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Is Australia Ready to Constitutionally Recognise Indigenous Peoples as Equals?

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Introduction

As the founding document of the nation, the Australian Constitution should, at a minimum, recognise Indigenous peoples as the First Peoples of the continent. For more than 200 years, it was believed as a matter of law that at English settlement the Australian continent was 'almost uninhabited'[1] and that the few humans present were 'barely civilised'.[2] The 1967 Referendum was arguably the first in a series of attempts to bring about constitutional recognition, in law, of the existence of Indigenous peoples, in that instance by including Indigenous peoples in the census count and by allowing the Federal Parliament to make laws with respect to Indigenous peoples. Its recognition of the existence of an Indigenous peoples effectively negates the notion of *terra nullius*. Indeed, the myth or legal fiction of an empty land (*terra nullius*) had for some time been acknowledged as wrong in fact,[3] though it was formally denied at law only in 1992.[4] The denial of *terra nullius* makes recognition of Indigenous peoples in the Constitution possible, a process that is now in train.

Recently, proposals have emerged calling for a new referendum (the recognition referendum) to remedy this shortcoming in the Constitution.[5] Constitutional recognition, in a form yet to be determined, is an intrinsically desirable outcome for the nation and the broader community, as it will make the Australian legal system more internally consistent and coherent. Setting this

1 *Cooper v Stuart* (1889) 14 App Cas 286, 291. In *Cooper v Stuart*, Lord Watson stated that the absence of 'settled inhabitants' and 'settled law' were criteria for determining whether inhabited territory had been acquired by 'settlement' under English law.

2 *R v Cobby* (1883) 4 LR (NSW) 355, 356 (Martin CJ): 'We may recognise a marriage in a civilized country but we can hardly do the same in the case of … these Aborigines, who have no laws of which we can take cognisance'.

3 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (*Gove Land Rights* case).

4 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (*Murray Island* case). This case bears the name of one of the plaintiffs who passed on just before the decision was brought down. For cultural reasons in parts of Australia, the continued use of the name-during-life of a deceased person is avoided, and this convention is adopted where possible.

5 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) (2013 Recognition Act); changing the Constitution requires a referendum: Constitution s 128.