Chapter 8
Confluence of the Rivers: Constitutional Recognition of Australia's First Peoples

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Abstract Australia has progressed rapidly from a collection of British Colonies to an advanced first world economy with an enviable democratic system of governance. However, despite embracing modernity and supporting peace and justice initiatives elsewhere, Australia has struggled to come to terms with its own First Peoples. The Colonial story begins with English 'settler' claims to have settled an empty land in the late 1700s. The nation has, however, made progress in this area. It acknowledged that the common law recognised that Australia was indeed populated by civilised peoples, possessing a civilisation stretching back 60,000 years or more, when the British Crown first claimed sovereignty over the Continent. This is not however, the end of the story. There are still many milestones to be reached and passed. The next of these milestones, now that the law recognises its First People, is for Australia to recognise Indigenous People in its Constitution. This chapter will briefly examine the history of Indigenous recognition in Australia, including an analysis of the barriers and challenges to such recognition. The chapter concludes that such recognition is imperative if Australia wants to promote peace and to hold its head up high in among the States of the International Community. Today, the two rivers, black and white, run separately and unequally; perhaps tomorrow their waters will be equal and one.

Keywords Aboriginal · Australian Constitution · Indigenous · Post-colonial · Terra Nullius · Symbolic/substantive recognition · Torres Strait Islanders

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8.1 Introduction

This chapter examines the prognosis for peacebuilding in the context of Australia's Indigenous people. The Indigenous people of Australia are variously described in the legislation[1] and in society in post-colonial terms as Aboriginal Peoples and Torres Strait Islander peoples who in turn are made up of several groups. For convenience, and while not ideal, they are collectively referred to here in the language of international law as Australia's Indigenous people.[2] My analysis in this chapter is primarily through the lens of the current process for recognising Australia's First People in the Australian Constitution.[3] Constitutional recognition in Australia requires a referendum. In anticipation of the referendum, Parliament commissioned the *Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* ("the Panel") to help it formulate appropriate referendum questions around the issue of Indigenous recognition and to gauge public readiness for such change. The referendum, originally scheduled for 2013, is now likely to be held in 2017, as Parliament has not been able to settle on a referendum question (Anderson 2014).[4]

After this basic history and debate to the lead-up of the referendum are examined, this chapter makes an argument for taking a step beyond purely symbolic recognition by adopting a mechanism that has helped referenda in the past. This chapter argues that symbolic recognition, coupled with *removing* Parliament's power to make special (race based) laws for the Indigenous people only, is a viable and practical option for progress. This change will bring Australia into line with other developed nations that do not require constitutional powers to regulate the affairs of small, disempowered segments of their populations: in Australia's case Indigenous people are the *only* ones who have been subjected to this power (French 2010). In doing this the chapter explores the normative question of recognition. The chapter also explores the importance of recognition for reconciliation and peacebuilding in the future.

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[1]In 1981 there were at least 67 classifications to determine who is an Aboriginal person: Department of Aboriginal Affairs, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* (1981), Commonwealth of Australia, Canberra; See also J Gardiner-Garden, *The Definition of Aboriginality: Research Note 18, 2000–01* (2000) Parliament of Australia, 2.

[2]While there have been some 250 distinct Indigenous language groups recorded, from a possible 700 prior to colonialism, for ease of reading this chapter will refer them in the singular.

[3]Hereinafter referred to simply as the Constitution.

[4]Stephanie Anderson, 'Tony Abbott has floated a date for a referendum to recognise indigenous people in the constitution, but failed to commit to a timeline.' SBS News 11 December 2014. <imgsrc="http://www.sbs.com.au/news/sites/sbs.com.au.news/files/styles/thumb_small/public/stepohanie_anderson_0.jpg?itok=GSsEqkqF&mtime=1424987345" itemprop="image/> [Accessed 29 May 2015].

8.2 The Australian Constitution and Its History of Change

The reason why constitutional 'recognition' became a central political issue in Australia in 2015 is a consequence of history. According to Anglo-Australian versions of history,[5] English "settlement" in the 18th Century took place on *terra nullius*, a vacant tract of land, this being a prerequisite for its settlement under the international law of the time.[6] This myth of an empty land was always known and accepted by many as legal fiction; law (albeit in a different context) which Sir Neville Windeyer (1970), described as always "in the rear and limping a little"[7] as compared with societal values. Consequently, recognition was *ipso facto* impossible, until the existence of Indigenous people was acknowledged nearly two centuries later.[8]

As it currently stands, the Constitution and the jurisprudence explicitly provide for the continued denial and, paradoxically, detrimental treatment of Indigenous people (French 2010). In the original Constitution "aboriginal natives", as Indigenous people were referred to in the document, were not counted as part of the human population and a White Australia policy was in place.[9] The Constitution also entrenched inequality for "coloured or inferior races" (Sawer 1910) through what is known as the "races power" in the Constitution.[10] In Bartlett's view (2004), Indigenous people still are denied equality before the law (Bartlett 2004). In the *Stolen Generation Case*, the Court held that the Constitution did not support a doctrine of equality,[11] a defensible position given the explicit constitutional power to discriminate on the basis of race and the allusion to the permissibility of creating Nazi-like laws under this constitutional power.[12]

The process of recognition has, however, inched forward. In 1971, the Supreme Court of the Northern Territory[13] and, in 1992, the High Court of Australia (HCA), the highest court in the land, discovered in common law and hence acknowledged the existence of Indigenous people at the time of "settlement".[14] The Commonwealth Parliament codified the common law a few years later[15] and formal

[5] *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 30–33 (Brennan J.).

[6] *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 31 (Brennan J.).

[7] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395 (Windeyer J).

[8] *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 31 (Brennan J.).

[9] The Australian Constitution s 127 (Repealed in 1967).

[10] The Australian Constitution s 51(xxvi).

[11] *Kruger v Commonwealth* (1997) 190 CLR 1, 70.

[12] *Kartinyeri v Commonwealth* (1998) 195 CLR 337. Transcript of 5 February 1998. Grifith QC's response to Kirby J. Cited in Tony Blackshield and George Williams '*Australian constitutional Law and theory Commentary and Materials*' (Sydney, Federation Press 5th ed 2010), 985.

[13] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

[14] *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

[15] *Native Title Act 1993* (Cth).

recognition through legislation was achieved in 2013.[16] Under Australia's federal constitutional system of parliamentary supremacy, however, parliamentary recognition is not entrenched and a future parliament can (in theory) rescind this recognition and this possibility is not remote (Gul 2015).[17] The next ethical and logical step of this process of recognition is for the majority to accept constitutional recognition. Without such recognition any peacebuilding efforts would be founded as if on quicksand. However, the fact that Australia is even contemplating constitutional recognition of Indigenous people is a significant step forward from the time of the promulgation of the Constitution at the turn of the 20th century.

Today the majority of Australians appear to oppose the notion of white supremacy as a contemporary Australian value, possibly because of the not-insignificant non-white migration since the mid-1970s but, on the other hand, the general populace appear to stop short of seeking *fully* to reconcile with Indigenous people, although there have been some steps forward. This process of full recognition will still take a few more years to complete because the continued existence of Indigenous people is a constant reminder of the unlawful usurpation of the continent. Thus, while recognising the existence of Indigenous people—a huge step forward—[18]the High Court nonetheless said that it would not examine the question of the lawfulness of the acquisition of the continent, as it was "not free to adopt contemporary notions of justice and human rights"[19] and reiterated its refusal "to fracture the skeleton of principle which gives the body of our law its shape and internal consistency".[20] There is also opposition from a sceptical population to any form of recognition that would also create "special" legal rights for Indigenous people (which can also be read as the return of stolen land) and this fear is a key impediment to peacebuilding.

As the founding document of the nation, the Constitution should; atl: a minimum, recognise the Indigenous people of the continent. However, in this current political environment the best one can hope to achieve is probably minimalist change. In attempting to identify what is possible Parliament commissioned a number of reports. As will be explored below, these are rich sources of information to help understand the impediments to recognition.

On the other hand, the political and legal difficulties of changing the Constitution are conceded. However, it is equally important not to waste this opportunity (to reduce the negative effects of 'race based' provisions of the Constitution) by putting forward unrealistic options, which are sure to fail. According to commentator Karvelas in the conservative newspaper *The Australian,* "the Panel's

[16]*The Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

[17]Jonathon Gul, '*Constitutional recognition of Indigenous people* '*racist*'*: [Senator] David Leyonhjelm*', 5 March 2015, ABC (Australia) News.

[18]Mansell, M, '*The Court gives an inch but takes another mile*' *Aboriginal Law Bulletin* Vol 2, No. 57, August 1992.

[19]*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 29.

[20]*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 29.

recommendations are almost certain to fail" (Karvelas 2012),[21] which was a statement equally applicable to the further substantive options suggested to date by the Parliament.[22]

The Constitution prescribes the means by which change must be effected.[23] Change to the Australian Constitution requires a referendum that must be passed by a majority of people in the majority of States ("double majority").[24] This is difficult to achieve in practice. Since federation, only eight out of 44 referenda have received the double majority (Blackshield/Williams 2002). There appears to be a consensus that; atl: minimum, a referendum will not be successful without multi-party support for a proposition. Further, this chapter notes that the most successful change to the Constitution (gaining over a 90 % 'yes' vote in 1967) was when text was *removed* from the Constitution and people found it relatively easy to understand the political message of treating Indigenous Peoples more humanely and equitably (Blackshield/Williams 2002).

However, that 1967 process was incomplete, as other race provisions still remain in the Constitution. This unfinished business can now be brought to completion by expunging the remaining race provisions from the Constitution, by following a similar approach to that taken in 1967, which is likely to have a reasonable chance of success and progress beyond the current impasse. It is not that the resultant process is likely to be cost free but that *not* doing so is unacceptable and that "our present constitutional order [which] contains explicit traces of a racist past" (Charlesworth/Durbach 2011: 64) is unbecoming for a modern otherwise socially and politically free country. Denying Parliament the power to treat Indigenous people detrimentally (by rescinding the races powers, may add some cold comfort that Indigenous People cannot lawfully be singled out for "legal" maltreatment, as is the case at present and is likely to continue to be the case if, as is discussed below, any of the parliamentary models published in the lead up to the referendum are adopted in practice.

The majority population is reasonably likely to be suspicious of convoluted or legalistic proposals for changes to the Constitution. On the other hand, as mentioned above, they appear to be comfortable with modest, straightforward change that does not create special rights. Therefore, the existence at present in the Australian Parliament of cross-party as well as popular support for constitutional recognition for equal treatment of Indigenous people in *principle* is promising (Gillard et al. 2010; Henderson 2015). This referendum provides a timely opportunity for simultaneously creating both formal constitutional recognition and removing entrenched racial inequality provisions that affect Indigenous Peoples.

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[21]Patricia Karvelas: *Historic Constitution vote over indigenous recognition facing hurdles,* The Australian, 20 January 2012.

[22]*Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (JSCATSI, 'the Committee') of June 2015 ('Final Report').

[23]The Australian Constitution s 128.

[24]The Australian Constitution s 128.

At present, the Constitution not only ignores the prior existence of Indigenous Australians. Further, it still has two sections, which explicitly allow Parliament to make race based laws.[25] The first is Section 25, which penalises a State for disqualifying people from voting on the basis of their race. It does this by potentially reducing the number of representatives from that State to the Federal Parliament. The second, more problematic, provision is Section 51(xxvi) which permits Parliament to make special laws with respect to people of a particular "race" but which in practice has *only* been used to make laws, including detrimental laws,[26] for Indigenous people (French 2010). While other non-Anglo-Saxon-Norman races have been 'safe' so far, it is possible that, if the Constitution is allowed to retain this race power, other races too may one day become adversely affected.

8.3 Importance of Recognition for Legal and Social Progress

Theoretically, reconciliation and a true peace, based on the equal dignity of all people, is impossible *ipso facto* while recognition is denied in the Constitution. The proposed referendum now allows the nation to consider constitutional recognition of Indigenous prior custodianship of the continent and to do so without contradiction by the Courts.

The argument in this chapter is that a presumption of racial equality in the Constitution can arguably be achieved by the rescission of the two "race" powers in the Constitution.[27] The presumption of formal social and legal equality of citizens of all races in the Constitution will make a significant practical difference to the everyday lives of Indigenous people and the prospect of true peace and security between equal citizens.[28] Constitutional change is also crucial if 'racial equality' is to be successfully defended when challenged at law.[29] Mere recognition, whilst racial inequality remains entrenched in the Constitution, would be a Pyrrhic victory and setback the prospect of meaningful peacebuilding in Australia.

Historical wrongs, which have compounded over the past two centuries inevitably, are likely to take some time to reverse. This chapter argues that, while change should not take *that* long, this referendum provides an opportunity to begin the proverbial 1000 mile journey by taking, in addition to symbolic recognition, this

[25]The Australian Constitution ss 25, 51(xxvi).

[26]*Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

[27]Ss 25 and 51(xxvi) *The Australian Constitution*.

[28]It is worth noting that there is a significant 'gap' in Australia between Indigenous people and others on most social and economic indicators, and much of this can arguably be linked to 200 years of unequal treatment.

[29]*Leeth v Commonwealth* (1992) 174 CLR 455: Here however, the case was not one specifically of racial equality but equality generally.

first necessary step towards *substantive* equality for Indigenous people. This must surely be a prerequisite before notions of peace, security and dignity can be expressed in practice. For the burden of history, the notion of equality for Indigenous people in the Constitution however, is not a simple process, an issue that will now be examined.

8.4 Impediments to Racial Equality and Recognition

The Constitution unambiguously entrenches racial inequality. The majority, (with few dissenting voices), participating in the Constitutional Convention debates in the 1800s, which led to the creation of the Constitution ensured that an "equality before the law" clause was not enshrined in the Constitution.[30] Instead, Section 51(xxvi) permits Parliament to make laws with respect to people of a particular "race". Indigenous people were originally specifically exempt from this provision as they were perceived as "no more than the flora and fauna of the land" (Castan 1999: 4). According to Sawer (1966), "the original framers of the constitution *intended* to regulate the activities of people [merely] of a race different from the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc.) mixture derived from the United Kingdom, which formed the main Australian stock" (Sawer 1966) Although the Constitution mentioned "aboriginal natives" , it was only to exempt them from the race power, and to exclude them from the census count of human persons (s 127), thus effectively denying their humanity.

Enshrining recognition, and racial equality, in the Constitution could be characterised as a fundamental constitutional change from the unambiguous position in 1901 of entrenching racial inequality. However, to freeze the Constitution with respect to race, in a way that it has not been frozen with respect to gender or sexuality, for example, appears anachronistic for an otherwise modern nation (although these human characteristics, while regulated by law, were not explicitly regulated under the Constitution).

As part of the slow evolution towards the recognition of Indigenous people, a referendum passed in 1967 provided for the inclusion of Indigenous Peoples in the general census, and extended the scope of the race power, thereby investing the federal Parliament with explicit jurisdiction over Indigenous people. Justice Gaudron (1998) of the High Court rightly noted that the 1967 amendments were 'minimalist'.[31] The reasons for this characterisation of the 1967 changes are arguably twofold (a) firstly because lighter skinned Indigenous people were already deemed 'European', as racial categorisation of Indigenous people was based on

[30] *Official Report of the Debates of the Australian Federal Convention*, Melbourne 8 February 1898, 664.

[31] *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361 (Gaudron).

relative skin colour and blood quantum[32] and would, therefore, be counted in the general population (the effect of the rescission of s 127 of the Constitution) and (b) for other Indigenous people, the 1967 amendments did not diminish the power of States to make laws over Indigenous people but now allows the Commonwealth Parliament to *also* discriminate against them (a power the Constitution previously explicitly denied to the Commonwealth Parliament).

Further, there is a widespread popular misconception that the 1967 referendum resulted in formal legal equality for Indigenous people.[33] However, S 51(xxvi) as modified now allows Parliament to make detrimental laws for Indigenous citizens.[34] A century after Federation, when the six Colonies (Queensland, Western Australia, New South Wales, South Australia, Victoria and Tasmania) formally became the Commonwealth under the present Constitution, Indigenous people, their languages, cultures and law still do not have formal (including constitutional) recognition.

8.5 The Expert Panel's Report

The Panel produced an excellent, informative and comprehensive report.[35] However, it also developed complex recommendations. While this complexity is appropriate given the difficult nature of the issues involved, the Panel's proposals unfortunately do not appear to translate into easily understood referendum questions. The two subsequent Parliamentary Reports, the Interim Report[36] and the Final Report,[37] while endorsing and advancing the concept of constitutional recognition in *principle*, have reformulated the Panel's recommendations arguably *because* their recommendations were too complex or impractical.

In turn, Parliament has also been unable to identify suitable referendum questions that are likely to gain the requisite double majority for constitutional change and has recommended yet another process, possibly to further narrow the options.[38] Failure by the several committees to arrive at a suitable question supports the notion that the approach to the date has been impractical. This referendum originally

[32]John Gardiner-Garden, The 1967 referendum: history and myths, Research brief (Australia. Parliamentary Library); 2006–7, no. 11), 7.

[33]John Gardiner-Garden, The 1967 referendum: history and myths, Research brief (Australia. Parliamentary Library); 2006–7, no. 11), 4.

[34]*Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[35]The Report of the Expert Panel, 'Recognising Aboriginal and Torres Strait Islander People in the Constitution', January 2012.

[36]*Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (JSCATSI, 'the Committee') of July 2014 ('Interim Report').

[37]*Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (JSCATSI, 'the Committee') of June 2015 ('Final Report').

[38]Final Report, 88 (Recommendation 10).

scheduled for September 2013[39] was postponed.[40] It will be now held on a new date,[41] possibly in 2017, the 50th anniversary of the landmark 1967 constitutional referendum.

The Panel recommended the conditional rescission of the races' power, subject to the substitution of a new Section 51A which contains both symbolic and substantive elements,[42] and will provide a (new) head of power for Parliament to make laws with respect to Indigenous people only.[43] However, given Parliament's record and history, Indigenous people would be unwise to entrust Parliament with a power such as the proposed Section 51A, or even the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (JSCATSI), subsequent proposed variations as a beneficial power, re-formulated in the Interim and Final Reports. What is beneficial is quite subjective and the High Court is likely to defer to Parliament on this issue as it has done in the past.[44]

Indigenous leader Professor Patrick Dodson (2012), a co-chair of the Expert Panel, admitted that "legislation such as that establishing the Northern Territory Intervention [NTI] which was characterised by many Indigenous People as being detrimental, would not be affected [by the new Sections 51A and 116A]".[45] The NTI, which involved the use of the Armed Forces, was described by UN Special Rapporteur, Professor James Anaya (2009) as "racist".[46] The Hindmarsh Island Bridge legislation[47] and the Northern Territory Intervention legislation (NTI)[48] are arguably also recent examples of the phenomenon of apparently, "neutrally framed laws" that work to the detriment of Indigenous people. In the Hindmarsh Bridge case, laws acted to the detriment of the *Ngarrindjeri* people.[49] Chesterman and Galligan describe such laws as "undignified protectionist regimes" (Chesterman/Galligan 1997: 122).

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[39]J Gillard, B Brown & others, [Agreement to Form Government], the Australian Greens and the Australian Labor Party ('the Parties')—agreement signed on 1 September 2010, 2.

[40]Kirsty Magarey & John Gardiner-Garden, Aboriginal and Torres Strait Islander Recognition Bill 2012, Bills Digest No 74 2012–2013, 11 February 2013, 10.

[41]*Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) Section 4(1). ('2013 Recognition Act').

[42]The Panel Report, 117.

[43]The Panel Report, 173: The Panel also recommended a close nexus between 51A and the proposed new Section 116A, particularly s 116A(2).

[44]*Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[45]Patricia Karvelas, "Historic Constitution vote over indigenous recognition facing hurdles," *The Australian*, 20 January 2012. http://www.theaustralian.com.au/national-affairs/policy/historic-constitution-vote-over-indigenous-recognition-facing-hurdles/story-fn9hm1pm-1226248879375.

[46]'UN human rights envoy James Anaya: NT intervention is racist', *The Australian* 28 August, 2009. http://www.theaustralian.com.au/news/un-human-rights-envoy-james-anaya-nt-intervention-is-racist/story-e6frg6n6-1225767082240.

[47]*Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[48]*Wurridjal v Commonwealth* (2009) 237 CLR 309. ('*Wurridjal Case'*.).

[49]*Kartinyeri v Commonwealth* (1998) 195 CLR 337.

The Panel also proposed the inclusion of Section 116A, a substantive general rights-creating provision which prohibits discrimination on the bases of "race, colour or ethnic or national origin". The Prime Minister Mr Abbott referred to the provision as a "one clause Bill of Rights" and did not support its inclusion in the Constitution.[50] This provision, therefore, does not enjoy the necessary multi-party support.

The Panel's recommendation on languages, s127A, provides broad mention of Indigenous languages in aspirational terms but entrenches the preeminent position of, and privileges, the *English* language only, therefore not substantially remedying the present situation. The Parliamentary reports have wisely dropped the possible inclusion of this recommendation as a separate provision.[51]

The Parliamentary Committee[52] examining the outcome of the Panel's Report has abandoned the panel's proposed s 116A and s 127A,[53] thus responding to popular concerns. The JSCATSI also significantly modified the Panel's proposed s 51A by suggesting five new and substantially even more complex options.[54]

Whilst the Final Report has reduced the number of options to three[55] the complexity remains problematic as it does not aid their comprehensibility. Further, and in order to avoid repeating the 'mistake' of creating laws that are quite different to the popular understanding of the referendum as occurred in 1967, there should be sufficient clarity and confluence, between the voters' aspirations, the proposed and resulting constitutional changes.

8.6 Referenda in Australia

In order to proceed with a referendum, the form and substance of proposed referendum questions must first be authorised by the Parliament. This is also an opportunity for reasonable community concerns about the scope and content of the proposed recommendations to be addressed.[56] In a free society, debate should be encouraged, not stifled.[57] However, the Panel's referendum questions are not likely

[50] http://www.abc.net.au/pm/content/2012/s3411592.htm.

[51] Final Report 4.

[52] *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (JCATSI, 'the Committee') of July 2014.

[53] The Panel Report 131, 133.

[54] See Parliamentary Submissions 18 and 18.1 (particularly) by this author at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Submissions.

[55] Final Report 42–45.

[56] A view confirmed by Panel member Professor Davis: M Davis, 'Where to next for constitutional recognition, ABC Radio National, Big Ideas Programme 14 January 2013. http://www.abc.net.au/radionational/programs/bigideas/2013-01-14/4420912.

[57] *Patricia Karvelas, 'Panels' racist card stifles debate: Mundine'*, The Australian, 23 January 2012.

to be easily understood by the voters and arguably for this reason have been developed by the subsequent parliamentary committees. In addition, the fact that the majority of Australian voters are non-Indigenous means that it is primarily non-Indigenous sensibilities that will determine the scope of the recognition (if any) that is afforded. Therefore, pragmatically, the proposed referendum question should appeal to mainstream values. The next section proposes change that will appeal to mainstream values in a manner that is likely to win majority approval and also deliver some tangible benefits to the Indigenous people.

8.7 A Proposal for a Referendum Question

In practice, formal constitutional racial equality could be achieved by denying the Parliament the power to make laws with respect to people of a particular race, that is, by rescinding s 25 and s 51(xxvi) of the Constitution. These proposed changes are not uncontroversial. Thus, expunging of the word from the Constitution while not reintroducing the word or the concept of 'race' in new provisions, must analogically remove all traces of such meanings for prospective constitutional interpretation with respect to any subset of Australian citizens.[58] However, removing 'race'-related text from the Constitution, as was the case in 1967, will prove much more effective as most people will support the reduction of the power for Parliament to intervene in the rights or obligations of citizens based purely on the discredited notion of race.

However, the real or often manufactured objections, frequently based on an aggressive dogmatism, to the removal of these racist powers, should not be allowed to frustrate removal of Parliament's power to make racist laws. No other industrial first world country, since the time of the Nazis, provides in its laws or constitutions powers for its Parliaments to make laws based on race alone. It is clearly an opportunity for Australia's Constitution to accord with this contemporary international norm.

The argument is sometimes made that the rescission of s 51(xxvi) will prevent Parliament from making beneficial laws for Indigenous people. This is not entirely true, because if necessary Section 8(1) the *Racial Discrimination Act* 1975 (RDA), allows for the passing of special measures, including measures commonly referred to as "positive discrimination", differentially to help adversely affected racial groups.

Nevertheless, the removal of the word 'race' from the Constitution does not mean that the concept of race is going to magically disappear from the vernacular or in practical use in Australia. Race is a deeply entrenched concept in Australia, and is found not only in ordinary use, but in legislation as well (Chalmers 2014). Most of the legislation containing the word "race", (in its many forms), will continue to

[58]Scholars such as Professor George Williams oppose the complete rescission of the race (without the introduction of a new power) albeit for a different reason: The panel Report, 138.

be in force, even if "race" is expunged from the Constitution. Governments in Australia have been said to have an addiction to the use, or misuse of "race", for social control of Indigenous Peoples (Chalmers 2014).

On the issue of 'race', therefore it is suggested that a simpler referendum question could be to 'remove the word and concept of "race" from the Constitution; and [thereby, henceforth to] presume all citizens racially equally before the law and under the Constitution. This or a similar question may prove simple and clear enough to garner the public support necessary for constitutional change without creating perceived rights for Indigenous People that are not currently enjoyed by the majority. Such a question should be accompanied by some form of generously worded constitutional recognition of Indigenous people as the First Nations of this Continent. For the practical purposes of gaining the requisite majorities for constitutional change, the successful form of "recognition" will probably not have any positive legal effect and be non-justiciable. This is probably as far as this Parliament is likely to be willing to take this issue at this time, and substantive recognition of Indigenous laws, identity, language, and culture, would have to be achieved at a different, much later point along this 1000 mile journey.

8.8 Conclusion

Parliament is committed in principle to achieving constitutional recognition of Indigenous people.[59] What is missing is a means for achieving this in practice. This chapter argues that removing racial inequality in the Constitution requires a much less convoluted question to be put to the people than what is contained in the Panel's recommendations. A "yes" case for: "*Delete the 'race' provisions (Sections 25 and 51(xxvi)) from the Constitution, and (thereby) create formal constitutional racial equality for all citizens*" would not be a difficult case to make and for the vast majority of Australians to support. The majority of the mainstream, now appear to oppose the notion of white supremacy as a contemporary Australian value.

The vast majority of voters are open to change (Henderson 2015).[60] The voters can make this constitutional change happen by generating sufficient public pressure on Parliament to modernise and remove the anachronistic concept of "racial separation" of Australian citizens. Positive and affirmative cross-party support from the major political parties for a "racial equality proposition" will help gain the requisite double majority that is required by the Constitution to remove this historical blot from the face of an otherwise progressive nation, thereby allowing peacebuilding to be extended to Indigenous people as equal partners. The notion of a peace between

[59]Final Report 88.

[60]Anna Henderson, 'Constitutional recognition of Aboriginal and Torres Strait Islander people referendum has majority support, Recognise poll finds', 18 May 2015, ABC News; at: http://www.abc.net.au/news/2015-05-18/majority-support-indigenous-recognition-in-constitution-poll/6476538.

groups of peoples who do not recognise each other is likely to fail but building peace will benefit through formal mutual recognition of the humanity and the civilisations of the "other". Only with true recognition, will the long night for Indigenous people on the continent end and this recognition will promote true peacebuilding efforts between equal human beings.

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