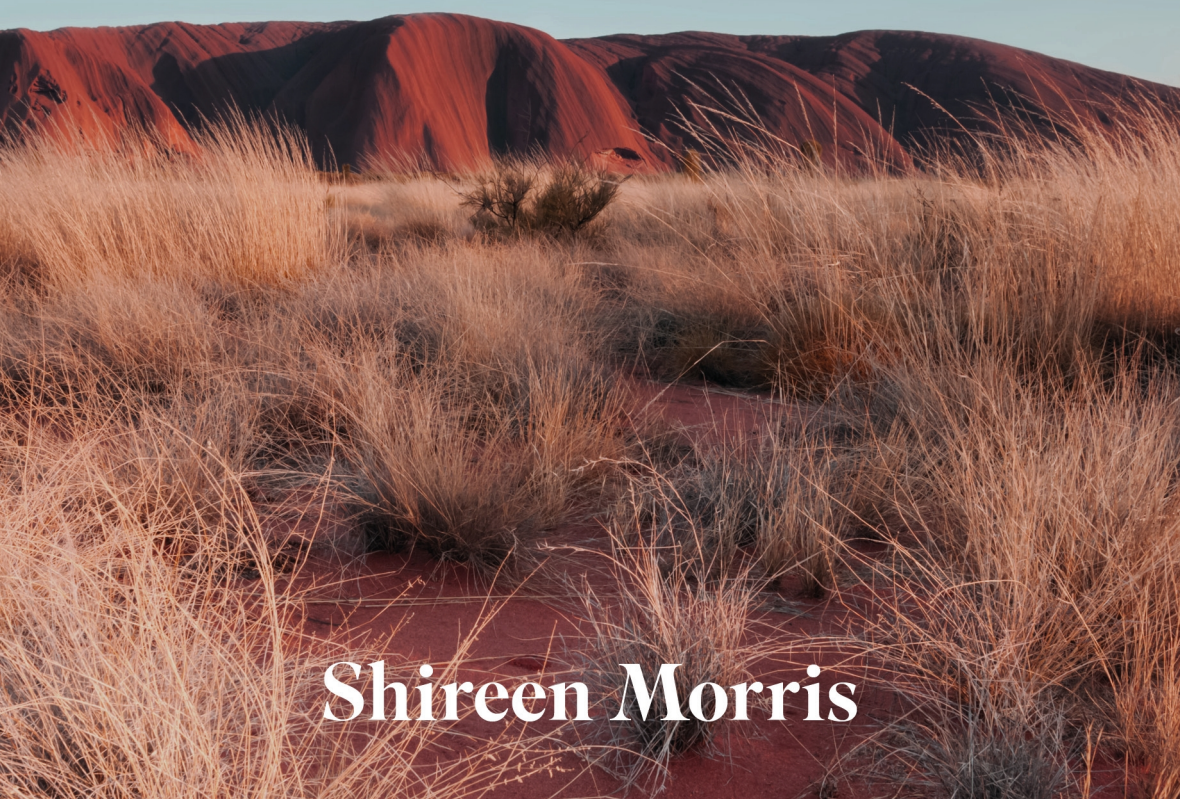
# A First Nations Voice in the Australian Constitution



Shireen Morris

# A FIRST NATIONS VOICE IN THE AUSTRALIAN CONSTITUTION

This book makes the legal and political case for Indigenous constitutional recognition through a constitutionally guaranteed First Nations voice, as advocated by the historic Uluru Statement from the Heart. It argues that a constitutional amendment to empower Indigenous peoples with a fairer say in laws and policies made about them and their rights, is both constitutionally congruent and politically achievable. A First Nations voice is deeply in keeping with the culture, design and philosophy of Australia's federal Constitution, as well as the long history of Indigenous advocacy for greater empowerment and self-determination in their affairs.

Morris explores the historical, political, theoretical and international contexts underpinning the contemporary debate, before delving into the constitutional detail to craft a compelling case for change.

# A First Nations Voice in the Australian Constitution

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# *Acknowledgements*

This book is the product of an intellectual journey undertaken over the last nine years. In 2011, I began working at Cape York Institute (CYI) with the Aboriginal leader and lawyer, Noel Pearson, exploring reform solutions in the debate about Indigenous constitutional recognition. For seven years I worked at the Institute, during which time I completed my PhD thesis making the case for a First Nations constitutional body to ensure Indigenous peoples a fairer voice in laws and policies made about them. In 2018, I began work at the University of Melbourne Law School (MLS) as a McKenzie Postdoctoral Fellow, which enabled me to turn my thesis into this book. I am grateful to CYI and MLS for supporting this work, which afforded me the opportunity for genuine intellectual exploration and collaboration across intellectual, political, ideological and cultural divides. A personal account of this journey is detailed in my 2018 book, *Radical Heart: Three Stories Make Us One* (Melbourne University Press 2018).

In 2014, under Pearson's leadership, this exploration and collaboration gave rise to a new conception of a very old idea, which built on decades of Indigenous advocacy: a constitutionally enshrined Indigenous representative body, to guarantee Indigenous people a voice in the governance of their affairs. Might this proposal present a model for constitutionally recognising Indigenous peoples and rights in a way that enlivens the kind of coalition of political support necessary for a successful 'double majority' referendum? In this book, I make the case for a First Nations voice in the *Constitution*, as advocated by the historic Uluru Statement from the Heart in 2017. Through the chapters I seek to share steps I took in my own reasoning as I searched for workable solutions to the legal and political challenges being faced in this debate.

My first step is to explore the historical, political and theoretical context in which the conversation about Indigenous constitutional recognition takes place, to elucidate the fundamental problem of purpose: what problem does constitutional recognition seek to fix? I suggest that constitutional recognition seeks much more than just symbolism: it seeks to reform the power relationship between Indigenous peoples and the Australian state, to ensure that it is fairer than in the past. I discuss how best to achieve this, given the legal and political parameters involved in successful constitutional reform. As I did in my own journey of discoveries and dead ends, the book grapples with, explores and eliminates particular reform solutions. Is a racial non-discrimination guarantee the answer? History and politics tell us this may not attract the bipartisan support arguably necessary for referendum success. I then seek inspiration from

overseas, before considering non-litigious, political and procedural constitutional reform alternatives. Could reserved Indigenous seats in Parliament present a way forward, like in New Zealand? Given Australia's *Constitution* and politics this may not be the best answer either. What about a constitutionally guaranteed Indigenous body, to ensure the First Nations a voice in laws and policies made about them? My hope is that readers will come to the same conclusion I did: a First Nations voice in the *Constitution*, as advocated by the Uluru Statement, properly drafted and implemented, fits with the culture, history and philosophy of *Australian Constitution*. A First Nations constitutional voice offers the best chance at winning an Indigenous recognition referendum.

Writing an academic book is in many ways a collective effort. I thank my parents, my brother and my husband, Sam, for being supportive throughout the process. I thank Kirsty Gover for her useful comments on the comparative chapter and Cheryl Saunders and Adrienne Stone for their leadership at the Centre for Comparative Constitutional Studies at MLS. I thank Melissa Castan and Patrick Emerton at Monash University for supervising my PhD thesis. I thank Damien Freeman for his ongoing guidance. I am grateful to Greg Craven, Anne Twomey and Julian Leeser for their collaboration and expertise. I appreciate, too, to the MLS Academic Research team and the support of Ken Kiat and Cate Read in converting the footnotes in the manuscript.

I want to particularly thank Noel Pearson for his mentorship, leadership and continued intellectual challenges over the years – it has been through my work with Pearson that the original thinking that gave rise to the concept of a First Nations constitutional voice was able to flourish. Pearson, and the other Indigenous leaders who worked so hard to achieve the Uluru Statement, remain a source of inspiration. While this book is the product of ongoing collaboration and conversation and my thinking has been shaped by many, any errors in fact or interpretation are my own.

I write this book from the perspective of an Australian constitutional lawyer of Indian and Fijian-Indian heritage. I do not speak for Indigenous Australians. I write as an academic and advocate for sensible and achievable constitutional recognition of the kind Indigenous people say they want, and as an Australian who wants to see justice and reconciliation in my lifetime.

Dr Shireen Morris
Melbourne Law School

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# 1

# *Introduction*

All the black man wants is representation in federal parliament … One hundred and fifty years ago, the Aboriginals owned Australia, and today he demands more than the white man's charity. He wants the right to live.

King Burraga (Joe Anderson), chief of the Thurawal tribe near Sydney, in 1933.[1]

[T]he procedures of the excision of this land and the fate of the people on it were never explained to them beforehand, and were kept secret from them.

… when Welfare Officers and Government officials came to inform them of decisions taken without them and against them, they did not undertake to convey to the Government in Canberra the views and feelings of the Yirrkala aboriginal people.

… the people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past, and they fear that the fate which has overtaken the Larrakeah tribe will overtake them.

And they humbly pray that the Honourable the House of Representatives will appoint a Committee, accompanied by competent interpreters, to hear the views of the people of Yirrkala before permitting the excision of this land.

The Yirrkala Bark Petitions in 1963.[2]

Our Yolgnu law is more like your Balanda Constitution than Balanda legislation or statutory law. It doesn't change at the whim of short-term political expediency. It protects the principles which go to make up the very essence of who we are and how we should manage the most precious things about our culture and our society. Changing it is a very serious business … If our Indigenous rights were recognised in the Constitution, it would not be so easy for Governments to change the laws all the time, and wipe out our rights.

Yolngu elder, Galarrwuy Yunupingu in 1998.[3]

[1] Heather Goodall, Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770–1972 (Sydney University Press 2008) 204. See also Bain Attwood and Andrew Markus, Thinking Black: William Cooper and the Australian Aborigines' League (Aboriginal Studies Press 2004) 36.

[2] 'Documenting a Democracy, Yirrkala Bark Petitions 1963 (Cth)' <http://www.foundingdocs.gov.au/item-did-104.html> accessed 1 October 2019.

[3] Galarrwuy Yunupingu, 'The Third Vincent Lingiari Memorial Lecture' (20 August 1998). ('Balanda' means European or Western).

> These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.
>
> We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.
>
> We call for the establishment of a First Nations Voice enshrined in the Constitution …
>
> In 1967 we were counted, in 2017 we seek to be heard.
>
> Uluru Statement from the Heart in 2017.

## I. BACKGROUND

Indigenous constitutional recognition is an area of Australian scholarship that simmers sporadically with political opportunity. Political leadership on the issue waxes and wanes. Both sides of politics maintain support for the idea of recognising Indigenous peoples in the *Australian Constitution*. But what does this mean? The debate challenges constitutional experts and reform advocates to ask and answer some of the nation's toughest yet most fundamental legal and political questions – questions that go to the heart of who we are as a country and who we want to be. What is the purpose of Indigenous constitutional recognition? What problem does it seek to fix? How might Australia reform and reset its constitutional relationship between Indigenous peoples and the Australian state, to ensure it is fairer than in the past? What is the best and most legally sound way to recognise and protect Indigenous rights and interests in Australia's *Constitution*? And how do the various solutions measure up against considerations of political viability? Constitutional reform cannot be separated from constitutional politics: the two are inextricably entwined. It is the people and the Parliament who hold the keys to changing the *Constitution*, with Parliament often acting as gatekeeper to structural progress that the Australian people may otherwise find attractive. Will the nation ever find a way through this maze, to take the steps to meaningfully recognise Indigenous peoples within the nation's constitutional arrangements – steps that other comparable democracies seem to have taken with greater ease?

The politics are complex and can make the *Australian Constitution* seem frozen in its intransigence: only 8 out of 44 attempted referenda have succeeded and the last successful constitutional reform was in 1977.[4] Former Prime Minister John Howard attempted to symbolically recognise Indigenous peoples in 1999 with a new preamble to the *Constitution*, alongside the Republic referendum. Many

[4] For the track record, see Australian Electoral Commission, Referendum Dates and Results, <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm> accessed 18 October 2019.

Indigenous leaders opposed the change[5] and the Australian people voted 'no' to both reforms – only 39.34 per cent voted 'yes' to the new preamble.[6] Troublingly, some politicians seem to want to re-run the 1999 failure. Australian governments thus far have not implemented Indigenous calls for substantive constitutional reform, instead tending to prefer a merely symbolic constitutional mention that entails no structural or operational reform.[7] But the government preference for pure symbolism is contrary to the long history of Indigenous advocacy for substantive constitutional reform and Indigenous aspirations as expressed in the historic Uluru Statement from the Heart. It is also strategically unwise. As this book will argue, the minimalist route will lead to a repeated referendum defeat.[8] Cracking the difficult formula for winning a constitutional referendum requires innovative thinking and hard work. There are no lazy ways through.

The Uluru Statement calls for one constitutional reform: a constitutionally guaranteed First Nations voice in their affairs.[9] I argue this is the right approach to Indigenous constitutional recognition. A constitutional voice is a balanced reform solution that is at once constitutionally innovative and constitutionally conservative: it is substantive and empowering, yet in keeping with Australian constitutional history, culture and design. This is a 'modest yet profound',[10] 'radical centre'[11] reform which, with leadership, perseverance and determination, can navigate the political blockages to meaningful constitutional reform in Australia. The Uluru Statement offers a breakthrough way forward that, in my view, provides the only way to win a recognition referendum.

The call for a First Nations constitutional voice builds on decades of Indigenous advocacy for greater representation, participation and self-determination in their affairs; however, the convergence of such calls for First Nations political empowerment with the push for Indigenous constitutional recognition

[5] See Mark McKenna, 'First words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991-99', Parliament of Australia, Research Paper No 16, 1999–2000 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP16> accessed on 31 December 2019.

[6] Australian Electoral Commission, '1999 Referendum Report and Statistics' (24 January 2011) <https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/Key_Results.htm> accessed 1 October 2019.

[7] See Megan Davis, 'Political timetables Trump Workable Timetables: Indigenous Constitutional Recognition and the Temptation of Symbolism over Substance' in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia* (Federation Press 2016) 81, 88.

[8] Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91(5) *Australian Law Journal* 350.

[9] It also called for a Makarrata Commission, set up in legislation, to oversee agreement-making and truth telling.

[10] Greg Craven, 'Noel Pearson's Indigenous Recognition Plan Profound and Practical', *The Australian* (23 May 2015) <https://www.theaustralian.com.au/nation/politics/noel-pearsons-indigenous-recognition-plan-profound-and-practical/news-story/472ff0238ad4f48cd423fdd9f74a9363> accessed 1 October 2019.

[11] Shireen Morris, 'The Radical Centre: Constitutional Conservatism and Indigenous Recognition', *ABC Religion & Ethics* (17 April 2018): <http://www.abc.net.au/religion/articles/2018/04/17/4831438.htm> accessed 1 October 2019.

represents a decisive shift in the recent debate. For the first part of the last decade, the debate on Indigenous constitutional recognition tended to focus on judicially adjudicated constitutional avenues for Indigenous rights protection. Particularly, it focused on the possibility of a new racial non-discrimination clause in the *Constitution*, as proposed by the Expert Panel in 2012.[12] The Uluru Statement changed the conversation. It offered a new way of thinking about the challenge of Indigenous constitutional recognition.

This shift in thinking presents fresh possibilities for consensus. Where proposals for additional constitutional rights guarantees have tended to create an intellectual and political impasse beyond which consensus has struggled to progress, discussion of political, procedural and participatory mechanisms for Indigenous recognition can illuminate more viable, alternative pathways forward in the national debate. A First Nations voice fits neatly with the philosophy, history and culture of Australia's *Constitution*. The *Constitution* is a power-sharing compact that is all about voices. It recognises and constitutionally guarantees representation of even the smallest historic political communities – the former colonies – ensuring their concerns will always be heard by more populous powers. It is but a small step to also recognise and guarantee that the voices of the First Nations – the historic political community wrongfully omitted from the constitutional compact of 1901 – are also heard in their affairs.

Australian constitutional culture, design and history support the argument that Indigenous constitutional recognition can best occur through political participation, representation and dialogue, rather than through a judicially adjudicated limitation on parliamentary power. This is the crux of the proposal for a First Nations constitutional voice: it presents a mechanism for Indigenous empowerment through political processes, not through the courts. The proposal thus upholds Australia's *Constitution* and respects parliamentary supremacy. It is a constitutionally congruent reform, revolutionary in its modesty. Properly conceived and drafted, the concept can address the relevant aspirations and concerns of divergent stakeholders in this debate: the aspirations of Indigenous peoples who have repeatedly made clear they want substantive, empowering constitutional reform – not mere symbolism; the concerns of constitutional conservatives, who want to uphold the *Constitution* and minimise legal uncertainty; and the concerns of Australian politicians, many of whom may not want to give up power to the High Court. Appropriately formulated, this is a workable 'noble compromise' solution.[13]

[12] Expert Panel on Constitution Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) <https://antar.org.au/sites/default/files/expert_panel_report_.pdf>.

[13] Noel Pearson and Shireen Morris, 'Indigenous Voice Ideal Option for Constitutional Change', *The Australian* (22 July 2017) <https://www.theaustralian.com.au/nation/inquirer/indigenous-voice-ideal-option-for-constitutional-change/news-story/8d318fd0a596dfd963e151c3c1fabccc> accessed 1 October 2019.

Addressing all rational concerns in this debate is important. As a matter of political strategy, a successful referendum can only be achieved by developing wide political consensus. Indigenous constitutional recognition must therefore forge three layers of consensus, each building upon the other. The first requirement is Indigenous consensus. A majority of Indigenous Australians should agree that the model of constitutional recognition is acceptable to them. This is a morally necessary precondition: it would be unconscionable to go ahead with a form of recognition that Indigenous people do not want. Indigenous national consensus has now been achieved through the Uluru Statement.

Indigenous consensus alone is not enough, however. The second requirement is winning widespread support from representatives in the Commonwealth Parliament – for Parliament will need to initiate any proposed referendum to make the constitutional reform a reality. Here, bipartisan support is usually considered important. Parliamentarians across the political spectrum will need to explain and advocate the proposed reform to the wider public. It is therefore not enough if reform-eager progressives support the change; success will likely require reform-cautious conservatives to champion the reform as well.[14] With political leadership across left and right, Australians across the political spectrum will be more inclined to vote 'yes'.

The Australian people will pose the final test through a referendum to change the *Constitution*. Section 128 of the *Constitution* requires a 'double majority' referendum: a majority of voters in a majority of States, as well as a majority nationally, must vote 'yes' to approve any constitutional change. Australians so far seem amenable to the proposal for a First Nations voice in the *Constitution*. A 2017 Omnipoll showed 61 per cent would vote 'yes' to the proposal,[15] and a February 2018 Newspoll demonstrated 57 per cent support.[16] In July 2019, research showed support at 66 per cent[17] – even in the face of sustained

[14] See also Noel Pearson, 'Indigenous People Need a Lot More than Just Symbolism', *The Australian* (4 July 2015) <https://www.theaustralian.com.au/commentary/opinion/indigenous-people-need-a-lot-more-than-just-symbolism/news-story/5db4aa54cbb26969420b4ff141d85aed> accessed 18 October 2019.

[15] Calla Wahlquist, 'Most Australians Would Support Indigenous Voice to Parliament Plan that Turnbull Rejected', *The Guardian* (30 October 2017) <https://www.theguardian.com/australia-news/2017/oct/30/most-australians-support-indigenous-voice-to-parliament-plan-that-turnbull-rejected> accessed 1 October 2019.

[16] Simon Benson, 'Shorten Raising Voice a Winner with Voters: Newspoll', *The Australian* (20 February 2018) <https://www.theaustralian.com.au/nation/bill-shorten-raising-voice-a-winner-with-voters-newspoll/news-story/3d6ee299780b7ac6901df9ccdfa16cc5> accessed 1 October 2019.

[17] Katherine Murphy, 'Essential Poll: Majority of Australians Want Indigenous Recognition and Voice to Parliament', *The Guardian* (12 July 2019) <https://www.theguardian.com/australia-news/2019/jul/12/essential-poll-majority-of-australians-want-indigenous-recognition-and-voice-to-parliament> accessed 1 October 2019. See also Isabella Higgins and Sarah Collard, 'Federal Election 2019: Vote Compass Finds Australians Are Ready to Back Indigenous "Voice to Parliament"', *ABC News* (3 May 2019) <https://www.abc.net.au/news/2019-05-03/vote-compass-federal-election-voice-to-parliament/11071384> accessed 1 October 2019.

government opposition. But a majority national vote is insufficient: at least four out of six States must achieve majority 'yes' votes as well. This is a high threshold for success.

This book argues that a First Nations constitutional voice is capable of winning support across voters of the left and right, and across a majority of States and nationally. Through the Uluru Statement, the idea of an Indigenous constitutional voice has won Indigenous consensus. I argue it can and should also win widespread political consensus and the popular support necessary for success.

## II. STRUCTURE OF THIS BOOK

Chapter two contextualises the constitutional recognition question. It explores the historical, political and theoretical context underpinning the argument for a First Nations constitutional voice, weaving in observations from the international context (which will be explored in greater depth in Chapter four).

Chapter three grapples with objections to the Expert Panel's 2012 proposal for a racial non-discrimination guarantee in the *Constitution*.[18] It seeks to understand those objections, in order to form a principled basis for exploring alternative reform solutions. This chapter also contrasts and compares the commonly proposed alternative – a qualified Indigenous power – but concludes that judicially adjudicated qualifications to a new Indigenous power are susceptible to all the same criticisms as a racial non-discrimination clause; such avenues are no more conducive to political consensus. Rather than judicially adjudicated solutions, the chapter suggests that political and procedural constitutional mechanisms should be considered as alternative constitutional avenues for empowering Indigenous peoples and safeguarding their rights.

In search of alternative approaches, Chapter four seeks inspiration from the international context, with a focus on mechanisms that empower Indigenous peoples to be heard in their affairs. It discusses the political and institutional mechanisms for Māori recognition in New Zealand's constitutional arrangements,[19] and the contrastingly judicialised approach taken in Canada under section 35 of the *Canadian Constitution*, particularly the court-adjudicated duty to consult. My analysis observes that judicial adjudication may not always lead to robust protection of Indigenous rights or fulsome empowerment of Indigenous voices in their affairs: constitutional litigation comes with its own risks. The chapter then briefly discusses arrangements in the Scandinavian countries of Norway,

[18] See also Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2014) 40(2) *Monash Law Review* 488.

[19] See also Shireen Morris, 'Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State' (2014/2015) 18 *Australian Indigenous Law Review* 67.

Sweden and Finland, where Sámi parliaments operate as Indigenous representative and advisory bodies that can engage with the state on Sámi matters.

Prompted by discussion of reserved Māori seats in New Zealand, Chapter five explores the idea of legislated reserved Indigenous seats under Australia's constitutional arrangements,[20] with a particular focus on the High Court's evolving approach to electoral law and voting rights. The chapter suggests there may be some legal uncertainty with respect to the legislative possibility of reserved Indigenous seats. While reserved seats would obviously be possible through constitutional amendment, this would be a complex change. I therefore suggest that a constitutionally guaranteed Indigenous body, to ensure the First Nations a voice in their affairs, would be a more constitutionally congruent and politically viable reform solution for Australia.

Chapter six makes the case for a constitutionally enshrined First Nations voice, as advocated by the Uluru Statement and the Referendum Council.[21] It recaps the case for change by distilling seven key arguments for this constitutional reform. The chapter draws insights from the Inter-State Commission and the Aboriginal and Torres Strait Islander Commission, and then delves into ideas for execution and implementation. It shows how a properly drafted constitutional amendment guaranteeing a First Nations voice, together with appropriate legislative design, can achieve the aspirations of the Uluru Statement while addressing concerns to uphold the *Constitution*, respect parliamentary supremacy and eliminate legal uncertainty. The chapter also responds to common objections to a First Nations constitutional voice.

Chapter seven concludes by urging the parties to work together in good faith to achieve the aims of the Uluru Statement. A First Nations voice would give effect to longstanding Indigenous aspirations for meaningful and empowering constitutional recognition and would also address common concerns related to constitutional reform in Australia. The proposed reform would empower Indigenous peoples with a voice in their affairs, in a way that is fundamentally constitutionally congruent. This would be a political and participatory approach to Indigenous constitutional recognition, in keeping with the *Australian Constitution*. A First Nations constitutional voice would make the constitutional relationship between Indigenous peoples and the Australian state fairer, both procedurally and thus hopefully in outcomes.

[20] As advocated, for example, by Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press 2016) 35–41.

[21] See also Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples When Making Laws for Indigenous Affairs' (2015) 26 *Public Law Review* 166; Shireen Morris, 'The Torment of Our Powerlessness: Indigenous Constitutional Vulnerability and the Uluru Statement's Call for a First Nations Voice' (2018) 41 *University of New South Wales Law Journal* 1; Shireen Morris, 'Parliamentary Scrutiny and Insights for a First Nations Voice to Parliament' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters 2020).

# 2

# *The Historical, Political and Theoretical Context*

## I. THE PROBLEM OF PURPOSE

Any discussion about Indigenous constitutional recognition must first grapple with the problem of purpose. Sensible dialogue about appropriate reform tends to remain elusive unless the parties can first agree on the problem constitutional recognition seeks to fix. Confusion about purpose has been evident in the Australian debate. Some believe constitutional recognition seeks only to make a symbolic statement. Others argue it must implement practical and substantive reform. Which answer is correct?

As will be shown below, an examination of the historical context – the history of Indigenous peoples in the development of the constitutional arrangements of Australia, the treatment of Indigenous peoples under those arrangements, and the related history of Indigenous advocacy for constitutional reform – contextualises Indigenous constitutional recognition as primarily seeking to solve a practical and structural problem. While the historic moment created by the act of Indigenous constitutional recognition may indeed carry symbolic meaning for the nation, the potential for a moving symbolic moment of national reconciliation should not obscure fundamental purpose or confuse the appropriate substance of the reform – yet often it does. Articulating a better answer to the problem of purpose requires an examination of what Indigenous advocates have been arguing for in their advocacy for constitutional recognition and reform, and an understanding of the historical, legal and political factors driving this advocacy for change. It calls for an appreciation of the legal and political power relationships that give rise to Indigenous feelings of powerlessness, and thus advocacy for constitutional empowerment.

The contemporary project of Indigenous constitutional recognition seeks to more fairly resolve some of the injustices perpetuated in the colonisation of Australia, through constitutional and structural reform. It arises because of the deeply unbalanced power relationship between Indigenous peoples and the state that was forged through colonisation and perpetuated in the making of the *Constitution*, as well as subsequently under it. Indigenous constitutional recognition seeks to reform and reset this constitutional power relationship to ensure it is fairer than in the past. It seeks to find a more just and inclusive

place for Indigenous peoples in the constitutional arrangements of Australia. The aim is not just a feel-good moment implementing a symbolic statement of no operational effect. Rather, the aim is to operationally reform structures and relationships so they work more fairly, produce better and fairer policies and laws, and thus improved outcomes for Indigenous Australians and the nation.[1]

The concept of fairness is used as a starting point because it speaks to the need for a practical shift in the way power is distributed and operationalised in this constitutional relationship, but also acknowledges that there are multiple ways to achieve this: there are judicially adjudicated non-discrimination guarantees and rights protections, and there are political, participatory and self-determinative mechanisms which could also be adopted. Fairness is an inherently subjective and amorphous concept.[2] Everyone has a different view on what is fair or not in a given set of circumstances. Fairness is defined by the Cambridge English Dictionary as 'the quality of treating people equally or in a way that is right or reasonable'.[3] It is clear the *Constitution* did not and does not treat Indigenous people equally: they were explicitly excluded by the *Constitution*[4] and there are still constitutional clauses demonstrating and promoting racial discrimination.[5] The *Constitution* has presided over discriminatory laws and policies directed particularly at Indigenous people. As will be shown, equality before the law is not a value protected by the *Australian Constitution*.

Before the Uluru Statement in 2017, the solution most commonly canvassed in recent official recommendations for Indigenous constitutional recognition was to guarantee fairness through constitutionally guaranteeing equality. A racial non-discrimination guarantee, as proposed by the Expert Panel on Constitutional Recognition of Indigenous Australians (the Expert Panel) in 2012, would largely position courts as the determiners of what is equal, reasonable and fair in the circumstances: it would give the judiciary authority to strike down

[1] The structural reform sought through Indigenous constitutional recognition therefore cannot be separated from the desire to 'close the gap' in social and economic outcomes, because Indigenous disparity has a structural and historical dimension. Present disadvantage is connected to a history of structural oppression and exclusion. This will be discussed further below.

[2] As discussed below, my understanding of fairness draws from John Rawls' conception of justice as fairness, as well as many other authors who discuss fairness in contexts of liberalism, constitutionalism, federalism, pluralism and postcolonialism. But see eg John Rawls, 'Justice as Fairness' in John Rawls (ed), *A Theory of Justice* (Harvard University Press 1971); John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly (ed) (Harvard University Press 2001); John Rawls, *Political Liberalism* (Columbia University Press 2005); John Rawls, *A Theory of Justice* (Harvard University Press 1971).

[3] 'Cambridge Dictionary' <https://dictionary.cambridge.org/dictionary/english/fairness> accessed 18 October 2019.

[4] Prior to the 1967 referendum, Indigenous people were excluded from equal participation in the constitutional system under s 127 and from the ambit of the Commonwealth law-making power under s 51(xxvi).

[5] See *Australian Constitution* ss 25, 51(xxvi).

Parliament's laws found in breach of the clause. This is a solution conceptually anchored in the idea of fairness as equality, and operationally and procedurally reliant on litigation as the main means of achieving fairness and equality.

Given the legal and political objections to a racial non-discrimination clause, explored briefly in this chapter and in detail in Chapter three, this book examines other ways – particularly political and non-litigious ways – in which the relationship between Indigenous peoples and the Australian state might be made constitutionally fairer, including constitutional mechanisms which could encourage the making of more reasoned, more reasonable and thus fairer, political decisions with respect to Indigenous peoples, affairs and rights. My concept of fairness in this discussion therefore also draws on notions of mutual respect, civility, reciprocity, consultation, dialogue and participation as ways of achieving reasonableness in dealings, processes and decisions. I argue that ensuring Indigenous peoples a distinctive opportunity to be heard in political decision-making about them and their rights, as the Uluru Statement requests, provides a sound way of improving constitutional fairness in Australia. Whereas the colonial relationship tends to be top-down, imposed, oppressive and discriminatory, and thus can appropriately be characterised as unfair to Indigenous peoples, a fairer relationship should strive for mutually respectful communication.[6] Australia, as a nation aspiring towards reconciliation, should work towards notions of consent and consultation, rather than force and imposition.[7] A sense of procedural fairness is important in this respect, because the way political decisions and laws are made can be as crucial an indicator of fairness as the outcomes of the decisions themselves.[8] Fairness in decision-making procedures can improve the quality of decisions arising from those procedures. The idea that a party should be heard before decisions about their rights and affairs are made is thus central to ideas developed in this book.

Australia's *Constitution* protects citizens' rights predominantly through institutional, democratic and federal power-sharing mechanisms, rather than through judicially adjudicated 'Bill of rights' style clauses. A constitutionally guaranteed First Nations voice would be in keeping with this constitutional culture. While litigation under new constitutional rights clauses is one way to give Indigenous peoples a platform and process via which to be heard, through

[6] See discussion of reciprocity and deliberative democracy in Duncan Ivison, *Postcolonial Liberalism* (Cambridge University Press 2002) 18–23.

[7] The importance of free, prior and informed consent, consultation and political participation is emphasised in the UN Declaration on the Rights of Indigenous Peoples (DRIP), Arts 3, 18, 19.

[8] I use the term 'procedural fairness' in a non-technical way here, as a moral and political principle of natural justice that requires a fair hearing and fair participation in political decision-making. This is particularly relevant to protecting Indigenous rights. For example, the requirement in Article 19 of DRIP that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights' entails procedural involvement by Indigenous people in the making of political decisions affecting their interests, and is essentially requiring a form of procedural fairness. See also Ivison (n 6 above) 23.

the courts, it is not the only way. The *Constitution* could empower Indigenous peoples to more actively participate in the political and policy decisions made about them. A constitutional amendment guaranteeing the Indigenous voice in Indigenous affairs would achieve recognition through increased representation and participation.

The next sections will discuss the historical, political and theoretical context that informs and underpins the debate about Indigenous constitutional recognition and my argument for a First Nations voice in their affairs.

## II. HISTORICAL CONTEXT

### A. *Terra Nullius*

Indigenous peoples inhabited the Australian continent for approximately 60,000 years or more, before the arrival of the British.[9] The interactions between Indigenous peoples and the British colonisers share some similarities with, and also certain differences from, the stories of colonisation in other comparable former British colonies, like New Zealand,[10] Canada,[11] and the USA.[12] Like the Indigenous peoples in those countries, Indigenous peoples in Australia suffered discrimination and dispossession.[13] There was warfare over land[14] and in some areas there was arguably attempted genocide of Indigenous peoples.[15]

[9] See eg Helen Davidson and Calla Wahlquist, 'Australian Dig Finds Evidence of Aboriginal Habitation up to 80,000 Years Ago', *The Guardian* (20 July 2017): <https://www.theguardian.com/australia-news/2017/jul/19/dig-finds-evidence-of-aboriginal-habitation-up-to-80000-years-ago> accessed 18 October 2019; Sean Brennan and Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2018) 27; Geoffrey Blainey, *The Story of Australia's People: The Rise and Fall of Ancient Australia* (Penguin Australia 2015); Scott Cane, *First Footprints: The Epic Story of the First Australians* (Allen and Unwin 2013).

[10] See eg Ian Pool, *Colonisation and Development in New Zealand between 1769 and 1900* (Springer International Publishing 2015).

[11] See eg Sarah Carter, *Aboriginal People and the Colonizers of Western Canada to 1900* (University of Toronto Press 1999).

[12] See eg Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (University of North Carolina Press 2010).

[13] See Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen and Unwin 1987); Henry Reynolds, *Dispossession: Black Australians and White Invaders* (Allen and Unwin 1989); Bain Attwood, *Telling the Truth about Aboriginal History* (Allen and Unwin 2005).

[14] Henry Reynolds, *The Other Side of the Frontier* (UNSW Press 2006); John Connor, *The Australian Frontier Wars 1788–1838* (UNSW Press 2005); Henry Reynolds, *Forgotten War* (NewSouth Publishing 2012); Maurice French, *Conflict on the Condamine: Aborigines and the European Invasion* (University of Southern Queensland Press 1989).

[15] See A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books 2004); Rosalind Kidd, *The Way We Civilize: Aboriginal Affairs – the Untold Story* (University of Queensland Press 2005). Noel Pearson also writes of the attempted genocide of Indigenous Tasmanians in Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 16–23.

The colonisers tended to view Indigenous peoples as inferior races.[16] Such attitudes worked to justify the assertion of Crown sovereignty and ownership of the land, at the expense of Indigenous rights.[17]

Assumptions of Indigenous inferiority were evident in the erroneous application of the international doctrine of *terra nullius* to inhabited land: the idea that the land belonged to nobody before the British arrived.[18] The 'common law cousin' to *terra nullius*, the English doctrine of 'desert and uncultivated' land, was also applied.[19] It held that practically uninhabited, uncultivated and undeveloped land could be acquired by settlement.[20] In *Cooper v Stuart* in 1889, the Privy Council characterised Australia as a 'colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, [acquired by] settlement'.[21]

The related doctrines of *terra nullius* and 'desert and uncultivated' land were factually incorrect[22] and discriminatory in their application to Australian land that was inhabited by Indigenous peoples.[23] The doctrines were based on the assumption that Indigenous peoples were racially, culturally and socially inferior to whites. The explanation offered in the *Southern Rhodesia* case of

For essays exploring colonial interactions, see Marcia Langton and Rachel Perkins (eds), *The First Australians* (The Meigunyah Press 2010).

[16] See Pearson, 'A Rightful Place' (n 15 above) 16–23; Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd edn, Aboriginal Studies Press 2007) 1; Noel Pearson, 'The Reward for Public Life Is Public Progress: An Appreciation of the Public Life of the Hon EG Whitlam AC QC, Prime Minister 1972–1975' (*Whitlam Oration*, Whitlam Institute, University of Western Sydney, 13 November 2013) <https://www.whitlam.org/publications/2013/11/13/the-reward-of-public-life-is-public-progress>.

[17] Henry Reynolds, *The Law of the Land* (3rd edn, Penguin 2003) 159. For alternative views of this history see Keith Windschuttle, *Fabrication of Aboriginal History: Van Dieman's Land 1803–1847* (Macleay 2003).

[18] See Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' (2008) 30 *Michigan Journal of International Law* 177, 184; Ulla Secher, 'The High Court and Recognition of Native Title: Distinguishing between the Doctrines of *Terra Nullius* and "Desert and Uncultivated"' (2007) 11 *University of Western Sydney Law Review* 1.

[19] Secher (n 18 above).

[20] William Blackstone, *Commentaries on the Laws of England*, vol 1 (3rd edn, Clarendon Press 1768) 107. Note also that Blackstone questioned the morality of the dispossession of the Indigenous peoples of the Americas.

[21] *Cooper v Stuart* (1889) 14 App Cas 286, 291.

[22] Even the assumption that the land was uncultivated may have been incorrect: see Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen and Unwin 2011); Bruce Pascoe, *Dark Emu: Aboriginal Australia and the Birth of Agriculture* (Magabala Books 2016).

[23] As Secher explains, '[a]lthough both doctrines classified inhabited land as uninhabited land, crucially, the two doctrines did so for different purposes: the doctrine of *terra nullius* served the purpose of legitimising the acquisition of sovereignty in international law and the "desert and uncultivated" doctrine served the purpose of ascertaining the law which is to govern a territory on colonisation at common law.': Secher (n 18 above) 3. See also Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of "*Continuity Pro-Tempore*"' (2004) 27 UNSWLJ 703, 707–8.

1919 for the non-recognition of Indigenous property rights demonstrates the thinking of the era:

> Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.[24]

Under such logic, the colonisers were able to disregard Indigenous property and sovereignty rights in their quest for territorial expansion. As Brennan J explains in *Mabo*, the landmark case which eventually overturned the misapplied doctrine of *terra nullius* in Australia, treating the Indigenous inhabitants as 'barbarous', 'backwards peoples', 'without settled law', helped the colonisers justify the acquisition of sovereignty over inhabited land:

> The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action. To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest …[25]

Both *terra nullius* and the 'desert and uncultivated' doctrine embodied a discriminatory attitude towards Indigenous people that denied Indigenous sovereignty and property rights, but also denied Indigenous human rights in general – including rights to be treated equally before the law. The principles embodied, in essence, a denial of Indigenous equal humanity.[26] Yet even under Britain's own law (had the British law been non-discriminatorily applied in Australia), Indigenous peoples should have been treated equally.[27] As Brennan J explained in *Mabo*, 'in a settled colony in inhabited territory, the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike

[24] *In re Southern Rhodesia* [1919] AC 211, 233–34.

[25] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 32. See also at 37–40.

[26] See Pearson, 'The Reward for Public Life is Public Progress' (n 16 above). Assumptions of Indigenous inferiority are evident in the writings and observations of the era. See eg Sigmund Freud, *Totem and Taboo*, Abraham A Brill (tr) (Cosimo Classics 2009), who wrote about Indigenous Australians in his 1918 analysis: '[f]or outer as well as for inner reasons, I am choosing for this comparison those tribes which have been described by ethnographists as being most backward and wretched: the aborigines of the youngest continent, namely Australia, whose fauna has also preserved for us so much that is archaic and no longer to be found elsewhere.' (at 4).

[27] Shireen Morris, 'Re-Evaluating *Mabo*: The Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity' (2012) 5 *Land, Rights, Laws: Issues of Native Title* 1, 8.

and equally'.[28] Toohey J suggested in the same case that, had the British law been applied equally, the colonisers should have recognised that the Indigenous peoples, being in possession of the land, owned a title under the British common law that should have been 'good against all the world'.[29] The colonisers often failed to apply their own principles of equality and justice to the Indigenous peoples they sought to colonise.

Equal application of the imported law was not the case in practice. From the unofficial policies of frontier killing of Indigenous people,[30] to official policies which included forced removal of Indigenous people into protective 'missions',[31] as well as laws and policies denying Indigenous people equal voting rights in some jurisdictions,[32] denying them equal wages,[33] dictating who they could marry and controlling where they could live,[34] and of course denying their property rights[35] – Indigenous people in practice were treated in a deeply discriminatory way under the imported law. Such discrimination facilitated dispossession. The prosperity and success of the modern Australian nation in a real sense was built on historical Indigenous losses. As Brennan J described, Indigenous dispossession 'underwrote the development of the nation'.[36]

The 1992 *Mabo* decision overturned some of this discrimination in relation to land rights by legally recognising that Indigenous people held native title under their traditional laws and customs, where that title was not extinguished by the Crown. The Commonwealth subsequently enacted the *Native Title Act 1993* (Cth) to recognise native title rights in legislation. But legislated recognition

[28] *Mabo* (n 25 above) 37. For a contrary interpretation contending that Indigenous peoples retained their own legal autonomy, see the much earlier case of *R v Ballard* [1829] NSWSupC 26.

[29] *Mabo* (n 25 above) 206 (Toohey J). See also Morris, 'Re-Evaluating *Mabo*' (n 27 above) 8.

[30] See Kidd (n 15 above); Pearson, 'A Rightful Place' (n 15 above) 16–23.

[31] Australian Human Rights Commission, 'Bringing Them Home: The Stolen Children Report' (1997); Pearson, 'A Rightful Place' (n 15 above), 24–28.

[32] See eg *Elections Act 1885* (Qld) s 6 provided that '[n]o aboriginal native of Australia, India, China or of the South Sea Islands shall be entitled to be entered on the roll except in respect of a freehold qualification'. The *Constitution Act Amendment Act 1899* (WA) s 26 provided that 'no aboriginal native of Australia, Asia, or Africa, or person of the half-blood, shall be entitled to be registered, except in respect of a freehold qualification.' The *Electoral Code 1896* (SA), s 16 provided that 'in the Northern Territory immigrants under the *Indian Immigration Act 1882* and all persons except natural-born British subjects and Europeans or Americans naturalized as British subjects, are disqualified from voting.'

[33] See Australian Associated Press, 'Indigenous Workers Receive $190m Stolen Wages Settlement from Queensland Government', *The Guardian* (9 July 2018) <https://www.theguardian.com/australia-news/2019/jul/09/indigenous-workers-receive-190m-stolen-wages-settlement-from-queensland-government> accessed 18 October 2019; Commonwealth of Australia, *Unfinished Business: Indigenous Stolen Wages* (Standing Committee on Legal and Constitutional Affairs 2006); *Bligh v Queensland* [1996] HREOCA 28.

[34] The Protection Acts empowered appointed protectors and boards to control many day-to-day aspects of Indigenous people's lives. See eg *Aborigines Protection Act 1886* (WA), *Aborigines Protection Act 1869* (Vic), *Aboriginals Preservation and Protection Act 1939* (Qld). See also John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press 1997) 12.

[35] See full discussion in *Mabo* (n 25 above).

[36] ibid 69.

of rights can be legislated away, as shown when former Prime Minister John Howard weakened native title rights under his Wik Ten-Point Plan in 1998.[37] The vulnerability of Indigenous rights in Australia's legal and political system is underpinned by the fact that Australia's *Constitution* provides no recognition or protection of Indigenous rights and interests. Indeed, the *Constitution* can be understood as creating a framework still predicated on the now defunct fiction of *terra nullius*. Ironically, after the 1967 amendments (discussed further below), the *Constitution* now makes no mention of Indigenous peoples: it reads as if Indigenous people do not exist and still provides means for continued discrimination and exclusion.[38]

## B. The Royal Instructions

There was no negotiated agreement with Indigenous peoples when the British colonised Australia. There was no consent. This appears contrary to initial Imperial intentions and instructions. Lieutenant James Cook on his exploration voyages carried with him secret instructions from the British King, authorising Cook to 'take possession of convenient situations in the country in the name of the King of Great Britain', but 'with the consent of the natives'.[39] On 22 August 1770, Cook declared possession of the east coast at Possession Island. Cook had noted that the land was inhabited, but no documented negotiation occurred and there was no consent.[40] Then in 1787, King George III issued further instructions to Arthur Phillip. The instructions this time did not mention 'consent',[41] but instructed as follows:

> You are to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them.[42]

[37] This was subsequent to the 1996 *Wik* case, which held that native title rights could coexist with the rights of pastoralist leaseholders: see *Wik Peoples v Queensland* (1996) 187 CLR 1; Wik Ten-Point Plan: *Native Title Amendment Act 1998* (Cth). See Paul Keating, 'The 10-Point Plan that Undid the Good Done on Native Title', *Sydney Morning Herald* (1 June 2011) <https://www.smh.com.au/politics/federal/the-10-point-plan-that-undid-the-good-done-on-native-title-20110531-1feec.html> accessed 18 October 2019.

[38] Discriminatory clauses still remain: see *Australian Constitution* ss 25, 51(xxvi), which apply to 'races' in general. See also Jennifer Nielsen, 'Breaking the Silence: the Importance of Constitutional Change' in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia* (Federation Press 2016).

[39] Secret Instructions to Captain Cook (30 June 1768): <http://foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf> accessed 18 October 2019.

[40] Pearson, 'A Rightful Place' (n 15 above) 40.

[41] The Expert Panel argue that these instructions perpetuate the notion of *terra nullius*, that the land belonged to no one. See Expert Panel on Constitution Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) 205 (Expert Panel Report).

[42] Governor Phillip's Instructions 25 April 1787 (UK): <www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.rtf> accessed 18 October 2019.

As the process of dispossession played out, these instructions were also not followed. Edward Wilson lamented in an 1856 newspaper that:

> In less than twenty years we have nearly swept them off the face of the earth. We have shot them down like dogs. In the guise of friendship we have issued corrosive sublimate in their damper and consigned whole tribes to the agonies of an excruciating death. We have made them drunkards, and infected them with diseases which have rotted the bones of their adults, and made such few children as are born amongst them a sorrow and a torture from the very instant of their birth. We have made them outcasts on their own land, and are rapidly consigning them to entire annihilation.[43]

The force and violence of colonisation in Australian history cannot accurately be described as fostering 'amity and kindness'. No 'intercourse' or dialogue was officially opened, and 'conciliation' or peaceful negotiation did not in any formal sense occur.[44] The British took control and asserted their sovereignty without Indigenous agreement.[45]

The issue of consent and surviving Indigenous sovereignty was sometimes kept alive by the colonial courts. Justice Dowling's judgment in *R v Ballard* in 1829 suggested that the Indigenous peoples retained their own legal authority in certain circumstances, until formal consent occurred:

> Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us interfering with their institutions even if such interference were practicable.[46]

Justice Willis, in *R v Bonjon* in 1841, perhaps inspired by the American cases establishing 'domestic dependent sovereignty' for the Native American tribes,[47] also observed that the colony was not 'obtained by right of conquest and driving out the natives, nor by treaties'.[48] Willis J argued that because no terms had been defined for the 'internal government, civilisation and protection' of Indigenous peoples, Indigenous peoples remained 'unconquered and free' as 'independent tribes' and 'self-governing communities'. Willis J thus urged that treaties should be made with the Indigenous peoples.[49]

[43] Edward Wilson, 'The Aborigines', *The Argus* (Melbourne, 16 March 1856) <https://trove.nla.gov.au/newspaper/article/4833244> accessed 18 October 2019.

[44] Though it was informally attempted, as discussed below.

[45] See also Attwood (n 13 above) 124.

[46] *R v Ballard* [1829] NSWSC 26, quoted in Expert Panel Report (n 41 above) 205; Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press 2009) 13. See also Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7.

[47] See eg *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831).

[48] Expert Panel Report (n 41 above) 206.

[49] See 'Supreme Court: Criminal Side', *The Port Phillip and Melbourne Advertiser* (Vol IV, No 243, 20 September 1841) <http://nla.gov.au/nla.news-article226510616> accessed 18 October

Despite such urgings, there was no formal treaty, agreement or mutually established terms of engagement in the relationship between Indigenous peoples and the Crown. Though consent was never obtained, the *Mabo* decision held that the issue of surviving Indigenous sovereignty is not justiciable in an Australian court.[50] This confirmed the principle stated in the *Sea and Submerged Lands case* that 'the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'.[51] The principle was again confirmed in 1993 in *Coe*.[52]

The unfulfilled royal instructions can be seen as broken promises of liberal justice in relation to Indigenous peoples. As Ivison puts it, '[t]he history of settler colonialism demonstrates how indigenous peoples have experienced the promise of liberal legitimacy as perpetually deferred, if not a matter of colossal bad faith.'[53] When it came to Indigenous peoples, the colonisers seemed to abandon their professed ideals.[54]

### C. Unrealised Attempts at Indigenous-Settler Negotiations

There were, however, unfulfilled, unrealised or unreciprocated attempts at Indigenous-settler negotiation and agreement-making. John Batman's attempted treaty with the Indigenous peoples near Port Phillip in 1835[55] is seen by some as a sham and an attempt at fraud: a tricky exchange of trinkets and supplies for vast

2019 for Justice Willis' judgment in the trial of *Bonjon*. See also Expert Panel Report (n 41 above) 206; Behrendt, Cunneen and Libesman (n 46 above) 15; Julie Cassidy, 'The Impact of the Conquered/Settled Distinction Regarding the Acquisition of Sovereignty in Australia' (2004) 8 *Southern Cross University Law Review* 1, 8–9; Ann Hunter, 'The Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict ("Inter Se Offences") in Western Australia in the 1830–1840s' (2004) 8(2) *Australian Journal of Legal History* 215.

[50] *Mabo* (n 25 above) 31–32.

[51] *New South Wales v Commonwealth* (1975) 135 CLR 337, 388.

[52] *Coe v Commonwealth (No 2)* (1993) 214 CLR 422.

[53] Duncan Ivison, 'Pluralising Political Legitimacy' (2017) 2(1) *Postcolonial Studies* 118, 128.

[54] In Frantz Fanon, *The Wretched of the Earth* (Grove Press, 1963) 309–12, Fanon poetically observes this apparent incongruence between principle and practice: '[l]eave this Europe where they are never done talking of Man, yet murder men everywhere they find them, at the corner of every one of their own streets, in all the corners of the globe … That same Europe where they were never done talking of Man, and where they never stopped proclaiming that they were only anxious for the welfare of Man: today we know with what sufferings humanity has paid for every one of their triumphs of the mind.' For more on the discrepancy between stated intentions and colonisation in practice, see Attwood (n 13 above) 128–30. See also Dylan Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' (2018) 81(5) *Modern Law Review* 73.

[55] James Boyce, *1835: The Founding of Melbourne and the Conquest of Australia* (Black Inc 2008). See also Malcolm Turnbull, 'Beneath the Boulevards' *The Monthly* (July 2011) <https://www.themonthly.com.au/issue/2011/june/1309412782/malcolm-turnbull/beneath-boulevards> accessed 18 October 2019.