent with the reason for the inclusion of a statement of recognition or values.<sup>8</sup> To qualify the recognition in this way treats a statement of recognition or values as an exceptional part of the *Constitution* and undermines important symbolism that the statement would otherwise provide.

### **3.3 *Uncertainty of Meaning***

The generality of the terms of a statement of recognition or values may create legal uncertainty. However, it is important to bear in mind the following:

- Certainty is not the only legal virtue. Generality of language in a statement of recognition or values would increase the breadth of its appeal and thus its capacity to ‘contribute to a more unified and reconciled nation’ or to provide a ‘benefit to and accord with the wishes of Aboriginal and Torres Strait Islander

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<sup>6</sup> Ibid 16.

<sup>7</sup> Constitution Alteration (Preamble) 1999 (Cth) s 4.

<sup>8</sup> On this point, see especially Megan Davis and Zrinka Lemezina, ‘Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?’ (2009) 33 *University of New South Wales Law Journal* 239.

peoples’.<sup>9</sup> In addition, generality of expression will contribute to the capacity of the statement to remain relevant over time. In this respect it is well to remember that constitutional amendments should be designed to endure for a considerable time.

- If a statement of recognition or values is substantially congruent with the other parts of the *Constitution* – including other Indigenous-related amendments achieved at the same time – the problem of legal uncertainty will be diminished. In this respect, it is advisable:
  - i. to accompany a statement of recognition or values with other changes to the *Constitution*’s text that also serve explicitly to recognise Indigenous people (eg, inserting an Indigenous-specific power, inserting an agreement-making power) and affirm stated values (eg, a prohibition on racial discrimination); and
  - ii. explicitly to link the statement of recognition or values with substantive changes.

### **3.4 The Location of the Statement**

The Discussion Paper suggested placing a statement of recognition or values either in a preamble or the *Constitution*’s body. If the statement is to be placed in the *Constitution*’s body, it could be either a bare, stand-alone provision or a provision accompanied by other more substantive clauses.

In deciding upon which option to recommend (if any), the Expert Panel should give consideration to the purpose of inserting a statement of recognition or values. As we see it, a statement of recognition or values provides an important but largely *non-legal* acknowledgment in Australia’s founding document of the unique status of Aboriginal and Torres Strait Islander people.

#### **3.4.1 In a preamble**

The advantages of placing a statement of recognition or values in a preamble are that preambles are:

- conventionally used to recite facts or sentiments that are deemed contextually important to the legal instrument they preface; and
- not directly legally enforceable: at their highest, preambles may be used in facilitating the interpretation of other ambiguous provisions; they do not themselves create new rights or duties.<sup>10</sup>

However, there are a number of difficulties:

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<sup>9</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, ‘A National Conversation About Aboriginal and Torres Strait Islander Recognition’ (Discussion Paper, May 2011) 16.

<sup>10</sup> See Mark McKenna, Amelia Simpson and George Williams, ‘First Words: The Preamble to the Australian Constitution’ (2001) 24 *University of New South Wales Law Journal* 382; Anne Twomey, ‘Constitutional Recognition of Indigenous Australians in a Preamble’ (Report No 2, Constitutional Reform Unit, University of Sydney, September 2011) <[http://sydney.edu.au/law/cru/documents/2011/Report\\_2\\_2011.pdf](http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf)>.

- If the statement was to be inserted into the existing Preamble to the *Commonwealth of Australia Constitution Act 1900* (UK), it may not be possible to amend this Act pursuant to s 128 of the *Constitution*.<sup>11</sup>
- A statement recognising Aboriginal and Torres Strait Islander people would not be the only salient inclusion in a constitutional preamble: it would make sense for a preamble to also recognise other key features of our constitutional and political system and perhaps also elements of Australian society, history and values. Significant political difficulties may arise over what is deemed worthy of and acceptable for preambular recognition beyond the status of Indigenous people.<sup>12</sup>

### 3.4.2 In the *Constitution*'s body

A statement in the body of the *Constitution* would have the following advantages:

- It could be effected by an amendment pursuant to s 128.
- It may avoid the wider demands for recognition that may be raised in relation to the insertion of a preamble. Whereas broader expectations of recognition are likely to attach to a preamble because it would be an introduction to the entire *Constitution*, these expectations would not attend a statement of recognition or values in the *Constitution*'s body. Such a statement could quite legitimately be confined solely to Indigenous recognition, which is the focus of the current reform process.

For these reasons, we favour a statement of recognition in the body of the *Constitution* over a statement in a preamble.

However, the idea of a non-functional statement of recognition or values in the *Constitution*'s body sits uneasily with the primary, functional role constitutions play in defining, structuring and limiting political power. The statement's presence in the operative text of the *Constitution* would point towards it having some independent legal function or effect.

As such, we recommend that any statement of values in the body of the *Constitution* should be accompanied by, and explicitly linked to, operative provisions. Combining a statement of recognition or values with functional provisions would create a strong implication that the effects of the statement were confined to those things stipulated in the accompanying operative clauses.

Three reforms raised in the Discussion Paper in particular would be suitable accompaniments for a non-preambular statement of recognition or values: a new power to make laws about Aboriginal and Torres Strait Islander people (in replacement of the race power), an agreement-making power, and a guarantee of racial non-discrimination and equality.

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<sup>11</sup> See Anne Twomey, 'Constitutional Recognition of Indigenous Australians in a Preamble' (Report No 2, Constitutional Reform Unit, University of Sydney, September 2011) 48ff <[http://sydney.edu.au/law/cru/documents/2011/Report\\_2\\_2011.pdf](http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf)>.

<sup>12</sup> Ibid 4. But cf Anne Winckel, 'A 21<sup>st</sup> Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics' (2001) 24 *University of New South Wales Law Journal* 636.

### 3.5 *An Example*

To illustrate how a statement of values or recognition could be linked to operative provisions, we have drafted an example provision.

It uses as a model the constitutional statement of Indigenous recognition from Victoria,<sup>13</sup> and it is attached to a new power to make laws about Aboriginal and Torres Strait Islander people. However, we note that a different form of Indigenous recognition may be more desirable. Moreover, the statement might be attached to provisions other than – or in addition to – a new Indigenous-specific lawmaking power (eg, an agreement-making power, a prohibition on racial discrimination).

51A.

(1) The people of Australia acknowledge that the enactment of this Constitution occurred without proper consultation, recognition or involvement of the Aboriginal and Torres Strait Islander people of Australia.

(2) The people of Australia recognise that Australia's Aboriginal and Torres Strait Islander people, as the original custodians of the land on which Australia was established—

(a) have a unique status as the descendants of Australia's first people; and

(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters; and

(c) have made a unique and irreplaceable contribution to the identity and well-being of Australia.

(3) Accordingly, the Federal Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the Aboriginal and Torres Strait Islander people of Australia.

## 4 **Section 25**

Repealing s 25 of the *Constitution* has been suggested as a possibility for constitutional reform in the Discussion Paper. We believe that s 25 should be repealed.

### 4.1 *The Function and Effect of s 25*

Section 25 of the *Constitution* provides that, if a State disqualifies the people of a particular race from voting in State lower-house elections, those people will not be counted when determining how many seats that State gets in the House of Representatives (calculated under s 24 on the basis of State population). As such, s 25 acts as a 'mild deterrent to discrimination on racial grounds by the States'.<sup>14</sup>

If a State disenfranchises a particular racial group, the State's population, and potentially therefore also its entitlement to House of Representatives seats, will be reduced accordingly.

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<sup>13</sup> *Constitution Act 1975* (Vic) s 1A.

<sup>14</sup> Cheryl Saunders, *The Australian Constitution (Annotated)* (Constitutional Centenary Foundation, 3<sup>rd</sup> ed, 2000) 38.

None of the States have had explicitly racially discriminatory franchise laws since 1965.<sup>15</sup> The operation of s 25 on House of Representatives seats has long been denied – and in some States never engaged at all – with the establishment of State franchises that are not restricted on the basis of race.

## 4.2 History

While some of the *Constitution*'s framers may have been in favour of s 25 because it operated as a disincentive towards discriminatory State voting laws, probably the more likely reason the provision made it into the *Constitution* was a federalist one. Around federation only some States imposed express racial bars on voting. The framers may have wanted to ensure that such States would not get an allocation of House of Representatives seats that took such disenfranchised people into account, out of fairness to those States that did not place racial restrictions on the franchise.

Two additional facts about s 25 are worth noting:

- The section does not appear to have ever operated directly with respect to Aboriginal people, though it may have done so with respect to Torres Strait Islanders. The reason that Aboriginal people did not come within s 25 is because, during the entire period that racially discriminatory State voting laws operated (in Western Australia until 1962 and Queensland until 1965), s 127 of the *Constitution* was also in force. The effect of s 127 was to automatically exclude 'aboriginal natives' (generally 'full-blood' Aboriginal people) from constitutional population counts, including in relation to each State's House of Representatives quota, regardless of whether Aboriginal people had been disenfranchised by their State. In short, the automatic exclusion of 'aboriginal natives' from constitutional population counts under s 127 effectively preceded the contingent operation of s 25. Aboriginal people of less than 'full-blood', to whom s 127 did not apply, were deemed to fall outside the definition of 'persons of any race' within the meaning of s 25. For Torres Strait Islanders (at least those classified as 'full-blood') the position may have been different. They did not come within the definition given by officials to 'aboriginal natives' under s 127, but arguably they would have come within the definition of 'persons of any race' within the meaning of s 25. Between 1930 and 1965, when Torres Strait Islanders were disenfranchised under Queensland law, it is possible (though in need of historical verification) that Torres Strait Islanders were excluded from House of Representatives population counts by virtue of s 25.<sup>16</sup>
- There have been three attempts in the past to repeal s 25. Interestingly, one of these attempts was in 1967, but it was part of the unsuccessful 'nexus' question rather than the successful 'Aboriginals' question.<sup>17</sup> The other two referendum questions which would have repealed s 25 took place in 1974 and

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<sup>15</sup> In this year Queensland repealed its bars on the enrolment of Aboriginal and Torres Strait Islander people. As noted below, however, s 25 did not apply to Aboriginal people, though it may have applied to Torres Strait Islander people.

<sup>16</sup> All of this is taken from Dylan Lino, 'The *Constitution* Before 1967' (unpublished manuscript) 23.

<sup>17</sup> See Constitution Alteration (Parliament) 1967 (Cth) s 2(b).

1988, and both were concerned (like the 1967 ‘nexus’ proposal) with parliamentary reform rather than Indigenous reform.

### **4.3 Repealing s 25**

In our view, s 25 ought to be repealed. There should not be a provision in our *Constitution* that expressly acknowledges that State governments can pass racially discriminatory laws.

The provision is effectively spent nowadays: no State has imposed racial bars upon the franchise since 1965, and in the politically inconceivable event that a State did seek to remove the franchise from Indigenous people or other racial groups in the future, that law would almost certainly be rendered inoperative by virtue of the *Racial Discrimination Act 1975* (Cth) in combination with s 109 of the *Constitution*.

Nonetheless, having a *Constitution* that does not constitutionally prohibit, but in fact through s 25 condones, racial discrimination is unacceptable. Section 25 conveys a repugnant symbolic message to the Australian public and the international community: that Australia tolerates racial discrimination by its governments. Perhaps more seriously, s 25’s continued presence in the *Constitution* can be used to support interpretations of other constitutional provisions that are more accepting of racial discrimination than might otherwise be the case. In fact, the High Court has already used s 25 in this way on two occasions, one of them being the *Stolen Generations Case*.<sup>18</sup>

## **5 The Race Power**

The Discussion Paper raises the possibility of repealing or amending s 51 (xxvi). Within this context, the Discussion Paper also suggests inserting a guarantee of racial non-discrimination and equality.

Detailed analysis of these issues is contained in the separate submission of CCCS member Dylan Lino. All of the points made in Mr Lino’s submission are not necessarily endorsed by all members of the CCCS. However, we draw on Mr Lino’s analysis here.

We make the following points:

### **5.1 Inserting a New Indigenous-Specific Power**

We believe a new Indigenous-specific head of power should be inserted into the *Constitution*. It should empower the Federal Parliament to make laws with respect to Aboriginal and Torres Strait Islander people.

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<sup>18</sup> See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 45 (Gibbs J), 58 (Stephen J), 62 (Mason J); *Kruger v Commonwealth* (1997) 190 CLR 1, 64 (Dawson J), 113 (Gaudron J). Other words in s 25 have been drawn upon to support inferences about the representative nature of Australian political institutions but, in our view, the removal of s 25 would not substantially reduce the capacity to continue to draw such inferences, given the presence of other more significant provisions (such as ss 7, 24 and 128) supporting these inferences.

The power could be contained in a new s 51A, and could be accompanied by, and explicitly linked to, a statement of recognition (as suggested earlier).<sup>19</sup>

## **5.2 *Repealing the Race Power***

There are arguments for and against repealing the race power. On the one hand, the race power reflects outdated and indeed offensive views about race. Moreover, the repeal of the race power may pose few practical problems for existing legislation. The race power does not appear to have been used to make laws about ‘racial’ groups other than Aboriginal and Torres Strait Islander people. Therefore, its repeal would probably not jeopardise the constitutionality of existing legislation, provided that a new power to make laws about Aboriginal and Torres Strait Islander people was inserted into the *Constitution*.

On the other hand, there is a small possibility that there may be laws on the statute books that rely on the race power for constitutional validity (though no major legislative schemes stand out in this respect). Moreover, in the future there may be occasions where it is desirable to pass laws of a beneficial or remedial character about particular non-Indigenous ‘racial’ groups. Repealing the race power would diminish the constitutional capacity for such laws to be passed.

As there are differing views amongst CCCS members on these matters, we do not express a concluded view on whether the race power should be repealed.

## **5.3 *Imposing Additional Limits on the Race Power***

The Discussion Paper raised the possibility of imposing new limits on laws that may be made under the race power or an Indigenous-specific head of power (and possibly other heads of power also). For instance, laws about Aboriginal and Torres Strait Islander people might be expressly confined to laws that are for their ‘benefit’. There might also be included in the *Constitution* a guarantee of racial non-discrimination and equality.

On the one hand, such provisions could potentially provide a valuable constraint on the exercise of legislative power, especially as it is exercised with regard to Indigenous people. Not infrequently, Indigenous rights and interests have been curtailed by legislation in a detrimental or discriminatory fashion. Because Aboriginal and Torres Strait Islander people constitute a persistent minority of the overall population, they are at a significant numerical disadvantage when it comes to influencing majoritarian parliamentary politics. Consequently, judicially reviewable constitutional constraints on lawmaking about Indigenous people could help to prevent future government discrimination and adverse treatment against them.

On the other hand, because such provisions would inevitably have to be worded in general terms (such as ‘benefit’, ‘discrimination’ or ‘equality’), there is likely to be disagreement in the courts over their meaning and consequently legal complexity and uncertainty. Another common objection raised to constitutional rights and guarantees

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<sup>19</sup> See above Part 3.5 ‘An Example’.

is that they inappropriately disempower democratically elected legislatures, and empower unelected judges, with regard to the meaning of contested moral concepts.

Because there are differing views on these issues amongst CCCS members, we do not express a final view.

#### **5.4 *Inserting a Power About Racial Discrimination***

Consideration should be given as to whether a new power to make laws for the prevention of racial discrimination should be inserted into the *Constitution*. A power of this kind would provide a firmer and less contingent constitutional footing for legislation on racial discrimination, hatred, vilification and offense than exists at present. Currently, legislation addressing these issues must be made under the external affairs power, as an implementation of Australia's international treaty obligations.

### **6 An Agreement-Making Power**

The final idea for constitutional reform raised in the Discussion Paper is for the insertion of a provision that would enable and support the making of agreements between Indigenous peoples and the Commonwealth. As the Expert Panel has observed, this particular amendment has its genesis in a proposal endorsed in 1983 by the Senate Standing Committee on Constitutional and Legal Affairs. It has subsequently been discussed by others, including the Constitutional Commission (which recommended against the proposal's adoption).

We are in favour of an agreement-making power. Agreement-making:

- will give Aboriginal and Torres Strait Islander people greater control over their governance;
- may help to resolve foundational, contemporary and future issues concerning Indigenous–state relations; and
- may lead to the achievement of important concrete outcomes advancing Indigenous wellbeing.

However, we believe that further work needs to be done to refine and clarify the operation of an agreement-making power.

#### **6.1 *The Proposed Model***

The proposal raised in the Discussion Paper and that drew the Senate Committee's support in 1983 was for the insertion of a provision modelled on s 105A of the *Constitution*, which enables the making of financial agreements between the Commonwealth and the States. It provides as follows:

- (1) The Commonwealth may make agreements with persons or bodies recognised as representative of the Aboriginal and Torres Strait Islander people of Australia with respect to the status and rights of those people within Australia including but not limited by the following:

- (a) restoration to Aboriginal and Islander people or some of them of rights to lands within the jurisdiction of Australia which were vested in said people prior to 1770;
- (b) compensation for loss of any land incapable of being restored to said people or some of them;
- (c) matters of health, education, employment and welfare of said people or some of them;
- (d) the law relating to the exercise of judicial power by the Commonwealth of Australia or any State or any Territory within Australia in respect to said people;
- (e) any matter of concern or matter seen as significant by the Aboriginal and Islander people in relation to their status as citizens of Australia.

(2) The Parliament shall have the power to make laws for validating any such agreement made before the commencement of this section.

(3) Any such agreement made may be varied or rescinded by the parties thereto and as such shall supersede any prior agreement for the purposes of this section.

(4) The Parliament shall have the power to make laws for the carrying out by the parties of any such agreement.

(5) Any law passed pursuant to clause 2 and clause 4 shall be binding upon the Commonwealth and the States, notwithstanding anything contained in this Constitution or the Constitutions of the several States or any law of the Parliament of the Commonwealth or of any State.

(6) Any variation or alteration or rescinding of this section shall occur in the following manner:

- (a) ... (constitutional alteration notwithstanding section 128).<sup>20</sup>

It is this clause upon which we base our comments.

## **6.2 Role of an Agreement-Making Power**

In Australia, the preponderant method of Anglo-Australian governance of Indigenous people has been through legislation (and administration pursuant to it). However, in recent years agreement-making between Aboriginal and Torres Strait Islander peoples and other parties, including governments, has emerged as a common, if ancillary, governance mode. In other English settler-colonies, agreement-making has been the norm since the outset of colonisation.

Inserting an agreement-making power into the *Constitution* would encourage, facilitate and give constitutional endorsement to Indigenous–state agreement-making as a mode of governance. It would represent a new institutional mechanism for an existing style of interaction between Indigenous peoples and the state. If an agreement-making power were endorsed at a referendum, it would be likely to spur the Commonwealth into increased negotiations with Indigenous groups – in the case

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<sup>20</sup> Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later ...: Report on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal People* (1983) 73–4.

of a willing government, by conferring upon it a popular mandate to undertake such a task; and in the case of a reluctant government, by imposing political pressure.

### **6.3 *Plurality and Scale of Agreements***

The proposed agreement-making power<sup>21</sup> envisages that multiple agreements will be made between various Indigenous groups and the Commonwealth, and enables agreement-making at different scales, from the national to the local. This course of action moves away from, but does not foreclose, the negotiation of a single national agreement or treaty between the state on the one side and all Indigenous peoples on the other, which has been the focus of debate in the past.

Enabling multiple and sub-national agreements overcomes some of the difficult issues that have emerged in discussions over a single national agreement:

- Indigenous representation: Under an agreement-making power, local and regional agreements could be negotiated while the political and legal difficulties surrounding national Indigenous representation – centring on which body or bodies have the political legitimacy and legal authority to negotiate on behalf of all Indigenous people and bind them to any agreement reached – are worked out.
- Diverse circumstances: An agreement-making power enables agreements tailored to diverse circumstances, claims and needs of Aboriginal and Torres Strait Islander peoples around Australia, avoiding the one-size-fits-all approach commonly complained of by Indigenous people.
- Referendum politics: As an agreement-making power is geared towards smaller-scale and multiple agreements, it may also be able to avoid the fraught ideological debates about a treaty that have occurred in the past. Even the Howard Government, which was a staunch opponent of a treaty, implemented or maintained a variety of laws and policies under which sub-national Indigenous agreement-making took place. These included the establishment in 2004 of mechanisms for the negotiation of ‘shared responsibility agreements’ and ‘regional partnership agreements’ between Indigenous groups and the Commonwealth. The Howard Government also created the machinery for Indigenous land use agreements under the *Native Title Amendment Act 1998* (Cth) (even as other agreement-making provisions under the *Native Title Act 1993* (Cth), such as the right to negotiate, were being watered down).

### **6.4 *Capacity to Revise Agreements***

As clause 3 of the proposed agreement-making power makes clear,<sup>22</sup> concluded agreements are subject to renegotiation.

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<sup>21</sup> See Part 6.1 ‘The Proposed Model’ above.

<sup>22</sup> It provides ‘Any such agreement made may be varied or rescinded by the parties thereto and as such shall supersede any prior agreement for the purposes of this section.’ See Part 6.1 ‘The Proposed Model’ above.

We agree that agreements ought not to be final or seen as definitive, nor should Indigenous–state relationships be fixed, for the simple reason that circumstances change.

In order to facilitate the renegotiation of existing agreements, one possibility would be to include within an agreement-making power a provision mandating that the parties provide machinery covering renegotiation in their agreements. Such a provision could be prescriptive to greater or lesser extents about renegotiation processes and the aspects of renegotiation that agreements should cover (eg, circumstances under which renegotiation is to occur, the frequency of renegotiation). Such a provision would not necessarily dictate the terms of renegotiation processes but might simply require that they be addressed, though thought should be given as to whether some minimum standards should be mandated. It may be, however, that absolute discretion about renegotiation processes is better left to the parties themselves to decide.

### **6.5 *Agreement Outcomes***

Agreement-making allows for an enormous range of outcomes being negotiated between Indigenous and government parties. Agreements could address fundamental issues about the relationship between Indigenous peoples and the Australian polity, and seek to come to terms with the moral or philosophical elements of historical and contemporary Indigenous–state relations.

However, the agreements may also relate to the delivery of social services, land and resource rights, and so on. Agreements of this sort would be very similar to those that are already being negotiated between Indigenous and other parties in Australia. Such agreements encompass ‘the hard, rather than soft, edges of a meaningful reconciliation process’.<sup>23</sup> Because agreements under an agreement-making power are clearly geared towards concrete and practical outcomes, this may limit the scope for opponents to reject an agreement-making power as being concerned with ineffectual symbolism (a common charge against proponents of ‘reconciliation’ in recent years).

### **6.6 *Inclusion of Procedural Requirements***

It may be wise to include in an agreement-making power provisions addressing negotiation procedures. Such provisions would allow for principled and judicially reviewable negotiations. Possibilities include:

- a requirement that negotiations be conducted in good faith; or
- an obligation that the Commonwealth ‘take reasonable steps within a reasonable period to conclude an agreement’.<sup>24</sup>

Lessons about what does and does not work could be learned from the negotiation requirements that apply in other contexts, such as native title.

### **6.7 *Commonwealth as the Sole Government Party***

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<sup>23</sup> Marcia Langton and Lisa Palmer, ‘Modern Agreement-Making and Indigenous People in Australia: Issues and Trends’ (2003) 8(1) *Australian Indigenous Law Reporter* 1, 25.

<sup>24</sup> Submission by G Neate, quoted in Constitutional Commission, Advisory Committee on the Distribution of Powers, *Report* (1987) 115.

Under the proposed agreement-making power,<sup>25</sup> the Commonwealth alone is stipulated as the government party to agreements. State and local governments may not be parties to agreements (though they may be involved in negotiations).

There are some reasons to favour this approach:

- Allowing all levels of government to negotiate such agreements may weaken the power of Indigenous parties.<sup>26</sup>
- The Commonwealth may be more impartial than States in its dealings with Indigenous peoples because it often has a less direct stake in certain areas, particularly in relation to land and resources.
- The Commonwealth has to answer to the international community for Australia's treatment of Aboriginal and Torres Strait Islander people and comply with international obligations concerning human rights and Indigenous peoples.<sup>27</sup>

In favour of the inclusion of States, however, are the following:

- The States have responsibilities in many areas that agreements would be likely to cover, including service delivery and land and resource issues. Excluding the States from being parties to agreements may impose undesirable limits on the areas that agreements are capable of covering and the outcomes they are able to deliver.
- Because clause 5<sup>28</sup> seems to envisage that the Commonwealth could make agreements in *any* area it wished – notwithstanding the Commonwealth–State division of powers, protections for the States contained in the *Constitution*, and State legislation – the proposal would probably raise substantial opposition from the States in any referendum campaign.
- Opposition on 'State rights' grounds would be less likely if the States were capable of being parties to agreements and (or in the alternative) if clause 5 contained safeguards for existing Commonwealth–State relations.

These are difficult issues on which we do not express a final view.

## **6.8 Agreements' Legal Status and Force**

The agreement-making power considered as a model in this submission provides that the agreements (or legislation giving effect to them):

- bind the Commonwealth and States;
- override all other Commonwealth and State constitutional and statutory provisions.

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<sup>25</sup> See Part 6.1 'The Proposed Model' above.

<sup>26</sup> See Sean Brennan et al, *Treaty* (2005) 125.

<sup>27</sup> Ibid.

<sup>28</sup> See Part 6.1 'The Proposed Model' above.

There are clear benefits to such arrangements. However, there are also some issues with this approach of which the Expert Panel should be mindful. We do not express a concluded view.

### **6.8.1 Making the agreements binding**

Clauses 4 and 5 of the agreement-making power<sup>29</sup> respectively provide for the Federal Parliament to pass legislation carrying out agreements and for any such legislation to bind the Commonwealth and the States, regardless of existing Commonwealth and State constitutions and legislation. These clauses are based on similar provisions in s 105A of the *Constitution*. However, there is one significant difference between these clauses and those in s 105A. Under the proposed agreement-making power it is the *legislation giving effect to agreements* that binds the Commonwealth and States, whereas under s 105A it is the *agreements themselves* that bind the Commonwealth and States.

A number of important questions emerge here about the legal status of agreements made under an agreement-making power:

- Would the agreements depend on the passage of enabling legislation to have legal force? If so, this would place further obstacles in the way of successful and enforceable agreements being reached.
- Could agreement-effecting legislation simply be repealed by Parliament? If so, this would seem to contradict the other notion in an agreement-making power that the variation or rescission of agreements should be subject to the consent of both parties.
- Would agreement-effecting legislation, which would have overriding legal force, constrain the capacity for the parties to vary or rescind their agreement? If so, this would place obstacles in the way of renegotiation that would be outside the control of Indigenous parties (and to a lesser extent the Commonwealth).

With all these issues in mind, a better version of clause 5 would, like s 105A, make the agreements themselves binding, rather than the legislation giving them effect. Our remaining remarks are made on the basis that the agreements themselves were made binding.

### **6.8.2 Benefits of agreements having overriding legal force**

The great value of agreements binding the Commonwealth and the States, and their being given overriding legal force (including over Commonwealth and State constitutions and legislation), is that it would:

- secure Indigenous people's rights and entitlements from alteration or withdrawal by parliaments and allow for development and implementation of policy according to a long-term time frame;
- insulate Indigenous rights and entitlements from transient non-Indigenous parliamentary majorities and the pursuit of short-term political advantage; and

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<sup>29</sup> See Part 6.1 'The Proposed Model' above.

- give Indigenous parties increased power in negotiations by raising the prospect of Indigenous parties waiving their existing legal rights (for instance, to just terms compensation under s 51(xxxi) of the *Constitution*) in exchange for other benefits. (There are also dangers in this approach, which we discuss below).

### **6.8.3 Potential difficulties posed by agreements having overriding legal force**

Careful consideration should be given as to whether the evident benefits of overriding legal force, especially for Indigenous people, outweigh some of the potential problems.

#### ***Uncertain interaction with existing law***

It is not clear how agreements with overriding force would interact with existing law. Two questions that arise here are:

- Is the general law overridden as a matter of course unless expressly agreed otherwise, or does the general law continue to operate in the absence of express agreement or necessary implication?
- What is the status of an agreement that draws or relies on existing law?

This latter question is important given that Indigenous parties to agreements are likely to be constituted as legal entities under existing law. That is, Indigenous parties would most probably take the form of corporations, associations or councils formed under Commonwealth and State legislation, or of statutory authorities (eg, land councils, the Torres Strait Regional Authority).

How such legislation would be affected by agreements with overriding legal force is not clear. For instance, in the case of an Indigenous party to an agreement that was registered under Commonwealth corporations legislation, what power would the Federal Parliament possess to amend that legislation if it would incidentally affect the powers, duties or constitution of the Indigenous party?<sup>30</sup> Serious thought needs to be given as to how overriding agreements would interact with existing law. Some express clarifications in an agreement-making power on the relationship between agreements and the existing law may be warranted.

#### ***Potential loss of entitlements under general law***

Giving agreements overriding legal force raises the prospect that Indigenous parties to agreements may be disentitled to the rights and benefits they possess, as both citizens and Indigenous people, under the general law. These rights and benefits are statutory, common law and constitutional: entitlements to social services, various Indigenous-specific rights (eg, native title, statutory land rights, cultural heritage), judicial review of administrative action, just terms compensation for the acquisition of property, protections derived from the separation of powers, and right to trial by jury, to name but a few. Also included within this list would be any new constitutional prohibition

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<sup>30</sup> Similar, if not identical, issues were raised by the Constitutional Commission's Advisory Committee on the Distribution of Powers: see Constitutional Commission, Advisory Committee on the Distribution of Powers, *Report* (1987) 114–15.

on racial discrimination or other protections or guarantees inserted as part of the current Indigenous constitutional reform process.

On the one hand, perhaps some rights and benefits should not be negotiable. On the other hand, as we observed above, the capacity for Indigenous parties to forego existing legal entitlements may increase their bargaining power.. Moreover, it may be that any such ‘trade-offs’ made in negotiation are justified by the benefits received in negotiation of new agreements.

However, the capacity for Indigenous parties successfully to protect their existing rights and benefits would in part depend on the ability and skill of Indigenous-party negotiators. If the renegotiation of existing rights and benefits turned out to be disadvantageous, the only recourse for the Indigenous groups concerned would be to exert political and moral pressure on the government party to renegotiate.

### ***Tension with responsible government***

There is a tension between agreements with overriding legal force, negotiated by the Executive Government, and the principle of responsible government. If, as we have advocated above, the agreements themselves were to be made binding (rather than agreement-effecting legislation), there would be no direct parliamentary control of those agreements. At the same time, for Aboriginal and Torres Strait Islander people, getting around the pitfalls of parliamentary majoritarianism is precisely the point. Moreover, as in the case of s 105A, we may recognise that in certain circumstances decisions should be for the Executive to make alone. And ultimately, the Parliament would still retain its powers to call the Executive to account (through confidence motions, committee inquiries, Question Time, and the like), even if Parliament would have no formal role as to the existence, content, variation and rescission of agreements.

### ***Tension with federalism***

To reiterate an earlier point, the overriding force of agreements, coupled with the exclusion of the States from being parties to agreements, raises a potential tension with federalism. Agreements could conceivably impinge on the constitutional responsibilities and rights of States. Obvious objections may be raised to this in principle, though whether the benefits outweigh the potential federalist costs is an open question.

A more pragmatic issue here is that, in the face of likely State objections to any such agreement-making power, the proposal would probably confront difficulties in securing support at a referendum. Therefore, as we stated above, it may be advisable to include the States as possible parties to agreements. It might be further provided that an agreement could only be binding on a government (and capable of overriding its laws and the constitutional provisions applicable to it) where that government was party to the agreement.