



Land, Rights, Laws: *Issues of Native Title*

**Native Title
Research
Unit**



October 2011

Volume 5

Issues Paper No. 2

Editorial note: The Australian government has made a commitment to a referendum on constitutional recognition of Australia's first peoples. In a series of two papers, *Land, Rights, Laws: Issues of Native Title*, will explore where native title might fit into this debate. In this paper, native title specialist Sean Brennan outlines five possible areas of constitutional change and discusses their practical implications for native title. In the previous paper, senior constitutional scholar George Williams provided an overview of the challenges facing constitutional change and the options for reform, and assessed what is required to achieve change.

CONSTITUTIONAL REFORM AND ITS RELATIONSHIP TO LAND JUSTICE

Sean Brennan

Sean Brennan is a Senior Lecturer at the UNSW Faculty of Law and Director of the Indigenous Legal Issues Project at the Gilbert + Tobin Centre of Public Law. He teaches and writes mainly about native title, land rights and constitutional law and is a co-author of *Treaty* (Federation Press, 2005) and *Indigenous Legal Issues* (Thomson Reuters, 4th ed, 2009). He has worked with various Aboriginal organisations, as well as for the Commonwealth Parliament and a Federal Court judge.

Abstract

While many key legal settings for native title are already in place, recent history tells us that important legislative and judicial choices about Indigenous land justice will continue to be made in coming years and that constitutional arrangements will exert a significant shaping influence on the outcome. A range of viable proposals for constitutional reform are presently under consideration for a 2013 referendum which could materially affect the future pursuit of land justice for first peoples in Australia. These include, in particular, a non-discrimination clause with respect to race, which allows for positive Indigenous-specific laws, including ones enacted under a revised power in section 51(xxvi) of the Constitution, and a constitutional provision to support agreement-making between governments and Aboriginal and Torres Strait Islander people.

SPARKING INTEREST: THE NEAR-TERM PROSPECT OF CONSTITUTIONAL CHANGE

People are often wary, skeptical or disengaged when the topic of constitutional reform arises, for reasons that are understandable. The Australian Constitution can seem a remote and dusty document. Constitutional change takes time and effort, requiring energy that could be directed to more immediate objectives which, in the context of Indigenous affairs, could include regaining rights over land or negotiating a share in the benefits from development. It is not self-evident that amending the Constitution will make a practical difference in people's daily lives.

But because of recent events in federal politics, conversations are beginning to occur, within Aboriginal and Torres Strait Islander forums and elsewhere, about the near-term prospect of constitutional change. When those discussions break out, disengagement can give way to lively debate and many people rapidly reach common ground on some key propositions.

First, people agree that the Constitution *is* important in a way that no other single legal document is. It is *foundational* in terms of values and in practical terms it stands above all judge-made law and all legislation. It defines some minimums and some outer possibilities in the legal and political arena. It counts at critical moments after major court decisions such as *Mabo*¹ and *Wik*² and, every day, it lurks in the background, shaping law, policy and government administration.

Secondly, viable political opportunities for changing the Constitution have been rare. The last successful amendment to the Constitution occurred in 1977. The inconclusive result of the 2010 federal election has prised open the possibility soon of a national vote (or 'referendum') on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Greens and the Independent member for Denison Andrew Wilkie made that a condition of their support for the Australian Labor Party to form a minority government. Although both major parties long ago endorsed constitutional amendment in relation to Aboriginal and Torres Strait Islander people, events outside the control of Labor and the Coalition have forced them to go beyond merely rhetorical support for putting a proposal or set of proposals to a national vote.

A third commonly shared intuition, I suggest, arises once these discussions get underway and it concerns the potential aftermath of a constitutional change which recognised Aboriginal and Torres Strait Islander peoples. It is possible for many people to imagine waking up the day after a successful referendum and thinking that the country had taken a meaningful step, that collectively it may have turned a corner and that there was something to build on that was not there before.

Realism

There are good reasons, then, to be positive about this door opening during the current political cycle. But also, just as importantly, to remain realistic and hard-headed about what lies ahead. There are some basic realities which must be accommodated.

¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1. For the significance of the Constitution in the aftermath of the decision, see nn 22–25 and accompanying text.

² *Wik Peoples v Queensland* (1996) 187 CLR 1. For the significance of the Constitution in the aftermath of the decision, see n 26.

The first is that any proposal for change put to the Australian people has to be something meaningful to most Aboriginal and Torres Strait Islander people. A proposal for recognising Indigenous people which those people themselves reject is a pointless exercise. The second reality is that the proposal must win majority voter support nationally and in at least four of the six States. That is the so-called ‘double majority’ requirement—the threshold for success at any national vote to change the Constitution.³

Together those two realities put significant constraints on what is achievable. They call for careful consideration and a strategy which tests the bounds of political possibility without pushing beyond what is achievable when 97% of voters are non-Indigenous Australians.

The need for realism also extends to keeping a sense of proportion about what constitutional change can achieve. The Constitution *is* a fundamental document but it only goes so far in determining what does and does not happen in Australian law, politics and society. Much still depends on other laws, political will, leverage and what Aboriginal and Torres Strait Islander groups themselves decide to do about their situation and their future.

It is also important to appreciate that if significant constitutional change occurs, it will create a certain rigidity in the legal and political system that was not there before. A degree of rigidity in the system is indeed what many advocates of change are after. The difficulty in holding onto gains made in legislation or the courts; the frequent discontinuity in law, policy and funding; the inability to hold government to certain fixed commitments—these are some of people’s strongest motivations for entrenching principles and standards in the Constitution. But constitutional rights and standards are rarely absolute, so any rigidity is usually qualified (and appropriately so). In any case, political pressures and conflicts will likely persist such as the conflict between means and ends, the short-term and the long-term, or between non-discrimination and other rights and interests. Rather than go away entirely, those pressures may be channelled in new directions within society, the political system and the courts.

The consequences of a newly defined constitutional reality are neither entirely predictable nor will they always match the expectations of those who advocate change. The 1967 referendum illustrates the point. It brought Aboriginal and Torres Strait Islander affairs within national jurisdiction, but through the mechanism of a power based on ‘race’ which it seems can be used adversely as well as for positive national laws.⁴ Because constitutional change can significantly realign law and politics and do so in ways that are not always predictable, it is important to carefully canvass options and future potential scenarios before finalising a referendum proposal.

Before examining more closely the link between land justice and constitutional change, some basic context is important—starting with the present Constitution and some proposals for change currently under discussion.

³ *Constitution*, section 128.

⁴ The litigation concerning withdrawal of Commonwealth heritage protection legislation from the construction area for the Hindmarsh Island Bridge did not definitively decide whether the ‘races power’ could be used adversely to the interests of Aboriginal people. But amongst six members of the High Court, the plaintiffs’ argument in favour of a ‘benefit-only’ interpretation was embraced by only one judge directly (Kirby J) and by another somewhat indirectly (Gaudron J) and was expressly rejected by two others (Gummow and Hayne JJ—who remain on the current Court): *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

THE CURRENT CONSTITUTION AND PROPOSALS FOR REFORM

In 1901 the drafters of the Australian Constitution were focused on establishing a federation which maintained strong links to the British Empire. Most of them saw no problem with laws that discriminated against people on the basis of race. They had no qualms about including section 127 which said that, in reckoning the ‘people of the Commonwealth’, Aboriginal people were not to be counted. They were content for the States to retain control of Indigenous affairs, so the scope of the Commonwealth’s power in section 51(xxvi) to make laws about people of a particular race contained words which excluded Aboriginal people from national jurisdiction. Aboriginal and Torres Strait Islander people played no role in writing the Constitution and the legal assumption that the Australian continent was a place without prior owners and organised societies went so deep that it was not even mentioned.

The hard work of those who fought to change the Constitution in 1967 made two important inroads. Section 127 was removed from the Constitution, meaning that Aboriginal people were counted when the population was calculated in federal electorates. Secondly, after 1967, the specific issues affecting Australia’s first peoples became a matter for the federal government and not one solely for the States. The ‘races power’ in section 51(xxvi) of the Constitution was extended to include Aboriginal people. That made it possible for the Commonwealth to make national laws about Aboriginal and Torres Strait Islander people that were binding on the States.

In the aftermath of the 1967 referendum, however, we are left with a Constitution that is utterly silent on Australia’s Aboriginal and Torres Strait Islander people. The negative references which excluded Aboriginal people were removed. But there is today a Constitution for an ancient continent, occupied for 50,000 years, which makes no mention of the first peoples, their societies and their descendants in present and future generations. Section 51(xxvi), it appears, continues to authorise laws which single out groups for adverse treatment on the basis of their race as well as authorising beneficial laws (noting that in practice Aboriginal and Torres Strait Islander people are the only group to whom section 51(xxvi) laws have been addressed).⁵

The question is what should a revised Constitution say? The Expert Panel on Constitutional Recognition of Indigenous Australians (the Panel) which reports to the Australian Government in December 2011 has the job this year of leading that conversation, through its website and other media activities, its program of national consultations and its own internal work in thrashing through the issues.⁶ Several thousand Aboriginal people, Torres Strait Islanders, organisations and non-Indigenous Australians have contributed to that process so far, through the public submission process to the Panel and its consultation meetings in urban, rural and remote areas.

A number of ideas have circulated for changing the Constitution to recognise the place of Australia’s first peoples. This paper will refer to five: inserting a new preamble or Statement of Recognition, deleting section 25, incorporating a non-discrimination clause in respect of race, addressing the ‘races power’ and

⁵ When the High Court heard the ‘Hindmarsh Island Bridge case’ in 1998 it established that no laws to that point had relied for their validity on s 51(xxvi), other than ones specifically addressed to Aboriginal and Torres Strait Islander people: *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 392 (Kirby J). I am not aware of any s 51(xxvi) law since 1998 that concerns a group other than Aboriginal and/or Torres Strait Islander people.

⁶ See <www.youmeunity.org.au>.

adding a power to support agreement-making. The point here is not to fully canvass the merits of each proposal. Instead, these five ideas will assist in analysing the broader relationship now and in the future between land justice and the Constitution.

These five proposals do not exhaust the agenda for constitutional change, but they have been situated by the Panel and many who have made submissions to the Panel as within the realms of near-term political possibility. By focusing on these five ideas, this paper consciously locates itself in the contemporary debate about a package of viable proposals for a referendum in 2013, rather than a more open-ended consideration of the links between the Constitution and land rights or native title.

Preamble or Statement of Recognition

There is no preamble to the Australian Constitution itself. The Constitution is in fact section 9 of an Act of the British Parliament and that Imperial Act contains only a few words of introduction, which are partially inaccurate (they exclude reference to the colony of Western Australia, which signed on very late to Federation).⁷ There are no prefatory words at section 9 of the UK Act other than ‘The Constitution of the Commonwealth shall be as follows’.

The key idea being promoted in the context of a possible 2013 referendum is a textual change to the prefatory words of the Constitution offering appropriate acknowledgment, recognition and inclusion of Australia’s first peoples, in terms of their past, present and future importance to human society on this continent. But inevitably any new preamble to the Australian Constitution will address the wider history, values and culture of non-Indigenous Australians.

Increasing attention has focused on an Indigenous-specific alternative to a new preamble, located in the body of the Constitution. New South Wales (in 2010)⁸ and Victoria (in 2004)⁹ added a provision to their State Constitutions acknowledging Aboriginal people, their relationship to land and other matters. This has triggered interest in the idea of adding a Statement of Recognition as a new section inside the body of the Australian Constitution. Many have registered opposition, however, to adopting the States’ practice of inserting a disclaimer clause denying any legal significance for such recognition.¹⁰

Achieving a preamble with a strong sense of popular ownership and support across the Australian community would require a concerted strategy and complex multilateral negotiations. There are concerns that this could jeopardise the near-term achievement of a package of practical and symbolic changes directed specifically to Aboriginal and Torres Strait Islander people. A new preamble, which should offer appropriate recognition of Aboriginal and Torres Strait Islander people, could accompany a broader

⁷ The preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp) says: ‘Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows’.

⁸ See s 2 of the *Constitution Act 1902* (NSW).

⁹ See s 1A of the *Constitution Act 1975* (Vic).

¹⁰ For example s 1A(3) of the *Constitution Act 1975* (Vic) states: ‘The Parliament does not intend by this section - (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria’.

revision of constitutional arrangements down the track (for example, should Australian voters choose to establish a republic), making a Statement of Recognition a more Indigenous-specific objective in the near-term.

A non-discrimination clause and deleting section 25

Many constitutions around the world contain a ban on discrimination based on race.¹¹ Australia has a national ban but it is in legislation—the *Racial Discrimination Act 1975*(Cth)('RDA')—not the Constitution. While the RDA can control the States, it can be over-ridden at a federal level. Ultimately its operation depends on the political will of the Commonwealth Parliament. A *constitutional* provision, which prohibits discrimination on the basis of race, would provide a stronger form of legal protection against federal, State and Territory laws of a discriminatory kind. A non-discrimination clause could also apply to government actions, programs and decisions.

The deletion of section 25 of the Australian Constitution is seen as an appropriate counterpart measure, as that provision contemplates State electoral laws that discriminate on the basis of race.¹²

Revisiting the 'races power'

The Commonwealth Parliament has power to make special laws it deems necessary for the people of any race.¹³ For many, the use of the term 'race' reflects an outdated way of thinking about society. As interpreted, the power apparently licenses adverse discrimination against Aboriginal and Torres Strait Islander people.¹⁴

The 'races power' in section 51(xxvi) could be removed, amended or replaced. Removal would prevent future discriminatory federal laws based on race (or at least some of them, given that other powers might still be used to achieve the same objective). But it would create a partial vacuum at the centre of the federation, making it harder to achieve national laws in Indigenous affairs and to impose some discipline on the States in their treatment of Aboriginal and Torres Strait Islander people.

The power could be amended so that race-specific laws (or more specifically, laws for Aboriginal and Torres Strait Islander people) could only be made 'for the benefit of' such people, or for their 'advancement', or some other benign purpose. That would put in the hands of High Court judges the potentially controversial question of what is 'beneficial' to first peoples and by itself would not necessarily prevent the adverse use of other powers available to the Commonwealth, such as the Territories power or the corporations power.

¹¹ Several comparable constitutions contain general non-discrimination clauses referring to race as well as other grounds. For example, section 15 of the Charter of Rights and Freedoms in the *Constitution of Canada* says: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability' while allowing for laws which ameliorate disadvantage. Section 9 of the *Constitution of South Africa* also guarantees equality before the law and, amongst other things, precludes unfair discrimination on seventeen named grounds beginning with race.

¹² Section 25 provides: 'For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted'.

¹³ *Constitution*, section 51(xxvi).

¹⁴ See above n 4.

Finally the ‘races power’ could be replaced with a power referring only to first peoples, in recognition of their special status under the Australian Constitution and in a way which uses neutral, minimal wording. For example the Commonwealth Parliament could be given the power to make laws ‘with respect to ... Aboriginal and Torres Strait Islander people’.

Co-ordinating the s 51(xxvi) power with a non-discrimination clause

Some of these proposals may stand alone. But the last one in particular is often promoted as a two-for-one proposal: a neutrally-worded power combined with a prohibition on racial discrimination. Finding the right words to clarify the relationship between a national power to make Indigenous-specific laws on the one hand and the non-discrimination principle on the other is a challenging and important task.

One response could be to say nothing, on the basis that drafting a legal formula in advance is difficult and that the High Court will develop doctrine on an evolving basis, employing the familiar legal principle that a Court must strive to give a coherent effect to provisions that co-exist in the same legal document. The case law which has developed under statutory non-discrimination regimes in Australia such as the RDA¹⁵ and international law principles regarding non-discrimination¹⁶ offer hints as to when Indigenous-specific laws may be found not to constitute impermissible discrimination. That may be on grounds of substantive equality, affirmative action or ‘special measures’ to ameliorate prior discrimination and/or where the law is deemed a reasonable limitation on the non-discrimination principle or a reasonable, proportionate and necessary pursuit of a legitimate purpose.

As a strategy for addressing the intersection of the power and the limitation in the 2013 referendum this leaves a lot to chance. It is not clear what assurance Aboriginal and Torres Strait Islander people could have about the survival of important Indigenous-specific laws, nor the appropriately protective deployment of the non-discrimination principle, in future years.

An alternative strategy is to insert an express rider to the non-discrimination principle. If a law is found *prima facie* to constitute racial discrimination then to survive it must fit within a category of permissible laws recognised by a subsection within the non-discrimination clause. The difficulty here lies in phrasing the carve-out from the non-discrimination principle. A *characteristics* approach involves anticipating the kind of Indigenous-specific laws which should stand not just now but in fifty or even a hundred years. That involves difficult questions of social, political and economic foreseeability. A formula such as this may be appropriate:

- (1) No law or government action may discriminate on the basis of race.
- (2) Subsection (1) does not apply to laws or actions which support or promote the identity, culture or language of a particular group or which address disadvantage in a reasonable, proportionate and necessary way.

In the alternative, a standards-based approach would use a broad litmus test such as ‘benefit’ or ‘unfairness’ in subsection (2), leaving the High Court to interpret its application in a given case by reference to an

¹⁵ Australian Human Rights Commission, *Federal discrimination law*, chapter 3, pp. 46–47, 2011. <www.hreoc.gov.au/legal/FDL/index.html>

¹⁶ J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples—Addendum: The situation of indigenous peoples in Australia*, Appendix B, pp. 51–52, 64–65, 2010. <www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>.

evolving set of principles or constitutional doctrine. Under this approach, subsection (1) would not apply where law or action is for the benefit of a particular group or where the measure does not constitute unfair discrimination.

As noted earlier, a future High Court may anyway find an Indigenous-specific law compatible with the non-discrimination clause for two reasons independent of a subsection (2)—reasonable limitation/proportionality and substantive equality/special measures. If up to three legal qualifications may apply to the non-discrimination clause in relation to Indigenous-specific legislation, it will be important in any referendum campaign to communicate that message, particularly to Aboriginal and Torres Strait Islander communities. The reach and effects of a non-discrimination clause should not be oversold.

An agreement-making power

In 1928 the Constitution was changed at a referendum. The people voted to include a power to make agreements between the Commonwealth and the States regarding their finances. The new section 105A gave those agreements the force of law binding the Commonwealth and the States. It authorised the parties to revisit their agreements and amend them in the future and to give any such changes likewise the force of law. Finally, the provision gave the Commonwealth power to make laws implementing such agreements.

The Constitution could be amended to authorise agreements to be made between governments and Aboriginal and Torres Strait Islander people, to give agreements the force of law, to implement them through legislation and to enable the parties to revise their agreements in the future if circumstances changed. There is, of course, a difference between process and substance. This amendment would support a process of agreement-making and give legal force to the outcomes. But it still leaves the key questions of political will, motivation and leverage which would determine the existence and content of any agreement.

It is now appropriate to turn to the connections between land justice and Australia's present constitutional arrangements and then to consider the implications of these reform proposals for future such links.

THE EXISTING LINK BETWEEN LAND JUSTICE AND THE CONSTITUTION

One way for those working on land justice to test whether they should be interested in the prospect of a referendum is to ask whether constitutional law has made any difference in the past to the law and policy with which they work today. Clearly it has. There is no question that constitutional arrangements have exerted a strong influence over questions of land justice in Australian history.

With colonisation, it appears there were no legally enforceable constraints on the capacity of the Crown and colonial parliaments to take the territory of first peoples (putting to one side arguments concerning the establishment of the colony of South Australia).¹⁷ Land was alienated to governmental or private interests without treating with the traditional owners and without compensation. Under other constitutional and legal arrangements, the history of dealing with land would have taken a different course, as experience in New Zealand, Canada and the United States shows.¹⁸

¹⁷ For the situation in South Australia, see S Berg (ed.), *Coming to terms: Aboriginal title in South Australia*, Wakefield Press, Adelaide, 2010.

¹⁸ Indigenous peoples suffered massive dispossession in all three places. However, the assumption now known by the shorthand term 'terra nullius' did not embed itself in any of these three jurisdictions as thoroughly as it did in the

After federation, the States, which retained control over the vast majority of traditional lands remained free to expropriate property without compensation. It would have been different, if the protection of property rights by the ‘just terms’ guarantee, which applied to Commonwealth laws from 1901, had extended to State action as well.¹⁹ That extension was indeed attempted unsuccessfully at a referendum held in 1988.

When pressure came on the Commonwealth from the late 1960s to support market-based acquisition of important land for Aboriginal and Torres Strait Islander people, it would have been difficult to establish the necessary institutions and financial base without a national power such as that found in section 51(xxvi).²⁰ Prime Minister Gough Whitlam capitalised on the Commonwealth’s direct control of the Territories through the broad power in section 122 of the Constitution to enact one of the high water marks in Australian land justice, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). At the same time, the federal system embedded in the Constitution discouraged bolder national reform.

The existence of a constitutional power to implement international treaty obligations in domestic law and the supremacy of federal law over State law was instrumental to the recognition of native title. By the narrowest margin in the High Court (four judges to three), the Queensland government led by Premier Joh Bjelke-Petersen failed to stop the *Mabo* litigation stone dead with a law that wiped out any traditional title that may have existed in 1985 in the Torres Strait.²¹

When *Mabo No 2* was later decided by the High Court, constitutional arrangements exerted a very strong influence over the legislative response of the Keating Government and they remain threaded throughout the present-day native title picture. The native title system is a national one across the federation, which lets the States do some things²² and has stopped them doing others (such as a race to the bottom after *Mabo No 2*)²³—that is the direct consequence of section 109 of the Constitution which ensures the primacy of

Australian colonies. This was reflected in North America, for example, in treaty-making at various stages of the colonisation process; in the Royal Proclamation of 1763 and in the United States Supreme Court decisions of the 1820s and 1830s commencing with *Johnson v M’Intosh* 21 U.S. (8 Wheat.) 543 (1823). In New Zealand, the Treaty of Waitangi signed by the Crown’s representative and over 500 Māori, formally acknowledged Māori lands and governance (albeit with important discrepancies between the English and Māori versions of the Treaty) and 1860s legislation and the Native Land Court recognised customary land title (albeit on the path to dispossessing Māori on a widespread scale).

¹⁹ For arguments that support the application of the constitutional guarantee of just terms in section 51(xxxi) to the extinguishment of native title see S Brennan, ‘Native title and the “Acquisition of Property” under the Australian Constitution’, *Melbourne University Law Review*, vol. 28, no.1, 2004.

²⁰ See *Aboriginal Land Fund Act 1974* (Cth) and more recently Part 4A of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) dealing with the Indigenous Land Corporation.

²¹ The *Queensland Coast Islands Declaratory Act 1985* (Qld) was found to be inconsistent with s 10 of the RDA because it singled out the property rights of one ethnic group for adverse treatment while leaving unimpaired the property rights enjoyed by the general community: *Mabo v Queensland* (1988) 166 CLR 186, 218-219 (Brennan, Toohey and Gaudron JJ), 231-233 (Deane J).

²² For example, the 1998 amendments to the *Native Title Act 1993* (Cth) (‘NTA’) allowed States and Territories to escape the right to negotiate scheme and diminish the procedural rights of native title parties, provided their legislation complied with a checklist of requirements in a new section 43A of the NTA. That scheme applies to mining and compulsory acquisitions where land has at some time been subject to a partially extinguishing tenure (typically a pastoral lease). Schemes with lesser procedural rights were also made possible for ‘low impact’ exploration licences (s 26A) and certain gold, tin and opal mining activities (ss 26B and 26C). States always had, since 1993, the capacity to set up schemes that mirrored the right to negotiate and did not diminish Indigenous rights (s 43) and also to allow a State body to carry out the relevant functions instead of the federal National Native Title Tribunal (s 207A, formerly s 251).

²³ See the *Land (Titles and Traditional Usage) Act 1993* (WA).

Commonwealth law over State law in situations of conflict.²⁴ The *Native Title Act 1993* (Cth) ('NTA') depends for its validity primarily on the existence of a 'races power' in the Constitution.²⁵ The 'just terms' guarantee for the acquisition of property in section 51(xxxi) of the Constitution has been treated as a serious constraint on the Commonwealth's decision-making about law and policy, notably after the High Court's findings about pastoral leases in *Wik*.²⁶ The national prohibition on racial discrimination, being legislative rather than constitutional, has allowed discriminatory treatment of native title to occur in crucial respects (such as the second round of blanket validation of non-Indigenous titles in 1998, after governments failed to comply with the NTA between 1994 and the end of 1996).²⁷

Many factors have contributed to the present-day configuration of laws and policies in Australia concerning land rights, native title, market-based acquisition and other aspects of land justice. Only a few could have had as telling an effect as the Constitution in influencing what was possible and what was not.

PROPOSED CONSTITUTIONAL REFORMS AND LAND JUSTICE

Has too much happened already to be distracted by the question of some future constitutional change? It is true that many important legislative and judicial choices about native title and land rights have been made. On the other hand, one only needs to look at the last decade to see that there is nothing static, temporary or one-off about the shaping influence of constitutional arrangements.

The key provisions of the NTA dealing with the definition of native title and how it can be extinguished, were interpreted by the High Court in the test cases of 2002 in *Yorta Yorta*²⁸ and *Ward*²⁹ under present understandings of the Constitution, its preamble and its position on racial discrimination. The complex legislative package associated with the Northern Territory National Emergency Response ('the Intervention') raced through the federal Parliament in 2007 and wound back Commonwealth laws which regulated the acquisition of property and prohibited racial discrimination.³⁰ A High Court challenge in 2009

²⁴ See, for example, the key provision in s 11(1) of the *Native Title Act 1993* (Cth) which says 'Native title is not able to be extinguished contrary to this Act'.

²⁵ See *Western Australia v Commonwealth* (1995) 183 CLR 373, 459-462 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).

²⁶ See, for example, Senate Legal and Constitutional Legislation Committee, *Constitutional Aspects of the Native Title Amendment Bill 1997*, chapter 3, 1997 and the discussion of notification amendments in the Bills Digest for the Native Title Amendment Bill 1997 [No 2] published by the Parliamentary Library at <www.aph.gov.au/library/pubs/bd/1997-98/98bd171.htm>.

²⁷ See, for example, United Nations Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia: Australia. 18/03/1999. A/54/18, para.21(2).(Decision),1999*. The Committee referred to four sets of provisions that 'discriminate against indigenous title holders under the newly amended Act': the validation of intermediate period acts (Part 2, Division 2A of the Act), the 'confirmation' of extinguishment provisions (Part 2, Division 2B), the provisions permitting broad diversification into primary production activities on what were previously pastoral operations (Part 2, Subdivision 3G) and the removal or diminution of the right to negotiate non-Indigenous land uses across various aspects of the future act regime (Part 2, Division 3).

²⁸ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

²⁹ *Western Australia v Ward* (2002) 213 CLR 1.

³⁰ When imposing involuntary 'leases' over township land in 64 Aboriginal communities – and compulsorily acquiring exclusive possession for five years – the Intervention legislation put formidable legal obstacles in the path of Aboriginal property owners recovering compensation by over-riding the statutory compensation regime applying to other Australians: see sections 50(2) and 60(2) of the *Northern Territory National Emergency Response Act 2007* (Cth). A non-Aboriginal freeholder subjected to the same kind of temporary expropriation of control over their land, in pursuit of government policy objectives, would have an unambiguous and upfront *statutory* entitlement to compensation, whereas the affected Aboriginal land holders were compelled to make a much more complex legal and constitutional case: see S Brennan, Submission to the Northern Territory Emergency Response Review Board on NT

to the Intervention focused on the applicability of section 51(xxxi) of the Constitution to severe incursions on Aboriginal property rights and the content of the just terms guarantee.³¹ The Commonwealth continues to tinker with the treatment of native title under the future act regime in ways which potentially intersect with the non-discrimination principle.³²

Substantial questions about compensation for the extinguishment and impairment of native title under Part 2 Division 5 of the NTA remain to be answered, given that no compensation claim has yet been litigated to a successful conclusion in the courts.

In other words, laws, policies and other developments affecting Indigenous property rights *continue to emerge or change*. Each time a political or judicial institution exercises its power it will do so with one eye to what the Constitution says. Would a normative tilt to the Constitution, in favour of Aboriginal and Torres Strait Islander people make a difference? Might the High Court have taken a different approach to the applicability of beneficial principles of statutory interpretation in *Ward*, for example, if the Australian Constitution had recently been amended to entrench a non-discrimination principle and include a statement recognising the relationship of Aboriginal people to their land?³³ The Commonwealth imposed five year leases over 64 townships as part of the Intervention, in the name of tackling child welfare and a range of other socio-economic problems in Northern Territory communities. Would the Commonwealth have felt it necessary to better justify why this was a reasonable, proportionate and necessary incursion upon property rights in order to achieve non-discriminatory objectives, if the Constitution contained a non-discrimination clause?

We cannot know for sure the answers to such hypotheticals, but what is clear is that the opportunity has now arisen to change what the Constitution says specifically about Aboriginal and Torres Strait Islander people in a positive direction. At a minimum, it is important to start discussing what that change could mean, including for those pursuing land justice. The following section offers some thoughts on that issue, by reference to the five proposals for constitutional change referred to earlier.

Preamble / Statement of Recognition

In drafting a new preamble it is safe to assume that the wording in relation to land and waters will be closely watched on all sides. That was certainly the case in 1999 when Prime Minister John Howard controversially formulated a preamble proposal which was put to the people at referendum and soundly defeated. He included the following phrase: ‘honouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands’. If a new preamble is to be voted on in 2013, some form

Intervention Measures, 22 August 2008, pp. 23–24.

<www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Submission_NTER_Review_Board.pdf>.

³¹ *Wurridjal v Commonwealth* (2009) 237 CLR 309.

³² *Native Title Amendment Act (No 1) 2010* (new subdivision JA dealing with public housing etc). See allegations of departure from the non-discrimination principle in submissions and in the dissenting report of Senator Siewert in relation to a virtually identical bill: Senate Legal and Constitutional Affairs Committee, *Native Title Amendment Bill (No 2) 2009 [Provisions]*, February 2010.

<www.aph.gov.au/Senate/committee/legcon_ctte/nativetitle_two/report/report.pdf>.

³³ For a discussion of the relevance of non-discrimination to the interpretation of s 223 of the *Native Title Act 1993* (Cth) and the equal application of normative principles in the law of statutory interpretation to Indigenous property rights, see S Brennan, ‘Statutory interpretation and indigenous property rights’, *Public Law Review*, vol.21, 2010, pp. 239–262, especially at p. 239, pp.253–254, 257–262.

of wording will need to be settled to describe the spiritual, social, cultural and economic relationship of Aboriginal and Torres Strait Islander people to land and waters.

The legal effect, if any, of a new preamble on the interpretation of the Constitution, or of laws enacted under it, is unknown. My expectation is that some judges would give the wording of a new preamble little or no weight that others will harness it to a result which they would have reached in any event and that occasionally it will have a mild nudging influence on a judge in two minds about an interpretive issue (which seems appropriate).³⁴ A Statement of Recognition inside the body of the Constitution may have a modest influence on the interpretation of surrounding provisions, consistent with ordinary principles that apply to reading legal instruments as a whole. This of course depends to some extent on whether the Commonwealth refrains (as I think it should) from inserting a disclaimer clause denying legal significance to such a Statement of Recognition.

A preamble or Statement of Recognition alone, however, is likely to disappoint many people interested in substantive constitutional change. Voters at a referendum may also question the value of a change which confines itself to symbolic words when substantive opportunities exist for amendment in areas such as racial discrimination. This is where section 25 comes in.

Section 25

In itself, section 25 is a minor provision from another era (and has no direct bearing on land issues). The crucial thing is that it is a provision in the *body of the Constitution* (the substantive legal provisions as opposed to the preamble) and it contemplates State voting laws that discriminate against groups on the basis of their race. It seems both sides of politics agree it has no place in a modern Constitution.³⁵ The reason is obvious: a modern Constitution should not contemplate racial discrimination of that kind, at the heart of the democratic system of voting.

The problem with stopping at section 25 is that it does not finish the job properly. Other provisions in the body of the Constitution contemplate racial discrimination. Arguably, the best way to address that is through inserting a non-discrimination clause in the Constitution and revisiting the ‘races power’.

A non-discrimination clause with respect to race

There is no question that governments and parliaments have treated Indigenous property rights in a discriminatory way since Australia was colonised and instances of discrimination have continued into the 21st century. The non-discrimination principle (expressed in legislation in the form of the RDA) was a central part of the debate in the wake of *Mabo* and again after *Wik*, as Commonwealth and State laws were drafted and passed. The RDA was wound back to permit the upfront, retrospective validation of non-

³⁴ For a discussion of this issue and other perspectives on a preamble, see A Twomey, *Constitutional recognition of Indigenous Australians in a preamble*, Report No.2, Constitutional Reform Unit, Sydney Law School, 2011. <http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf>.

³⁵ The Coalition Government sought its removal at the 1967 referendum and the ALP did so in 1974 and 1988. On each occasion, the deletion of section 25 was part of a larger package which did not gain the requisite voter support. In 2002 the Howard Government stated that: ‘The Government is generally supportive of the proposal to remove s.25 of the Constitution. Given adequate support for such a proposal, the Government would be disposed to put the matter to a referendum at an appropriate time’: *Commonwealth Government submission to Senate Legal and Constitutional References Committee Inquiry into the Progress Towards National Reconciliation*, November 2002.

Indigenous property rights.³⁶ Non-discrimination principles were again at stake in the crucial test cases about native title and its extinguishment decided by the High Court in 2002. The Northern Territory Intervention included incursions on Aboriginal property rights and the legislation excluded the RDA from applying to these and other measures.³⁷

A constitutional prohibition on discrimination (albeit not absolute) would surely influence the laws, actions and presumably the thinking of politicians, legislators and courts when it comes to future action in relation to land and waters. The relative rigidity of a constitutional provision would alter the legal and political calculus of government and the bargaining dynamics surrounding new legislation. As mentioned earlier, the consequences of that are not always predictable. But the value to Aboriginal and Torres Strait Islander people of curbing the tendency towards discriminatory treatment of property rights in this relatively firm way has to be seriously weighed in the coming months, as momentum towards constitutional change picks up speed.

In my view, a key minimum benefit from constitutionalising non-discrimination in relation to race is that it will encourage better quality and more careful use of governmental and law-making power in Indigenous affairs. Indigenous-specific legislation is more likely to satisfy the non-discrimination principle if it demonstrates the qualities of good decision-making: the clear identification of legitimate purposes and the adoption of reasonable and proportionate means to achieve them.

Revisiting the ‘races power’

It is important for the national parliament to retain a clear source of power to make national laws in the area of native title, statutory land rights, land acquisition on the open market, compensation and other potential forms of land justice which might arise in the future. The NTA is not popular in many quarters, amongst Australia’s Aboriginal and Torres Strait Islander people, for understandable reasons and the same could be said for other federal legislation in Indigenous affairs. But it is important to separate the *content* of a given federal law from the *existence of a power to make such a national law*. Absent a national power to address Indigenous affairs, it will be mostly the States who legislate. Arguably some issues call for a national approach. Sometimes also the excesses of State governments need to be curbed (as demonstrated by the Bjelke-Petersen Government’s legislation of 1985 attempting to stop the *Mabo* litigation³⁸ and the Court Government’s legislation of 1993 to water down native title³⁹). Section 109 of the Constitution, when coupled with a federal power to make laws in the relevant area, does that job. Remember also that State

³⁶ *Native Title Act 1993* (Cth), sections 14, 15 and 19 (inserted in 1993) and sections 22A, 22B and 22F (inserted in 1998).

³⁷ *Northern Territory National Emergency Response Act 2007* (Cth), section 31 (forced imposition of ‘five year leases’ over townships) and section 50(2) (disapplication of the *Lands Acquisition Act 1989* (Cth)); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) sch 4 item 12 (over-riding the permit scheme and allowing public entry onto certain parts of Aboriginal land). The non-discrimination principles in the *Racial Discrimination Act 1975* (Cth) were excluded by section 132 of the *Northern Territory National Emergency Response Act 2007* (Cth) and section 4 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

³⁸ See *Mabo v Queensland* (1988) 166 CLR 186.

³⁹ See *Western Australia v Commonwealth* (1995) 183 CLR 373.

Parliaments are not constrained by a constitutional obligation to accord just terms when it comes to the compulsory acquisition of property.⁴⁰

Maintaining the capacity for federal legislation—for example, a neutrally-worded power to make laws with respect to Aboriginal and Torres Strait Islander people—can achieve national standards in the future treatment of native title and increase the likelihood that the just terms guarantee can apply to its extinguishment, while a constitutional provision against racial discrimination would help keep the Commonwealth itself in line. Such a power would support new Commonwealth laws in relation to other aspects of Indigenous land justice, while also leaving room for positive measures enacted by the States under their concurrent powers.

An agreement-making power

A section 105A-style amendment is perhaps a more ambitious proposal, though it is important to remember that ultimately it turns on the notion of government and parliamentary *consent* and does no more than create *an option to reach agreements*, which itself is hardly a threatening idea.

Many people involved in the pursuit of land justice whether through native title or alternative settlements, as well as other areas of Indigenous affairs, understand the attraction of agreements with government which transcend the limitations of existing laws. Broad-based negotiations allow parties to escape the rigidities of the law, the instability of policy from year to year and the winner-take-all consequences of litigation, to engage in a more flexible process of negotiating enduring outcomes and commitments. An amendment which makes it possible to negotiate agreements backed up by the Constitution would be a practical measure, allowing governments and Aboriginal and Torres Strait Islander communities to engage in a process focused on genuinely shared responsibility and on a broad range of issues. In a symbolic sense, by including such a power in the Constitution, Australians would also be doing something appropriate to recognise the status of Australia's first peoples.

An Indigenous rights guarantee?

Some have suggested that constitutional protection for Indigenous land rights along the lines of section 35 in the Canadian Constitution is a more obvious reform path to pursue.

Section 35(1) of the Canadian Constitution states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

This protection extends to inherent rights recognised by the courts as well as rights recognised under pre-existing and future treaties.

The Panel did not include this idea as an option for the Australian Constitution in the Discussion Paper released to the public in May 2011.⁴¹ That raises a serious question about political achievability in the near term. There are other conceptual complications.

⁴⁰ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. Recently there have been attempts in the High Court to rope in the States and apply the just terms guarantee, where they are enmeshed with the Commonwealth in an intergovernmental agreement or some other joint enterprise: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242; *Spencer v Commonwealth* (2010) 241 CLR 118, relying on the earlier High Court decision in *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382.

If such a proposal were to cover native title, the overall benefits would need careful scrutiny and a number of difficult questions would require answers. They include whether the beneficiaries would be only those who can successfully obtain legal recognition under the current interplay of statute and common law. Given the widespread dissatisfaction with this law within Aboriginal and Torres Strait Islander communities it may be difficult to marshal broad Indigenous support for such a proposal. If native title was accorded this strong-form constitutional protection, would it entail a wholesale rewriting of extinguishment law? The torrid experience of law-making and litigation over that and other fundamental native title issues in the last two decades make it a questionable topic for a referendum requiring ‘double majority’ support.

If the provision was extended to existing statutory land rights schemes, would this again risk strong division within Indigenous communities, given the geographically disparate outcomes under such legislation.⁴² Could it accommodate the wide diversity of models adopted in various States and Territories?

There is also a question whether such a provision would inhibit the scope of future judicial developments and agreement-making. The potential for negotiated rights protection through an agreement-making power appears to me to provide a more viable alternative to the section 35-style approach, when it comes to the legal protection of Indigenous property rights.

CONCLUSION

At the time of writing it is unclear where the process undertaken by the Gillard minority government and the Panel will take us. But the country is presently on a trajectory towards a possible change to the Constitution in favour of Aboriginal and Torres Strait Islander people. A referendum is a near-term prospect, no longer a distant possibility. It is true that many key legal settings for native title are already in place and it is questionable that constitutional change would influence past rather than future legal questions in the area.

But if the past two decades and the past two centuries are any indication, crucial legislative and judicial choices about native title and other issues of Indigenous land justice will continue to be made in coming years and constitutional arrangements will exert a significant shaping influence on the outcome. A range of viable proposals for constitutional reform are under consideration which could materially affect the future pursuit of land justice for first peoples in Australia, including in the area of native title. The active participation of organisations and individuals committed to better land-related outcomes for Aboriginal and Torres Strait Islander people could make a difference to the success of a campaign for substantive constitutional change.

⁴¹ Expert Panel on Constitutional Recognition of Indigenous Australians, *A national conversation about Aboriginal and Torres Strait Islander constitutional recognition*, Discussion Paper, May 2011.

www.youmeunity.org.au/downloads/2653fb1b6a59a1ab8d18.pdf.

⁴² See Heather McRae et al, *Indigenous legal issues: Commentary and materials*, 4th edn, Thomson Reuters, 2009, pp. 212–214.

ISSN 13260316

ISBN 9780987135353

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
GPO Box 553
Canberra ACT 2601
Telephone: 02 6246 1161
Facsimile: 02 6249 7714
Email: ntru@aiatsis.gov.au
Website: www.aiatsis.gov.au

Views expressed in this series are not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.
--

The NTRU acknowledges the support of the Native Title and Leadership Branch of the Department of Families, Housing, Community Services and Indigenous Affairs.