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Referendum Council
Department of the Prime Minister and Cabinet
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To the Referendum Council

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

Thank you for the opportunity to make a submission on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. I am a Lecturer at the University of Western Australia Law School, and I recently completed a PhD at Melbourne Law School that examined Indigenous constitutional recognition. I am solely responsible for the views and contents of this submission.

Yours sincerely,

Dylan Lino

Overview of Submission

General Comments on Indigenous Constitutional Recognition

1. Indigenous constitutional recognition is about respect for Indigenous identity within Australia's constitutional arrangements. The Referendum Council must therefore answer these questions: 'Who are Aboriginal and Torres Strait Islander peoples? And what constitutional arrangements are required to respect who Aboriginal and Torres Strait Islander peoples are?'
2. Indigenous views must be paramount in determining what forms of constitutional recognition to adopt. Aboriginal and Torres Strait Islander peoples have emphasised the need for substantive constitutional reform, rather than purely symbolic changes. Aboriginal and Torres Strait Islander people have also been seeking constitutional recognition of their identities as (1) citizens, (2) historically wronged communities, and (3) self-determining peoples.
3. We should be exploring opportunities for Indigenous constitutional recognition outside the 'big-C' *Constitution*. That means changing the basic distribution of political power through 'small-c' constitutional change: crafting important new statutes, constitutional conventions, common-law doctrines and treaties so as to better respect Aboriginal and Torres Strait Islander people as citizens, historically wronged communities and self-determining peoples.
4. Aboriginal and Torres Strait Islander peoples' claims to be recognised as self-determining peoples are not threatening to Australia's constitutional arrangements or traditions. Constitutionally recognising Indigenous peoplehood – whether through an Indigenous parliamentary advisory body, a treaty or some other means – is fundamentally in keeping with Australia's constitutional tradition of federalism. The roots of federalism are in the idea of a treaty between different parties.
5. Constitutional recognition is not an endpoint or something that can be achieved once and for all. It is rather an ongoing process of negotiating and renegotiating the political relationship between Aboriginal and Torres Strait Islander peoples and the Australian state.

Comments on Particular Reform Ideas

1. **Statement of Acknowledgement:** If a statement of acknowledgement is adopted, it should be drafted in such a way as to catalyse constitutional conventions among the institutions of Australian government in their dealings with Aboriginal and Torres Strait Islander peoples.
2. **Power to Make Laws for Aboriginal and Torres Strait Islander Peoples:** The Federal Parliament should have a power to make laws concerning Aboriginal and Torres Strait Islander peoples. However, the current race power should not be replaced with an Indigenous-specific power unless additional constitutional limits are simultaneously imposed on the Federal Parliament's power to racially discriminate.
3. **Constitutional Prohibition on Racial Discrimination:** A constitutional prohibition on racial discrimination is a vital form of Indigenous recognition. If it is politically

unfeasible to insert such a prohibition into the *Constitution*, the *Racial Discrimination Act 1975* (Cth) should be entrenched through a ‘manner and form’ provision.

4. **An Indigenous Voice to Parliament:** An Indigenous parliamentary advisory body is an important form of Indigenous constitutional recognition. To ensure the body’s strength, independence and viability, the body must have secure funding that is relatively independent from governmental interference. The body could be funded from interest generated by a capital fund or from a statutorily fixed percentage of some particular federal revenue stream.

General Comments on Indigenous Constitutional Recognition

I want to emphasise five general points about Indigenous constitutional recognition before proceeding to discuss particular reform ideas.

Constitutional Recognition as Respect for Indigenous Identity

First, debates over constitutional recognition are debates over Indigenous *identity* – over who Aboriginal and Torres Strait Islander peoples are – and also debates over what is constitutionally required to *respect* Aboriginal and Torres Strait Islander peoples’ identities. (They are also debates over the nature of Australian identity more generally.) So much is clear from the rich body of political theory on ‘the politics of recognition’.¹ Adopting particular proposals for Indigenous recognition involves endorsing particular visions of Indigenous identity, as well as particular understandings of what it means to respect Indigenous identity. The Referendum Council is therefore tasked with answering these questions: ‘Who are Aboriginal and Torres Strait Islander peoples? And what constitutional arrangements are required to respect who Aboriginal and Torres Strait Islander peoples are?’

Indigenous Views on Constitutional Recognition Should Take Precedence

Second, in determining the constitutional arrangements that are required to respect Aboriginal and Torres Strait Islander peoples’ identity, the views of Aboriginal and Torres Strait Islander peoples themselves must take precedence, and broad Indigenous support must be obtained. It would be hard to conclude that any ‘recognition’ had taken place if Aboriginal and Torres Strait Islander people did not endorse the reforms adopted. A lack of Indigenous support would indicate that the reforms had failed to properly respect Aboriginal and Torres Strait Islander peoples.

In terms of Indigenous views on these matters, Aboriginal and Torres Strait Islander people have generally been seeking recognition of their identities (1) as equal citizens of Australia, (2) as communities aggrieved by histories of colonial oppression and discrimination, and (3) as self-determining, sovereign peoples.² Overwhelmingly, Aboriginal and Torres Strait Islander people have emphasised that substantive constitutional reforms – reforms that change the way political power can be exercised over and by them – are necessary to properly respect their status as citizens, as historically wronged communities and as self-determining peoples. Purely symbolic reforms will not in themselves be adequate to confer such respect. Substantive constitutional reforms that may address Indigenous demands for recognition include a constitutional ban on racial discrimination (recognising citizenship

¹ Dylan Lino, ‘What is Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples?’ (2016) 8(24) *Indigenous Law Bulletin* 3, 5.

² *Ibid* 7–8. I note that not all Aboriginal and Torres Strait Islander people identify in all of these ways. In particular, a significant number of Aboriginal and Torres Strait Islander people do not identify as Australian citizens.

and historical grievance), an Indigenous voice to Parliament (recognising historical grievance and Indigenous peoplehood), a treaty (recognising historical grievance and Indigenous peoplehood) and forms of collective Indigenous autonomy and jurisdiction such as Indigenous States or Territories (recognising Indigenous peoplehood).

Think Outside the Constitution on Indigenous Constitutional Recognition

Third, we should be willing to think creatively outside the *Constitution* on Indigenous constitutional recognition. This might sound contradictory, but it is not. Within constitutional theory generally as well as in Australia's own constitutional traditions, it is widely recognised that the constitutional domain extends beyond 'big-C', written constitutions to also include 'small-c' constitutional norms and institutions.³ Small-c constitutional arrangements are constitutional in the sense that they regulate the basic distribution of political power. In Australia, such arrangements include an array of important statutes, common-law doctrines and principles, and constitutional conventions (entrenched customs of political practice). In settler states that have negotiated treaties with Indigenous peoples, treaties are also widely seen as possessing a constitutional status in this broader sense, and they may be reinforced by other constitutional mechanisms, both big-C (eg, the protection of treaty rights under s 35 of Canada's *Constitution Act, 1982*) and small-c (eg, legislation, common-law doctrine and constitutional conventions concerning the Tiriti o Waitangi/Treaty of Waitangi).⁴

Given the political difficulties involved in amending the *Australian Constitution*, it is vital to consider possibilities for recognising Aboriginal and Torres Strait Islander peoples by way of small-c constitutional change. That would mean crafting new statutes, constitutional conventions, common-law doctrines and treaties that redistribute political power so as to better respect Aboriginal and Torres Strait Islander people as citizens, historically wronged communities and self-determining peoples. Later in this submission, I propose two new forms of small-c constitutional recognition: first, the establishment of new constitutional conventions governing the relationship between Australian government and Aboriginal and Torres Strait Islander peoples; and second, the entrenchment of the *Racial Discrimination Act 1975* (Cth) through a 'manner and form' provision.

To expand on a point made earlier, a broader understanding of the constitutional domain shows that the apparent dichotomy between Indigenous constitutional recognition and treaty is false. That is not simply because constitutional recognition and treaty can be pursued at the same time. It is because treaty itself is a form of constitutional recognition, at least where it involves respectfully altering how political power can be exercised over and by Aboriginal and Torres Strait Islander peoples. A treaty that altered the basic distribution of public power would constitutionally recognise Aboriginal and Torres Strait Islander peoples as self-determining peoples, equal in standing to the non-Indigenous people of Australia.

Federalism Supports Indigenous Constitutional Recognition

Fourth, federalism – a deeply entrenched Australian constitutional tradition – offers considerable support to Aboriginal and Torres Strait Islander people's demands to be constitutionally recognised as self-determining peoples.⁵ Broadly speaking, federalism involves combining *self-rule* for distinct political communities with *shared rule* across a

³ Ibid 6–7.

⁴ Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008).

⁵ See further Dylan Lino, 'Towards Indigenous–Settler Federalism' (2017) *Public Law Review* (forthcoming).

common association of those political communities.⁶ Australia's States and self-governing Territories are distinct political communities who enjoy forms of self-rule while also participating in the shared rule practised by Australia's national institutions. Aboriginal and Torres Strait Islander peoples' demands to be constitutionally recognised as self-determining peoples are similarly federal in nature, and are fundamentally consistent with Australia's constitutional traditions. Whether Indigenous peoplehood was constitutionally recognised through a treaty, an Indigenous parliamentary advisory body or other reforms, the goals are broadly the same: for federal arrangements that afford Aboriginal and Torres Strait Islander peoples stronger forms of self-rule as well as a proper say in the shared rule of Australia as a whole.

For critics who say that increasing Aboriginal and Torres Strait Islander peoples' collective political autonomy would unduly fracture Australia's political unity, they must confront the reality that Australia's constitutional arrangements are founded upon – indeed they celebrate – the fracturing of political unity through federalism. Federal diversity is the political and legal foundation on which the Australian nation has been built. In its federal character, the *Australian Constitution* is a treaty between different political communities who agreed to unite in a single overarching association while maintaining their own autonomy and distinctness. To describe the charter of Australia's federation as a treaty is to connect with the very intellectual foundations of federalism – the Latin root of federalism, *foedus*, means treaty.⁷ So, contrary to former Prime Minister John Howard's well-known declaration that 'a united undivided nation does not make a treaty with itself', making a treaty is precisely what the six Australian colonies did in the 1890s in constructing a constitution for a new nation.⁸ In the process, those colonies, now States, were constitutionally recognised as self-determining communities through arrangements that remain in place over a century later.

Just as the States were constitutionally recognised as self-governing communities under the original *Constitution*, today Aboriginal and Torres Strait Islander peoples – the continent's first political communities, whose age is in counted in millennia rather than decades – are seeking to be afforded proper recognition within Australia's federal association. To be sure, the forms of recognition sought by Aboriginal and Torres Strait Islander peoples are not identical to those enjoyed by the States and self-governing Territories. But they undoubtedly share the federal spirit that underpins the Australian constitutional order. The idea of treaty, which is sought by so many Aboriginal and Torres Strait Islander peoples, is at the heart of federalism. Indigenous claims for constitutional recognition of their peoplehood are not alien demands; they are fundamentally aligned with Australia's federal constitutional tradition.

Constitutional Recognition is an Ongoing Process

Fifth and finally, Indigenous constitutional recognition is not an endpoint – a moment of 'completing the *Constitution*', as some have claimed – but is instead an ongoing process of negotiating and renegotiating the political relationship between Aboriginal and Torres Strait Islander and settler peoples. This is for several reasons. One is that any form of constitutional recognition will be an imperfect compromise rather than an exercise in constitutional completion. Few if any of those involved will get all that they want out of the process. Aboriginal and Torres Strait Islander peoples in particular are negotiating with the rest of Australia at a massive disadvantage in bargaining power, thereby limiting their ability to

⁶ Daniel Elazar, *Exploring Federalism* (University of Alabama Press, 1987).

⁷ *Oxford English Dictionary* <www.oed.com>.

⁸ John Howard, quoted in *Interview with John Laws, 2UE Radio* (29 May 2000) PM Transcripts <<https://pmtranscripts.dpmc.gov.au/release/transcript-22788>>.

achieve their goals. Therefore, any successful outcome must be seen as open to renegotiation in the future.

Another reason why constitutional recognition should be seen as an ongoing process is that it is impossible to know in advance how any particular reform will ultimately fare in practice. Much will depend on how different actors – governments, parliaments, courts, the general public and Aboriginal and Torres Strait Islander peoples themselves – respond to any new institutional arrangements over time, and this is a dynamic and unpredictable process, especially in the long run. For these reasons, new forms of Indigenous constitutional recognition should be seen as vital but provisional achievements, open to future revisitation and renovation.

Comments on Particular Reforms

Statement of Acknowledgement

Provided that it is supported by Aboriginal and Torres Strait Islander peoples and accompanied by the substantive constitutional reform they seek, a statement of acknowledgement could be a worthy form of Indigenous constitutional recognition. The general idea behind incorporating a statement of acknowledgement into the *Constitution* is to more respectfully include Aboriginal and Torres Strait Islander peoples within an important cultural and civic symbol of the Australian polity. Though Indigenous views differ on the need for such a statement, it is possible that a statement of acknowledgement will give some Aboriginal and Torres Strait Islander people a greater sense of belonging to the polity. It may also help in fostering more respectful attitudes towards Aboriginal and Torres Strait Islander peoples' history and identity among the wider community. Entrenching respectful community attitudes towards Indigenous history and identity is important for ensuring that the political and legal gains won by Aboriginal and Torres Strait Islander peoples over many decades of hard struggle – including any substantive reforms that emerge from the current constitutional process – are not wound back, and that there is community support for potential future reforms. A statement of acknowledgement could be one way to help foster such attitudes – though without Indigenous support or substantive constitutional reform, it would not be worth pursuing.

Greater thought should be given to how a statement of acknowledgement could support substantive constitutional recognition. Much of the debate to date has focused on whether the statement should have any legal effect, especially as an aid to interpreting other parts of the *Constitution*, such as a new power to make laws about Aboriginal and Torres Strait Islander peoples. But a statement of acknowledgement might be legally unenforceable and yet still have substantive constitutional effects within the political domain.

In particular, if it was drafted in the right way, a statement of acknowledgement could serve as the basis for new constitutional conventions – entrenched norms of political practice – among the institutions of Australian government in their dealings with Aboriginal and Torres Strait Islander peoples. New Zealand's Tiriti o Waitangi/Treaty of Waitangi is in itself legally unenforceable, but its broad statements of principle have served to generate constitutional conventions that govern the New Zealand Government's relationship with Māori, especially conventions of consultation and consent.⁹ A statement of acknowledgement could work like the Treaty of Waitangi: it might not actually be included in the *Constitution* or legislation, but would instead operate as a political agreement negotiated between Aboriginal and Torres Strait Islander peoples and Australian government. To serve as a

⁹ PG McHugh, 'What a Difference a Treaty Makes – The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15 *Public Law Review* 87, 94.

political check on the actions of the government and to catalyse constitutional conventions, it would need to define the principles governing the relationship between Aboriginal and Torres Strait Islander peoples and the Australian state and outline the respective rights and obligations of each party. This would constitute a form of Indigenous constitutional recognition outside the *Constitution*.

In drafting terms, such a statement would depart from the approach adopted in the statements of Indigenous acknowledgement inserted into each of Australia's State constitutions. The existing State recognition provisions take the form of ceremonial declarations of factual and evaluative belief but offer very little in the way of normative guidance. By contrast, my proposal is for a statement – not necessarily legally enforceable and not necessarily in the *Constitution* – that outlines normative principles and rules concerning the distribution and exercise of public power as it concerns Aboriginal and Torres Strait Islander peoples. The statement would serve to ground new constitutional conventions and be enforceable by political means.

Power to Make Laws for Aboriginal and Torres Strait Islander Peoples

It is important for the Federal Parliament to retain a power to make laws with respect to Aboriginal and Torres Strait Islander peoples.¹⁰ The Federal Parliament has possessed such a power since the 1967 referendum, when the 'race power' (s 51(xxvi)) was extended to Aboriginal and Torres Strait Islander people in the States. Such a power is needed to support legislation upholding Aboriginal and Torres Strait Islander peoples' distinctive claims to land, culture, heritage and self-government; to reparations for the injustices wrought by colonisation; and to special measures addressing the socioeconomic disadvantage many Aboriginal and Torres Strait Islander people experience. In the absence of a specific federal power concerning Aboriginal and Torres Strait Islander peoples, enacting federal legislation across all of these areas – including much existing legislation passed since 1967 – would be constitutionally difficult to say the least, and probably in many cases constitutionally impossible.

As the campaigners for the 1967 constitutional amendments recognised, the Commonwealth, rather than the States alone, should possess legislative power in Indigenous affairs. This is for two reasons. First, the Commonwealth has greater financial resources than the States, and so is better placed to address Indigenous demands that require significant funds for their realisation. Second, the Commonwealth rather than the States is held accountable internationally for its treatment of Aboriginal and Torres Strait Islander peoples, and so is generally more responsive than the States to international criticism.

The current basis of federal lawmaking power in Indigenous affairs – the concept of 'race', under s 51(xxvi) – carries negative symbolic baggage that should be jettisoned. As many have recognised, the concept of race has origins in outdated and offensive notions of human difference that were deeply entangled with values of white superiority. The race power should be replaced with a federal power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

But replacing the race power with an Indigenous-specific power, while a worthwhile objective, is insufficient on its own as a form of constitutional recognition, since it does nothing to realise Indigenous aspirations for substantive constitutional reform. It is largely a symbolic change, because the way that the courts interpret Indigeneity is basically identical to the way they interpret race. It would not be worth spending the political capital and financial resources on a referendum to enact such a change on its own.

¹⁰ See further Dylan Lino, 'Replacing the Race Power: A Reply to Pritchard' (2011) 15(2) *Australian Indigenous Law Review* 58.

Indeed, if the race power was simply replaced by an Indigenous-specific power without the imposition of additional limits on Australian governments' powers to racially discriminate, this would actually disadvantage Aboriginal and Torres Strait Islander peoples. That is because it is possible that the race power itself does not authorise laws that racially discriminate. The last time this issue was considered by the High Court, in the 1998 *Kartinyeri* case, two judges effectively said that the race power did not authorise adversely discriminatory laws, two judges said that it did authorise adversely discriminatory laws and two judges did not decide the issue.¹¹ Since the race power's scope remains uncertain, it is eminently possible that the courts might side with the strand of jurisprudence which says that the race power does not support racially discriminatory laws. By contrast, it is very hard to see how a new provision that replaced the race power with a power to make laws about Aboriginal and Torres Strait Islander peoples would in itself be limited to laws that benefit rather than discriminate. By replacing the race power with an Indigenous-specific power, the anti-discriminatory potential of the existing race power would be lost. It would only be worth losing that potential if new limits were simultaneously imposed on the power of Australian governments to racially discriminate.

Constitutional Prohibition Against Racial Discrimination

A constitutional prohibition against racial discrimination is an important form of Indigenous constitutional recognition, a point emphasised by many Aboriginal and Torres Strait Islander people over many years. As I wrote recently, a constitutional prohibition against racial discrimination

recognises Aboriginal and Torres Strait Islander people (and indeed all Australians) as equal citizens who should not be discriminated against because of their racial or ethnic background. But protection from racial discrimination goes beyond recognising Indigenous people as citizens. As the history of this country shows only too well, discrimination has been a constitutive and ongoing dimension of Indigenous people's experience throughout colonisation, from dispossession onwards. A constitutional ban on racial discrimination is fundamentally about recognising Indigenous Australians as a historically wronged and aggrieved people, and providing a guarantee against the recurrence of similar wrongs in the future.¹²

Similarly, Noel Pearson has perceptively observed that '[e]limination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past'.¹³

A constitutional prohibition on racial discrimination is needed to deprive the Federal Parliament of its power to pass racially discriminatory laws. While the *Racial Discrimination Act 1975* (Cth) (RDA), in combination with the supremacy of federal law under s 109 of the *Constitution*, effectively imposes a constitutional prohibition on racial discrimination upon State and Territory parliaments, the RDA does not bind the Federal Parliament. For Aboriginal and Torres Strait Islander peoples, that problem is more than hypothetical. Since the RDA's enactment, the Federal Parliament has on four separate occasions acted to partially repeal the RDA's guarantee of equality before the law, in every case to wind back Indigenous rights. Those four occasions were (1) the validation of non-Indigenous titles under the original

¹¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

¹² Dylan Lino, 'Thinking Outside the Constitution on Indigenous Constitutional Recognition: Entrenching the Racial Discrimination Act' (2017) 91 *Australian Law Journal* 381, 383.

¹³ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) 167.

Native Title Act 1993 (Cth), (2) the 1997 repeal of cultural heritage protections during the Hindmarsh Island bridge affair, (3) the weakening of native title rights under the *Native Title Amendment Act 1998* (Cth) and (4) the 2007 Northern Territory Intervention (arguably along with its successor policy, Stronger Futures). In light of this relatively recent history, as well as Aboriginal and Torres Strait Islander peoples' earlier experiences of discrimination at the hands of the Commonwealth, there is a compelling need to constitutionally deprive the Federal Parliament of power to pass racially discriminatory laws.

If inserting such a prohibition on racial discrimination into the *Constitution* is politically unfeasible, the RDA itself should be entrenched through a 'manner and form' provision. This is another example of Indigenous constitutional recognition outside the *Constitution*: it could be enacted by way of ordinary legislation.¹⁴ As I wrote in a recent article:

A provision of this kind would make repeal of the RDA more difficult by prescribing that legislation repealing the RDA's protection must take on a prescribed form to be effective. Such a provision was proposed in the RDA's doomed companion Bill, the Human Rights Bill 1973 (Cth): it provided that subsequent federal laws inconsistent with the Bill would be without force or effect unless they included an express declaration affirming that they operated 'notwithstanding' their inconsistency with human rights. A provision like this was included in Canada's 1960 statutory *Canadian Bill of Rights*, and its effectiveness has been upheld by the Canadian Supreme Court. A similar 'notwithstanding' provision could be inserted into the RDA, prescribing that federal laws inconsistent with the RDA would be without force or effect unless they expressly declared that they applied notwithstanding anything in the RDA.¹⁵

Though the Australian courts have not considered whether such a provision would be effective at the federal level, there is a strong argument that it would be.¹⁶ To quote my article once again:

A protection like this would not prevent a determined government from having its way, but it would raise the political costs of overriding the RDA by forcing governments to own up to what they were doing – with all the negative national and international attention such an admission can bring. If a government was not explicit about overriding the RDA, the courts could declare the infringing legislation inoperative. Entrenching the RDA through a 'notwithstanding' clause would be an undoubted improvement on the current state of affairs, imposing an unprecedented, if still fairly modest, constraint upon the Federal Parliament's power to racially discriminate.¹⁷

The mechanism of a manner and form provision could also be adopted to protect Indigenous rights and interests in other contexts outside of the RDA. For instance, the *United Nations Declaration on the Rights of Indigenous Peoples* could be enshrined in federal legislation, which could then be entrenched using a manner and form provision.

An Indigenous Voice to Parliament

An Indigenous voice to the Federal Parliament is yet another important form of Indigenous constitutional recognition, and one that has gained increasing endorsement from Aboriginal and Torres Strait Islander people. It would constitutionally recognise Aboriginal and Torres

¹⁴ Lino, 'Thinking Outside the Constitution on Indigenous Constitutional Recognition', above n 12.

¹⁵ Ibid 384.

¹⁶ George Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167.

¹⁷ Lino, 'Thinking Outside the Constitution on Indigenous Constitutional Recognition', above n 12, 384–5.

Strait Islander peoples as self-determining peoples by guaranteeing them a place within Australia's federal arrangements: it would afford Aboriginal and Torres Strait Islander peoples a say in the shared rule operating at the federal level across all of Australia's subnational political communities.

Since a great deal has already been written about this idea, the only thing I want to add is that, if an Indigenous parliamentary advisory body is to be created, it ought to have an adequate, secure and independent source of funding. Too often in the recent past, the strength, independence and viability of Indigenous institutions – including representative bodies such as the National Congress of Australia's First Peoples and the Aboriginal and Torres Strait Islander Commission – have been undermined by federal control over their funding. Even if a new Indigenous advisory body was entrenched in the *Constitution*, the withdrawal of federal funding could well be fatal to the body.

One way to address this problem would be to resource a new Indigenous body with the interest generated from a secure capital fund. That is how both the Indigenous Land Corporation and the NSW Aboriginal Land Council are funded, and both are generally self-sufficient. In each case, the capital fund was built up incrementally over the course of several years. Another means of ensuring adequate, secure and independent funding could be based on the funding model for the Northern Territory land rights regime, whose key institutions, the land councils, are resourced from royalty equivalents generated from mining on Aboriginal land. Originally, the land councils were statutorily guaranteed at least 40 per cent of this revenue stream (though since amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in 2006, there has been greater ministerial discretion over land council funding). On this model, an Indigenous body might be statutorily guaranteed a percentage of some federal revenue stream as a way of securing its viability and independence.