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The Uluru Statement: A First Nation's perspective of the implications for social reconstructive race relations in Australia

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Abstract

From every state and territory of Australia, including the islands of the Torres Strait, over 200 delegates gathered at the 2017 First Nations National Constitutional Convention in Uluru, which has stood on Anangu Pitjantjatjara country in the Northern Territory since time immemorial, to discuss the issue of constitutional recognition. Delegates agreed that tokenistic recognition would not be enough, and that recognition bearing legal substance must stand, with the possibility to make multiple treaties between Aboriginal peoples and Torres Strait Islanders and the Commonwealth Government of Australia. In this article, we look at the roadmap beyond such a potential change. We make the case for a redistributive approach to capital, and propose key outcomes for social reconstruction, should a voice to parliament, a Makarratai Commission, and multiple treaties be enabled through a successful referendum. We conclude that an alteration to the Australian Constitution is the preliminary overture of a suite of changes: the constitutional change itself is not the end of the road, but simply the beginning of years of legal change, which seek to provide a socio-economic future for Australia's First People, the oldest continuing culture in the world. Constitutional change seeks to transform the discourse about Aboriginal and Torres Strait Islander relations with the Australian state from one centred on distributive justice to one that is primarily informed by retributive justice. This article concerns the future generations of Aboriginal and Torres Strait Islander children and their right to labour in a market that honours their cultural contributions to humanity at large.

Keywords

race relations, distributive justice, social and economic policy, social reconstruction, Aboriginal, Torres Strait Islander, constitutional recognition, treaties, First Nations People, retributive justice, political liberalism

Aboriginal people and Torres Strait Islanders are the First People of the continent now called Australia. These First Nations include the oldest continuing cultures and political societies on the planet. Our deep and ancient histories are the true and continuing history of Australia, and our achievements and contributions to society have been powerful and disruptive to the foundation narratives and national mythologies that underpin settler-colonialism and the Australian state. One of the most significant events in Australia's Labour Movement was the walk-off and strike by over 200 Gurindji stockmen and other community Elders and members in 1966. This took place in Kalkarindji—formerly known as Wave Hill—in the Northern Territory. Just over half a century later, in the same territory, Uluru, on Anangu Pitjantjatjara land, saw over 200 Aboriginal and Torres Strait Islander people from across the continent seeking the highest and most ambitious act of retributive justice in ancient, continuing history. The Referendum Council's work is the culmination of every act of Aboriginal and Torres Strait Islander sovereignty, and it represents the future of a decolonised Australia. While the origin of Aboriginal and Torres Strait Islander peoples remains a point of scientific debate, the Lake Mungo remains in New South Wales are at least 40,000 years old (Olley, Roberts, Yoshido, & Bowler, 2006), and more recent scientific research suggests the habitus of First People at the Warraty rock shelter of South Australia to be from 49,000 to 50,000 years old (Hamm et al., 2016). Regardless of the scientific debate, Aboriginal and Torres Strait Islander people are the First People of Australia.

The outcome of the Uluru Statement from the Heart ('Uluru Statement') are demands that there should be: (1) a voice to federal Parliament; (2) an established Makarrata Commission for legal reconciliation, retributive justice, healing and truth-telling; and (3) for all coming time, the possibility for Aboriginal and Torres Strait Islander people to make treaties with governments, as are suitable to their socio-economic situations, and for the good of the enduring legacy and dignity our peoples.

These directives, which emerged from the 2017 First Nations National Constitutional Convention at Uluru ('Uluru Convention'), will each require further consideration and much negotiation in order that mechanisms that fulfil these stated requirements are achieved and become effective tools in reconstituting the Australian state in ways that many of the delegates hope for (Referendum Council, 2017). The first author, Jesse Fleay, was approached to participate as a delegate at the Perth dialogue in Western Australia, and was there elected to attend the National Constitutional Convention at Uluru in Kata Tjuta, Northern Territory. Fleay then contributed to the Uluru Statement and the successive road map forward, with Thomas Mayor, Noel Pearson and others. Fleay was elected as the youth representative for the movement that formed from the process, and was also recruited to the work group that formed to continue the discussion about constitutional change. Fleay is aligned to Voice Treaty Truth and the Australian Republican Movement, and has been working to find a way forward together, as Aboriginal and Torres Strait Islander people, and as Australians on a grander scale.

As demands, the directives of the Uluru Convention are a prelude to the beginning of a retributive industrial program of equality, which seeks distributive socioeconomic justice among Aboriginals and Torres Strait Islanders, so that we may have worthwhile livelihoods in a swiftly changing international labour market. The constitutional changes, to be put to the Australian people in a referendum, will only gain relevance with the socioeconomic applications of the changes and their influence on human life. It must be noted, however, that the Turnbull government rejected the referendum and determined that the demands made by the delegates were too radical. This criticism came, apparently ignorant of the fact that most Commonwealth nations—including New Zealand and Canada—have

enacted far less conservative treaties with their First People, and none of these democracies have collapsed. The criticism also came with apparent unawareness of the fact that Australia remains the only Commonwealth nation without a treaty with its First People. However, along with the collapse of Turnbull's leadership in 2018, it appears that the referendum has been shelved, as well as the Republican referendum or any mention of constitutional development in Australia. Despite all of this, the three demands made by Aboriginal and Torres Strait Islander delegates are discussed in this article, to point to their direct socioeconomic relevance.

Voice, Makarrata, treaties: outcomes of the Uluru Statement

The voice to Parliament via the formation of a national Indigenous representative body (Referendum Council, 2017) could have a number of roles, although its principle purpose and form is to be constitutionally enshrined to give legal and binding advice on matters that concern Aboriginal and Torres Strait Islander affairs. Unlike the Aboriginal and Torres Strait Islander Commission (ATSIC)—which was a good model with poor leadership—this new power would be democratically elected by Aboriginal and Torres Strait Islander constituents in each state and territory, in direct consultation with the First Nations of each of those states and territories; this would be consistent with the principles of John Locke, who declared that the will of the people, through democratic representation, must be the goal of a free, civil society, and that the old social order, which monarchy and the aristocracy embodies, is an affront to the potential of each human being, who should not be limited by their birth, but rather free to live their lives and seek fulfilment through the merits of industry and achievement. The identity of humanity depends on these principles, while the diversity of humanity demands them. The humanity of Aboriginal and Torres Strait Islander people, advanced through constitutional change, will be a mechanism for fairness, in one thread reflecting the humanity of all people, different and diverse but essentially equal, as a part of the entirety of the tapestry.

As authors, our position is clear: we see cause for constitutional change in Australia, that seeks to include a voice to Parliament for Aboriginal and Torres Strait Islander Australians, and we see the ultimate destination of an Australian Republic by the year 2020. Both of these demands are no longer a point of debate; rather, the debate is around how they can both come about, and what the relationship of each outcome will be. We do not for a moment privilege one of these outcomes over the other: each are important milestones to achieving Australian and First Nation sovereignty and can work hand in hand. Under a Republic, a voice to Parliament is easily achievable, and all treaties will be made with a sovereign Australia, rather than simple surrender documents to the Crown of the United Kingdom and its broken empire. Truth telling, through a Truth and Justice Commission, can be established through legislation.

This position is founded in the well-documented and tabled discussions of the delegates at Uluru, and the fact that a majority of Australians now support Australia becoming a republic, or feel no loyalty toward a constitutional monarchy whatsoever: Australians generally want a referendum, or would not mind if one is held before the year 2020, and they will inevitably vote yes to a republic. It is further founded on the inherent truth of our constitutional processes in Australia. Only one referendum will succeed, and that must be the Republic. The voice will be established in the new republican order of the state, through constitutional measures, and all successive demands will be met. Aboriginal and Torres Strait Islander people, like all Australians, will be free to make demands of our government.

The late E.G. Whitlam, 21st Prime Minister of Australia, claimed that there are strong socially democratic principles in the Australian Constitution, but that these principles were left incomplete in relation to Aboriginal and Torres Strait Islander people. The specific arrangements for such a representative body should be left to Aboriginal people and Torres Strait Islanders to determine; however, we believe the Australian Electoral Commission will have an important role to play in ensuring fairness and transparency in elections to the new body and to underpin the authority of the new body to legitimately represent Indigenous Australia.

It is our view that the voice will be the most important aspect of the three outcomes of the Uluru Statement. Ideally, any new representative body will operate as more than a simple *advisory* body to Australian government: the legal context of *advice* in common law is a powerful one. Australia's governors and governors-general, as delegates to the Head of State, Her Majesty Queen Elizabeth II, her Heirs and her Successors, have the power to dissolve Parliament, sack prime ministers, declare war, and more. Advice is a higher power in the Australian Constitution that should not be underestimated. With its powers enshrined in the Constitution, the new body will exist as a new power in the formal politics of Australia. With a clear remit to give voice to the issues and concerns, hopes and aspirations of Aboriginal peoples and Torres Strait Islanders, to hold Australian governments to account and to provide a political counterweight to the sectional interests of miners, pastoralists and developers, the changes demanded at the Uluru Convention are at odds with the problematic jurisprudential issues of native title, which only serve certain applicants through courts (Strelein, 2009) rather than entire generations through effective constitutional change and the great reforming legislation that would follow.

Whereas the Commonwealth of Australia assumes its legitimacy from an increasingly tenuous lineage of the Crown of the United Kingdom as an old-world monarchy (Cross, 2007; Nugus, 2007; Power, 2010; Warhurst, 1993), the voice of Aboriginal peoples and Torres Strait Islanders will be a democratic force for sovereignty and self-determination, whose authority is rooted in the antiquity of unique cultures and societies that predate the contemporary Australian state by millennia: from hunting paths to sites aligned with the stars as an early seasonal map, First Nations have carried on an advanced knowledge of the land and self-organisation that has lasted until the present day (Bracknell, 2014; Cowlshaw, 2012; Magowan & Magowan, 2001).

A representative body that gives voice to Aboriginal peoples and Torres Strait Islanders interests is highly consistent with the inevitable shift in Australian sovereignty to a republic, where power is elected and assumed on the basis of merit, rather than determined by the lottery of birth. Specific terms for elected First Nations representatives will mean self-governance of Aboriginal and Torres Strait Islander people stays *with* the people. Such changes to the form and content of the formal institutional framework that shapes the politics of the Australian state will function to enfranchise Aboriginal peoples and Torres Strait Islanders in a way that recognises their claims to participatory citizenship and their claims to have rights that originate in the societies, their customs, laws and political principles.

A formally instituted Aboriginal and Torres Strait Islander mechanism to inform Parliament in an ongoing dialogue, authorised and empowered by the Constitution, would do much to overcome the historical, and as yet unresolved, issues that have their origins in the founding of British Australia and the subsequent dispossession and disenfranchisement of Aboriginal peoples and Torres Strait Islanders by the settler-colonial Australian state.

Calls to institute a Makarrata Commission echo the politics of the 1970s when a group of prominent Australians that included H. C. 'Nugget' Coombes, William (Bill) E. H. Stanner, Charles Dunford Rowley and Judith Wright formed the Aboriginal Treaty Committee (ATC; Fenley, 2010; Robbins, 2010). Between 1979 and 1982 the ATC advocated for a *Makarrata*, a political process that has its origins in the Yolngu people of East Arnhem Land. A Makarrata is a traditional form of political compact that was concluded with ceremony and used to end disputes between previously hostile parties. In 2017, delegates have returned to this device as a means to heal the wounds of history that have been inflicted upon Aboriginal peoples and Torres Strait Islanders since the arrival of settler-colonialism in Australia, and which has been the result of years of work by academics such as Megan Davis and Marcia Langton (Davis & Langton, 2016; Referendum Council, 2017; Schultz, 2018).

Although Australia adopted a process of national reconciliation in the 1990s in an attempt to address the historical divisions between Indigenous and non-Indigenous Australians, unlike similar processes in South Africa and more recently Canada, no truth commission was part of this process. The consequences of this have been felt in the sporting world, which has always reflected on identity and race in postcolonial nations (Burn, 2011; Young, Hallinan, & Judd, 2013). This occurred along with the culture wars of the 1990s (Deane, 2017) and the infamous cultural cringe alluded to by Prime Minister Paul Keating (Parliament of Australia, 1992). The Makarrata Commission advocated by the Uluru Convention will be a preliminary body to advise the Prime Minister. The Commission will seek to right wrongs and heal the nation of its colonial past and its postcolonial actions through the establishment of a national process that enables people to tell their stories. It will seek to reconcile the nation through this formal process of truth telling, calling each individual and organisation in Australia to enact reconciliatory actions as Australian law. This includes placing the historic abuses of church and state, the economic and health sectors, crime and justice, and most importantly, education, on the national record as truth and fact that require public acknowledgement, in order to create a reconstituted Australian state in which Aboriginal peoples and Torres Strait Islanders are an integral part of the national polity.

The third key outcome of the Uluru Convention is that a treaty or treaties be concluded between Aboriginal peoples, Torres Strait Islanders and the Commonwealth of Australia as the successor state and prime beneficiary of British colonialism in the continent now known as Australia and its near islands. British colonisation of the Australian continent took place according to the legal doctrine of *terra nullius*, meaning that Indigenous inhabitants were provided no legal status or protections under English common law. Recognition of Indigenous customary law was not provided, and rights to land, culture and language were given no protection under the incoming colonial legal system. Although colonial officials from New South Wales concluded the Treaty of Waitangi (1840), which provided Maori in Aotearoa (New Zealand) with the formal legal rights of British subjects (Toki, 2010), no legal framework for treaty making was developed in the British colonies that claimed the Australian continent. The lack of a treaty-making tradition by the settler-colonial state in Australia stands in stark contrast to other 'new-world' colonies in the former British Empire.

Both Canada and the United States have a long history of treaty making with the Indigenous peoples of North America. This tradition was entrenched into the English common law of Britain's North American colonials through the Royal Proclamation of 1763, which established the principle of native title in colonial law. This principle was further entrenched by Chief Justice John Marshall of the United States, who in a series of

important legal cases between 1823 and 1832 confirmed tribal sovereignty of the 'Indians' within the context of the settler-colonial state now occupying their territories. Marshall famously termed the relationship that existed between 'Indian' nations and the Federal Government of the United States of America as one of a sovereign 'settler-state' and 'native' domestic dependent nations. Should a treaty-making process be initiated in Australia, it will bring the relationship between Indigenous peoples and the settler-state into the 1830s (Brennan, Behrendt, Strelein, & Williams, 2005).

While many non-indigenous Australian are concerned that a treaty or treaties between the settler-colonial state and Aboriginal peoples and Torres Strait Islanders will fracture the Australian state, the experience in North America and New Zealand suggests that treaty-making processes actually work to strengthen new world political societies by functioning to legitimise settler claims to sovereignty and incorporating Indigenous populations, their languages, cultures and systems of land tenure within the politico-legal framework of the state. Treaties therefore provide a mechanism for the formal resolution of historic disputes such as territorial dispossession or the forced removal of children, and establish a framework through which the future and ongoing relationship between Indigenous peoples and settler-colonial states are determined. We believe that the establishment of a treaty-making process in Australia will have important implications, not only for resetting the relationship between Aboriginal peoples, Torres Strait Islanders and the Commonwealth of Australia, but also for reconstituting the social and economic position that Indigenous people occupy.

The three key resolutions of the Uluru Convention seek to reconfigure the Commonwealth of Australia through formal mechanisms that will provide Aboriginal peoples and Torres Strait Islanders with a voice through a national representative body. This voice will open a dialogue with the federal Parliament. The Makarrata process will endeavour to heal historic grievances through the telling of national truths and the establishment of a treaty-making framework. This will enshrine and incorporate Indigenous rights to land, culture and language within the national polity of contemporary Australia, as the nation transitions from a state tied to a colonial past to one determined to reconfigure a republic that is fairer, more just and more inclusive of all.

While the Uluru convention and the key statements to emerge from this national meeting advocate macro socio-political changes for how the settler-colonial state functions in Australia, we believe that such changes will have the most significant impact at the micro-economic level where individual Aboriginal and Torres Strait Islanders might be liberated from a life of unemployment and welfare dependency and empowered by the right to labour. In the section that follows, we provide some preliminary thoughts on how the key platforms to emerge from the Uluru Convention might allow Aboriginal peoples and Torres Strait Islanders to participate in the national labour market as never before. We are particularly interested in how voice, Makarrata and treaty can underpin and facilitate a reconstruction of Aboriginal and Torres Strait Islander social wellbeing within Australian society via redistributive capital.

Redistributive capital as social reconstruction

Why have a referendum to establish these three powers at all? We believe that the current approach to addressing the socio-economic position occupied by Aboriginal and Torres Strait Islander based on non-historical distributive justice has failed to solve the significant problems facing Aboriginal and Torres Strait Islander wellbeing, including their right to education, income, and employment in Australia. Native title, as it has come to be defined

in the politico-legal system of the settler-colonial state in Australia, is a neoliberal approach to addressing Indigenous land tenure issues insofar as it incorporates traditional forms of propriety into Australian common law and in doing so corporatises the concept of the 'traditional owner'. As distributive economic policy, it creates competition and enterprise, but in doing so it attaches access to social and economic resources to state-designated 'traditional owners'. Whatever its original intent, native title has created new problems: the positioning of 'traditional ownership' and not labour market participation as a viable pathway to income, wealth and economic independence is, we think, a significant problem that has emerged. The problems that emerge from this situation are multiple and complex. Significantly, they include the creation of relationships of power within Aboriginal communities that have more in common with sub-Saharan Africa and its history of failed states and corrupt 'strong man' dictatorships than Aboriginal systems of governance and social organisation. This is because, through native title, the settler-colonial state has authorised the power of the few at the expense of the many. In economic terms, 'traditional owners' designated by the settler-colonial state have prospered relative to the majority of Aboriginal people whose rights to country—as owners, managers or sanctioned users of resources—have been overlooked and/or ignored by the state-imposed framework of native title. In this way, native title effectively works to lock out the vast majority of Aboriginal people from the economic benefit that might flow from exercising their rights to Country.

Examples that demonstrate the social and economic divisions caused by the current system of native title in Australia are many. A recent case before the Federal Court of Australia has brought the validity of Aboriginal and Torres Strait Islander land agreements under the *Native Title Act* (Cth) into question, because not all registered claimants had signed for a collective claim over Noongar lands in Western Australia.ⁱⁱ The individual interests of some, under distributive policy, negatively affect the greater good of the collective, and this case has far-reaching consequences for native title in the future. This outcome points towards the case for rethinking and reforming new ways of Aboriginal and Torres Strait Islander sovereignty: we must not ask what governments can do for us or give us, but rather how we can generate the requisite amounts of income and wealth to enact self-determining communities that enable our peoples to govern ourselves in ways to minimise reliance on federal, state and territory governments.

Should the key directives of the Uluru Statement be adopted, First Nations will be the single greatest driving force of social reconstruction, and whether that means putting native title to its final use in creating sustainable programs and infrastructure, or abandoning the processes entirely, the consequences for not acting now will be detrimental to Aboriginal peoples, Torres Strait Islanders and the future wellbeing of the Australian polity overall. We must abandon the divisive view that equality that includes the recognition of difference infringes on freedom, and that freedom undermines equality. American moral and political philosopher, John Rawls, proposed a new approach to political liberalism, based on freedom and equality, where one value operates to enhance the other in a society where justice is primarily regarded in terms of fairness (Rawls, 1958, 1982). Importantly, Rawls' principle for determining a just and fair society holds that a society may only claim to be just when social and economic policy improves the wellbeing of the least well-off, the most vulnerable groups in society. Rawls called this the difference principle. Some believe that Rawls' brand of political liberalism based in social contract theory is impractical; we believe such notions of a social contract between the citizenry and state should be the basis of all legitimate social democratic forms of government.

Such ideas have been applied to the status of indigenous peoples by the Canadian theorist of political liberalism, Will Kymlicka. Significantly, Kymlicka and Banting (2006) argue that an effective social democracy—or what Rawls (1958, 1982) terms ‘a well-ordered society’—can only be achieved in a new-world context when the situation of Indigenous peoples is addressed as a primary consideration of justice in such societies. An example of this theory in action occurred in Canada, where the individual and collective rights of First People have been formally protected by the institutional frameworks of the settler-state, as a highlight of social democracy.

The innovation of the political liberalism that Kymlicka and Banting (2006) advocate rests in their treatment of Indigenous people as national minorities. These minorities are different in type to minorities that form in new world societies as a result of immigration. As cultures and societies whose territorial claims predate the establishment of settler-colonial states that came to occupy the same territories and encapsulated Indigenous peoples within colonial social and political frameworks, Kymlicka and Banting believe this prior history of occupation coupled with the involuntary nature of their encapsulation makes the case of Indigenous peoples unique. Their solution is to propose that just and fair social democracies in new world contexts require the operation of both retributive and distributive justice

In very simple terms, Kymlicka and Banting (2006) argue that distributive justice and fairness must be informed by considerations that are drawn from retributive justice insofar as fairness requires historical facts of colonialism to be acknowledged and addressed (2006). In doing so, Kymlicka and Banting believe that justice as fairness in societies like Canada, the United States or Australia must consider the historical priority of pre-settler-colonial Indigenous societies and ensure their rights to land, culture and language are protected by the institutional politico-legal framework of the contemporary state. Furthermore, in the model of political liberalism that Kymlicka and Banting advocate, the persistence of Indigenous identities, cultural traditions and languages should not be an impediment to social and emotional wellbeing, good health, the attainment of education and the capacity to generate income and wealth.

In the political liberalism of both Rawls (1958, 1982) and Kymlicka and Banting (2006), each attempts to strike a balance between the primary liberal values of freedom and equality, a problem that has come to define the politics of Western social democratic states since the founding of the first French republic in 1792. The Friedrich-Ebert-Stiftung Academic Foundation proposes a solution to this confusing dichotomy: freedom, equality, and the additional but often forgotten value of fraternity are the three factors that contribute to the just society (Gombert, 2009).

Historically, since the French Revolution the three core values have been ‘freedom, equality and solidarity’ (*liberté, égalité et fraternité*). From a philosophical perspective, therefore, one could talk of a ‘just society’ if these core values were realised. At the same time, the debate on the core value of ‘equality’ gives rise to the question of what a just distribution of material and non-material goods would be. (Gombert, 2009, pp. 19–20)

We propose something akin to the model of political liberalism that Kymlicka and Banting (2006) propose for social democratic states born of settler-colonialism, a model that contains redistributive elements and an awareness of the facts of national history, rather than a social justice agenda that is framed solely by non-historical forms of distributive justice, and which will provide the necessary institutional framework to facilitate what has to date proved so elusive for Australian government policy makers—the self-determination of Aboriginal peoples and Torres Strait Islanders. This will never be realised through the

charity of the state. As Noel Pearson has argued for two decades, the application of distributive justice by the settler-colonial state in an effort to ameliorate the social and economic ills suffered by Aboriginal peoples and Torres Strait Islanders results only in a reliance on transfer payments like the dole, whereby Indigenous people become defined by government, the settler-colonists, *and* themselves as passive welfare recipients (Gibson, 2009).

The goal of self-determination requires the protection of rights to land, culture and language in ways that can only be achieved within an institutional framework that acknowledges the past. Such a framework, with its recognition of Aboriginal and Torres Strait Islander peoples, claims both the right to be equal socially and economically with settler Australians, and the right to be different, which constitutes a claim to freedom of identity. Entrenched rights of the type we envisage might flow were the Uluru Statement to be implemented to facilitate the solidarity of First Nations, instead of inspiring further divisions and the accumulation of wealth and status by the few.

Access to a land base, and with cultural security strengthened by legal protections over time, Aboriginal peoples and Torres Strait Islanders would be empowered to take responsibility for their own social and economic wellbeing. Over time—perhaps several generations—steady access to income and the accumulation of wealth would be translated into the establishment of infrastructure and revenue-generating activities, and self-sustaining programs that will be necessary for substantive social reconstruction. The decision of Maori in Aotearoa (New Zealand) to leverage their land resources to invest in publicly listed companies on the stock exchange provides one such model of what is possible when the land, culture and language rights of an Indigenous people are secured by law and incorporated as a non-negotiable component of the national polity. This vision is in direct conflict with current approaches to framing the rights and positionality of Aboriginal peoples and Torres Strait Islanders and their relationship with the settler-colonial state. For example, with respect to current legislation that frames, directs and defines native title, even perceived victories are—more or less—victories *over* the native title mechanism, rather than victories *in* its name. Kelly and Bradfield (2012) have commented that the Noongar constitutional recognition bill was less of a native title victory, and more of a victory over the *Native Title Act 1993* and its impacts on society, and that ‘we have yet to see how far the shadow of the Native Title Act will extend into a post-settlement world where Noongar people should be free to express their nationhood as they see fit’ (2012, p. 16). Rather than criticise native title settlements, these current events point toward the need to search for a new form of self-determination and collective nation-building. Through a voice in Parliament, a Makarrata Commission, and the legislative space for Aboriginal and Torres Strait Islander people to make treaties with government, that new form must be proposed before, rather than after, a referendum to the people.

We propose an approach that gives primacy to retributive justice. Such a retributive approach to social reconstruction will set Aboriginal and Torres Strait Islanders on a path to true self-determination, one underpinned with high levels of labour market participation and an intergenerational accumulation of wealth. Sefton (2008) defines a redistributive approach as a well-ordered welfare state that provides a continuing income for the unemployed (p. 609). A well-ordered welfare state is not a series of government pensions or a work-for-the-dole system: it is a completely untested approach to governance in Australia that would safeguard the rights of its citizens, so that they may seek education and employment opportunities based on merit and a willingness to participate in the political economy. A welfare state is one that dedicates its efforts to economic growth through social reconstruction.

Conclusion

Neither distributive justice nor native title are solutions to the social and economic marginalisation and despair experienced by Aboriginal peoples and Torres Strait Islanders in Australia today. The recent Uluru Statement made by Aboriginal and Torres Strait Islander delegates to the national convention signposts a way beyond the limitations we believe to be inherent in the current approach to 'Aboriginal affairs'.

Distributive justice defined as the economic transfer of income succeeds only in facilitating an Indigenous life experience characterised by the certainties of unemployment, chronic underemployment and low educational attainment, where reliance on welfare payments becomes an entrenched way of life. Aboriginal people and Torres Strait Islanders become defined, to borrow Noel Pearson's terminology, as the passive recipients of structural welfare. This social and economic dead-end is matched by the current native title regime that empowers a small group of 'traditional owners' designated by the settler-colonial state with the performance of Indigeneity in respect to land resources.

While designated 'traditional owners' are empowered (by the settler-colonial state) with greater access to economic resources as well as the enhanced political status associated with being legally authorised as a traditional and authentic Aborigine or Islander, the vast majority of Aboriginal people and Torres Strait Islanders find themselves locked out of the system with little or no hope of accessing the social and economic benefits associated with owning, managing or utilising the Country to which they have valid and reasonable claims based on history, family, kin and culture. Combined, these frameworks conspire to effectively lock the majority of Aboriginal people and Torres Strait Islanders out of the labour market and into a cycle of diminished income. Just as significantly, these current frameworks make the accumulation and transfer of wealth from one generation to successive generations a near impossibility among Aboriginal people and Torres Strait Islanders.

In summary, we believe in a settler-colonial state focus on distributive justice instead of a native title framework that overwhelmingly functions to eliminate Indigenous claims to Country, whose resources do little more than entrench the structural disadvantage of Indigenous peoples that originated in British colonialism and that persist today in the politico-legal and institutional framework of the settler-colonial state known as the Commonwealth of Australia. Distributive justice concerned with non-historical, time-slice statistical discrepancies in present-day social and economic indications of wellbeing do nothing to address the ongoing consequences of a colonial process that amounts to state-sanctioned theft on a monumental scale.

Native title—concerned only with land defined as unalienated—does nothing to address the historic theft of lands now defined as freehold by the laws of settler-colonial Australia. Furthermore, what we consider to be the 'corporatisation' of 'traditional ownership' creates new layers of economic disadvantage to those whose claims to Country are not recognised by the settler-colonial state. Native title—like distributive justice and its focus on welfare—consigns the vast majority of Aboriginal people and Torres Strait Islanders to a life in which they remain dispossessed of the social and economic benefit that might flow from their Country. We believe a major casualty of the current institutional framework in which Aboriginal peoples and Torres Strait Islanders find themselves has been the expectation of labour market participation as well as the expectation that land 'owned'

under native title be used to generate 'common wealth' for general use by Aboriginal and Torres Strait Islander communities.

In our view, the Uluru Statement provides Australia with an historic opportunity to recalibrate the politico-legal-institutional relationship that exists between Aboriginal people, Torres Strait Islanders and settler-colonial Australians. Voice, Makarrata and treaties: although likely to be critiqued by settler-colonialists as impossible because they call into question the legitimacy of the Commonwealth of Australia, these new institutional frameworks are capable of both resolving this fundamental and divisive issue and reconstructing race relations in Australia to make a future in which Aboriginal peoples and Torres Strait Islanders are more fully integrated and freed to make a greater social and economic contribution to Australia than is presently the case.

The ideas put forward by convention delegates and conveyed in the Uluru Statement are hardly radical in pushing the settler-colonial state in Australia to actions that British colonies and their successors in North America had reached in the 1830s. Moreover, the ideas of voice, Makarrata and treaties are not only highly consistent with the political liberalism advocated by late 20th and early 21st century political philosophers John Rawls and Will Kymlicka respectively, they are imperative to any new world society that strives to be a just and fair society. We believe adopting the key demands of the Uluru Statement has the potential to reshape race relations in Australia. Ensuring Aboriginal people and Torres Strait Islanders have security in their land, culture, language and ultimately their personal and collective identities will have wide-ranging and positive consequences that will be intergenerational in nature. Liberated from the survival mode they have been forced to live since 1788, we believe that Aboriginal people and Torres Strait Islanders will be able to refocus their energies on the everyday requirements for self-determination. Importantly, this will include participation in the labour market and, for many, forms of employment that occur on Country in ways that strengthen and add contemporary value to Indigenous forms of knowledge. Such potentials are rarely discussed in the current politico-legal-institutional framework of settler-colonial Australia because Aboriginal people and Torres Strait Islanders are perceived as 'problems' and 'costs' to Australia, rather than as assets and long-term, committed social and economic contributors. The Indigenous Rangers Program in northern Australia perhaps best foreshadows what a future labour market may look like were the Uluru Statement to be adopted.

References

- Bracknell, C. (2014). Wal-Walang-al Ngardanginy: Hunting the songs (of the Australian south-west). *Australian Aboriginal Studies*, 2014(1), 3–15. Retrieved from <http://www.go.galegroup.com>.
- Brennan, S., Behrendt, L., Strelein, L., & Williams, G. (2005). *Treaty*. Sydney, Australia: The Federation Press.
- Burn, G. (2011). Reconciliation and land in Australia. *Pacifica: Journal of the Melbourne College of Divinity*, 24(1), 80–101.
- Cowlshaw, G. (2012). Culture and the absurd: The means and meanings of Aboriginal identity in the time of cultural revivalism. *Journal of the Royal Anthropological Institute*, 18(2), 397–417.
- Cross, B. (2007). The Australian republic referendum, 1999. *Political Quarterly*, 78(4), 556–567.
- Davis, M., & Langton, M. (2016). *It's our country: Indigenous arguments for meaningful constitutional recognition and reform*. Melbourne, Australia: Melbourne University Publishing.
- Deane, L. (2017). Review essay: reconciliation, a postcolonial settlement and the constitutional recognition debates: A review essay. *Flinders Open Access Research*, 9(2), 1–17. Retrieved from <http://hdl.handle.net/2328/37202>
- Fenley, J. (2010). The National Aboriginal Conference and the Makarrata: Sovereignty and treaty discussions, 1979–1981. *Australian Historical Studies*, 42(3), 372–389.
- Gibson, M. N. (2009). Noel Pearson and the 'cultural left': Between listening and deaf opposition. *Continuum*, 23(4), 465–476. <http://www.tandfonline.com/doi/full/10.1080/10304310903003262>.
- Gombert, T. (2009). *Social Democracy Reader 1: Foundations of Social Democracy*, Berlin, Germany: Friedrich-Ebert-Stiftung Division for International Development Cooperation.
- Hamm, G., Mitchell, P., Arnold, L. J., Prideaux, G. J., Questiaux, D., Spooner, N. A., ... Johnston, D. (2016). Cultural innovation and megafauna interaction in the early settlement of arid Australia. *Nature*, 539(7628), 280–283. <http://dx.doi.org/10.1038/nature20125>.
- Kelly, G., & Bradfield, S. (2012). Winning native title, or winning out of native title? The Noongar native title settlement. *Indigenous Law Bulletin*, 8(2), 14–16.
- Kymlicka, W., & Banting, K. (2006). Immigration, multiculturalism, and the welfare state. *Ethics and International Affairs*, 20(3), 281–304.
- Magowan, F., & Magowan, F. (2001). Waves of knowing: Polymorphism and co-substantive essences in Yolngu Sea cosmology. *Australian Journal of Indigenous Education*, 29(1), 22–35.
- Nugus, P. (2007). Re-theorising minimalist and maximalist discourses in the Australian monarchy-republican debate. *Australian Journal of Political Science*, 42(1), 111–128.
- Olley, J. M., Roberts, R. G., Yoshido, H., & Bowler, J. M. (2006). Single-grain optical dating of grave-infill associated with human burials at Lake Mungo, Australia. *Quaternary Science Reviews*, 25(19–20), 2469–2474.
- Parliament of Australia. (1992). *Questions without notice: The 1950s*. Canberra, Australia: Author.

- Power, J. (2010). *Fiducial governance: An Australian republic for the new millennium*. Canberra, Australia: ANU Press.
- Rawls, J. (1958). Justice as fairness. *The Philosophical Review*, 67(2), 164–194. <http://www.jstor.org/stable/2182612?origin=crossref>.
- Rawls, J. (1982). Social unity and primary goods. In E. Sen & B. Williams (Eds.), *Utilitarianism and beyond* (pp. 159–186). Cambridge, UK: Cambridge University Press.
- Robbins, J. (2010). A nation within? Indigenous peoples, representation and sovereignty in Australia. *Ethnicities*, 10(2), 257–274.
- Sefton, T. (2008). Alternative forms of redistribution. In M. Moran, M. Rein, & R. Goodin (Eds.), *The Oxford handbook of public policy* (pp. 608–609). New York, NY: Oxford University Press.
- Schultz, J. (2018). Whispering in our hearts: Time to learn from the past. *Griffith Review*, 60(1), 7–11. Retrieved from <https://search.informit.com.au/documentSummary;dn=585273018226783;res=IELLCC>
- Strelein, L. (2009). *Compromised jurisprudence: Native title cases since Mabo* (2nd ed.). Canberra, Australia: Aboriginal Studies Press.
- Toki, V. (2010). The Treaty of Waitangi in New Zealand's law and constitution. *Commonwealth Law Bulletin*, 36(2), 398–400. Retrieved from http://www.tandfonline.com.virtual.anu.edu.au/doi/abs/10.1080/03050718.2010.481413#.VrhD1_F587A.
- Referendum Council. (2017). *Uluru Statement from the Heart*. Retrieved from https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF
- Warhurst, J. (1993). Nationalism and republicanism in Australia: The evolution of institutions, citizenship and symbols. *Australian Journal of Political Science*, 28(4), 100–120.
- Young, K., Hallinan, C., & Judd, B. (2013). *Native games: Indigenous peoples and sports in the post-colonial world*. Bingley, UK: Emerald Group Publishing.

ⁱ Yolŋu ceremony for coming together after a struggle.

ⁱⁱ *McGlade v Native Title Registrar* [2017] FCAFC 10.