Constitution reform: referendums in Australia

Information paper
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Introduction

This two-part information paper outlines the complexities of making Constitutional reform in Australia. It comes on the back of the Turnbull Government's goal to seek Constitutional recognition for Indigenous Australians before May 2017.

Part 1 provides an overview on the referendum process, examines the history of Constitutional reform in Australia, and outlines what elements successful past-referendums have shared.

Part 2 looks at the current Indigenous-led Recognise campaign in Australia. This seeks to amend sections 25 and 51(26) of the Constitution which allow for adverse racial discrimination in law. In doing so, the paper considers the options of a treaty as opposed to, or complementary with, holding a referendum.

Part 1: The Australian Constitution

The Australian Constitution is the law under which the government of the Commonwealth of Australia operates. It evolved through a series of Constitutional conventions throughout the 1890s and was passed by the British Parliament as part of the Commonwealth of Australia Constitution Act 1900. It took effect on 1 January 1901. Though the Constitution was technically an act of the British Parliament, British legislative influence was officially removed when the Australia Act passed in 1986.

The Constitution outlines the separation of powers into three branches: legislative, executive and judicial – those who make laws, those who put the laws into operation, and those who interpret the law. The Constitution also establishes the framework for the relationship between Federal Parliament and the states.

Section 128 and section 51 of the Constitution specifies that it can only be altered through a referendum. This means it can only be amended with the approval of Australian electors.

The Australian Constitution is not the only legislation to have constitutional significance in Australia: The Statute of Westminster (which sets the basis for the relationship between the Commonwealth and the Crown) and the Australia Act 1986 (which removed the remaining possibilities for the UK to pass legislation in Australia) also play a substantial role in legislation.

However, many believe that the process of changing the Constitution has been somewhat circumvented through rulings of the court, such as in relation to Commonwealth-State powers.

In order for a proposed law to reach referendum stage, it must be passed in both Houses of Parliament. It must pass with an absolute majority in both houses, meaning it must receive one more than half the votes of the total number of members of the house, whether they are present or not.

Since the Constitution was established, there have been 44 attempts on 19 different occasions (it is common to have multiple questions on the ballot) to change the Constitution. Of these 44 attempts, only eight have been successful. The last successful referendum was in 1977, and only four referendums have successfully been voted in over the past 50 years.

How does a referendum pass the public?

To pass a referendum, the "yes" vote must receive a majority of votes – which is one more than half the total number (i.e. 50 per cent plus one.)

To use a referendum to change the Constitution, the referendum must win a double majority requiring:

- *A national majority of voters must vote "yes". This means that the combined "yes" vote across all Australian states and territories must be 50 per cent plus at least one.*
- *When state votes are counted, a majority (50 per cent plus one, therefore four) of the states must have voted "yes". This clause was intended to protect the smaller states' interests. Only the six states are included in this majority, the two territories are excluded.*

Many attribute the double majority rule as the reason it is so difficult to pass referendums. There have been occasions where a clear majority has passed at the national voting level (such as the Aviation and the Simultaneous elections referendums), but failed to get a total of four "yes" state votes.

The appendix provides a full list of referendums in Australia and their outcomes.

What makes a successful referendum?

Australia's most successful referendum to-date was in 1967 to give Federal Parliament the power to make laws in relation to Aboriginal and Torres Strait Islander people and to remove the prohibition against including them in population counts in the Commonwealth or a state. The national vote received 90.77 per cent and all states carried the vote.

Contrasting the success of this referendum to less successful endeavours provides some theories on what makes a successful referendum. For example, the "no" vote in the 1999 referendum proposing Australia become a republic was 54.87 per cent and the insertion of a new preamble in the Constitution was 60.7 per cent.

To achieve a successful outcome, the Australian Human Rights Commission puts forward three strategies:

Bipartisan support

Support and unity by the major political parties has been a key factor in the success of referendums. In 1967 a "no" campaign was never put forward to the Australian people. Additionally, there were years of united political messaging, which greatly contributed to such a successful outcome. Conversely, political party opinions diverged greatly in 1999 – particularly over the proposed new wording.

Popular ownership

When there is comprehensive debate and opportunities for public involvement resulting in the Australian people feeling they personally own the issue and what is at stake, and they are willing to champion the proposal, there is a much greater likelihood a referendum will pass. It is important that the referendum is not perceived as owned either by politicians or the elite, but by the nation as a whole.

Popular education

If voters understand the issues being discussed and proposed, the chances of getting their support for a "yes" vote is much higher. A successful referendum should have a robust education campaign planned that highlights the need for the reform.

For example, the *Yes/No booklet* became the main source of information during the formal campaign in 1999. The information provided in the booklet was drafted by politicians who either supported or opposed the amendments.

As a consequence, the booklet presented information to the public as polarised and adversarial, rather than dispassionate and factual and did not provide balanced and credible information for a successful referendum.

Part 2: On the referendum agenda – Indigenous acknowledgement

What is the Recognise campaign?

The Constitution was drafted at a very different time in Australia's history when Australia was considered a land that belonged to no one before European settlement and when Aboriginal and Torres Strait Islander peoples were considered a dying race, not worthy of citizenship or humanity.

Because of this, Aboriginal and Torres Strait Islander people were not involved in the discussions surrounding the creation of the new nation or its Constitution.

It was not until the 1967 referendum that saw a formal change when over 90 per cent of Australian voters agreed to amend the Constitution to give the Federal Parliament power to make laws in relation to Aboriginal and Torres Strait Islander people, and to allow them to be included in the census. However, the referendum did not recognise Aboriginal and Torres Strait Islander people as first peoples or specify the conditions under which parliament could make such laws.

The Recognise campaign is a movement that seeks to redress this by recognising Aboriginal and Torres Strait Islander peoples in the Constitution and tackle racial discrimination. At the heart of the debate is changing section 51, paragraph 26, which allows parliament to "make special laws" for "the people of any race".

Cape York Institute Constitutional Reform Research Fellow, Shireen Morris has noted that Aboriginal and Torres Strait Islander people have no presumption of equality before the law in Australia. In fact, they have the opposite – sections 25 and 51(26) (Race Power) explicitly allow for adverse racial discrimination in law.

"Today, race-based laws allowed by the Constitution's Race Power together with an absence of general protection from adverse discrimination, means that Aboriginal people still do not enjoy equality before the law, nor equality in the substantive or practical sense." – Shireen Morris

What outcomes are the Recognise campaign looking to achieve?

The Recognise campaign seeks to amend sections 25 and section 51(26) to specify that the "special laws" parliament can make on the basis of race must be *for the benefit* of the race they apply to.

The Recognise campaign states that the amendments would:

- **Address** the sections of the Constitution, including section 25 and section 51(26), that are based on the outdated notion of race, including a Constitutional prohibition on racial discrimination;
- **Formally acknowledge** Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia;
- **Provide** an Aboriginal and Torres Strait Islander body to advise Parliament about matters affecting Indigenous peoples.

Speaking on the importance of outcomes from the proposed Constitution changes, Federal Shadow Minister for Human Services, Linda Burney said, "We are the only first world nation with a colonial story that doesn't acknowledge its people's within the Constitution. There is absolutely no downside. It is a great act of truth-telling.

"The Federal Government can't remove the Race Power clause without replacing it with something, otherwise it will not have the capacity to ever change the native title act. The idea that there is a clause within the Constitution that gives government the capacity to make laws about particular groups of people is fine, except it has made laws about particular groups of people that have been detrimental.

"The clause needs to say that government has a responsibility to make laws that are advantageous – or something along those lines – to particular groups of people. And for me the thing is not just about Aboriginal people, this is about nation building, it's about every single person in this country who will have a vote, and that's really important."

Aboriginal leader and Yaabubiin Institute for Disruptive Thinking Chair, Nyunggai Warren Mundine AO said the Constitutional changes should include "the poetic words in regards to the Aboriginal and Torres Strait Islanders", dealing with the detrimental race laws, and could include an added clause in regard to the powers of the Commonwealth to make agreements or treaties with First Nation peoples.

Arguments from the "no" campaign

Considering the opposition that the Recognise campaign may face, Ms Burney said "There will be a core group of misguided conservatives who will mount a no campaign, and it will be based on fear mongering and divisiveness… This sort of mad argument that somehow putting recognition of Indigenous people in the Constitution adds race, which is ridiculous, because race is already there in a negative way. It will be an argument that this is divisive and giving one group of people a set of rights that other people in the country don't have."

Another argument is that a "no" vote to Constitutional reform may put forward centres around future tax-payer costs. If the reforms establish an independent body to assess Indigenous land settlements and grievance disputes, there could be concerns about how much this would cost the government and tax-payers.

Ms Burney describes this as "a non-argument".

"This is just nonsensical. And I suppose the other issue that will divide Australia is around Aboriginal people waiting to set up their own space, and I suppose the issue of treaty will be in there as well. There are already a number of what you would describe as treaties existing in Australia. They're called Indigenous Land Use Agreements, or Native Title Determinations," she said.

"It is impossible, based on Aboriginal culture, to have a treaty between the Australian government and Aboriginal people. It would have to be, and it is, a series of treaties between individual Aboriginal nations."

Referendum vs a treaty

A call for changes to the Australian Constitution to recognise Indigenous Australians and a call for the Commonwealth to establish a treaty, or series of treaties, with Indigenous Australians are essentially two different issues. Both proposals are not mutually exclusive, and could work to complement each other. A treaty is a contract between two sovereign parties, while a Constitution is a set of governing laws.

In many countries around the world, treaties are an accepted way to reach settlement between the Indigenous population and those who have colonised their lands. Australia remains the only Commonwealth nation without a treaty with its Indigenous people.

Treaty in Australia?

The idea of a treaty with Indigenous Australians goes back many years. In 1832 the Governor of Van Diemen's Land remarked that it was "a fatal error...that a treaty was not entered into" with the Tasmanian Aboriginal people. Prime Minister Bob Hawke promised to deliver a treaty by 1990. However, the term became controversial because treaties are typically established between two independent, sovereign countries, not peoples within the same country.

This led to criticism that a treaty could serve to further divide Indigenous Australians. Prime Minister John Howard said that "a nation ... does not make a treaty with itself".

From here, the term was renamed a "document of reconciliation", or Makarrata. Makarrata is a word in the Yolngu language meaning "the resumption of normal relations after a period of hostilities". Some people preferred the word Makaratta because they felt the word treaty was too divisive.

These discussions were eventually replaced by the push for Constitutional recognition.

The New Zealand example

One of the most commonly cited examples of a treaty with Indigenous land owners is New Zealand's Treaty of Waitangi. It is difficult to make direct comparisons between Australia and New Zealand in regards to Constitution versus a treaty, as New Zealand has no single Constitution document. The Constitution Act 1986 and a collection of statutes (Acts of Parliament), the Treaty of Waitangi, Orders in Council, letters patent, decisions of the Courts and Constitutional conventions, comprise only a portion of the uncodified Constitution.

However, it is still possible to look at how the establishment of a treaty has affected the lives of Maori New Zealanders. The principles of the Treaty are referred to in several Acts of Parliament. It is an important part of how New Zealanders work and the New Zealand education system, and the Treaty affects life in New Zealand in many ways.

According to *New Zealand Now*, "The Treaty governs the relationship between the Indigenous people, Maori, and everyone else and ensures the rights of both Maori and Pakeha (non-Maori) are protected."

It does that by:

- Accepting that Maori iwi (tribes) have the right to organise themselves, protect their way of life and to control the resources they own;
- Requiring the Government to act reasonably and in good faith towards Maori;
- Making the Government responsible for helping to address grievances; and
- Establishing equality and the principle that all New Zealanders are equal under the law.

Seeing the Treaty in practice has resulted in:

- Maori representation in Parliament is guaranteed, currently with seven reserved Maori seats;
- A "Waitangi Tribunal" researches and makes legal decisions on cases where Maori land and other resources were taken illegally or unfairly in the past. This can result in settlements for tribes, including cash and land;
- Maori now have significant control of, and rights to, fisheries resources – as a direct result of the Treaty in action;
- Maori language, *Te Reo,* is now an official language alongside English and New Zealand Sign Language. Increasingly often the names of places are written in both English and Maori; and
- There are initiatives to protect the Maori language, such as government funded radio stations and TV channels.

Stance of the political parties

Currently there is bipartisan support for the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. However, this has been complicated with Federal Labor Leader Bill Shorten's stance that it would be better to pursue a treaty than Constitutional reform – which he says makes logical sense given how difficult it is to successfully pass a referendum

Prime Minister Malcolm Turnbull distanced himself from pursuing a treaty – at least in the near future. The *Sydney Morning Herald* reported that he has said such a proposal could inhibit progress towards Constitutional recognition of Indigenous people. The government has signalled it will hold a referendum on that question in 2017.

What we can expect from here

Hypothesising how the campaign will move from here, Ms Burney said, “What we urgently need is a discussion on what the question will be that goes to the people.

“Part of the concern with conservatives (and some Aboriginal people as well) is that it won’t make a difference in terms of outcomes, and I don’t accept that. If you have a look at the Rudd apology in 2008, the practical outcome was the closing the gap target. You can argue whether they’re working or not, but it’s certainly what drives governments.

“I think that social justice argument is a really important one. What it changes is the way in which Aboriginal people are seen, and that has long-term ramifications. You go up to old people and they say ‘Well, it will make us proud’ or ‘It will make us thankful’, and that’s important.

“I think the other thing to say is that, why would you be afraid? Why wouldn’t you have a Constitution that celebrates something remarkable and unique in this country? And that is that we have the oldest humanity on earth, that of Aboriginal people – and what a wonderful thing to recognise.”

Mr Mundine said, “I am hoping the discussion will happen quickly, it’s now been six years since we started this conversation. And I’m looking forward to having a referendum next year. I believe if we do that, we will be able to move forward as a united nation.”

Appendix: Referendums in Australia and their outcomes

Subject/proposal	Issue of writ	Polling day	Result	States that voted in favour	Per cent of votes in favour
Senate election To enable elections for both Houses to be held concurrently.	8 November 1906	12 December 1906	Carried	All	82.65
Finance To allow the Commonwealth to make a fixed payment out of surplus revenue to the States according to population. This was to replace the arrangement where the Commonwealth returned three-quarters of net revenue to the States.	28 February 1910	13 April 1910	Not carried	Queensland, WA, Tasmania	49.04
State debts To give the Commonwealth unrestricted power to take over State debts.	28 February 1910	13 April 1910	Carried	All except NSW	54.95
*Legislative Powers To extend the Commonwealth's powers over trade, commerce, the control of corporations, labour and employment, including wages and conditions; and the settling of disputes; and combinations and monopolies.	15 March 1911	26 April 1911	Not carried	WA	39.42
*Monopolies To give power to the Commonwealth to nationalise monopolies.	15 March 1911	26 April 1911	Not carried	WA	39.89
Trade and commerce	24 April 1913	31 May 1913	Not carried	Queensland, WA, SA	49.38
Corporations	24 April 1913	31 May 1913	Not carried	Queensland, WA, SA	49.33
Industrial matters	24 April 1913	31 May 1913	Not carried	Queensland, WA, SA	49.33
Railway disputes	24 April 1913	31 May 1913	Not carried	Queensland, WA, SA	49.13
Trusts	24 April 1913	31 May 1913	Not carried	Queensland, WA, SA	49.78
Nationalisation of monopolies	24 April 1913	31 May 1913	Not carried	Queensland, WA, SA	49.33

Legislative powers To seek temporary extension of Commonwealth legislative powers over trade and commerce, corporations, industrial matters and trusts.	3 November 1919	13 December 1919	Not carried	Victoria, Queensland, WA	49.65
Nationalisation of monopolies To seek power for the Commonwealth to make laws with respect to monopolies	3 November 1919	13 December 1919	Not carried	Victoria, Queensland, WA	48.64
*Industry and commerce To authorise the creation of authorities to control the terms and conditions of industrial employment, to give State authorities similar powers to Commonwealth authorities, and to regulate and control trusts and combinations.	26 July 1926	4 September 1926	Not carried	NSW, Queensland	43.50
*Essential services To allow the Commonwealth to take measures to protect the public against interruption of essential services.	26 July 1926	4 September 1926	Not carried	NSW, Queensland	42.80
State debts To end the system of per capita payments which have been made by the Commonwealth to the States since 1910, and to restrict the right of each State to borrow for its own development by subjecting that borrowing to control by a loan council.	9 October 1928	17 November 1928	Carried	All	74.30
*Aviation To give the Commonwealth power to legislate on air navigation and aircraft.	4 February 1937	6 March 1937	Not carried	Victoria, Queensland	53.56
*Marketing To give the Commonwealth power to legislate on marketing.	4 February 1937	6 March 1937	Not carried	None	36.26
*Post-war reconstruction and democratic rights To give the Commonwealth power, for a period of five years, to legislate on 14 specific matters, including the rehabilitation of ex-servicemen, national health, family allowances and 'the people of the Aboriginal race'.	4 July 1944	19 August 1944	Not carried	WA, SA	45.99

Social services To give the Commonwealth power to legislate on a wide range of social services.	21 August 1946	28 September 1946	Carried	All	54.39
Organised marketing of primary products To allow the Commonwealth to make laws for the organised marketing of primary products.	21 August 1946	28 September 1946	Not carried	NSW, Victoria, WA	50.57
Industrial employment To give the Commonwealth power to legislate on terms and conditions of industrial employment.	21 August 1946	28 September 1946	Not carried	NSW, Victoria, WA	50.30
*Rent and prices To give the Commonwealth permanent power to control rents and prices	12 April 1948	29 May 1948	Not carried	None	40.66
*Powers to deal with communists and communism To give the Commonwealth powers to make laws in respect of communists and communism.	10 August 1951	22 September 1951	Not carried	Queensland, WA, Tasmania	49.44
*Parliament To increase the number of Members of the House of Representatives without necessarily increasing the number of Senators.	28 April 1967	27 May 1967	Not carried	NSW	40.25
*Aboriginals To enable the Commonwealth to enact laws for Aboriginal people. To remove the prohibition against counting Aboriginal people in population counts in the Commonwealth or a State.	28 April 1967	27 May 1967	Carried	All	90.77
*Prices To give powers to the Commonwealth to control prices.	12 November 1973	8 December 1973	Not carried	None	43.81
*Incomes To give powers to the Commonwealth to legislate on incomes.	12 November 1973	8 December 1973	Not carried	None	34.42

Simultaneous elections To hold elections for the Senate and the House of Representatives on the same day.	20 April 1974	18 May 1974	Not carried	NSW	48.30
*Senate casual vacancies To ensure, as far as practicable, that a casual vacancy in the Senate is filled by a person of the same political party as the Senator chosen by the people, and that the person shall hold the seat for the balance of the term.	27 April 1977	21 May 1977	Carried	All	73.32
*Referendums – Territories To allow electors in Territories, as well as in the States, to vote in constitutional referendums.	27 April 1977	21 May 1977	Carried	All	77.72
*Retirement of judges To provide for retiring ages for judges of Federal courts.	27 April 1977	21 May 1977	Carried	All	80.10
Terms of senators To change the terms of senators so that they are no longer fixed, and to provide that the election for both houses are always on the same day.	26 October 1984	1 December 1984	Not carried	NSW, Victoria	50.64
Interchange of powers To enable the Commonwealth and the States voluntarily to refer powers to each other.	26 October 1984	1 December 1984	Not carried	None	47.06
*Parliamentary terms To provide four-year maximum terms for members of both Houses of the Commonwealth Parliament.	25 July 1988	3 September 1988	Not carried	None	32.92
*Fair elections To provide for fair and democratic parliamentary elections throughout Australia	25 July 1988	3 September 1988	Not carried	None	37.60
*Local government To recognise local government in the Constitution.	25 July 1988	3 September 1988	Not carried	None	33.62

*Rights and Freedoms To extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.	25 July 1988	3 September 1988	Not carried	None	30.79
*Republic To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.	1 October 1999	6 November 1999	Not carried	None	45.13
*Preamble To alter the Constitution to insert a preamble.	1 October 1999	6 November 1999	Not carried	None	39.34

Note: *Indicates a referendum that was not held in conjunction with an election. Source: *2008 Parliamentary Handbook. Parliamentary Library.*

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