OPINION OF AMELIA ABBOTT ON CONSTITUTIONAL RECOGNITION OF INDIGENOUS AUSTRALIANS AS PROPOSED BY THE EXPERT PANEL

Summary of Submission:

The proposed constitutional amendment of the Expert Panel is intended to replace s 51(xxvi) with a new s 51A that only empowers the creation of 'beneficial laws.' Where all previous detrimental laws are wiped out, however, the cause of action will be frozen, in turn perpetuating further detriment. Even if the court maintained some supervisory power against the 'manifest abuse of power,'[1] an external body remains necessary to serve as a proactive service, lessening reliance on the reactive resolutions of the Courts. The question remains to be one for the Indigenous population themselves, whereby mending and amending must be viewed in the light of the purpose for change.

Australian law is yet to solve the predicament it created through the notion of *terra nullius* and the passing of the *Constitution* 113 years ago. That is, there is a fundamental mismatch within the law as it relates to Indigenous Australians; in parts, the Constitution itself is premised on the notion of *Terra Nullius,* while the *Murray Island Case* overruled this notion. Recognition of the original inhabitants of Australia is arguably the most pressing though long-standing issue that Australia faces, which is entwined with both legislative and common law issues.

It is in this author's opinion that constitutional recognition of Indigenous Australians is imperative to a foundational extent, but will not go far enough to provide

[1] *Kartinyeri v Commonwealth* (1998) IndigLawB 48 per Gaudron J.

Indigenous Australians with equality before the law, education and health. Australian law must be used for the purpose of mending situations, not merely formal amending, particularly in the case of the relationship between Indigenous Australians and Australian law. This is achievable through concurrent amendment of the *Constitution* and reinstatement of the Aboriginal and Torres Strait Islander Commission (ASTIC).

This discussion necessarily questions the *purpose* of amending the *Constitution* to provide the Commonwealth Parliament the 'power to make laws with respect to Aboriginal persons,' as proposed by the *Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples* (Expert Panel). This author agrees with the submission of Neil Young QC that s 51(xxiv) should remain yet be qualified,[2] as was achieved in the 1967 referendum. This author therefore disagrees with The Expert Panel's recommendation to hold a referendum proposing the repeal of ss 25 and 51(xxiv) of the *Constitution* and instating their s 51A, but rather those s 51A notions of recognition, acknowledgement and respect should be used to qualify s 51(xxvi). Acknowledgement of Indigenous Australians as the original inhabitants of Australia is imperative, either in the preamble or the body of the text, however the reinstatement of the ATSIC is necessary to protect against potential legislation enacted under s 51(xxiv), amended or otherwise. This author believes that the use of the race power needs to be monitored by an external body, while the power itself remains an important part of Australian law.

[2] Neil Young QC, 'In the Matter of an Opinion on the Recommendations Made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (11 June 2014) para 2.

I *The Purpose of Constitutional Amendment*

To mend the issue here refers to focusing on systemic issues and outcomes while amending is to formally assign rights or otherwise. The question of whether a law will mend or amend the relationship of Indigenous Australians with Australian law, and how to achieve both, necessarily turns to the perspective of the Indigenous population. That is, the proposed amendments must not only be considered in a legal framework, but also in how that legal framework may be interpreted by the population it relates to. Research suggests that Indigenous Australians 'understand the false promise of formal equality and demand something more.'[3]

Recognition of Original Inhabitants

It is uncontestable that recognising Indigenous Australians as the original inhabitants of Australia is the fundamental caveat affecting their interaction with Australian law. While the *Murray Island Case* ruled that the concept of terra nullius is a historical legal fiction, the *Constitution* remains a trajectory of colonialism. Some research suggests that Indigenous Australians envision such recognition in the preamble of the *Constitution.*[4] This recognition is essential not in the way that the neo-liberal model fears; it is about a spiritual and pastoral connection to the land, not property rights as viewed at common law.

[3] Larissa Behrendt, 'Indigenous Self-Determination: Rethinking the Relationship Between Rights and Economic Development' (2001) 24 *University of New South Wales Law Journal,* 850-863, 854.
[4] Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) 33 *University of New South Wales Law Journal,* 239-268, 240.

The Races Power

This is a power not merely used for dealing with Aboriginal people and land, but all races as the 'special' need may arise. This has resulted in a wide-range of laws not specific to Indigenous Australians. Moreover, there are examples of laws currently in place that do benefit Indigenous Australians, which would collapse with the removal of s 51(xxvi). The amendment of s 51(xxvi), on the other hand, may help to distinguish the currently beneficial legislation from the detrimental language, whereby laws no longer valid under the amended legislation would also collapse. From the *Native Title Act*[5] to the *Evidence Act,*[6] the Commonwealth has demonstrated some intention to use the power to benefit Indigenous Australians, though the *Hindmarsh Island Bridge Act*[7] suggests a pick-and-choose approach. It is therefore unfeasible to completely abolish the races power, while necessary to protect against abuse of power by Parliament, as was experienced during the stolen generation. With a view to moving forward, and not focusing on past abuses of power, the question turns to how beneficial purpose can be realised as beneficial effect, and what can be learnt from international comparisons.

1I *Purpose and Effect: Will Changes Mend or Amend the Relationship?*

The Indigenous Community is left behind in all areas that are otherwise considered to be the 'unquestioned rights [of] all Australians,'[8] such as health and education. This cycle of generational inequality is sometimes attributed to 'the process of

[5] *1993 (Cth)*.
[6] *1995 (Cth)*.
[7] *1997 (Cth)*.
[8] Larissa Behrendt, 'Indigenous Self-Determination: Rethinking the Relationship Between Rights and Economic Development' (2001) 24 *University of New South Wales Law Journal,* 850-863, 851.

dispossession and colonisation.'[9] There are, therefore, two integral questions to determining whether new law, or new amendments, will mend or simply amend the issue. Amending the *Constitution,* while symbolically meaningful to Indigenous Peoples and Australian society generally, will not go far enough to afford Indigenous Australians equality before not only the law but also education and health. This paper therefore agrees with Alexander Reilly that the Aboriginal and Torres Straight Island Commission, once invested with adequate jurisdiction, should be reinstated.[10]

Previous Amendments and Enactments

The issue of amending the Constitution is ultimately one of popularity, not only drafting an amendment to afford adequate protection but also of attaining the support of the double majority. This was achieved in the 1967 referendum, through striking out 'other than the Aboriginal race' from s 51(xxvi), therein allowing Parliament to make special laws with respect to Indigenous Australians. While this amendment successfully allowed the inclusion of Aboriginal people in the census, it did not go so far as to acknowledge Indigenous Australians as the original inhabitants of Australia, nor has it prevented issues such as the *Hindmarsh Island Bridge Act* and its unsuccessful challenge in *Kartinyeri.* This is supported by the *Racial Discrimination Act,* which allows the Parliament to take these special measures.

The *Hindmarsh Island Bridge Act* was a 'special' law validly enacted under s 51(xxvi), following the case of *Kartinyeri v Commonwealth.*[11] This Act overturned

[9] Ibid.
[10] Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review,* 403-438, 422.
[11] (1998) IndigLawB 48.

the *Aboriginal and Torres Strait Islander Heritage Protection Act*[12] and allowed for construction at a site allegedly sacred to the Ngarrindjeri female elders, on evidence of the Hindmarsh Island Royal Commission that the women's relationship to the site was fabricated. This case highlights the true complexity of this issue; the races power was used to overcome the issue of rights and powers to build on particular land and further, it is now almost impossible to rectify. That is, the bridge is there – the Ngarrindjeri women are gone. The effect of this issue is compounded by the federal race powers, as Kirby J wrote, 'so long as racist provisions exist in the Australian Constitution, they stand at risk of being used.' A closer analysis also reveals that if s 51(xxvi) is removed, legislation such as the *Hindmarsh Island Bridge Act* will have no head of power to support it. While the enactment of validating legislation could potentially counter this issue, it requires retrospective application, which should be clearly avoided in this context.[13] In turn, this paper will argue that a retained yet qualified version of 51(xxvi) should be proposed, as well as a new section enacted to recognise the original inhabitants of Australia.

Attempts to Mend: A Way Forward for Australia

Attempts to mend the relationship between Indigenous Australians and Australian law have been transitory and incomplete. Bodies such as the ATSIC and the Prison Through Care Unit of the Aboriginal Legal Service were proving effective and unreasonably abolished. While issues of criminality are beyond the scope of this paper, the ATSIC 'established an indigenous governance structure

[12] *1984* (Cth).
[13] *Acts Interpretation Act 1901* (Cth) s 7.

through which Indigenous representatives played a key role in Commonwealth decisions.'[14] It is in this light that attempts to mend the situation may be more powerful than amendment, where repealing s 51(xxvi) and replacing it with s 51A would not give the Indigenous population the 'key role' it ought to have in governing relevant affairs.[15]

[14] Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review,* 403-438, 421.
[15] Gary F Bell, 'Minority Rights and Regionalism in Indonesia – Will Constitutional Recognition Lead to Disintegration and Discrimination? (2001) 5 *Singapore Journal of International and Comparative Law* 784-806, 789.