First Peoples and the Australian Commonwealth

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ABSTRACT

On Saturday, October 14, 2023, the Australian people will vote in a referendum to amend the Australian Constitution to recognise Australia's Indigenous peoples and to establish an Aboriginal and Torres Strait Islander Voice to make representations to the Parliament and the Executive Government. This paper discusses the possible meaning and effect of the constitutional recognition of Australia's Indigenous peoples as 'the First Peoples of Australia.' The paper considers: (a) the constitutional relationship between Australia's Indigenous peoples and the Australian people, (b) the potential implications for the locus of sovereignty in Australia and the possibility of Indigenous self-government, (c) the potential relevance of the US doctrine of 'domestic dependent nations,' the Canadian doctrine of the honour of the Crown and the fiduciary obligations owed by the Crown to Aboriginal peoples, as well as the international human right to self-determination of Indigenous peoples. The paper builds on the submission of Professor Aroney and Professor Gerangelos to the Australian Parliamentary Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, which examines several of the other aspects of the constitutional amendment proposal.

INTRODUCTION

When the idea of what was then called an 'Indigenous Advisory Council' was first proposed by the Cape York Institute, it was emphasised that the body must be:

- non-justiciable: it must not transfer power to the courts and, therefore not diminish parliamentary sovereignty;
- efficient: it should not slow down or hold up the machinery of Parliament;
- not open to abuse: Parliament must keep running if no advice is delivered by the body on a particular law; and

- certain and clear: it should be precise enough to be understood easily by all parties.[1]

In its *Final Report*, the Referendum Council adopted four further principles to guide the assessment of proposals for constitutional reform.[2] These principles, which had first been proposed by the Expert Panel on Constitutional Recognition, were that the proposal must, among other things:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound.

If the referendum is to have strong prospects of success, the proposal will need to meet these and similar criteria. Views may differ as to whether this is the case. Time will tel.'l.

In this paper, I focus on a series of questions concerning the constitutional meaning and effect of the proposed Indigenous Voice. My remarks do not advocate either in favour or against the proposal, even though committed participants on both sides have quoted from or relied upon certain things that Professor Peter Gerangelos and I said in our submission to the parliamentary Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum.[3] The paper seeks to explore the likely constitutional meaning and effect of the proposal, while acknowledging that an assessment of its likely or possible consequences is an essential element in one's decision whether to support or oppose it.

It seems to me that questions around the meaning and effect of the constitutional amendment can be organised into six topics, dealing respectively with:

1. the structural implications of the establishment of an Indigenous Voice in its own chapter of the Constitution, thus according the Voice, a constitutional status comparable to that of the Parliament, the Executive and the Courts, but with a different specific function;
2. the legal consequences of the constitutional recognition of Australia's Indigenous

[1] *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Final Report* (2015) [4.49].
[2] *Final Report of the Referendum Council* (30 June 2017) 5.
[3] The submission can be downloaded from the Joint Select Committee website.

peoples as ‘the First Peoples of Australia’;

3. the constitutionally prescribed nature and composition of the Voice as a singular ‘body’ that is ‘Indigenous’;
4. the constitutional implications, if any, that will be attached to the right to make representations to the Parliament and Executive Government;
5. the particular institutions, agencies and office holders that are comprehended within the term ‘Executive Government’;
6. the extent to which the Parliament will be able to legislate with respect to matters relating to the Voice.

Much of the debate has centred on this last question—the extent to which the Parliament will have the power to determine the composition, functions, powers and procedures of the Voice under clause (iii) of the proposed section 129—noting that the Parliament's power will be subject to the mandatory requirements of clauses (i) and (ii).

In the submission Professor Gerangelos and I made to the parliamentary committee, we attempted to identify and address several of the constitutional questions we believe arise in in relation to these six topics. On some issues, we did not express a concluded view, principally because we did not see a clear or decisive answer. On others, we did express a view, while acknowledging that it is difficult for any of us to be absolutely certain about the precise meaning and effect of a constitutional amendment of this kind.

I will take the same approach in this paper. The paper will build on some of the observations we made in our submission to the parliamentary committee, with a particular focus on a question that has not received very much consideration in the debate so far. That question concerns the legal consequences of the constitutional recognition of Australia’s Indigenous peoples as ‘the First Peoples of Australia.’

RECOGNITION

The proposed section 129 begins with a set of introductory words in the following terms:

> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia: ...

Notably, these introductory words are separate from the three operative clauses that establish the body, affirm its right to make representations, and empower the Parliament to make laws with respect to it. At the outset, it could be argued that the legal effect of the recognition of

Australia's First Peoples is limited to what is required by the three operative clauses. In other words, it has no implications beyond the legal effect of those clauses, interpreted in the light of the introductory words. However, it could also be argued that the introductory words contain implications of their own. The three substantive clauses spell out three particular constitutional imperatives premised on recognition of the First Peoples, but the recognition of Australia's First Peoples is itself a central objective of the new section 129, which may have legal implications of its own.

To consider why this might be the case, it is instructive to compare the current amendment proposal to the preamble put to the Australian people for their approval in the constitutional referendum of 1999. The proposed preamble then similarly recognised 'Aborigines and Torres Strait Islanders' as 'the nation's first people.'[4] However, this was to be accompanied by an additional section which provided that the preamble was of no legal force and was not to be considered in the interpretation of the Constitution.[5] This limiting clause was considered important to help ensure that the broad language used in the proposed preamble would not have unpredictable legal consequences.[6] The Constitution Acts of New South Wales, Victoria, South Australia and Queensland, which also recognise Indigenous peoples as 'first people and nations,' 'first people,' 'first peoples and nations' and 'First Australians,' include similar limiting provisions.[7]

In the absence of a limiting clause of this kind, the opening words of the new section 129 are likely, at a minimum, to inform the interpretation of the section itself and its place and operation within the Constitution as a whole. However, beyond that, the constitutional recognition of 'the First Peoples of Australia' contains the prospect of carrying additional implications of its own, potential implications that should at least be explored.

What might those implications be? Several questions arise.

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[4] *Constitution Alteration (Preamble) 1999* (Cth), Sch. Notably, this phrasing would have recognised Australia's Indigenous peoples as integral to the larger nation of which they are an essential part.

[5] *Constitution Alteration (Preamble) 1999* (Cth), section 4, inserting a new section 125A into the Constitution.

[6] *Constitutional Convention, Transcript of Proceedings*, 2nd to 13th February 1998, 'Resolutions D2 and D3 of Day 8' and statements in support of the limiting clause by Prof Greg Craven, Mr Kevin Andrews, Mr Gareth Evans and Mr Michael Lavarch (at pp 29-30, 425-6, 472-3, 799-800, 803-804).

[7] *Constitution Act 1902* (NSW) s 2(3); *Constitution Act 1975* (Vic) s 1A(3); *Constitution Act 1934* (SA) s 2(3); *Constitution of Queensland 2001* (Qld) s 3A.

FIRST PEOPLES AND THE AUSTRALIAN PEOPLE

The first and most basic question is this: How will the recognition of Australia's Indigenous peoples as 'First Peoples' be conceptualised constitutionally and, in particular, how will it relate to the constitutional conception of the Australian people?

By way of comparative analysis, in Canada and the United States, the terms more frequently used in the case law are 'First Nations'[8] and 'Domestic Dependent Nations.'[9] While the word 'nation' may carry a relatively stronger signification than the term 'people,' the words can be used interchangeably. The Macquarie Dictionary defines 'nation' as 'a relatively large body of people living in a particular territory and organised under a single, usually independent government' while it defines 'people' as 'the whole body of persons constituting a community, tribe, race, or nation.'[10]

Unlike the proposed section 129, the *Uluru Statement from the Heart* uses the terms 'first sovereign Nations' and 'First Nations.'

The International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) protect the right to self-determination of all 'peoples,' while the United Nations Declaration on the Rights of Indigenous Peoples (2007) affirms the right of self-determination of 'indigenous peoples.'

The recognition of 'the First Peoples of Australia' in the proposed section 129 is likely to be interpreted in the context of the reference in the preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) to the agreement of 'the people' of the several Australian colonies 'to unite in an indissoluble Federal Commonwealth under the Crown ... and under the Constitution ....'[11] Several justices of the High Court have affirmed that, following termination of the power of the UK Parliament to legislate for Australia in 1986,[12] ultimate

[8] That is, alongside the Métis and Inuit. See, eg, *Taku River lingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388.

[9] *Cherokee Nation v Georgia* 30 US (5 Pet) 1; 8 L Ed 25 (1831), 31, 32.

[10] *The Macquarie Dictionary of Australian English* (Macquarie Publishers Australia, 2015), *sv* 'nation,' 'people.'

[11] *Commonwealth of Australia Constitution Act 1900* (UK), preamble.

[12] *Australia Acts 1986* (UK) and (Cth).

sovereignty is now vested in the Australian people.[13] The opening words of section 129 will raise similarly fundamental questions about the constitutional status of and relationship between the First Peoples and the Australian People.

At present, the Constitution recognises the distinct existence of the people of each State (section 7) but also treats them as integral parts of the people of the Commonwealth (section 24).[14] In similar terms, it is quite possible, and indeed likely, that the 'First Peoples' referred to in section 129 will be recognised by the courts as a distinct and yet integral part of the 'Australian People': *distinct* as regards their status as First Peoples, but *integral* as regards their equal status as Australian citizens.[15] However, there are complications.

INDIGENOUS PEOPLES AND THE LOCUS OF SOVEREIGNTY

The first complication concerns the implications of the High Court's recent decision in *Love v Commonwealth*.[16] In that case, it was held by a majority that Aboriginal Australians are not 'aliens' within the meaning of s 51(xix) of the Constitution.[17] One premise of that conclusion was that aboriginality would be determined according to the tripartite test articulated by Brennan J in the *Mabo* case.[18] The third element of that test requires recognition by 'the elders or other persons enjoying traditional authority' among the people concerned.[19]

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[13] Eg, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171, 180 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140, 171 (Deane J), 201 (Toohey J), 230 (McHugh J). See also *Unions NSW v New South Wales* (2013) 252 CLR 530, 571 [104], 578 [135], 581 [146], 583-4 [158] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508 at 593 [197] (Keane J); *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

[14] This relationship between the people of each State and the people of the Commonwealth is central to the design of the Constitution as a whole: see, generally, Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) chs 7 and 8.

[15] *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 366 [40] (Gaudron J); *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152, 172 [9] (Kiefel CJ), 201-204 [103]-[110] (Gageler J), 215-216 [160]-[163] (Keane J), 250-252 [267] (Nettle J).

[16] *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152.

[17] See Peter Gerangelos, 'Reflections Upon Constitutional Interpretation and the "Aliens Power": Love v Commonwealth' (2021) 95(2) *Australian Law Journal* 109.

[18] *Love v Commonwealth* (2020) 270 CLR 152, 191-192 [76]-[81] (Bell J), 281-282 [366]-[368] (Gordon J), 317 [458] (Edelman J); see also 176 [23] (Kiefel CJ).

[19] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70 (Brennan J) ('[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a

The three dissenting justices (Kiefel CJ, Gageler and Keane JJ) considered that this entailed recognition of a measure of Indigenous sovereignty insofar as it empowered the traditional holders of authority in Aboriginal communities to determine a person's status in a manner that limited the power of the Commonwealth to determine conditions of citizenship and entry into the country.[20] As the Chief Justice put it, 'To suggest that traditional laws may be determinative of the legal status of a person in relation to the Australian polity is to attribute sovereignty to Aboriginal groups.'[21] This appeared to contradict a long line of cases that had decided that sovereignty is vested exclusively in the Commonwealth and that all persons within Australian territory are subject to the duly enacted laws of the Commonwealth, State and Territory Parliaments.[22]

The majority justices (Bell, Nettle, Gordon and Edelman JJ) did not consider this to be the case. Justice Gordon affirmed, for example, that Australia's Indigenous peoples are an integral part of the Australian people in whom ultimate political sovereignty is reposed and that this directly contradicted the proposition that 'any notion of Indigenous sovereignty' could persist after the assertion of sovereignty by the British Crown.[23]

Juxtaposed against this reasoning, what would constitutional recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia imply? Here it is worth observing that in *Coe v Commonwealth [No 2]*, the plaintiff sought declarations that the Wiradjuri are a 'sovereign nation of people,' a 'domestic dependent nation, entitled to self-

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particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people'). See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J).

[20] *Love v Commonwealth* (2020) 270 CLR 152, 176–177 [25], 179 [37] (Kiefel CJ), 208 [125], 211[137] (Gageler J), 226 [197] (Keane J).

[21] *Love v Commonwealth* (2020) 270 CLR 152, 179 [37].

[22] *Coe v Commonwealth [No 1]* (1978) 52 ALJR 334, 336 (Mason J); *Coe v Commonwealth [No 1]* (1979) 53 ALJR 403, 408 (Gibbs CJ, with whom Aiken J agreed), 409-410 (Jacobs J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57-58 (Brennan J); *Coe v Commonwealth [No 2]* (1993) 68 ALJR 110, 115 (Mason CJ); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443–444 [44] (Gleeson CJ, Gummow and Hayne JJ); *Love v Commonwealth* (2020) 270 CLR 152, 226-228 [199]-[205] (Keane J).

[23] *Love v Commonwealth* (2020) 270 CLR 152, 278-279 [356] (Gordon J). See also Gageler J's statement that at federation both Indigenous Australians and non-Indigenous Australians alike became 'members of the body politic of the Commonwealth of Australia': *Love v Commonwealth* (2020) 270 CLR 152, 204 [110].

government,' and a 'free and independent people.'[24] Chief Justice Mason considered that all three claims amounted to a claim to sovereignty, even when the word 'sovereignty' was not expressly used.[25]

This would be consistent with the *Uluru Statement from the Heart*, on which the Voice proposal is premised,[26] which refers to 'our Aboriginal and Torres Strait Islander tribes' as 'the first sovereign Nations of the Australian continent and its adjacent lands,' possessing a sovereignty that 'has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.'[27]

DOMESTIC DEPENDENT NATIONS AND LIMITED SOVEREIGNTY

It was noted earlier that the term 'domestic dependent nation' is generally used in the United States. The term designates those Indian tribes that are considered to possess a qualified form of sovereignty which continues to exist subject to the sovereign power of the US Congress. As Stewart J put it in *United States v Wheeler*:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[28]

It followed, for Stewart J, that subject to these qualifications the Indian tribes continued to have jurisdiction over their own internal affairs, including the power to prescribe and enforce criminal laws against their own tribal members.[29]

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[24] *Coe v Commonwealth [No 2]* (1993) 68 ALJR 110, 113 (Mason CJ).

[25] *Coe v Commonwealth [No 2]* (1993) 68 ALJR 110, 115 (Mason CJ).

[26] *Explanatory Memorandum: Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Commonwealth Parliament, House of Representatives, 2023) 2.

[27] *Uluru Statement from the Heart* (2017).

[28] *United States v Wheeler* 435 US 313 (1978), 323, cited in *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 202 [58].

[29] *United States v Wheeler* 435 US 313 (1978), 324, 326. See, similarly, *Duro v Reina* 495 US 676 (1990), 685, affirming that tribal jurisdiction extends to that which is 'needed to control their own internal relations, and the preserve their own unique customs and social order,' and that it therefore extends only to members of the tribe. However, see United States Code (Title 25, §1301(2)), extending the jurisdiction to 'all Indians.'

Consistently with the approach generally taken in Australia, the High Court has rejected the proposition that Australia's Indigenous peoples have the status of 'domestic dependent nations' in the sense used in the United States.[30] However, the question arises whether constitutional recognition of Australia's First Peoples in the proposed section 129 might change this.

In this connection, it is noteworthy that in *Love v Commonwealth*, one of the reasons Gageler J (as he then was) gave for his dissenting judgment was his reticence as a judge to engage in what he called the 'judicial creation' of a 'race-based constitutional limitation on legislative power,' no matter how benign that limitation might be. 'Creativity of that nature and in that degree,' he said, 'is not within the scope of the acknowledged judicial function of ensuring that the structure of government, democratically endorsed through the adoption and amendment of the Constitution, is accommodated to the "changeful necessities and circumstances of generation after generation" as "the nation lives, grows, and expands."'[31] Noting, however, the 'national conversation' presently occurring about the appropriateness of amending the Constitution to include an Indigenous Voice, his Honour went on to say that if the scope of the power of the Parliament were to be limited in the way proposed, 'then the Constitution should be amended to produce that result by referendum,' as had occurred in 1967 in relation to the race power.[32]

Clearly, a constitutional amendment is a change to the fundamental ground rules of the legal system as a whole. The recognition of Australia's First Peoples in the Constitution is a change to the system at the most fundamental level, because it is the recognition of Peoples who possessed the continent prior to the People of Australia, noting that it is to this latter People of Australia that ultimately sovereignty is now ascribed. It is thus of the utmost significance precisely how Australia's First Peoples will be conceptualised as a result of the insertion of the proposed section 129, and how they will be conceived to relate to the Australian People as a whole.

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[30] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 135-136, 164-165 (Dawson J); *Coe v Commonwealth (No 2)* (1993) 118 ALR 193, 194 (Mason CJ); *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767, 772 (Kirby J); *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 202 [58] (Lehane J).

[31] *Love v Commonwealth* (2020) 270 CLR 152, 210 [133], citing House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902, p 10967.

[32] *Love v Commonwealth* (2020) 270 CLR 152, 211 [134] (Gageler J).

INDIGENOUS SOCIETIES AND NORMATIVE SYSTEMS

A further complication arises out of the reasoning of Gleeson CJ, Gummow and Hayne JJ in the *Yorta Yorta* case.[33] In that case, the plurality began their reasoning with the premise, consistent with earlier decisions, that the Crown's acquisition of sovereignty cannot be challenged in Australian municipal courts.[34] This entailed the corollary, they reasoned, that 'there could thereafter be no parallel lawmaking system' in the territory over which such sovereignty had been asserted.[35] The rights of Indigenous peoples must depend, therefore, on their recognition by the 'normative system' introduced at British settlement.[36]

This new normative system, the plurality affirmed, recognised the then-existing rights and interests of Australia's Indigenous peoples, these being rights and interests derived from the traditional laws and customs of those peoples.[37] However, because no 'parallel law-making system' persisted after the assertion of British sovereignty, the traditional body of Indigenous laws and customs did not have the capacity, they said, to generate *new* rights and interests, except to the extent that the then-existing rules of Indigenous law and custom themselves contemplated such development.[38] In other words, the only rights and interests that will be recognised by Australian courts 'are those that find their origin in pre-sovereignty law and custom.'[39]

The plurality went on to state that rights and interests under a body of law and custom are always the product of a particular society, which they defined as a body of persons united in its acknowledgement and observance of such laws and customs.[40] (The definition was perhaps circular in this respect.) Accordingly, if a traditional society should cease to exist as a group, those laws and customs, and the particular rights and interests arising under them, would also cease to exist.[41] However, if the content of those laws and customs should later be adopted by the new society, they reasoned, those rights and interests might be given 'new

[33] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422
[34] *Yorta Yorta* (2002) 214 CLR 422, 441 [37].
[35] *Yorta Yorta* (2002) 214 CLR 422, 444 [44].
[36] *Yorta Yorta* (2002) 214 CLR 422, 443 [43].
[37] *Yorta Yorta* (2002) 214 CLR 422, 443 [44].
[38] *Yorta Yorta* (2002) 214 CLR 422, 443 [44].
[39] *Yorta Yorta* (2002) 214 CLR 422, 444 [44].
[40] *Yorta Yorta* (2002) 214 CLR 422, 445 [49].
[41] *Yorta Yorta* (2002) 214 CLR 422, 445-446 [50].

life.'[42]

This gives rise to a question. Might section 129, in recognising Australia's First Peoples, have the effect of giving 'new life' to the Indigenous societies to which the *Yorta Yorta* plurality referred? Could it be interpreted to affect a kind of resurrection of those societies and their traditional laws and customs, particularly in relation to those cases in which the courts have found that the continuous observance and acknowledgement of those laws and customs could not be established? If so, how far could this reasoning be taken? Could it resurrect particular rights and interests, particular laws and customs, particular social and communal identities, and even some degree of sovereignty, autonomy or law-making power vested in Australia's First Peoples? As Kirby J observed in the *Wik* case, '[d]ifferent considerations may arise in different societies where Indigenous peoples have been recognised, in effect, as nations with inherent powers of a limited sovereignty that have never been extinguished.'[43] Might the recognition of Australia's First Peoples in the proposed section 129 have this sort of effect? It is difficult to be sure. But the possibility needs to be considered.

In this respect, it is notable that the term 'First Peoples' may be apt to invoke the right to self-determination recognised and protected by the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and the United Nations Declaration on the Rights of Indigenous Peoples (2007). As the Australian Human Rights Commission has observed, 'The right to self-determination has particular application to Aboriginal and Torres Strait Islander peoples as Australia's first peoples.'[44] The use of international human rights law and principles in the interpretation of the Constitution is controversial.[45] However, much of the controversy has concerned the use of provisions of international law that have come into being after the Constitution was

[42] *Yorta Yorta* (2002) 214 CLR 422, 446 [53].

[43] *Wik Peoples v Queensland* (1996) 187 CLR 1, 213.

[44] Australian Human Rights Commission, 'Right to self-determination' < https://humanrights.gov.au/our-work/
rights-and-freedoms/right-selfdetermination> (accessed 24 August 2023). The Commission continues: 'Self-determination is an "on going process of choice" to ensure that Indigenous communities are able to meet their social, cultural and economic needs. It is not about creating a separate Indigenous "state."'

[45] See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [62]-[63], 591-595 [66]-[74] (McHugh J), 616 [150], 623-624 [171]-[176], 629 [190] (Kirby J).

enacted.[46] A contemporary amendment to the Constitution made after the conclusion of an international human rights treaty is in a different category altogether.[47] It is quite possible that the courts, when seeking to divine the implications of the constitutional recognition of Australia's First Peoples, would give at least some consideration to these international instruments. In *Love v Commonwealth*, for example, Bell J referred to the United Nations Declaration on the Rights of Indigenous Peoples in support of the proposition that '[i]t is not offensive, in the context of contemporary international understanding, to recognise the cultural and spiritual dimensions of the distinctive connection between Indigenous peoples and their traditional lands.'[48]

HONOUR OF THE CROWN AND FIDUCIARY DUTIES

A further question concerns the possible application within Australia of the doctrine, developed in both Canada and New Zealand, of the 'honour of the Crown,' and the consequential duty of the Crown to Indigenous peoples, an obligation which has been characterised as a kind of 'fiduciary duty.'[49] Would constitutional recognition provide a basis for the development of these or similar doctrines in relation to Australia's First Peoples?

The early Canadian cases, as I understand them, found that the Crown owed a special fiduciary duty to Aboriginal peoples in respect of native title rights over land surrendered to the Crown under statute.[50] Later cases appear to have been reconceptualised the fiduciary

[46] *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [62], 592 [68] (McHugh J); *Love v Commonwealth* (2020) 270 CLR 152, 255 [275] (Nettle J).

[47] In *Maloney v The Queen* (2013) 252 CLR 168, the High Court held that restrictions implemented under the *Liquor Act 1992* (Qld) in respect of the Palm Island community were a 'special measure' within the meaning of s 8(1) the *Racial Discrimination Act 1975* (Cth) and therefore were not invalid under section 109 of the Constitution for inconsistency with s 10 of that Act. The Court rejected the submission that the restrictions were not a special measure within the meaning of Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination due to inadequate consultation with the Indigenous community prior to the implementation of the policy.

[48] *Love v Commonwealth* (2020) 270 CLR 152, 190 [73] (Bell J); see also 255 [274] (Nettle J).

[49] Academic commentary has advocated for a fiduciary duty based on the honour of the Crown: Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339.

[50] *Guerin v The Queen* [1984] 2 SCR 335, 349-350 (Wilson J, for Ritchie and McIntyre JJ), 376, 383-385 (Dickson J, for Beetz, Chouinard and Lamer JJ). In this case, part of an Indian reserve set apart for the use of the Musqueam band was surrendered to the Crown by the band 'in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive

duty as being grounded in the doctrine of the honour of the Crown.[51] According to a recent statement of the position in Canada, the principle of the honour of the Crown 'derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation.'[52] Would constitutional recognition of Australia's First Peoples have a similar effect because it would affirm Indigenous occupation of Australia prior to the assertion of British sovereignty?

The status and rights of Canada's Aboriginal peoples are expressly recognised and protected by sections 25 and 35 of the *Constitution Act 1982* (Can). Section 35(1) states that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.' Section 35(2) defines 'aboriginal peoples of Canada' to include 'the Indian, Inuit and Métis peoples of Canada.' Section 25 further provides that the 'guarantee of certain rights' in the Canadian Charter of Rights and Freedoms 'shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada ….'

The Supreme Court of Canada has held that section 35(1) 'incorporates the government's responsibility to act in a fiduciary capacity with respect to Aboriginal peoples' in a manner that imports certain limitations or restraints on the exercise of sovereign power.[53] Reflecting on the wider 'significance' of section 35, Dickson CJ and La Forest J quoted with apparent approval the statement of one scholar that:

> ... the context of [the constitutional amendments of] 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[54]

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to our Welfare and that of our people.' The Crown accepted the surrender and entered into a lease upon terms substantially less advantageous than those which had been discussed with the band.

[51] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, discussed in Jamie Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Purich Publishing, 2015).

[52] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, [24].

[53] *R v Sparrow* [1990] 1 SCR 1075, 1108.

[54] *R v Sparrow* [1990] 1 SCR 1075, 1105-1106.

Their Honours concluded that section 35 should therefore be interpreted in a generous, liberal and purposive manner, having regard to 'principles relating to aboriginal rights.'[55]

The Canadian Supreme Court has also held that it is a 'corollary' of section 35 that 'the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.'[56] As McLachlin CJ explained:

> … Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognised and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[57]

These Canadian cases have often involved claims over land or rights appurtenant to such claims. However, they have also involved claims to aboriginal rights that exist independently of native title,[58] and there have been suggestions that the Crown has a broader responsibility to act in a fiduciary capacity with respect to Aboriginal peoples generally.[59] I certainly do not profess any deep understanding of the intricacies of the Canadian jurisprudence.[60] But it seems clear the amendment of the Canadian Constitution in 1982 has had significant ramifications in Canadian law.

The Australian constitutional context is different from Canada's, and one would not expect any simple one-for-one correspondence between the legal doctrines developed in the two

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[55] *R v Sparrow* [1990] 1 SCR 1075, 1106.

[56] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 524 [20].

[57] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 525 [25].

[58] Eg, *R v Adams* [1996] 3 SCR 101; *R v Côté* [1996] [1996] 3 SCR 139.

[59] *R v Sparrow* [1990] 1 SCR 1075, 1108; but see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 166 (Dawson J) citing *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185, 482. In *Delgamuukw*, McLachlan CJ held that traditional title had been extinguished and that this unilateral extinguishment was, in part, the source of the Crown's obligation: at DLR 464, 477-8. See also, to similar effect, *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767, 775 (Kirby J).

[60] The development of the Canadian jurisprudence in relation the honour of the Crown and fiduciary duties owed by the Crown is recounted and analysed in Dickson (n 51).

countries. However, their constitutional histories also have several important similarities and where these exist the jurisprudence of the two countries has sometimes run along parallel lines.[61] To date, Australian courts have not affirmed the doctrine of the honour of the Crown or the proposition that Australian governments owe fiduciary duties towards Australia's Indigenous peoples.[62] Nonetheless, there has been discussion of the latter in several High Court and Federal Court decisions.[63]

In *Mabo v Queensland (No 2),* Toohey J found that while native title could be extinguished, alienated or appropriated by legislation or by an executive act authorised by such legislation, such extinguishment, alienation or appropriation would involve a breach of the Crown's fiduciary obligation to the title holders, for which it would be liable to pay compensation. The basis of his Honour's conclusion was that the power of the Crown to alienate land the subject of native title, and thus impair traditional Indigenous rights and interests in land, 'give[s] rise to a fiduciary obligation on the part of the Crown.'[64] His Honour considered that to the extent the Crown is a fiduciary, it 'must act for the benefit of the beneficiaries,' and that this entailed an obligation 'to ensure that traditional title is not impaired or destroyed without the consent or [is] otherwise contrary to the interests of the titleholders.'[65] His Honour went on to say that such a fiduciary obligation does not limit the legislative power of the Parliament to extinguish native title, but that such legislation would be a breach of the fiduciary obligation if its effect were 'adverse to the interests of the title holders' or if the process it establishes 'does not take account of those interests.'[66]

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[61] Eg, *McGinty v Western Australia* (1996) 186 CLR 140, 186-187, 203-204, 246-247, 267-268, 287-288.

[62] The only references to the Honour of the Crown that I have been able to find in High Court decisions are in *New South Wales v Bardolph* (1933-34) 52 CLR 455, 481-2 (Evatt J) (subject to parliamentary appropriation, all contracts for the Crown's departments and services should be honoured) and *Commonwealth v Anderson* (1960) 105 CLR 303, 325 (Windeyer J) (despite the legal fiction that the Crown can never be dispossessed of its property, the Crown may bring an action of ejectment and need not bring an information of intrusion).

[63] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 199-204 (Toohey J); *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 204-5 (Lehane J). Academic commentary has also advocated for a fiduciary duty based on the honour of the Crown: Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339.

[64] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 203.

[65] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 204.

[66] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 205.

None of the other justices followed Toohey J in this line of reasoning. However, Brennan J did consider that there may be specific circumstances where a fiduciary duty might arise, but that such circumstances did not exist in this case.[67] Dawson J considered the existence of a fiduciary duty would depend on the existence of subsisting native title rights. In his dissenting judgment, his Honour found that native title had not survived Crown annexation and, therefore, there was no basis for a fiduciary duty.[68] The other justices did not address the issue.

In his dissenting judgment in *Wik Peoples v Queensland*,[69] Brennan CJ again rejected the argument that the Crown owed a fiduciary duty to the native title holders in the exercise of a statutory power to alienate land, because the exercise of such a power by its nature enables the native title to be extinguished without the consent of the title holders and contrary to their interests.[70] However, the Chief Justice also noted that a discretionary power—whether statutory or not—that is to be exercised on behalf of, or for the benefit of, others 'might well have to be exercised by the repository in the manner expected of a fiduciary.'[71]

In *Coe v Commonwealth [No 2]*, Mason CJ similarly accepted that a fiduciary duty might arise out of a representation or an undertaking made by the Crown to an Indigenous people.[72] However, he considered the claims made by the plaintiff in that case to be inadequately pleaded or untenable on various grounds.[73]

Summing up the state of the law in *Thorpe v Commonwealth [No 3]* some years later,[74]

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[67] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 60. Brennan J referred specifically to circumstances where there had been a voluntary surrender of native title to the Crown in expectation that the Crown would exercise its discretion to grant a tenure in land to the titleholders, citing *Guerin v The Queen* [1984] 2 SCR 335.

[68] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 164, 166-7, 169, 175.

[69] The majority in *Wik* did not need to address the fiduciary issue because they found that the pastoral leases did not necessarily extinguish the underlying native title: *Wik Peoples v Queensland* (1996) 187 CLR 1, 123 (Toohey J), 156 (Gaudron J), 167 (Gummow J).

[70] *Wik Peoples v Queensland* (1996) 187 CLR 1, 96-97.

[71] *Wik Peoples v Queensland* (1996) 187 CLR 1, 96, citing *Guerin v The Queen* [1984] 2 SCR 335.

[72] *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110, 116-117.

[73] *Coe v Commonwealth (No 2)* (1993) (1993) 68 ALJR 110, 117-118.

[74] *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767, 776. In *Thorpe*, the plaintiff sought, among other things, a declaration that the Commonwealth owed a fiduciary duty to the 'original peoples of this land.' Justice Kirby held that a declaration of that kind could not be made in the circumstances because

Kirby J observed that: 'whether a fiduciary duty is owed by the Crown to the Indigenous peoples of Australia remains an open question. This Court has simply not determined it. Certainly, it has not determined it adversely to the proposition. On the other hand, there is no holding endorsing such a fiduciary duty ….'[75]

In *Bodney v Westralia Airports Corporation*, Lehane J made similar observations.[76] His Honour went so far as to say that there was 'nothing surprising' in the conclusion of the Canadian Supreme Court in *Guerin v The Queen* that the disposal by the Crown of Aboriginal lands under a statutory scheme that required such lands first to be surrendered by the particular Indian band concerned, should give rise to a fiduciary duty to 'act in the interests of members of the band.'[77] However, his Honour also noted two important distinctions between the Canadian and Australian contexts. Firstly, his Honour noted that there had been a 'constitutionalisation' of Aboriginal rights in Canada by section 35 of the *Constitution Act 1982*. Secondly, he observed that the law concerning fiduciary duties had developed differently in the two countries.[78] These are important distinctions that need to be factored into the discussion.

In relation to the constitutionalisation of Aboriginal rights, Lehane J drew attention to the statement of Dickson CJC and La Forest J in *R v Sparrow* that the 'recognition and affirmation' of Aboriginal rights in section 35 not only 'incorporate' the fiduciary relationship between the Crown and Aboriginal peoples, but also 'import some restraint on the exercise of sovereign power.'[79] Justice Lehane then drew attention to the statement of Lamer CJC in *Delgamuukw v British Columbia* to the effect that legislative or governmental measures affecting Aboriginal peoples must be justified so as to comply with section 35. In all such cases, he noted, consultation in good faith is required with 'the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue'; most cases will require something 'significantly deeper than mere consultation'; and some

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it amounted to seeking a declaration of legal right 'divorced from any attempt to administer the law.' It would be, in other words, an 'entirely theoretical' pronouncement.

[75] *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767, 776.

[76] *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 204-5 [65]-[67], citing *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767, 776.

[77] *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 200-201 [53].

[78] *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 202 [57].

[79] *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 201 [55], citing *R v Sparrow* [1990] 1 SCR 1075, 1077.

might require 'full consent of an aboriginal nation.'[80]

As one Canadian scholar has put it: 'the Crown has a duty to consult Aboriginal communities prior to undertaking or authorising activity that could adversely impact Aboriginal or treaty rights, and, if the need for accommodation is revealed through consultation, has a companion duty to accommodate the applicable concerns of that community.'[81]

Notably, it has also been argued in some of the Canadian cases that section 35 protects the right to self-government of Aboriginal peoples.[82] In none of these cases (to my knowledge) has such a constitutional right been established in the particular circumstances. In practical terms, the issue appears to have been addressed through treaties between the Canadian government and particular First Nations.[83] However, the Canadian Supreme Court does seem to have contemplated the possibility that powers of self-government are protected by section 35. The main qualification the Court has imposed is that any such right must be 'an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.'[84] In *R v Pamajewon,* for example, the Supreme Court rejected the claim that the Shawanaga First Nation and the Eagle Lake First Nation possessed inherent rights to self-government or self-regulation that would enable them to enact by-laws regulating commercial lotteries because these are 'twentieth-century phenomena' and 'nothing of the kind' existed among Aboriginal peoples prior to that time.[85]

CONCLUSIONS

What conclusions can be drawn from all this? What would be the effect, in Australian law, of the constitutional recognition of Australia's First Peoples? It is difficult to be certain or to make any accurate predictions. But it does seem that, at the least, the proposed amendment would provide a premise upon which something similar to these American and Canadian doctrines could potentially be built.

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[80] *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 202 [56], citing *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193, 265; [1997] 3 SCR 1010, 1113.

[81] Dickson (n 51) 37.

[82] *R v Pamajewon* [1996] 2 SCR 821; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1114-1115.

[83] Government of Canada, 'Treaty and agreement negotiations,' <https://www.rcaanc-cirnac.gc.ca/eng/1100100028568/1529354090684> (accessed 25 August 2023).

[84] *R v Pamajewon* [1996] 2 SCR 821, 823.

[85] *R v Pamajewon* [1996] 2 SCR 821, 835.

The existence of any fiduciary duty would probably depend, as the Australian cases have indicated, on a properly pleaded, specific set of circumstances in which a fiduciary relationship would arise, having regard to the ordinary principles of Australian law on this topic.

Beyond that—and noting that the Canadian jurisprudence has come to depend on the recognition of the prior and existing rights of Aboriginal peoples in section 35 of the *Constitution Act 1982*—the recognition of the prior and continuing status of Australia's Indigenous peoples as the First Peoples of Australia may be expected to have significant consequences in Australian law. This is because recognition of the First Peoples of Australia is to recognise not only their prior occupation and possession of the land, but also their original status as independent, self-governing communities.

And yet, as was said at the outset, this all depends on the proposition that the recognition of Australia's First Peoples would establish a constitutional premise from which implications can be drawn that extend beyond the substantive clauses of the proposed section 129. However, it could just as cogently be argued, to the contrary, that clauses (i), (ii) and (iii) exhaust the implications to be derived from the recognition of Australia's First Peoples.

It is very difficult to be exactly sure how the opening words of section 129 would be interpreted. The nearest analogy, I would submit, is to be found in the existing Preamble to the Constitution, in its recital of the agreement of the people of the Australian colonies to unite an indissoluble federal commonwealth under the Crown and under the Constitution. We know that several members of the High Court have relied on the Preamble to support the proposition that ultimate sovereignty is now vested in the Australian people.

All of this might seem very abstract and very theoretical, and indeed it is. But as Sir Owen Dixon once observed, theories about the ultimate grounds and fundamental assumptions of the legal system 'are capable of generating rules of law when adopted by a system of law as part of its principles.'[86]

[86] Owen Dixon, 'The Statute of Westminster' (1936) 10 *Australian Law Journal* 96, 96.