

Yidindji, the Remedy

A Blueprint to True Reconciliation

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Introduction

“There has never been a moment in Australia’s history where a formal agreement has been made with the Aboriginal and Torres Strait Islander peoples.”¹

*“We recognise this land and its waters were settled as colonies **without** treaty or consent.”*
Prime Minister John Howard; media release 11th May 2000²

The statement by John Howard, the Prime Minister of the Commonwealth of Australia set the framework for the position that the Yidindji Tribal Nation is now trying to remedy.

Though the Australian colonies became British possessions by settlement and not by conquest it still does not demonstrate how the British possession became an Australian possession with the de-colonisation by the British Empire of the landmass known as Australia.

¹ Treaty, Federation Press, Sean Brennan, Larissa Behrendt, Lisa Strelein, George Williams, page 1

² <http://pmtranscripts.dpmc.gov.au/browse.php?did=11557>

“Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations. Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependant peoples and militates against the United Nations ideal of universal peace, ... Convinced that all peoples have an unalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.”³

“While Australia’s colonial links with the United Kingdom were largely terminated by the Imperial Conferences of the 1920’s and the Statute of Westminster 1931, the Australian States remained ‘self-governing colonial dependencies of the British Crown’ until the Australia Acts 1986 came into force. The States deliberately retained their links with the United Kingdom as a counter-balance to Commonwealth power. They believed that the British Government was politically disinterested in State matters and acted merely as the formal channel of communication in State matters. This belief was proved to be incorrect in the 1970s when the British Government exercised independent discretion in relation to the appointment and removal of State Governors.”⁴

“From 3 March 1986, when the Australia Acts 1986 came into force, the de-colonisation of Australia became complete.”⁵

With the act of de-colonisation did the land and resources, which were alleged by the Commonwealth of Australia to be possessions of the Queen, not revert back to the tribal nations? This would be in keeping with the statements made in the Native Title Consent Determinations as mentioned later in this document as to who the owners are.

“And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen.”⁶

Was the Yidindji Tribal Territory a possession of the Queen at the time of federation?

³ <http://www.un.org/en/decolonization/declaration.shtml>

⁴ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984994## The De-colonisation of the Australian States, page 1, Professor Anne Twomey, May 2007

⁵ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984994## The De-colonisation of the Australian States, page 10, Professor Anne Twomey, May 2007

⁶ <http://www.comlaw.gov.au/Details/C2013Q00005> page 7

The Native Title Consent Determination handed down by the Federal Court of Australia stated that the Yidindji people are acknowledged, by the Commonwealth of Australia, as the owners of certain areas within the Yidindji territory, then these areas **must not have been the possession of the Queen** at the time of federation and thus unable to be included in the territory of the Commonwealth of Australia, then or now.

Prime Minister John Howard made another statement during the John Laws radio interview two weeks after the aforementioned media release of 11th May 2000:

“A nation can’t make a treaty with itself.”⁷

The very act of acknowledging that the Commonwealth of Australia does not have the consent of the tribal peoples of the landmass known as Australia immediately brings about the question as to how this can be remedied.

The lack of consent can be cured by way of a treaty with the tribal nations to get consent for the Commonwealth of Australia to have legitimate political and legal authority on any tribal territories within the landmass now commonly known as Australia.

The problem that has occurred is one of standing. Prime Minister Howard made the correct statement on the 29th of May 2000 by stating that a nation cannot make a treaty with itself. No aboriginal Australian can negotiate the consent or treaty for and on behalf of the tribal nation they have originated from. The tribal negotiating members cannot have an allegiance to the Commonwealth of Australia lest they not be sovereign nor of the correct standing to enter into treaty negotiations on behalf of the sovereign tribal nations.

The tribal members must be independent of the Commonwealth of Australia and subject to the laws of the tribal nation. Sovereignty is the ability of a state to act without external control.⁸ These native’s titles rights and interests, though not completely defined, are recognised by the Commonwealth of Australia within the Native Title Act 1993⁹ as being those *“(1) The expression native title or native title rights and interests means a communal, group, or individual rights and interests of Aboriginal peoples or Torres Straits Islanders in relation to land or waters, where: (a) the rights and interests are **possessed under the traditional laws acknowledged, and traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginals and Torres Strait Islanders, by those laws***

⁷ <http://pmtranscripts.dpvc.gov.au/browse.php?did=11516>

⁸ Dictionary of International and Comparative Law, 3rd edition, 2003, James R Fox

⁹ Native Title Act 1993, section 223

*and customs, have a connection with the lands and waters; and (c) the **rights and interests are recognised by the common laws of Australia.***”.

Aboriginal Customary Law is further defined¹⁰ as “*The body of rules, practices, and customs, relating to diverse matters such as land, marriage, and dispute resolution, that have been traditionally recognised by an Aboriginal community or clan as being **obligatory** upon them, regardless of whether those rules are precisely and exhaustively defined.*”

The aboriginal Australian is a person of aboriginal descent, but none the less they are an Australian person. They are the person who can and must participate in Australian elections and referendums. The aboriginal Australian is neither created by nor subject to Aboriginal Customary Law

This is confirmed in all Native Title Consent Determinations handed down by the Federal Courts of Australia; along with the production by the Commonwealth of Australia of the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013.

The Problem

The first and largest problem facing the Australian people is one of a separate system of law created within the Australian Constitution to govern the Australian people; whilst at the same time there is acknowledged separate and distinct systems of authority of the Aboriginal and Torres Strait Islander peoples that was not extinguished, or modified upon the arrival of the British and subsequently Australian laws. There now exists two separate normative societies on the one piece of land.

There cannot be two separate and distinct systems of authority on one piece of land unless one is subservient to the other in a hierarchical format.

This would make the system of authority and decision making of the Yidindji Tribal Nation the highest norm¹¹ with ultimately the Yidindji Tribal Nation having the superior Grundnorm¹² within the Yidindji Territory.

With the presence of the superior hierarchical system of law, the maxim of international law “***Qui in territorio meo est, etiam meus subditus est-** that which is in my territory is my subject; old rule of a state’s authority over persons and things found within its territory*”¹³ affects the Commonwealth of Australia’s ability to enforce any authority, obligations, and or

¹⁰ LexisNexis Concise Australian Legal Dictionary 4th edition

¹¹ LexisNexis Concise Australian Legal Dictionary 4th edition

¹² LexisNexis Concise Australian Legal Dictionary 4th edition

¹³ Dictionary of International and Comparative Law, 3rd edition, 2003, James R Fox

rights as derived from the Australian Constitution to be enforced against and or applied to the Yidindji peoples.

Another problem facing the Australian people today is the lack of tenure to the land and resources, whilst the Australian Government has admitted that it did not have a treaty and or consent to have absolute and legitimate authority on the landmass known as Australia.

Was the landmass of Australia obtained by settlement, conquest or ceded?

“Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where already cultivated, they have been gained by conquest, or ceded to us by treaties....For it has been held, that if uninhabited country be discovered and planted by English subjects, all English laws then in being, which have birthright of every subject, are immediately there in force.... But in conquered or ceded countries, then have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless they are against the law of God.”¹⁴

The uncertainty of how the landmass commonly known as Australia was acquired to be a British possession in the first instance leaves all other subsequent claimants on an insecure footing.

The statement that the landmass commonly known as Australia was acquired via settlement clearly removes any other forms of acquisition, that being occupation, accretion, cession, conquest and prescription¹⁵.

The definition of ‘settlement’¹⁶ has a legal meaning of ‘Disposition of property’. Should this have been a ‘Disposition of Property’ it would have been effected by a conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property.¹⁷

The Yidindji Tribal people have requested, on numerous occasions, for any such instruments as created by these and or other methods of the alleged ‘Disposition of Property’; **to date nothing has been forthcoming.**

This lack of evidential instruments of such disposition of property coupled with the confirmation from Justice Dowsett of the Federal Court of Australia that the Yidindji people own their lands pursuant to the traditional Yidindji laws and customs clearly demonstrates

¹⁴ Australian Constitutional Law and Theory 6th edition, Blackshield & Williams, page 91, [3.4]

¹⁵ Principles of International Law 7th edition, part 7, chapter 5, page 127, Ian Brownlie

¹⁶ LexisNexis Concise Australian Legal Dictionary 4th edition

¹⁷ LexisNexis Concise Australian Legal Dictionary 4th edition

that the Yidindji people are the true and correct owners of all their lands, waters, and resources to this present day. The one thing that Federal Court of Australia acknowledges as fact is that a certain area of land is owned by the Yidindji Tribal nation.

The Aboriginal and Torres Strait Islander peoples have been described as the underwriters of the Commonwealth of Australia in the Mabo determination.

*“Aborigines were dispossessed of their land parcel by parcel, to make way for the expanding colonial settlement. Their dispossession **underwrote** the development of the nation.”*¹⁸

With this statement, the claim made was that the Aborigines were ‘**dispossessed**’ of their land. The legal¹⁹ definition of ‘dispossessed’ *“Deprivation of, or eviction from, rightful possession of property; the wrongful taking or withholding of land from the person lawfully entitled to it, the wrongful taking or withholding of possession of land from the person lawfully entitled to it.”*

In any instances the land and or resources have never been acquired, by the Commonwealth of Australia, by any lawful and or legal manner that is recognisable by the Yidindji Tribal Nation, and or any other nation on the face of the earth. This statement is in keeping with the statements made by the then Prime Ministers John Howard that it was *“without treaty or consent”*, and Paul Keating *“Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life.”*²⁰

With further reference to this statement would make the Yidindji Tribal Nation as the **underwriter** for any debts incurred by the Commonwealth of Australia within the territorial boundaries of Yidindji without full disclosure and or consent of the Yidindji Tribal people. However this position as the underwriter would make the Yidindji Tribal Nation the insurer of any loss that the Commonwealth of Australia incurs in the future, normally secured by some form of contract. There have been no formal contracts between the Yidindji Tribal people and the Commonwealth of Australia.

The maxims of law *“Qui prior est tempore potior est jure- Priority in time of creation gives the better equity”* and *“Quod prius est verius, et quod prius est tempore potius est jure- What is earlier is more genuine, and what is earlier in time is preferred in law”*²¹ leave the

¹⁸ <https://jade.barnet.com.au/Jade.html#article=67683> paragraph 82

¹⁹ Black’s Law Dictionary 9th Edition

²⁰ <http://www.nfsa.gov.au/digitallearning/mabo/info/PaulKeatingSpeech.htm>

²¹ LexisNexis Concise Australian Legal Dictionary 4th edition

Commonwealth of Australia and the States with no ability to maintain that the land tenures issued by them as having any legitimacy when Honourable Justice John Dowsett AM QC handed down the Native Title Consent Determination *'Mundraby on behalf of the Combined Mandingalbay Yidinji- Gunggandji People v State of Queensland [2012] FCA 1039'*.

*"The laws and customs characteristics of the identified regional society can be identified as: A system of land tenure, wherein language-labelled groups are associated with identifiable areas of land and water"*²² clearly states that the Yidindji Tribal Nation has a current system of land tenure that has been in existence prior to that of the Commonwealth of Australia and the State of Queensland.

The Native's Titles of land did not originate from neither the Colonial system of land titles nor any that are created subject to the Australian Constitution or State Constitutions.

*"Neither the Australian Parliament, nor the Australian Government, nor the Australian Courts have created the native title which we are acknowledging today. The Act simply provides a way which Aboriginal people can prove traditional ownership of land, which ownership has existed since before European settlement in Australia."*²³

As the Yidindji Tribal Nation has a land tenure system predating that of the State of Queensland and the Commonwealth of Australia; would the land titles issued by the State of Queensland and or the Commonwealth of Australia have any force or affect when confronted with Yidindji land titles? Would the Yidindji Land Tenures not be of superior standing and preferred in law due to position in time?

Furthermore Justice Dowsett cleared up the issue of ownership to the lands.

*"I have not come here today to give anything to the Tableland Yidinji people. Rather I have come to recognize, on behalf of all Australians, that **they are the traditional owners of this land pursuant to traditional laws and customs which have their roots in ancient times.** I now recognize that traditional ownership."*²⁴

If the Yidindji Tribal Nation is recognised as the owners of the lands then do the State of Queensland and or the Commonwealth of Australia have the ability to sell and or control land and or resources that clearly belong to the Yidindji Tribal Nation?

If so this would infer that the lands and resources taken or being used by the Australian citizens are done so without the consent of the Yidindji Tribal Peoples when read in association with the media release of Prime Minister John Howard on the 11th of May 2000.

²² <https://jade.barnet.com.au/Jade.html#article=289068> Reasons for Judgement, point 21

²³ <https://jade.barnet.com.au/Jade.html#article=289068> Reasons for Judgement, point 26

²⁴ <https://jade.barnet.com.au/Jade.html#article=289103> Reasons for Judgement, point 30

Prime Minister Julia Gillard confirmed that the Australian Government does not own the mineral resources.

“And here’s the rub; you don’t own the minerals; they own it and they deserve their share, she added. Governments only sell you the rights to mine the resource- a resource we hold in trust for a sovereign people.”²⁵

This questions the legitimacy and authority of the Commonwealth of Australia. A question that has been raised numerous times.

Professor Sean Brennan, Brenda Gunn and Professor George Williams AO, in reference to the media release by Prime Minister John Howard on the 11th of May 2000, raised the issue of legitimacy.

“The first statement by Prime Minister John Howard is a matter of fact. From that fact flows a sense of grievance, felt by many Indigenous people and shared by many other Australians, that ultimate political and legal authority – or ‘sovereignty’ – was never properly secured by the Crown over the Australian landmass.”²⁶

The point raised about the power and authority of the Commonwealth of Australia to make laws for the peace, order and good government of the tribal nations needs to be addressed.

The Australian Constitution is the foundational legal instrument that creates all else below it.

“The Australian Constitution is the set of rules by which Australia is governed. Australians voted for the national constitution in a series of referendums.”²⁷

The Australian Constitution creating the three arms of government, the executive, the legislative, and the judiciary work in unison, from the creation of a law, the application of the law, and the interpreting the law.

But does the Commonwealth of Australia have the ultimate political and legal authority to enforce Australian laws on the tribal nations if the sovereignty was never properly secured by the Crown over the Australian landmass?

Native Title; the Flawed Attempt

The Native Title concept, no matter how well meaning, as enacted by the Native Title Act 1993 cannot and does not address the underlying issues of sovereignty, dominion, possession, nor does it provide a legitimate mechanism to secure for the Commonwealth of Australia the

²⁵ <http://www.abc.net.au/news/2012-05-31/gillard-faces-down-mining-bosses/4043276>

²⁶ http://sydney.edu.au/law/slr/docs_pdfs/editions/slr_v26_n3.pdf

²⁷ http://www.peo.gov.au/uploads/peo/docs/closer-look/CloserLook_Constitution.pdf page 2

political and legal authority over the Australian landmass. It does provide concrete evidence as to the fact that the Aboriginal and Torres Strait Islander people are the true and correct owners of the land mass **pursuant to their continuing laws and customs.**

The single unassailable obstacle is the one of a treaty or consent with the first in time tribal inhabitants granting the consent to the Commonwealth of Australia to have the political and legal authority within the tribal territories.

This all stems from the lack of inclusion in the original referendums to federate the colonies into becoming the Commonwealth of Australia.

The individual States and thus the Commonwealth of Australia lost the ability to enter into a treaty with the passing of the Australia Acts 1986 with the last vestiges of colonialism being removed forever.

Whilst Native Title is a useful tool for the identification of who the true and correct owners of the tribal lands are, it cannot go any further.

The Native Title Act 1993 removes any preconceived idea that the Australian landmass was terra nullius.

“The High Court has: (a) rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement;”²⁸

It is now a matter of fact that the Australian landmass was inhabited by peoples with their own laws at the time the British made the claim of sovereignty. However the waters are muddied even further with the Native Title Act 1993. *“In correcting the terra nullius error without fully working out the consequences for the ‘conquered/ settled’ distinction, **the Court may have left its analysis incomplete.**”²⁹*

Due to the lack of ‘Constitutional Recognition’ in the federation process the tribal inhabitants cannot be legally seen within any of the courts created subject to the Australian Constitution; The Australian people have not yet agreed to allow the tribal inhabitants to take part in the Commonwealth of Australia leaving them legally invisible as they do not have an Australian person to be seen by within the Australian courts.

Those Australian citizens that apply for a Native Title Consent Determination must abandon their original first in time tribal law, to take a pledge of allegiance to the Commonwealth of Australia to enable them to use an Australian person. This abandonment of their tribal laws

²⁸ Native Title Act 1993, Preamble, page 1

²⁹ Australian Constitutional Law and Theory 6th edition, Blackshield & Williams, page 138 [4.27]

disables them from speaking in regards to tribal issues, such as entering into treaties, or any other issues concerning tribal land pursuant to tribal law.

The Commonwealth of Australia does not have the consent for the political and legal authority over the persons created subject to tribal law.

How Did Australia Arrive at this Position?

The most glaring question that arises is that how did the Commonwealth of Australia arrive at this position.

To answer that question we have to look back in time to the settlement of the landmass known as Australia.

Captain Cook was given secret orders that should he find the great southern land he was to do one of two things. If the land was inhabited he was to cultivate friendship and alliance with the natives.

“You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain: or: if you find the country uninhabited take possession for his Majesty by setting up proper marks and inscriptions, as first discoverers and possessors.”³⁰

With the hoisting of the English colours on Possession Islanders, were the tribal inhabitants given full disclosure in a manner that they could comprehend of the consequences of the declaration of possession?

“There, on Possession Island, just before sunset on Wednesday 22 August 1770, he declared the coast a British possession: Notwithstanding I had in the Name of His Majesty taken possession of several places upon this coast, I now once more hoisted the English Colours and in the Name of His Majesty King George took possession of the whole Eastern Coast... by the name New South Wales, together with all the Bays, Harbours Rivers and Islands situate upon the said coast, after which we fired three Volleys of small Arms which was Answered by the like number from the Ship.”³¹

History shows that Captain Cook never really obeyed his orders.

³⁰ http://foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf

³¹ <http://foundingdocs.gov.au/item-sdid-67.html>

Cook had recorded signs that the coast was inhabited during the voyage north, and here he noted as he returned to the ship the great number of fires on all the land and islands about them, 'a certain sign they are inhabited'."³²

History shows that the British occupied the Australian landmass without the consent of the natives. The Letter Patent for the establishment of South Australia demonstrates that the Monarch of Great Britain was aware of the Aboriginal Natives on the continent in the establishment of the colony of South Australia.

*"...Provided always that nothing in those Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own persons or in persons of their descendants of any lands therein now actually occupied or enjoyed by such natives."*³³

The State of South Australia could not be established and developed without impacting on the Aboriginal Natives; such impact is demonstrated within the Native Title Consent Determinations of the State.

As the six colonies agreed to federate to form the Commonwealth of Australia, the Aboriginal Natives, especially in Queensland and Western Australia³⁴, were excluded from such referendums and federation. They were not considered as British Subjects due to the existence of their own ancient society, customs and laws.

With the birth of the Commonwealth of Australia, Queen Victoria acknowledged that the Aboriginal Natives were not part of the Commonwealth and could not be counted when reckoning the population of the Commonwealth³⁵

Queen Victoria further acknowledged that the colonies did not have the ability to make laws for the people of Aboriginal race, thereby ensuring that the newly constituted Commonwealth of Australia did not possess the authority and or powers to make laws for the people of the aboriginal race in any State.³⁶

This inability to make laws for the peace, order, and good government remained in the Commonwealth of Australia Constitution Act 1901 until the referendum held in 1967³⁷. This demonstrates that even after the Commonwealth of Australia was a completely separate

³² <http://foundingdocs.gov.au/item-sdid-67.html>

³³ http://www.foundingdocs.gov.au/resources/transcripts/sa2_doc_1836.pdf

³⁴ http://www.aec.gov.au/about_aec/Publications/Fact_Sheets/fact_sheets/fact1.pdf page 2

³⁵ Commonwealth of Australia Constitution Act [63 & 64 VICT] section 127

³⁶ Commonwealth of Australia Constitution Act [63 & 64 VICT] section 51 xxvi

³⁷ <http://www.naa.gov.au/collection/fact-sheets/fs150.aspx>

sovereign nation due to the enacting of the Statute of Westminster Act 1931 and the Statute of Westminster Adoption Act 1942, it still did not have the ability to make laws for the peace, order and good government for the people of the aboriginal race.

The question that is raised by the referendum of 1967 is one of standing. If prior to the referendum the aboriginal race were not considered as an Australian citizen and could not be counted in the reckoning of the numbers of the Commonwealth, then could they take part in the referendum? Only an Australian citizen can take part in an Australian referendum.

*“A referendum is a vote of **the Australian people** on measures proposed or passed by the Australian Parliament.”³⁸*

The aboriginal natives could not take part in the referendum as they were not Australian citizens. As the Aboriginal Natives that were not Australian immediately prior to the 1967 referendum and thereby not subject to laws created by section 51 of the Australian Constitution, then by what mechanism did they become subject to the laws of the Commonwealth of Australia immediately after the referendum? What would be the situation should the 1967 referendum have been a no? This inability to make laws for Tribal non-citizens is reflected in the Native Title Consent Determinations handed down by the Federal Court of Australia today.

Did the yes vote for the 1967 grant citizenship or voting rights to the Aboriginal Natives?

“Two of the biggest assumptions about it that are wrong are that it gave indigenous people the right to vote or that it was the moment at which indigenous people became citizens.”³⁹

The 1967 referendum success did not end the reform debate.

“One reason for this is that the 1967 referendum deleted negative references to Aboriginal people from the Constitution, but put nothing in their place. As a result, the Constitution makes no mention of Aboriginal peoples.”⁴⁰

The Commonwealth of Australia Constitution Act clearly defines the people who agreed to federate.

“Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United

³⁸ <http://www.aec.gov.au/Elections/referendums/index.htm>

³⁹ http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop48/1967referendum

⁴⁰ Australian Constitutional Law and Theory 6th edition, Blackshield & Williams, page 1352, [30.29]

Kingdom of Great Britain and Ireland, ad under the Constitution hereby established.”⁴¹

The Commonwealth of Australia with the enactment of the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 has further acknowledged the facts that the Aboriginal peoples are not yet constitutionally recognised.

*“The Parliament is committed to placing before the **Australian people** at a referendum a proposal for the **constitutional recognition of Aboriginal and Torres Strait Islander Peoples.**”⁴²*

The Yidindji Tribal people are clearly not included as being the Australian people.

Once again the Aboriginal people of tribal standing cannot take part in the Australian referendum for constitutional recognition.

“Its time to RECOGNISE Aboriginal and Torres Strait Islander peoples in Australia’s Constitution. It’s the right thing to do.”⁴³

It does not matter that should the Australian people vote ‘yes’ and the Aboriginal and Torres Strait Islander peoples are recognised within the Australian Constitution, the Commonwealth of Australia will still not have the ability to make laws for the peace, order and good government of the Aboriginal and Torres Strait Islander people until such people give **consent** to be subject to the Australian Constitution. The Commonwealth of Australia cannot force the Australian Constitution onto another nation and in this instance the Yidindji Tribal Nation.

“Recognition- In international law, a unilateral political act by a state acknowledging and confirming a specific legal situation or consequence, such as the emergence of a new state or government. No entity can claim to be recognised as a matter of right; nor is there a duty to recognise.”⁴⁴

The recognition referendum, just like the 1967 referendum will be for the Australian people, by the Australian people. The aboriginal tribal nations, due to the lack of constitutional recognition, being unable to participate in such referendums cannot have the results applied to their nations by the Commonwealth of Australia, lest it may be construed as either **enslavement** and or **forced assimilation**, both of which the Commonwealth of Australia

⁴¹ <http://www.comlaw.gov.au/Details/C2013Q00005> page 7

⁴² Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 preamble

⁴³ <http://www.recognise.org.au/>

⁴⁴ LexisNexis Concise Australian Legal Dictionary 4th edition

have declared as abhorrent and or a crime against humanity⁴⁵. Any forced assimilation would contravene the United Nations Declaration on the Rights of Indigenous Peoples⁴⁶ and the International Covenants^{47, 48}.

The Commonwealth of Australia is already on insecure grounds by not having the consent of the first in time nations to occupy the tribal territories, let alone try and enforce a foreign constitution upon such nations.

The Australian Courts still cannot agree as to how the landmass was acquired, and that just exacerbates the problems of how the Commonwealth of Australia secured political and legal authority.

“...it was open to the Court in Mabo (No.2) to hold that the classification of the Australian colonies as ‘settled’ was a misapplication of Blackstone’s categories, and had never been an accurate statement of the common law. Instead, however, the majority of judges agonised over whether it was open to them to change the common law. The ‘supposed’ change involved the acceptance of two propositions;

- 1. That in 1788 Australia, and more particularly New South Wales, was not terra nullius (that is, land belonging to no-one); and*
- 2. That the Crown on acquisition of Australia in 1788 did not immediately and automatically assume full and beneficial ownership of all land in Australia.”⁴⁹*

Yidindji Tribal Nation

Yidindji Tribal Nation is a true ‘sovereign’ nation in the very sense of the word; so acknowledged by the judicial system of the Commonwealth of Australia.

“To make law is thus the key mark of a sovereign, something that even those who ‘have written best [about the state] have not sufficiently and as it ought, manifested. According to Bodin, there would be nine marks of sovereignty; (i) the power to legislate, (ii) to make war and peace, (iii) to appoint magistrates, (iv) to hear final appeals, (v) to grant pardons, (vi) to receive homage, (vii) to coin money, (viii) to regulate weights and measures, and (ix) to imposes taxes.”⁵⁰

⁴⁵ Criminal Code Act 1995, section 268.10

⁴⁶ United Nations Declaration on the Rights of Indigenous Peoples, article 8

⁴⁷ International Covenant on Civil and Political Rights

⁴⁸ International Covenant on Economic, Social and Cultural Rights

⁴⁹ Australian Constitutional Law and Theory 6th edition, Blackshield & Williams, page 138 [4.24]

⁵⁰ The Social Power of Bodin’s ‘Sovereignty’ and International Law Stephane Beaulac pages 15, 16

Justice Dowsett has bound all Australians to the facts that are contained within the Native Title Consent Determination Mundraby on behalf of the Combined Mandingalbay Yidindji-Gunggandji People v State of Queensland [2012] FCA 1039. Those facts at Reasons for Judgement demonstrate that the Yidindji Tribal Nation has all of what would be considered as marks of sovereignty as described in the works of Bodin.

The ability to enter into a treaty or to grant consent to the Commonwealth of Australia to have the legitimate power and authority on the landmass known as Australia must be as equals whereby both parties agreeing to enter into negotiations are of an equal standing.

All Australian citizens are represented by the Prime Minister of Australia, and that person along with the Queens Representative must enter into negotiations with the continuing tribal nations.

The tribal peoples of their respective tribal nations are represented by their elders as selected according to tribal laws of each tribal nation.

The Yidindji Tribal Nation has revitalised its ancient institutions to create the remedy to be able to enter into negotiations with the Commonwealth of Australia, thus with the ultimate aim of resolving the unsettled issues of the statement made by Prime Minister John Howard regarding the lack of treaty or consent and to have legitimate power and authority within the Yidindji Tribal boundaries.

Justice Dowsett has handed down a number of Native Title Consent Determinations concerning the Yidindji Tribal Peoples.

Within such determinations he has clearly acknowledged that the Yidindji Tribal Nation has survived the settlement by the British and subsequently the Australians of the Yidindji Tribal Lands.

This acknowledgement is demonstrated in the determinations *'Johnson on behalf of the Tableland Yidinji People #1 v State of Queensland [2012] FCA 1417'*

*"Despite early dispossession, traditional laws and customs have survived, although in modified forms... I am satisfied that the Tableland Yidinji people have an unbroken physical connection to the claim area, dating back to a time prior to 1788."*⁵¹

; and *'Mundraby on behalf of the Combined Mandingalbay Yidinji- Gunggandji People v State of Queensland [2012] FCA 1039'*

⁵¹ <https://jade.barnet.com.au/Jade.html#article=289103>, Reasons for Judgement, point 21

“They were there when Captain Cook sailed past in 1770 in the Endeavour, and they are there today.”⁵²

The Yidindji Tribal Nation is revitalising all its institutions in accord with its ancient laws and customs; such laws and customs that allow the Yidindji Tribal Nation to create the Sovereign Yidindji Government to enter into negotiations with the Commonwealth of Australia as equals.

“The laws and customs characteristics of the identified regional society can be identified as: A system of land tenure, wherein language-labelled groups are associated with identifiable areas of land and water... A system of authority and decision making,”⁵³

This particular point should properly be in keeping with the issues raised in Mabo (No. 2).

“The Court recognised that the indigenous population had a pre-existing system of law in relation to property rights, which remained in force under the new sovereign except where specifically modified or extinguished by legislative or executive action.”⁵⁴

The Commonwealth of Australia has acknowledged that the first in time tribal peoples have the ability to revitalise their institutions when the Commonwealth of Australia ratified the United Nations Declaration on the Rights of Indigenous Peoples.

“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”⁵⁵

If the Crown cannot make laws for the peace, order, and good government of the Aboriginal and Torres Strait Islander peoples then it does not have enough authority to extinguish the traditional law and land tenures of those same people.

The Remedy in Brief

Using the Vienna Convention on the Law of Treaties 1969 as a guide, whereas both parties wanting to enter into negotiations for a treaty enter such negotiations as equals.

The Commonwealth of Australia needs the consent of each and every individual tribal nation within the claimed areas of the Commonwealth of Australia to ensure that the Commonwealth of Australia has obtained its sovereignty in a manner that befits such status.

⁵² <https://jade.barnet.com.au/Jade.html#article=289068>, Reasons for Judgement, point 1

⁵³ <https://jade.barnet.com.au/Jade.html#article=289068> Reasons for Judgement, point 21

⁵⁴ Australian Constitutional Law and Theory 6th edition, Blackshield & Williams, page 138 [4.25]

⁵⁵ United Nations Declaration on the Rights of Indigenous Peoples, article 5

The standing of the Commonwealth of Australia is inferior to that of the tribal peoples of the landmass known as Australia. As the individual tribal nations define their territories the Commonwealth of Australia loses territory. It therefore would not have a definable territory and theoretically the standing of the Commonwealth of Australia could not meet the international requirements of the definition as a State or Nation⁵⁶.

As soon as the Commonwealth of Australia has a defined territory with the consent of one individual tribal nation, the Commonwealth of Australia would then meet the international requirements and have standing to negotiate in international treaties with the rest of the tribal nations of this landmass.

The tribal people being considered as ecclesiastical heir of the supreme creator have to create a negotiating entity that is of equal standing to the Commonwealth of Australia. That entity would be considered as a Government created by each respective tribal nation.

The Yidindji Tribal Nation subject to the Supreme Creator known by the term 'Goopi' has created the Sovereign Yidindji Government.

The Sovereign Yidindji Government is there to serve the Yidindji Tribal People, including but not limited to the negotiations of a treaty with and or the granting consent to the Commonwealth of Australia.

The Sovereign Yidindji Government acquires citizens through the issuance of birth certificates pursuant to Yidindji Births Deaths and Marriage Act, and or the Yidindji Citizenship Act.

This model of treaty negotiations satisfies all requirements for the successful completion of such a treaty to enable the Commonwealth of Australia to have valid consent for the legitimate power and authority on Australia.

Using the Montevideo Convention on the Rights and Duties of States 1933 as a guide, the requirements to be considered a State⁵⁷ are:

1. Have a permanent population
2. Have a defined Territory
3. Have a government
4. Have the capacity to enter into relations with other states

The Yidindji Tribal Nation, in reference to the United Nations Declaration on the Rights of Indigenous People to which the Commonwealth of Australia became a signatory to in 2009, and through the various notices and proclamations to the whole world have made known to

⁵⁶ Montevideo Convention on the Rights and Duties of States, article 1

⁵⁷ Montevideo Convention on the Rights and Duties of States, article 1

the Commonwealth of Australia that the Yidindji Tribal Nation is revitalising all the ancient institutions along with the creation of a more modern version of government, known as the Sovereign Yidindji Government, in keeping with the global trend towards democracy.

The Yidindji Tribal Council of Elders on the 5th day of January authorised Goon-Jarra-By to submit to the world the proclamation of the Yidindji Tribal People revitalising Yidindji Tribal Institutions⁵⁸ along with a map representing the Yidindji Tribal Territory. This was sent to the world on the 7th day of January 2013.

The Yidindji Tribal Council of Elders on behalf of and under instruction from the Yidindji Tribal People have established the Sovereign Yidindji Government⁵⁹ on the 16th day of October 2014.

The Sovereign Yidindji Government identifier⁶⁰ was unveiled to the world on the 20th day of November 2014.

The Sovereign Yidindji Government established Minjaani Wungarlji⁶¹ (the Department of Foreign Affairs and Trade) on the 3rd day of January 2015

The Sovereign Yidindji Government appointed a Minister for Foreign Affairs⁶² on the 4th day of January 2015.

A Win-Win Situation

The Yidindji Tribal Nation and the Sovereign Yidindji Government must exist to grant the Commonwealth of Australia the political and legal authority (consent) it so desperately needs. The Yidindji Tribal Nation and Sovereign Yidindji Government have to continue in perpetuity for the Commonwealth of Australia to continue in perpetuity.

The conclusion of the granting of consent or a successful treaty between the Commonwealth of Australia and the Yidindji Tribal Nation through the Sovereign Yidindji Government will have far reaching affects for both nations.

The British colonisers and the subsequent Commonwealth of Australia have perpetrated crimes against humanity on a massive scale. From the genocide, attempted genocide, forced assimilation and theft of lands and resources are just to name a few.

While we will never be able to bring back the lives of those who died at the hands of the respective governments, nor repair the wanton destruction of the tribal societies so smashed

⁵⁸ Yidindji Tribal Council of Elders Determination Number 7

⁵⁹ Yidindji Tribal Council of Elders Public Notice 6

⁶⁰ Sovereign Yidindji Government Public Notice 10

⁶¹ Sovereign Yidindji Government Public Notice 17

⁶² Sovereign Yidindji Government Public Notice 18

at the hands of the uninvited settlers; these acts of aggression against the original people will have a chance to be addressed and settled in a peaceful manner.

These negotiations will not mean that the Yidindji Tribal Nation will cease to exist, nor lose its sovereignty, quite the contrary. Should the Commonwealth of Australia fail to uphold its end of the bargain the treaty will be voided and collapsed, resulting in all political and legal authority (consent) reverting back to the Yidindji Tribal Nation within the Yidindji Tribal Territory.

The Yidindji Tribal Nation through the Sovereign Yidindji Government will be able to negotiate in good faith what it wants in return for the Yidindji tribal resources, past, present and future.

The Commonwealth of Australia will finally have a legitimate base to secure the ultimate political and legal authority (consent) for the Crown over the area of the Yidindji Tribal Territories.

The Commonwealth of Australia will have force and effect granted to it by the first in time law system that will always be here.

“Dormiunt aliquando leges, nunquam moriuntur- The laws sometimes sleeps, never dies.”⁶³

“Quod prius est verius, et quod prius est tempore potius est jure- What is earlier is more genuine, and what is earlier in time is preferred in law.”⁶⁴

No other entity will be able to circumvent this position and standing at law.

This can then be rolled out as a blueprint for the negotiations of a treaty between the Commonwealth of Australia and the other tribal nations within the area of the claimed jurisdiction of the Commonwealth of Australia. Whilst the Yidindji Tribal Nation cannot speak for the other tribal nations, the Yidindji Tribal Nation sees this opportunity to correct the past and set the future as a win - win situation for every person within the Australian jurisdiction.

This first treaty would give the Commonwealth of Australia a standing that it has never had before, real agreed sovereignty, enabling the Commonwealth of Australia to proceed with full confidence to enter other treaties regarding the landmass known as Australia

The past will be settled and the future secured.

Should the Commonwealth of Australia fail to act upon the olive branch that the Yidindji Tribal People are handing to them, there can never be any certainty for the future of Australia. Someone in the future will keep raising the very same questions that have been asked in the

⁶³ Black's Law Dictionary 9th edition

⁶⁴ LexisNexis Concise Australian Legal Dictionary 4th edition

past and at present; how, when, and where did the Commonwealth of Australia secure political and legal authority over the Australian landmass?

In a Simplified Form

The steps to a simple and straight forward process:

1. The Tribal Nation revitalise their institutions
2. The tribal members not being a citizen of any other nation (including Australia) revitalise the ancient laws of their tribe.
3. The Tribal Nation defines its territory
4. The tribal members revitalise the Tribal Council of Elders
5. The Tribal Nation proclaims its standing and territory to the world
6. The Tribal Council of Elders grants approval for the establishment of a Tribal Government (this is then of the equal standing as the Commonwealth of Australia)
The Tribal Government and its members is the servant of the tribal nation
7. The Tribal Government appoints a Foreign Minister to enter into international arrangements such as treaties
8. The Tribal Nation can work out what it wants for the tribes future, prior to entering into negotiations
9. The Tribal Government requests the Commonwealth of Australia to enter into negotiations for a treaty or consent between the Tribal Government and the Commonwealth of Australia
10. Negotiations take place and a binding treaty or consent obtained

This addresses all the shortfalls of the present approach. Namely, both parties:

1. are of equal standing
2. are sovereign nations in their own right
3. are recognised in all current Australian Court Native Title determinations
4. are foreign or international to each other
5. give full disclosure in a language that is comprehensible to both parties
6. settle the past events and secure the future

Many issues were raised in various instruments produced by the Commonwealth of Australia, and in particular the prospect of collapsing the Australian Constitution;

“However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.”⁶⁵

By accepting the basic principles and theories of law as outlined by Hans Kelsen in his various works the Australian legal system can only be reinforced or bolstered by the acceptance of the Grundnorm of the single creator authorising the various tribes to speak for certain areas of land.

This uniting of the two separate normative societies and law systems will grant the Commonwealth of Australia a valid consent to administer laws created by the Sovereign Yidindji Government subject to certain terms and conditions, terms and conditions yet to be determined.

Should this fail to be so, one system of law will have to give way, as there cannot be two separate equal law systems, especially regarding land tenure, on the one piece of land.

Tribal law is here to stay and the tribes still hold the original titles possessed pursuant to traditional laws. The Commonwealth of Australia at best can only ever issue derivative titles.

The tribal peoples of this landmass as the ‘underwriters’ hold the ultimate authority.

In the interest of all parties involved it would be wiser for the Commonwealth of Australia to focus its time, effort and money into achieving a long lasting sustainable future for the Commonwealth of Australia, rather than placing so much effort into such campaigns of ‘Recognition’.

As stated earlier recognition will achieve nothing as recognition or better described as ‘The Constitutive Theory of Recognition’^{66,67}, has already been achieved; with the acknowledgements attained through the various Native Title Consent Determinations and Commonwealth legislations.

Let’s focus the energies into a better outcome for the Commonwealth of Australia and its citizens.

⁶⁵ <https://jade.barnet.com.au/Jade.html#article=67683> paragraph 43

⁶⁶ Dictionary of International and Comparative Law, 3rd edition, 2003, James R Fox

⁶⁷ Principles of International Law, page 284, Hans Kelsen