

FOREWORD

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On 1 July 2011, the Indigenous Law Centre and the Gilbert + Tobin Centre of Public Law co-hosted a workshop at the University of New South Wales, with the aim of progressing discussion and debate around contemporary questions as to the ‘recognition’ of Aboriginal and Torres Strait Islander peoples in the *Australian Constitution*, and their rights under it. This special issue of the *Australian Indigenous Law Review* collects the contributions of the workshop participants. Should the special status of Aboriginal and Torres Strait Islander peoples be acknowledged in a new preamble, and, if so, what form should this take? How could agreement making be entrenched in the *Constitution*? How might section 51(xxvi), also known as the ‘race power’, be altered so as to prevent its use by the Commonwealth Parliament in a manner adverse to the interests of Aboriginal and Torres Strait Islander peoples? These questions are highly complex, and their consideration benefits greatly from historical, political and comparative perspectives from public law, human rights and, most importantly, the experience of Indigenous peoples both in Australia and around the world. As the careful and expert consideration given to these and other questions in this special issue demonstrates, the shorthand expression ‘constitutional recognition’ serves to mask a range of competing options and difficult choices.

This collection is being published in the year that the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution handed its final report¹ to the Prime Minister. Many of the articles collected here were submitted in modified forms to the Expert Panel as part of the latter’s extensive consultation process with the Australian community. Given the expertise of the authors, it is hardly surprising that this body of research influenced the deliberations of the Expert Panel. To give just one example, Professor Anne Twomey’s article persuasively

argues against the recognition of Aboriginal and Torres Strait Islander people in a standalone preamble at the beginning of the *Constitution*, a view that the Expert Panel came to share. Anyone seeking to understand the question of constitutional reform in the interests of Aboriginal and Torres Strait Islander peoples will find in these pages an indispensable complement to the Expert Panel’s own report. As very high quality legal research on these matters that fed directly into the Panel’s deliberations, these articles constitute significant contributions to the current and ongoing debate. The questions considered throughout this issue remain highly topical, and the authors’ elucidation and treatment of them current and valuable. This is even more the case now that the Expert Panel has provided some much needed substance to the national conversation about what ‘recognition’ of the unique place of Aboriginal and Torres Strait Islander people and their culture in Australia in the *Constitution* might involve.

The timing of this publication is propitious, given the recent emergence of political divisions about the way forward in acting on the report of the Expert Panel. The Commonwealth government has committed \$10 million to build public awareness and community support for the constitutional recognition of Indigenous Australians. Reconciliation Australia is leading the organisation of this program, supported by business and community groups, the Australian Human Rights Commission and the National Congress of Australia’s First People. But the government’s attempts to build political consensus – which the history of referenda shows is absolutely critical to achieving success – is proving less simple. The Federal Opposition has voiced general support for the aims of the referendum, but misgivings about it proceeding under the current government’s watch. It argues that Australians should not

be asked to approve this constitutional change in respect of Aboriginal and Torres Strait Islander peoples at or before the next Commonwealth election, in the second half of 2013. Some Indigenous organisations appear to share this concern, and would generally support the adoption of a longer timeframe, within which community understanding of the proposals could deepen, and agreement about them solidify.

Exactly what the specific proposals to be put to the people will be remains an open question. Despite the carefully argued recommendations of the Expert Panel, no political party has chosen to articulate with much clarity what it sees as being the direction from here. While that might be seen as a failure to lead the community debate, or at least to provide momentum in the wake of the Panel's report, it also means that the field is still open for constructive debate about just how far reform might reach. Some of the contributions in this issue definitely continue that discussion, and prompt readers to consider options for constitutional change that may yet attract strong adherents.

We wish to thank all the participants in the 2011 workshop, for their contributions both on the day, and to this lasting record of those discussions. We thank them also for their patience as this issue was edited and produced. We are also grateful to Dylan Lino and Jeanette Murdoch who ensured that the Workshop ran so smoothly, and to the editors of the *Australian Indigenous Law Review*, especially Robert Woods, for their interest in publishing this collection and their work on the issue.

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 - 1 Expert Panel on the Recognition of Indigenous Australians in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) <<http://www.youmeunity.org.au>>.

COMMENTARY

