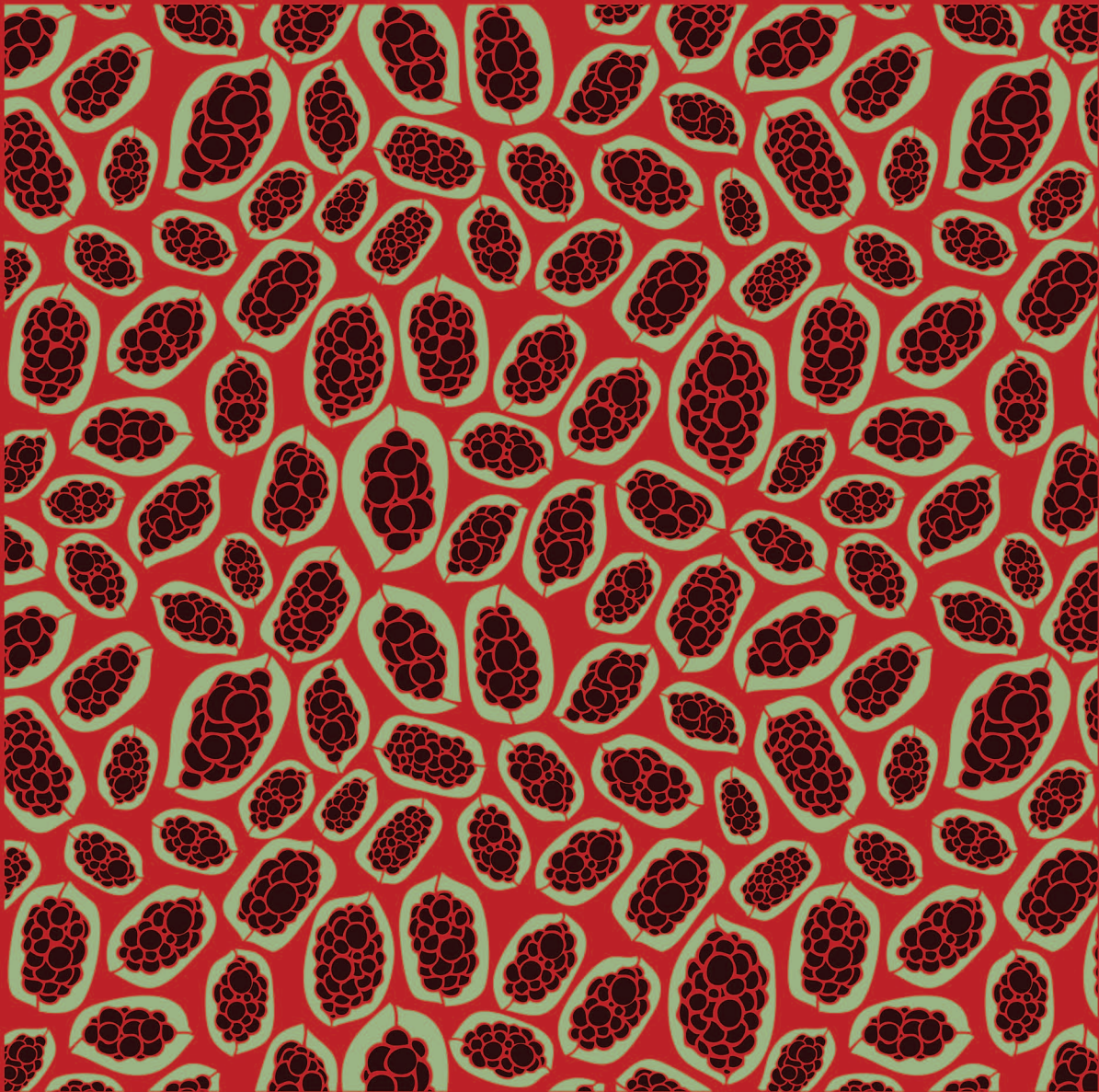


INDIGENOUS LAW BULLETIN

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'TOO HARD TO HANDLE': INDIGENOUS VICTIMS OF VIOLENCE WITH DISABILITIES
NATIVE TITLE AND TAX: UNDERSTANDING THE ISSUES
REGULATING RIGHTS: THE CASE OF TRADITIONAL KNOWLEDGE

EDITORIAL

Welcome to the final edition of the *Indigenous Law Bulletin* for 2010. To close the year, we bring you a diverse range of issues and legal developments for consideration.

Kylie Cripps, Leanne Miller and Jody Saxton-Barney open this edition with an exploration of the issues that face Indigenous women with disabilities, who are also victims of violence. They discuss the functionality of partnerships between disability, family violence and community sectors, and the need to address the deficiency in services available for this vulnerable group in our communities.

Miranda Stewart examines the Federal Treasury Department's consultation paper *Native Title, Indigenous Economic Development and Tax*, released in May. Miranda outlines the key issues in relation to the main options for reform, particularly the establishment of a tax-exempt Indigenous Community Fund.

The Australian Indigenous Art Commercial Code of Conduct opened up for membership earlier this year. Erin Mackay discusses this domestic regulation, together with international law and domestic legislation, in her examination of why and how Indigenous Cultural and Intellectual Property should be protected.

Sarah Bury examines the Northern Territory case of *R v Wunungmurra*, and the application of s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth). Sarah inspects the purported aims of s 91 in the context of the *Little Children are Sacred Report* and the rights of Aboriginal women and children as victims of violence and sexual assault.

In late 2010, Western Australian Premier Colin Barnett stated that James Price Point in the Kimberly will be compulsorily acquired for the development of a \$30 billion gas precinct. Suzanne Mortimer explores the background to the initial negotiations, and uncovers a flawed consultation process that she argues has unnecessarily left traditional owners in opposition.

Dylan Lino reviews *People Power: the History and Future of the Referendum in Australia*, which is particularly timely following Prime Minister Julia Gillard's announcement that an expert panel will be established to work towards including Aboriginal and Torres Strait Islander people in the Constitution.

Finally, we close this edition with an interview with the newly appointed Northern Territory Anti-Discrimination Commissioner Eddie Cubillo. Eddie talks to Lucienne Cassidy about the complaints and conciliation process at the Commission, and the challenges he faces as Commissioner.

Peta MacGillivray
Editor

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SEEKING CONTRIBUTORS

Would you like to submit an article to the *Indigenous Law Bulletin* ?

If you are a student, practitioner, part of a community organisation, or are simply concerned about issues affecting Aboriginal and Torres Strait Islander people, the ILB wants to hear from you! We welcome contributions from Indigenous and non-Indigenous authors, on a wide range of topics. For more information, please visit our website at www.ilc.unsw.edu.au, or contact the Editor at ilb@unsw.edu.au.

BOOK REVIEW

POWER PEOPLE: THE HISTORY AND FUTURE OF THE REFERENDUM IN AUSTRALIA

George Williams & David Hume
UNSW Press (\$34.95) (September 2010)
by Dylan Lino

Australian voters are facing the prospect of voting in a referendum to recognise, in some way, Aboriginal and Torres Strait Islander people in the *Constitution* before or at the next federal election. This reflects a commitment made by the Labor Party during the 2010 election campaign – a commitment that was echoed by the Liberal Party and the Greens. With this apparent federal cross-party support for constitutional recognition of Indigenous people, what could possibly go wrong? Lots, according to a new book by George Williams and David Hume. But more of that later. In *People Power: The History and Future of the Referendum in Australia*, Williams and Hume offer a wide-ranging analysis — the first of its kind — of referendums to change the *Australian Constitution*. Part legal account, part history, part lament about Australia's unwillingness to approve constitutional changes, and part how-to manual for a less reluctant constitutional culture, *People Power* provides a broad vision of the Australian referendum in retrospect and prospect that will be accessible to the general reader and also of use to researchers and students.

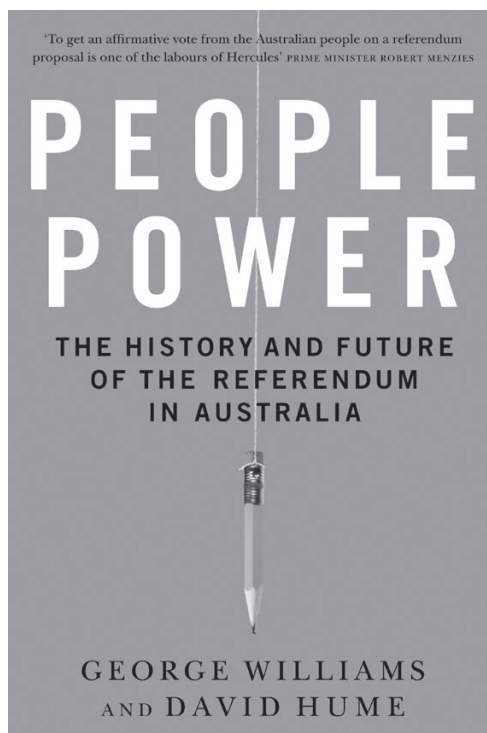
The authors' starting premise is 'an understandable degree of frustration'¹ at the woeful success rate of Australian referendum proposals. To date, just eight out of 44 proposals to amend the *Constitution* have been approved by the 'double majority' required in s 128 (ie, a national majority of voters and a majority of voters in a majority of States). The authors are also of the view – and it is a perennial theme of *People Power* – that referendum success 'is not just a matter of having good ideas, but of getting the process right'.² While they believe that 'Australia's

long constitutional drought must be broken',³ they do not champion any drought-breaking changes in particular — something that might come across to some as an attitude of 'reform for reform's sake'. In the absence of discussion over the merits of particular referendum proposals, Williams and Hume can seem dismayed less by the rejection of worthy proposals for constitutional revision

and more by the overall failure (or refusal) of Australians to change the *Constitution*. For Australians of a progressive bent, the fact that the words of the *Constitution* remain largely unchanged after more than a century can be galling, seemingly bespeaking a conservatism at the heart of the Australian polity. But whatever their views in that respect, the authors make clear that their fundamental concern with Australia's constitutional reticence is that 'the community must pay the high price of having a second-best system of government'.⁴ This point is a good one. And if the recent debate around Indigenous constitutional recognition is anything to go by,

many in the Indigenous community agree that the current constitutional arrangements affecting them are not only second-best but indeed deeply unsatisfactory. It is an open question whether the constitutional 'recognition' of Indigenous peoples that is ultimately proposed by the Gillard Government will be an improvement. And it is a question beyond the scope of *People Power*, which the authors in large part leave, as they must, for others to debate.

Helpfully, the book begins by going back to basics. In Chapter 1, Williams and Hume outline what exactly referendums are, how they operate under the *Constitution*,



what kinds of changes can be made by referendums, and what kinds of constitutional change can be made without referendums (for instance, changes through new interpretations of old provisions). Chapter 2 discusses how, as a matter of politics and law, constitutional change comes about, from the process of generating reform ideas, to legislating them through Parliament, getting approval from the people, and obtaining Royal Assent from the Governor-General. In Chapter 3, the authors offer a general picture of the conduct of referendum campaigns. They look at such issues as advertising, the official pamphlet, the Yes and No cases and the cost of referendums. These opening chapters provide a useful and clear introduction to the law surrounding referendums for the uninitiated general reader. But the chapters also contain material that will be new to constitutional scholars, for they cover not only the constitutional dimensions of referendums but also the legislation and administrative practice surrounding referendums and voting.

Marshalling an impressive and sometimes bewildering array of statistics in Chapter 4 — did you know that since 1901 almost 226 million formal votes have been cast in referendums, with nearly 51 per cent of them No votes?⁵ — Williams and Hume give a picture of the referendum record beyond the ‘eight out of 44’ figure many are familiar with. Chapter 4 contains some useful tables and charts that map when referendums have been held and what the results were. We learn that, historically, referendums held simultaneously with elections have exactly the same rate of success as referendums held mid-term.⁶ This is interesting in light of current developments: at this stage it is unclear whether the Gillard Government will seek to hold the proposed referendum on Indigenous constitutional recognition during this term or on election day. The crucial thing in this respect, and which Williams and Hume would acknowledge, is not whether the referendum coincides with an election but whether there has been enough time to build sufficient political and popular support. The Government’s pledge to pursue Indigenous constitutional recognition by the end of this parliamentary term may simply be too soon, regardless of whether it takes place on the 2013 election day or before. Another interesting historical fact is that, while subsequent referendums on an earlier failed proposal have not succeeded, ‘the results suggest that *more* people vote Yes the second time around’.⁷ So if, as seems likely, the coming referendum on Indigenous constitutional recognition proposes preambular recognition of Aboriginal and Torres Strait Islander peoples, as was the case in 1999, the proposal is not doomed just because it has already been tried and rejected. In fact, it may have a better chance of success.

The authors move on to give more detailed accounts of eight referendums in Chapter 5, teasing out some of the nuances. Of most interest for *ILB* readers will be the story of the 1967 ‘Aboriginals’ referendum provided in this chapter. It is described as ‘Australia’s greatest constitutional pronouncement since 1901’,⁸ when Australians voted to delete s 127 and to remove a restriction from s 51(xxvi) (the ‘race power’) that prevented the Commonwealth making special race-based laws under that section for Aboriginal people in the States. While Williams and Hume could have been more legally precise in describing the pre-1967 effects of these provisions, they do a much better job than most, and the lack of precision is easily forgivable in a book that covers much constitutional territory and is written to be accessible to a general audience.

People Power’s treatment of the 1967 ‘Aboriginals’ referendum is important in two respects. Firstly, it resurrects an often forgotten fact of political history: there was another referendum held on the same day. This ultimately unsuccessful referendum sought, amongst other things, to remove the requirement in s 24 that the number of Members in the Lower House be, as nearly as practicable, twice the number of Senators. It was this more politically fraught attempt to break the ‘nexus’ between the size of the two Houses of Parliament, and not the almost universally supported ‘Aboriginals’ referendum, that was the main political and media focus of the day.⁹ Today, the position is reversed: it is the ‘Aboriginals’ referendum that is memorialised and the ‘nexus’ referendum that is forgotten. Amongst other things, this reminds us that constitutional reform is a long-term investment, the significance of which may only be felt (or constructed) much later.

The second important feature of *People Power’s* take on the 1967 ‘Aboriginals’ referendum is its assessment of why the referendum was successful. Williams and Hume suggest the following interrelated reasons:

- unlike with most referendums, there was no official No case against the referendum proposals;
- the State governments were all on board and did not mount campaigns against the proposals;
- there was a unique national convergence in support of the referendum proposals;
- changes to the *Constitution* in the area of Indigenous affairs had been canvassed at the national level for many years, which resulted in an informed public comfortable with the proposals; and
- because of the general national uniformity in Indigenous affairs law and policy, and because the Holt Government was not seeking to make changes

in Indigenous affairs, the reform proposals were not viewed as particularly threatening or major.¹⁰

The picture, then, is one of overwhelming support for the 1967 proposals from Parliamentarians, the States and voters, built up over a period of many years. Arguably, the failure of *People Power* to afford a significant place to Indigenous activists in this schema is an oversight,¹¹ but Williams and Hume's assessment of the 1967 referendum's success nevertheless offers much food for thought in light of the coming Indigenous recognition referendum. One wonders whether there is something more substantive than preambular recognition of Aboriginal and Torres Strait Islander peoples upon which politicians and the public can converge.

What advice do Williams and Hume offer would-be constitutional reformers? They have numerous recommendations, but we will focus here upon the five 'pillars' that the authors argue successful constitutional change must be built:

1. bipartisanship, or, more accurately, support across the major political parties at federal and State levels;
2. popular ownership through public consultation, genuine opportunities to participate, plebiscites, and the like;
3. popular education to improve Australians' knowledge of the *Constitution*;
4. sound and sensible proposals, including putting different proposals in different questions, incorporating sunset or sunrise provisions, and using 'multiple choice' referendums; and
5. a modern referendum process that involves abolishing referendum expenditure restrictions on the Commonwealth Government, changing requirements surrounding the official Yes/No referendum pamphlet, and publicly funding Yes and No committees.¹²

Though it is still early days for the Indigenous recognition referendum, we can nonetheless reflect on the state of these five pillars at this point in time. To start with Pillar 3, addressing the deficit in Australians' civics knowledge is a long-term goal that is unlikely to be advanced in any significant way before the Indigenous recognition referendum. That said, popular knowledge about the *Constitution* is probably no different now than it was during previous referendums: in short, not great but sufficient to facilitate occasional referendum success. It is unclear whether Pillar 5 will be up any time soon, though Williams and Hume's suggestions reflect recommendations made in late 2009 by a House of Representatives Committee, which is promising.¹³ As for Pillar 1, at this stage there

appears to be bipartisanship for *some* sort of constitutional 'recognition'. Whether this support will hold once the process progresses and 'recognition' is given substance remains to be seen. There is likely to be some public consultation (Pillar 2) through the Government's 'expert panel' but it is another question whether this will foster a sense of popular or elite ownership of the referendum. And Pillar 4, sound and sensible proposals? Though we must wait and see, constitutional 'recognition' appears to be geared more towards the symbolic rather than the legally substantive. This may be 'sound and sensible', as far as achievable constitutional reform is concerned. But will Aboriginal and Torres Strait Islander people view it as enough?

Dylan Lino holds a BA LLB (Hons) from the University of New South Wales. He is currently working on the Constitutional Reform and Indigenous Peoples project at the Indigenous Law Centre.

- 1 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) vii.
- 2 *Ibid* viii.
- 3 *Ibid*.
- 4 *Ibid* vii.
- 5 *Ibid* 93.
- 6 *Ibid* 96.
- 7 *Ibid* 103.
- 8 *Ibid* 140.
- 9 *Ibid* 152.
- 10 *Ibid* 232–3.
- 11 See, eg, John Chesterman, 'Defending Australia's Reputation: How Indigenous Australians Won Civil Rights, Part Two' (2001) 32(117) *Australian Historical Studies* 201.
- 12 Williams and Hume, above n 1, ch 7.
- 13 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *A Time for Change: Yes/No?: Inquiry into the Machinery of Referendums* (2009) 60.