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# Final Report of the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel

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September 2014

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## Executive Summary

*“I suppose to some extent I see this as nation building. We have now matured as a nation and our Constitution needs to recognise that.”<sup>1</sup>*

The recognition of Aboriginal and Torres Strait Islander peoples in our country’s founding document is a matter of profound importance. We cannot afford to get it wrong. Since 1967, when over 90% of Australians supported the inclusion of Indigenous Australians in the national census and a new Commonwealth responsibility for Indigenous policy matters, no other referendum has come close in its significance or impact on Australia’s national psyche.

Constitutional recognition embodies the strong spirit of reconciliation across Australia, signalling the next important step in our maturity as a nation. Non-Indigenous Australians who have not been subject to racism need to understand the debilitating effect it has on those who regularly experience it.

Most Australians know of the existence of the Constitution in broad terms and see it as the rulebook that ensures ‘fair play’ for all. Against that backdrop it is only logical that many Indigenous Australians feel that the Constitution not only fails to acknowledge their unique place in the country’s history, but also, that it has let them down. In fact, it is more often the case that when discrimination happens it is because we have failed to uphold the intent and inherent values of the Constitution.

It is readily apparent from the research that most Australians want to ensure that the Constitution reflects what it means to be Australian in the 21<sup>st</sup> century. We have a landmark opportunity to recognise our first peoples and ensure the Constitution never again allows for the omissions and inequalities that have happened in the past. It would allow us to protect what is uniquely Australian and acknowledge over 40,000 years of history. It ensures our Constitution reflects our values and recognises the equal worth and dignity of each citizen.

As a principle, there is broad support for the recognition and acknowledgement of our nation’s first peoples in the Constitution. Indeed, in the current climate, few issues have such a solid base of public support. However, it is also clear that levels of awareness and understanding of why change is needed, and what it would mean, are still low.

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<sup>1</sup> Evidence to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Senate, Halls Creek, 22 July 2014, p. 16. (Mr Ian Trust, Chairman and Executive Director, Wunan Foundation).

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Despite the issue of constitutional recognition being on the national agenda since 2006, there is evidence that we are losing momentum and awareness is drifting. Over the past year public awareness levels on the referendum have dropped to less than 40% across the country. Encouragingly, support remains steady across both Indigenous and non-Indigenous people but this is at risk of declining if there isn't a clear path to a referendum.

We have not yet reached a point where we can proceed immediately to a referendum on the issue. To give the greatest chance of success, a number of pre-conditions need to be met. Fundamentally, this rests on a number of interdependent elements: agreeing a final proposal that can win the support of Indigenous Australians, parliaments and the people; setting a clear timeframe to show renewed commitment and urgency; and significantly raising the profile and understanding of constitutional recognition across the population. Our report reflects on each of these matters.

We are ready to take the next step on the path to a referendum. A 'circuit-breaker' is needed to move the debate forward. The time for clarity of intention and action is now.

First and foremost, the Panel has found that there is an **immediate imperative to remove any sense of ambiguity** around the intention to proceed to a referendum. The process to date has been challenging, with many moving parts, unclear timelines and a lack of certainty about next steps. This has led to unrealistic expectations on several fronts, leading to ambiguity and a sense of frustration among key groups. In our consultations we consistently heard the need for a clear public re-commitment to constitutional recognition. Indeed, there is a need for strong public commitment from all sides of politics, from state and territory governments, and from a wide range of Aboriginal and Torres Strait Islander people. This must be accompanied by a clear pathway forward, articulating the steps to get the country to a point of readiness and delivery of a referendum.

As noted above, awareness levels are flagging. **Raising awareness of why** we should pursue a referendum is a relatively straightforward matter, but efforts to promote this understanding need to be ramped up in the near future as investment in a wide-scale national campaign has been limited. The campaign will require new investment and a focus on the place our first Australians held in this nation before European settlement together with the valuable ongoing contribution of Aboriginal and Torres Strait Islander peoples and cultures to modern Australia. There is also a very real need for strong political leadership in explaining the place and role of our Constitution.

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**Crystallising the question to be put to the Australian voters** lies at the heart of the referendum. Indeed, shaping a final proposition is by far the most complex matter on the path to a referendum. Definitively assessing the country's readiness for a referendum is difficult in the absence of the final proposal to be put to a vote.

It is clear that there is a thirst for change that is both symbolic and substantial. History confirms that to vote 'yes', Australians must be convinced that the proposed change to the Constitution is worth the investment. Consultations and research show that the change must be more than symbolic to win both Indigenous support and that of the wider public. The broader population also want to know that the final proposal is one that is wanted by the majority of Aboriginal and Torres Strait Islander Australians before they will support it. There are a range of diverse views on wording of the final proposition. Finding the 'sweet spot' that meets the test of meaningful change without significantly increasing the risk of uncertainty and judicial activism is challenging but possible.

Our report provides some observations around the issues that will need to be confronted when settling on a final model. Research shows that there is strong support for changes that recognise the place and history of Indigenous Australians and the removal of references to race. Australians want to address inequality in our Constitution but are wary of 'special treatment' for one group of people on the basis of race. The scope of the final proposition is narrowing and centres on:

- the placement of a statement of recognition;
- removal of section 25, which currently envisages the ability of state governments to disqualify a group of people from voting based on race; and
- re-formulation of the race power (section 51(xxvi)) to avoid the potential for perverse outcomes while retaining the Commonwealth's responsibility for Indigenous affairs.

It is worth noting that the 1967 referendum changes were arguably not as substantial as the modern public narrative indicates – yet the moral force of the changes have been tremendous. While not of itself sufficient, the importance of symbolic change through a statement of recognition should not be understated, and the strength of unity and goodwill accompanying such changes will be a landmark moment in our nation.

The current debate lends itself to more substantial changes – changes which will amend the Constitution so that it reflects our values. Section 25 of the Constitution is out-dated and indeed reflective of a time long past – where our leaders could restrict, on the basis of race, access to the most fundamental democratic right, the right to vote. The Panel considers that the Australian people are ready for this change.

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Changes beyond these have become the real focus of the debate. This centres on the way in which the Commonwealth can exercise its powers under the Constitution and discharge its responsibilities in Indigenous affairs without the risk of perverse outcomes. These changes elicit the most polarised opinions.

As noted above, the Panel found a significant divergence of perspectives on what the final proposition should look like, and what the rightful role of the Constitution is in recognising Indigenous Australians. Importantly the Panel is optimistic that a strong proposition can be agreed – one which balances symbolism, while also ensuring there is substance to the change.

The work of the Expert Panel on Constitutional Recognition of Indigenous Australians and more recently the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has been invaluable in exploring the options and building multi-party support. Ultimately, however, the referendum rests on finalising a set of words that can be widely supported by Aboriginal and Torres Strait Islander people and the wider public. Political leadership is needed to break through the ongoing cycle of deliberations. There are a number of ways to achieve this, but any mechanism must have legitimacy, trust across the political spectrum, the direct involvement of Indigenous people and be above the challenges of day to day politics. It requires dedicated commitment, leadership and focus to bring about a truly multi-partisan approach – one where Indigenous Australians are full and respected partners in the change.

The **timing of a referendum** also needs to be settled quickly to give renewed certainty that we are progressing to a vote and to build momentum. The complex and hard work of finalising a model does not get any easier with delays or deferral. There are mixed views on when to hold a referendum and whether to hold it with an election or as a standalone vote. Holding a referendum within this term of government is ambitious but possible if all the pre-conditions are met. This hinges on gaining agreement to a final set of words and building sufficient understanding and support for the change. All efforts must be highly synchronised and coordinated.

The Panel heard views that holding a referendum at the time of the next election is possible, and in some cases desirable, principally to reduce cost. This needs to be balanced with the risks associated with holding a referendum that is designed to unite the nation, and which needs unwavering multi-partisan support, at a time of inevitable political tension. Others were of the strong view that the imperative to ‘get it right’ justifies holding a referendum after the next election. The Panel also heard that many

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Aboriginal and Torres Strait Islander people were increasingly concerned about the ability to deliver constitutional change if the timeframe lingers.

However, almost all of the people we spoke to made it clear that reaching agreement on a final proposition to put to a referendum will ultimately determine the timeframe.

The Panel is of the view that an end-date must be identified – to remove ambiguity and achieve a sense of focus. The Panel suggests that a referendum should be held no later than the first half of 2017, within a fifty year window of the 1967 referendum. If the pre-conditions outlined in this report can be met earlier, including widespread support for an agreed proposition, then there remains a case for an earlier referendum. However, above all else, the Panel recognises that such a referendum is a most fundamental step for our nation. Getting it right and achieving success must be the overriding imperative.

### **Recommendations:**

On the basis of the evidence before it, the Panel recommends:

1. A 'circuit breaker' needs to be rapidly identified to settle the final form of words and draw debate on the model to a conclusion. This will build a sense of national urgency and provide renewed certainty that the country will proceed to a referendum. Delivering on the commitment to form a special committee to guide the referendum, a Referendum Council of trusted national figures is recommended.

The Referendum Council would:

- a. Have legitimacy in the eyes of the nation, be seen as apolitical and include both Indigenous and non-Indigenous members.
  - b. Advise on the final proposition and gain agreement to it from Indigenous peoples, constitutional experts, parliaments and the wider public.
  - c. Draw on the work of this report and the Joint Select Committee.
  - d. Ensure that the final proposition is legally sound, clear, easily understood and does not significantly increase constitutional uncertainty.
2. The Parliament, state and territory governments and Aboriginal and Torres Strait Islander peoples publicly re-declare their commitment to constitutional recognition and working in collaboration towards a referendum.
  3. Timing parameters for a referendum should be settled as soon as possible to provide certainty and focus. A referendum should be held no later than the first

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half of 2017. If the pre-conditions outlined in this report can be met earlier, including widespread support for an agreed proposition, then there remains a case for an earlier referendum.

4. The Government should continue to support and resource Recognise, and its partner organisations, to finalise an increased public awareness strategy that builds a better understanding of why recognition is important in the wider community. This strategy should:
  - a. include a focus on the enduring contributions of Aboriginal and Torres Strait Islander peoples and cultures on the life of the nation;
  - b. focus on real Australians telling real stories;
  - c. draw on social research and historical facts;
  - d. target a wide audience, but with a focus on those groups that have the lowest levels of awareness;
  - e. ensure Aboriginal and Torres Strait Islander peoples are engaged in community education activities as broadly as possible; and
  - f. be educational in nature and include raising awareness of the role of the Constitution.
  
5. The Parliament should amend the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* to demonstrate continuing commitment and ensure the Act does not sunset in March 2015. The Act should be extended for no more than three years, to align with the timing of the referendum (as per Recommendation 3 above).<sup>2</sup>

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<sup>2</sup> Note: in this report the term 'Indigenous people/s' refers to both the Aboriginal and Torres Strait Islander peoples of Australia.



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## 1. Introduction

### Appointment and Terms of Reference

On 13 February 2013, on the fifth anniversary of the National Apology to the Stolen Generations, the House of Representatives passed the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, recognising the unique and special place of Aboriginal and Torres Strait Islander peoples in the Nation. The bill received Royal Assent on 27 March 2013, and came into effect on 28 March 2013.

Under the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (the Act of Recognition) the Minister for Indigenous Affairs appointed a Review Panel on 27 March 2014.

The Review Panel was tasked with assessing levels of public awareness and support for amending the Constitution to recognise Indigenous peoples and levels of community support for different proposals for constitutional change.

The Panel's **terms of reference** are to:

- consider the readiness of the Australian public to support a referendum to amend the Constitution to recognise Aboriginal and Torres Strait Islander peoples; and
- consider proposals for constitutional change to recognise Aboriginal and Torres Strait Islander peoples, taking into account the work of:
  - the Expert Panel on Constitutional Recognition of Indigenous Australians; and
  - Reconciliation Australia;
- identify which of those proposals would be most likely to obtain the support of the Australian people; and
- consider the levels of support for amending the Constitution to recognise Aboriginal and Torres Strait Islander peoples amongst:
  - Aboriginal and Torres Strait Islander peoples;
  - the wider Australian public; and
  - the governments of the states and territories;
- consider the pre-conditions for a successful referendum and possible steps to get there.

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## Context

The Review Panel's work has been informed by:

- the work of the Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel) and its 2012 report;
- the consultations and interim report of the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Joint Select Committee), noting that its final report is due on or by 30 June 2015.

## Approach

In fulfilling its role the Panel considered:

- the significant consultations and public opinion research undertaken by the Expert Panel between May and October 2011;
- the work of Reconciliation Australia through its 'Recognise' campaign (previously known as 'You Me Unity');
- the work of the Joint Select Committee; and
- other relevant research and surveys.

In acknowledging the role and work of the Joint Select Committee, the Panel's Terms of Reference did not extend to designing specific proposals or wording. Given the work of the Joint Select Committee is still underway at the time of this report and a final proposal has not been settled, the Panel tested support for the intent and scope of different proposals.

Conclusions of the Panel are based on:

- targeted stakeholder consultations with Commonwealth, state and territory government ministers and opposition leaders, Indigenous community leaders and organisations, interest groups, constitutional law experts, academics and other key stakeholders over the past three months. A list of stakeholders consulted by the Review Panel is at Appendix A;
- available transcripts from the Joint Select Committee's public consultations, discussions and submissions; and
- qualitative and quantitative public opinion research commissioned by the Panel.

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## 2. Pre-conditions for success:

The history of Australian referendums is fraught. The Australian public is inherently, and understandably, conservative when it comes to changing our founding democracy's document. Only 8 of the 44 referendums that have been put to the people since federation have succeeded.

It is almost universally acknowledged that this referendum is distinctly different. Many past referendums have addressed administrative issues, such as clarifying the extent of Commonwealth power, validating existing conventions, and removing anomalies or out-dated provisions (see Appendix B). Few have had such national importance riding on a successful vote.

*"This is a great moment we've got. This is a great opportunity Australians have got to do something that's right, that's decent and that will bring unity and help to create a greater level of pride amongst us all".<sup>3</sup>*

The recognition of our first peoples in the Constitution carries with it a moral imperative. The continued journey toward reconciliation relies on the restorative power of this referendum. A failed referendum cannot be contemplated. Indeed, the risk of anything but a resounding national 'yes' vote is difficult to comprehend. Fundamentally, the proposition to be put forward also needs to be legally sound and ensure that the Constitution remains true to its purpose.

At the same time, the Panel suggests that we have gone past the point of 'no return'. Recognition has been contemplated for much of the past decade and has been a live issue for the past eight years. For many Indigenous Australians, the path towards recognition has been too long and delays frustrating. Many stakeholders told the Panel that not going to a referendum at this point in our history will have implications that are almost as damaging as a 'no' vote.

The pre-conditions for referendum are clear and generally well known. As Williams and Hume<sup>4</sup> succinctly argue, a successful referendum requires:

- bipartisanship;
- popular ownership;
- popular education;

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<sup>3</sup> P Dodson, Radio Interview with Chris Ullman on 28 May 2014, ABC, retrieved 5 September 2014, <<http://www.abc.net.au/news/2014-05-28/patrick-dodson-calls-for-constitutional/5483072>>.

<sup>4</sup> G Williams & D Hume, *People Power: The History and Future of the Referendum in Australia*, University of New South Wales Press, Sydney, 2010, p. 239.

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- a sound and sensible proposal; and
  - a modern referendum process.

In the context of this referendum, popular ownership requires both an increase in awareness and the wide support of Indigenous Australians.

Meeting each of these pre-conditions is ambitious but achievable, and provides the best chance of success. All are necessary, but not of themselves sufficient. The Panel considers that each element is within reach.

### **Leadership and multi-party support**

Any referendum proposal must secure resounding and unequivocal multi-party support across governments (Commonwealth, state and territory) before it is put to the vote. There can be no difference between parties on the issue. Any attempts to politicise the issue risks fracturing support and disenfranchising voters. History shows that this support must endure, not only as the referendum bill passes Parliament, but right up until the referendum is held. Leaders of all political persuasions must actively campaign in support of the referendum to overcome the nation's inherent reluctance to support constitutional change.

All stakeholders reaffirmed this point. Recognition must be, and must be seen to be, above politics. Any signs of disagreement on the issue will jeopardise the chance of success.

This referendum, more than all others, needs a strong show of political leadership to signal the importance of the issue for our nation and the unity of parliaments supporting it. It requires a consistent message of cross-party collaboration. It presents a unique opportunity for an impressive show of parliamentary unity, responding to the will of the people and building confidence in our system of government.

*“We believe, however, that there must be a strong commitment to constitutional recognition sooner rather than later and, in turn, commitment of sufficient resources to achieve a successful referendum outcome.”<sup>5</sup>*

Similarly, gaining the support of all state and territory governments is critical to success. The Council of Australian Governments (COAG) will be an important mechanism in securing this support.

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<sup>5</sup> Evidence to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Senate, Melbourne, 14 August 2014, p. 2. (Mr Romlie Mokak, Chief Executive Officer, The Lowitja Institute).

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The Panel’s consultations confirm that all state and territory parliaments support constitutional recognition in principle. Most parliaments have recognised Aboriginal and Torres Strait Islander peoples in their own constitutions<sup>6</sup> but each has done it in its own way. To secure a majority of votes in a majority of states and territories, each jurisdiction needs to be treated individually, and both the proposition and the ways of communicating it must be considered in light of the differing needs of voters in that jurisdiction. In settling the final form of words, state and territory governments must be given an opportunity to consider the final proposal before it is put to the people.

**Recommendation:**

The Parliament, state and territory governments and Aboriginal and Torres Strait Islander peoples publicly re-declare their commitment to constitutional recognition and working in collaboration towards a referendum.

**Popular ownership**

Constitutional recognition must be driven by the Australian people. The referendum then becomes a point of inevitability in our nation’s story.

Research confirms that Australians still consider the Constitution to be the bedrock of our society. While specific knowledge about the Constitution is low, there is a broad understanding that it is the rulebook that governs our country. Voters don’t see the Constitution as aspirational, but rather as a foundation document that ‘catches up’ with current social ethics and standards.<sup>7</sup>

*“The Constitution is the ultimate example of past generations preventing their mistakes being made by subsequent generations of Australians.”<sup>8</sup>*

Non-Indigenous Australians want a way to make a positive difference for Indigenous peoples. There is a shared frustration about the limited progress made in Indigenous affairs and in overcoming disadvantage over the past decades. The referendum

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<sup>6</sup> All state governments with the exception of Western Australia have some form of recognition included in their constitutions. The Australian Capital Territory and Northern Territory Governments have each considered recommendations to amend their self-government acts to recognise Indigenous peoples but have not as yet done so.

<sup>7</sup> Crosby Textor, *Recognise Campaign Qualitative Research Summary*, un-published qualitative report commissioned by Review Panel, August 2011, p. 8.

<sup>8</sup> Ibid.

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empowers all Australians with the opportunity to take individual action in contributing to reconciliation and better outcomes for Indigenous Australians. This is a key factor in working towards success.

Achieving a sense of popular ownership also relies on a wide range of respected Australians, many of whom would otherwise be considered strange bedfellows, voicing their support. This will build trust in the ability to reach unity on this issue and reduce fear or disconnection amongst different voter groups. Ultimately, however, the success of the referendum depends on ordinary Australians telling extraordinary stories of what recognition means to them.

### **Strong Aboriginal and Torres Strait Islander support (popular ownership)**

The need for strong Aboriginal and Torres Strait Islander support for the referendum proposal is an intrinsic and necessary part of building popular ownership. Unlike most other referendums, Indigenous support is a critical pre-condition to establish legitimacy and support for this vote. Not only is it fundamental to Indigenous Australians that any changes that affect them are designed with them, but non-Indigenous Australians need to see that this change is wanted and driven by Aboriginal and Torres Strait Islander peoples.

The Panel's discussions, confirmed by the consultations of the Joint Select Committee, show that there was strong Indigenous support for the Expert Panel recommendations. A significant move away from these recommendations will need to be tested with Indigenous Australians again. The current consultations of the Joint Select Committee go some way towards this,<sup>9</sup> but once a final proposal is drafted it needs to be supported by Indigenous Australians before it goes to referendum. Consultations must involve, but also go beyond, prominent Indigenous Australians and aim to engage a diverse range of communities in building ownership over the final referendum proposal.

### **Popular education - awareness and understanding:**

A successful referendum relies on widespread public understanding of the need for change. When it comes to amending our Constitution, Australian voters have proven reluctant to change. Levels of awareness about the referendum and an understanding of why the referendum is important are low across the general community.

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<sup>9</sup> Consultations of the Joint Select Committee are due to conclude in November 2014. At the time of this report, a number of different formulations were being publicly tested by the Joint Select Committee – see Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report – July 2014*, Parliament of the Commonwealth of Australia, Canberra, 2014.

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In addition, Australians tend to have a limited knowledge of our history and that of our Indigenous peoples. Across the community relatively little is known of the injustices suffered by Indigenous Australians in the past, such as the Stolen Generations, lost wages and lack of recognition for service in defence forces. Explaining why constitutional recognition is important for Indigenous Australians, and indeed for all Australians, will be crucial in building support for change.

Public opinion research indicates that awareness of the referendum has dropped over the past twelve months in the general population – slipping from 42% to 34%.<sup>10</sup> The issue is drifting—most likely reflecting the lack of definitive progress toward a referendum and a sense that momentum is flagging. This drop in awareness is not surprising given the crowded political and media landscape, and the lack of a final proposition to drive the referendum. Of those that are aware of the referendum, only 17%<sup>11</sup> consider that they have a good understanding of the issues.

Despite this drop in awareness, support for constitutional recognition remains solid. Research suggests that this support will not be maintained unless the issue is elevated in the public consciousness. Significant effort needs to go into ramping up the awareness and understanding across the Australian public. The Panel advises that this commence in the near future to avoid losing further ground.

Previous referendums indicate that awareness and support both need to be at high levels across the country (ideally in the 80-90% range) before progressing to a referendum. Qualitative research shows that Australians need to understand why recognition of Indigenous Australians is important, who is behind it, what the benefits are and why we should do it now, before they will support it.

*(It is important) “to establish the need for reform and to have a clear narrative that explains what is needed and why”.*<sup>12</sup>

For success, the referendum must be seen as the next step on the path to reconciliation. Australians want to know that this step will help unite the country. There is a strong belief that change is needed. The debate should be framed as an issue that goes to the heart of what we as a nation see as core Australian values – fairness, equity and doing the right

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<sup>10</sup> Polity Research and Consulting, *Recognise: Tracking Community Sentiment Regarding Aboriginal and Torres Strait Islander Constitutional Recognition*, un-published quantitative report commissioned by Review Panel, August 2014, p. 5.

<sup>11</sup> Polity Research and Consulting, op. cit. p. 21.

<sup>12</sup> A Twomey, Submission 1132 to the Expert Panel on Constitutional Recognition of Indigenous Australians, September 2011, p. 68.

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thing. It should acknowledge that these values have not always been applied to our nation's first peoples and affirm the intention for positive change.

An awareness campaign should not be confused with a 'yes/no' campaign leading up to the referendum. It should be educational, focus on gaining awareness and support for the idea of recognition and be well underway before a proposed form of words is settled.<sup>13</sup>

### **A sound and sensible proposal**

The change to the Constitution will be longstanding and not easily reversed. Any proposal must be legally sound and avoid the risk of constitutional uncertainty. This will be an important pre-requisite in the minds of many voters.

The question that is put to the people must also be clear and easily understood. Consultations and research support the Expert Panel's view that ideally only one question is put to the voters to achieve the necessary constitutional changes.<sup>14</sup> Discussions with many state and territory Ministers, parliamentarians and constitutional experts confirmed the view that complexity or ambiguity in what was put forward at referendum increased the likelihood of failure.<sup>15</sup>

At the same time, the proposed change must be both symbolic and meaningful. To meet the expectations of the wider community and gain support, the final proposal must offer tangible change. To vote to change the Constitution, Australians need to accept that there is a gap or problem presented by the current words and that the proposed change will fix it. At its core, the public needs to see that the change is worth the effort of a referendum.

Many stakeholders stated that to secure their support the final proposition must, at a minimum: recognise Indigenous Australians as our first peoples; remove out-dated and odious<sup>16</sup> references to race; and constrain the way in which the Parliament exercises its

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<sup>13</sup> This is consistent with the recommendations of the Expert Panel that signalled the need for a comprehensive public education and awareness program. See Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution - Report of the Expert Panel*, January 2012, p. 227.

<sup>14</sup> *Ibid*, p. xix.

<sup>15</sup> See G Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution Should Say and How the Referendum Can Be Won', *Land, Rights, Laws: Issues of Native Title*, vol. 5, no. 1, September 2011, pp. 14 – 15; G Craven, 'Keep the constitutional change simple', *The Australian Financial Review*, 6 February 2012, p. 55.

<sup>16</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *op. cit*, p. 7.



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powers in relation to Indigenous Australians. Some form of protection from racial discrimination has been highlighted by the research as important. However, this issue is also the most polarising with constitutional conservatives. Many argue that such a protection goes beyond the principles of our Constitution, creates incongruous individual rights in a document that primarily outlines powers across the federation, and falls outside the intent of recognition.

The challenge of finding this ‘sweet spot’ – a proposition which balances expectations of Indigenous Australians and the wider community without increasing uncertainty or undermining existing rights (such as native title) – is not underestimated. However, the Panel is convinced that finding this balance is within reach. This is a threshold issue that needs to be resolved as soon as practicable and with confidence.

### **A modern referendum process**

A modern referendum process also affects the likelihood of success. In essence, the easier it is for people to vote the more likely a positive outcome. Many commentators have suggested that the Australian public resents going to the polling booth, particularly in the context of a federal election. Success depends on a process that makes voting as straightforward and efficient as possible.

This is the first Australian referendum to be held in an age of social media. Unlike the last referendum held in 1999, social media adds a new and significant dynamic to current debate. Modern campaigns on any issue are no longer a slow evolutionary process. The impact of the modern day media cycle must be considered not only in the context of building understanding and awareness of the referendum, or the yes/no campaigns, but also in modernising the mechanics of voting. There is a risk in dragging out the process. Once the final proposition is agreed, the pre-conditions outlined above are met and support is high, the Government needs to progress to a referendum on the issue.

For many voters this will be the first time they vote in a referendum. Over 22% of currently enrolled voters were not of voting age at the last referendum in 1999.<sup>17</sup> More than 62% of voters have never voted in a successful referendum.<sup>18</sup> Information on the

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<sup>17</sup> Australian Electoral Commission, *Elector Count by Division, Age Groups and Gender for all States/Territories: As at: 31 March 2014*, 2014, retrieved 5 September 2014, <[http://www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/elector\\_count/2014/elector-count-3-2014.pdf](http://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/elector_count/2014/elector-count-3-2014.pdf)>.

<sup>18</sup> The last successful referendum was held in 1977. For history of referendums in Australia, see generally: Australian Electoral Commission, *Referendum dates and results*, 2012, retrieved 5 September 2014 <[http://www.aec.gov.au/elections/referendums/Referendum\\_Dates\\_and\\_Results.htm](http://www.aec.gov.au/elections/referendums/Referendum_Dates_and_Results.htm)>.

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mechanics and purpose of a referendum will need to be easy to understand and digest to target these voters and avoid misunderstanding.

### 3. Finalising the model

The Act of Recognition requires the Panel to consider different proposals for constitutional change and identify which of those is most likely to obtain the support of the Australian people. In making its recommendations, the Panel considered the work of the Expert Panel, Reconciliation Australia (and in particular the work of the Recognise campaign) and the current work of the Joint Select Committee, as well as results from research that was commissioned for this review.

It is difficult to be definitive about the levels of support for a proposal without a final form of words to test. Unsurprisingly, the level of understanding (even amongst more informed stakeholders) about the detail of various proposals and key differences between them is low.<sup>19</sup> Settling the final proposal was not within the ambit of this Panel's terms of reference, nor was testing the legal implications of any proposals. Accordingly, the Panel considered the key elements of different models put forward by the Expert Panel and more recently the Joint Select Committee. These were broadly grouped as:

- A statement of recognition (including its placement)
- Removal of out-dated provisions based on race (section 25)
- Reformulation of the 'race power' to remove references to race, but retain the power for the Commonwealth to make laws for Indigenous Australians
- Protections from racial discrimination<sup>20</sup>
- Recognition of Indigenous languages<sup>21</sup>

In summary, views on the levels of support for different elements of the model are:

#### Statement of recognition

A statement recognising Aboriginal and Torres Strait Islander Australians as our first peoples and "*correcting the birth certificate of the nation*"<sup>22</sup> is almost universally

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<sup>19</sup> This was confirmed in discussions with the Joint Select Committee and others.

<sup>20</sup> See generally the proposals for a section 116A construction as recommended by the Expert Panel; Expert Panel on Constitutional Recognition of Indigenous Australians, op. cit., pp. xviii, 157 – 173.

<sup>21</sup> See generally the proposals for a section 127A construction as recommended by the Expert Panel; Expert Panel on Constitutional Recognition of Indigenous Australians, op. cit., pp. xviii, 109 – 133.

<sup>22</sup> This was the language used by Joseph Elu of the Torres Strait Regional Authority in consultations with the Review Panel on 27 August 2014.

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supported across all stakeholders. The key issue to be resolved is where such a statement would be included – in the Preamble to the British Act of Parliament establishing Australia’s Constitution or in the body of the Constitution itself. Some have even suggested a short statement be included in the Preamble and a more expansive ‘Declaration of Recognition’ be attached and printed with the Constitution, arguing that this would carry some authority without the complexity of constitutional amendment. Including a statement of recognition outside the body of the Constitution is unlikely to satisfy the majority of Indigenous Australians and significant sections of the wider public, and raises questions about how the court will view it in interpreting the Constitution.<sup>23</sup> It is clear from the work of the Expert Panel that a form of recognition which explicitly avoided any legal effect (as exists in some state constitutions) would not have the support of Indigenous Australians.<sup>24</sup>

### **Removing out-dated references to race (section 25)**

There is unequivocal support for removing out-dated and ‘odious’ provisions that discriminate on the basis of race.<sup>25</sup> Most people are unaware that our Constitution still includes provisions such as section 25 and are shocked when it is brought to their attention. Removing references to race is considered by many to be a ‘no brainer’ and is seen as the most compelling part of all proposals.<sup>26</sup> This element of the Constitution requires rectification, and in itself will represent a major step forward in ensuring our Constitution reflects 21<sup>st</sup> century Australian values.

### **Changing the ‘race power’ (section 51(xxvi))**

The key challenge to finalising the model is articulating the scope of the Commonwealth’s power to legislate with respect to Indigenous peoples. Evidence before the Panel suggests many stakeholders accept that you need to retain some provision that allows the Commonwealth to make laws for Indigenous Australians, but that this power should be constrained to ensure that it reflects the original intent and cannot be used for perverse outcomes. Debate centres on whether a form of words such as ‘for the betterment’, ‘advancement’ or ‘so as not to adversely discriminate’ offer sufficient controls on the Commonwealth’s powers. This is becoming the central point of focus in finalising a model. The Panel heard from Indigenous Australians and some federal politicians that the retention of a positive Commonwealth power to make laws for Indigenous people with

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<sup>23</sup> A Twomey, ‘The Preamble and Indigenous Recognition’, *Australian Indigenous Law Reporter*, vol. 15, no. 2, 2011, pp. 13 – 14.

<sup>24</sup> Expert Panel Report, op. cit. p. 115, 113.

<sup>25</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, op. cit, p. 7.

<sup>26</sup> Crosby Textor, op. cit.

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limits on how it can be used is necessary. Any change that undermined native title, heritage protections or Indigenous programmes would be unlikely to gain support.

Generally, constitutional conservatives will seek to be satisfied that the retention of any such power is warranted and introducing new limitations does not risk ambiguity or promote judicial adventurism. Public opinion research clearly shows that any reformulation of section 51(xxvi) cannot be seen as ‘special treatment’ or ‘additional benefits’ for Indigenous Australians. In this respect, it is worth noting that no other constitutional head of power offers the ability to legislate on the basis of a person’s natural characteristics, so it is unsurprising that there is an element of caution associated with changes in this area.

Overall support for this element of the model is contingent on a formulation that is seen as useful but that doesn’t create unintended consequences or uncertainty.

### **Broad based protection from racial discrimination (either in section 51A or section 116A)**

A protection from racial discrimination enshrined in the Constitution is the issue that raises the most polarising views. Public opinion research shows strong public support for a protection from racial discrimination. The key issue is whether the Constitution is the appropriate vehicle for such reflections. A broad prohibition from racial discrimination would not be supported by constitutional conservatives who argue that this goes beyond the objective of recognising our first peoples and mischaracterises our Constitution – a document that generally does not confer rights on individuals, but rather allocates power across the federation.

### **Recognition of languages (section 127A)**

The Joint Select Committee’s Interim Report, the Burmester, Davis and Ferguson report<sup>27</sup> and the feedback from the Panel’s consultations all confirm that recognition of Indigenous languages in the Constitution as a standalone clause was not widely supported. In line with the Joint Select Committee’s position in its interim report, most see this issue as either a distraction or an element that creates difference (rather than unity). A general recognition of Indigenous languages could also occur, as the Joint Select Committee has found, as part of the statement of recognition mentioned above.

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<sup>27</sup> H Burmester, M Davis & G Ferguson, ‘Post-Expert Panel Constitutional Legal Consultations’, unpublished internal report to Review Panel, June 2014.

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## Next steps

It is clear that options for the final proposal are narrowing. While there are a range of diverse views, messages heard by the Panel in its consultations are broadly consistent with those heard by the Joint Select Committee and the Expert Panel. The Panel is optimistic and confident that there is a way of finding a resolution that is both symbolic and meaningful, which can win broad public support.

Crystallising the question to be put to the voters lies at the heart of progressing the referendum. Delays in finalising a solid proposal to put to the people are seen as equivocation or a lack of commitment on the issue. It risks diluting support and losing momentum across the community. Indeed there is a growing sense of frustration, particularly amongst Indigenous peoples, that a final model has not yet been agreed. Most stakeholders reinforced the need to break the cycle of endless deliberations on the different models and crystallise a final proposition quickly.

First and foremost, there is an **immediate imperative to remove any sense of ambiguity** around the intention to proceed to a referendum. In our consultations with political leaders and Aboriginal and Torres Strait Islander peoples, we consistently heard the need for a clear public re-commitment to constitutional recognition. Indeed, there is a need for strong public commitment from all sides of politics, from state and territory leaders, and from a wide range of Indigenous peoples.

The work of the Expert Panel and more recently the Joint Select Committee has been invaluable in exploring the options, putting forward proposals and building multi-party support for constitutional recognition. By June 2015 the Joint Select Committee will put forward recommendations on proposals that it considers have the best chance of winning support. Ultimately, however, the referendum rests on finalising a proposition that can secure the support of the majority of Indigenous Australians and the wider Australian public.

A ‘circuit-breaker’ is needed to cut through the debates on the model and settle a final proposition. There are a number of ways to achieve this and the Panel heard a range of options. Some suggested a constitutional convention, a plebiscite or a series of conferences with Indigenous Australians in each of the major parts of the country. Others suggested a mix of eminent Australians charged with landing the final set of words.

After considering the range of views, the Panel recommends that a Referendum Council be appointed as soon as possible to agree a final proposition. Appointments to the Council would be determined in collaboration with major parties. This Council would fulfil the Government’s the commitment to a special committee and guide the country to a

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referendum. It would be a relatively small group of Indigenous and non-Indigenous national guardians, trusted to deliver the best model that can be supported by all sides in the interests of country. Whichever mechanism is chosen as a circuit-breaker by Government, it must have a set of common features: it must have legitimacy in the eyes of Indigenous Australians, the wider population and Parliament; it must be apolitical and widely trusted; it must have the direct involvement of a diverse range of experienced Indigenous people; and it must be above the mire of day to day politics.

### **Recommendation:**

A 'circuit breaker' needs to be rapidly identified to settle the final form of words and draw debate on the model to a conclusion. This will build a sense of national urgency and provide renewed certainty that the country will proceed to a referendum. Delivering on the commitment to form a special committee to guide the referendum, a Referendum Council of trusted national figures is recommended.

The Referendum Council would:

- a) Have legitimacy in the eyes of the nation, be seen as apolitical and include both Indigenous and non-Indigenous members.
- b) Advise on the final proposition and gain agreement to it from Indigenous people, constitutional experts, parliaments and the wider public.
- c) Draw on the work of this report and the Joint Select Committee.
- d) Ensure that the final proposition is legally sound, clear, easily understood and does not significantly increase constitutional uncertainty.

## **4. Readiness and Support:**

Levels of awareness, understanding and support across the Australian population have not yet reached the point where we can proceed immediately to a vote on the issue, even if a final proposition were settled now.

Awareness levels are flagging. Raising awareness of why we should pursue a referendum is a relatively straightforward matter, but needs to be ramped up in the near future. It will require new investment, a focus on the place our first Australians held in this nation before European settlement and the valuable contribution of Aboriginal and Torres Strait Islander peoples and culture to modern Australia.

This broad educative process needs to reach as many Australians as possible before a final set of words is put forward. Leaving it too late risks debate focusing on the model and splintering support before the fundamental argument is clearly cemented.

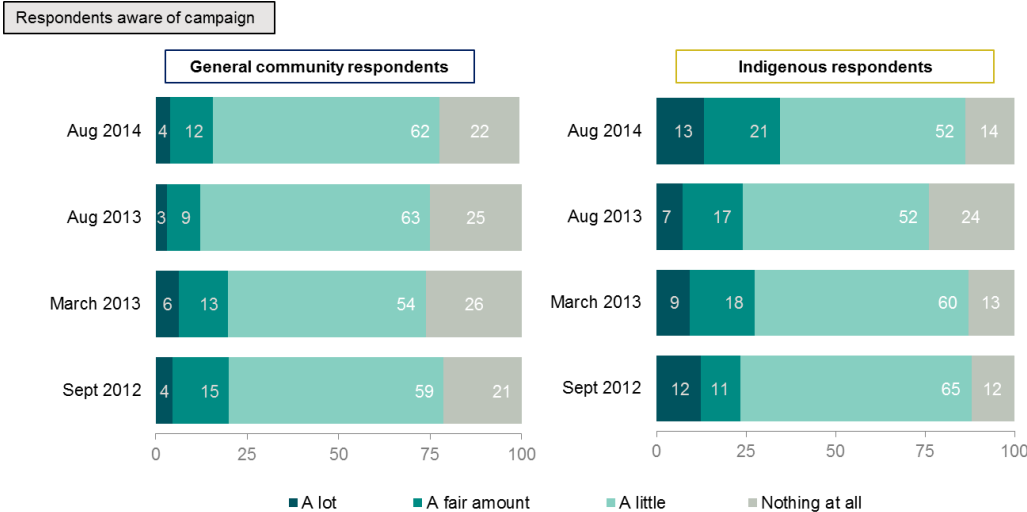
An awareness campaign is fundamentally different to a yes/no campaign in the lead up to the referendum. People need to understand what it is they will be voting on and why it is being put to a vote. Awareness is about making clear the case for change, while a yes/no campaign would focus on a specific proposition and the mechanics of change. There must be an opportunity for understanding to build to avoid confusion and the risk that support will waver in the absence of a clear rationale for change.

Levels of awareness and support across different groups of the population are summarised below.

**Aboriginal and Torres Strait Islander Peoples**

Contrary to trends in the wider community, awareness and support for constitutional recognition amongst Aboriginal and Torres Strait Islander peoples has risen in the past year. Of those surveyed, 57% had heard of the referendum – up from 49% in August 2013 (see Figure 2). Support for recognition is also high amongst this group, despite consistent calls for sovereignty or treaty from some segments of the Aboriginal and Torres Strait Islander population. While support is solid, only a minority (34%) consider that they have a detailed or deeper understanding of what is proposed (refer Figure 1 below).

**Figure 1: Levels of understanding of constitutional recognition (amongst those aware of constitutional recognition).**



Source: Auspoll Survey, August 2014.

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The Panel's work suggests that many Indigenous people see constitutional recognition as a tool to address the injustices of the past and empower the next generation of Aboriginal and Torres Strait Islander youth to feel part of modern Australia.

*"I am invisible in the Constitution and therefore legally invisible in Australia."*<sup>28</sup>

For those who have considered the proposals put forward, many start with the Expert Panel's recommendations. A number of stakeholders questioned why neither this Government, nor the previous Government, had directly responded to the Expert Panel's recommendations. At the time of consultation, the work of the Joint Select Committee was not well known amongst stakeholders. In some cases, the place of the Joint Select Committee (and this Panel) created confusion or frustration and a perception the referendum is being delayed. It is clear that many Indigenous people consider a significant shift away from the recommendations of the Expert Panel would need to be tested with Indigenous people before it was put to the wider Australian public.

All Indigenous survey respondents and individuals consulted agreed that any changes to the Constitution need to be more than merely symbolic. There is strong support for some form of limitation on the Commonwealth's power to make laws with respect to Indigenous Australians, to avoid perverse outcomes. At the same time, some noted that views on policies such as the Northern Territory Emergency Response were mixed. A number of Indigenous stakeholders interviewed agreed that anything that creates uncertainty in native title or undermines Indigenous-specific funding would be unacceptable.

Consistent with past research, there is strong support amongst Aboriginal and Torres Strait Islander peoples for some form of protection from racial discrimination to be enshrined in the Constitution. Many noted the recent proposed changes to the *Racial Discrimination Act 1975* had created increased attention and expectations in relation to constitutional change. Many Indigenous individuals interviewed expressed a preference that a broader protection from racial discrimination apply to all Australians, rather than just Indigenous Australians. This was seen as a means of gaining wider support, particularly with the multi-cultural community, and avoiding notions of 'special treatment' for Indigenous Australians.

There is a clear frustration amongst this group that the country is taking too long to get to a referendum on this issue. For many, this has been a decades-long fight for recognition and a number of individuals questioned the Parliament's commitment and whether the

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<sup>28</sup> Lowitja O'Donoghue, Personal Communication, 4 September 2014.



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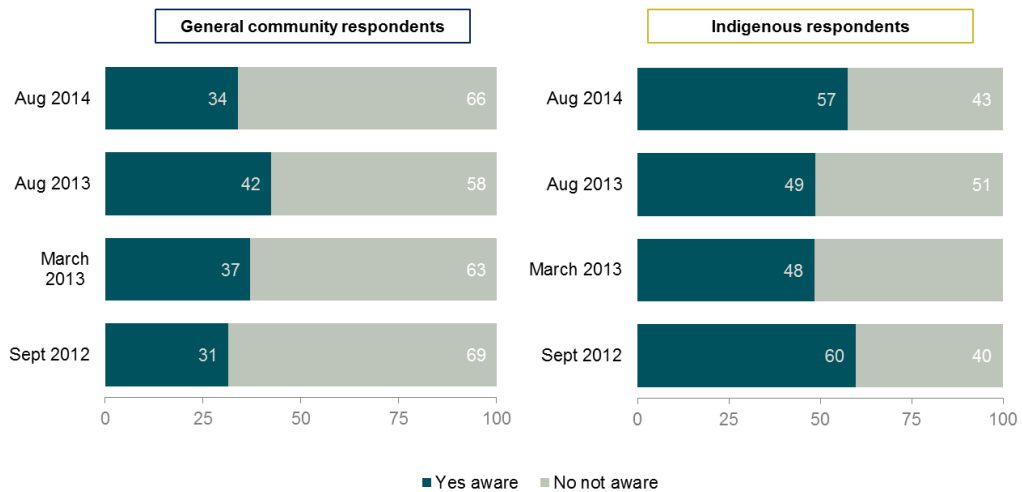
referendum would happen in their lifetimes. Some respondents noted the potential impact of other issues such as a challenging budget environment and cuts to Indigenous funding. While most saw the issue of constitutional recognition as separate to those concerns, some Indigenous stakeholders warned of goodwill and patience for recognition dissipating amongst Indigenous Australians. The Government's commitment to the issue was questioned and needs to be reaffirmed quickly. This affirmation would need to be accompanied with a clear pathway forward, articulating the steps to get the country to a point of readiness and delivery of a referendum.

Finally, it is clear from the responses that there is a need to address the perceived impact of constitutional recognition on Indigenous aspirations for sovereignty or a treaty. A number of respondents noted that the movement in support of sovereignty was gaining some ground. Any final proposal will need to clearly differentiate the issue of constitutional recognition from treaty. Awareness-raising should focus on clarifying the fact that recognition in no way precludes a treaty, and indeed, may present a pathway towards it.

### **Wider Australian public**

The wider Australian public is not yet ready for a referendum. There is clear evidence of drift on the issue, with awareness levels slipping over the past twelve months. According to most recent research, awareness of the referendum has fallen from 42% in August 2013 to 34% in August 2014 (see Figure 2 below). For most people the issue rates low on the agenda, with health, the cost of living, education, jobs and the economy taking primacy. Of those who have heard of the referendum and campaign, most still have a low level of knowledge about the specifics – 62% of respondents profess to only having 'a little' knowledge of the proposals, and 22% indicated that they knew 'nothing at all'.

**Figure 2: Levels of awareness of constitutional recognition:**



Source: Auspoll Survey, August 2014

Encouragingly, while awareness levels have dropped, support for constitutional recognition remains high – with 61% of respondents aware of the issue saying they support recognition (up from 56% at the same time last year).

The information environment is cluttered – newspaper, radio and television use has been declining since consumers began looking to the internet for news and information.<sup>29</sup> Many people purchase their media now and are more selective about where and what news they get. A staggering 73% of all Australians use social networking sites,<sup>30</sup> and while that figure is even higher in the 18 to 30 age demographic,<sup>31</sup> one of the largest growth

<sup>29</sup> For example, between 2012 and 2013 overall television viewing in Australian homes fell by 2 hours and 24 minutes per month with a reduction of 5 hours and 51 minutes among teenagers, 3 hours and 45 minutes among the 18-24 age group, 4 hours 19 minutes among the 25-34 age group and over 2 hours less for those aged over 65; see InformITV, *Australian television viewing minutes fall as viewers go online*, InformITV, 2014, retrieved 5 September 2014, <<http://informitv.com/2014/04/14/australian-television-viewing-minutes-fall-as-viewers-go-online/>>.

<sup>30</sup> Sensis, *Annual eBusiness Report - The Online Experience of Small and Medium Enterprises*, September 2014, retrieved 5 September 2014, <[http://about.sensis.com.au/IgnitionSuite/uploads/docs/SNS14508\\_e\\_businessReport\\_2014\\_WEB.pdf](http://about.sensis.com.au/IgnitionSuite/uploads/docs/SNS14508_e_businessReport_2014_WEB.pdf)>p. 74.

<sup>31</sup> In the 18-19 demographic, 92% of Australians use social media; in the 20-29 demographic, 86% of Australians use social media, and this drops to 80% of Australians in the 30-39 demographic; see Sensis, op. cit. p. 75.

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segments in social media use is those aged over 65 years.<sup>32</sup> This needs to be factored into raising awareness levels.

For a successful referendum, the Australian voters need to see that the final proposal is led and supported by Indigenous Australians and that the changes will provide another significant step towards reconciliation. Most of those surveyed were frustrated with the lack of progress in addressing Indigenous inequality but felt powerless to take personal action. Many saw the referendum as a way to be personally empowered to help.

There is strong support across non-Indigenous Australians for removing references to race from the Constitution. Many are shocked to realise provisions such as section 25 still exist. Similarly, providing a general protection from racial discrimination also tends to be supported by this group.<sup>33</sup>

Evidence suggests that most people generally see recognition as a 'no brainer'. There is a strong desire to recognise and protect Aboriginal and Torres Strait Islander culture as a unique part of our national identity. In this regard, some statement of recognition would be widely supported.

There is clearly a strong desire for a unified Australia. With this group, the challenge arises in explaining the need for the Commonwealth to retain a power to make laws for Aboriginal and Torres Strait Islander peoples (currently section 51(xxvi)). This reflects general support for measures that promote equality but caution towards any notion of 'special treatment' or distinction on the basis of race.

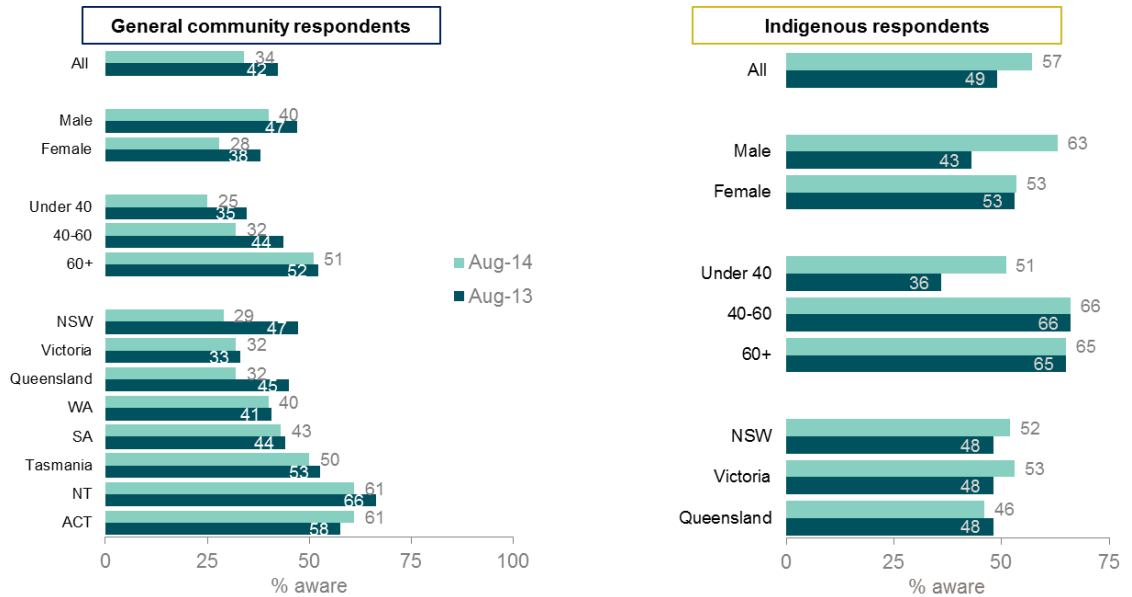
Interestingly, research shows that **older voters** (60+ years old) have some of the highest levels of awareness and support on the issue, with 51% aware of the proposed referendum and 66% of those supportive of recognition (see Figure 3 below). This may reflect higher levels of engagement with traditional forms of media and memories of the 1967 referendum.

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<sup>32</sup> Sensis, op. cit. p. 74.

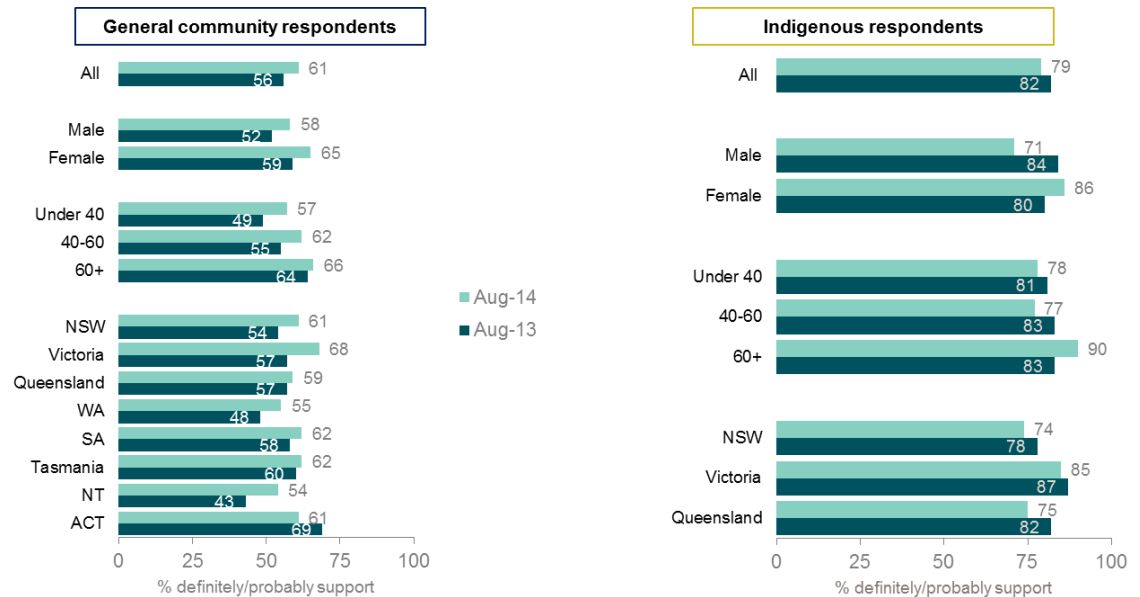
<sup>33</sup> Newspoll survey, November 2011.

**Figure 3: Levels of awareness by age, gender and jurisdiction:**



Source: Auspoll Survey, August 2014

**Figure 4: Levels of support by age, gender and jurisdiction:**



Source: Auspoll Survey, August 2014

Men are also more likely to be aware of proposed referendum than women (40% versus 28%), however, women are more likely to support recognition.

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**Young voters** (under 40 years old) have the lowest levels of awareness and engagement. Research suggests that young people tend to engage on individual issues of personal relevance rather than in wider political discourse. While the RecogniseTHIS campaign is making some inroads, this group needs to be more comprehensively targeted given some 20% of the voters at the next election will be aged between 18-30.

Given Australia's historical reluctance for constitutional change, considering the views of **constitutional conservatives is important**. Distinctions must be drawn among this group. Many people who would label themselves as constitutional conservatives support recognition and see the major restorative benefits of acknowledging the place and contribution of Aboriginal and Torres Strait Islander peoples in our founding document. However, this group of people consider the Constitution to have served the country well over the past century. More radical or far-reaching proposals would be challenged. Many constitutional conservatives consider our Constitution to have withstood the test of time and don't see it as flawed, but rather that successive governments through the abuse of power have offended the values and principles at its core. This group's support depends primarily on the recognition and equality arguments for change. Constitutional conservatives are unlikely to support a move to enshrine individual rights in the Constitution, seeing this as incongruous with our constitutional model and its fundamental role in our democracy.<sup>34</sup>

### States and territories

In line with its terms of reference, the Panel met with all state and territory governments and opposition parties to assess levels of support.

Without exception, consultations with states and territories confirmed unequivocal bipartisan support for constitutional recognition as a fundamental principle. Most jurisdictions<sup>35</sup> have included some form of recognition in their own constitutions. Predominantly this has been symbolic in nature, with no legal effect and introduced through legislative amendment rather than a referendum or plebiscite. Where this has been achieved, state governments stated that the move had generally been welcomed by both the Indigenous and wider population of the state, and created little if any controversy.

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<sup>34</sup> Most note that our Constitution fundamentally deals with the division of power between states and the Commonwealth across the federation, rather than incorporating individual rights for citizens.

<sup>35</sup> With the exception of Western Australia, the Northern Territory and the Australian Capital Territory.

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Although constitutional recognition receives in-principle support across all jurisdictions, each government noted that definitive support for the final proposition is contingent on the final form of words and the opportunity to consider the proposal before it is put to the vote. A discussion and agreement through the Council of Australian Governments (COAG) is considered the most appropriate forum.

Many jurisdictions reinforced the need for a clear and simple question for the referendum. Some Ministers and members stressed the risk posed by complexity or ‘over-reaching’ in the final proposal. Key considerations in securing ultimate support from states and territories will be: the impact of the final proposal on current state, territory and Commonwealth powers and responsibilities; any implications for state and territory laws; and preserving the federal compact as the basis of our Constitution.

Each jurisdiction is unique and must be considered individually in the lead up to the referendum. Issues that resonate in one jurisdiction aren’t necessarily a priority in another. This in part reflects the size of the Indigenous population, the approach to land rights and the history and impact of different government policies in the jurisdiction. The Northern Territory, Queensland and Western Australia all highlighted the need to focus on the practical benefits of recognition and how it will affect the day to day experience of people. Unsurprisingly, the Northern Territory records the lowest support for retaining the Commonwealth’s law making power (only 34%). By contrast Victoria and New South Wales stressed the important role their multi-cultural communities can play in supporting the referendum. These differences have clear implications for campaign targeting.

A number of jurisdictions noted that the process for gaining acceptance of a proposal – particularly from Indigenous people and governments – was almost as important as the final proposition. This will need to be carefully considered and factored into the preparation for the referendum. The Panel suggests that the proposed Referendum Council and COAG could appropriately take the lead on these issues.

Two jurisdictions (Western Australia and New South Wales) noted their expectation that the referendum would run with the 2016 federal election. The cost and timing of a standalone referendum was seen as difficult to justify. However, other jurisdictions noted the unique nature of this referendum, the need for a celebratory moment in history and the risk of reactionary voting if the issue is politicised.

The research commissioned by the Panel paints an interesting picture of public support across the jurisdictions. Awareness levels have fallen across the country in the past year – most notably in New South Wales (from 47% to 29%), Victoria (from 33% to 32%) and

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Queensland (from 45% to 32%) - but support for recognition continues to rise across most jurisdictions, especially Victoria and Western Australia.

### **Recommendation:**

The Government should continue to support and resource Recognise, and its partner organisations, to finalise an increased public awareness strategy that builds a better understanding of why recognition is important in the wider community. This strategy should:

- a. include a focus on the enduring contributions of Aboriginal and Torres Strait Islander peoples and cultures on the life of the nation;
- b. focus on real Australians telling real stories;
- c. draw on social research and historical facts;
- d. target a wide audience, but with a focus on those groups that have the lowest levels of awareness;
- e. ensure Aboriginal and Torres Strait Islander people are engaged in community education activities as broadly as possible; and
- f. be educational in nature and include raising awareness of the role of the Constitution.

## **5. Timing of a referendum:**

The timing of the referendum is a delicate matter. To give the greatest chance of success, the timing of a referendum fundamentally depends on the pre-conditions (articulated in chapter 2 of this report) being met.

Over the course of the past six months the Panel heard a range of different views on when and how a referendum should be held. Despite the diversity of opinions, there were a number of common themes that emerged:

- **There is no such thing as perfect timing.** At any point in time there is a wide array of issues competing for the public's attention. How a referendum is viewed in light of other priorities is difficult to predict. Issues such as the economy, the Budget, cost of living and debates on racial discrimination may affect the mood of the nation and expectations of a final model. However, according to recent research, this context appears to have relatively little impact on the support for recognition.
- **Waiting does not make the issue easier.** In some respects waiting may make it harder to maintain the support of Indigenous Australians. For some, putting off a referendum increases frustrations and raises expectations of what the final model

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can deliver. At the same time this needs to be balanced with the view that it cannot be rushed and waiting will assist in meeting other pre-conditions such as achieving clear and unequivocal multi-partisan support. Ideally, you need enough time to build a solid base of awareness and support, but once a final model is settled and the pre-conditions are met, the Government should move to a referendum. Modern referendum campaigns are not a ‘slow-burn’ issue. Maintaining voter attention, interest and goodwill becomes increasingly difficult over a longer term.

- **There are risks and benefits in either running the referendum with an election or as a standalone vote.** Historically, an analysis of successful referendums reveals no pattern or trend. Of the eight successful votes, four were held with an election and four as a standalone vote.<sup>36</sup>
- Attaching the referendum to a federal election risks polluting the issue with political positioning, limits the opportunities to explain or debate the issue in detail, and increases competition for media attention. At the same time it is significantly less costly and only requires the voting public to visit polling booths once.
- Running the referendum as a standalone vote gives it more prominence, reduces the risk that it is seen as a political issue, increases opportunities for debate and attaches a greater sense of occasion and unity to the vote. Of course this is also the more expensive option.
- **Support will drop off immediately before a referendum on any issue.** Historical evidence suggests that support will dip just before a vote. This can be expected as the yes/no campaigns peak and voter thinking solidifies on the issue. This reaffirms the need to proceed quickly to a vote once the model is agreed. It also suggests that support needs to be high enough in the lead up to the referendum to allow for a slight drop by the time of a vote.
- **There are strong expectations that the referendum will be held this term.** A range of different stakeholders voiced the expectation that the referendum will be held this term. Most acknowledge that going to a vote too soon, without the relevant pre-conditions being met, will most likely result in failure. Equally, many cautioned against further delays.
- **Without setting a clear target date for the referendum people won’t focus on the issue.**

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<sup>36</sup> A list of successful referendums at Appendix B.



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Providing advice on how to prepare for a successful referendum and when to hold it, risks degenerating into a circular argument. Timing depends on a final model and the pre-conditions being met. They in turn rely on the sense of urgency that would come from a clear timeframe for the referendum.

*“Given the possibility for momentum to be lost, it is essential that a target date is set prior to the expiry of the Act of Recognition in February 2015 and that it not exceed three years.”<sup>37</sup>*

The announcement of a clear timeframe for the referendum would provide renewed certainty and focus to constitutional recognition. Given the frustrations noted in our consultations, this timeframe should not be longer than the first half 2017. There should be flexibility to proceed to a vote within this term of government if all the pre-conditions are met. On balance, the Panel also recommends that the referendum be held as a standalone issue given the importance of the outcome to our national future.

**Recommendation:**

Timing parameters for a referendum should be settled as soon as possible to provide certainty and focus. A referendum should be held no later than the first half of 2017. If the pre-conditions outlined in this report can be met earlier, including widespread support for an agreed proposition, then there remains a case for an earlier referendum.

**Recommendation:**

The Parliament should amend the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* to demonstrate continuing commitment and ensure the Act does not sunset in March 2015. The Act should be extended for no more than three years, to align with the timing of the referendum.

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<sup>37</sup> Oxfam, Submission No. 10 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 25 June 2014, p. 8.

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## Appendices

- a. List of individuals and organisations consulted
- b. List of successful referendums

**List of stakeholders consulted:**

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Federal Government and Opposition

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Prime Minister, the Hon Tony Abbott MP  
 The Hon Alan Tudge MP, Parliamentary Secretary to the Prime Minister  
 Senator the Hon George Brandis QC, Attorney General  
 Senator the Hon Nigel Scullion, Minister for Indigenous Affairs  
 The Hon Bill Shorten MP, Opposition Leader  
 Senator Rachel Siewert, Australian Greens Whip and former Expert Panel Member  
 The Hon Jenny Macklin MP, Federal member for Jagajaga

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Parliamentary and Advisory Committees

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Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples  
 Prime Minister's Indigenous Advisory Council

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State and Territory Governments and Opposition

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ACT	Ms Katy Gallagher MLA, Australian Capital Territory Chief Minister Mr Jeremy Hanson MLA, Australian Capital Territory Opposition Leader
NSW	The Hon Mike Baird MP, New South Wales Premier The Hon Victor Dominello MP, New South Wales Minister for Aboriginal Affairs The Hon Linda Burney MP, New South Wales Deputy Opposition Leader, Shadow Minister for Aboriginal Affairs
NT	The Hon Adam Giles MLA, Northern Territory Chief Minister Ms Delia Lawrie MLA, Northern Territory Opposition Leader
QLD	The Hon Glen Elmes MP, Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs The Hon Anastacia Palaszczuk MLA, Queensland Opposition Leader Mr Curtis Pitt MP, Queensland Shadow Minister for Aboriginal and Torres Strait Islander Partnerships
SA	The Hon Jay Weatherill MP, South Australian Premier The Hon Ian Hunter MLC, South Australian Minister for Aboriginal Affairs and Reconciliation Dr Duncan McFetridge MP, Shadow Minister for Aboriginal Affairs and Reconciliation on behalf of Mr Steven Marshall MP, South Australian Opposition Leader
VIC	The Hon Timothy Bull, Victorian Minister for Aboriginal Affairs The Hon Richard Wynne MP, Victorian Shadow Minister for Aboriginal Affairs and Closing the Gap
TAS	Ms Angela Williamson, Advisor on behalf of the Hon Will Hodgman MP, Tasmanian Premier The Hon Bryan Green MP, Tasmanian Opposition Leader
WA	The Hon Colin J Barnett MLA, West Australian Premier The Hon Peter Collier MLC, West Australian Minister for Aboriginal Affairs The Hon Michael Mischin MLC, West Australian Attorney General The Hon Mark McGowan MLA, West Australian Opposition Leader

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Constitutional Law Experts:

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Professor Anne Twomey, University of Sydney  
 Professor George Williams AO, University of New South Wales  
 Professor Megan Davis, University of New South Wales  
 Professor Greg Craven, Vice-Chancellor, Australian Catholic University

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#### Indigenous stakeholders and organisations

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Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner  
Mr Patrick Dodson, Chairman Lingiari Foundation, former Expert Panel Co-Chair  
Mr Les Malezer & Ms Kirstie Parker, Co-Chairs, Mr Geoff Scott, CEO, National Congress of Australia's First Peoples  
Mr Aden Ridgeway, Partner, Cox Inall Ridgeway  
Ms Lauren Ganley, General Manager at Telstra, former Expert Panel Member  
Mr Jason Glanville, CEO, National Centre of Indigenous Excellence  
Mr Noel Pearson, Chairman of the Cape York Group, former Expert Panel Member  
Mr Geoff Clark, former ATSIC Chairperson  
Ms Daphne Yarram  
Mr Joseph Elu, Chairperson & Mr Wayne See Kee, CEO, Torres Strait Regional Authority  
Mr Richard Weston, CEO, Aboriginal and Torres Strait Islander Healing Foundation  
Mr Romlie Mokak, Incoming CEO, Lowitja Institute  
Ms Lowitja O'Donoghue, Patron, Lowitja Institute, former ATSIC Chairperson  
Mr Justin Mohamed, Chairperson, National Aboriginal Community Controlled Health Organisation

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#### Non-Indigenous stakeholders and organisations

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Mr Mark Liebler, Senior Partner, Arnold Bloch Leibler, former Expert Panel Co-Chair  
The Hon Fred Chaney AO, Chair, Desert Knowledge Australia, Reconciliation Australia Board member, former Expert Panel Member  
Ms Melinda Cilento, Reconciliation Australia Board Co-Chair  
Mr Bill Lawson AM, former Expert Panel Member  
ANTaR : Mr Andrew Meehan, National Director, Ms Jane Powles, National Campaigns Manager, Dr Peter Lewis, President of ANTaR's National Management Committee  
Amnesty International : Ms Louise Allen, Government Relations Manager, Ms Tammy Soloneck, Director  
Mr Peter Dawson & Youth Ambassadors – Recognise THIS!

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## Successful Referendums in Australian History

Subject/Proposal	Issue of Writ	Polling Day	Result	States that Voted in Favour	% of Votes in Favour
<b>Senate Elections</b> To enable elections for both Houses to be held concurrently	8 November 1906	12 December 1906	Carried	All	82.65
<b>State Debts</b> To give the Commonwealth unrestricted power to take over State debts	28 February 1910	13 April 1910	Carried	All except NSW	54.95
<b>State Debts</b> To end the system of per capita payments which have been made by the Commonwealth to the States since 1910, and to restrict the right of each State to borrow for its own development by subjecting that borrowing to control by a loan council	9 October 1928	17 November 1928	Carried	All	74.30
<b>Social Services</b> To give the Commonwealth power to legislate on a wide range of social services	21 August 1946	28 September 1946	Carried	All	54.39
<b>*Aboriginals</b> To enable the Commonwealth to enact laws for Aborigines. To remove the prohibition against counting aboriginal people in population counts in the Commonwealth or a State.	28 April 1967	27 May 1967	Carried	All	90.77
<b>*Senate Casual Vacancies</b> To ensure, as far as practicable, that a casual vacancy in the Senate is filled by a person of the same political party as the Senator chosen by the people, and that the person shall hold the seat for the balance of the term	27 April 1977	21 May 1977	Carried	All	73.32

<b>Subject/Proposal</b>	<b>Issue of Writ</b>	<b>Polling Day</b>	<b>Result</b>	<b>States that Voted in Favour</b>	<b>% of Votes in Favour</b>
<b>*Referendums – Territories</b> To allow electors in Territories, as well as in the States, to vote in constitutional referendums	27 April 1977	21 May 1977	Carried	All	77.72
<b>*Retirement of Judges</b> To provide for retiring ages for judges of Federal courts	27 April 1977	21 May 1977	Carried	All	80.10

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