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A FAILED REFERENDUM: AUSTRALIA VOTES ‘NO’ TO THE RECOGNITION OF ITS FIRST PEOPLES IN THE AUSTRALIAN CONSTITUTION

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Australia, the oft' forgotten continent at the bottom of the planet and my home, has recently held a referendum on the question of whether our First Peoples, the Aboriginal and Torres Strait Islanders, should be formally recognised in the Australian Constitution. It has made global news over the weekend that the referendum was unsuccessful.

While a shock to many outside Australia, public opinion polls have indicated throughout the campaign that the referendum was unlikely to be successful. The purpose of this piece, therefore, is to provide the readers of this blog with a bit of an insight into the background to the proposed constitutional amendment, to consider the amendment itself, before then going on to outline the core arguments run by either side of the referendum debate. As you will observe, while the question put to the Australian people had a specifically Australian flavour, the debate that took place drew upon and is reflective of the challenges faced by other liberal democracies around the world when it comes to issues such as: the conveying of complex information to a disengaged electorate; dealing with matters of indigeneity in former colonies; the effectiveness of campaigns that weaponise misinformation; and, the benefits and pitfalls

of constitutional referenda mechanisms designed to make constitutional change very difficult.

Background to the Referendum

The Indigenous peoples of Australia, the Aboriginal people of the mainland and the Torres Strait Islander people, have lived on the Australian continent for approximately 65,000 years. Indigenous Australians possess the oldest continuing cultural history in the world, with over 250 surviving Indigenous language groups, complex systems of customary law, art, and land management. In 1770, Captain Cook, on behalf of the British Crown, landed in what is now Sydney. In accordance with the legal fiction of terra nullius ('land belonging to no one'), and despite numerous encounters with Indigenous peoples on arrival, a British flag was planted, and the colony of New South Wales was established.

The period between 1770 and Australia's federation in 1901 was one of colonial expansion and Indigenous decline. By the time of the constitutional conventions in the late 19th century, in states such as Tasmania (an island the size of the Republic of Ireland), [close to 100 per cent](#) of the Indigenous population had been wiped out by disease, dispossession and frontier conflict. It is no surprise therefore that Indigenous people were not involved in said constitutional conventions and that no mention was made of their existence in the [preamble](#) to the Constitution. Indeed, as originally drafted, the constitution provided that Indigenous people [were to be subtracted from the total number of Australians](#) counted as part of the national census, which informed the determination of the allocation of House of Representatives seats and the raising and distribution of taxes.

While there have been positive constitutional developments with respect to Indigenous Australians in the past 122 years – [a referendum in 1967](#) successfully removed the abovementioned exclusion and gave the Federal Parliament the right to make laws for the benefit of Indigenous Australians, and a [High Court Decision in 1992](#) served as the foundation for Indigenous land rights and the rejection of the legal fiction of terra nullius – the relationship between Indigenous and non-Indigenous

Australians throughout the 20th and early 21st centuries could only be described as chequered. As such, [as at 2023](#), the life expectancy of Indigenous Australians is 8.6 years less than the rest of the Australian population; with nearly half of all Indigenous men over 15 years of age having been formally charged by the police, with Indigenous incarceration rates running at 14 times the rate of non-Indigenous adults.

Lead-up to the Campaign and the referendum process

On the back of a [speech](#) by a former conservative Prime Minister in Australia, John Howard, in 2007, a bi-partisan process was begun to try and advance the cause of reconciliation in Australia. In 2010, an Indigenous consultation process was established to consider the issue of how Indigenous Australians would like to be recognised in the Australian Constitution. This process led to the development of what has become known as '[The Uluru Statement from the Heart](#)', a one-page document, signed in 2017 by a large portion of the various distinct Indigenous communities from around the country setting out their request for constitutional recognition in the form of a Voice to Parliament. The road from 2017 to 2023 has been one of further painstaking constitutional discussion and debate, resulting in the proposal that was put to the Australian people on 14 October.

The proposal was to insert a new chapter into the Australian Constitution containing the following words:

Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

1. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
2. the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
3. the Parliament shall, subject to this Constitution, have power to make

laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

In essence, the proposal was to recognise Indigenous Australians as the First Peoples of Australia by constitutionally entrenching a new representative advisory institution called 'the Voice', with the Federal Parliament retaining ultimate power over its composition, functions, powers and procedures.

Voting in Australia is compulsory. Under [section 128 of Australia's Constitution](#), for a referendum to be successful, a double majority must be obtained – a majority of the overall population of Australia, and a majority of people in a majority of states. Australia has six states and two territories (interestingly, the approximately 500,000 people who vote in Australia's territories only count towards the national vote).

The task was always therefore going to be a difficult one, with only 8 of the last 45 referenda ending in constitutional change. No referendum has been successful without bipartisan political support. In April of this year, the [conservative political coalition](#) in Australia came out and declared its opposition to the referendum proposal.

The campaign

The 'Yes' campaign focused its attentions on the substance of the proposed constitutional amendment, emphasising the advisory nature of the Voice proposal, the continued supremacy of the Parliament, and the potential for the Voice to engender greater and more coherent Indigenous input into the policy making process (in so far as the policies pertain to the needs of Indigenous peoples). The amendment was pitched as a unifying moment for Australia, a necessary step towards the eventual development of a treaty between the Commonwealth Government and Indigenous Australians.

The 'No' campaign was split between 'progressive' no voters and 'conservative' no voters. Those on the progressive side argued that the Indigenous people should be demanding more than an advisory body. Indeed, given its advisory nature, that it would do nothing to address

Indigenous disadvantage, and that by engaging with and being recognised in the 'colonial constitution' this would lead to the undermining of future sovereignty claims.

Those on the conservative side of the No campaign adopted the tactic of sowing doubt and confusion in the electorate, capitalising on the relative lack of constitutional knowledge/experience of the average Australian with the slogan 'if you don't know, vote no.' Led by two prominent Indigenous Australians, the proposed amendments were attacked for: being an elitist idea that would insert race-based division into the constitution; the potential for increased bureaucracy in indigenous affairs; the potential for the Voice to provide advice on issues other than those relating to Indigenous Australians; the potential for ongoing litigation on the powers of the Voice; and, the fact that not enough detail on the scope and powers of the Voice had been provided to the electorate before voting on the constitutional amendment. A summary of the formal arguments of both sides of the campaign can be found in the [official referendum booklet](#) produced by the Australian Electoral Commission.

At every stage of the campaign it was as if the two sides were referring to completely different constitutional proposals. This, of course, played into the hands of those opposed to the referendum, as the general 'vibe' of the debate was one of division and confusion. There were numerous instances of [race-based slurs and slogans](#) being used in the mainstream media and on social media. There were also moments of elevation – tens of thousands of Australians turned out to march in favour of the Voice in the final weeks of the campaign.

With voter participation in the referenda sitting in the high 90 per cent range, the outcome on the night was decisive. All six of Australia's states recorded a majority no vote, which equated to approximately [60 per cent of the overall Australian population voting against the proposal and 40 per cent in favour](#). Interestingly, early indications of the voter breakdown suggest that a large majority of Indigenous Australians voted 'Yes'.

Constitutional and political ramifications

From a constitutional perspective, real doubts have been raised by eminent constitutional scholars such as [Professor Twomey of Sydney](#)

[University](#), as to whether, in the new era of social media-driven news and opinion consumption and the willingness of political actors to weaponise misinformation for electoral gain, progressive constitutional change is even possible in modern Australia. The double majority mechanism, designed to protect Australia's constitutional order from majoritarian threats, when combined with the inability to conduct serious, reasoned, respectful public policy debates, has set the bar too high for formal constitutional change. Indeed, Professor Twomey [has argued](#) that if the successful arguments of the 'No' campaign had of been run during the federation debates, it is possible that Australia would never have federated and that it 'would still be six squabbling British colonies'.

The result has led to important constitutional questions being posed regarding the extent to which informal, incremental constitutional reform will be able to fill the gap left by the inability to effect formal constitutional change. Given the expressed desire of Indigenous Australians for formal recognition, such informality and incrementalism is unlikely to be enough, with [some Indigenous leaders](#) claiming that the result signals the end of the reconciliation process in Australia.

While undoubtedly a major setback for the cause of national reconciliation, it has long been a feature of the Australian Federation that when the Commonwealth Government drags the chain on progressive social, political and economic causes, the states and territories pick-up the slack. State-based Voices to Parliaments exist in the Australian Capital Territory (the '[Aboriginal and Torres Strait Islander Elected Body](#)' is 15 years old) and Victoria (the '[First People's Assembly](#)' held its inaugural election in 2019), with South Australia's '[First Nations Voice to Parliament](#)' expected to hold its first elections for Indigenous representatives in 2024.

In addition to the creation of State and Territory-based advisory bodies, [much work has also been done at this level](#) to advance the process of negotiating treaties between these jurisdictions and their Indigenous constituents: Victoria is expected to start treaty negotiations in 2024, New South Wales has committed to a path to treaty negotiations, as have Queensland, South Australia and Tasmania. Although Western Australia has not committed to treaty negotiations, the Noongar native title claim,

signed in 2015, covering 200,000 square kilometres of that State, has been referred to as Australia's first Indigenous treaty.

There are many takeaways from the referendum result for Australians and non-Australians alike; for political scientist and constitutional scholars. This being the case, the impact of the result on Australia's Indigenous communities will be felt deeply - [a national week of mourning](#) has been called for by those Indigenous leaders who headed the 'Yes' campaign. What was seemingly forgotten, and what is often forgotten in these sorts of debates, is that at their core are real people.