MEDIA STATEMENT

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Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: A Historical View

The Goldfields Land & Sea Council ('GLSC') endorses the Constitutional recognition of Aboriginal and Torres Strait Islander peoples. A brief examination of the history of the Australian Constitution demonstrates clearly why Indigenous Australians need to be formally recognised in this country's founding document.

The Australian Constitution sets the tone for this country's relationship with its Indigenous population.[1] Being aware of the Constitution's history can lead to greater understanding of the theoretical and practical aspects of Indigenous recognition, as a pointer towards substantive equality.

Historically, the framers of the Australian Constitution believed that freedoms were adequately protected by the common law and responsible government. They were aware of the racial divide in the United States of America and its reflection in the *Bill of Rights*, yet they perceived no parallel in Australia's Indigenous population, who were at that time viewed as an inferior and dying race.[2] The framers of the Australian Constitution rejected a proposal to introduce a 'due process/equal protection' provision similar to that contained in the Fourteenth Amendment of the *Constitution of the United States of America.* This rejection appears to have been based on a concern that it might be used to protect ethnic minorities from discriminatory State and Federal laws.[3] Instead, the framers created a system of law that would specifically *allow* parliaments to pass legislation that discriminated

[1] See A Byrnes, H Charlesworth and G McKinnon, Bills of Rights in Australia, ch 2, "A short history of Australian bills of rights" (2008); see also *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
[2] See for example the repealed *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic), which was premised upon the notion that the 'Australian Aborigine' was part of a dying race, and therefore their relics needed to be preserved for posterity.
[3] See Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 1898, vol. IV at 665.

on the basis of race.[4] This is now recognised as an affront to the notion that all individuals are born with inherent and inalienable rights.[5]

The High Court case of *Kruger v The Commonwealth*[6] ('the Stolen Generation case') was the first to consider the legality of the formal assimilationist policy of removing Indigenous children from their families. In that case, the plaintiffs argued that the Northern Territory Ordinance that allowed the child removals violated numerous rights of the children and their families. These included the rights to due process before the law, equality before the law, freedom of movement (argued as implied rights in the Constitution), and freedom of religion (which is expressly included in s 116 of the Constitution). The plaintiffs were unsuccessful on each ground, a result that highlights the general lack of rights protection under our legal system, particularly for Indigenous people. Most of the rights that Australian citizens assume we inherently hold are not actually protected by our legal system, but are instead vulnerable to the whims of whatever political party holds power at any given time.

Constitutional recognition of Indigenous Australians would go a long way towards righting the wrongs of the past, by forging a new pathway and changing attitudes and behaviours between Indigenous and non-Indigenous Australians. The nature of the challenge before us is well captured in the National Report of the *Royal Commission into Aboriginal Deaths in Custody*:

> *"The relations between Aboriginal and non-Aboriginal people were historically influenced by racism, often of the overt, outspoken and sanctimonious kind; but more often, particularly in later times, of the quiet assumption that scarcely recognises itself. What Aboriginal people have largely experienced is policies nakedly racially-based and in their everyday lives the constant irritation of racist attitudes. Aboriginal people were never treated as equals and certainly relations between the two groups were conducted on the basis of inequality and control.* [Emphasis added]
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> *[…] The consequence of this history is the partial destruction of Aboriginal culture and a large part of the Aboriginal population and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between*

[4] See Hilary Charlesworth, "Writing in Rights – Australia and the Protection of Human Rights" (UNSW Press, 2002) 25.
[5] See *Racial Discrimination Act 1975* (Cth) and ss 4(14), 6(i), & Pts 2, 3 of the *Equal Opportunity Act 1995* (Vic).

> *Aboriginal and non-Aboriginal people. The other consequence is the considerable degree of breakdown of many Aboriginal communities and a consequence of that and of many other factors, the losing of their way by many Aboriginal people and with it the resort to excessive drinking, and with that violence and other evidence of the breakdown of society. As this report shows, this legacy of history goes far to explain the over-representation of Aboriginal people in custody, and thereby the death of some of them."*[7]

In 1967 the federal government and the Australian people took a step towards changing their position on the country's Indigenous population. Indigenous policy would no longer be the exclusive domain of the (then) conservative state governments, and the number of seats in federal Parliament would now be determined by counting *all* of the voters in each state, not just the non-Aboriginal voters. These changes, and the campaign that accompanied them, provided Indigenous people with a symbol of their political and moral rights. Along with the subsequent passage of the *Racial Discrimination Act 1975* (Cth), reflecting international conventions to which Australia became a signatory, there seemed to be a genuine movement against discrimination on the ground of race.[8]

Today, state and federal governments alike, of all political persuasions, must extend that movement further. A bipartisan approach to this important issue is critical, just as during the campaign for the 1967 referendum. Without that broad political support, any suggested reforms are doomed to failure.

What's at stake? In the international arena, Australia's credibility on human rights is compromised by the country's reluctance to address the wrongs of its history. Our international standing would be improved by Constitutional recognition, bringing Australia in line with other democracies. But the most crucial benefits would be delivered here at home. Constitutional recognition would allow Aboriginal and Torres Strait Islander men, women and children to take part in Australian society on their own terms: not as the invisible inhabitants of *terra nullius*, not as conquered people forced to assimilate to a foreign identity, not as a 'dying race', but rather as members of living communities that existed long before British

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[6] (1997) 190 CLR 1.
[7] *Royal Commission into Aboriginal Deaths in Custody, National Report* (1991) volume 1 at 1.4.14 and 1.4.19.
[8] See for example the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* to which Australia ratified the *Convention* on 30 September 1975.

settlement. Constitutional recognition would, for the first time, correct the long-standing untruth in the country's founding myth – that Australia's social and political institutions were painted on a blank canvas. In historical fact and recognised legal doctrine,[9] Australia's British-inherited system of laws was superimposed on pre-existing systems of law and custom.

In this sense, Australia is a 'joint venture'. But so long as the Constitution remains silent about this blended heritage, Indigenous Australians will be excluded from full membership of the Australian political community. In this way, Constitutional recognition can set the platform for a tangible partnership of reconciliation, solidly founded, in addressing the unique position of Australia's *first peoples*.

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[9] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.