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# THE AUSTRALIAN LAW JOURNAL

Volume 91, Number 5

May 2017

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**Megan Davis**

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**INDIGENOUS CONSTITUTIONAL RECOGNITION: PATHS TO FAILURE AND  
POSSIBLE PATHS TO SUCCESS**

**Shireen Morris and Noel Pearson**

This article argues that the purpose of constitutional recognition is predominantly practical, rather than just symbolic. The purpose is to positively reform the power relationship between Indigenous peoples and the Australian state, to empower Indigenous peoples and create a more mutually respectful relationship. The article examines the legal and political calculations involved in the main reform options. It explains why a purely symbolic or minimalist model for Indigenous constitutional recognition is likely to lead to referendum failure, and argues that the proposal for a constitutionally mandated Indigenous representative body presents the most viable path to referendum success. .... 350

**TESTAMENTARY FREEDOM AND CUSTOMARY LAW: THE IMPACT OF  
SUCCESSION LAW ON THE INHERITANCE NEEDS OF ABORIGINAL AND  
TORRES STRAIT ISLANDERS IN AUSTRALIA**

**Prue Vines**

The civil law needs of Aboriginal and Torres Strait Islander people in Australia have often been neglected in favour of seemingly more urgent criminal law matters. This is no less true of issues relating to the passing of property on death and the treatment of death and burial than of other civil matters. One of the myths regarding the legal system's treatment of Aboriginal and Torres Strait Islander people has been that because they did not own much property there was little need to be concerned about succession issues for them. This turns out to be untrue in a profoundly important way. .... 360

**OPPORTUNITY IS THERE FOR THE TAKING: LEGAL AND CULTURAL  
PRINCIPLES TO RE-START DISCUSSION ON ABORIGINAL HERITAGE  
REFORM IN WA**

**Lauren Butterly, Ambelin Kwaymullina and Blaze Kwaymullina**

The Aboriginal Heritage Act 1972 (WA) was drafted at a time when there was no consultation with Indigenous peoples, and based on a Eurocentric, anthropologically grounded “museum mentality” that failed to understand that Indigenous heritage is living.

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All sides of the contemporary debate – Indigenous communities, the full range of the political spectrum and the mining industry – acknowledge that major reform is needed. This article provides guidance on how to achieve such reform – not in the sense of specific legislative provisions, but broad legal and cultural principles that must lead discussions about change. .... 365

TWO NEW TOWNSHIP LEASES ON ABORIGINAL LAND IN THE NORTHERN TERRITORY

**Leon Terrill**

Township leasing is the Australian Government’s flagship land tenure reform for Aboriginal communities in the Northern Territory. Recently, agreement was reached for two new township leases, which are fundamentally different from earlier leases. This article describes how the new leases will operate. While often the focus is on the economic consequences of township leasing, the article describes how the more significant impact is on community governance and relationships around land use. .... 370

ENSURING ETHICAL COLLABORATIONS IN INDIGENOUS ARTS AND RECORDS MANAGEMENT

**Terri Janke**

Traditional cultural expression and traditional knowledge and its interface with intellectual property laws raise many challenges for law and policy makers, and are viewed as incongruent with conventional intellectual property laws. However, the case studies in this article examine how the law and protocols have dealt with this meeting place of culture and law to consider what lessons can be gleaned. The author makes some concluding comments about her vision for a National Indigenous Cultural Authority. .... 375

THINKING OUTSIDE THE CONSTITUTION ON INDIGENOUS CONSTITUTIONAL RECOGNITION: ENTRENCHING THE RACIAL DISCRIMINATION ACT

**Dylan Lino**

Of all the major proposals to constitutionally recognise Aboriginal and Torres Strait Islander peoples, a constitutional ban on racial discrimination has been one of the most popular – and most contentious. According to some conservative commentators, this proposal would unduly empower the judiciary and would not amount to Indigenous recognition in any case. This article argues that protection from racially discriminatory laws is an important form of Indigenous constitutional recognition, and that the Racial Discrimination Act 1975 (Cth) (RDA) represents a pre-existing form of “small-c” constitutional recognition. To address the political resistance against inserting a racial discrimination prohibition into the “big-C” Constitution, it proposes strengthening the RDA’s protection by entrenching it through a “manner and form” provision. More generally, supporters of Indigenous constitutional recognition should be thinking creatively outside the Constitution in imagining a just Indigenous – settler future. .... 381

ADMINISTRATIVE LAW

**Gemma McKinnon**

This article argues that administrative law is under-utilised by the Aboriginal community, particularly as a solution to legal issues in their early stages. It looks at administrative law in all of its practical forms, discussing why administrative law is of particular relevance to the Aboriginal community, and exploring why this relevance is not widely realised throughout the community. .... 386

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WHAT DOES NATIONAL EQUALITY LAW HAVE TO DO WITH CLOSING THE  
GAP?

**Laura Beacroft**

This article discusses the role that a strengthened national equality law can and must play in closing the gap between Indigenous and non-Indigenous life outcomes. With the Australian Government committed to reframing and humanising relations with Indigenous peoples, the challenge is more than tinkering with the status quo. It involves adherence by Australian governments to laws that recognise Indigenous equality. Non-discrimination is a key area that should be targeted in closing the gap initiatives. Disturbing patterns of government action and law-making that undermine the legitimacy of Indigenous equality, and politicise discussions about it, need to be turned around. Strengthening Australia's national equality law can assist in this task. The priority is enacting catch-up reforms to improve the scrutiny of special laws and to improve Indigenous participation, which are aligned with international and comparable nations' laws. .... 390

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