Submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

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Graham Atkinson
Robert Nicholls
Annette Xiberras
Melissa Jones

Land Justice Group Co-chairs

About the Victorian Traditional Owner Land Justice Group

The Victorian Traditional Owner Land Justice Group was formed in 2005 as an unincorporated coalition of representatives of traditional owner groups across Victoria. It is primarily an advocacy body and continues a long tradition of traditional owner activism working for land justice in Victoria. Membership is open to one representative and a deputy from each Victorian traditional owner group. The aim of the Land Justice Group is to lobby government for improvements to policy, legislation and practice, to provide a forum for the discussion of relevant state-wide issues, and to engage with various agencies and bodies in relation to the interests of Victorian first nations. It meets approximately three times each year and also hosts an annual state-wide land justice summit. The Land Justice Group is supported by Native Title Service Victoria through the provision of secretariat and logistical support.

The Land Justice Group welcomes this opportunity to make a submission to the Expert Panel concerning the recognition of Aboriginal and Torres Strait Islander peoples in Australia’s Constitution.

PLEASE NOTE: Due to tight timelines, this submission has not been endorsed by all Traditional Owner groups in Victoria. It is a perspective put forward by members of the Land Justice Group.
THE NEED FOR CONSTITUTIONAL CHANGE

The Constitution of Australia is not an inspirational document. Australians have, historically, not been given to grand vision statements such as those found within the American Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights”. The fact that the equality of those times was more a matter of aspirations, and that the nature of equality needed to be reinterpreted by subsequent generations, does not count against the value of visionary foundational documents.

Our federal Constitution, which is said to structure our ‘legal universe’, is mired in the dated pragmatism of colonial minds. It contemplates the use of race powers, for example, instead of protecting the property rights of traditional owners. It is not that the common law had no conception of such rights at the time, since the rights of ‘domestic dependant nations’ had been long accepted in North America – at least in law, if not in practice.

Among the very few rights that our Constitution enshrines, it promises to provide compensation for the compulsory acquisition of land. Yet, until the recognition of native title forced the issue, the First Australians were not protected by this provision. And still today, the Crown does not provide compensation for the historic extinguishment of native title. In short, our legal universe seems to be too small to qualify as a founding vision for the whole Australian nation.

Pat Dodson has recently put a challenge to all sectors of our society to confront the truth of our history, and in particular, to recognize the unique position of the First Australians:

If, as a nation, we are able to conduct ourselves with courage, love and integrity in the dialogue before us, then the nation will be well served and future generations will not be left wondering why our courage was so lacking that we were unable to confront the truth of our history and to deal with that truth accordingly.¹

There is great value in securing recognition of the First Australians in the Constitution. This would preferably be framed in terms of traditional ownership, rather than anachronistic conceptions of race. Such a change to the Constitution is an opportunity for national conversation about, and for a wider understanding of, the historic problems at the heart of the nation’s sovereignty.

If, for example, the Constitutional property rights of all Australians had actually been protected since 1901, then it would be difficult to quibble with the prospect of the Crown investing in infrastructure for Aboriginal and Torres Strait Islander communities – precisely because their rights should have been the same as those enjoyed by all Australians since 1901. In this respect, acknowledgement of traditional ownership does not set one group of Australians over against other groups; it simply states some key features of the first chapters in the Australian story.

If the symbolism of Constitutional recognition can give rise to greater knowledge of our histories, then we cannot afford to lose this opportunity.
SPECIFIC RECOMMENDATIONS

A STATEMENT OF RECOGNITION

Victorian Traditional Owners have outlined core principles\(^2\) for inclusion in a recognition statement that could equally apply to a statement of recognition in the Constitution. These include recognition that Traditional Owner groups:

- Are the original owners of the land and waters,
- Have never ceded their sovereignty over their land and waters
- Have been dispossessed from their traditional lands
- Maintain their spiritual, social, cultural, historical and economic relationship to their traditional lands and waters
- Use their traditional land and waters for cultural purposes
- Are the right people to speak for their country

The Land Justice Group further submits that any statement of recognition should also recognise the violent process of dispossession including recognition of massacres and frontier wars.

Recommendation 1: Statement of Recognition.
Positive recognition of Aboriginal and Torres Strait Islander peoples should be inserted into the Constitution, either in a new preamble or in the body of the Constitution. This recognition should be framed in terms of traditional ownership, rather than race, and the specific words should be negotiated with Aboriginal and Torres Strait Islander peoples.

REMOVING RACIAL DISCRIMINATION

Whilst Constitutional recognition of Aboriginal and Torres Strait Islander peoples is important, this measure will be insufficient if the referendum does not also amend the two sections of the Constitution that are overtly racist.

Section 25
Section 25 of the Australian Constitution acknowledges that a State can exclude a racial group (including Aboriginal and Torres Strait Islanders) from voting in State elections. This outmoded provision is fundamentally at odds with Australian values of non-

discrimination and equality.

**Recommendation 2: Section 25**
The Land Justice Group recommends that section 25 be deleted in its entirety from the Constitution.

**Section 51 (xxvi)**
The reasons for including this section in the Constitution are now acknowledged as ‘clearly racist’ in nature, with the intention of allowing the Federal Parliament to make laws restricting the 'liberty and rights of some sections of the community' on the basis of their race. Problematically, the High Court decision of *Kartinyeri v The Commonwealth* left open the possibility that section 51(xxvi) might support racially discriminatory laws to the detriment of Aboriginal and Torres Strait Islander peoples. There is therefore a need for Constitutional amendment to ensure that this provision can only be used for the benefit (and not to the detriment) of Aboriginal and Torres Strait Islander peoples.

Consideration of both section 25 and section 51(xxvi) highlights the fact that the Constitution does not currently contain any specific protection against racial discrimination. Legislative protection offered by the *Racial Discrimination Act (1975)* (Cth) (‘RDA’) is vulnerable to the political whim of Parliament, as demonstrated by the suspension of the RDA on three separate occasions. Embedding the right to be free from racial discrimination in the Constitution would strengthen human rights’ protection and remove the power of Government to suspend this right at will.

**Recommendation 3: Section 51(xxvi)**
The Land Justice Group recommends that:

- s 51(xxvi) be repealed and replaced with a new power authorising laws made with respect to Aborigines and Torres Strait Islander peoples;
- a general guarantee of freedom from racial discrimination in all laws and programs be inserted in the Constitution, which also allows for affirmative action taken to address the legacies of discrimination against Aboriginal and Torres Strait Islander peoples.

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AN AGREEMENT MAKING POWER

The Land Justice Group supports the amendment of the Constitution to enable the Australian Government to enter into specific agreements with Aboriginal and Torres Strait Islander peoples which would have the force and effect of Commonwealth law.

As Aboriginal peoples, we have never ceded the traditional sovereignty of our country. No formal treaty has ever been entered into between the British or Australian Parliament and Aboriginal and Torres Strait Islander peoples. The Australian Constitution, its structures of government and systems of law, were imposed on Victorian Aboriginal people without our consent or participation. The governing institutions were established through a process which involved the disruption of the political, cultural and social institutions of our people and the dispossession of our people from our traditional lands and natural resources. Ultimately, the Australian Constitution, its structures of government and systems of law have been founded on a non-recognition of Indigenous sovereignty. This situation was not remedied in *Mabo v Queensland (No 2)*. Here the High Court reaffirmed the legal system’s commitment to the non-recognition of Indigenous sovereignty.

In light of this history, contemporary agreement-making between the State and Aboriginal and Torres Strait Islander peoples is important because it involves an acknowledgment of the continuation of Aboriginal societies as a source of authority over land and resources, and it involves a fundamental recognition that Traditional Owner groups are societies with distinct laws, traditions and customs. Importantly, there is scope for agreements made pursuant to a Constitutional agreement-making power to build on this experience of land settlement agreements to provide express, legal recognition of the inherent rights of Victorian Traditional Owners.

Agreement-making can help secure important benefits for Aboriginal and Torres Strait Islander peoples, including benefits aimed at redressing historic wrongs which continue to manifest themselves in contemporary economic and social disadvantage. For instance, agreements might include a commitment to improve and allow equitable access to health, housing, education, employment and other services.

As Traditional Owners in Victoria, we continue to exercise our right to self-determination. Agreement-making provides further opportunities to exercise this right through the process of negotiating agreements. Self-determination can also be supported by the substantive

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5 (1992) 66 ALJR 408.

outcomes secured by negotiated agreements.

**Recommendation 4: An agreement-making power**

The Land Justice Group recommends that a specific agreement-making power be included in the Constitution which allows the Commonwealth Government to enter into agreements with Aboriginal and Torres Strait Islander peoples and to endow such agreements with the force of law.

This power should also provide protection to such agreements, so that they cannot be unilaterally rescinded or varied by Government (for instance, by way of a requirement that this occur only by agreement between the contracting parties).

**Land Justice Group contact:** Jill Webb (secretariat), 03 93215319 jwebb@ntsv.com.au