Aboriginal land: seeking a place at the table

Frank Brennan | 30 May 2017

The 2017 Lowitja Oration, 7pm Tuesday 30 May 2017, Bonython Hall, North Terrace, The University of Adelaide. Listen on Soundcloud

Introduction: A roadmap after the Uluru Cry from the Heart

I acknowledge the Kaurna people, the traditional custodians of the Adelaide region and join you in paying our respects to all the Elders present.

It's a great honour for an Australian without any Aboriginal or Torres Strait Islander heritage to be asked by Lowitja O'Donoghue to deliver the Lowitja Oration marking the 50th anniversary of the 1967 referendum. It is also the 25th anniversary of the High Court's *Mabo* decision and the 20th anniversary of the first Reconciliation Convention held in Melbourne and chaired by Patrick Dodson. I was privileged to be the Rapporteur at that Convention.

Fifty years on from the successful 1967 referendum, we have all heard the *Uluru Statement from the Heart*. Aboriginal and Torres Strait representatives have told us that 'in 1967 we were counted, in 2017 we seek to be heard' .Australians of good will acknowledge that sovereignty is a spiritual notion for Indigenous Australians and that Aboriginal and Torres Strait Islander incarceration and separation of children are indicators of 'the torment of (their) powerlessness'. We affirm the aspiration of the Indigenous leaders gathered at Uluru: 'When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.'

Indigenous leaders this last week have called for the creation of two new legal entities. They want a First Nations Voice enshrined in the Constitution, and a Makarrata Commission set up by legislation. The Makarrata Commission would supervise agreement making between governments and First Nations and engage in truth telling about history. The envisaged destination is a national Makarrata (or treaty).

So the immediate constitutional issue is the creation of the First Nations Voice. There is no point in proceeding with a referendum on a question which fails to win the approval of Indigenous Australia. Neither is there any point in proceeding with a referendum which is unlikely to win the approval of the voting public.

The consultations conducted in Indigenous communities under the auspices and with the financial support of the Referendum Council have yielded a constant message that Indigenous Australians want substantive constitutional change and not just symbolic or minimalist change.

The question is: How much should we attempt to put in the Constitution now, and how much should we place outside the Constitution, or delay for constitutional inclusion until another day? There's certainly one thing worse than minimal symbolic constitutional change accompanied by substantive change outside the Constitution, and that is no mention of Aboriginal and Torres Strait Islander peoples in the Constitution, either because we judged it all too hard or too compromised, or because we tried to achieve too much, too soon.

The Referendum Council is required to report to the Prime Minister and the Leader of the Opposition by 30 June on 'options for a referendum proposal, steps for finalising a proposal, and possible timing for a referendum'. The Referendum Council needs to recommend to government a timetable for constitutional change with maximum prospects of a 'Yes' vote for proposals sought by Indigenous Australians.

Australians will not vote for a constitutional First Nations Voice until they have first heard it and seen it in action. The work needs to begin immediately on legislating for that First Nations Voice, so that it is operating as an integral part of national policy and law making, attracting national support for constitutional recognition. Presumably this new legislated entity would replace the existing National Congress of Australia's First Peoples which boasts, 'As a company the Congress is owned and controlled by its membership and is independent of Government. Together we will be leaders and advocates for recognising our status and rights as First Nations Peoples in Australia.'

The Referendum Council should recommend that the government commence immediate consultations how best to set up a new Indigenous advisory council as a First Nations Voice. It should recommend that Parliament legislate for the creation of such an advisory council. It should recommend that any referendum be delayed until the advisory council is established and working well. The Parliament might then, and only then, consider legislation for a referendum proposing relevant changes to the Constitution. Prime Minister Malcolm Turnbull was right when he said on Saturday at the 50th anniversary of the 1967 referendum: 'No political deal, no cross-party compromise, no leader's handshake can deliver constitutional change. To do that, a constitutionally conservative nation must be

persuaded that the proposed amendments respect the fundamental values of the constitution and will deliver precise changes that are clearly understood to be of benefit to all Australians.' That will happen only once the proposed First Nations Voice has been set up and been seen to be working well.

One desirable change would be to section 51 (26) of the Constitution which could be amended to provide that the Commonwealth Parliament have power to make laws with respect to the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples, and their continuing relationship with their traditional lands and waters. These are the distinctively Indigenous matters which warrant Indigenous peoples having a secure place at the table. Section 51(26) of the Constitution could go on to provide that the Parliament have power to make laws with respect to the constitution and functions of an Aboriginal and Torres Strait Islander Council which may request the Parliament to enact a law or advise the Parliament of the effect of a law or proposed law relating to any of those matters.

Other issues will wait for another day, or be dealt with outside the Australian Constitution. One thing is certain following last week's cry from the heart at Uluru. There is no quick fix to the Australian Constitution. Successful constitutional change acceptable to the Indigenous leaders gathered at Uluru won't be happening anytime soon. We need to take the time to get this right. This evening, I will argue that a First Nations Voice is more like a complex symphony with multiple conductors than a chamber choir under one conductor.

I will explain why a racial non-discrimination clause is unachievable and unworkable in light of the High Court's development of the common law recognising native title. In any event, such a clause should be attempted only as part of a comprehensive constitutional bill of rights or as part of a non-discrimination clause addressing all key discrimination concerns in contemporary Australia.

The removal of the 'race' provisions and the addition of an Acknowledgment could have been put to referendum fairly promptly if sought by Aborigines and Torres Strait Islanders. The constitutional recognition of a First Nations Voice will take more time. A referendum is more likely to succeed if the First Nations Voice is already in existence, so that people know what they are voting for or against.

I will add a note of well-intended caution about the political risk and cost of deferring incremental constitutional change. With a slightly Irish touch, I will be suggesting that if I were setting out on a journey towards a Makarrata between Aborigines and Torres Strait Islanders and the Commonwealth, and a First Nations Voice enshrined in the Constitution, I would prefer to set out on my journey with a Constitution which acknowledges Aboriginal history, present reality and future aspirations and which specifically empowers the Commonwealth Parliament to legislate on such matters, rather than setting out with a Constitution that does not even mention Aborigines and Torres Strait Islanders. And if I were not setting out for those destinations, I would still prefer a Constitution that actually mentions Aborigines and Torres Strait Islanders and which specifies that the Commonwealth Parliament has power to make laws with respect to Indigenous Australians, without having recourse to the generic term 'race'.

There should be no incremental change to the Constitution unless that change is commended, supported and advocated by Indigenous leaders.

Acknowledgements

This evening's event is organised by Reconciliation South Australia and the Don Dunstan Foundation. I pay tribute to the late **Don Dunstan**. I met him only once, but it was in the best of circumstances. A group of us were camping under the stars with him and Nugget Coombs in the Pitjantjatjara Lands while consulting on proposed reforms on the 'Pit lands'. We were all aware that we were in the presence of two of the all-time greats. Don entered the South Australian Parliament before I was born. Having witnessed the appalling living conditions for Aborigines living on the Port Pearce Mission in the early 1950's he was resolved to act. He got to know some young Aboriginal men here in Adelaide including Charles Perkins and John Moriarty who had lived at the St Francis Home. He listened to them. He learned from them. And he provided them with hope and leadership. The Federal Council of Aboriginal Advancement (FCAA), later named FCAATSI was established here in Adelaide in 1958. Sue Taffe notes in *Black and White Together*, Lowitja's preferred history of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders:

The people at the Adelaide conference were old and young, male and female, black and white, liberal and socialist. Nonetheless they were connected by a common view. They agreed that the repeal of restrictive laws would allow Aboriginal Australians to join the Australian community as citizens. They were moved by a common drive to pressure apathetic governments and electorates to take greater responsibility for Aboriginal Australians ... They would travel together for the next fifteen years, not always harmoniously but on the whole accepting the good intentions of those with whom they differed.

Don Dunstan became involved and was to be the last white president of the council in 1960, paving the way for Joe McGinniss to take over at the Brisbane conference in 1961. Joe remained president of FCAATSI until 1973. I was privileged to meet him a few times in Cairns when I was legal adviser to the Queensland Aboriginal Co-ordinating Council. Joe had been a wharfie; he had worked for the Cairns Council; he worked for the newly established Commonwealth Department of Aboriginal Affairs and then was a leader of Aboriginal Hostels in North Queensland. Together with Clarrie Grogan, he was very welcoming of the new young Catholic whitefella on the block. Don

Dunstan became a minister in the new Labor Government here in 1965 and by 1966 he had succeeded in having the South Australian Parliament pass the first law instituting an Aboriginal land trust and the first Australian law prohibiting racial discrimination. He withdrew from FCAATSI later telling Peter Read: 'They didn't need Europeans sitting around doing a sort of hand holding job. That we should be in the background helping'.

I note the presence this evening of **Dawn Casey and Kerrie Tim**: two extraordinary Aboriginal women who have contributed so much to the well-being of their people and to the common wealth of our nation, through public service to governments of all political persuasions. I am greatly honoured that each of them has travelled from the east to be here. They were to be accompanied by **Patricia Turner** but she needs to be at Parliament House first thing in the morning to represent her mob in discussions with some of our elected politicians. We have supported each other through many political battles in the past. I particularly thank Pat Turner for writing the foreword to my book *No Small Change,* and I acknowledge Lowitja's successor as Chair of ATSIC, the late Gatjil Djerrkura who courageously and generously launched my book *The Wik Debate* during the difficult aftermath of the acrimonious 1998 native title debate.

I note the presence of **Fr Brian McCoy SJ**, the provincial of the Jesuits here in Australia. He is my boss. He worked for many years with Aboriginal people — from Palm Island in Queensland to Balgo in the Kimberley. He worked for Patrick Dodson on the Royal Commission into Aboriginal Deaths in Custody. Brian and I take pride in our Jesuit predecessors like Donald MacKillop, the brother of the now canonised St Mary MacKillop. Donald MacKillop ministered amongst the Aborigines of Daly River in the Northern Territory at the end of the nineteenth century, and wrote one of the great letters to the editor when he sent his 1892 Christmas epistle to the *Sydney Herald*: 'Australia, as such, does not recognise the right of the blackman to live. She marches onward, truly, but not perhaps the fair maiden we paint her. The blackfellow sees blood on that noble forehead, callous cruelty in her heart; her heel is of iron and his helpless countrymen beneath her feet.'

I also note the presence of my sister **Madeline Brennan QC**, a member of the Queensland Bar. We share considerable familial pride that the lead judgment in *Mabo* was penned by our father 25 years ago. As a barrister, Gerard Brennan had served as senior counsel for the Northern Land Council during the Royal Commission into Aboriginal land rights set up by the Whitlam government and chaired by Sir Edward Woodward. Prior to *Mabo*, he had spent a decade on the High Court delivering numerous judgments on the interpretation of the Northern Territory land rights legislation. When Prime Minister Paul Keating rose in the House of Representatives to move the second reading of the *Native Title Bill* on 16 November 1993, he commenced with these words: 'Today is a milestone. A response to another milestone: the High Court's decision in the *Mabo* case. The High Court has determined that Australian law should not, as Justice Brennan said, be 'frozen in an era of racial discrimination'. Its decision in the *Mabo* case ended the pernicious legal deceit of *terra nullius* for all of Australia—and for all time.' When Chief Justice of Australia, Sir Gerard told an international audience of judges in Canada:

> The modern development of Australian law governing Aboriginal title to land is part of that post-colonial jurisprudence that has been developed in other countries to protect the relationship between the descendants of the Indigenous inhabitants and their traditional lands ... The post-colonial relationship of the Indigenous population with their traditional land is not only, or even chiefly, a problem for the courts. But the courts, sensitive to the demands of justice for minorities and the disadvantaged in society, are likely to remain a forum in which Indigenous peoples will seek to right what are now perceived to be historic wrongs.

Fred Chaney, a former Minister for Aboriginal Affairs in pre-*Mabo* Australia and later the deputy president of the National Native Title Tribunal, has recently said: *Mabo* 'has transformed the status of Aboriginal people from perpetual mendicants to stakeholders. *Mabo* and the *Native Title Act* represent the biggest single shift in the power equation since 1788.'

I pay tribute to **Lowitja O'Donoghue** who personally invited me to deliver this oration. I have been privileged to work with Lowitja and to be inspired by her over many decades, particularly when she chaired ATSIC and led the team which negotiated the Native Title Bill with Prime Minister Paul Keating in 1993. There have been many times when Lowitja, Pat Turner and I have turned to each other seeking the way to enhance the place at the table for Indigenous Australians. I thank Lowitja for her national leadership, for her trust, for her hopeful example, and for her friendship.

On this 50th anniversary of the 1967 referendum, it is appropriate to recall the years of hard labour put in by those Australians who contributed to FCAATSI and its predecessors. This evening that is best done looking through the prism of Lowitja's early political involvements. Having left the Colebrook Home, she first became involved with the Aboriginal Advancement League here in South Australia because it was the only organisation working for Aboriginal rights at the time. Lowitja recalls that there were many white people from the churches involved. She would take Thursdays off and meet up with like-minded people near what is now Rundle Mall. Looking back on those days, she recalls a strict religious upbringing so that even going to the cinema was not well regarded. She was sent to the country to work after her 16th birthday. She observes, 'I'm not a radical but I certainly wasn't to be walked over.'

When she took up nursing as a career, she had less time to dedicate to the Advancement League. But on her return from India in 1962, she got involved with the Aborigines Progress Association (APA). The APA was affiliated with FCAATSI. Lowitja used travel to Canberra for the annual Easter conference. One attraction of the APA in contrast to the Advancement League was that the executive positions were held by Aborigines. Lowitja then found a more natural home in the newly established Aboriginal Women's Council. She was the first secretary. She found her

political voice, working locally with these fledgling Indigenous organisations in South Australia, and participating in the annual FCAATSI meeting at which Indigenous and non-Indigenous Australians worked together. Their great achievement was harnessing support for the 1967 constitutional referendum. This involved sustained effort over many years, with close collaboration of key Indigenous and non-Indigenous leaders representing many varied communities and sectors of society. Their efforts were rewarded with the highest 'Yes' vote ever in a referendum campaign.

Once the referendum was carried, FCAATSI splintered, culminating in the 1970 meeting at which Aboriginal members walked out and established their own National Tribal Council. Barrie Pittock, a Quaker scientist who had some exposure to the American approach to Indigenous affairs, was very involved with FCAATSI and by 1970, was one of the non-Indigenous members supportive of Aboriginal desires to be self-determining. He proposed the amendment to the FCAATSI Constitution that all executive members 'be of Australian Aborigine or Island descent', with a power to co-opt members 'irrespective of racial descent'. The meeting was a fiasco, resulting in a vote of 48-48, whereupon Pastor Doug Nicholls and Kath Walker called on those supporting the amendment to gather on one side of the hall. They immediately resolved to form an interim body controlled by Aborigines and Torres Strait Islanders. This became the National Tribal Council. Reflecting on the conference, Pittock wrote:

The (1970) Easter Conference of FCAATSI showed that a lot of white Australians, often sincere and dedicated, believe they know what is best for Aborigines better than Aborigines themselves. For the sake of Aboriginal advancement, let us hope they will listen more closely in future and think again.

The National Tribal Council wants, needs and welcomes genuine friends and allies, but not people who attach conditions to their friendship or who believe they have the right to dictate 'solutions' to other people's problems.

Contemplating constitutional recognition of Indigenous Australians five decades later, we are all needing to respect the place of Indigenous Australians in the complex processes of constitutional change given that the amendment process of our Constitution is one of the most democratic on earth, requiring not just the vote of both Houses of Parliament but also the vote of a majority of voters nationally, as well as in four of the six states. We have only amended our Constitution eight times out of 44 attempts. Australians are very cautious about constitutional change. No voter under 58 years of age has ever voted for a successful change to our Constitution. No voter under 71 years of age had the opportunity to vote for the 1967 referendum. I have previously expressed my views on how Indigenous recognition might best be achieved. But I come this evening willing to 'listen more closely in future and think again' in light of the ongoing deliberations by Indigenous Australians. I am one of those non-Indigenous Australians wanting to respond to last week's invitation at Uluru to 'walk with us in a movement of the Australian people for a better future'.

So I salute **Pat Anderson,** the Chair of the Don Dunstan Foundation and the co-chair of the Referendum Council appointed by the Turnbull government to propose a way forward on constitutional recognition of Indigenous Australians. Last week, Pat oversaw the National Constitutional Convention of Indigenous leaders gathered at Uluru, the culmination of 12 consultations with Aboriginal and Torres Strait Islander Australians conducted by the Indigenous members of the Referendum Council. Pat's co-chair of the Referendum Council, Mark Leibler, told ABC *Q&A* on 8 May 2017:

Aboriginal and Torres Strait Islanders have only now completed 12 dialogues. They were not formulated or devised by me or by the non-Indigenous people sitting on the council. They were designed by the Aboriginal and Torres Strait Islander representatives on the council. They needed that time, they needed to consult widely. This is an absolutely unique phenomenon. This is the first time that we've had this sort of thing actually designed by and culturally acceptable to our Aboriginal and Torres Strait Islanders.

Now that the national convention of Indigenous leaders at Uluru is complete, it is for the Referendum Council to consider the Uluru report which is the culmination of the 12 First Nations Dialogues and to make recommendations to the Prime Minister and the Leader of the Opposition. And it is for us to heed Pat's call: 'Australia has to hear us for goodness sake. How many times do we have to tell you?' Last night on the ABC *Q&A* Pat told us that it is now time 'to put meat on the bones'. With her gentle but firm wisdom, Pat observed that there has to be truth telling, and 'there might be a bit of blood-letting'.

The way forward

This is a critical time for all Australians who are seeking the due place for Indigenous Australians at the table, acknowledging that we are all, and always will be, on Aboriginal land which is shared with all who call Australia home. I am particularly appreciative of this invitation, knowing that a couple of past Lowitja orators have had cause to criticise me in my role over the years as 'the meddling priest' as Prime Minister Keating once described me. I make no claim to infallibility, only to having an unswerving commitment to seeking a place at the table for the First Australians.

On 27 May 1967, fifty years ago last Saturday, Australians voted overwhelmingly to amend the Australian Constitution, deleting the two adverse references to Aborigines in the nation's founding document. The amendments were seen at the time to be modest and largely symbolic. Ironically, one result of the successful referendum was that the Australian Constitution would no longer mention Aborigines. One amendment gave the Commonwealth

Parliament power to make laws with respect to Aborigines, just as it had always given the Commonwealth Parliament power to make laws with respect to the people of any other race for whom it was deemed necessary to make special laws. Given the White Australia policy and the discriminatory policies visited upon Kanaka cane farmers in Queensland and Chinese miners on the goldfields, it was always expected prior to the 1967 referendum that this special Commonwealth 'race' power would be exercised adverse to the interests and liberties of the targeted race.

Given the way the 1967 referendum was conducted, it was assumed that this special Commonwealth race power would be exercised for the benefit of Aborigines, if at all. Mind you, Prime Minister Robert Menzies who was a good constitutional lawyer and no great fan of this amendment had always warned that the power could be exercised adverse to the interests of Aborigines. Prime Minister Harold Holt was surprised by the overwhelming vote in support of the amendments and was prompted into action by this expression of the popular will. He appointed a three-member Council for Aboriginal Affairs chaired by Nugget Coombs. These three wise white men — Coombs, WEH Stanner and Barrie Dexter — were instrumental in transforming a modest symbolic constitutional change into a lever for substantive policy change and legal reform. Looking back on their achievements in the light of the present debate about Indigenous recognition in the Constitution, I published my book *No Small Change*.

In that book, I argued that it was time to learn the real lessons which followed the 1967 referendum. That referendum contained proposals which nowadays would be called 'symbolic' rather than 'substantive'. It is, and remains, my contention that the modest constitutional changes contributed to substantive change. They kick started the changes from *terra nullius* to land rights, and from assimilation to self-determination. Prime Minister Harold Holt appreciated that a modest referendum carried overwhelmingly provided the political mandate for policy changes. The catalyst for change was the Council for Aboriginal Affairs which he then set up to advise government and to engage daily with public servants and politicians when considering policy and administrative changes. Any modern equivalent would not restrict its membership to 'three wise white men' even of the eminence of Dr H C Coombs, Professor W E H Stanner and Barrie Dexter. Aboriginal Australians are entitled to their place at the table, especially when it comes to decisions about their lands and cultures, and social policies which single them out for special treatment or which impact on them more heavily and more often than on other Australians.

The problems with a constitutional ban on racial discrimination

One reason for my writing *No Small Change* was that I thought the expert panel set up by Prime Minister Julia Gillard had proposed measures for constitutional recognition which were unachievable or unworkable. I was particularly concerned about the proposal that the Constitution include a provision:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

I understand the desire to put in place strong measures against racially discriminatory Commonwealth policies. I believe the Constitution is not the best place to do this. I will provide an alternative suggestion how best to achieve this aim.

If the Expert Panel's recommendation of, and the Indigenous leaders' demand for, a constitutional ban on racial discrimination were to have any prospect of success, we would need to clarify a number of issues. In the absence of a bill of rights, why would the Australian voters contemplate a comprehensive constitutional ban on racial discrimination by the Commonwealth and the States, but not a constitutional ban on sexual discrimination or discrimination on the basis of sexual orientation or religious belief?

A constitutional ban on racial discrimination is not as simple as it seems. When legislating for native title in 1993 and 1998, both the Keating Government and then the Howard Government were unable to agree to the demand by Indigenous leaders that all provisions of the *Native Title Act* be strictly subject to the *Racial Discrimination Act 1975*. In the Senate, the Democrats and Greens had proposed such an amendment both times but the major parties, in government and in opposition, agreed to oppose it because of its 'so-called clause busting capacity'. It was essential that the *Native Title Act* allow both the States and the Commonwealth to validate existing land titles and future approved land use, especially on pastoral leases. To provide absolute legal certainty, both the Commonwealth and the States had to be able to validate those titles regardless of the effects of the *Racial Discrimination Act.* Both the Commonwealth and the States had to be able to legislate and act in a way which was not necessarily completely consistent with the *Racial Discrimination Act*. That is why s 7 of the *Native Title Act* provides:

(1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.

(2) Subsection (1) means only that:

(a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and

(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.

(3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

It has become a fashionable shorthand to claim: 'While the states and territories cannot escape the effect of the *Racial Discrimination Act*, the Commonwealth can.' The argument then runs that all that is needed is for the same restriction to be applied to the Commonwealth as its legislation applies to the States. With the 1993 and 1998 *Native Title Act* exercises, it was critical that both the Commonwealth *and* the States be able to avoid any ambiguity or uncertainty caused by the *Racial Discrimination Act* when it came to ensuring the certainty of past titles. It is more correct to state that the Commonwealth Parliament presently can suspend the operation of the *Racial Discrimination Act*, both for itself and for State Parliaments. That option would be removed were a non-discrimination clause to be inserted in the Constitution. It is not correct to claim:

The biggest change with a non-discrimination clause being added to the *Constitution* is that federal politicians would agree to wear the constraint they have seen fit to apply to State politicians for the past 40 years.

The even bigger change would be to take away the capacity of all parliaments and all executive governments to validate titles and land use with certainty, regardless of the complexity and uncertainty of the common law of native title as it is developed by the courts.

Anyone serious about a constitutional ban on racial discrimination should clear the decks by trying to convince both the Coalition parties and Labor to amend the *Native Title Act* as previously suggested by the minor parties. They would first need to convince the Business Council of Australia, the National Farmers' Federation, and the Minerals Council of Australia to agree to native title amendments which previously were thought to put in doubt future pastoral and mining activities. Without this deck clearing, a constitutional guarantee of non-discrimination would be a clause buster of nuclear proportions. It would put in doubt the legal validity of many mining and pastoral activities. Given these legal doubts which have been conceded in the past by both Liberal and Labor, in government and in Opposition, this proposed constitutional change is not politically achievable. Even I would vote against it. It is too uncertain in its application, and it would occasion years of litigation in the High Court, delivering little benefit but occasioning considerable financial uncertainty.

There is another significant problem when it comes to considering a one-off constitutional ban on racial discrimination. The advocates for the constitutional ban argue that the High Court's interpretation of the new constitutional provision would be much the same as the court's interpretation of the key provisions of the *Racial Discrimination Act* over the last 40 years. It might be, but then again it might not be. Strangely the key provisions of the *Racial Discrimination Act* (sections 9 and 10) do not include the word 'discriminate' or 'discrimination'. But they do refer to a list of rights and freedoms which are contained in the *International Convention on the Elimination of All Forms of Racial Discrimination*. A constitutional provision would not refer to any such catalogue of rights listed in an international convention. When considering constitutional change, voters want to be assured that the proposed words have a certain meaning and application. No lawyer could attest that the non-discrimination clause proposed by the 2012 Expert Panel would have exactly the same outcomes as the application of the *Racial Discrimination Act*. It would take the High Court some years to develop the novel Australian jurisprudence of a constitutional non-discrimination clause limited to race, while permitting exceptions for the purposes 'of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group'. For example, would alcohol bans or restrictions, income management or cashless welfare cards be permissible in remote Aboriginal communities? Would such measures require consent from the persons affected, or only consultation?

Those wanting to ensure greater coverage by the *Racial Discrimination Act* should look outside the Constitution. In light of the concern expressed by Indigenous leaders that 'current and future parliaments (areable) to enact discriminatory measures against Aboriginal and Torres Strait Islander peoples' andgiven that their option of 'a stand-alone prohibition of racial discrimination' is not a possibility, Isuggest an amendment to the *Acts Interpretation Act* specifying that all futureCommonwealth legislation be subject to the *Racial Discrimination Act* except when the later statutespecifies that it is to prevail. I suggest an amendment in these terms:

15AAB. In interpreting a provision of an Act, the interpretation that would best achieve consistency with sections 9 and 10 of the *Racial Discrimination Act 1975* is to be preferred to each other interpretation, unless the Act specifies that sections 9 and 10 of the *Racial Discrimination Act 1975* are not to be considered when interpreting a provision of the Act.

Especially when our Parliament includes strong Aboriginal leaders as members, it would be a very brave or foolhardy Executive which would propose to the Parliament a new law that specified that the key provisions of the *Racial Discrimination Act* were not to be considered by a court when interpreting the provisions. The only imaginable instance would be where a court has expanded the common law rights of Indigenous Australians in such a way that there is a need for a legislative compromise accommodating fairly those newly explicated rights and the rights of others as those rights have been justifiably presumed to exist in the past. You will recall that in 1993, Prime Minister Keating marketed the *Native Title Act* as a special measure under the *Racial Discrimination Act,* arguing that the adverse provisions in the Act (those provisions validating other titles and extinguishing any competing native title)

were outweighed by the benefit of the benign provisions which enhanced the prospects for the recognition of native title and which boosted the rights of proven native title holders whose native title was not extinguished.

A symphony in three movements: A First Nations voice or a First Nations symphony under numerous conductors?

First movement

The 1993 native title debate was the first time in Australian parliamentary history that Aboriginal people had real bargaining chips to bring to the table of political deliberation. The High Court had determined that Aboriginal native title existed in areas undefined, with rights undefined. Any native title which survived until 1975 was thereafter buttressed by the *Racial Discrimination Act*, ensuring that it could not be treated in a less advantageous way than any other form of land title. Miners and pastoralists wanted certainty when planning future activities on lands which might be subject to native title. It was imperative that government fashion legislation which was seen to be fair to Aboriginal people as well as to miners and pastoralists. Prime Minister Paul Keating needed to cut a deal with Aboriginal Australians knowing he could not expect unanimity among Aboriginal leaders. Keating needed an Aboriginal group with whom to work. As Keating said in his 2011 Lowitja Oration:

Had Aboriginal and Torres Strait Islander leaders not stepped up to the plate, the substance and equity of the subsequent *Native Title Act* may never have materialised. In an instant, I was struck by the opportunity of the High Court decision and was determined to not see it slaked away in legislative neglect. But determined as I was, I needed the partnership with Indigenous leaders to get it done and get it done fairly.

This was Lowitja's finest hour. As the chair of ATSIC she had the opportunity to bring a group of key Indigenous leaders into the tent. It was not all plain sailing. On Black Friday, 8 October 1993, negotiations had broken down and Keating let fly as only Keating could. He said, 'I am not sure whether Indigenous leaders can ever psychologically make a change to decide to come into a process, be part of it, and take the burdens of responsibility which go with it.' In his own Lowitja Oration, he added that he was not sure 'whether they could ever summon the authority of their own community to negotiate for and on their behalf'. Looking back in 2011, he said:

I like to think those remarks helped galvanise Lowitja O'Donoghue's view as to what needed to be done. But as it turned out — only she could do it. She was the chair of ATSIC. This gave her a pulpit to speak from but no overarching authority, much less power. But this is where leadership matters: she decided, alone decided, that the Aboriginal and Torres Strait Islander peoples of Australia would negotiate, and I emphasise negotiate, with the Commonwealth government of Australia — and that the negotiators would be the leaders of the Indigenous land councils. She decided that. And from that moment, for the first time in the 204-year history of the settled country, its Indigenous people sat in full concert with the government of it all.

Keating had the good fortune not to control the Senate. If he had controlled the Senate, some Aboriginal people and their supporters would have had the perception that Keating had cut a deal with a handful of Aboriginal leaders who had gone to water behind closed doors. Not controlling the Senate, Keating had first to negotiate the settlement with Aboriginal leaders who for the first time came in and sat at the Cabinet table cutting a deal. They were the 'A' team. The deal then had to pass muster in the Senate where Keating had to negotiate with the minor parties who took their riding instructions from another group of Aboriginal leaders — the 'B' team, which included sovereignty advocates like Michael Mansell, who ultimately endorsed the deal.

Without these complex checks and balances not controlled by the government of the day, Keating would never have won the well-deserved adulation for the final outcome. Through all these complexities and intrigues, Lowitja O'Donoghue held a steady course with an unerring instinct about where to find true north. She did it, not by treating ATSIC as the primary consultative body for Aboriginal Australia, but by using ATSIC as the clearing house or hub to bring the key local and specialist representatives to the table. But having done so, she knew there would be other Indigenous leaders who would want their own place at the table, and that was a different table — the table of Senate deliberation and horse trading, rather than the cabinet table of negotiation.

If 'a First Nations Voice (is) enshrined in the Constitution' as sought by the Uluru Convention last week, there will be times that body has to act more as a clearing house or facilitator for the channelling of advice from diverse Indigenous groups rather than giving the advice itself. There will be other times when it will have to butt out, having done its best negotiating with Executive government and leaving it to other more independent Indigenous groups to try their hand with the cross bench in the Senate.

With his customary intellectual insight and passion, Noel Pearson has suggested that 'the Constitution could be amended to create a non-justiciable guarantee that Indigenous people themselves get a say in the laws and policies made about them' which could create 'an ongoing dialogue between Indigenous peoples and the parliament, rather than the courts and parliament'. He has proposed 'that Parliament should remain supreme, but it should be constitutionally required to hear Indigenous views before making laws about Indigenous interests'. Noel's suggestion won appeal at last week's summit at Uluru. Warren Mundine has suggested the need for a plurality of local land holding advisory groups.

When considering whether to include an Indigenous advisory body or bodies in the Constitution, many voters will have an eye to past experience with earlier Aboriginal advisory bodies. In the 1970s, there was the National Aboriginal Consultative Committee; in the 1980s, the National Aboriginal Conference; and in the 1990s, the Aboriginal and Torres Strait Islander Commission (ATSIC). Whatever its shortcomings, ATSIC was well resourced with a series of local and regional councils in addition to its national commissioners. The art of national Indigenous representation is matching local and specialist Indigenous concerns with national policy positions ensuring that there is a two-way communication between those speaking with a national voice and those working at the grassroots. A national Indigenous body without elected local and regional councils will have its work cut out in maintaining local legitimacy. After the demise of ATSIC, the National Congress of Australia's First Peoples was established. Very deliberately, it was not made a creation of statute.

When parliamentary committees are considering proposals for legislation, they may be well assisted by receiving submissions from a national Indigenous advisory council. No doubt they will also be attentive to local Indigenous groups and specialist Indigenous bodies impacted by proposed legislation, such as land councils, community councils, and service delivery organisations. There will be a need to consider any co-ordinating role which the First Nations Voice might play, in much the same way as ATSIC was able to help convene and resource Indigenous groups in the historic native title debates in 1993 and 1998. Let's remember that contested legislation like the *Native Title Act* undergoes a lot of horse-trading in the Senate. Though a constitutional advisory body sounds attractive, it might not be the most appropriate/effective means of engagement in some of that horse-trading.

Second movement

There has been much criticism of the way that Senator Brian Harradine in 1998 secretly negotiated the final compromise on native title with John Howard after the government had twice rejected Senate amendments to Howard's bill. The wily Harradine picked his moment after the Queensland election when Queensland Premier Rob Borbidge lost office, and when Pauline Hanson's One Nation won 11 seats in the Queensland Parliament. Borbidge, together with Western Australian premier Richard Court, had vetoed Howard's approval of Harradine's earlier offer during the first two Senate debates. Harradine knew that Howard would no longer contemplate a double dissolution election, and thus would be more open to cutting a deal without obstruction from Borbidge. This cleared the way for an unprecedented third Senate debate. The key plank of Harradine's proposal had been drafted by the National Indigenous Working Group and their lawyers. Harradine delivered, and once the deal was cut he apologised publicly to Aborigines saying, 'I was concerned that if others were involved there might be leaks and the horses might be frightened and they'd bolt'. Gatjil Djerrkura acknowledged that the deal was 'an advance on the government's original bill'. He said, 'We suspect Senator Harradine has taken the Prime Minister as far as he could to avoid a race based election. I think he has demonstrated courage and integrity throughout this debate.'

I don't see how the consultation process or the ultimate legislation could have been improved at that time if ATSIC had been established by legislation envisaged specifically by the Constitution rather than by legislation without any mention in the Constitution of an Indigenous advisory body. That's one reason I have regarded the insertion of a constitutional provision for an advisory body as more symbolic and minimal than real and substantive. But I defer to the Indigenous groups who think there would be a real value-add with such a constitutional provision. I remain wary that the addition of such a provision may make any referendum less appealing to the general voting public. But these prudential calls are not mine to make. I can only offer well intentioned observations. We have all heard loud and clear the Uluru call for 'the establishment of a First Nations Voice enshrined in the Constitution'.

Third movement

In recent times, Indigenous participation in the law-making processes of Parliament have been enhanced by the presence in the parliament of Indigenous members of both houses. Consider the present debate about technical amendments to the provisions of the *Native Title Act 1993* in relation to Indigenous land use agreements (ILUAs). Incidentally, credit is rarely given to the Howard government for introducing the legislation which created these novel agreements which have done so much to give Indigenous Australians a place at the table of economic participation and land use deliberation regardless of whether they can ultimately prove a native title claim. While there have been 318 successful determinations of native title registered on the national native title register, there are 1170 Indigenous land use agreements (ILUAs). One of the great breakthroughs of *Mabo* and *Wik* has been not only convincing both sides of politics of the moral truth and political entrenchment of land rights but also having the conservative side of politics champion a legal device to enhance economic participation by Aboriginal Australians even before they are able to prove a native title claim. I think credit should be given where it's due.

It is one thing to have a non-justiciable consultative body outside the Parliament, it is another to have strong Indigenous representation inside the Parliament. We saw this early this month when the Senate delayed the native title amendments to ensure that all relevant Indigenous groups had been consulted about the amendments. Senator Patrick Dodson, the Shadow Assistant Minister for Indigenous Affairs and Aboriginal and Torres Strait Islanders, was able to tell the Senate:

I have personally met with representatives of native title claimants' groups across Australia and I have listened to their issues, their concerns and their hopes. Aboriginal people have a right to object if they believe their native title rights are at risk, especially by extinguishment, and they should be heard. Importantly, Labor has blocked the government's attempt to give itself unfettered power over Indigenous Land Use Agreements. We have insisted on amendments that make sure that control rests with native title holders, not politicians in Canberra. This is about

respecting the decisions of Aboriginal and Torres Strait Islander people and giving certainty to the agreements that native title holders have entered into.

Dodson assured the Senate that his side of the chamber would be 'informed by the views of the native title claimants and owners across Australia, rather than just by the views of the powerful and privileged'. These views on complex legal and policy issues can be sought without being channelled through one Indigenous advisory body. But such a body might play a useful co-ordinating role. Perhaps the way forward is to set up a Parliamentary Joint Committee on Aboriginal and Torres Strait Islander Affairs which would develop a working relationship with the peak Aboriginal and Islander advisory bodies.

Responding generously but thoughtfully to the *Uluru Statement from the Heart*

The consultations conducted in Indigenous communities under the auspices and with the financial support of the Referendum Council have yielded a constant message that Indigenous Australians want substantive constitutional change and not just symbolic or minimalist change. In the past, I have proposed changes which I think would lead to substantive reform and which are achievable, were they attractive to Indigenous leaders.

In addition to the repeal of section 25, I have suggested two additional changes to the Constitution: the addition of an Acknowledgment (as distinct from a preamble) and the amendment of section 51(26). The first additional change draws on the words proposed by the Expert Panel in the first three paragraphs of the introduction to their proposed section 51A. The key words of the proposed Acknowledgment have already found unanimous endorsement in the Commonwealth Parliament's *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*, with the parliament speaking 'on behalf of the people of Australia.' We could add this Acknowledgment at the commencement of the Constitution immediately prior to 'Chapter I: The Parliament':

Acknowledgment

We, the people of Australia, recognise that the continent and the islands of Australia were first occupied by Aboriginal and Torres Strait Islander peoples.

We acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

We acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

We could amend section 51(26) so that the Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters.

Those who regard these suggestions as minimalist, symbolic poetry would be on stronger ground if they thought there was some realistic prospect of having the major political parties and the majority of voters in a majority of states adopting more substantive reforms. I think it arguable that there are some options that are worse than minimalist, symbolic changes. One is: no change whatever to the Australian Constitution, with the result that we maintain a Constitution in which Aborigines and Torres Strait Islanders are not even mentioned. If there be agreement amongst Indigenous groups about substantive reforms to be achieved in the future or outside the body of the Constitution, would it not be better to work from the base of a Constitution which actually mentions you, your history, your continuing relationship with the land, and your continuing cultures, languages and heritage? Rather than from the base of a Constitution which does not mention you at all?

I readily concede that there is no point in proceeding with a referendum on a question which fails to win the approval of Indigenous Australia. So let me now walk the fine line between substantive change and popular acceptance. This evening, I am delighted to have the opportunity to recast my thinking in the wake of the *Uluru Statement from the Heart*.

When Prime Minister, Tony Abbott used speak about completing the Constitution rather than changing it. He thought the only prospect of constitutional change was if there was something in it for everybody — with some reference to Aboriginal history, the British heritage, and the modern reality of multicultural Australia with immigrants from every land on earth. In his contribution to last year's book on 'Indigenous Arguments for Meaningful Constitutional Recognition and Reform', Noel Pearson embraced the Abbott approach and wrote about 'the opportunity to formally bring together these three parts of our national story: our ancient Indigenous heritage, our proud British inheritance, and our multicultural triumph.' Pearson thinks, 'Indigenous constitutional recognition provides an opportunity for a long-awaited reconciliation that could perfect our constitutional union, and make ours a more complete Commonwealth.' So here is my amended threefold suggestion.

First, we repeal section 25 — that's just low hanging fruit.

Second, we place an acknowledgment at the beginning of the Constitution:

We, the people of Australia, include Aboriginal and Torres Strait Islander peoples and peoples from all continents who have made Australia home, having migrated to be part of a free and open society.

We recognise that the continent and the islands of Australia were first occupied by Aboriginal and Torres Strait Islander peoples.

We acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

We acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

We acknowledge the foundation of modern Australia, through British and Irish settlement and the establishment of parliamentary democracy, institutions and law.

We espouse respect, freedom and equality under the law for each other.

Third, we then amend section 51(26) so that the Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(a) the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples, and their continuing relationship with their traditional lands and waters;

and (b) the constitution and functions of an Aboriginal and Torres Strait Islander Council which may request the Parliament to enact a law or advise the Parliament of the effect of a law or proposed law relating to any of these matters.

Those wanting minimal symbolism and simple substance might consider deleting section 25 and omitting any special acknowledgment, while simply amending section 51(26). The acknowledgement could be included in the preamble of the already passed legislation setting up the First Nations Voice.

In 1958 WEH Stanner delivered his presidential address to the Australian and New Zealand Association for the Advancement of Science. He spoke of the Dreaming and the Market. He observed that the things of the market 'are among the foremost means of social disintegration and personal demoralisation' for Aboriginal Australians, and concluded: 'If we tried to invent two styles of life, as unlike each other as could be, while still following the rules which are necessary if people are to live together at all, one might well end up with something like the Aboriginal and the European traditions.' Most Indigenous Australians maintain a foot in both the Dreaming and the Market. Some end up without a foothold in either. For the majority in the third century since the assertion of British sovereignty, the Market is now more determinative of their identity than the Dreaming, with the result that there is less strained straddling to be done. The happiest Aboriginal Australians I know are those with a firm foothold in both the Dreaming and the Market. In the *Uluru Statement from the Heart* last week, Aboriginal leaders said, 'When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.'

Perhaps it is my own religious impulse, but I think it is impossible for most human beings to straddle two such different worlds without a deep, nurtured and nurturing spirituality. Let's recall that the Indigenous leaders in last week's Uluru Statement described sovereignty not primarily as a legal or political idea, but as 'a spiritual notion'. Those of us who have never had to straddle two such diverse worlds are not those best placed to advise how to overcome the 'social disintegration and personal demoralisation', especially in a society as secular and materialist as Australia. Governments that place a deep faith in the Market and in community 'interventions' enforced by instrumentalities of the state may be well intentioned, but unless they consult and work collaboratively with local Aboriginal leaders, who carry the deep spiritual insights of the Dreaming, they will be sure to make big mistakes, waste precious resources and forfeit trust.

It is heartening to hear Aboriginal Australians like Stan Grant rejecting 'a definition of Aboriginality predicated on community endorsement', claiming a connection to 'the history of dispossession, suffering and injustice', while arguing that 'history need not be destiny'. Grant writes:

The rise of the Aboriginal middle class is raising urgent — undoubtedly uncomfortable — questions about the nature of identity, culture and community. Like many, I demand the right to define myself. Appropriating others' suffering to bolster authenticity is offensive. I have no need of a vicarious identity framed around unending grievance and intractable poverty. I have many layers to my identity — none of them exclusive.

With an increasing and secure land base, and with increasing access to the Market (through employment, education and the fruits of Indigenous land use agreements) and increasing engagement with mainstream Australia, those Australians claiming their Indigenous heritage will need to reflect on how best to provide realistic life choices for their young people, including the provision of government services equitably delivered and the enjoyment of culture and heritage. These will be particularly acute questions in regional and remote areas, especially where the spiritual commitment to land has waned in the face of readily available alcohol and destructive drugs and other life options in

towns and cities. Some will want to recast the balance between security of land title for future generations and utility of land title for present communities and individuals anxious to use land for economic development. I suspect the time has come for an Indigenous Land Bank which could tailor mortgages for native title holders wanting to utilise land commercially while being assured that their country will always remain under the control of its traditional custodians. Over time, Australians will come to appreciate that ILUAs under the *Native Title Act* are the legal means for agreement making between governments and Indigenous groups who increasingly identify themselves as First Nations. Once most native title claims are determined, the National Native Title Tribunal might be replaced or augmented by a Makarrata Commission.

When proposing the first-ever motion in the new Parliament House in 1988 acknowledging Aborigines and Torres Strait Islanders, Prime Minister Bob Hawke quoted Dr Coombs:

It's a politician's job to recognise when the will is there to do something; but they also have a responsibility to create that will. It's never divisive to correct injustice. The fact of injustice is divisive and will continue to be until we correct it and learn to live with it. People who benefit from injustice will oppose this, but you don't stop working for justice simply because people around you don't like it.

I still think it's time to amend the Constitution modestly but with the expectation that due acknowledgment of you, the Indigenous Australians, will effect the big changes needed so that you might enjoy your realistic choices of belonging to the Dreaming and the Market that constitute modern Australia. All of us are on Aboriginal land. You who are Aboriginal and Torres Strait Islander Australians are entitled to your place at the table whenever your cultures, languages, heritage and your continuing relationship with your traditional lands and waters are being considered by our Parliament.

The question is: How much should we attempt to put in the Constitution now, and how much should we sit alongside the Constitution, or delay for constitutional inclusion until another day? There's certainly one thing worse than minimal symbolic constitutional change accompanied by substantive change outside the Constitution, and that is no mention in the Constitution, either because we judged it all too hard or too compromised, or because we tried to achieve too much, too soon. Given that Indigenous Australians have spoken, it is now for the Referendum Council to recommend to government a timetable for constitutional change with maximum prospects of a 'Yes' vote. Australians will not embrace a constitutional First Nations Voice until they have first heard it in action. The work needs to begin immediately on legislating for that First Nations Voice, so that it is operating as an integral part of national policy making and legislating, attracting national support for constitutional recognition. Presumably it would replace the existing National Congress of Australia's First Peoples.

Lowitja, we still need your leadership, inspiration and experience. You are the only Aboriginal Australian to have worked closely with our present prime minister Malcolm Turnbull when he was full of idealism for constitutional change as Chair of Paul Keating's Republican Advisory Committee. As a member of that committee, you recommended a constitutional preamble recognising your people and you convinced Mr Turnbull to back it. In the wake of the Uluru declaration, I think you have one more national task to perform, Lowitja. After the 2015 Lowitja Oration delivered by Marcia Langton you compared the situation in 1967 with the contemporary situation:

There was a different movement to what it is now. The only way I can explain it is that black and white were together, walking towards the path to referendum. I think there's another element to it now because I think there are activists out there who want things to happen before the referendum. They're really more keen about getting action now and not waiting until what, hopefully, is a successful referendum. At the beginning I had confidence ... but we don't have the unity and we have to get the unity.

Lowitja, bring us together behind a proposal for constitutional recognition that is both achievable and principled, providing constitutional recognition of a First Nations Voice on distinctively Aboriginal policy issues, while leaving open the future extra-constitutional question of a makarrata following upon a makarrata commission. Together in the spirit of the pre-1970 FCAATSI members, let's join hands and sing together the Freedom Songs, committing ourselves to the unfinished business of the 1967 referendum, recalling last week's *Uluru Statement from the Heart* that 'in 1967 we were counted, in 2017 we seek to be heard'.

Frank Brennan SJ is the CEO of Catholic Social Services Australia.

Main image: Gathered at St Paul's Outside the Walls commemorating Francis Xavier Conaci